

**COPYRIGHT AND COLLECTIVE  
AUTHORSHIP**

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# **ABSTRACT**

## **COPYRIGHT AND COLLECTIVE AUTHORSHIP**

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Many scholars have suggested that current copyright law is ill-equipped to the challenges of determining the authorship of collaborative work. This thesis analyses four case studies of large scale collaboration (Wikipedia, Indigenous art, scientific collaborations and film) in order to consider how best to determine the authorship of the creative works that they produce for the purposes of copyright law. Current scholarship and much of the case law has tended to favour a restrictive approach to the grant of joint authorship status, in order to minimise the number of potential authors of a work. This is motivated by instrumental/pragmatic concerns related to the ease of exploiting a copyright work. As joint authors are often joint first owners of copyright, proponents of this approach fear that a minor contributor might cause hold-up problems by refusing to consent to licence or assign their copyright interest. This thesis argues that an instrumental/pragmatic approach to the application of the joint authorship test is undesirable, because it distances the test both from the creativity reality of collective authorship and from copyright's notion of the author. In addition, the instrumental/pragmatic approach relies upon assumptions about creators, the creative process and the exploitation of creative works which are not borne out in the case studies.

Building on the insights from the four case studies, the thesis argues that the best approach to applying the joint authorship test to works of collective authorship is one that is *inclusive* (of all those who have made a more than de minimis contribution of creative choices to the protected expression) and *contextual* (in that it takes the context of creativity into account). In coming to this conclusion the thesis also offers broader lessons about the nature of authorship and the ongoing relevance of copyright law standards for the regulation of collaborative creativity.

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## Table of Abbreviations

1911 Act – Copyright Act 1911

1956 Act – Copyright Act 1956

Bently and Sherman – L Bently and B Sherman, *Intellectual Property Law* (OUP 2009)

Berne – Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886

Copinger et al – KM Garnett, G Davies, G Harbottle, WA Copinger and EP Skone James, *Copinger and Skone James on Copyright* (16th edn, Sweet & Maxwell 2011)

Cornish et al – W Cornish, D Llewelyn and T Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th edn, Sweet & Maxwell 2013)

CDPA – Copyright Designs and Patents Act 1988

Database Directive – Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases

Duration Directive – Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and related rights (codified version) (repealing and replacing Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights)

Gregory Report – ‘Report of the Board of Trade Copyright Committee’ (Her Majesty’s Stationery Company October 1952)

InfoSoc Directive – Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society

IPQ – Intellectual Property Quarterly

JIPLP – Journal of Intellectual Property Law and Practice



Laddie et al – H Laddie, P Prescott and M Vitoria, *The Modern Law of Copyright and Designs* (4th edn, LexisNexis 2011)

Myer Report – Commonwealth Department of Communications, Information Technology and the Arts (Australia), ‘Report of the Contemporary Visual Arts and Crafts Inquiry’, June 2002

Rental and Related Rights Directive – Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (replacing Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights relating to copyright in the field of intellectual property)

Senate Report – Australian Senate Standing Committee on Environment, Communications, Information Technology and the Arts, ‘Indigenous Art – Securing the Future: Australia’s Indigenous Visual Arts and Craft Sector’, June 2007

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# Chapter 1: Introduction

This thesis analyses four cases of large scale collaboration (Wikipedia, Indigenous art, scientific collaborations and film) in order to consider how to best determine the authorship of the creative works they produce, for the purposes of copyright law. Building upon insights from these case studies, I argue that the joint authorship test should be applied in an inclusive and contextual way. In coming to this conclusion, this thesis also offers broader lessons about the nature of authorship and the ongoing relevance of copyright law standards for the regulation of collaborative creativity.

## *1.1 Copyright Law and Collective Authorship*

This thesis is written at a moment when copyright law appears to be suffering from a crisis of legitimacy<sup>1</sup>. In recent decades, the successful lobbying of entertainment conglomerates and the internationalisation of copyright law has led to the expansion of copyright protection. This has resulted in a copyright regime which is often accused of being geared more towards protecting the corporations involved in producing and distributing creative works, than it is towards rewarding and incentivising authors. At the same time, non-compliance with copyright law is becoming increasingly widespread, and in some quarters, normalised (viz. the anti-copyright law platform of the Pirate Party). The Creative Commons and the Free Software movements, which cast themselves as an ‘ethical alternative’ to copyright, are also gaining popularity. As

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<sup>1</sup> See: S Dusollier, ‘Open Source and Copyleft: Authorship Reconsidered?’ (2003) 26 Columbia J of L and Arts 281: ‘The institution of copyright is in ill repute these days’; N Elkin-Koren, ‘Tailoring Copyright to Social Production’ (2011) 12(1) Theoretical Inquiries in L 309, 310: ‘... a regime in crisis’.

copyright law is frequently accused of being out of touch with modern creative realities, non-compliance may appear unsurprising<sup>2</sup>. Indeed, psychologists have demonstrated that people are more likely to obey laws they consider to be legitimate and fair<sup>3</sup>.

In light of this legitimacy crisis, a search for the best way to apply the joint authorship test ought to begin with the reality of creativity<sup>4</sup>. As Jane Ginsburg argued just over a decade ago, refocusing on the author and the act of creating may help restore a proper perspective on copyright law<sup>5</sup>. In this spirit, this thesis focuses on the act of creating a work of collective authorship and, in particular, analyses the dynamics of creativity in four cases of large scale collaboration. Throughout the thesis, a '*work of collective authorship*' refers to any work that is created by many contributors<sup>6</sup>.

Large scale collaboration is becoming increasingly widespread and economically significant. This is due, in large part, to advances in digital and communications technology. In their best-selling book, *Wikinomics*, Don Tapscott and Anthony

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<sup>2</sup> T Tyler, 'Compliance with Intellectual Property Law: A Psychological Perspective' (1996) 29 International L and Politics 219, 227 arguing that people are more likely to obey a law that reflects public morality.

<sup>3</sup> For example, the important work of T Tyler, *Why People Obey the Law* (Princeton UP 2006) and *ibid*.

<sup>4</sup> RR Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the US* (Stanford UP 2009) 5 draws upon Tyler's work to argue that laws governing authors' rights are likely to be ignored if they fail to embrace widely shared norms regarding authorship.

<sup>5</sup> J Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52 De Paul L Rev 1063, 1071.

<sup>6</sup> This term is not intended to be confined to the meaning of 'collective work' in s178 of the Copyright Designs and Patents Act 1988 ('CDPA'), although most works of collective authorship are likely to fall within this definition. 'Collective' is preferred to 'collaborative' to avoid confusion when considering which contributors might be considered to be joint authors of such work (given that 'collaboration' is a requirement for joint authorship). The term 'group authorship' has been avoided, as it might seem to imply some cohesion between contributors, which is unnecessarily under-inclusive.

Williams, make the bold claim that ‘mass collaboration changes everything’<sup>7</sup>. Tapscott and Williams identify a fundamental shift in the way that work and innovation are conducted, which they foresee will ultimately transform the current economic system<sup>8</sup>. In this context, they argue that businesses must ‘collaborate or perish’<sup>9</sup>. Whether or not one shares Tapscott and Williams’ view, it is clear that large scale collaboration is an increasingly important feature of the cultural and economic landscape. Yet, for a number of years intellectual property scholars have expressed doubts that copyright law is adapted to the challenge of regulating collaborative works<sup>10</sup>. If copyright law is to retain its credibility as the primary tool for regulating creativity it must come to terms with this challenge.

Although most scholars agree that current copyright law is not well-equipped to meet the challenges of determining the authorship of collaborative works, they offer different explanations for this. Some suggest that the ‘Romantic author construct’, a literary trope which conceives of authors as ‘solitary geniuses’, has influenced copyright law leaving it ill-adapted to collaborative creativity<sup>11</sup>. Others offer a more fundamental critique of copyright law, suggesting that it lacks the conceptual tools to

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<sup>7</sup> D Tapscott and A Williams, *Wikinomics: How Mass Collaboration Changes Everything* (Atlantic Books, London 2008).

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid* 31-33.

<sup>10</sup> For example, RC Dreyfuss, ‘Collaborative Research: Conflicts on Authorship, Ownership and Accountability’ (2000) 53 *Vanderbilt LRev* 1161; A Stokes, ‘Authorship, Collaboration and Copyright a View from the United Kingdom’ (2002) *Entertainment LRev* 121.

<sup>11</sup> Much of this scholarship is collected in M Woodmansee and P Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke UP, 1994). See also: M Rose, *Authors and Owners: The Invention of Copyright* (Harvard UP 1993); D Saunders *Authorship and Copyright* (Routledge 1992); J Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard UP 1996). Others suggest that there are better explanations of the current state of copyright law: L Bently, ‘R v Author: From Death Penalty to Community Service’ (2008) 32(1) *Columbia J of L & the Arts* 1.

deal with the forms of creativity that flourish in the modern digital world (many of which are highly collaborative)<sup>12</sup>. This thesis does not ask why copyright might be ill-adapted to collaborative creativity. Instead, it investigates the underlying assumption that copyright law lacks the appropriate conceptual tools to deal with collective authorship. I argue that copyright does contain the appropriate tools to determine the authorship of works of collective authorship, and I conclude that, in applying the joint authorship test, judges should make better use of their conceptual tool box.

## ***1.2 Method and Structure of the Thesis***

In his recent report for the UK government on the reform of copyright law, Ian Hargreaves argues for the importance of evidence-based policy making<sup>13</sup>. This is in line with an increased interest in economic analysis and empirical investigations among intellectual property scholars. Although valuable, these frames of reference do not provide a complete picture of the dynamics of creativity. The thesis engages with a broad range of scholarship from the Social Sciences and the Humanities, which provide an equally important perspective on the reality of creativity and the role of copyright law within creative communities. I embrace an interdisciplinary approach that draws from a range of literature that concerns itself with understanding the dynamics of creativity and the role of concepts such as ‘authorship’ in the relevant domains. In

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<sup>12</sup> JP Barlow, ‘The Economy of Ideas: Selling Wine Without Bottles on the Global Net’ <<https://projects.eff.org/~barlow/EconomyOfIdeas.html>>. All websites referred to in this thesis were last accessed on 30 September 2014 unless otherwise indicated.

<sup>13</sup> I Hargreaves, ‘Digital Opportunity: A Review of Intellectual Property and Growth for HMG’ (2011) available at: <<http://www.ipo.gov.uk/ipreview>>.

taking this approach, my research might be located amongst the growing reaction to the abstract approach of previous copyright scholarship<sup>14</sup>.

The four case studies considered in this thesis have been chosen because they provide a typical picture of collective authorship. They concern the creation of different types of copyright works (literary, artistic, dramatic, film) in very different economic sectors. They are fairly representative of the range of collaborative practices that currently exist, including a very new form of creativity (Wikipedia) and one that is ancient in origin (Australian Indigenous art), as well as hi-tech (Science, Film) and amateur (Wikipedia) examples. In each case, authorship is driven by different motivations, from largely commercial motivations (Film), to religious and spiritual motivations (Indigenous art), and even as a recreational pursuit (Wikipedia). They also provide examples of a range of different ways in which issues of authorship might be self-regulated.

In order to investigate how best to determine the authorship of works of collective authorship, I begin by looking at current copyright doctrine. In Chapter 2 I consider the concept of authorship in the Copyright Designs and Patents Act 1988 ('CDPA')<sup>15</sup> and the application of the joint authorship test in the case law. Despite its central role as an organising concept in the CDPA, authorship is relatively under-theorised<sup>16</sup>. Although the contours of the concept of authorship are uncertain, I identify a stable core

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<sup>14</sup> See, J Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 University of California Davis LRev 1151.

<sup>15</sup> Unless otherwise indicated throughout this thesis statutory provisions refer to sections of the CDPA.

<sup>16</sup> Much of the theoretical scholarship focuses upon the philosophical underpinnings of copyright law, assigning 'authorship' an instrumental role according to the scholars' preferred view. Ginsburg (n5) provides a notable exception.

requirement of a more than de minimis contribution of creative choices evident in the protected expression<sup>17</sup>. To the author's knowledge, there are no UK cases in which a court has applied the joint authorship test to determine the authorship of a work of collective authorship<sup>18</sup>. The existing case law concerns works where only a few people might claim to be authors. This case law offers limited guidance because most of these cases are said to be specific to their facts; and the rationale for determining which contributors count as copyright authors is often unclear<sup>19</sup>. Chapter 2 offers three critiques of the application of the joint authorship test, which have led to uncertainty in the case law. These are: (i) the factual specificity of the joint authorship test; (ii) the instrumental/pragmatic approach to the implementation of the test; and (iii) a judicial preoccupation with aesthetic neutrality<sup>20</sup>.

Then, I look outward at the realities of collective authorship. I consider the regulation of the attribution of authorship and the social incidents of authorship (benefits, responsibilities, etc) in four case studies of collective authorship:

- (i) Wikipedia (Chapter 3);
- (ii) Australian Indigenous art (Chapter 4);
- (iii) Scientific collaborations (Chapter 5); and
- (iv) Film (Chapter 6).

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<sup>17</sup> 2.1 below.

<sup>18</sup> With the exception of some cases on film copyright where the joint authorship test has not been applied because the principal director and the producer are deemed to be the joint authors of a film.

<sup>19</sup> L Zemer, 'Contribution and Collaborations in Joint Authorship: Too Many Misconceptions' (2006) 1(4) *JIPLP* 283.

<sup>20</sup> 2.3.

Each case study has been approached with similar questions in mind and the Chapters follow a common structure in order to facilitate a comparison of what each case study reveals for copyright law<sup>21</sup>. The first part of each Chapter contains an analysis of the dynamics of creativity and the social norms which operate to regulate the attribution and social incidents of authorship in that particular context. The second part considers the application of copyright law's rules of subsistence to the case study, focusing on identifying any gaps or uncertainties. The third part is an assessment of private ordering measures that have been adopted to address these gaps. The fourth part is a comment on the insights for copyright law which might arise from the case study.

In Chapter 7 I build upon the insights gained from the case studies to develop five broad themes which elucidate the role of copyright law in regulating collective authorship<sup>22</sup>. In light of these findings, I suggest that an inclusive, contextual approach ought to be taken to the application of the joint authorship test. Chapter 8 sets out this approach in detail and concludes with some other insights for copyright law which arise from the analysis of collective authorship in the thesis. In particular, the case studies provide a direct challenge to the incentive theory from copyright law's heartland, as they involve works that fall neatly within copyright law's rules of subsistence.

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<sup>21</sup> The order has been slightly modified in Chapter 5 (scientific collaborations) in order to aid the clear presentation of the relevant issues.

<sup>22</sup> These are dealt with under five main headings: (i) the nature of collective authorship; (ii) the different meaning of authorship for each authorial group; (iii) the gap between copyright law and creative reality; and (iv) the role of copyright law and its concepts.

### ***1.3 An Inclusive, Contextual Approach to the Joint Authorship Test***

This thesis searches for the best way of applying the joint authorship test in cases of collective authorship. It is difficult to assess whether or not the current statutory test provides a suitable mechanism for determining the authorship of works of collective authorship because: (i) collective authorship has not yet been considered by a court; (ii) the case law on joint authorship is very factually specific; and (iii) the case law tends to lack analytical clarity<sup>23</sup>. Following the interdisciplinary method identified above, this thesis proceeds on the hypothesis that an examination of the ways in which collective authorship groups regulate authorship can shed light on how the joint authorship test ought to be applied so that it can provide a suitable mechanism for determining the authorship of those works. The research question, thus, is formulated in the following terms:

*What does an examination of examples of works of collective authorship reveal about the best way of applying copyright law's joint authorship test so that it can provide a suitable mechanism for determining the authorship of those works?*

For the purpose of this thesis *suitable* is taken to mean:

- in a way that serves copyright law's purposes to incentivise and reward creativity<sup>24</sup>; and

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<sup>23</sup> Chapter 2, p22-28.

<sup>24</sup> Although these are most commonly cited by commentators, there are a number of other possible purposes of copyright law. For example, encouraging the distribution of creative works, promoting individual flourishing or fostering the achievement of a just and attractive culture. See W Fisher 'Theories of Intellectual Property' in S Munzer (ed), *New Essays in the Legal and Political Theory of Property* (2001) <<http://www.tfisher.org/publications.htm>> for a helpful overview of the many different views on the theoretical underpinnings of copyright law. In Chapter 2 I argue that the concept of authorship might be affected by one's view of copyright law's purpose and I offer a definition of the



- in a way that is credible to creators and the creative community concerned (because of the importance of the congruency between law and social norms, both in enhancing the law's perceived legitimacy and in promoting compliance).

There are at least two possible approaches to the application of the joint authorship test to collective authorship: a restrictive approach and an inclusive approach<sup>25</sup>. Current scholarship and much of the case law on joint authorship tends to favour a restrictive approach. Proponents of this approach are persuaded by pragmatic and instrumental reasons to concentrate the authorship of a work of collective authorship in the hands of few creators (who will, then, usually be the first owners of the copyright interest subsisting in the work). This position flows from concerns about the ability of joint owners to effectively exploit their copyright interest, which proponents of this approach fear may be impeded where many joint owners must agree on terms to licence or assign copyright<sup>26</sup>. I refer to this as the *instrumental/pragmatic approach*.

Proponents of a minority view are persuaded that a more inclusive approach to who constitutes a joint author would facilitate collaboration by incentivising and

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minimum core of authorship, which operates as a 'mid-level principle' of the sort discussed by R Merges, *Justifying Intellectual Property* (Harvard UP, 2011).

<sup>25</sup> In the US context, this debate has been explicitly played out between two eminent copyright scholars: Melville Nimmer and Paul Goldstein, see: Zemer (n19) 288; M LaFrance, 'Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors' (2001) 50 Emory LJ 193, 196-197, 259-261; and PS Fox, 'Preserving the Collaborative Spirit of American Theatre: The Need for a 'Joint Authorship Default Rule' in Light of the Rent Decision's Unanswered Question' (2001) 19 Cardozo Arts & Entertainment LJ 497, 507-509. The restrictive view is currently favoured by most US courts, although not without criticism from the academy, see: J Dougherty, 'Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under US Copyright Law' (2001) 49 UCLA LRev 225.

<sup>26</sup> On this view, the more owners there are the greater the possibility of hold-ups occurring.

rewarding a broader range of creators<sup>27</sup>. Yet, few scholars have explicitly set out the parameters of such an approach<sup>28</sup>. This thesis proposes that the best approach to the application of the joint authorship test to works of collective authorship is an *inclusive, contextual approach*. This approach reflects the concept of authorship at the heart of UK copyright law and is also adapted to the realities of collective authorship. I briefly outline what I mean by an inclusive, contextual approach below.

### **1.3.1 The Joint Authorship Test Should Be Inclusive**

The view that judges should take a restrictive approach to who counts as an author of a collaborative work results from pragmatic or instrumental concerns related to the difficulty of exploiting copyright where ownership is shared among a number of individuals. Yet, in copyright law authorship is conceptually distinct from ownership. Indeed, contributors to works of collective authorship often care more about the noneconomic consequences of authorship (such as, attribution) than they do about remuneration and control. Further, an examination of the use of private ordering by collective authorship groups reveals that the fears that motivate the instrumental/pragmatic approach are generally not well-founded. Collective authorship groups tend to be able to manage ownership issues very well by relying on social norms or other private ordering mechanisms. Even where this is not the case, insights from the case studies support a broad, rather than a restrictive approach to the application of the joint authorship test, because this would give authors a valuable bargaining chip in negotiations with other more powerful players.

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<sup>27</sup> For example, NB Nimmer and D Nimmer, *Nimmer on Copyright* (Matthew Bender 1998) 6-23; and Zemer (n19) 288.

<sup>28</sup> Nimmer, *ibid* is a notable exception.

An inclusive approach better reflects the reality of creativity in large collaborations. Collective authorship has a number of special characteristics: (i) there is a division of labour; (ii) responsibility for the creative or intellectual content of the work is shared or diffused among many contributors; and (iii) contributors rely on social norms to regulate the creative process (and, often, also to determine their rights and responsibilities to one another). When these three characteristics are considered, it is apparent that the search for one or two controlling minds who might be identified as the authors of a work of collective authorship misses the point of how large groups work together to create. In order to achieve an inclusive approach to the joint authorship test that more accurately reflects the reality of collective authorship, more emphasis should be given to the ‘collaboration’ limb and less to whether a particular contribution is of an ‘authorship’ type. Also, the legal requirement for ‘authorship’ should not be more demanding in the case of a joint work, than it is in the case of a work of individual authorship.

### **1.3.2 The Joint Authorship Test Should Be Applied Contextually**

One of the greatest strengths of the joint authorship test is its inbuilt flexibility, which allows it to adapt to different creative contexts. The case studies reveal that the dynamics of creativity might vary considerably between creative groups, making this character of the test an essential feature if copyright law is to remain in touch with the creative realities of authorship.

Related to this, I argue that the joint authorship test ought to be applied in a way that is sensitive to the context in which creativity occurs. In Chapter 2 I argue that some aspects of the joint authorship test are best regarded as questions of fact, ie the

requirements for ‘collaboration’; a contribution that is ‘not distinct’; and a contribution that is ‘significant’<sup>29</sup>. The social norms which operate to regulate creativity in collective authorship groups provide an important source of information that can offer answers to these questions. There are many advantages to incorporating social norms in the application of the joint authorship test, the most important of which is enhancing the perceived legitimacy of copyright law decision-making, which is likely to promote compliance<sup>30</sup>.

In the CDPA, authorship is, however, ultimately and importantly, a legal question. In the joint authorship test, the requirement for authorship is expressed as a requirement that the contribution be of the ‘right kind’. This thesis argues that the same concept of authorship ought to apply in cases of individual authorship and joint authorship<sup>31</sup>. For reasons that are set out more fully in Chapter 2, I argue that a requirement for some creative or intellectual input, which is evident in the expression, is hard-wired into copyright law’s concept of authorship. This requirement provides an important filter when it comes to the incorporation of social norms in copyright decisions.

I argue that the principle that judges ought not to judge the aesthetic merits of a copyright work is not violated by reference to aesthetic criteria in coming to decisions on the subsistence of copyright in a work<sup>32</sup>. Indeed, it is probably impossible not to

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<sup>29</sup> 2.2.4.

<sup>30</sup> 8.1.

<sup>31</sup> p29.

<sup>32</sup> 2.3.3 and 8.4.2.

have reference to such criteria. It would be preferable if such criteria were explicitly acknowledged in judicial reasoning rather than obscured behind a cloak of aesthetic neutrality. The social norms that govern creativity within a particular authorship group provide an important and independent source of information about the aesthetic significance of a particular contribution to a work.

Yet, social norms might be affected by three potential defects: a lack of certainty; the influence of power imbalances; and the failure to account for the interests of the public and other third parties<sup>33</sup>. Therefore, I suggest a framework that requires proof that the norm exists in a stable form and that it does not enshrine values that might be repugnant to the law's overall purposes. This framework might be used in order to avoid the incorporation of undesirable social norms in judicial decision-making<sup>34</sup>.

### ***1.4 Broader Lessons for Copyright Law***

The case studies also provide an opportunity to consider the influence of non-legal forms of regulation on the ways in which authorship is understood and attributed. Thus, the thesis forms part of an emerging body of literature that explicitly considers the complicated relationship between copyright law norms and the social norms which operate to regulate creativity in different creative contexts<sup>35</sup>. The case studies demonstrate that the noneconomic incidents of authorship are frequently just as important, if not more important, to creators than the economic incidents. In

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<sup>33</sup> 8.2.

<sup>34</sup> 8.3.

<sup>35</sup> See LJ Murray, S Tina Piper and K Robertson, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (OUP 2014).

considering the noneconomic benefits of authorship and the role of social norms in regulating creativity, this research crosses the terrain of another significant body of scholarship, which calls into question the ‘incentive’ story of copyright protection by exploring noneconomic motivations for authorship<sup>36</sup>. Much of this literature focuses on creativity that falls within Intellectual Property’s ‘negative spaces’<sup>37</sup>. It is open to debate whether such activities ought to be regulated by copyright law in the first place. In contrast to this literature, the case studies considered here fall squarely within copyright law’s domain as they concern the creation of copyright works. As such, they provide an opportunity to re-examine copyright law’s concept of authorship on its own terms. The case studies seriously undermine the persuasive power of the ‘incentive story’ by demonstrating that authorship is a complex phenomenon that has important intrinsic and social dimensions.

Much of the current copyright debate fails to appreciate the importance of the noneconomic incidents of authorship in motivating creativity. The limitations of the incentive justification suggest that it can only provide a shaky foundation for the copyright expansionism that has occurred in its name. There are important intrinsic and social dimensions to creativity, which might require a nuanced approach to regulation.

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<sup>36</sup> Elkin-Koren (n1) ‘Tailoring Copyright to Social Production’ (2011) 12 *Theoretical Inquiries in Law* 309; J Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (Stanford Press, forthcoming December 2014).

<sup>37</sup> E Rosenblatt, ‘A Theory of IP’s Negative Space’ (2011) 34(3) *Columbia J of L and the Arts* 317 provides an overview of the literature on this point. See also: K Raustiala and C Sprigman, ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’ (2006) 92 *Virginia LRev* 1687; D Oliar and C Sprigman, ‘There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy’ (2008) 94 *Virginia LRev* 1787; E Fauchart and EA von Hippel, ‘Norm-Based Intellectual Property Systems: The Case of French Chefs’ available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=881781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781)>; CJ Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment LJ* 1121; J Loshin, ‘Secrets Revealed: How Magicians Protect Intellectual Property without Law’ in C Corcos, *Law and Magic: A Collection of Essays* (Carolina Academic Press 2008) 123.

An economic lens alone will not provide a clear picture of the best way to regulate collaborative creativity. An appreciation of the realities of creativity suggests the need to review the way in which instrumental reasoning shapes the development of copyright law.

This thesis highlights the importance of copyright law as a source of good authorship standards. These standards are likely to be most valuable when they are developed in light of the creative realities of authorship. At its best, copyright law can provide a valuable bulwark against power dynamics in creative communities that can cause authorship to gravitate to dominant players at the expense of other creators. At its worst, out of a desire to simplify rights and ensure efficient exploitation, copyright law might end up bolstering the positions of dominant players (who tend to be orchestrators and investors) at the expense of real creators. The latter vision would seem to justify the view that copyright law is out of touch with creative realities. Thus, this thesis urges an approach that would allow copyright law to reconnect both with creative realities and also with its own *raison d'être*: protecting, rewarding and incentivising *creators*. Although the CDPA may seem to offer little guidance on the definition of authorship, in fact, the description of the author as the one who *creates* a work in section 9 reveals the heart of this concept.

This thesis offers a first step towards realigning the legal conception of authorship with creative realities, arguing for a recalibration of the joint authorship test. Before doing so, I begin by assessing the status quo, looking at the concepts of authorship and joint authorship in current copyright law.

## **Chapter 2: Authorship and Joint Authorship**

This Chapter provides the legal and conceptual background for the analysis of the case studies that occurs in the following four Chapters. Its purpose is to provide a brief overview and critique of the provisions on authorship and joint authorship in the CDPA. Although the contours of copyright law's concept of authorship are uncertain, it has a stable core in that it refers to the creator of the protected expression. I argue that the best view is that authorship requires at least a modicum of creativity or other intellectual input that is evident in the author's/s' expression.

One of the most serious weaknesses in the current jurisprudence is a lack of analytical clarity in the application of the joint authorship test. This makes it difficult to predict how the test might be applied to a work of collective authorship. I suggest that this lack of analytical clarity is a result of instrumental/pragmatic reasoning, which tends to conflate 'authorship' with 'ownership', and a judicial preoccupation with aesthetic neutrality. The former suggests there is a more demanding requirement for authorship in the case of a joint work than for works of individual authorship, which might make it more difficult for contributors to such works to establish that they are authors. It is hard to make sense of this from a conceptual point of view, as authorship implies the same consequences (and has the same role in the CPDA) regardless of whether a work is individually or jointly authored.

This Chapter begins by outlining copyright law's concept of authorship (2.1) and the provisions of the joint authorship test (2.2). Then, I present three critiques of the



way in which the joint authorship test is applied in the case law (2.3). These critiques explain the difficulty of predicting how the joint authorship test might apply to works of collective authorship. Section 2.4 searches for insights from the scholarly literature on authorship about how the joint authorship test ought to apply in cases of collective authorship, revealing a more inclusive alternative to the instrumental/pragmatic approach. Although authorship is ultimately a legal question that may be influenced by one's view of the purpose of copyright law, it is also inevitably linked to creative practice. Judges are necessarily influenced by pervasive cultural views about creators and the creative process in the application of copyright law's rules of subsistence. Indeed, a great strength of copyright's concept of authorship is its inbuilt flexibility, which allows it to adapt to changes in creative practices over time and in different creative sectors. The Chapter ends by suggesting that the authorship practices of creative communities might provide some insight on the question of how best to apply the joint authorship test to works of collective authorship.

## ***2.1 The Concept of Authorship in the CDPA***

Authorship is an important organising concept for copyright law. In determining authorship courts also often take into account factual matters, such as the context within which creativity occurs. Yet, ultimately for the purposes of the CDPA, determining who is an author is a question of law. Thus, the concept of the 'author' is understood by reference to matters that lie outside of a dictionary definition of the word, such as the policy aims of copyright law<sup>1</sup>. In this section, I explain the two aspects of the concept of authorship: its factual/causative dimension and its normative dimension. I argue that a

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<sup>1</sup> L Bently and B Sherman, *Intellectual Property Law* (OUP 2009) 120 consider that the concept of the author operates as a 'legal fiction'.

requirement for a modicum of creativity or intellectual contribution is hard-wired into the provisions of the CDPA on authorship. However, this important requirement has not been translated into any clear test. This section argues that authorship requires a more than de minimis contribution of creative or intellectual choices to the protected expression. Although this view of authorship has not always prevailed in the case law, it is more likely to do so in the future as a result of the Court of Justice of European Union's application of the harmonised standard for originality (the 'author's own intellectual creation' test)<sup>2</sup>.

Authorship is the linchpin of the scheme embodied in the CDPA. Thus, jurisdictional connection with the author of a work is one of the bases for qualification for copyright protection<sup>3</sup>. The author is also a point of reference for the duration of copyright and moral rights protection<sup>4</sup>. The author is usually the first owner of copyright subsisting in a work<sup>5</sup> and is entitled to various moral rights in respect of the work, namely, the attribution right and the right to object to derogatory treatment<sup>6</sup>.

Despite the importance of the concept of authorship, it is very under-theorised<sup>7</sup>. There is no definition of 'author' at the international level, and the concept has only

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<sup>2</sup> Following Case C-5/08 *Infopaq v Danske Dagblades Forening* [2009] ECR I-6569 [45]; see text at n25.

<sup>3</sup> CDPA s153, s154.

<sup>4</sup> CDPA s12, s13A, s13B.

<sup>5</sup> CDPA s11.

<sup>6</sup> CDPA s77, s80.

<sup>7</sup> J Ginsburg, 'The Concept of Authorship in Comparative Copyright law' (2003) 52 De Paul LRev 1063, 1066, observes that the concept has not been very well articulated in the case law.

been partially harmonised at the European level<sup>8</sup>, as will be discussed below. The UK statute is similarly brief. The CDPA simply provides that the author is the ‘creator’ of a copyright work, but does not define ‘author’<sup>9</sup>. Below, I argue that some qualities inherent in the definition of ‘author’ might be inferred from provisions deeming certain persons authors (ie, that they be ‘taken to be the author’)<sup>10</sup>. Before doing so, however, I consider what the description of the author as someone who ‘creates’ a work might imply about authorship.

The Oxford English Dictionary defines ‘create’ as follows:

...to make, form, set up or bring into existence (something which has not existed before); to produce (a work of imagination or invention; an artefact)<sup>11</sup>.

This definition captures two senses in which authorship might operate in copyright law. The first sense, which is the predominant understanding, is of creator as *originator/source*. Here the focus is on the causal connection between the creator and what is created. In this sense a creator is a person who produces an artefact or who causes it come into existence. The second sense is of creator as *innovator* and focuses on the act of creation, that is, the production of something that has a quality which might be described as inventive, imaginative or creative. It is this second sense of

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<sup>8</sup> Case C-277/10 *Luksan v van der Let* [2013] ECDR 5. The emergence of a common harmonised standard of originality also indirectly partly harmonises authorship given the close link between authorship and originality.

<sup>9</sup> CDPA s9(1).

<sup>10</sup> p14 below.

<sup>11</sup> This is the most relevant definition (‘Of a human agent’) that is given on the electronic version of the *Oxford English Dictionary* <[www.oed.com](http://www.oed.com)>.

‘create’ which primarily distinguishes this word from others such as ‘make’ or ‘produce’.

In the case law, authorship has at least two dimensions: a factual, causative dimension and a normative dimension. The most obvious dimension of authorship is the factual, causative dimension. This dimension corresponds to the first meaning of ‘create’. According to this view the author is conceived of as the ‘originator’ of the work. Thus, in *Cummins v Bond*, a medium was the author of the automatic writing she produced during a séance because she had written every word of it<sup>12</sup>. Although this might seem to imply the need for ‘writing’, in fact, what is required is ‘something approximating penmanship’, that is, responsibility for the *expression* of the work<sup>13</sup>. *Expression* is understood in abstract terms as the intangible property that copyright protects (for example, a ‘literary work’) and ought to be distinguished from the fixation or physical object in which that expression is embodied. So where a clerk takes dictation of a letter, the author of the resulting literary work is the person who composed the letter (not the clerk who has merely ‘fixed’ it to paper)<sup>14</sup>.

The normative dimension of authorship is less clear. The normative dimension of authorship is essentially the content given to this concept when it is used to police the boundaries of copyright protection. In order to understand the normative dimension of authorship it is helpful to consider another closely related concept: originality.

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<sup>12</sup> (1926) 1 Ch 167, 175. The medium was the originator of the words, which had not been copied. The supposed ‘spiritual origin’ of the words was irrelevant in this regard.

<sup>13</sup> *Cala Homes v Alfred McAlpine Homes* [1995] EWHC 7; *Robin Ray v Classic FM* [1998] FSR 622 (Ch).

<sup>14</sup> *Walter v Lane* [1900] AC 539 (HL), 554 (James LJ).

Authorship and originality are like two sides of the same coin<sup>15</sup>. It is often an ‘original’ contribution that makes a contributor an ‘author’<sup>16</sup>. In the classic formulation of the originality test in *University of London Press v University Tutorial Press* the word ‘original’ is distanced from its ordinary meaning insofar as it might denote novelty or inventiveness<sup>17</sup>. Instead, originality is said to mean that the work originates from the author in that it is not copied. Yet, original often seems to imply ‘that which copyright protects’. As such, the concept seems to contain more specific requirements, although these are uncertain and shifting, as the underlying normative justification for copyright law relied upon is rarely made clear in the cases<sup>18</sup>.

As the originality requirement sets the threshold for copyright protection, it is necessarily affected by one’s view of the purpose of copyright law, which shapes one’s view on the sorts of creative activities that ought to benefit from copyright protection. The lack of a consensus on the best theoretical justification for copyright protection may explain why the cases sometimes appear to offer conflicting guidance<sup>19</sup>. The predominant justification for copyright law in common law jurisdictions assumes that authors are incentivised to create by the ability to control reproductions of their work in

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<sup>15</sup> Existing understandings of the originality requirement developed from judicial interpretation of the notion of ‘authorship’ before there was an express requirement for originality in the Copyright Act. See, for example, *Walter v Lane*, *ibid*.

<sup>16</sup> This is particularly the case for derivative works and in the case of works of joint authorship. See 2.2.3 below for a discussion of the emphasis on the ‘authorship’ limb in the application of the joint authorship test.

<sup>17</sup> [1916] 2 Ch 601, 608-9 (Peterson J): ‘...the act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author’.

<sup>18</sup> Bently and Sherman 94; S Ricketson, ‘The Concept of Originality in Anglo-Australian Copyright Law’ (1991) 9(2) Copyright Reporter 1.

<sup>19</sup> Some of the main views are helpfully summarised by W Fisher, ‘Theories of Intellectual Property’ in S Munzer (ed), *New Essays in the Legal and Political Theory of Property* (2001) <<http://www.tfisher.org/publications.htm>>.

order to extract royalties. Yet, the incentive story has limited explanatory power, which leads some to prefer natural rights or social planning justifications. The uncertainty as to the normative content of the concept of originality necessarily affects the concept of authorship, because an original contribution is generally what makes a person an author. Persistent disagreement about the philosophical underpinnings of copyright law complicates any attempt to clarify the breadth of the concept of authorship and its role within the statutory scheme, which seems to reflect more than one rationale for protection<sup>20</sup>. Equally as important as economic incentives, for example, the label ‘author’ provides valuable noneconomic benefits both in terms of moral rights and social recognition<sup>21</sup>.

Originality is a matter of fact and degree. And the philosophical tension between UK and European notions of authorship plays out in its interpretation. Originality is often said by the UK courts to involve skill, labour and/or judgment, although a number of other wordings of the test exist<sup>22</sup>. In some cases (most involving compilations or tables), courts appear to have held that mere routine labour or sweat of the brow is sufficient to confer the requisite originality upon a work<sup>23</sup>. Yet, these cases appear to be more influenced by a desire to provide a remedy for unfair competition than the

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<sup>20</sup> Fisher *ibid.* On the limits of the incentive story: D Zimmerman, ‘Copyright as Incentives: Did We Just Imagine That?’ (2011) 12 *Theoretical Inquiries in Law* 29; N Elkin-Koren, ‘Tailoring Copyright to Social Production’ (2011) 12(1) *Theoretical Inquiries in Law* 309.

<sup>21</sup> Attribution is an important incident of authorship, as seen in a number of aspects of literary property law. The right to object to false designation of authorship is venerable and attribution is a precondition for relying upon a number of the fair dealing defences. W Cornish, D Llewelyn and T Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th edn, Sweet & Maxwell 2013) 505.

<sup>22</sup> Bently and Sherman 95, cite others: ‘work, capital, effort, industry, time, knowledge, taste, ingenuity, experience or investment’.

<sup>23</sup> For example, *Ladbroke v William Hill* [1964] 1 All ER 465 (HL), 478 (Lord Devlin); *Waterlow Directories v Reed Information Services* [1992] FSR 409 (Ch); *Blacklock v Peterson* [1915] 2 Ch 376; *University of London Press* (n17); *Elanco Products Ltd v Mandops* [1979] FSR 46; [1980] RPC 213 (CA).

recognition of authorship<sup>24</sup>. In a recent line of cases, however, the Court of Justice of the European Union appears to apply a new harmonised standard of originality: the ‘author’s own intellectual creation’ test<sup>25</sup>. This test focuses on the creator’s ability to make free and creative choices and stamp the work with his or her ‘personal touch’<sup>26</sup>.

Although some UK judges are adamant that this new formulation does not alter the position in the UK<sup>27</sup>, in a number of cases, UK courts seem to refer to both tests simultaneously, as if hedging their bets<sup>28</sup>. Most recently, in *SAS Institute v World Programming* the UK Court of Appeal seems to suggest that this test may have raised the standard<sup>29</sup>. However, the requirement for some creative choices is not far removed

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<sup>24</sup> Cornish et al 438-439 observe that copyright tends to be denied where some other form of relief against unfair competition is available, citing *Exxon v Exxon Insurance* [1982] Ch 119 (CA). Bently and Sherman 106 note that instead of focusing on whether the work is original, courts in these cases start from the premise that any labour or effort exerted in the production of the work ought to be protected (as long as a quantitative threshold is met) citing the maxim: ‘what’s work copying is prima facie worth protecting’.

<sup>25</sup> This test appears to require that: (i) the work is the author’s own original creation; (ii) the creation reflects his or her personality; and (iii) the author has been able to express his or her creative ability by making free and creative choices in the process of creation, thus, stamping his or her personal touch on the work. See: *Infopaq* (n2) [45]; C-393/09 *Bezpečnostní software asociace v Ministerstvo Kultury* [2011] ECDR 3, [2011] FSR 18 [45]; C-403/08 & C-429/08 *Football Association Premier League v QC Leisure* [2012] 1 CMLR 29, [2012] ECDR 8 [97]; C-604/10 *Football Dataco v Yahoo! UK* [2012] ECDR 10 [37]; C-145/10 *Painer v Standard Verlags* [2012] ECDR 6 [87]. Cf, *Newspaper Licensing Agency v. Meltwater* [2011] EWCA 890 [20].

<sup>26</sup> See, for example, *Painer* *ibid*.

<sup>27</sup> *NLA v Meltwater* (n25) [20] (Chancellor Sir Andrew Morritt): ‘I do not understand the decision of the European Court of Justice in *Infopaq* to have qualified the long standing test established by the authorities [referring to *University of London Press* (n17) and *Ladbroke* (n23)]’.

<sup>28</sup> *Temple Island Collections v New English Teas* [2012] EWPCC [27] (Judge Birss QC): stating the test as ‘skill and labour (or intellectual creation)’. *Taylor v Maguire* [2013] EWHC 3804 [6]-[7] (District Judge Clark): ‘an original artistic work is a work in which the author/artist has made an original contribution in creating it, for example by applying intellectual effort in its creation... it must have been produced as a result of independent skill and labour by the artist’. *Abraham Moon v Thornber* [2012] EWPCC 37 [56] (Judge Birss QC): ‘skill, labour and judgment... it is his own intellectual creation’.

<sup>29</sup> *SAS Institute v World Programming* [2013] EWCA Civ 1482, [2014] RPC 8 [36]-[37] (Lewison LJ): ‘This test may not be quite the same as the traditional test in English law... If the Information Society Directive has changed the traditional domestic test, it seems to me that it has raised rather than lowered the hurdle to obtaining copyright protection’. Lewison LJ cites Advocate-General Mengozzi in *Football Dataco* (n25), who suggests that the test resembles the continental European approach and is, therefore, probably higher than the traditional UK approach in that it excludes mere ‘mechanical’ effort.

from some of the terms that have been used to express the originality test in the UK, such as ‘judgment’ or ‘taste’. At the very least, the author’s own intellectual creation test seems to allow no room for the full-blown ‘sweat of the brow’ doctrine. It is thus a matter of debate, the extent to which this doctrine remains part of UK copyright law<sup>30</sup>. Despite the ongoing disagreements, the continental European view, which is often seen to require some amount of creativity, might be gaining more traction in the UK with the emergence of the own intellectual creation standard of originality beyond the three categories of software, databases and photography<sup>31</sup>. This can be seen in the distinct shift in language to focus on the personal vision of the creator rather than pure time, effort or investment<sup>32</sup> (although the standard remains fairly low<sup>33</sup>).

It is difficult to pin down the normative dimension of authorship when it is treated as a proxy for what copyright protects or ought to protect<sup>34</sup>. In the absence of a clear guiding account of the purpose of copyright law, some courts have preferred to define authorship in the negative as *not* a contribution merely of ideas<sup>35</sup>; *not* a mechanical

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<sup>30</sup> Bently and Sherman 104-106. Routine labour or sweat of the brow has only been sufficient to confer originality in limited situations, largely in respect of tables or compilations. Thus, sweat of the brow may not have survived the implementation of the Database Directive, which resulted in the ‘author’s own intellectual creation’ standard being applied to establish copyright in a databases (the wording of s3(1)(a) of the CDPA suggests that where a work is both a database and a compilation it should be treated as a database only).

<sup>31</sup> M van Eechoud, ‘Along the Road to Uniformity – Diverse Readings of the Court of Justice’s Judgments on Copyright Work’ (2012) 1 JIPITEC 60. Cornish et al 440 describing the extension of this test to other works as a ‘judicial sleight of hand’.

<sup>32</sup> See: *Taylor v Maguire* (n28), *Abraham Moon v Thornber* (n28), *Temple Island Collections* (n28). The language used in these cases approaches the way in which the CJEU describes authorship in cases such as *Painer* (n25).

<sup>33</sup> *Painer* (n25), *BSA* (n25).

<sup>34</sup> Ginsburg (n7) 1067 highlighting the problem of consequentialist reasoning.

<sup>35</sup> *Donoghue v Allied Newspapers* [1938] 1 Ch 106 (Ch).



contribution to fixation<sup>36</sup>; *not* interpretation or performance<sup>37</sup>; or *not* proof-reading or things akin to proof-reading<sup>38</sup>.

Indeed, the most conservative view of the recent European case law is that it simply establishes that there can be no authorship where there is no creative freedom at all<sup>39</sup>. The positive aspects of authorship are less clear. The aesthetic quality of the contribution is sometimes a relevant factor, as on occasion the sorts of contributions that count depend upon the type of work<sup>40</sup>. For example, contributions which affect the playability of a musical work might be authorial<sup>41</sup>; whilst contributions which do not affect an artistic work in a visually significant way will not be authorial<sup>42</sup>. In this way the categories of work have been used to police the scope of copyright protection<sup>43</sup>. This provides an entry point for judges to take into account creative practices, as the CDPA provides only skeleton definitions of the categories of work<sup>44</sup>.

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<sup>36</sup> Such as a clerk taking dictation: *Walter v Lane* (n14) 554 (James LJ).

<sup>37</sup> *Hadley v Kemp* [1999] EMLR 589 (Ch); *Brighton v Jones* [2004] EWHC 1157, [2005] FSR 288.

<sup>38</sup> *Fylde Microsystems v Key Radio Systems* [1998] FSR 449 (Ch).

<sup>39</sup> *Football Association Premier League* (n25); *BSA* (n25).

<sup>40</sup> This may be what Ginsburg (n7) 1092 refers to as the ‘constraints of [the author’s] task’.

<sup>41</sup> *Sawkins v Hyperion Records* [2005] EWCA 565, [2005] 3 All ER 636, 648 (Mummery LJ): ‘The work of Dr Sawkins has sufficient aural and musical significance to attract copyright protection’.

<sup>42</sup> *Interlego v Tyco Industries* [1989] AC 217 (PC); *Lucasfilm v Ainsworth* [2009] FSR 2.

<sup>43</sup> Some suggest that this approach may no longer be permitted following *BSA* (n25) and *Football Association Premier League* (n25), which seems to suggest that the categories of work are no longer relevant. See van Eechoud (n31) 70-71. Yet, it still seems likely that the category of work will be pertinent in identifying the sorts of choices that might be relevant in determining whether a work amounts to an ‘intellectual creation’. Thus, choices related to lighting, setting and pose allow an author to stamp his or her personal touch upon a photograph: *Painer* (n25).

<sup>44</sup> The presumptions about authorship also oblige the court to take into account attribution as an author on a work (which is also likely to have been affected by predominant creative practices) see CDPA s104, 105.

The different protection offered to entrepreneurial works (compared to authorial works) may offer further insight into the meaning of authorship<sup>45</sup>. Entrepreneurial works have always been treated differently on the basis that they are the result of investment, not authorship<sup>46</sup>. Copyright was generally conferred on the person who bore the financial risk of creating an entrepreneurial work<sup>47</sup>. For a film, for example, this was the producer<sup>48</sup>. In the 1956 Act the first owner of copyright in an entrepreneurial work was referred to as a ‘maker’, not an ‘author’. European harmonisation led to reform in this area and the CDPA now provides that certain nominated people are ‘taken to be’ the author of an entrepreneurial work<sup>49</sup>. This phrasing echoes the historical hesitation to call those whose main contribution was bearing the financial risk, ‘authors’. It suggests that here the word ‘author’ is used as a shorthand way of referring to particular persons who do not have the inherent qualities of a *true* copyright author (that is to say, they are not creators)<sup>50</sup>. This, in turn, suggests that the use of ‘*creates*’ in the section 9 definition of authorship (rather than ‘makes’ or ‘produces’) tells us something about authorship. In particular, it indicates the relevance of the second meaning of ‘create’ – which implies creativity, imagination or innovation.

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<sup>45</sup> Bently and Sherman 111 contrasting entrepreneurial works with authorial works.

<sup>46</sup> The Gregory Report argued for a fixation only form of copyright protection for film on the basis that it resembled an industrial product more than an authorial work: ‘Report of the Board of Trade Copyright Committee’ (Her Majesty’s Stationery Company, October 1952).

<sup>47</sup> Cornish et al 450.

<sup>48</sup> Now the principal director is also considered to be an author, see further Chapter 6.

<sup>49</sup> In particular, implementing the Rental and Related Rights Directive and the Duration Directive. KM Garnett, G Davies, G Harbottle, WA Copinger and EP Skone James, *Copinger and Skone James on Copyright* (16th edn, Sweet & Maxwell 2011) 251 [4-47]; G Dworkin, ‘Authorship of Films and the European Commission Proposals for Harmonising the Term of Copyright’ [1993] EIPR 151.

<sup>50</sup> Copinger et al 248, [4–40]: in this context ‘... the expression [author] is not in fact used otherwise than as a shorthand in the process of identifying the first owner of the copyright’. Although it might be argued that this is just a drafting technique used for the avoidance of doubt and that it should not impact the definition of ‘author’ (or if it should, it should favour a broad intention) – the history of the introduction of these provisions records a hesitation to call these contributors ‘authors’. See Gregory Report (n46).

This also goes some way to explaining why the ‘authors’ of entrepreneurial works are generally not granted moral rights<sup>51</sup>.

The existence of these deemed authors suggests something about the meaning of authorship in UK copyright law: the requirement for at least a modicum of creative or intellectual effort<sup>52</sup>. This suggests that a true author must be a natural person<sup>53</sup>. This is reinforced by the provisions on works made in the course of employment where although first ownership of copyright is presumed to belong to the employer (often a company), the author is still held to be the individual employee who created it<sup>54</sup>. So, an author is a natural person who must have contributed more than assuming the financial risk or controlling the act of creation to be a ‘true’ author (rather than a deemed author). Seen from this angle, it is hard to escape the conclusion that when the CDPA provides that an ‘author’ is a person who *creates* a work, create is meant in both relevant senses of the word, and hence, what is required is more than a mere causal connection between creator and work (ie, an author must do something more than just ‘make’ or ‘produce’ a work). This demonstrates that the requirement for at least a modicum of ‘creativity’ is hardwired into the concept of authorship in the CDPA. In the third part of this Chapter,

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<sup>51</sup> With the exception of those who are also creative contributors, eg the principal director of a film and the performer of a broadcast or sound recording.

<sup>52</sup> Bently and Sherman 120 also argue that in the case of entrepreneurial works and computer-generated works the author is a legal fiction used to allocate rights.

<sup>53</sup> S Ricketson, ‘People or Machines? The Berne Convention and the Changing Concept of Authorship’ (1991) 16 Columbia J of L and the Arts 1, 28 arguing that the Berne Convention requires an author to be a natural person; thus considering that US ‘work for hire style’ principles run counter to the basic premises of the concept of authorship in the Convention. See also: A Dietz, ‘The Concept of Authorship Under the Berne Convention’ (1993) 155 Revue Internationale du Droit d’Auteur 3.

<sup>54</sup> This might be contrasted with US copyright law that provides that an employer is considered to be the author as well as the first owner of copyright subsisting in a work for hire, 17 US Code § 201.

I explain that one of the reasons that this requirement for creativity is rarely acknowledged relates to judicial anxiety about aesthetic neutrality<sup>55</sup>.

Copyright has often been used as a tool to protect investors and entrepreneurs. For this reason, some suggest that copyright law is primarily concerned with ensuring the dissemination of creative works (rather their creation)<sup>56</sup>. Yet, the fact that authors often need to give away some of their rights to entrepreneurs to ensure that their works are disseminated, does not undermine the importance of granting them these rights in the first place<sup>57</sup>. Indeed, copyright law derives its legal and moral force from the act of creativity<sup>58</sup>. This is the reason why authorship is one of the central organising concepts in copyright law<sup>59</sup>. In this section, I have argued that the concept of authorship is linked to the act of creativity and requires a more than de minimis contribution of creative choices evident in expression of a copyright work. This stable core concept of authorship remains at the heart of copyright law regardless of the normative justification or combination of justifications appealed to in an instant case<sup>60</sup>.

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<sup>55</sup> The other probable reason is that some judges have been tempted to expand copyright protection in order to compensate for the lack of a tort of misappropriation or unfair competition. M Spence, *Intellectual Property* (OUP 2007) 80-82.

<sup>56</sup> LJ Lacey, 'Of Bread and Roses and Copyright' [1989] Duke LJ 1532.

<sup>57</sup> M Handler, 'Continuing Problems with Film Copyright' in F Macmillan (ed), *New Directions in Copyright Law: Volume 6* (Edward Elgar 2007) 173.

<sup>58</sup> W Cornish, 'The Author as Risk-Sharer' (2002) 26 Columbia J of L & the Arts 1, 12.

<sup>59</sup> L Bently, 'R v Author: From Death Penalty to Community Service' (2008) 32(1) Columbia J of L & the Arts 1, 94: '...authorship remains at the heart of what most people think, and most legal systems say, copyright is about'.

<sup>60</sup> This might considered a 'mid-level' principle that ties together the disparate practices and doctrines of intellectual property law and that might help bridge the gaps between different views of the theoretical underpinnings of the law, see: R Merges, *Justifying Intellectual Property* (Harvard UP, 2011).

## ***2.2 The Joint Authorship Test***

Section 10(1) of the CDPA defines a ‘work of joint authorship’ as a ‘work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors’. In addition, case law establishes that in order to be a joint author a contributor must have contributed a significant part of the protected skill, labour or judgment, which is sometimes referred to as the authorship limb of the test<sup>61</sup>. Therefore, to be a joint author under the CDPA a contributor must have:

- (i) made a contribution that is not distinct;
- (ii) in pursuance of some collaboration or common design; and
- (iii) he or she must have made a significant contribution of the right kind.

The case law on joint authorship tends to lack analytical clarity as the three limbs of the test are often considered at once, making it difficult to discern overarching principles. The uncertainty in the case law is compounded by the fact that the application of the test is said to be very factually specific<sup>62</sup>. Despite these difficulties, I outline each part of the test separately below. I try to draw out common themes from the case law, filling in gaps where possible with reasoning from first principles.

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<sup>61</sup> *Godfrey v Lees* [1995] EMLR 307, 325-8; *Ray v Classic FM* (n13) 636; *Hadley v Kemp* (n37).

<sup>62</sup> Indeed, some textbooks and commentaries resort to giving long lists of examples to give the reader a feel for the various circumstances in which joint authorship has and has not been granted to different contributors to different works, for example, H Laddie, P Prescott and M Vitoria, *The Modern Law of Copyright and Designs* (4th edn, LexisNexis 2011) [3.97].

### 2.2.1 Contribution Not Distinct

In order to be a joint author, a contributor's contribution must not be 'distinct'. The requirement is probably not a question of whether it is possible to identify the contribution. Rather, it is a question of whether the contribution is an integral part of the work such that without it the work would be different in character<sup>63</sup>. Thus, in *Beckingham v Hodgens* (applying the 1956 Act which used 'not separate', rather than 'distinct'), the court held that the violin part of a song was not separate because it was,

heavily dependent upon what is there already. Stripped of the voices and other instruments, the violin part would sound odd and lose meaning. The final musical expression – what the audience will hear – is a joint one<sup>64</sup>.

In other words, a work of joint authorship is not a collection of separate contributions eg two separate essays in the same book. Distinct contributions may, however, constitute separate works or a collective work<sup>65</sup>. This part of the test seems to indicate that a work of joint authorship involves a combination, merging or mixing of contributions<sup>66</sup>.

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<sup>63</sup> Copinger et al [4-37].

<sup>64</sup> At first instance [2002] EWHC 2143 [46].

<sup>65</sup> On the distinction between co-authors and joint authors see Copinger et al [4-33]. In *Redwood Music v Chappell* (1982) RPC 109 (QB), for example, it was held that the music and lyrics to a song were distinct contributions to two separate works – a literary work and a musical work. In *Cala Homes v Alfred McAlpine Homes* [1995] EWHC 7, [1995] FSR 818, 834 it was accepted that there was no material difference between the wording of the test in 1956 and 1988 (n5 of the judgment).

<sup>66</sup> It might also indicate a bias toward individual ownership, as works are treated separately wherever possible. On the disaggregation of authorship in this way: P Jaszi, 'On The Author Effect: Recovering Collectivity' in M Woodmansee and P Jaszi (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke UP 1999) 29, 51-56.

### 2.2.2 Collaboration or Common Design

The requirement for ‘collaboration’ distinguishes a derivative work from a work of joint authorship<sup>67</sup>. A derivative work is created where a work is changed by a subsequent author who is not working together with the original author (for example, a translation). In order to be joint authors, contributors must have a loose plan to work together or some sort of preconceived design to produce the work. For this, joint authors do not have to be located in the same place and do not need to work simultaneously.

The cases do not provide much clear guidance beyond this. In *Levy v Rutley*, the introduction of a new scene and some alterations to the dialogue of a play by a theatre company proprietor, without the co-operation of the commissioned writer, was not found to be in furtherance of a common design<sup>68</sup>. On the other hand, in *Springfield v Thame* it was suggested that the sub-editor of a newspaper who touched up a paragraph composed by another sub-editor might be a joint author of the article<sup>69</sup>. In *Levy v Rutley*, ‘mere additions’ to a complete piece were not sufficient to demonstrate collaboration as they were only intended to make the play more attractive to the audience. In that case Justice Keating seemed to consider authorial intention to be relevant as he noted that the requirement would have been satisfied if they had agreed

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<sup>67</sup> *Beckingham v Hodgins* (n64) [45] (Floyd QC) citing *Levy v Rutley* (1871) LR 6 CP 523 distinguishing ‘joint labouring in the furtherance of a common design’ from the ‘subsequent independent alteration of a finished work’.

<sup>68</sup> (1871) LR 6 CP 523. The Court failed to discover ‘any cooperation of the two in the design, or execution of the piece, or in any improvements either in the plot or general structure’ (529, Keating J); ‘The additions do not disturb the drama composed by Wilks: they were made for the mere purpose of improving or touching up some of its parts. It would be strange indeed, if not unjust, if the author’s rights could be thus merged into a joint-authorship with another. There are probably very few instances, at least in modern times, of a play being put upon the stage without some alteration by the manager’ (530, Montague Smith J).

<sup>69</sup> (1903) 89 LT 242 (Ch). Laddie et al [3.97] consider that collaboration might have been assumed in this case on the basis that both were employed as sub-editors at the same newspaper.

or jointly undertaken to write the play. The Court of Appeal in *Beckingham v Hodgens*, however, held that the requirement of a ‘common design’ did not mean the common intention to be a joint author<sup>70</sup>. Yet, the best interpretation of *Beckingham v Hodgens* is that the Court did not mean that no form of intention is required at all – for surely there must be some intention to work together for a common design to exist<sup>71</sup>. To hold otherwise would impermissibly stretch the common language meaning of the word ‘collaboration’. Rather, the Court’s decision should be construed to mean that there is no need for a subjective intention in a narrow sense: to be a joint author for the purposes of copyright law.

In jurisdictions that require a specific intention to be a joint author such as the US, this part of the test tends to take on great importance<sup>72</sup>. In the UK, instead, cases focus almost exclusively on the authorship limb which means that decisions on joint authorship tend to hinge on the characterisation of the nature of a contribution. As a result, there is an impoverished understanding of collaboration in the case law. There is virtually no elaboration of the meaning of this term and its impact on the other parts of the test, ie does the nature of the common design shed any light on whether a contribution is distinct or whether it is significant? The neglect of the requirement for

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<sup>70</sup> *Beckingham v Hodgens* [2003] EWCA Civ 143, [2003] EMLR 18 (Jonathan Parker LJ): there is no requirement for intention for joint authorship, just a common design to produce the work. The Court rejected the approaches taken in Canadian and US cases as looking ‘beyond the section into the uncertain realm of policy’ and introducing undesirable requirements of proof, referring to *Childress v Taylor* 945 F2d 500 (1991) (US CA 2<sup>nd</sup> Cir) and *Neudorf (Darryl) v Netzwerk Productions Ltd* [2000] RPC 935 (British Columbia SC) [52]. Cf L Zemer, *The Idea of Authorship in Copyright* (Ashgate 2007) 217 arguing that despite this decision UK courts tend to silently embrace a requirement for the intention to co-author to some extent. See also: Ginsburg (n7).

<sup>71</sup> L Zemer, ‘Is Intention to Co-author an Uncertain Realm of Policy?’ (2007) 30(4) *Columbia J of L and the Arts* 611, 617: ‘a joint enterprise, by its very nature, is based on some intention by parties to collaborate’.

<sup>72</sup> L Zemer, ‘Contribution and Collaborations in Joint Authorship: Too Many Misconceptions’ (2006) 1(4) *JIPLP* 283.



collaboration in favour of the requirement of authorship does not seem justified by the wording of section 10, which specifically requires the former and only implies the latter. This impoverished understanding of collaboration makes the joint authorship test difficult to apply to works of collective authorship<sup>73</sup>.

The requirements for collaboration and for contributions which are not distinct, when considered together, indicate that a work of joint authorship involves a working together to create something that is more than the sum of its parts. This thesis will argue that if this view of the joint authorship test is taken seriously, the test would be well-suited to collective authorship.

### **2.2.3 A ‘Significant’ Contribution of the ‘Right Kind’**

As mentioned above, the case law overwhelmingly focuses on the authorship limb of the test. In order to be a joint author, a contributor must have made a significant contribution of the right kind<sup>74</sup>. Joint authors do not need to contribute equally<sup>75</sup>. Courts consider the nature of the work at issue as well as the quantity and quality of the contribution in question<sup>76</sup>. Where a qualitative approach is taken it is not clear whether this is in relation the requirement that a contribution be ‘significant’ or of the ‘right kind’. It is difficult to identify any over-arching guiding principles from the case law as

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<sup>73</sup> This problem is particularly acute in relation to a perpetual work in progress like Wikipedia. The current test for collaboration fails to convincingly resolve the issue of whether Wikipedia is best seen as a series of derivative works or a work of joint authorship. 3.2.1 below.

<sup>74</sup> Although this part of this test tends to be referred to collectively as the authorship limb, the authorship part really only relates to the requirement that the contribution be of the ‘right kind’.

<sup>75</sup> *Godfrey v Lees* (n61) [1995] EMLR 307, 325 (Blackburne J): ‘It is not necessary that his contribution to the work is equal in terms of either quantity, quality or originality to that of his collaborators’.

<sup>76</sup> *Brown v Mcasso* [2005] FSR 846 [42] (EWPC) (affirmed on appeal [2005] EWCA Civ 1546).

decisions on joint authorship are often said to be limited to the facts at issue. Yet, this also provides scope for the court to take predominant creative practices into account. In this way, the joint authorship test contains a significant amount of flexibility that enables it to adapt to changing practices and different creative contexts.

There is little judicial guidance on the meaning of ‘significant’. This is complicated by the fact that this question is often considered together with the requirement that the contribution be of the right kind. It is unclear whether the requirement for a significant contribution is qualitative or quantitative. The only judge to specifically comment on this point is Justice Blackburne in *Fisher v Brooker*, at first instance, who suggested that it means ‘more than merely trivial’ (a de minimis quantitative standard)<sup>77</sup>; although he also said that the relevant contribution in that case was ‘on any view substantial’<sup>78</sup>. Some commentators have preferred this quantitative approach, because it has the advantage of appearing aesthetically neutral, which accords with the traditional reluctance of judges to make aesthetic judgments in copyright decisions<sup>79</sup>.

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<sup>77</sup> [2006] EWHC 3239, [2007] FSR 255 [46]. In *Fylde Microsystem* (n38) [25] Laddie J thought the relevant question was whether the contribution was ‘big enough’, which also seems to imply a quantitative standard.

<sup>78</sup> *ibid* [98]. Mr Justice Blackburne’s decision was partially reversed on appeal, the Court of Appeal considering it to be an ‘extremely unusual case’ ([2008] EWCA Civ 287 [34]); then upheld in the House of Lords ([2009] UKHL 41). Mr Justice Blackburne’s ruling on joint authorship was not challenged in either appeal.

<sup>79</sup> L Bently, ‘Authorship of Popular Music in UK Copyright Law’ (2009) 12(2) *Information Communication & Society* 179, 197 acknowledges that it might not be possible, or even always desirable, to completely exclude aesthetic value judgments from legal decision-making.

Bently has argued that the requirement for a significant contribution has tended to invite judges to make value judgments about the quality of particular contributions<sup>80</sup>. Zemer agrees that many of the cases demonstrate a subjective, qualitative approach to this criterion<sup>81</sup>. In *Beckingham v Hodgens*, for example, it was thought significant that the violin riff was memorable and catchy<sup>82</sup>. Similarly, in *Hadley v Kemp* it was thought relevant that the saxophone fills were not ‘particularly memorable, tuneful or original... they were just the sort of thing which any accomplished professional saxophonist would have provided’<sup>83</sup>. There was also a quantitative element in that case as the court considered that the saxophone interlude was only 9% of the duration of the track. The court in *Brown v Mcasso* also took a qualitative approach when it considered that Brown was a joint author, his main contribution being to give the song an ‘authentic rap feel’<sup>84</sup>.

Bently and Sherman consider a quantitative approach to be preferable to an assessment of the aesthetic significance of a contribution<sup>85</sup>. This might be due to the number cases in which the determinations on this point appear fairly subjective and arbitrary<sup>86</sup>; or where inappropriate weight appears to have been given to expert evidence that does not take into account the particular features of the relevant genre<sup>87</sup>.

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<sup>80</sup> Bently *ibid* 190.

<sup>81</sup> Zemer (n72) 287.

<sup>82</sup> (n64) [49].

<sup>83</sup> [1999] EMLR 589, 650.

<sup>84</sup> [2005] FSR 40 [30].

<sup>85</sup> Bently and Sherman 126.

<sup>86</sup> Zemer (n72).

Vaver goes further, suggesting that the requirement for a significant contribution might be an unnecessary gloss<sup>88</sup>.

These concerns might be better addressed by taking a third way. In line with the importance of collaboration as indicated by the wording of section 10, ‘significant’ might be determined in light of the common design of the contributors. This implies a qualitative approach and entails reference to aesthetic criteria drawn from the potential authors’ shared sense of their creative realities (rather than the application of aesthetic criteria, determined judicially, in isolation from that context)<sup>89</sup>.

In addition to making a significant contribution, a joint author must make a contribution of the *right kind*. This is an entry point in the joint authorship test for much of the normative content of the concept of authorship discussed above. Although there is no requirement that a joint author’s contribution must be separately copyrightable, the jurisprudence on originality is relevant to whether or not a contribution is of the right kind<sup>90</sup>. The contribution must be ‘in the nature of authorship’, which means that it must be a contribution to the *creation* of the work<sup>91</sup>. Additional suggestions after the substance of the creative process is complete will rarely be sufficient<sup>92</sup>. The application

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<sup>87</sup> Bently (n79) 198 discussing the inappropriate weight given to the evidence of classically trained musicologists in cases involving popular music.

<sup>88</sup> D Vaver, *Intellectual Property: Copyright, Patents and Trade-Marks* (2<sup>nd</sup> ed, Irwin Law 2011) 120-1.

<sup>89</sup> I argue that there is a reliable external standard from which to judge the significance of a contribution: the common design of the contributors as revealed by the social norms which regulate their collaborative activities. This is explained in detail in Chapters 7 and 8.

<sup>90</sup> In the US, some courts have required a joint author to provide a separately copyrightable contribution, eg *Childress v Taylor* (n70); *Erickson v Trinity Theatre* 13 F3d 1061 (7th Cir, 1994); *Thomson v Larson* 147 F3d 195 (2d Cir, 1998). Cf. *Gaiman v McFarlane* 360 F3d 644 (7th Cir, 2004).

<sup>91</sup> *Hadley v Kemp* (n37).

<sup>92</sup> *ibid*; *Brighton v Jones* (n37).

of the authorship limb of the test depends upon the nature of the work in issue. So, for example, contributions to performance of a musical work were not of the right kind<sup>93</sup>; and contributions to the interpretation, and theatrical presentation, of a dramatic work were not of the right kind<sup>94</sup>. In the case of a literary work, contributions akin to proof-reading do not amount to authorship<sup>95</sup>.

The contribution must also be to the protectable expression, not just the ideas<sup>96</sup>. The idea/expression dichotomy is a notoriously slippery distinction. In *Cala Homes* the court held that a person can be a joint author even if he has not put pen to paper. According to Justice Laddie: ‘... to have regard merely to who pushed the pen is too narrow a view of authorship’<sup>97</sup>. Justice Laddie stressed the importance of the contributions of concepts and emotions, over physical or mechanical contributions<sup>98</sup>. In *Robin Ray v Classic FM* Justice Lightman took a narrower approach, maintaining that *Cala Homes* might be an exceptional case and distancing himself from any suggestion that ‘there is no restriction on the way in which a joint author’s contribution may be funnelled into the finished work’<sup>99</sup>. In what he sees as restoring the primacy of the idea/expression dichotomy, Justice Lightman insists that a joint author must ‘participate

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<sup>93</sup> *Hadley v Kemp* (n37).

<sup>94</sup> *Brighton v Jones* (n37).

<sup>95</sup> *Fylde Microsystems* (n38).

<sup>96</sup> *Donoghue v Allied Newspapers* (n35); *Brighton v Jones* (n37).

<sup>97</sup> *Cala Homes* (n65) 835-6.

<sup>98</sup> *ibid* 835: ‘It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected’.

<sup>99</sup> *Robin Ray* (n13) 636 (Lightman J): ‘it appears to me the architects in [*Cala Homes*] were in large part acting as “scribes” for the director. In practice such a situation is likely to be exceptional’.

in the writing’<sup>100</sup>. This presents an unduly narrow view of authorship that fails to appreciate the distinction between the expression and the fixation of the work, and does not sit well with much of the case law<sup>101</sup>. In requiring responsibility for what appears on the page, it is probable that Justice Laddie was suggesting responsibility for the *expression* (not the fixation). It will be apparent from the case studies in this thesis that Justice Laddie’s approach in *Cala Homes* is better adapted to the unique way in which large groups of authors work together to create a copyright work. Despite this, there is a real risk that Justice Lightman’s restrictive approach might be taken to the requirement of ‘responsibility for what appears on the page’ for pragmatic reasons (to reduce the number of potential joint authors) as I discuss in the third part of this Chapter<sup>102</sup>.

#### 2.2.4 Questions of Law, Questions of Fact

In light of the lack of analytical clarity in the case law, it may be useful to suggest a more defined structure and, in particular, to separate the parts of the joint authorship test which ought to be treated as questions of law from the parts that ought to be treated as questions of fact. Although some commentators suggest that the distinction between questions of law and questions of fact is ultimately a pragmatic one, Endicott carefully demonstrates that an analytical approach is possible<sup>103</sup>. According to Endicott, a

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<sup>100</sup> *ibid* 636 Lightman J stressing ‘[w]hat is essential is a direct responsibility for what actually appears on the paper’. Similarly at 637 when Lightman J states ‘... the plaintiff...was in no wise a collaborator in its production’, he seems to be referring to the physical fixation of the work.

<sup>101</sup> For example, *Heptulla v Orient Longman* [1989] 1 FSR 598 (Indian High Court); *Donoghue v Allied Newspapers* (n35) 109.

<sup>102</sup> 2.3. See also M Rimmer, ‘Heretic: Copyright Law and Dramatic Works’ (2002) 2(1) QUT LRev 131, 139, 144.

<sup>103</sup> T Endicott, ‘Questions of Law’ (1998) 114 LQR 292 noting that the analytical approach he proposes incorporates both pragmatic and normative considerations. Endicott argues that it is possible to determine which questions are questions of law by asking what the point is of treating certain questions as questions of law.

question of law arises where the law requires the question to have a particular answer or where the appellate tribunal wishes to elaborate on the law<sup>104</sup>. Adopting this approach, it seems likely that the requirement that the contribution be of the ‘right kind’ or ‘in the nature of authorship’ is a question of law, as it requires a particular answer. The law requires a particular answer to this question because of its normative dimension<sup>105</sup>. As an important organising concept in the CDPA, ‘authorship’ is shaped by the purpose of copyright law and policy concerns that limit its scope<sup>106</sup>. Indeed, it is recognised that although contributors might make agreements about who owns the copyright in a work, they may not make an agreement about who counts as an author of the work<sup>107</sup>. Although authorship is ultimately a legal question, the joint authorship test also contains questions of fact.

According to Endicott, questions of fact are those questions that are capable of decision either way; or to put it another way, the law does not require a particular answer to these questions. The parts of the joint authorship test that are likely to be questions of fact include: the requirement for a significant contribution; for collaboration; and that the contribution not be distinct<sup>108</sup>. The last two questions

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<sup>104</sup> Endicott *ibid*. It may not always be immediately obvious which questions are questions of law, particularly in the latter case (which is likely to entail some pragmatic considerations). Endicott does not make this point in relation to a particular application of the law/fact distinction; rather, he proposes a general analytical framework that might be used to distinguish questions of law and questions of fact.

<sup>105</sup> The law might also require a particular answer to a question where delegating that answer to prevailing social norms would conflict with other important policy goals that the law seeks to uphold. For more on the limits of incorporating social norms in judicial decision-making, see 7.4.3 below.

<sup>106</sup> In this way copyright law provides a good source of standards, etc. The importance of retaining a legal dimension of authorship in the application of the joint authorship test is discussed in Chapters 7 and 8.

<sup>107</sup> Copinger et al [4-38]; *Samuelson v Producers Distributing* [1932] 1 Ch 201, (1932) 48 RPC 580, 586; *Wiseman v George Weidenfeld* [1985] FSR 525.

<sup>108</sup> The meaning of these parts of the test should be determined in accordance with ordinary language: Lord Reid in *Cozens v Brutus* [1973] AC 854, 861; *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929.

indicate that a work of joint authorship involves a working together to create something that is more than sum of its parts. These are matters that are capable of decision either way; that is, copyright law does not require a particular answer to these questions<sup>109</sup>. If, as I have suggested, the requirement for a significant contribution is best determined in light of the particular common design shared by the contributors, it would also be a question of fact<sup>110</sup>. This is the preferable approach as it leaves issues with a likely aesthetic dimension to those in the best position to answer such questions (creators)<sup>111</sup>.

### ***2.3 Three Critiques of the Application of the Joint Authorship Test***

It is difficult to tell how the joint authorship test would apply to works of collective authorship for two reasons. The first reason is that the application of the joint authorship test is said to depend upon the facts of the case. The second reason is that there is a lack of analytical clarity in the case law on joint authorship<sup>112</sup>. I suggest that this lack of analytical clarity might explained by two preoccupations: a concern to reduce the number of potential joint owners of copyright; and an anxiety about aesthetic neutrality. These two reasons can be broken down to three critiques of the application of the joint authorship test:

- (i) the factual specificity of the joint authorship test;
- (ii) the instrumental/pragmatic approach; and

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<sup>109</sup> Whether or not there is collaboration, for example, depends upon the shared understanding of the contributors.

<sup>110</sup> At 8.5 I argue that there are good reasons to consider social norms at this point in the analysis.

<sup>111</sup> Endicott (n103) 294 argues that the most common use of the notion of questions of law or questions of fact is to distribute decision-making power and responsibility.

<sup>112</sup> Indeed, some textbooks resort to giving long lists of examples to explain the application of the test, see text at n62.



(iii) a preoccupation with aesthetic neutrality.

This section explores these three critiques in order to foreshadow the insights for copyright law that emerge from the consideration of the case studies of collective authorship in the following Chapters.

### **2.3.1 The Factual Specificity of the Joint Authorship Test**

The application of the joint authorship test is frequently said to be a question of degree that depends upon the facts of the case<sup>113</sup>. This can make it difficult to predict the outcome of a case, particularly where there is no precedent, as is the case for collective authorship<sup>114</sup>. Although the factual specificity of the joint authorship test might result in considerable uncertainty, ultimately this aspect of the test is a strength<sup>115</sup>. This is because it provides inbuilt flexibility in that allows the concept of authorship to adapt over time to new creative forms and techniques<sup>116</sup>. The factual specificity of the application of the joint authorship test also allows judges to calibrate the provisions of the joint authorship test to the creative context in which authorship occurs. This provides a workable method of implementing a copyright scheme that provides a single test for authorship and joint authorship that is meant to apply in a diverse range of creative contexts.

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<sup>113</sup> *Brighton v Jones* (n37) [31] (Park J): ‘...to a considerable extent the question whether a person is or is not the author of a work within [s10] is one of fact, assisted of course by the wealth of case law which has considered the matter’.

<sup>114</sup> A notable exception is *Bulun Bulun v R & T Textiles* (1998) 86 FCR 244 (Fed. Ct. of Australia) which involved an Indigenous elder who claimed that his tribe had a communal authorship interest in an artwork produced in accordance with customary law (4.2 below).

<sup>115</sup> On the potential benefits of vagueness in the law: M Spence and T Endicott, ‘Vagueness in the Scope of Copyright’ (2005) 121 LQR 657.

<sup>116</sup> See for example, the change in the way that photography has been treated, Bently and Sherman 96.

### 2.3.2 The Instrumental or Pragmatic Approach

The second reason it is difficult to predict how the joint authorship test applies to works of collective authorship is the lack of analytical clarity in the case law. One reason for this is the preference for pragmatic or instrumental reasoning which is adopted out of a concern about one of the potential consequences of finding joint authorship: joint ownership of copyright<sup>117</sup>.

Joint authors are usually the first owners of the copyright that subsists in a joint work<sup>118</sup>. Joint owners hold their copyright interests as tenants in common<sup>119</sup>. There is a presumption that each joint owner owns equal shares of the copyright interest<sup>120</sup>; however, this presumption has been rebutted in a number of cases where copyright was found to be owned in unequal shares<sup>121</sup>. Each joint owner's consent is required to grant a licence to do any of the protected acts in relation to the work or to assign copyright in that work, no matter how great or small their share of ownership of the copyright<sup>122</sup>. There is no provision in the CDPA that a joint owner must not unreasonably withhold

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<sup>117</sup> This is not the only example of consequentialist reasoning. A classic example is the 'principle' that what is copying is worth protecting, which seems to be a judicial sleight of hand designed to transfer complicated considerations of policy to the infringement side of the analysis shifting focus from the proper scope of the rights of the copyright owner to the conduct of the potential infringer.

<sup>118</sup> CDPA s11(1), s10(3).

<sup>119</sup> *Lauri v Renad* [1892] 3 Ch 402. They may hold their copyright interest as joint tenants as in *Mail Newspapers v Express Newspapers* [1987] FSR 90, although this may be a special case given that it concerned a prospective bride and groom who jointly commissioned the taking of wedding photographs.

<sup>120</sup> *Prior v Landsdowne Press* [1977] FLR 59, [1977] RPC 511; *Stuart v Barrett* [1994] EMLR 448; *Beckingham v Hodgins* (n70).

<sup>121</sup> For example, *Bamgboye v Reed* [2002] EWHC 2922 [42] (ownership divided one third to two thirds); *Fisher v Brooker* [2009] UKHL 41 (Fisher's organ solo entitled him to 40 per cent ownership of the copyright in the song 'A Whiter Shade of Pale').

<sup>122</sup> *Powell v Head* (1879) 12 Ch D 686. One owner can sue in relation to an infringement of copyright subsisting in the work, but they may have to account to the other owners. One owner may also assign his or her ownership share.

his or her consent. This makes the joint ownership rules appear poorly adapted to situations involving multiple owners<sup>123</sup>, because they allow one contributor (who may have made a relatively small contribution) a seemingly disproportionate power to chill the exploitation of a copyright work at the expense of other contributors' interests in generating royalties and the general public's interest in the dissemination of creative works<sup>124</sup>.

Frequently, judges take a restrictive approach to the joint authorship test out of a concern to reduce the number of potential joint owners of a work<sup>125</sup>. In doing so they appear motivated by consequentialist reasoning: they seek to reduce the possibility of a situation arising in which one contributor holds up the exploitation of the work. Simplifying ownership might also mean that assignments and licences of copyright are easier and cheaper to effect<sup>126</sup>. Pragmatic, instrumental reasoning of this type is evident in many of the cases. Justice Park in *Hadley v Kemp* commented, for example: '...[i]t would be surprising if a slight contribution was enough to make a person a joint author and thereby make him an equal owner with another or others who had contributed far more than he had'<sup>127</sup>. Although this quote seems to rely upon the misassumption that

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<sup>123</sup> Copyright also provides little guidance as to contributors' rights with respect to one another and in relation to the work as a whole, see: Elkin-Koren (n20); RC Dreyfuss, 'Collaborative Research: Conflicts on Authorship, Ownership and Accountability' (2000) 53 Vanderbilt LRev 1161.

<sup>124</sup> The position in the US is quite different. One joint owner can licence any use of the work, with only the requirement to account to the other authors. Interestingly, a restrictive approach to the application of the joint authorship has also been adopted in this context based on the concern that creators may refrain from asking for suggestions of others out of fear that those people might claim authorship and gain control over subsequent uses of the work: see, for example, *Aalmuhammed v Lee* 202 F3d 1227 (9th Cir, 2000).

<sup>125</sup> D Vaver, *Copyright Law* (Irwin Law, 2000) 76; D Vaver (n88) 121; Rimmer (n102) and L Bently, 'Copyright and the Death of the Author in Literature and Law' (1994) 57 MLR 973.

<sup>126</sup> Bently *ibid*.

<sup>127</sup> *Hadley v Kemp* (n37) 643.

joint authors are joint owners in equal shares (which is not always the case), Justice Park repeats this sentiment in *Brighton v Jones*<sup>128</sup>.

In order to restrict the number of joint authors, judges use a combination of strategies. One involves finding there has not been *enough* of a contribution<sup>129</sup>. In so doing, the cases seem to imply a higher standard for joint authorship than individual authorship. Another strategy is to privilege some contributors over others. Most of the authorship requirements can be employed strictly to privilege certain contributors over others; for example, finding that there has not been a contribution of an authorship-type (eg, contribution to interpretation or performance, not creation)<sup>130</sup>. The fact that decisions depend on their facts makes it even easier to employ the instrumental/pragmatic approach. Most frequently, it is unclear whether the contribution is not ‘significant’ or not of the ‘right kind’<sup>131</sup>. In some of the older cases the entire joint authorship test is run together, so that it is difficult to tell whether the decisive factor was an absence of collaboration or not enough of a contribution of the right kind<sup>132</sup>. To get a flavour of the inconsistencies one might compare *Brighton v Jones* with *Hadley v Kemp*. In *Brighton v Jones* the judge focused on contributions to the fixation, considering that although some of the concepts and dialogue came from Brighton, it was Jones that actually wrote the words on her laptop (she was thought to

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<sup>128</sup> Correcting the point on equal shares at [34].

<sup>129</sup> *Brighton v Jones* (n37) [34].

<sup>130</sup> *Hadley v Kemp* (n37).

<sup>131</sup> In *Brighton v Jones* (n37), for example, a director did not make enough of the right kind of contribution to be a joint author despite the judge describing her contribution as ‘valuable and important’.

<sup>132</sup> *Levy v Rutley* (n68); *Springfield v Thame* (n69).

be the sole author)<sup>133</sup>. In *Hadley v Kemp* the court took the opposite approach. The actual process of fixation seems to have been completely disregarded. The musical works were held to have been already ‘fixed’ in Gary Kemp’s musical consciousness before he presented it to the band; therefore he was the sole author<sup>134</sup>.

In adopting the instrumental/pragmatic approach, judges seek to find one person or a small number of persons who most ‘deserve’ to own the copyright. This leads them to restrict authorship to those who appear to have done most of the work to the exclusion of contributors who have made quantitatively less important contributions in all but the most explicitly egalitarian environments<sup>135</sup>. This approach is likely to tend to favour parties who have exercised control over the creative process<sup>136</sup>. Where many contributors have made creative contributions to a work it might be tempting to consider the most dominant or powerful contributors to be the only authors. Dominant players in the relevant industry will be the most likely to be able to exercise a great deal of control over the creative process<sup>137</sup>. These players might also seem to deserve copyright protection as they may appear best placed to ensure the work’s effective exploitation. Granting authorship only to those figures with the most control at the

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<sup>133</sup> (n37) [56].

<sup>134</sup> (n37) 639. Cf. D Free, ‘Beckingham v Hodgins: The Session Musician’s Claim to Music Copyright’ (2005) 1(3) Entertainment and Sports LJ 93 <<http://www.warwick.ac.uk/go/eslj/issues/volume1/number3>>. The band members were said to be ‘interpreting’, not creating. Free argues that if they were interpreting something, it was not something created by Gary Kemp.

<sup>135</sup> Compare *Hadley v Kemp* (n37) and *Stuart v Barrett* (n120) which involved ‘collective jamming’.

<sup>136</sup> For example in *Hadley v Kemp* (n37) 641 Gary Kemp was described as a ‘control freak’ and the band as ‘not a democracy’; see also *Brighton v Jones* (n37). RR Kwall, ‘Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine’ (2001) 75 Southern California LRev 1, 5 warns that the restrictive application of the joint authorship test in the US also tends to privilege dominant contributors.

<sup>137</sup> On the dangers of allowing authorship to gravitate to the most powerful players, see Dreyfuss (n123) 1206, 1209. Also 8.2 below.

expense of other creative contributors, however, tends to distance authorship from its core meaning in copyright law (a contribution of creative choices evident the expression)<sup>138</sup>.

In trying to restrict authorship to few contributors, the case law seems to imply that there is a higher standard of authorship for joint works than for individually authored works. This does not make much sense on the conceptual level as ‘authorship’ implies the same consequences and has the same role in the CDPA whether a work is individually or jointly authored<sup>139</sup>. Collaboration is becoming an increasingly important, and in some cases an essential, way of working. Sometimes groups can create works that individuals cannot. If one of the goals of copyright is to promote cultural flourishing it seems perverse to encourage individual authorship at the expense of collaborative endeavours. On the view that copyright’s purpose is to reward and incentivise authors, there seems little basis to arbitrarily exclude valuable contributors to a collaborative project in the search of a small number of potential ‘owners’<sup>140</sup>. In some cases the work may not have existed at all without the efforts of large number of people<sup>141</sup>. Surely issues of ownership ought to be addressed by reconsidering the rules on joint ownership rather than tinkering with the concept of *authorship*<sup>142</sup>.

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<sup>138</sup> This can be seen in the US where control has become an important part of the joint authorship test, see FJ Dougherty, ‘Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under US Copyright Law’ (2001) 49 UCLA LRev 225.

<sup>139</sup> There may be a stronger argument for different notions of authorship for the other guises which this concept might take in the CDPA. L Bently and L Biron, ‘Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, if anything, is to be done?’ forthcoming in M van Eechoud (ed), *The Work of Authorship* (Amsterdam UP 2014) 237 suggest the possibility of broader rights of attribution as a way to address the discontinuities between legal conceptions of authorship and social practices.

<sup>140</sup> Kwall (n136) 58.

<sup>141</sup> Vaver (n88) 52-53.

<sup>142</sup> The instrumental/pragmatic approach is arguably worse than this as it appears to empty the concept of authorship of most of its meaning – treating it instead, as a placeholder for the separate concept of

The instrumental/pragmatic approach, in focusing upon one outcome of a decision to include a contributor as a joint author (joint ownership), ignores another important consequence of this decision: the denial of moral rights. Yet, moral rights (particularly the attribution right) might sometimes be more significant to creators than copyright ownership. The instrumental/pragmatic approach ignores the realities of collaboration and the need to incentivise contributors to collaborative work<sup>143</sup>. Furthermore, as instrumental/pragmatic concerns are accommodated at the expense of a thorough analytical approach to the joint authorship test, this approach tends to result in legal uncertainty. This uncertainty has a potentially chilling effect on creativity with a collaborative element<sup>144</sup>. The impoverished understanding of ‘collaboration’ and the diminished importance of this part of the test in the UK is also likely to contribute to a difficulty in conceptualising collaborative creative processes. This leads to the restriction of authorship to the most obvious/substantial/dominant contributor and a failure to explicitly consider the important value of other contributions to a work. In this way the instrumental/pragmatic approach might be seen as an instantiation of the romantic authorship myth: the assumption that creativity is the product of the mind of a singular genius figure.

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ownership. For suggestions on how the rules of joint ownership might be better adapted to collective authorship see 8.4.3.

<sup>143</sup> Bently (n125) noting that copyright law prefers to minimise the number of authors rather than reflect the ‘realities’ of collaboration.

<sup>144</sup> PS Fox, ‘Preserving the Collaborative Spirit of American Theatre: The Need for a ‘Joint Authorship Default Rule’ in Light of the Rent Decision’s Unanswered Question’ (2001) 19 Cardozo Arts & Entertainment LJ 497, 498.

### 2.3.3 A Preoccupation with Aesthetic Neutrality

I have suggested that an unwillingness to explicitly consider relevant aesthetic considerations also leads to a lack of analytical clarity in joint authorship cases<sup>145</sup>. The application of the joint authorship test has been affected by the ‘supposed terrors for judicial assessment of matters involving aesthetics’<sup>146</sup>. The principle that originality does not require any ‘novelty, usefulness, inventiveness, aesthetic merits, quality or value’ is a long-standing feature of copyright law<sup>147</sup>. In this subsection I argue that the (valid) concern that copyright decisions ought not to depend upon the aesthetic merit of a work has developed into a general judicial anxiety about making any sort of aesthetic value judgement. This preoccupation with aesthetic *neutrality*, however, is misplaced because aesthetic criteria are inescapably relevant to a determination of authorship<sup>148</sup>.

The preoccupation with aesthetic neutrality is based upon a legitimacy concern: that judges are poorly placed to make aesthetic judgments about a work<sup>149</sup>. As Lord Reid puts it:

Judges have to be experts in the use of the English language but they are not experts in art or aesthetics.... we must avoid philosophic or metaphysical argument about the nature of beauty, not only because there does not seem to be any consensus about this but also because those who

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<sup>145</sup> J Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U of California Davis LRev 1151 discusses copyright scholars’ preoccupation with neutrality and abstraction.

<sup>146</sup> *Burge v Swarbrick* [2007] HCA 17 [63].

<sup>147</sup> *Sawkins v Hyperion* (n41) [31].

<sup>148</sup> Recently, Barton Beebe has discussed the role of the concept of aesthetic progress in the US copyright tradition, ‘Intellectual Property and the Problem of Aesthetic Progress’, Ninth Annual International Intellectual Property Lecture, Emmanuel College, University of Cambridge, 11 March 2014.

<sup>149</sup> Cf. *George Hensher v Restawile* [1976] AC 64, 97 Kilbrandon LJ did not think that aesthetic matters were difficult or unseemly for a court to decide (although he thought this unwarranted in that case).



are ignorant of philosophy are entitled to have opinions about what is artistic.<sup>150</sup>

Despite this concern to maintain neutrality, a number of scholars have convincingly argued that copyright cases are affected by cultural biases<sup>151</sup>. This seems to suggest that aesthetic value-judgments do, in fact, slip into judicial decisions.

It is difficult to make sense of the concept of authorship, especially as it is framed in the CDPA, without any resort to aesthetic criteria. In determining authorship, judges often assess a putative author's contribution in terms of the category of work concerned. It is difficult to assess the literary, dramatic, musical or artistic nature of a contribution without making some sort of aesthetic judgment about what makes something literary, dramatic, etc<sup>152</sup>. Indeed, such judgments are apparent in the case law. In *Norowzian v Arks* the court held that dramatic work must be capable of being 'performed'<sup>153</sup>; in *Lucasfilm v Ainsworth*, a sculpture was held to be something that is intended to be enjoyed visually, not something that is merely utilitarian or functional<sup>154</sup>; and the Court of Appeal in *Hollinrake v Truswell* considered that a literary work must be 'intended to afford either information and instruction, or pleasure in the form of literary

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<sup>150</sup> *George Hensher* ibid 78, also 94 (Simon LJ), 96 (Kilbrandon LJ).

<sup>151</sup> A Barron, 'Copyright Law and Musical Practice: Harmony or Dissonance?' (2006) 15(1) *Social and Legal Studies* 25 discussing copyright's complicity with the cultural bias against the popular. K Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture' (2001) 12 *L and Critique* 75 discusses the influence of Western views about creativity in denying the communal authorship claim of an Indigenous tribe, see 4.2 below.

<sup>152</sup> Only very minimal guidance about the meaning of these terms can be found in the CDPA. It is a matter that has been essentially left to case law to define, see further, J Pila, 'An Intentional View of the Copyright Work' (2008) 71(4) *MLR* 535.

<sup>153</sup> *Norowzian v Arks (No 1)* [1998] FSR 394 (Ch).

<sup>154</sup> *Lucasfilm v Ainsworth* [2008] EWHC 1878, [2009] FSR 103.

enjoyment’<sup>155</sup>. Earlier in this Chapter, I argued that the requirement for some creativity is bursting from the seams of the CDPA. In light of this preoccupation with aesthetic neutrality, it becomes apparent why judges have been hesitant to explicitly embrace such a requirement in the past.

The requirement of authorship is often seen as a shorthand way of asking: is this the sort of thing that copyright ought to protect? This inquiry is far from value-neutral. Indeed, in many cases the application of copyright’s rules of subsistence appears to have been influenced by public policy concerns<sup>156</sup>. Of course, the consideration of policy concerns and the use of aesthetic criteria to guide decision making where these yield principles which shed light on the meaning of the CDPA is not just helpful, it is essential. The elision of such matters, however, leads to unhelpfully opaque reasoning as is evident in some of the joint authorship cases. In assessing the value and significance of a contribution to a work relative to other contributions judges necessarily have regard to aesthetic matters. For example, in *Beckingham v Hodgens* it was thought relevant that a violin riff was memorable and catchy; and in *Brown v Mcasso* changes to the lyrics of a song which gave it an authentic rap feel amounted to joint authorship. Yet, in the reasoning of these cases it is not clear whether these considerations relate to whether the contribution was significant or of the right kind.

Instead of striving for neutrality, a better approach would be to avoid subjective judgments of the aesthetic *merit* of a work. The aesthetic characteristics of a particular contribution are likely to be highly relevant to questions of authorship or joint

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<sup>155</sup> [1894] 3 Ch 420 (CA), 428 (Davey LJ); approved in *Exxon* (n24) 142-143 (Stephenson LJ).

<sup>156</sup> Spence (n55) 80-82.

authorship. Instead of being preoccupied with trying to achieve aesthetic neutrality, judges ought to explicitly engage with questions of how best to determine and apply aesthetic criteria. This includes considering the relevance of the intention of the author, the views of experts and social norms which operate in the particular creative context. An explicit, analytical approach is more likely to enhance the perceived legitimacy of judicial decisions than the surreptitious consideration of aesthetic criteria. Such an approach is also likely to result in greater analytical clarity in the case law.

## ***2.4 Copyright Scholarship: Theories of Authorship***

The three critiques of the joint authorship test offered in the previous section suggest that it is difficult to predict how the joint authorship test might apply to works of collective authorship. This complicates the task of assessing whether the current test provides a suitable mechanism for determining the authorship of such works. In this section I consider whether the scholarly literature on authorship in copyright might shed some light on this question. I begin with the scholarship criticising the influence of the romantic concept of authorship on copyright law. I note that proponents of this view have offered few concrete, implementable suggestions on how the authorship of collaborative works ought to be determined. Then, I situate this thesis in the context of broader scholarship addressing the concept of authorship in copyright, particularly, the influential work of Jane Ginsburg. I note an alternative to the pragmatic/instrumental approach that has been proposed by prominent US copyright scholar, Melville Nimmer. I also consider recent trends in copyright scholarship which stress the value of taking into account the context in which creativity occurs. I conclude this section with a

comment on the inter-relationship of legal and cultural notions of authorship, which underlies the method of this thesis<sup>157</sup>.

The debate on the role of literary theory and the influence of the ‘romantic’ conception of authorship in copyright law has been the subject of many pages of academic writing. Some commentators have called for a conception of authorship in copyright law that is more aligned with literary theory<sup>158</sup>. These commentators consider the historical origin of copyright law’s conception of authorship as being intertwined with the romantic literary tradition of the solo genius, which conceives of an author’s work as an organic emanation from one individual and the embodiment of his or her personality<sup>159</sup>. This conception might be contrasted with a post-modern vision of authorship as a process of cultural negotiation between author and audience in which the work functions as a cultural pastiche<sup>160</sup>. The observation typically made is that whilst notions of authorship have progressed in literary theory under the influence of post-modernist and post-structuralist ideas, copyright law’s conception of authorship has remained frozen, dominated by romantic conceptions of authorship. Many commentators blame this romantic view of authorship for a copyright system which is

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<sup>157</sup> See 1.2.

<sup>158</sup> For example: M Woodmansee, ‘On the Author Effect: Recovering Collectivity’ in Woodmansee and Jaszi (n66) 15; M Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”’ (1983-1984) 17 *Eighteenth Century Studies* 425; D Nimmer, ‘Copyright in the Dead Sea Scrolls: Authorship and Originality’ (2001) 38(1) *Houston LRev* 1.

<sup>159</sup> Woodmansee and Jaszi (n66); J Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard UP 1996); D Saunders, *Authorship and Copyright* (Routledge 1992); M Rose, *Authors and Owners: The Invention of Copyright* (Harvard UP 1993); M Rose, ‘The Author as Proprietor: *Donaldson v Beckett* and the Genealogy of Modern Authorship’ (1988) 23 *Representations* 51. Cf. M Lemley, ‘Romantic Authorship and the Rhetoric of Property’ (1997) 75 *Texas LRev* 873 and A Adler, ‘Against Moral Rights’ (2009) 97 *California LRev* 263. See also discussion in Bently (n125).

<sup>160</sup> JP Barlow, ‘The Economy of Ideas: Selling Wine Without Bottles on the Global Net’ (1993) <<http://homes.eff.org/~barlow/EconomyOfIdeas.html>>.

seen to grant rights which are too broad in scope and granted in too narrow circumstances<sup>161</sup>.

Aspects of copyright law appear to support this critique. There is some foundation to the claim, for example, that basic concepts of copyright subsistence are inadequately equipped to deal with some situations of collective authorship; and specifically, that the concepts of the ‘work’ and of the ‘author’ are not broad or flexible enough to encompass certain works or to extend to certain creators perceived to merit copyright protection<sup>162</sup>. Many elements of copyright law, however, are at odds with a claim that copyright law has a romantic view of the author, for example:

- the relatively low standard of the originality test;
- the application of the idea/expression dichotomy which implicitly recognises that authors are not the source of original knowledge, but rather are compilers assembling their works from a pre-existing stock of ideas which belong to the public domain;
- judicial reluctance to assess the aesthetic merits of a work in applying the provisions of the CDPA; and

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<sup>161</sup> Woodmansee and Jaszi (n66) 10; A Chander and M Sunder, ‘The Romance of the Public Domain’ (2004) 92 California LRev 1331; P Jaszi, ‘Towards a Theory of Copyright: The Metamorphoses of Authorship’ (1991) 2 Duke LJ 455 argues that this romantic conception of authorship in copyright law operates to conceal the influence of economic forces in discussions of literary property; M Rose, *Authors and Owners* (n159) 133: ‘The story of copyright...is one of steady expansion’. Cf. Lemley (n159), O Bracha, ‘The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American copyright’ (2008) 118 Yale LJ; Bently (n59).

<sup>162</sup> R Merges, ‘Locke for the Masses: Property Rights and the Products of Collective Creativity’ (2008) 36(4) Hofstra LRev 1179; DJ Halbert, *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights* (Quorum 1999); A Stokes, ‘Authorship, Collaboration and Copyright a View from the UK’ (2002) Entertainment LRev 121.

- a bias in favour of corporations over individuals (for example the rules about the ownership of copyright subsisting in works created by employees and the ease of transferring and assigning copyright interests)<sup>163</sup>.

It follows from these elements that even if copyright law did reflect a romantic notion of authorship<sup>164</sup>, such a notion does not completely explain the modern legal rules for determining the subsistence of copyright<sup>165</sup>. Perhaps this is unsurprising as law and literary theory are engaged in two very different enterprises<sup>166</sup>. Literary theory seeks conceptions of authorship which aid in understanding the meaning of a text. In this context post-modern ideas about authorship may well be revealing. Copyright law is usually thought to be largely unconcerned with the meaning of a work, seeking instead to grant property rights to particular identifiable authors in respect of original works.

Regardless of whether the romantic author model is an adequate explanation of current copyright law<sup>167</sup>, it is generally agreed that copyright is not well adapted

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<sup>163</sup> Lemley (n159) 883.

<sup>164</sup> *ibid* 879.

<sup>165</sup> Lemley (n159); Adler (n159); Bently (n59).

<sup>166</sup> M Price and M Pollack, 'The Author in Copyright: Notes for the Literary Critic' in Woodmansee and Jaszi (n66) 439; Saunders (n159) 233: '...to have believed that a mutation in the literary theory of authorship must produce a corresponding mutation in the law of copyright was perhaps a sign of naivety or aesthetic arrogance'; R Posner, *Law and Literature. A Misunderstood Relationship* (Harvard UP 1988) 17: '...the problems of literary and of legal interpretation have little in common except the word "interpretation"'. Posner argues that literature and literary theory are unlikely to help lawyers and judges to interpret legal texts.

<sup>167</sup> Some argue that the romantic notion of authorship may not have existed or might be greatly exaggerated: A Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011).

collaborative authorship<sup>168</sup>. Critiques of the supposed romantic notion of authorship in copyright law, however, offer few concrete solutions to the problem of determining the authorship of collaborative works<sup>169</sup>. A post-modern definition of authorship is essentially a definition of non-authorship, that is, the ‘death of the author’ to make way for the ‘birth of the reader’<sup>170</sup>. This can be demonstrated by considering Zemer’s work on the concept of authorship in copyright law, which might be seen to approach a post-modern view<sup>171</sup>. Zemer argues that the general public ought to be considered joint authors of all creative works, because a work is the product of a cultural discourse that is constituted by the general public. Zemer’s proposal, although well-argued and in some ways conceptually attractive, would be extremely difficult to implement<sup>172</sup>. From a practical point of view, granting everyone authorship rights is almost the same as granting no one authorship rights. If every person is an author of every work then the label of author is emptied of any meaning because it cannot distinguish between readers, writers and the general public as they relate to works of authorship. In addition, such a conception does not reveal any criteria for determining rights between primary and derivative authors<sup>173</sup>. It seems that neither a romantic nor a post-modern view of

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<sup>168</sup> Stokes (n162) 121, 124: ‘...hopes for a simple, pragmatic, fair and meritocratic solution to the questions “who owns a collaborative work” and “what is each collaborator’s share of it” are comprehensively dashed by the actual operation of the CDPA’.

<sup>169</sup> Commentators tend to focus on the infringement side of the analysis, suggesting a more liberal approach to copyright defences.

<sup>170</sup> See R Barthes, ‘The Death of the Author’ in S Heath (ed) *Image, Music, Text* (Fontana 1977); M Foucault, ‘What is an author?’ in D Bouchard (ed) *Language, Counter-Memory, Practice: Selected Essays and Interviews by Michel Foucault* (Cornell UP 1977).

<sup>171</sup> Zemer (n63). Although he does not consider his work in these terms: ‘I do not announce the “death of the author”’ (228); ‘I distance my approach from Foucault and Barthes’ (1450). For an argument in favour of ‘postmodern law’, see: A Todd, ‘Painting a Moving Train: Adding “Postmodern” to the Taxonomy of Law’ (2008) 40(1) U of Toledo LRev 105.

<sup>172</sup> RR Kwall, ‘The Author as Steward “for Limited Times”: A Review of “The Idea of Authorship in Copyright” (Lior Zemer, Ashgate Press, 2007)’ (2008) 88(3) Boston U LRev 685.

<sup>173</sup> Lemley (n159) 885.

authorship is helpful in determining the boundaries and content of the concept of the ‘author’ in copyright law.

The concept of authorship is surprisingly under-theorised given its importance as an organising concept in the CDPA. Whilst many scholars have written about the different theoretical justifications of copyright law, few have provided comprehensive theories of authorship. Although it is difficult to identify a fully articulated, coherent concept of authorship in the case law<sup>174</sup>, some scholars have taken some positive steps in this direction<sup>175</sup>. This thesis develops a number of the points suggested by one such scholar: Jane Ginsburg.

Ginsburg has identified six principles ‘in search of an author’ which characterise many legal systems’ attempts to identify the author of a copyright work<sup>176</sup>. Ginsburg argues that an ‘author’ in copyright law generally refers to the person who conceptualises and directs the development of a work, rather than a person who follows those directions to execute it<sup>177</sup>. This seems in line with Justice Laddie’s flexible view in *Cala Homes* that authorship is about more than who pushed the pen. Ginsburg notes that authorship is a shifting concept that is sensitive to context and that might depend upon the nature of a work and the number of putative authors. This aspect of authorship

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<sup>174</sup> Saunders (n159) 213, 235; Ginsburg (n7) 1066.

<sup>175</sup> R Versteeg, ‘Defining “Author” for Purposes of Copyright’ (1996) 45 American U LRev 1323 argues that the heart of the concept of authorship is the communication of original expression. A Drassinower, ‘From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law’ (2009) 34(4) J of Corporation L 991 presents a concept of authorship as a mode of communication or public address. A similar definition of authorship has been adopted by C Graber and G Taubner, ‘Art and Money: Constitutional Rights in the Private Sphere?’ (1998) 18 OJLS 61.

<sup>176</sup> Ginsburg’s principles point to characteristics that sometimes indicate authorship, such as, sweat of the brow, highly skilled labour, intent to be a creative author, and investment: (n7) 1071.

<sup>177</sup> *ibid* 1072 noting that *Walter v Lane* (n14) may not sit perfectly with this.



is useful because it provides copyright law with the flexibility to adapt to new creative practices. Ginsburg argues that much of the confusion about the concept of authorship arises from eliding the concept of authorship and ownership (as has been observed at 2.3.2). The thesis explicitly considers the gap between authorship and ownership, reasserting the importance of preserving a distinction between these two concepts.

Ginsburg calls for an emphasis on those principles which focus on the author themselves and the act of creating<sup>178</sup>. According to Ginsburg an ‘author’ for the purposes of copyright law is, or should be,

...a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work. Because, and to the extent that, she moulds the work to her vision...<sup>179</sup>

A point of commonality between Ginsburg and Justice Laddie’s observations in *Cala Homes* is that both suggest that authorship concerns a link between the subjectivity of the author and his or her creation that is difficult to express in precise terms<sup>180</sup>. I have argued that this might best be expressed as a minimum core requirement for authorship: a more than de minimis contribution of creative choices that are evident in the expression.

Although US copyright law is different to UK law in crucial respects, it is useful to note the opposing views of two eminent US copyright scholars on the proper

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<sup>178</sup> Ginsburg is not alone in calling for renewed focus on the role of the concept of authorship in copyright law, see: Bently (n59).

<sup>179</sup> *ibid* 1092.

<sup>180</sup> Also, Nimmer (n158) 159: ‘...copyright protection arises only for works that reflect an intent to produce something personal or subjective’.

approach to determining the authorship of collaborative work<sup>181</sup>. Melville Nimmer, concerned to ensure that collaboration is incentivised and rewarded, proposed that all those who have made a more than de minimis contribution of an authorship-type, pursuant to a common design, ought to be recognised as joint authors<sup>182</sup>. Paul Goldstein, on the other hand, proposed that a contributor must have made an independently copyrightable contribution to count as a joint author<sup>183</sup>. US courts, in recent years, have tended to favour Goldstein's approach, which has generally resulted in awarding authorship only to one or two dominant contributors<sup>184</sup>. Courts have been concerned that Nimmer's approach might result in too many authors, which may interfere with the efficient exploitation of the work<sup>185</sup>. Further, there was a concern that a more inclusive approach might discourage creators from consulting with others in order to avoid losing sole authorship<sup>186</sup>. Many scholars criticise the current approach on the basis that it does not correspond well to the creative reality of many collaborative endeavours, particularly, because under this test, some highly collaborative works may seem to have no authors<sup>187</sup>. The debate is significant because it suggests a viable

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<sup>181</sup> M LaFrance, 'Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors' (2001) 50 Emory LJ 193, 196–197, 259–261; PS Fox, 'Preserving the Collaborative Spirit of American Theatre: The Need for a 'Joint Authorship Default Rule' in Light of the Rent Decision's Unanswered Question' (2001) 19 Cardozo Arts & Entertainment LJ 497, 507–509; T Huang, 'Gaiman v McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material' (2005) 20(1) Berkeley Technology LJ 673.

<sup>182</sup> MB Nimmer and D Nimmer, *Nimmer on Copyright* (1976 edition) 283 ('more than a word or a line'); (2011 edition): '...copyright's goal of fostering creativity is best served, particularly in the motion picture context, by rewarding all parties who labor together to unite idea with form, and that copyright protection should extend both to the contributor of the skeletal ideas and the contributor who fleshes out the project'.

<sup>183</sup> P Goldstein, *Copyright: Principles, Law and Practice* (Little Brown & Co 1989) 4.2.1.2.

<sup>184</sup> This is due to additional requirements that have been added including: mutual intent to be joint authors and the control test in *Aalmuhammed v Lee* (n124) discussed at 6.2.5 below.

<sup>185</sup> *Erickson v Trinity Theatre* (n90) 1069-71 (7th Cir, 1994); *Childress v Taylor* (n70) 506-7.

<sup>186</sup> *Aalmahummed v Lee* (n124).

<sup>187</sup> Nimmer (2011 edn) (n182) 6.07[A][3][c] citing, in particular, the opinion of Judge Posner in *Gaiman v McFarlane* (n90) 659 that in some cases this would result in 'peeling the onion until it disappeared'.

alternative to the restrictive instrumental/pragmatic approach. This thesis follows the path that Nimmer has lit, arguing for an inclusive approach to the application of the joint authorship test.

Many commentators have noted a gap between social practices and copyright law's concept of authorship<sup>188</sup>. Dreyfuss offers a new concept of the 'collaborative work' to realign copyright law with social practices in large scientific collaborations<sup>189</sup>. Biron and Cooper offer insights from aesthetics, arguing that the concepts of role, intention and authority might be usefully employed to enhance copyright law's flexibility and make it more adaptable to changes in creative practice over time<sup>190</sup>. Kwall stresses the importance of considering the perspectives of authors (as reflected in the narrative of creation)<sup>191</sup>. These theorists are part of a growing body of literature that stresses the relevance of the context in which creativity occurs<sup>192</sup>. Some scholars take this even further, arguing that in some cases social practices might provide an effective substitute for copyright law<sup>193</sup>. In Chapter 8, I argue that there are good reasons to have regard to social practices in the application of copyright (as well as some potential dangers).

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<sup>188</sup> Bently and Biron (n139). On the gap between copyright law and practices of attribution see also: C Fisk, 'Credit Where It's Due: The Law and Norms of Attribution' (2006) 95 Georgetown LJ 49; G Lastowska, 'The Trade Mark Function of Authorship' (2005) 85 Boston U LRev 1171.

<sup>189</sup> Dreyfuss (n123).

<sup>190</sup> L Biron and E Cooper, 'Copyright and Multiple Authorship: Insights from the Philosophy of Art', HERA Working Paper, 21 June 2013, referring to the relational theories of Arthur Danto, George Dickie and Jerrold Levinson.

<sup>191</sup> Kwall (n136).

<sup>192</sup> LJ Murray, S Tina Piper and K Robertson, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (OUP 2014); Cohen (n145).

<sup>193</sup> E Rosenblatt, 'A Theory of IP's Negative Space' (2011) 34(3) Columbia J of L and the Arts 317; see the literature on intellectual property's negative spaces referred to on p8 in the text at n37.

It might be helpful to make some general remarks about the relationship between copyright's notion of authorship and other notions of authorship. There are many possible dimensions of authorship including: a historical dimension (located temporally); a social dimension (who judges who is an author); a cultural dimension (what it means to be an author of a work); a technological dimension (the mechanical aspects of creation)<sup>194</sup>; and a legal dimension (who the law considers to be an author for the purposes of copyright law and related rights). In cultural terms, whether or not a creator is an author is a socio-historical question based upon technology and politics<sup>195</sup>. In this context, what it means to be an author will be different to different interpretative communities (ie literary critics, authors, copyright lawyers and the public). In cultural terms, the label 'author' is important in ensuring that creators are accountable for what they create by identifying an originator of a work who is socially and legally responsible for its content<sup>196</sup>. Thus authorship has a specific meaning which allows readers to make generalisations about the truth and reliability of a work by reference to broadly located sources of meaning in respect of the particular author and in respect of the aesthetic or expressive tradition to which the work belongs<sup>197</sup>.

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<sup>194</sup> J Griffin, 'The Changing Nature of Authorship: Why Copyright Law Must Focus on the Increased Role of Technology' (2005) IPQ 135, 137 argues that technology is a central component of authorship.

<sup>195</sup> M Ross, 'Authority and Authenticity: Scribbling Authors and the Genius of Print in Eighteenth Century England' (1992) 10 CAELJ 495, 495.

<sup>196</sup> Griffin (n194) 193: 'authorship is used as a method of quality control by readers'; Lastowska (n188); J Ginsburg, 'The Author's Name as a Trade Mark: A Perverse Perspective on the Moral Right of "Paternity"?' (2005) 23 Cardozo Arts and Entertainment LJ 379.

<sup>197</sup> Shapin considers the significance of trust and its relation to cultural ideas about the location of textual authority in constituting knowledge: S Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (U of Chicago P 1994); see also J Pila, 'Authorship and e-Science: Balancing Epistemological Trust and Skepticism in the Digital Environment' (2009) 23 Social Epistemology 1 on the role of authorship in balancing epistemological trust and skepticism in e-science.

Scholars agree that legal definition of authorship might be influenced by other dimensions of authorship (ie what it means to be an author or to create a literary work in social and cultural terms, etc)<sup>198</sup>. Coombe argues that the relation between law and culture is best conceived of as one of ‘mutual rupturing’<sup>199</sup>. The attribution of the label of ‘author’ in copyright law has significance for the public at large because Intellectual Property Law can serve as a valuable source of ‘default rules, policy and public interest safeguards’<sup>200</sup>. By defining who is an author, copyright law has an important role to play in constituting textual authority (who can be held responsible for that work)<sup>201</sup>. The wider interpretative community’s attribution of textual authority is necessarily influenced by whom copyright law considers to be an author. But, because the relationship between law and culture is not simple or linear, it may be informative to consider significant reasons for the attribution of authorship that are external to the legal definition<sup>202</sup>.

Cultural ideas have a place within legal notions of authorship. Once it is acknowledged that it is virtually impossible to decide who counts as an author without reference to aesthetic criteria, it must be recognised that there are better sources of information about these criteria external to legal discourse. Musicians have a valuable

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<sup>198</sup> Pila (n152) 557 argues that legal conceptions of authorial works ought to be anchored in non-legal conceptions of them.

<sup>199</sup> R Coombe, ‘Contingent Articulations: A Critical Cultural Studies of Law’ in A Sarat and T Kearns (eds) *Law in the Domains of Culture* (U of Michigan P 1998); R Coombe, ‘Fear, Hope and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property’ (2003) 52 DePaul LRev 1171.

<sup>200</sup> Pila (n197); Dreyfuss (n123); R Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Duke UP 1998) particularly the Introduction.

<sup>201</sup> Saunders (n159) 213: ‘in a culture as juridified as ours, the phenomenon of authorship cannot be defined independently of, or prior to, its legal conditions’.

<sup>202</sup> *ibid.*

perspective, and greater knowledge, of what constitutes a musical contribution than judges or lawyers. The creative context might provide important information that can help answer questions of fact. It may shed light on what contributors intend to do, how they see each other, and which aspects of the creation are meaningful to them<sup>203</sup>. These perspectives are particularly relevant to the determination of whether a contribution is distinct, whether it is significant, and whether contributors are collaborating. Perhaps the most important reason for a link between the legal conception of authorship and social or cultural understandings of authorship is that this is important for copyright law's legitimacy<sup>204</sup>. I will consider how social norms can usefully inform legal decisions in Chapters 7 and 8.

## ***2.5 Conclusion***

Although the contours of the concept of authorship in copyright law are uncertain, I have argued that authorship has a stable core meaning, which requires a more than de minimis contribution of creative choices evident in expression of a copyright work. A number of scholars have suggested that copyright law's rules of subsistence are poorly adapted to collaborative activities, because of the influence of a literary trope: the romantic author construct. An analysis of some of the case law does suggest a tendency to concentrate authorship in the hands of one or two dominant contributors. I have argued that this does not necessarily follow from the provisions CDPA; rather, it results from the way in which those provisions have sometimes been applied. In fact, it is

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<sup>203</sup> Some see intention as a crucial aspect of the determination of copyright subsistence: Nimmer (n158); Pila (n152).

<sup>204</sup> Bently and Biron (n139); A Barron, 'Copyright and the Claims of Art' (2002) 4 IPQ 368, 399: '... the relation between art and copyright law *matters*; and in particular that copyright law is in some important sense answerable to the claims of art, and amenable to being judged by reference to whether and how it responds to those claims'. See also 8.1 below.

difficult to tell how the joint authorship test would apply to a work of collective authorship because of the factual specificity of the test and the lack of analytical clarity in the case law. The lack of case law applying the joint authorship test in situations of collective authorship and the lack of analytical clarity in the existing case law results in legal uncertainty that has the potential to chill collaborative creativity.

I presented three critiques of the application of the joint authorship test. Two of these critiques suggest that the joint authorship test may not be able to determine the authorship of a work in a way that reflects the reality of collective authorship. The tendency to apply a restrictive approach to the application of the joint authorship test to concentrate ownership in the hands of a few, based upon pragmatic reasoning, is unnecessarily restrictive. This pragmatic/instrumental approach divorces the application of the joint authorship test from both the realities of collaboration and the core meaning of authorship in copyright law. Second, a judicial preoccupation with aesthetic neutrality makes it difficult to take the context of creativity into account, leaving the joint authorship test lacking adequate tools to differentiate between authors and mere contributors where many contributors share responsibility for the creative or intellectual content of a work.

This thesis proceeds on the basis that analysing the ways in which creative communities regulate authorship themselves in cases of collective authorship can shed some light on how the joint authorship test ought to be applied so that it can provide a suitable mechanism for determining the authorship of such works. The best approach to applying the joint authorship test should retain the strengths of the current law, particularly, the flexibility of the concept of authorship. It should also uphold copyright

law's purpose to incentivise and reward authors, ie those who make contributions of creative choices to protected works. The best approach is one which enhances, or at least does not detract from, the credibility of copyright law as a tool for regulating authorship.

In the next four Chapters, the case studies reveal that there are good reasons for UK courts to follow Nimmer's lead and favour an inclusive approach to the application of the joint authorship test in cases of collective authorship. They show that the assumptions upon which the pragmatic/instrumental approach is premised do not correspond with the creative realities of collective authorship. Then, I suggest an approach to the application of the joint authorship test that is *inclusive* (because it includes all those who would qualify as authors); and *contextual* (as it takes collective authorship group social norms into account in answering relevant questions of fact).



## Chapter 3: Wikipedia

Wikipedia, the popular online encyclopaedia, is one of the most visited websites on the internet<sup>1</sup>. It is the site for a unique form of creativity that is interactive, dynamic and highly iterative. Wikipedia promotes a model of creativity that intentionally blurs the distinction between reader and writer. It is an example of the increasing use of applications which facilitate the interactive and collaborative use of the internet, which is often described as Web 2.0<sup>2</sup>. Web 2.0 technology has transformed processes of cultural production by providing authors with new sources of inspiration and greatly facilitating the creation, dissemination and publication of works thereby permitting more people than ever before to participate in creative processes. A number of commentators have observed that copyright law provides a significant impediment to much of the innovation facilitated by Web 2.0<sup>3</sup>. Some claim that copyright law is at a moment of crisis<sup>4</sup>, or at least, in need of substantial reform as many of its concepts seem to conflict with norms and community expectations which have developed in the context of this new digital environment<sup>5</sup>. As the ‘poster child for the collaborative

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<sup>1</sup> At the time of writing, Alexa ranked [www.wikipedia.org](http://www.wikipedia.org) sixth globally in terms of internet traffic: <<http://www.alexa.com/siteinfo/wikipedia.org#>>. This thesis primarily refers to the English language version of Wikipedia, see <[http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page)>.

<sup>2</sup> T O'Reilly, ‘What is Web 2.0?’ <<http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>>.

<sup>3</sup> L Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008); D Tapscott and A Williams, *Wikinomics: How Mass Collaboration Changes Everything* (Atlantic Books 2008) 25-27; N Elkin-Koren, ‘Tailoring Copyright to Social Production’ [2011] 12 Theoretical Inquiries in Law 309.

<sup>4</sup> S Corbett, ‘Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?’ (2011) 74(4) MLR 503.

<sup>5</sup> R Merges, ‘The Concept of Property in the Digital Era’ (2008) 45(4) Houston LRev 1239 provides a summary and critique of some of these arguments. See also Lessig (n3); DJ Halbert, *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights* (Quorum 1999).

construction of knowledge and truth that the new, interactive Web facilitates’<sup>6</sup>, Wikipedia makes an interesting case study of collective authorship and the challenges that it might pose to copyright law’s joint authorship test.

This Chapter begins by considering the dynamics of creativity on Wikipedia: briefly describing how it works; and suggesting some reasons why it works. I explain that authorship on Wikipedia is understood as a donation of creative efforts to an altruistic community project. In the second section, I consider the subsistence of copyright on Wikipedia, asking whether: (i) Wikipedia as a whole, or individual Wikipedia pages, would be recognised as original literary works in which copyright subsists for the purposes of the Copyright, Designs and Patents Act 1988 (CDPA); and (ii) whether Wikipedia contributors would be recognised as joint authors and thus copyright owners under the CDPA. I conclude that it is at most unlikely, and at least uncertain, that *Wikipedia* contributors would be considered to be joint authors of individual pages to which they have contributed. The third section examines the role of copyleft licences in sustaining collective creativity on Wikipedia. I argue that copyleft licences are more effective as a means of reinforcing Wikipedia’s sharing norms, than they are as legal instruments. The fourth section concludes with some insights for copyright law that arise from this case study.

### ***3.1 Authorship Dynamics: Promoting Sharing***

This section considers the dynamics of authorship on Wikipedia. I argue that these dynamics are influenced by three significant features of Wikipedia, namely that: (i) it is

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<sup>6</sup> W Richardson, *Blogs, Wikis, Podcasts, and Other Powerful Web Tools for Classrooms* (Corwin Press 2006) 61-62.

a perpetual work in progress; (ii) it requires collaboration between people from all over the world who are likely to have never met; and (iii) it relies upon social norms that emphasise sharing. On Wikipedia, authorship is a very inclusive notion that is defined in terms of participation in a non-profit community project with public-minded goals.

Wikipedia calls itself ‘the free encyclopedia that anyone can edit’<sup>7</sup>. There are many differences between Wikipedia and traditional paper encyclopaedias like *Encyclopaedia Britannica*. *Encyclopaedia Britannica* commissions experts to write articles which are presented as an evaluative synthesis of views which approach the ‘truth’ on a subject. The subject of each article is chosen by an editorial board with almost no input from readers and each edition is published (and sold) only when complete. Wikipedia, by contrast, is created by an extensive, loose, global network of collectively organised volunteers and is made freely available to anyone with an internet connection<sup>8</sup>. It aims to present a selection of currently prevalent representations of knowledge, rather than the truth on any subject<sup>9</sup>. Contributors have an almost unrestrained freedom to determine its content and scope. Contributions can be made by anyone, regardless of their level of expertise, at any time<sup>10</sup>. Wikipedia is a constant

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<sup>7</sup> <<http://www.wikipedia.org>>.

<sup>8</sup> This is made possible by wiki software which allows web pages to be created, edited and linked to one another by anyone in real time using a common web browser. See: A Ebersbach, M Glaser and R Heigl, *Wiki: Web Collaboration* (Springer 2006) 14-17.

<sup>9</sup> A Bruns, *Blogs, Wikipedia, Second Life, and Beyond: from Production to Produsage* (Peter Lang 2008) 114. The debate on the reliability of Wikipedia is outside the scope of this article. See: A Keen, *The Cult of the Amateur: How Today's Internet is Killing our Culture* (Doubleday/Currency 2007); L Sanger, ‘WHO SAYS WHAT WE KNOW: On the New Politics’ (*The Edge*) <[http://www.edge.org/3rd\\_culture/sanger07/sanger07\\_index.html](http://www.edge.org/3rd_culture/sanger07/sanger07_index.html)>; cf. Bruns 121.

<sup>10</sup> To adopt Eric Raymond’s often-quoted observation on the creation of Linux, Wikipedia is not built like a cathedral ‘carefully crafted by individual wizards’, but more like ‘a great babbling bazaar of different agendas and approaches...out of which a coherent and stable system could seemingly emerge only by a succession of miracles’: ‘The Cathedral and the Bazaar’ <<http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/>>.

work in progress that grows by the accumulation of a great many small contributions. Wikipedia works on the assumption that many different users will continually refine or ‘refactor’ each individual page until the page stabilises and comes to represent the voice of the community<sup>11</sup>. In this way, it makes more sense to think of Wikipedia as a creative *process* than a creative *product*. Indeed, Wikipedia is best conceived of as a perpetual work in progress.

Although it may seem that such a process could only result in chaos, Wikipedia has organised itself over time through the consensus-driven activities of its community of regular contributors. In the ‘Village Pump’ section of Wikipedia users collaborate to create policies, style guides, codes of conduct and other self-governing mechanisms to regulate the community’s activities. Perusal of this behind-the-scenes space reveals that Wikipedia sees itself as defined by five fundamental principles, or ‘pillars’:

- Wikipedia is an encyclopaedia;
- Wikipedia is written from a neutral point of view;
- Wikipedia is free content that anyone can use, edit, modify and distribute;
- Editors should treat each other with respect and civility; and
- Wikipedia does not have firm rules<sup>12</sup>.

Wikipedia has developed complex dispute resolution mechanisms for dealing with editorial and other conflicts.

Wikipedia contributors might undertake a variety of different activities including: contributing content, editing, correcting spelling and grammar, devising and running

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<sup>11</sup> Bruns (n9) 321.

<sup>12</sup> <[http://en.wikipedia.org/wiki/Wikipedia:Five\\_pillars](http://en.wikipedia.org/wiki/Wikipedia:Five_pillars)>.

‘bots’<sup>13</sup>, creating and enforcing community policy, helping to resolve disputes, etc. Many of these are community sustaining activities rather than purely content creating activities. There are a variety of levels of access to the functionalities of Wikipedia’s wiki software which a user might attain over time if they participate as a good Wikipedia community member. Each Wikipedia page has a history page associated with it which allows users to see previous versions of the page so that quick reversions might be made if it is affected by vandalism or spam and so that contributions might be clearly identified by user name (for a registered user) or IP address (for an ‘anonymous’ user). Every time a contributor edits a Wikipedia page that page is reproduced and published online. In order to avoid future claims of copyright infringement, when a contributor adds anything to Wikipedia he or she must agree to allow that contribution to be reproduced or modified by anyone for free (under certain conditions) pursuant to copyleft licences<sup>14</sup>.

Wikipedia works because the barriers to contribution (money, technical expertise, time, etc) are minimal. A sense of community is often seen as a key factor in ensuring that there are more positive than negative contributions<sup>15</sup>. Wikipedia fosters this sense of community through the activities of its welcoming committee<sup>16</sup>, the discussion pages

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<sup>13</sup> These are semi-automated tools or ‘robots’ which carry out mundane or repetitive tasks.

<sup>14</sup> When a contributor makes changes to Wikipedia, he or she sees the following message displayed above the ‘Save Page’ button: ‘By clicking the “Save Page” button, you agree to the Terms of Use, and you irrevocably agree to release your contribution under the CC-BY-SA 3.0 License and the GFDL. You agree that a hyperlink or URL is sufficient attribution under the Creative Commons license’ (including hyperlinks to the licences and Terms of Use).

<sup>15</sup> Bruns (n9) 110; S Rafaeli and Y Ariel, ‘Online Motivational Factors: Incentives for Participation and Contribution in Wikipedia’ in A Barak (ed), *Psychological Aspects of Cyberspace: Theory, Research, Applications* (CUP 2008). It is also important to have enough contributors for this to work.

<sup>16</sup> <[http://en.wikipedia.org/wiki/Wikipedia:Welcoming\\_committee/Welcome\\_to\\_Wikipedia](http://en.wikipedia.org/wiki/Wikipedia:Welcoming_committee/Welcome_to_Wikipedia)>.

linked to each page, the use of consensus-driven policies<sup>17</sup> and the principle of Wikiquette<sup>18</sup>. People contribute to Wikipedia for a variety of non-financial reasons: because they want to teach the world about something that they are enthusiastic about, out of a sense of altruism, just for fun, or ‘because there’s nothing better on television’<sup>19</sup>. Some contributors might be motivated by a desire to attain status and respect within this community. Contributors grant each other ‘barnstars’ for positive contributions to Wikipedia and its community<sup>20</sup>. Although contributors to Wikipedia might have different motivations, they are bound together by the act of contributing towards the shared goal of the community: providing a free encyclopedia that anyone can edit<sup>21</sup>.

Cass Sunstein suggests that the concept of authorship makes no sense in the context of Wikipedia<sup>22</sup>. This is because of the unique way in which the wiki software it relies upon allows people to add, delete, and change the content of any page in real time. Implicit in Sunstein’s suggestion is that the notion of authorship implies control or dominion over a work. This notion of authorship appears strongly linked to a particular

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<sup>17</sup> <[http://en.wikipedia.org/wiki/Wikipedia:List\\_of\\_policies\\_and\\_guidelines](http://en.wikipedia.org/wiki/Wikipedia:List_of_policies_and_guidelines)>.

<sup>18</sup> <<http://en.wikipedia.org/wiki/Wikipedia:Etiquette>>.

<sup>19</sup> Bruns (n9) 112; Lessig (n3) 162.

<sup>20</sup> <<http://en.wikipedia.org/wiki/Wikipedia:Barnstars>>. Barnstars are displayed on a contributor’s userpage and are available to reward virtually any type of contribution. Some examples include: the Barnstar of Good Humour (for lightening the mood); Anti-Vandalism Barnstar; the Barnstar of Diplomacy; the Copyright Clean-up Barnstar. Giving barnstars, when they are earned, is particularly encouraged by a group of contributors who have formed what is known as the ‘Kindness Campaign’.

<sup>21</sup> There is a more ambitious ultimate vision for Wikipedia: as a tool for disseminating the sum of human knowledge to everyone on the planet.

<sup>22</sup> C Sunstein, *Infotopia: How Many Minds Produce Knowledge* (OUP 2006) 153.

view of copyright's notion of the author as first owner of copyright<sup>23</sup>. Rather than being a space of non-authorship, the Wikipedia community creates its own concept of authorship. In doing so the community taps into some of the values of copyright's notion of authorship, whilst discarding other aspects of it. Wikipedians have re-invented their own concept of authorship which is tailor-made to the project's needs. In the context of Wikipedia, authorship is an extremely inclusive and community-orientated notion built on sharing rather than exclusion. It is a dynamic concept that is defined in terms of participation in a shared project with altruistic goals. Participation is shaped by adherence to a set of community-developed policies and norms that are crafted to reflect the project's aims<sup>24</sup>.

A crucial feature of Wikipedia's sense of community is the notion that Wikipedia is a sharing economy which operates in the absence of the usual notions of authorship in the sense of the ownership and control of works<sup>25</sup>. Contributors make their contributions for free and expect others to modify or even destroy them. Wikipedia is thought of as owned by no one, to be shared by all<sup>26</sup>. The next section considers whether Wikipedia is in fact owned by no one in copyright terms; and the following section considers whether the operation of copyleft licences really does ensure that content may be shared by all.

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<sup>23</sup> To some extent, this view appears to conflate authorship and ownership. In Chapter 2, I argued that these concepts ought to remain conceptually distinct within copyright law.

<sup>24</sup> So, for example, the no original research policy reflects the anti-expertise bias of the site; and the neutral point of view policy reflects the desire to create a factual work of reference.

<sup>25</sup> Sunstein (n22) 153.

<sup>26</sup> <[http://en.wikipedia.org/wiki/Wikipedia:Ownership\\_of\\_articles](http://en.wikipedia.org/wiki/Wikipedia:Ownership_of_articles)> accessed 30 September 2014, still substantially reflecting a statement made in the original version of this page on 24 September 2003, that: 'No one person "owns" the articles in the Wikipedia. They are the common property of all humankind. The license known as [[GFDL]] guarantees this'.

### **3.2 Copyright Subsistence on Wikipedia**

Wikipedia encourages users to download and print articles and even to create ‘books’ of collections of Wikipedia pages<sup>27</sup>. Whilst there are many pages of discussion dedicated to dealing with the problem of identifying and removing copyright infringing material, the Wikipedia community spends considerably less time considering the extent to which copyright subsists in Wikipedia itself and which contributors, if any, might own that copyright<sup>28</sup>. Presumably, this is because the act of contributing to Wikipedia is often seen to imply the relinquishment of the usual incidents of authorship, such as the right to control certain reproductions of the work, for the greater good of the Wikipedia project (the creation of a free encyclopaedia that anyone can edit) in the spirit of its ethic of sharing. Yet, this question merits some consideration.

#### **3.2.1 Is Wikipedia (or Parts Thereof) an Original Literary Work?**

Section 1(1)(a) of the CDPA provides that copyright subsists in an ‘original literary, dramatic, musical or artistic work’. Copyright may subsist in: an individual Wikipedia page as a literary work; or in Wikipedia as a whole as a literary work which is a compilation or a database. Individual Wikipedia pages are clearly ‘literary’ in the relevant sense<sup>29</sup>. They are also likely to be original as long as they are an ‘intellectual creation’, the result of some labour, skill or judgment<sup>30</sup>. Some ‘stub’ articles may not be

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<sup>27</sup> Facilitated by links on the left-hand side of each Wikipedia page.

<sup>28</sup> To the author’s knowledge no court has considered the subsistence of copyright in Wikipedia to date. Wikipedia’s copyright policy can be found at: <<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>>.

<sup>29</sup> CDPA s3(1), s178.

<sup>30</sup> Although this has usually been taken to be a low threshold test: *University of London Press v University Tutorial Press* [1916] 2 Ch 601, 608-9 (approved in *Ladbroke v William Hill* [1964] 1 WLR 273, [1964] 1 All ER 465 (HL)). There remains considerable uncertainty as to the full impact of Case C-5/08 *Infopaq Intl v Danske Dagblades Forening* [2009] ECR I-6569 and subsequent CJEU decisions



sufficiently substantial or original for copyright to subsist in them<sup>31</sup>. It may be difficult to determine the contours of a literary work on Wikipedia given the interactive and transient nature of most of its content<sup>32</sup>. A Wikipedia page could be conceived of either as a series of different works or as a series of draft versions of one final work. It seems that a Wikipedia page might more closely resemble the latter case, although a truly final version may never exist. This view is supported by the fact that Wikipedia presents itself as a perpetual work in progress: almost every page invites the reader to interact with it by editing it or commenting on its content on the associated ‘talk’ page.

It is unclear how copyright law would deal with this situation. Although copyright generally does not subsist in mere copies of a work with minor alterations<sup>33</sup>, each draft

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which imply a new harmonised European standard of originality of ‘the author’s own intellectual creation’. Some UK jurisprudence suggests that *Infopaq* has not materially altered the originality requirement in the UK: *Newspaper Licensing Agency v Meltwater* [2011] EWCA 890 [20]. See further: M van Echoud, ‘Along the Road to Uniformity – Diverse Readings of the Court of Justice’s Judgments on Copyright Work’ (2012) 1 JIPITEC 60; E Rosati, ‘Originality in a Work, or a Work of Originality: the Effects of the Infopaq Decision’ (2011) 33(12) EIPR 746.

<sup>31</sup> Stub articles usually consist of a short title or a few sentences, which act as an invitation to the reader to add content. They might be seen as ideas, lacking originality, or not ‘intended to afford either information and instruction, or pleasure in the form of literary enjoyment’ (*Hollinrake v Truswell* [1894] 3 Ch 420 (CA) (Davey LJ, 428) approved in *Exxon v Exxon* [1982] Ch 119 (CA) (Stephensen LJ, 142-143)). Although titles and short works have often been held either not to be a ‘work’ or to be insufficiently original, there is authority to suggest that in some cases they might be extensive and important enough to be considered original literary works: *Francis Day and Hunter v 20<sup>th</sup> Century Fox* [1940] AC 112. In *NLA v Meltwater* (n30) [19]-[22] the Court of Appeal affirmed the first instance decision that newspaper headlines might be original literary works. In *Infopaq* ([45]) the CJEU considered that an 11 word phrase might be sufficiently original in cases where the author expresses his or her creativity in an original manner through the choice, sequence and combination of words so as to achieve a result which is an ‘intellectual creation’.

<sup>32</sup> M Chon, ‘New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship’ (1996) 75 Oregon LJ 257, 263.

<sup>33</sup> *Interlego AG v Tyco Industries* [1989] AC 217 (PC) holding that ‘a well-executed tracing’ is not sufficiently original, although the decision may have been affected by the court’s perception that Interlego were attempting to obtain a perpetual monopoly by making minor alterations to their Lego bricks (255-6). Similarly, an enlarged facsimile copy of a drawing will not suffice: *The Reject Shop v Manners* [1995] FSR 870.

version of a final work is likely to create a new copyright work<sup>34</sup>. In *LA Gear v Hi-Tec Sports*, for example, Lord Justice Nourse said that,

If, in the course of producing a finished drawing, the author produces one or more preliminary versions, the finished product does not cease to be his original work simply because he adapts it with minor variations, or even if he simply copies it, from an earlier version. Each drawing having been made by him, each is his original work<sup>35</sup>.

Bently and Sherman suggest that these comments only apply in cases where draft versions have the same author<sup>36</sup>. Where the same author creates a number of drafts, courts appear to adopt a more relaxed approach that takes into account the iterative nature of the creative process, tending to consider each draft to be a potentially independent copyright work<sup>37</sup>. In taking this approach, judges have sometimes thought the point not to be of great consequence since, as a practical matter, even if a later draft is not an independent work in which copyright subsists (because it lacks originality), it might still be used as evidence of an earlier draft which is an original work<sup>38</sup>. Yet, determining which of a series of drafts constitute an original work becomes important

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<sup>34</sup> *Brighton v Jones* [2004] EWHC 1157 [32] (adopting Justice Lightman's comments in *Robin Ray v Classic FM* [1998] FSR 622, 638 that where an earlier work is used as a basis for a later work, copyright in the earlier work is not somehow 'subsumed' into copyright in the later work).

<sup>35</sup> [1992] FSR 121 (CA). Approved in *Taylor v Rive Droite Music* [2004] EWHC 1605, [2004] All ER 88 [247-8] Mr Justice Lewison noted that copyright is capable of subsisting in unfinished versions, but that a new composition will not be created by simply reworking a previous version of a work unless the reworking is so extensive as to produce a recognisably new work or a new arrangement of the previous work (136, Staughton LJ and Sir Michael Kerr agreeing).

<sup>36</sup> Bently and Sherman 103.

<sup>37</sup> For example, *Sweeney v Macmillan Publishers* [2002] RPC 35 (HC) [34] (Lloyd J): 'In the case of a creative process as complex as that of Ulysses, it may be unclear, now, in what form the author's text, as a whole, stood at any given moment of time'.

<sup>38</sup> *Cala Homes (South) v Alfred McAlpine Homes East* [1995] FSR 818 (Laddie J); *Sweeney v Macmillan* (n37) (although the court may have been influenced by the fact that the previous versions were unpublished).

where the author does not own copyright in each draft<sup>39</sup> or where a party appears to be attempting to create a perpetual monopoly<sup>40</sup>.

Where a series of drafts involves the contributions of different people, one must turn to the complex case law on derivative works for assistance. It may be difficult to distinguish between an infringing copy and a derivative work in which copyright subsists (especially given that a work might be both<sup>41</sup>). In such cases judges might be disinclined to find that a new derivative work has been created where there appears to have been some misappropriation of the labour of previous authors<sup>42</sup>. Generally some material change in character or quality must be brought about in the new work for it to be considered sufficiently 'original'. It seems that the skill, labour or judgment applied in creating the derivative work must exhibit some 'individuality', which the Privy Court's decision in *MacMillan v Cooper* might lead one to believe is an exacting standard, implying the addition of a new quality or character which the raw material did not possess<sup>43</sup>. The change must also be of the right kind in relation to the type of work

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<sup>39</sup> *Ultra Marketing v Universal Components* [2004] EWHC 468 where the author did not own copyright in the latest and most detailed draft of a drawing; *Biotrading and Financing Oy v Biohit* [1996] FSR 393, 395 (HC) (upheld on appeal [1998] FSR 109 (CA)) where it seemed likely there was no copyright in the earliest drawing.

<sup>40</sup> *Interlego* (n33) 255-6 (Lord Oliver of Aylmerton). *Biotrading v Biohit* 395 (upheld on appeal [1998] FSR 109 (CA)) where it was suggested that earlier drawings cannot be relied upon as proof of the originality of almost identical later drawings to avoid the possibility of creating a perpetual copyright monopoly in an image (referring to *Interlego*); cf *Rexnold v Ancon* [1983] FSR 245, 260 (HC) where it was considered arguable that later drawings might be sufficiently original if there were some differences between these and earlier drawings. These cases might also be explained by the need to ensure certainty in the subject matter of copyright: *IPC Media v Highbury-Leisure Publishing* [2004] EWHC 2985 [7] referring to *Green v Broadcasting Corp NZ* [1989] RPC 700.

<sup>41</sup> *Redwood Music v Chappell* (1982) RPC 109 (QB).

<sup>42</sup> For example: *Elanco Products v Mandops* [1980] RPC 213 (CA) 228 (Goff LJ); 231 (Buckley LJ): 'on the material before the court there is a distinct possibility that it might be held that they have not done sufficient independent work to eradicate the vice of copying'.

<sup>43</sup> (1924) 40 TLR 186.

considered (ie, having a literary, artistic, dramatic or musical character)<sup>44</sup>. The amount and type of change required appear to vary between categories of work and even between sub-categories of work<sup>45</sup>. On the strict view established in *MacMillan v Cooper*, it might seem that few newly updated versions of Wikipedia pages would qualify as independent original literary works. Yet, this would be to disregard case law in which judges have taken a less stringent view making allowances for a creative process that involves building upon pre-existing ideas and works<sup>46</sup> or taking into account the public interest in encouraging the creation of particular types of derivative works such as high quality restorations<sup>47</sup>.

For some theorists, the heart of the matter is whether there has been an injection of the author's subjectivity in the derivative work<sup>48</sup>. Although this approach might have more currency in the UK following the CJEU's decision in *Infopaq*, it remains unclear how it might be used to guide decision-making. In assessing the subsistence of copyright in recreative works (such as restorations), Ong persuasively argues that the best approach is to focus on the *process* by which the derivative work is created, rather

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<sup>44</sup> In *Interlego* (n33) 268 (Lord Oliver) as the case concerned an artistic work, the change needed to be visually significant. In *Sawkins v Hyperion Records* [2005] EWCA 565, [2005] 1 WLR 3281 changes to a musical work were sufficient to establish the originality of a derivative work because they impacted upon its playability.

<sup>45</sup> For example, a higher standard might be required of condensements than abridgements: *Macmillan v Cooper* (n43).

<sup>46</sup> *IPC Media v Highbury-Leisure Publishing* [2004] EWHC 2985, [2005] FSR 20 [9]; *Baigent v Random House Group* [2006] EWHC 719, [2006] EMLR 16; on Appeal [2007] EWCA Civ 247, [2008] EMLR 7 Lloyd LJ [106].

<sup>47</sup> Some have suggested that high quality replicas of works of art may be protected by copyright. See Laddie et al [4.42]; Copinger et al [3-133] and J Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2002) 52 DePaul LRev 1063 cited with approval in *Sawkins v Hyperion* (n44) (Jacob LJ [83]). Also see: *Elisha Qimron v Hershel Shanks* [1993] 7 EIPR D-157 (Israeli SC).

<sup>48</sup> D Nimmer, 'Copyright in the Dead Sea Scrolls: Authorship and Originality' (2001) 38 Houston LRev 1, 159: 'Copyright protection arises only for works that express an intent to produce something personal or subjective'; Ginsburg (n47).

than any visual change that is evident in the resulting work<sup>49</sup>. Although one might make a variety of policy-based arguments in favour of providing copyright protection for recreative works that might not equally apply in the context of Wikipedia, Ong does not confine his argument in this way. Rather, he makes the general point that the case law on derivative works tends to be unduly concerned with the character of the end-product, arguing that a determination of the existence of a new original work ought to extend beyond this to take into account the process by which it has been made<sup>50</sup>. Copyright law's very static conception of a work makes it ill-adapted to Wikipedia's dynamic, process-orientated model of creativity.

Iterative processes of creativity have been accommodated within copyright's notion of the work on occasions where the precise identification of the moment or moments in which an original copyright work comes into existence is of less practical importance, for example, when copyright is owned by the same person(s). In such cases, drafts might be conceptualised as steps along a process which will end with a final work, although such a work might have been incomplete in the mind of the author at the time the drafts were made<sup>51</sup>. If sufficient labour and skill to establish originality can be shown at some point in that process, then determining the exact point in time at which there is a work might only become important where a question is raised in relation to the duration of copyright. In *MacMillan Publishers v Thomas Reed Publications*, for example, the Court was willing to consider a sequence of chartlets in

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<sup>49</sup> B Ong, 'Originality from Copying: Fitting Recreative Works into the Copyright Universe' (2010) 2 IPQ 165.

<sup>50</sup> Ong, *ibid* does not make an argument based on the policy reasons that favour allowing copyright protection for recreative works, rather, he argues that any policy or doctrinal reasons against such protection are not insurmountable. He focuses on giving weight to the intellectual skill, labour and judgment involved in creating many such works.

<sup>51</sup> Copinger et al [3-06].

successive editions of a nautical almanac all together<sup>52</sup>. The Court was influenced by the fact that although the chartlets were the result of the efforts of a number of different people, any copyright subsisting in them was owned by the plaintiff. Despite the attractive possibility of considering a series of versions together as the relevant original literary work which appears to arise from this case, as Wikipedia contributors retain any copyright that they might have in any part of Wikipedia, there is no similar unified ownership solution that would unite the rights of contributors in a series of versions of a Wikipedia page the way the court was able to do in that case.

Where a case involves the adjudication of rights between different contributors to different versions of a work over time, it is usually resolved by determining whether there has been a ‘material change’ (although it is difficult to predict what sort of change would suffice) so that the resulting work might be redefined as something new: an object of authorship as opposed to a copy. In this way, determinations of the contours of a work seem to slip into an analysis of the sufficiency of any relevant authorial input, which as the next section considers, is a part of the joint authorship test which also proves to be problematic in the context of Wikipedia. Whether the best approach to the case law on derivative works is to focus on the injection of the author’s subjectivity or the process of their creation, it seems clear that the current case law is a doctrinal maze, which makes it extremely difficult to understand how a multi-authored dynamic work like Wikipedia might fit within copyright’s concept of the work.

The collaboration of many different people by small increments over a significant period of time on Wikipedia is difficult to fit within the confines of copyright law’s idea

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<sup>52</sup> [1993] FSR 455, also cited in *Biotrading v Biohit* (n39) 395 (Robert Walker J).

of the work. This is exacerbated by the fact that many potential authors are involved at different points in time. Some argue that the CJEU's reasoning in *Infopaq* might result in a fracturing of the traditional notion of the copyright work, as the Court seemed to suggest that parts of a work could be sufficiently original to be protected in their own right (where by the choice, sequence and combination of those words the author expresses his creativity in an original manner so as to achieve a result which is an intellectual creation)<sup>53</sup>. Although fracturing the work in this way might, at first, appear to better accommodate the creative process on Wikipedia by allowing each contributor the copyright in his or her specific contribution, this approach seems very artificial and is still likely to result in significant legal uncertainty as to the contours of a work<sup>54</sup>. It also appears to be at odds with judicial statements about the necessity of objectively determining the scope of the work, as copyright should not be seen as a 'legal millefeuilles' in which a claimant might try to claim various layers of protection by asserting that small parts of a work are independent works, thus making it easier to establish that an infringer has copied a substantial part of the work<sup>55</sup>. Considering parts of Wikipedia pages to be independent works will also not do much to accommodate pages which cannot be so easily divided as they have been heavily edited by large numbers of people. Copyright's fundamental conception of a work as having the character of a fixed object which is (or might be) completed is poorly adapted to Wikipedia's creative process which results in works that do not have such neatly defined contours.

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<sup>53</sup> *Infopaq* (n30) [47]; B Sherman, 'What is a copyright work?' (2011) 12(1) *Theoretical Inquiries in Law* 99, 115.

<sup>54</sup> This is because, as argued below, the kind of labour which a contributor must contribute to a work to be considered an author of the work remains uncertain.

<sup>55</sup> *IPC Media v Highbury-Leisure* (n46) (Laddie J, [23]) approved in *Coffey v Warner/Chappell Music* [2005] EWHC 449 (Ch) (Blackburne J, [10]).

Further complications arise when considering Wikipedia as a whole. For the purposes of the CDPA, Wikipedia is probably a database rather than a compilation<sup>56</sup>. A database is defined as a ‘collection of independent works, data or other materials which – (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means’<sup>57</sup>. These criteria are not explained in the CDPA or the Database Directive that lead to their implementation. Case law and commentary provide some guidance and suggest that the term ‘database’ ought to be construed broadly<sup>58</sup>. Wikipedia is a ‘collection of independent works’ because Wikipedia pages are ‘separable from one another without their informative, literary, artistic, musical or other value being affected’<sup>59</sup>. Wikipedia pages are also ‘individually accessible’ via a search function<sup>60</sup>. Derclaye suggests that the criterion of arrangement in a ‘systematic or methodical way’ is probably a fairly low standard, which should be read broadly so as to exclude only haphazard collections<sup>61</sup>. The existence of some structure to the data so that it might be organised after the application of a search programme, for example,

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<sup>56</sup> The wording of s3(1)(a) suggests that where a work is both a database and a compilation it should only be treated as a database. The sui generis database right is beyond the scope of this article and has been considered elsewhere, see: J Lipton, ‘Wikipedia and the European Union Database Directive’ (2010) 26 Santa Clara Computer & Technology LJ 631; J Phillips, ‘Authorship, Ownership and Wikiship: Copyright in the Twenty-First Century’ (2008) 3 (12) JIPLP 788.

<sup>57</sup> CDPA s3A(1).

<sup>58</sup> E Derclaye, ‘The Court of Justice Interprets the Database Sui Generis Right for the first time’ (2005) 30(3) Eur LR 420; E Derclaye, ‘Database Sui Generis Right: What is a Substantial Investment? A Tentative Definition’ (2005) 36(1) Intl Rev of Intellectual Property and Competition L 2; E Derclaye, ‘Databases Sui Generis Right: Should We Adopt the Spin Off Theory?’ (2004) 26(9) EIPR 402; E Derclaye, ‘Do Sections 3 and 3A of the CDPA violate the Database Directive? A Closer Look at the Definition of a Database in the UK and its Compatibility with European Law’ (2002) 24(10) EIPR 466; E Derclaye, ‘What is a Database? A Critical Analysis of the Definition of a Database in the European Database Directive and Suggestions for an International Definition’ (2002) 5(6) JWIP 981. See Case 444/02 *Fixtures Marketing v Organismos Prognostikon Agnon Podosfairou* [2004] ECR-I10549 [19]-[21], C-545-07 *Apis-Hirstovich v Ladorka* [2009] ECR I-1627 [69].

<sup>59</sup> *Fixtures Marketing* (n58) [29].

<sup>60</sup> This threshold requirement is probably not high: Derclaye, ‘Do sections 3 and 3A of the CDPA violate the Database Directive?’ (n58) 469; Laddie et al [30.23].

<sup>61</sup> (n60) 468.



would be sufficient<sup>62</sup>. Wikipedia satisfies this requirement because its software indexes and stores pages in a database. As Wikipedia is constantly being updated, it might be difficult to determine when, and if, changes made to it over time result in a new database. In *British Horseracing Board v William Hill* a database of horse racing details updated by around 800,000 changes a year was held to be a single database in a constant state of refinement<sup>63</sup>. Wikipedia is likely to be considered similarly.

Although Wikipedia is almost certainly a database, it is probably not sufficiently original as it currently operates. To meet this requirement the database must constitute the author's own intellectual creation by reason of the *selection* and *arrangement* (not the creation) of its contents<sup>64</sup>. Reviewing, marking and editing particular Wikipedia pages to ensure compliance with Wikipedia's editorial policies would probably be seen as a contribution to content. If Wikipedia became more controlled and its administrators took a more active role in the organisation of pages, it might meet this standard and in that case (assuming the requirements for joint authorship are met) these administrators

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<sup>62</sup> *Fixtures Marketing* (n58) [30]: 'while it is not necessary for the systematic or methodical arrangement to be physically apparent...that condition implies that the collection should be contained in a fixed base, of some sort, and include technical means...or other means, such as an index, a table of contents, or a particular plan or method of classification, to allow the retrieval of any independent material contained within it' (in the Opinion of Advocate General Stix-Hackl this is to 'ensure that only planned collections of data are covered'[40]).

<sup>63</sup> [2001] EWCA 1268, [2001] RPC 31 [71]-[73]. This approach was supported by A-G Stix-Hackl's opinion in C203/02 *British Horseracing Board v William Hill* [2004] ECR I-10415 in which he described constantly updated databases as dynamic databases providing a rolling right [148]-[151] (the CJEU did not specifically consider this point). See also *Beechwood House Publishing t/a Binley's v Guardian Products* [2010] EWPCC 12 [63]-[64].

<sup>64</sup> It had been assumed that the requirement in s3A(2) that the database constitute 'the author's own intellectual creation' is a higher standard of originality than for other literary works: see Bently and Sherman 108. In C-604/10 *Football Dataco v Yahoo! UK* [2012] ECDR 10 [37] the CJEU seems to link this standard to its newly harmonised originality standard post-*Infopaq* citing this case and C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo Kultury* [2011] ECDR 3, [2011] FSR 18 [45]; C-403/08 & C-429/08 *Football Association Premier League v QC Leisure* [2012] 1 CMLR 29, [2012] ECDR 8 [97]; and C-145/10 *Painer v Standard Verlags* [2012] ECDR 6 [87].

would own any copyright subsisting in Wikipedia as a database<sup>65</sup>. As it stands, however, relatively little effort is expended by individual contributors and administrators in this respect. Indeed, the value of Wikipedia and much of the reason for its success lies in its lack of explicit structure and the ability of contributors to easily link pages on the fly. This is despite the fact that, as Wikipedia has grown, efforts have increased to organise and structure it into categories and to identify which parts need to be improved or are yet to be written.

In summary, although it seems unlikely that copyright subsists in Wikipedia as a whole as a database at present, it is likely that copyright would subsist in individual Wikipedia pages as literary works. It is impossible to predict, however, how a court might construe the contours of such a work. This is likely to result in uncertainty in relation to which contributors might be considered to be authors of that literary work.

### **3.2.2 Are Wikipedia Contributors Copyright Authors?**

Assuming that a given Wikipedia page is an original literary work, in most circumstances it would have multiple potential authors. For a Wikipedia contributor to be a joint author under the CDPA he or she must have:

- (i) made a significant contribution of the right kind;
- (ii) in pursuance of some common design or collaboration; and
- (iii) his or her contribution must not be distinct<sup>66</sup>.

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<sup>65</sup> Administrators are contributing Wikipedia members of long-standing who ought not to be confused with the Wikimedia Foundation that owns and runs the website (but does not control its content). Lipton (n56) 647 argues that the Wikimedia Foundation is also unlikely to own any database rights subsisting in Wikipedia following *British Horseracing Board* (n63).

<sup>66</sup> CDPA s10(1); *Godfrey v Lees* [1995] EMLR 307, 325-8; *Ray v Classic* (n34) 636; *Hadley v Kemp* [1999] EMLR 589.

Although most contributions to Wikipedia will satisfy the last criterion, it is by no means clear that the others would be met. The case law on joint authorship only provides limited guidance and is often specific to a particular set of facts.

In order to satisfy the first criterion, the contributor must have contributed some of the skill, labour or judgment that makes the work original in the sense required by the CDPA. The contribution must be of the *right kind*, that is, in relation to the expression of the work and not just the ideas<sup>67</sup>. A joint author of a literary work must share some responsibility for what appears on the page, which has been explained as ‘something which approximates to penmanship’<sup>68</sup>. This can often be a fine point<sup>69</sup>. In *Fylde Microsystems v Key Radio Systems*, a technician who tested and debugged software was not a joint author of that software, despite the fact that the contributions made were extensive, technically sophisticated and involved the expenditure of considerable time and effort. This was because the technician’s work was more akin to proof-reading than authorship<sup>70</sup>. Following this reasoning, many valuable Wikipedia contributors would not qualify as joint authors (for instance, minor editing, involvement in dispute resolution procedures, developing bots, creating and enforcing community policy). If a restrictive approach, such as the instrumental/pragmatic approach, is taken to the joint authorship test it is likely that most valuable contributors to Wikipedia would not be considered joint authors.

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<sup>67</sup> *Donoghue v Allied Newspapers* [1938] 1 Ch 106 (Ch).

<sup>68</sup> *Cala Homes v Alfred McAlpine Homes* [1995] EWHC 7, [1995] FSR 818; *Ray v Classic FM* (n34) 636 (Lightman J).

<sup>69</sup> Bently and Sherman 122. Compare *Hadley v Kemp* (n66) and *Stuart v Barrett* [1994] EMLR 449.

<sup>70</sup> [1998] FSR 449 (Ch) Mr Justice Laddie stated, rather ambiguously, that section 10 ‘does not turn someone who is not an author into an author’ suggesting, perhaps, that authorship requires more than the investment of skill, time and effort relied upon by the defendant in that case.

In addition to contributing the right kind of skill and labour, the contribution must also be *significant*. Whether or not a contribution is significant is a question of fact that depends upon the circumstances of the case<sup>71</sup>. In *Fisher v Brooker* Justice Blackburne considered this to mean ‘more than merely trivial’<sup>72</sup>. If this is an accurate formulation of the standard, although fairly low, it may still exclude the activities of a large number of contributors who only make very small contributions to individual pages. Bently has argued that the requirement for a significant contribution has tended to invite judges to make value judgments about the quality of particular contributions<sup>73</sup>. If significance is a qualitative requirement, it is difficult to predict how it might apply to contributions to Wikipedia, especially given the lack of guidance from the case law<sup>74</sup>.

Section 10(1) requires that a work of joint authorship be ‘produced through the collaboration of two or more authors’, which has been described in the case law as ‘joint labouring in furtherance of a common design’<sup>75</sup>. The Court of Appeal in *Beckingham v Hodgins* held that the requirement of a ‘common design’ did not mean the common intention to be a joint author<sup>76</sup>. In Chapter 2 I argued that the Court’s decision should be construed to mean that there is no need for a subjective intention in a

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<sup>71</sup> *Stuart v Barrett* (n69).

<sup>72</sup> [2006] EWHC 3239, [2007] FSR 255 [46] in that case Mr Justice Blackburne considered the relevant contribution to be ‘on any view substantial’ [98]. Although the case was partially reversed on appeal ([2008] EWCA Civ 287) the Court of Appeal considering it to be an ‘extremely unusual case’ [34], it was again reversed by the House of Lords ([2009] UKHL 41). Mr Justice Blackburne’s ruling on joint authorship was not challenged.

<sup>73</sup> L Bently, ‘Authorship of Popular Music in UK Copyright Law’ (2009) 12(2) *Information Communication & Society* 179, 190.

<sup>74</sup> See 2.2.3 above.

<sup>75</sup> *Levy v Rutley* (1871) LR 6 CP 523 (Court of Common Pleas) 529 (Keating J).

<sup>76</sup> [2003] FSR 238 (Ch) [52]. Cf L Zemer, *The Idea of Authorship in Copyright* (Ashgate 2007) 217 arguing that despite this decision UK courts tend to silently embrace a requirement for the intention to co-author to some extent. See also Ginsburg (n47).

narrow sense: to be a joint author for the purposes of copyright law. On this view, the requirement of a common design would still require some intention to work together. If this approach were adopted, one could argue that most Wikipedia contributors satisfy this requirement. The existence of discussion pages, consensus-driven policy measures and the Wikipedia community culture tend to support the existence of a common design amongst contributors. The longer a contributor has participated and the more involved they have been as a member of the Wikipedia community, the more likely this argument is to be persuasive.

Indeed, Chon argues that in determining the authorship of digital creations, judges ought to favour an objective determination with reference to the existing expectations of the relevant internet subculture<sup>77</sup>. She suggests inferring the intention to be a joint author from the fact that an ‘individual author voluntarily created his or her work in response to a call for participation that emphasised interactivity’<sup>78</sup>. Wikipedia’s sharing culture might conversely be relied upon as evidence of the absence of an intention to collaborate in a narrower sense (that is, in the proprietary sense provided for by the CDPA) because contributors might be seen to evince an intention to donate or relinquish copyright ownership of their contributions by agreeing to copyleft licences. However, this is not a persuasive argument, as copyleft licences involve an implicit recognition that the contributor owns any copyright subsisting in his or her contribution, although he or she agrees not to enforce some of the incidents of that ownership provided for by copyright law. In addition, such an argument relies upon the narrow interpretation of intention that I argue was rejected in *Beckingham v Hodgens*.

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<sup>77</sup> Chon (n32) 271.

<sup>78</sup> *ibid* 272.

The requirement for collaboration or a common design provides a way of distinguishing between cases involving successive derivative works (with different authors) and works which involve different contributions to a common project that might be considered to be works of joint authorship. Considering Wikipedia in isolation from its social norms, it might seem that each contributor potentially creates a new derivative work when making a small change to a Wikipedia page and that it would be in rare cases that such a contributor would bring about enough of a material change for that version to be sufficiently original. I have argued that it makes more sense to think of Wikipedia as a series of drafts of a final work that may never come into existence. This contention is supported by the existence of social norms (as embodied by Wikipedia's consensually developed policies) which establish collaboration amongst the majority of Wikipedia contributors. Although contributors will vary in the extent to which they are familiar with, and subscribe to, Wikipedia's social norms, a contributor's response to the general invitation to the public to participate in the free Wikipedia encyclopaedia project ought to be enough to raise a presumption that the contributor is collaborating in the relevant sense. One might then consider a Wikipedia page at any particular point in time and with the aid of Wikipedia's history pages, identify which users have contributed to the written expression on the page as it existed at that moment taking into consideration its previous versions, as the court did in *MacMillan v Thomas Reed*. Yet, it would remain a difficult task to determine which, if any, have made enough of the right kind of contribution to count as joint authors and thus owners of any copyright that might subsist in that page. In Chapter 8 I present an inclusive, contextual approach to the application of the joint authorship test, which provides a framework for undertaking this task. Specifically, I suggest that the common design of the contributors ought to take on a more significant role in the application of

the joint authorship test. In particular, the significance of a contributor's contribution ought to be assessed in light of the common design from which the joint work arises.

In summary, on the basis of current case law it seems at most unlikely, and at least uncertain, that some Wikipedia contributors would be considered to be joint authors of individual pages to which they have contributed. If this were established, the joint authors would hold their copyright interests as tenants in common so that although one author might sue in relation to an infringement, all joint authors would be required to grant any licence to reproduce a part of it<sup>79</sup>. This would present obvious logistical issues for Wikipedia's creative model in the absence of copyleft licensing.

### ***3.3 Copyleft Licences and the Ambivalent Role of Copyright Law***

Copyleft licensing is commonplace on the internet as a response to the breadth of scope and perceived uncertainty of copyright restrictions on the reproduction of works<sup>80</sup>. Licences are used as a means for authors to opt-out of the automatic operation of copyright law protection so as to authorize the copying of their works in advance in certain circumstances. The origin of copyleft licensing lies with the Free/Libre/Open Source Software movement, which adopted licences to enhance the development of a free collaborative exchange by software developers. Creative Commons then expanded upon this idea by producing a variety of tailor-made licences which are designed to cover many different works in which copyright might subsist and which are made

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<sup>79</sup> For a comparative study of the complexities of joint ownership: M Perry and T Margoni, 'Ownership in Complex Authorship: A Comparative Study of Joint Works' (2012) 34(1) EIPR 22.

<sup>80</sup> LP Loren, 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright' (2007) 14 George Mason LRev 271, 273.

available online for anyone to use<sup>81</sup>. For many commentators copyleft licences have a political significance. Gonzalez, for example, notes that the Free Software Foundation's General Public Licence reads as a mixture of a legal contract and an ideological manifesto<sup>82</sup> and Lessig presents Creative Commons as the only ethical way possible for exercising copyright<sup>83</sup>.

On Wikipedia, copyleft licences police the interaction between copyright law's notion of authorship (implying ownership and control) and Wikipedia's own notion of collective creativity (the donation of creative efforts to a community project). Most content on Wikipedia is co-licensed under the Creative Commons Attribution-Sharealike 3.0 Unported Licence ('CC-BY-SA')<sup>84</sup> and the GNU Free Documentation Licence ('GFDL')<sup>85</sup>. These licences allow anyone to copy or modify text on Wikipedia as long as they:

- credit the authors (by including a hyperlink/URL to the original Wikipedia page or by providing a list of all authors which may be filtered to exclude very small or irrelevant contributions);

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<sup>81</sup> Proposal sketched in L Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Vintage Books 2002); see <<http://www.creativecommons.org>>.

<sup>82</sup> AG Gonzalez, 'Viral Contracts or Unenforceable Documents? Contractual Validity of Copyleft Licences' (2004) 26(8) EIPR 331, 333. The preamble to the GPL has been described as reading like a 'declaration of independence': M O'Sullivan, 'The Pluralistic, Evolutionary, Quasi Legal Role of the GNU General Public Licence in Free/Libre/Open Source Software (FLOSS)' (2004) 26(8) EIPR 340, 341; or as the Free Software Movement's 'constitution': R Gomulkiewicz, 'General Public License 3.0: Hacking the Free Software Movement's Constitution' (2006) 42(4) Houston LRev 1015.

<sup>83</sup> L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press, 2004). S Dusollier, 'The Master's Tools v the Master's House: Creative Commons v Copyright' (2005) 29 CJLA 271, 287: Creative Commons tends to see the commons as a 'principle, a religion or morality'.

<sup>84</sup> <[http://en.wikipedia.org/wiki/Wikipedia:Text\\_of\\_Creative\\_Commons\\_Attribution-ShareAlike\\_3.0\\_Unported\\_License](http://en.wikipedia.org/wiki/Wikipedia:Text_of_Creative_Commons_Attribution-ShareAlike_3.0_Unported_License)>.

<sup>85</sup> <[http://en.wikipedia.org/wiki/Wikipedia:Text\\_of\\_the\\_GNU\\_Free\\_Documentation\\_License](http://en.wikipedia.org/wiki/Wikipedia:Text_of_the_GNU_Free_Documentation_License)>.



- re-licence any modifications or additions under the CC-BY-SA or later versions<sup>86</sup>;
- indicate if modifications or additions have been made to the original; and
- include a licensing notice stating that the work is released under CC-BY-SA and either a hyperlink/URL to the text of the license, or a copy of the license<sup>87</sup>.

There is no requirement that reuse be for non-commercial purposes<sup>88</sup>.

Although copyleft licences are becoming extremely prevalent, there have been surprisingly few cases considering their validity<sup>89</sup>. In *Jacobsen v Katzer* the US Court of Appeals (Fed Ct) held that copyleft licences are enforceable as contracts<sup>90</sup>. Although convincing arguments might be still made either way<sup>91</sup>, it seems likely that UK courts would treat copyleft licences as bare licences, not contracts, due to the apparent lack of consideration<sup>92</sup>. The court in *Jacobsen v Katzer* located the reciprocity required for consideration in the advantages associated with the increased distribution facilitated by copyleft licenses and the conditions imposed on re-use (ie, attribution). These

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<sup>86</sup> The validity of this provision is unclear: Gonzalez (n82).

<sup>87</sup> <<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>>.

<sup>88</sup> It is likely, however, that the successful commercial exploration of reproductions would detrimentally affect Wikipedia's ethic of sharing.

<sup>89</sup> For a useful outline of most of the cases to date, see Corbett (n4).

<sup>90</sup> 535 F 3d 1373 (2008); See: R Gomulkiewicz, 'Conditions and Covenants in License Contracts: Tales from a Test of the Artistic License' (2009) 17(3) Texas Intellectual Property LJ 335; J Wacha, 'Taking the Case: Is the GPL Enforceable?' (2005) 21 Santa Clara Computer & High-Technology LJ 451, 481; W Reynolds and J Moringello, 'Survey of the Law of Cyberspace: Electronic Contracting Cases 2008-2009' (2009) 65 The Business Lawyer available at <<http://ssrn.com/abstract=1437162>>.

<sup>91</sup> Loren (n80) 312-3; Gomulkiewicz (n90) 346 criticises the concept of a bare licence as an artefact; M Henley, 'Jacobsen v Katzer and Kamind Associates – an English legal perspective' (2009) 1(1) IFOSS L Rev 41.

<sup>92</sup> P Johnson, "'Dedicating" Copyright to the Public Domain' (2008) 71(4) MLR 587; E Moglen, 'Free Software Matters: Enforcing the GPL, I' <<http://emoglen.law.columbia.edu/publications/lu-12.pdf>>.

arguments, however, may not be persuasive to a UK court given that the conditions of re-use require little more than the moral rights provisions in the CDPA and given that increased (free) distribution is not always advantageous per se<sup>93</sup>. On this view, copyleft licences operate as a defence to a claim of copyright infringement rather than as a foundation for an action for breach of contract, so that if a licence condition is not met the only legal effect would be that the permission granted by the licence would cease to be effective.

The symbolic association of copyleft licences with the ideals of the free software and Creative Commons communities gives them a key role in constituting Wikipedia's culture of sharing, which may be more significant than their role as legal instruments<sup>94</sup>. In the context of Wikipedia, copyleft licences appear to operate as a type of customary law which relies primarily on the effect of social pressures for its moral force<sup>95</sup>. Copyleft licences rely upon property rights granted by copyright law, but seek to exercise them differently. Despite their intention to create a copyright-free zone for creativity<sup>96</sup>, copyleft licences necessarily rely upon the continuing validity of copyright law as a source of legal standards<sup>97</sup>. In this way, they might be seen as playing the game of copyright, not attempting to abolish it<sup>98</sup>. Reliance on property language and concepts

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<sup>93</sup> The former argument might not be as strong in case of Wikipedia as would be for copyleft licences more generally, given the exception to the attribution and integrity rights in relation to literary works made for inclusion in an encyclopaedia (CDPA s79(6)(b), s 81(4)(b)).

<sup>94</sup> O'Sullivan (n84) 345

<sup>95</sup> K Bowrey, *Law and Internet Cultures* (CUP 2005) 95 argues it makes more sense to think of them as evidencing a relationship of trust, rather than a commercial relationship.

<sup>96</sup> M Fox, T Ciro and N Duncan, 'Creative Commons: an Alternative, Web-based Copyright System' (2005) 16(6) Ent LR 111, 116.

<sup>97</sup> J Boyle, 'Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 Law and Contemporary Problems 33, 64-6.

<sup>98</sup> Dusollier (n83) 278.

in copyleft licences may undermine the goal of facilitating a sharing or ‘free culture’<sup>99</sup> and the share-alike provision seems to make contractual rights more like property rights, as they resemble rights against the world that run with the work<sup>100</sup>. The community spirit which motivates many regular contributors to Wikipedia is built upon a shared understanding (embodied in the copyleft licences) that contributions are donated. This assumption subtly reinforces copyright law’s proprietary notion of authorship, because the grant of permission to reuse or modify a contribution is premised on the assumption that the contribution is valuable and might be ‘owned’ in a copyright sense.

Copyleft licences might also tend to expand the perception of what can be protected by copyright law. The use of these licences tends to raise a presumption in the minds of those encountering the works to which they are attached, that copyright subsists in those works and that it is necessary to observe the conditions of the licence to reproduce them<sup>101</sup>. As this Chapter has argued, in the case of Wikipedia, the extent to which copyright subsists might be uncertain. In addition, users might not be aware that uses of the work covered by fair dealing defences need not comply with the licence conditions (as the licence is likely to operate at most as a defence to a claim of copyright infringement)<sup>102</sup>. The copyleft licence used by Wikipedia attempts to expand the rights of contributors in some respects, for example, by providing for strong attribution rights and requiring creators of derivative works to re-license their works

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<sup>99</sup> For example references to a ‘Commons Deed’. On the use of property metaphors in copyright: M Rose, ‘Copyright and its Metaphors’ (2002) 50 UCLA LRev 1.

<sup>100</sup> Dusollier (n83) 284.

<sup>101</sup> Corbett (n4) 527.

<sup>102</sup> *ibid.* This point is highlighted in the most recent version of the CC-BY-SA used on Wikipedia.

under the same licence<sup>103</sup>. Yet many, if not most, contributors to Wikipedia who must be attributed as authors under the licence will not be ‘authors’ who would have this right according to the CDPA. The attribution of contributors provides a locus for credit which might be gained within the Wikipedia community; it demonstrates one’s belonging to a community that presents itself as altruistic to outsiders; and attribution might have an intrinsic value in itself to the contributor. In this way copyleft licences provide an alternative notion of authorship which is better adapted to the Wikipedia community: modifying the incidents and rewards of authorship and broadening the category of contributors who might be the beneficiaries of this alternative conception of authorship.

Dusollier has suggested that it may be possible for the widespread use of copyleft licences, over time, to re-signify the meaning of authorship in the digital context<sup>104</sup>. Caution is warranted in relation to the increasingly widespread use of instruments which institutionalise a process involving individual creators giving up benefits to which they may be entitled under copyright law with licences which have been criticised as overbroad and inflexible<sup>105</sup>. Whilst some argue that copyleft licences are empowering, giving authors back their long-lost autonomy<sup>106</sup>, it is difficult to see how an author is empowered by giving away copyright entitlements especially when this is done via a standard form which has been devised by a third party. In the case of

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<sup>103</sup> It seems unlikely that this provision is legally valid, but even if it were, it would be unenforceable against third parties. Gonzalez (n82).

<sup>104</sup> Dusollier (n83) 286.

<sup>105</sup> Copyleft licences are difficult, if not impossible, to amend. R Gomulkiewicz, ‘Open Source License Proliferation: Helpful Diversity or Hopeless Confusion?’ (2009) 30 Washington UJ of L and Policy 261.

<sup>106</sup> N Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’ (2005) 74 Fordham LRev 375, 386.

Wikipedia, copyleft licences do not offer much authorial control as a contributor must agree to the version of the licence the community has adopted. Dusollier argues that copyleft licensing is more concerned with user rights and free access to culture than it is with creators' rights. She criticises the social forces at play in copyleft licensing, arguing that they aim to make free access to works the politically correct way for a creator to exercise his or her rights, which she compares to other social constructions which can operate to undervalue labour<sup>107</sup>. She argues that this narrative of a gift society (the sharing culture) could render invisible the work done by authors<sup>108</sup>.

Furthermore, copyleft licences are not a complete substitute for copyright law because they do not have the benefits of being produced through a legislative process which involves the balancing of interests and public policy considerations<sup>109</sup>. Although there is a tendency to present copyleft licences as the 'people's response' to the perception that copyright law is out of step with the norms and expectations which have developed in the new digital environment, these licences are not produced by any sort of participatory process and do not reflect customs that have emerged over time – rather, they have been developed to reflect the will of strong norm entrepreneurs<sup>110</sup>. In addition, the standardised form of these licences might reinforce a licensing culture which some corporations have used to enforce strong proprietary control and restrict

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<sup>107</sup> Dusollier (n83) 288.

<sup>108</sup> *ibid* 293. She argues that authors must give free and informed consent for others to use their works, which includes freedom from 'social construction' 289.

<sup>109</sup> Although this point might be made about all contracts, it seems particularly relevant here given the ideological aims of the copyleft movement.

<sup>110</sup> F Marrella and S Yoo, 'Is Open Source Software the New Lex Mercatoria?' (2006-2007) 47 *Virginia J of International L* 807.

user rights such as has been the case with the use of End-User Licensing Agreements in the software industry.

Despite the potential for the widespread use of copyleft licences to slowly devalue the concept of authorship that copyright law aims to protect, the benefit of their use in the context of Wikipedia probably outweighs any potential detriment. This is because copyleft licences allow for a space to be carved out from the application of copyright law in order to facilitate the survival of, and even nourish, the unique means of collective creation that thrives on Wikipedia.

### ***3.4 Insights for Copyright Law***

Corbett argues that copyright law is poorly suited to the new types of creativity enabled by modern digital technology because it is not aligned with community norms and expectations<sup>111</sup>. Wikipedia provides a useful lens through which to examine this contention. Wikipedia does not fit neatly within copyright law's principles of subsistence. Indeed, it appears to challenge some of the notions at the heart of copyright law's conception of authorship. For instance, must a 'work' be an object capable of being finished? Which sort, and how much, labour, skill or judgment counts as 'authorship'? How do the rules on derivative works apply in situations where the reader is invited to interact with a work and become a creator? What does it mean for joint authors to 'collaborate' or to 'pursue some common design'? In practice, copyleft licences alleviate uncertainty in the application of copyright law by limiting potential claims of copyright infringement which might otherwise impede Wikipedia's day-to-

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<sup>111</sup> Corbett (n4).

day operation. In fact, Wikipedia's culture of sharing both relies upon, and is partly constituted by, copyleft licences. Nevertheless, the legal effect and the general desirability of copyleft licences still remains unclear.

Authorship and ownership are not intertwined on Wikipedia in the same way that they are in copyright law. Wikipedia attempts to separate creativity from ownership in the name of a greater good: the Wikipedia project and its ethic of sharing. The phenomenal success of Wikipedia seems to undermine instrumental justifications for copyright law as necessary to incentivise creativity<sup>112</sup>. Contributors participate in Wikipedia willingly and appear to derive some personal, albeit non-monetary, benefit from their participation. In so doing they are not alone – many other creators (magicians, chefs, comedians, etc) do not rely upon copyright law's incentives<sup>113</sup>. Although Dusollier argues that the prevalence of sharing economies facilitated by copyleft licences might undervalue the work of authors, it would be stretching her argument too far to suggest that copyright law ought to regulate all forms of creativity which might be conceived of as 'authorship'. Instead, it provides an argument for ensuring that copyright remains an important source of good authorship standards, that establish a presumption that authors are entitled to the pecuniary (as well as reputational benefits) from their creative activities.

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<sup>112</sup> Elkin-Koren (n3) makes this point more generally in relation to what she terms social production. See also: D Zimmerman, 'Copyright as Incentives: Did We Just Imagine That?' (2011) 12(1) *Theoretical Inquiries in Law* 29.

<sup>113</sup> See the literature on intellectual property's negative spaces referred to in Chapter 2, p37.

Some suggest that creativity on Wikipedia is not ‘authorship’ and, therefore, that it might be the sort of creativity that copyright ought not to concern itself with<sup>114</sup>. Indeed, Wikipedia’s contributors seem to have no desire for copyright law to directly apply to their activities, agreeing to copyleft licences which limit the restrictions copyright law might impose upon Wikipedia’s creative model. Yet, from every angle that you look at it, Wikipedia is exactly the sort of creation that the CDPA seeks to regulate. It is a ‘literary work’ and is it clearly a product of authorship (it is created by many people who have made creative or intellectual choices that are evident in the expression). The problem is not that Wikipedia is not a work of authorship, but rather that copyright law’s concepts are not currently applied with enough attention to the context in which creativity occurs. Three aspects of Wikipedia make it ill-served by a narrow, acontextual approach to the application of the joint authorship test. These are the facts that: a number of contributors might make very small contributions; those contributors are likely to have never met; and Wikipedia is a perpetual work in progress.

The shadow of copyright law still casts itself over the norms which operate to create and regulate the alternative system of self-regulated creativity on Wikipedia<sup>115</sup>. The fact that copyleft licences rely upon copyright law for their effectiveness and as a source of standards should not be under-estimated. The Wikipedia community taps into some of the values of copyright’s notion of authorship, whilst discarding others. Crucially, contributors retain any copyright in their contributions, and in choosing to forgo many of the benefits that that copyright interest might entail in the name of the

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<sup>114</sup> Sunstein (n22) 153.

<sup>115</sup> R Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Duke UP 1998).



Wikipedia project, they help constitute the sharing norms which sustain this loose-knit network of contributors. Although some contribute to Wikipedia just for fun or because they find it intellectually stimulating, many contribute out of a sense of altruism, because they value interaction with the Wikipedia community or because they wish to build a reputation within that community. In these situations contributors may value the fact that however great or small, their contributions are acknowledged in the history pages and whenever any part of the page is reproduced pursuant to the copyleft licence.

If new forms of creativity, like Wikipedia, ought to be considered ‘authorship’, as I think they should be, the question arises as to what sorts of accommodations ought to be made for this fluid, interactive and participatory model of creativity. This thesis argues for a *contextual* approach to the application of the joint authorship test that places more emphasis on the collaboration limb of the test. In the context of Wikipedia, this means appreciating that there is collaboration present amongst contributors who are united by their response to a call for participation in the Wikipedia project. This is more likely to be the case, the more integrated contributors are in the Wikipedia community. This avoids the unreal conceptualisation of Wikipedia as a series of derivative works, none of which may contain enough of a material alteration to be considered original. A contextual approach to the joint authorship test also means taking the common design of contributors into account when determining whether a contributor has made a significant contribution of the right kind. This means that contributions that are viewed as important in the context of the common design will not be immediately excluded. In this light those who enforce community policy might not be so easily dismissed as having not made enough of a contribution of the right kind. This leads into the second aspect of my argument, which is that an *inclusive* approach should be taken to the

application of the joint authorship test. In most cases it will be impossible to isolate only one or two contributors, and consider them to be the sole authors of a Wikipedia page, particularly in light of the lack of control which contributors have in respect of their contributions. If a high standard were required for people to be considered joint authors, this might lead to the view that Wikipedia has no authors, which, in turn, would lead to a significant mismatch between copyright law and creative realities.

Wikipedia demonstrates that private ordering can be very successfully used to regulate authorship issues (including issues relating to copyright ownership). Whilst there are good reasons to be sceptical about copyleft licences, they do have an important role to play on Wikipedia in providing a space which allows for this unique type of creativity to flourish<sup>116</sup>. Although the availability of private ordering mechanisms has been crucial in allowing Wikipedia to implement a notion of authorship that is tailor-made to the project, there remains an important role for copyright law. Copyright law provides an important source of default good authorship standards. These standards make it possible to constitute the sharing norms that Wikipedia depends upon for its success. As the example of Wikipedia indicates, critics have been justified in expressing concern that copyright law may not be well-adapted to Web 2.0 collaborations. Yet, I have suggested that this might not necessarily entail a crisis for copyright law. Instead, I argue that if copyright law is to retain its relevance and credibility as a source of standards it must be clarified and brought closer in line to community norms and expectations<sup>117</sup>.

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<sup>116</sup> They also allow Wikipedia to avoid the rules on joint ownership which are not well-adapted to large group collaboration. Perry and Margoni (n79).

<sup>117</sup> Corbett (n4).

These observations do not just relate to the modern digital environment. The next Chapter considers a case study of collective authorship that carries on a tradition which is ancient in origin, but which still thrives today: Australian Indigenous art. The case study of Australian Indigenous art provides a number of insights about the limitations of the current approach to the application of the joint authorship test (particularly in relation to the application of the idea/expression dichotomy) and reveals some of the disadvantages of relying upon private ordering to remedy the gap between copyright law and creative realities in cases of collective authorship.

## Chapter 4: Australian Indigenous Art

The limitations of the current approach to the joint authorship test are also apparent outside the context of new forms of digital collaboration. This Chapter presents a case study of collective authorship with ancient roots: Australian Indigenous art. I focus on Indigenous art produced in accordance with customary law that Indigenous communities consider to be a product of communal authorship. Although there is no UK case law on the application of the joint authorship test to works of collective authorship, Australian courts have had the occasion to consider, and reject, a claim of communal authorship in respect of Indigenous art<sup>1</sup>. In *Bulun Bulun v R & T Textiles* the Federal Court of Australia struggled to find a way to protect an Indigenous community's interests in art within the bounds of copyright, because of the apparent difficulty establishing that these interests amount to *authorship* interests<sup>2</sup>. Indeed, one of the most significant challenges in providing effective protection of Indigenous cultural expressions in general is accommodating them within existing legal regimes for the protection of cultural property, such as copyright law. In this Chapter I argue that copyright law's difficulties in recognising Indigenous community interests in art stems from the influence of historically-located, culturally specific understandings of authorship; and a preference for a restrictive approach (finding few joint authors) to the application of the joint authorship test. In the absence of copyright protection,

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<sup>1</sup> Although the distance between UK and Australian copyright law has increased over time, there remains a sufficient degree of similarity in the application of the joint authorship test to provide a helpful comparison for the purposes of this thesis. The definition of a work of joint authorship is virtually identical to the CDPA, s10 of the Copyright Act 1968 (Cth) provides that it: 'means a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors'.

<sup>2</sup> (1998) 86 FCR 244.

Indigenous communities must rely on contracts and a patchwork of other legal doctrines, which only provide partial protection. Ultimately, Indigenous cultural expressions and traditional knowledge would be best protected by a *sui generis* regime that might be better adapted to this task. Nevertheless, I argue that the joint authorship test is probably more flexible than *Bulun Bulun* might suggest.

In the first section of this Chapter I consider the dynamics of the authorship of Indigenous art and I provide some background to the issue of the protection of Indigenous cultural expressions in Australia. The second section considers a number of cases in which Indigenous people have sought to use copyright law to protect their interests in art. I analyse some of the conceptual challenges that prevented the court in *Bulun Bulun* from recognising the communal authorship of an artwork. The third section looks at some of the other ways in which Indigenous people have sought to have their interests in their cultural property protected. In this context, private ordering and market-based measures have provided limited assistance because of the inequality of bargaining power that arises from the poor socio-economic position of many Indigenous artists and their communities. The final section of this Chapter suggests some insights for copyright law that arise from this case study, in particular, the need for a more flexible, contextual approach to the application of the joint authorship test.

#### ***4.1 Indigenous Art***

The first part of this section considers the dynamics of the authorship of Indigenous art. I outline the meaning and the consequences of authorship in ‘traditional’ Indigenous

communities<sup>3</sup>. It is worth noting at the outset that a different analysis might apply to the work of many modern urban Indigenous artists not produced in accordance with Indigenous customary law. Although there is a danger of adopting a definition of ‘traditional’ Indigenous art which is too static, there are important policy reasons to treat art produced in accordance with Indigenous customary law as a special case. This sort of art provides an example of collective authorship as it is communal in origin. The second part of this section provides a brief contextual background to the issue of protecting Indigenous cultural expressions in Australia in order to shed light on the social, cultural and political significance of the problem of protecting Indigenous art. This provides context to the judicial decisions on the subsistence of copyright in Indigenous art that are considered in the following section.

#### **4.1.1 Authorship Dynamics: Building Cultural Identity**

Indigenous art often has a spiritual or religious significance as it depicts and invokes an ancestral past, or ‘Dreaming’. For Indigenous communities, the Dreamtime is a period when ancestral spirit beings emerged from the ground to transform the earth and determine the form of social life<sup>4</sup>. These ancestral beings are seen to have moved aside, often merging into land forms and retaining the power to intervene in the life of man. Certain pre-existing designs are seen as artistic manifestations of ancestral beings or

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<sup>3</sup> W Wendland, ‘Intellectual Property, Traditional Knowledge and Folklore: WIPO’s Exploratory Program – Part 1’ (2002) *International Review of Intellectual Property and Competition* L 485, 491 objects to the use of the word ‘traditional’ as it seems to imply a quality of stasis that may not adequately account for the dynamic nature of Indigenous culture. Wendland (495) stresses that the important issue is not necessarily identifying the precise ambit of terms like ‘traditional knowledge’, but rather delineating the terms upon which they will be protected. It is in this spirit, and for practical reasons, that I use the word ‘traditional’ here and I adopt the term ‘Indigenous cultural expressions’ when referring to the debate more generally.

<sup>4</sup> D Ellison, ‘Unauthorised Reproduction of Traditional Aboriginal Art’ (1994) 17 *UNSWLJ* 327, 330-1; See also Mr Justice Ronald Sackville, ‘Legal Protection of Indigenous Culture in Australia’ (2003) 11(2) *Cardozo J of International and Comparative L* 711, 714-15.

aspects of ritual knowledge associated with the Dreamtime<sup>5</sup>. According to Indigenous customary law, pre-existing designs ought not to be changed. Their efficacy in activating ancestral power, would be impaired if they deviated too widely from socially accepted norms<sup>6</sup>. Certain persons (depending upon descent, apprenticeship and initiation) have the right to depict pre-existing designs, which are seen as owned by the relevant Indigenous community. The artist is accountable to the community, so in this sense the group has control over the reproduction of pre-existing designs and the subsequent uses of those reproductions<sup>7</sup>. Indigenous art is integral to the social fabric of 'traditional' Indigenous communities, because the transmission of Indigenous cultural heritage is an essential part of it<sup>8</sup>. Art often provides the framework for ordering the relationships between people, ancestors, ritual knowledge and the land. Thus, paintings might have a dual aspect of representing relationships between things and being integral to those relationships<sup>9</sup>. If objects of cultural expression are removed from their context, they often cease to have meaning; and if appropriated or disrespected their sacred nature might be lost<sup>10</sup>.

Authorship (of art) might have a number of values within Indigenous communities governed by customary law. It is often an act of religious significance

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<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> L Behrendt, C Cunneen, T Libesman, *Indigenous Legal Relations in Australia* (OUP 2009) 210.

<sup>9</sup> H Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge* (U of Chicago P, 1991).

<sup>10</sup> A Diver, "'A Just War': Protecting Indigenous Cultural Property' (2004) 6(4) Indigenous L Bulletin 7.

expressing and maintaining a relationship to the land<sup>11</sup>. It is primarily a way of transmitting and preserving culture, but the sale of certain artworks can also provide a valuable source of income for the artist and his or her community<sup>12</sup>. The authorship of art promotes community cohesion and helps socialise young members into a particular worldview<sup>13</sup>. This is because Indigenous artists must often undergo a period of initiation and apprenticeship, learning particular artistic techniques and discovering the meaning of certain designs and motifs. The artist is also a custodian of cultural knowledge; as such, he or she is responsible to the community for the appropriate use of the sacred knowledge embodied in the artwork. This can include subsequent uses of the original and any copies which are made of it, whether or not those copies have been authorised by the artist<sup>14</sup>.

In Indigenous communities the values of individual authorship are often inextricably linked to community values and norms (such as the hierarchy of access to particular cultural meanings). Although an artwork might actually be painted by one individual, from an Indigenous point of view the whole community is involved in the creation of that artwork. The artist is only able to paint the artwork after a period of apprenticeship, during which elders pass on secret information and teach the artist the appropriate techniques for depicting the ritual knowledge. Then, the artist is initiated

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<sup>11</sup> Morphy (n9). Some Indigenous art is not of spiritual significance, for instance, the result of children playing.

<sup>12</sup> See the testimony of Indigenous artist John Bulun Bulun in *Bulun Bulun v Nejlam Investments* (unreported, Fed. Ct. of Australia, Darwin 1989). For more see: C Golvan 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 14(7) EIPR 227, 228.

<sup>13</sup> Morphy (n9).

<sup>14</sup> This was acknowledged by the Federal Court of Australia in *Milpururru v Indofurn* (1994) 54 FCR 240, 246, where Justice von Doussa made an award of damages for 'cultural harm' as compensation to Indigenous artists for the stigma, humiliation and punishment that they were likely to suffer within their communities as a result of the unauthorised and offensive reproduction of their artworks.



and given the permission to depict certain aspects of the ritual knowledge that belongs to his or her tribe. As a delegate of the tribe and a custodian of ritual knowledge an artist may paint an artwork, but it is the community as a whole who have created it in the relevant sense. Thus, the resulting artwork is seen as owned by the community as a whole, as the ritual knowledge depicted in it belongs to, and is controlled by, the community (as represented by elders).

The communal values of authorship for Indigenous communities might be contrasted with the values of authorship in the Western art market, which tend to relate to authenticity – a value which attaches strongly to an artist as an individual (albeit as an Indigenous individual). This authenticity value is more easily accommodated by copyright law than communal values of authorship, because copyright law defines authorship in terms of origination, which tends to be linked to the mechanical act of fixing a work in a material form. The incompatibility of these two notions of authorship is evident in recent controversies about the authenticity of paintings, which include substantial unattributed contributions from family members of the named Indigenous artist ‘author’<sup>15</sup>.

#### **4.1.2 Background to the Issue of Protecting Indigenous Cultural Expressions**

The apparent gap in legal protection available for Indigenous artists has been a topical issue in Australia in recent times<sup>16</sup>. At the same time, the legal protection of traditional

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<sup>15</sup> E Burns Coleman, *Aboriginal Art, Identity and Appropriation* (Ashgate 2005) 84-5.

<sup>16</sup> The problem of Indigenous art ‘rip-offs’ in the souvenir market was considered in the ‘Stopping the Rip-Offs’ issue paper <<http://www.ag.gov.au/Publications/Pages/StoppingtheripoffsOctober1994.aspx> >

knowledge and Indigenous cultural expressions are issues that have featured prominently on the international intellectual property agenda<sup>17</sup>. In both the national and the international context, this debate has been significantly affected by historical factors, such as colonialisation and social justice concerns. On the international level, however, the protagonists are different: the debate takes place between states, tending to elide the issue of empowering indigenous groups to lobby their own state for protection of cultural expressions where that state is reluctant to take these measures. Despite this difference, international and national debates feed into one another. Some commentators characterise this dispute as being one of the developed world's ideas of intangible property (embodied in current intellectual property law) versus the developing world's (or Indigenous) concepts of intangible property<sup>18</sup>. Indeed, under the current intellectual property status quo, developed countries seem to benefit more in economic terms than developing countries<sup>19</sup>. This suggests that current intellectual property law is a product of dominant social and economic forces which have shaped modes of (cultural) production<sup>20</sup>. A central question in the debate on Indigenous

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(Australian Federal Government, October 1994); T Janke, *Our Culture: Our Future A Report on Australian Indigenous Cultural and Intellectual Property Rights* (Michael Frankel & Co and Terri Janke, 1998); and in the media: 'The 7.30 Report', ABC, 19 August 2010 <<http://www.abc.net.au/7.30/content/2010/s2988038.htm>>. Recently, there has been controversy over a sculpture featuring unauthorised and offensive depictions of Wandjina spirits that was eventually removed following an action under planning regulations by the Blue Mountains City Council: R Ayres, 'The Wandjina case illustrates the lack of protection for Indigenous Culture', *Art+Law*, Issue 3, September 2010; and the costumes of two Russian ice dancers that performed an 'Aboriginal dance' in the Russian National Figure Skating Championships: B Manton, 'Russian Ice Dancers Should Re-think their Routine' *Sydney Morning Herald*, 21 January 2010 <<http://www.smh.com.au/opinion/politics/russian-ice-dancers-should-rethink-their-routine-20100121-mnwj.html>>.

<sup>17</sup> In October 2000, for example, the WIPO General Assembly established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

<sup>18</sup> Note that the characterisation of such interests as intangible property is not entirely uncontroversial.

<sup>19</sup> Some argue that a strong intellectual property regime will stimulate creativity for developing countries in the long term. It is, however, by no means clear that such a regime would promote creativity to a greater extent than allowing free copying.

<sup>20</sup> Behrendt, Cunneen and Libesman (n8) 224; C Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011) 12-13.

cultural expressions is whether ‘cultural rights’ in the broadest sense are rival to intellectual property rights, or essentially the same thing? Are such rights necessarily constructed in opposition to traditionally ‘authored’ works or should they be incorporated into the copyright fold? These questions reverberate throughout this Chapter, as they do through the Australian case law considered in the next section.

Indigenous art is of great economic and cultural significance in Australia. The Indigenous art market is valued at around 300 million AUD each year<sup>21</sup> and there appears to be annual growth in value of the Indigenous art industry of 40 to 50%<sup>22</sup>. Indigenous art can create a ‘window of recognition’ between white and black Australia and the whole community can share a collective sense of pride in it<sup>23</sup>. The benefits of Australian Indigenous art are difficult to quantify. They include:

Pride, self esteem, maintenance of culture, transmission of culture, intergenerational learning, meaningful activity, purposeful life, creative achievement, recognition from peers; recognition from national and international art media, provision of much of our nation’s ‘corporate identity’; provision of ‘Australia’s greatest cultural export’...<sup>24</sup>

Unfortunately, Indigenous Australians are very rarely the main financial beneficiaries of their art<sup>25</sup>. Furthermore, there are widespread problems of unauthorised

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<sup>21</sup> T Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke & Co, 2009) 6. The Australian Senate Standing Committee on Environment, Communications, Information Technology and the Arts, ‘Indigenous Art – Securing the Future: Australia’s Indigenous Visual Arts and Craft Sector’ (June 2007) (‘Senate Report’) placed it around \$200-300 million, noting the dearth of available statistics.

<sup>22</sup> Senate Report, *ibid* 13.

<sup>23</sup> Golvan (n12) 227.

<sup>24</sup> Submission from Ms Christine Godden quoted in the Senate Report (n21) 15.

<sup>25</sup> According to the Senate Report, *ibid* 13-4, this was one probable explanation of evidence of the massive growth in the value of the industry combined with no commensurate expansion in the number of artists. This assumption was supported by evidence presented to the inquiry.

reproductions and uses of Indigenous art which have caused offence and cultural harm to Indigenous communities. The formal legal protection available for Indigenous cultural expressions is unclear and often seen to be inadequate. This issue has been the subject of a number of inquiries and public reports, most notably, the ‘Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples’ Issues Paper and the Janke and Frankell report, ‘Our Culture: Our Future’<sup>26</sup>.

Indigenous people seek to have a number of different rights/interests enforced in respect of their cultural expressions. These include: the right to economic benefits from commercialization; the right to control disclosure (including the right to keep certain things secret); the right to control their use and in particular to prevent derogatory, offensive and fallacious uses; the interest in their preservation and continuation (for identity/heritage reasons); the right to be acknowledged and attributed as their ‘author’. Indigenous artists, communities, and their advocates, have sometimes struggled to enforce these rights/interests within the framework of existing legal regimes which provide protection to intangible property. This Chapter focuses on copyright law – the regime which has often seemed best adapted to address one of the most pressing problems in relation to Indigenous Australian art: unauthorised and/or offensive reproductions.

The issue of protecting Indigenous art cannot be separated from its social and historical context. The legacy of colonisation, Indigenous people’s historic experience of discrimination and injustice, the Indigenous struggle for self-

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<sup>26</sup> See n16 above. Other notable reports include: Commonwealth Department of Communications, Information Technology and the Arts, ‘Report of the Contemporary Visual Arts and Crafts Inquiry’, , June 2002 (‘Myer Report’); T Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO 2003); and *Beyond Guarding Ground* (n21).

determination and a sense of regret or responsibility for past wrongs from much of the Australian community, all form part of the social and cultural tapestry upon which judicial decisions and political debate on this subject are interwoven<sup>27</sup>. In this context, improving protection for Indigenous cultural expressions is often seen as a matter of public importance, part of an ongoing project of reconciliation between Indigenous people and the wider Australian community for the injustices of the past<sup>28</sup>.

The process of reconciliation with the Indigenous peoples of Australia has been slow and fraught with difficulties<sup>29</sup>. The Australian legal system has proven limited in its ability to provide adequate and appropriate remedies for Indigenous Australians across a range of areas. The debate on the ‘recognition’ of Indigenous customary law, for example, always prioritises Australian law over Indigenous law<sup>30</sup>. The recognition of native title rights is also subject to a presumption that generally favours non-Indigenous land interests over Indigenous interests in land<sup>31</sup>. In addition, there are a number of practical problems which affect the ability of Indigenous people to take advantage of the legal protections which may already be available to them. One such example comes from the Arts Law Centre of Australia’s newsletter:

Arts Law advised one very senior artist in Arnhem Land who believed the document he signed (with a cross as he neither read nor wrote English)

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<sup>27</sup> For further see: Behrendt, Cunneen and Libesman (n8).

<sup>28</sup> ‘Creative Nation’, Commonwealth Cultural Policy Statement, October 1994, 67; C Hawkins, ‘Stopping the Rip Offs: Protecting Aboriginal and Torres Strait Islander Cultural Expression’ [1995] *Aboriginal L Bulletin* 3.

<sup>29</sup> One step forward, such as the Australian Government’s apology in 2008, is often accompanied by steps backwards, such as the failure to enact the Indigenous Communal Moral Rights Bill.

<sup>30</sup> C Graber, ‘Aboriginal Self-Determination vs The Proprietisation of Traditional Culture: The Case of the Sacred Wanjina Sites’ (2009) 13(2) *Australian Indigenous LR* 18.

<sup>31</sup> Behrendt, Cunneen and Libesman (n8) xiv.

was a sale document for his painting. In actuality, the document also purported to assign all his copyright to a third party who produced photographic reproductions for online sale with no further royalty or payment.<sup>32</sup>

Indigenous Australians have sometimes been reluctant to bring legal claims, because of their historically uneasy relationship with courts and the police, who have not always been perceived to be instruments of justice in their eyes<sup>33</sup>. This is exacerbated by the poor socio-economic position of many Indigenous artists. Although many of these issues are outside the scope of this Chapter, they ought to be borne in mind when assessing the case law and, in particular, when assessing the adequacy of the current approach to determining the subsistence of copyright in Indigenous art.

## ***4.2 Protecting Indigenous Art with Copyright***

There are often a number of problems establishing the subsistence of copyright in Indigenous cultural property. Obstacles include, for example, the idea/expression dichotomy which might preclude protection for styles and themes; the requirement of originality<sup>34</sup>; the material form requirement<sup>35</sup>; and the fact that copyright law struggles

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<sup>32</sup> D Everard, 'Code of Conduct for Indigenous Art', *Art+Law*, June 2009, available at <<http://www.artslaw.com.au/artlaw/archive/2009/09CodeOfConduct.asp>>.

<sup>33</sup> For example: 'Report of the Royal Commission into Aboriginal Deaths in Custody', tabled in the Australian Federal Parliament on 9 May 1991 considered the underlying social, cultural and legal reasons for the disproportionately high rates of incarceration of Indigenous people. Chapter headings used in this report suggest some of the major issues, they include: the Legacy of History, Aboriginal Society Today, Relations with the Non-Aboriginal Community, The Harmful Use of Alcohol and Other Drugs, Schooling, Employment, Unemployment and Poverty, Housing and Infrastructure, Land Needs and Self-Determination.

<sup>34</sup> There was thought to be difficulty establishing the subsistence of copyright in Indigenous art that depicts pre-existing clan-owned motifs. It is unlikely that Indigenous art will lack originality on these grounds following: *Yumbulul v Reserve Bank of Australia* [1991] FCA 332, 21 IPR 481 and *Milpurrruru* (n14).

to give meaning to Indigenous notions of communal ownership and custodianship of particular cultural forms<sup>36</sup>. Body art, for example, might be too ephemeral to be protected<sup>37</sup>. Copyright law is also probably not an effective tool to protect ancient rock art, because the author or authors are generally unknown and the term of copyright protection is likely to have expired<sup>38</sup>.

This section considers a line of cases in which Indigenous artists have sought to use copyright law to protect their cultural expressions from unauthorised and offensive reproductions. These cases culminated with the Federal Court of Australia's decision in *Bulun Bulun v R & T Textiles*, which is an important case because it exemplifies the difficulties of accommodating Indigenous interests in art within copyright's conceptual framework<sup>39</sup>. *Bulun Bulun* concerned a claim by an Indigenous elder, as a representative of his community, that an artwork created in accordance with customary law was the product of 'communal' authorship and, as such, the Court ought to recognise the community's interest in any copyright subsisting in the artwork. Although the Federal Court of Australia expressed its sympathy for this cause, it ultimately felt too constrained by the limits of existing legal concepts to be able to offer much effective relief, acknowledging the inadequacies of copyright law's provisions in this context.

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<sup>35</sup> Dances and stories might lack the material form required for copyright subsistence: E Adeney, 'Unfixed Works, Performers' Protection, and Beyond: Does the Australian Copyright Act Always Require Material Form?' (2009) IPQ 77 comparing UK and Australian law on this point.

<sup>36</sup> In addition, as suggested above, there are practical problems bringing claims and an imbalance in power relations.

<sup>37</sup> *Merchandising Corporation of America v Harpbond* [1983] FSR 32.

<sup>38</sup> On Indigenous rock art see: 'Chapter 5: Rock Art Revisited' in S Kleinart & M Neale, *The Oxford Companion to Aboriginal Art and Culture* (OUP 2000) 103.

<sup>39</sup> (1998) 86 FCR 244.

Before considering *Bulun Bulun* in detail it is worth considering some of the cases that laid the groundwork for that decision. Many early cases did not make it to court. In 1966, for example, the Reserve Bank of Australia was the subject of much public embarrassment for reproducing David Malangi's artwork (a bark painting entitled 'The Hunter') on the one dollar note without seeking his permission, assuming it to be the work of an 'anonymous and probably long dead artist'<sup>40</sup>. This case was settled with the artist being given \$1000, a fishing kit, and a silver medallion. In 1988, there was another widely publicised case involving the unauthorised reproduction of the artworks of fourteen Indigenous artists on T-shirts which was settled for \$150,000, which the artists decided to share equally (irrespective of the number of infringing reproductions of each artwork) in accordance with their customary law<sup>41</sup>. This case provided hope that copyright law might prove a useful means of protecting Indigenous communities' interests in their art.

In another action brought against the Reserve Bank of Australia, *Yumbulul v Reserve Bank of Australia* (which concerned the reproduction of Terry Yumbulul's 'Morning Star Pole' sculpture on the ten dollar note), Justice French noted the '... difficulties that arise in the interaction of traditional Aboriginal culture and the Australian legal system relating to the protection of copyright and the commercial exploitation of artistic works by Aboriginal people'<sup>42</sup> and that Australia's copyright law may not provide 'adequate recognition of Aboriginal community claims to regulate the

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<sup>40</sup> Janke (n16) 8.

<sup>41</sup> *Bulun Bulun v Nejlam Investments* (unreported, Federal Court of Australia, Darwin 1989). For more, see: C Golvan, 'Aboriginal Art and Copyright: The Case For Johnny Bulun Bulun' (1989) 11(10) EIPR 346.

<sup>42</sup> *Yumbulul* (n34) [1].



reproduction and use of works which are essentially communal in origin'<sup>43</sup>. The court suggests that this is a matter that ought to be dealt with by legislative intervention<sup>44</sup>. In this case, the Court did not need to explicitly consider any copyright issues, focusing instead on the validity and terms of licences that Yumbulul had granted the Aboriginal Artists Agency in respect of the work. Evidence presented to the effect that Mr Yumbulul might not have understood the nature of the licences that he signed was not accepted by the court, although Justice French acknowledged that '...[i]t may be that greater care could have been taken in this case'<sup>45</sup>.

In *Milpurrruru v Indofurn*, which was described as a 'landmark in the protection of Indigenous culture'<sup>46</sup>, the Federal Court explicitly recognised that Indigenous artworks, which depicted pre-existing clan-owned designs, were original works in which copyright subsists because of the skill and judgment exercised by the artist in the interpretation of those designs<sup>47</sup>. This was an important finding because some commentators had previously expressed concern that Indigenous artworks which featured traditional designs might lack the requisite originality for copyright to subsist in them (as the form of these designs is strictly controlled by customary law)<sup>48</sup>. In his

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<sup>43</sup> *ibid* [21].

<sup>44</sup> *ibid* [2].

<sup>45</sup> *ibid* [21].

<sup>46</sup> Ms Bronwyn Bancroft, artist and chairperson of the National Indigenous Arts Advocacy Association: T Janke, 'Briefs: Copyright – The Carpet Case' [1995] *Aboriginal L Bulletin* 13, (1995) 3(72) *Aboriginal L Bulletin* 36.

<sup>47</sup> See Mr Justice von Doussa's comments (n14) 248, although the subsistence of copyright in the artworks was eventually conceded by the carpet importers.

<sup>48</sup> *Milpurrruru* (n14) 247-8: '...a problem perceived to exist at one time in relation to the application of the *Copyright Act* to Aboriginal artworks based on pre-existing tradition and images...whether works incorporating them satisfied the requirement of originality... Although the artworks follow traditional Aboriginal form and are based on Dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality'. See also Golvan (n12).

judgment, Justice von Doussa acknowledged the use of art by Indigenous communities as a means of recording stories of the Dreaming and for teaching future generations<sup>49</sup>. Much evidence was presented of the importance of art in the Indigenous community and its regulation under customary law. Testimony was also heard on the nature of communal ownership under Indigenous customary law<sup>50</sup>.

In this case, the importers of carpets which infringed the copyright in the artworks were required to pay additional damages which took into account the ‘culturally based harm’ suffered by the three living artists in the action<sup>51</sup>. This was intended to compensate the artists for the stigma, humiliation and punishment that they were likely to suffer within their communities (because they would be held responsible for the unauthorised and offensive reproductions of sacred images on the carpets even if they had no knowledge of what had occurred and no control over it)<sup>52</sup>. It was not an award to the community to compensate for the devaluing of their cultural artefacts.

Although the judgment does not explicitly uphold Indigenous customary law provisions in relation to the ownership and appropriate treatment of the artwork, accommodations of customary law were made within the scope of judicial discretion as permitted by court rules and procedures<sup>53</sup>. In accordance with Indigenous customary

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<sup>49</sup> *ibid* 245.

<sup>50</sup> *ibid* 245-6.

<sup>51</sup> *ibid* 279 as permitted by Copyright Act 1968 (Cth) s115(4).

<sup>52</sup> *ibid* 246, 277.

<sup>53</sup> *ibid* 243, 272-3.

law the names of the deceased artists were not spoken in court<sup>54</sup>. Although the damages award was not made to the whole community as compensation for the offensive treatment of their cultural artefacts, the court did take the step of making a collective award of damages rather than individual awards so that the amount could be distributed amongst the artists equally according to custom<sup>55</sup>. This willingness to use judicial discretion to accommodate customary law might have seemed, at the time, like a first step towards the recognition of communal ownership of artistic works by Indigenous people within the Australian legal system.

The Australian case law on copyright ownership and Indigenous art culminates with the Federal Court of Australia's decision in *Bulun Bulun*. This case concerned the importation and sale of printed clothing fabric which infringed John Bulun Bulun's copyright in the artistic work, 'Magpie Geese and Water Lilies at the Waterhole'<sup>56</sup>. Bulun Bulun's artistic work incorporated sacred subject matter derived from the ritual knowledge of the Ganalbingu people that was only reproduced because of certain rights granted by Indigenous customary law. The respondents admitted infringing Bulun Bulun's copyright and the trial focused upon the second applicant, George Milpururru, who as a representative of the traditional Indigenous owners of the Ganalbingu country (Arnhem Land, Northern Territory), brought a number of claims in the alternative:

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<sup>54</sup> *ibid* 243. The deceased applicants were only referred to by name once for the purpose of ensuring that they were identified with certainty.

<sup>55</sup> *ibid* 272-3. The damage award was expressed in terms of an aggregate liability.

<sup>56</sup> (n2) 246.

- (i) that the community are equitable owners of the copyright subsisting in the artwork<sup>57</sup>;
- (ii) that Mr Bulun Bulun held ownership of copyright in the artwork on trust for the community; or
- (iii) that Mr Bulun Bulun's ownership of copyright in the artwork gave rise to fiduciary obligations in favour of the community.

At the heart of these claims was the fact that the relevant artistic work incorporated sacred and important subject matter derived from the ritual knowledge of the Ganalbingu people that was only reproduced because of certain rights granted by Indigenous customary law.

Justice von Doussa highlighted the significance of the case:

These proceedings represent another step by Aboriginal people to have communal title in their traditional ritual knowledge, and in particular in their artwork, recognised and protected by the Australian legal system. The inadequacies of statutory remedies under the *Copyright Act* as a means of protecting communal ownership have been noted in earlier decisions of this court: see [*Yumbulul* and *Milpururru*]<sup>58</sup>

And later, '... [t]he claim raises important and difficult issues regarding the protection of the interests of Indigenous people in their cultural heritage'<sup>59</sup>. Indeed, in recognition of the importance of the issues, the Court took the step of travelling to Arnhem Land to

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<sup>57</sup> The Federal Minister for Aboriginal and Torres Strait Islander Affairs and the Attorney-General (NT) intervened to argue that this claim, in effect, involved an assertion of native title land rights over Ganalbingu country, which the court lacked the jurisdiction to determine in the absence of a proper application under Native Title Act 1993 (Cth) s74. The interveners were significant because the respondent company was under administration and without them there would have been no contradictor.

<sup>58</sup> *Bulun Bulun* (n2) 247.

<sup>59</sup> *ibid* 257.

hear evidence from Indigenous elders and to inspect the site that was the subject of the artwork<sup>60</sup>.

Justice von Doussa explained that the claims were confined to the recognition of an equitable interest in the copyright subsisting in the artwork, for a number of reasons:

- (i) Section 8 of the Copyright Act 1968 (Cth) precludes the continuing application of any copyright protection, except as provided by the Act. This was seen to remove the possibility that Indigenous customary law providing communal title to artwork could be recognised by the common law.
- (ii) Section 35(2), which provides that the author is the owner of any copyright subsisting in a work, was seen to preclude the notion of group authorship (except insofar as provided for by the joint authorship test).
- (iii) The case law on joint authorship was said to establish that it is not enough to supply the artistic idea for a work; instead, it envisages a contribution of skill and labour to the production of the work itself. Justice von Doussa clearly implies that these criteria are not satisfied in this case as he assumes that the community's contribution was only of unprotectable ideas<sup>61</sup>.
- (iv) The case was further complicated by the fact that the claim as originally stated appeared to imply that the community's interest in the artwork was an incident of native title to the land, which ultimately had to be abandoned because no application for native title had been made in the proper form<sup>62</sup>.

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<sup>60</sup> C Golvan, 'Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments' (1999) EIPR 549, 552.

<sup>61</sup> *Bulun Bulun* (n2) 257-8 (von Doussa J) citing *Kenrick v Lawrence* (1890) 25 QBD 99 and *Fylde Microsystems v Key Radio Systems* [1998] FSR 449 (Ch).

<sup>62</sup> Native Title Act 1993 (Cth) s74. It is unfortunate that the Court did not consider the possibility that intellectual property rights might arise as an incident of native title rights. Subsequent cases have

Justice von Doussa and counsel for the parties seem so convinced of the impossibility of success of an argument that the community might own a legal interest in copyright in the artwork that despite a ‘wide ranging search’ for ways to establish this, the statement of claim was amended to claim only equitable interests<sup>63</sup>. This left Justice von Doussa with limited options. There could be no express trust in favour of the community because the facts did not establish evidence of an intention to create such a trust and even if they had, the terms of any such trust would be likely to lack sufficient certainty<sup>64</sup>. The court considered the possibility that there might have been an express contract between the artist and the community, but found that there was no evidence of an ‘intention to create legal relations’ because there was no suggestion of an ‘express agreement of a contractual nature in which terms were agreed’<sup>65</sup>. The conditions in which a contract might be implied also did not appear to be present. This is unsurprising given that these conditions are directed towards upholding the reasonable expectations of parties to a transaction (as indeed is the law of contract)<sup>66</sup>. The principles for implying a contract focus on factors such as business efficacy, which seem to be fundamentally at odds with the moral and deeply religious character of the relationship between an Indigenous artist and his or her community expressed in the creation of art which embodies ritual knowledge.

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foreclosed this possibility, citing Justice von Doussa’s comments that recognising such rights would fracture a skeletal principle of the common law in: *Western Australia v Ward* [2002] HCA 28, (2002) 213 CLR 1 [59], [60], [644]; in dissent [580] (Kirby J); *Neowarra v Western Australia* [2003] FCA 1402 following *Ward* and rejecting a claim that a native title right existed to use, maintain, protect and prevent the misuse of cultural knowledge (specifically, sacred painting and ceremonies) of the Wanjina-Wunggurr community in relation to a native title land claim. See further: Graber (n30).

<sup>63</sup> *Bulun Bulun* (n2) 256-7.

<sup>64</sup> *ibid* 259.

<sup>65</sup> *ibid* 262-3.

<sup>66</sup> See: *BP Refinery (Westernport) v Hastings Shire Council* (1977) 180 CLR 266, 283. Cf. Mr Justice von Doussa noted that there has been some success adopting the contract approach in Ghana: *Bulun Bulun*, *ibid* 263.

Justice von Doussa found it easier to establish the existence of a fiduciary duty, given the inherent adaptability of this legal category and its purpose to remedy harms that arise in situations where a special relationship of trust and confidence exists between parties. Justice von Doussa held that Bulun Bulun owed a fiduciary duty to his community arising from the nature of the ownership of artistic works amongst the Ganalbingu people because the grant of permission by representatives of the community to paint certain designs is ‘predicated on the trust and confidence which those granting permission have in the artist’<sup>67</sup>. In holding that a fiduciary duty exists in these circumstances Justice von Doussa affirmed that the community’s interest in ‘the protection of [their] ritual knowledge from exploitation which is contrary to their law ... is deserving the protection of the Australian legal system’<sup>68</sup>. The content of this fiduciary duty, however, was held to be very narrow: merely requiring the artist to act in the interests of the community in relation to the artwork, so as to preserve the integrity of their culture and ritual knowledge<sup>69</sup>. This duty would not prevent the artist from pursuing his own interest to a certain degree, for example, by selling the artwork for profit. In this case the duty did not extend further than to oblige Bulun Bulun to sue infringers of copyright in the work, a duty which he had satisfied<sup>70</sup>. The existence of this fiduciary duty ‘without more’ was held to be insufficient to vest an equitable interest in the ownership of the copyright in the Ganalbingu people<sup>71</sup>. The fiduciary duty would only give rise to a constructive trust in the most extreme of circumstances –

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<sup>67</sup> *ibid* 261-2.

<sup>68</sup> *ibid* 263.

<sup>69</sup> *ibid* 262.

<sup>70</sup> *ibid* 263.

<sup>71</sup> *ibid*.

in order to allow the community to bring an action to enforce copyright in the work in the artist's absence.

*Bulun Bulun* was seen by many as a beacon of hope for the protection of Indigenous cultural expressions and has been greatly commented upon. This is largely because the Court recognised the significance of Indigenous cultural expressions for Indigenous communities, and for Australia in general, admitting the desirability of protecting such expressions from misuse and unauthorised exploitation. Although *Bulun Bulun* might be seen as a symbolic judicial gesture of good faith, ultimately Justice von Doussa considers the matter to be one that ought to be primarily dealt with by the legislature<sup>72</sup>. The importance of *Bulun Bulun* has often been overstated<sup>73</sup>. The decision is of little precedential value, given that it is likely to be restricted to its facts and it largely ignores the social realities of the production and exploitation of Indigenous art<sup>74</sup>. The problem of widespread unauthorised and offensive commercial exploitation of Indigenous cultural expressions is not likely to be ameliorated by the narrow fiduciary duty created in *Bulun Bulun*, as Indigenous artists are rarely unwilling to protect their community's interest in artwork produced according to customary law<sup>75</sup>.

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<sup>72</sup> *ibid* 247 (von Doussa J) referring to the 'inadequacy of statutory remedies'.

<sup>73</sup> See also E Mackay, 'Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach' (2009) 32(1) UNSWLJ 1, 6.

<sup>74</sup> M Rimmer, 'The Bangarra Dance Theatre: Copyright Law and Indigenous Culture' (2000) 9(2) Griffith L Rev 274, 278.

<sup>75</sup> MacKay (n73) 6; K Weatherall, 'Culture, Autonomy and Djulibinyamurr: Individual and Community in the Construction of Rights to Traditional Designs' (2001) 64 MLR 215, 221-2 arguing that *Bulun Bulun* will only ever have a limited practical effect because it is response-based and prohibitively expensive.



*Bulun Bulun* demonstrates an apparent lack of flexibility in copyright law's concepts of subsistence, which suggests that copyright is not well-adapted to protect an Indigenous community's interests in its cultural expressions. There are unlikely to be more cases testing the limits of copyright protection in this respect. Aside from the practical problems of access to the court system, there seems little reason for Indigenous communities to take the financial risk of bringing another copyright claim for protection of their interests in art as *Bulun Bulun* appears to categorise Indigenous communal ownership of artwork and the various rights this ownership entails under customary law as something that is fundamentally different from, and which cannot be contained within, copyright law's notion of joint authorship. In a number of places in the judgment, Justice von Doussa characterises the Indigenous community's ideas of authorship as fundamentally different from copyright law's concept of authorship. For example, recognising the connection between the creation of artistic works and land ownership was seen to risk fracturing a skeletal principle of the legal system (the separate recognition of real property and intangible property)<sup>76</sup>. Similarly, it was considered contrary to established legal principle for the common law to recognise *communal* title<sup>77</sup>.

The judgment involves an odd characterisation of Indigenous communal ownership under customary law, in one part of the judgment as analogous to copyright (so as to be extinguished by section 8); and in another part, as something fundamentally different to copyright (so much so, that recognising it would fracture a skeletal part of the legal system). The issue of sovereignty is a strong undercurrent throughout the

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<sup>76</sup> *Bulun Bulun* (n2) 256.

<sup>77</sup> *ibid* 257.

decision. Justice von Doussa affirms previous case law which limits the application of Indigenous customary law to those outside of the relevant Indigenous community. He holds that Indigenous customary law might only be taken into account as part of the factual matrix of a case, rather than as an independent source of obligations for third parties<sup>78</sup>. Yet, Indigenous customary law seems not to have actually had a material impact on the assessment of the relevant factual matrix of the community's copyright claim, given the arguably pre-emptive dismissal of the joint authorship claim.

The failure to consider the application of the joint authorship test might be explained by what some have criticised as a judicial tendency to focus upon 'fixation', that is, how the material form of a copyright work comes into existence. In the previous Chapter, I mentioned Burton Ong's argument that the case law on derivative works focuses too much on the form of a work rather than the process by which it is created<sup>79</sup>. This focus might tend to result in the denial of copyright protection for socially valuable works such as art restorations<sup>80</sup>. In this way, the originality test appears to privilege contributions which are easily observed in the material form of the copyright work. This characteristic affects the joint authorship test, because originality provides the yardstick for 'authorship' and therefore contributes to how judges determine whether a contributor has made a contribution of the right kind. Determining which sorts of contributions count becomes more difficult the greater the number of contributors, so the joint authorship test particularly struggles to come to terms with creations involving

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<sup>78</sup> *ibid* 262, 248 noting that the court in *Milpururru* (n14) took the consequences of unauthorised reproductions of artistic works under Indigenous customary law into account when determining the quantum of damages to award.

<sup>79</sup> B Ong, 'Originality from copyright fitting recreative works into the copyright universe' (2010) IPQ 165.

<sup>80</sup> There are cases which suggest that this might not be the case: *Sawkins v Hyperion Records* [2005] EWCA Civ 565, [2005] 1 WLR 3281. Cf *Bridgeman Art Library v Corel* 36 FSupp 2d 191 (SDNY 1999).

the contributions of large numbers of contributors<sup>81</sup>. This is exacerbated by the tendency to adopt stricter requirements of authorship in some cases in order to reduce the number of potential joint authors and, therefore, potential joint owners of copyright subsisting in the work (the instrumental/pragmatic approach).

The application of the joint authorship test is by no means as clear cut as Justice von Doussa seems to suggest. First, as the application of the test depends upon the facts in issue, previous cases do not foreclose the possibility of finding joint authorship in new circumstances. It is precisely this flexibility which I argue might be used to adapt the test to the wide range of creative forms. Second, the joint authorship test struggles to precisely calibrate the necessary connection between a contributor and their creation for ‘authorship’ due to judicial concern that copyright law ought to be seen to be aesthetically neutral. This tends to preclude the use of creativity, artistic merit, authorial intent, or any other value-specific criterion for determining authorship. Instead, judges have often focused on the literary, artistic, etc character of the work, or the amount of skill, labour or judgment which went towards its fixation. Although it is not sufficient to be a joint author just to take dictation (as this is pure expression without any form of creativity); there is also a need to exert some labour, skill or judgment which is expressed in the form of the work. This focus on ‘objective’ characteristics makes copyright law more amenable to creative contributions which reflect ‘traditional’ modes of cultural production, which might seem more self-evidently ‘authorial’ and less adaptable to contributions which fall outside the romantic author model. Despite this

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<sup>81</sup> D Simone, ‘Copyright or Copyleft? Wikipedia as a Turning Point for Authorship’ (2014) 25(1) *Kings LJ* 102; D Simone, ‘Recalibrating the Joint Authorship Test: Insights from Scientific Collaborations’ (2013) 26(1) *Intellectual Property J* 111.

focus on ‘objective’ characteristics, some cases are influenced by considerations of public policy<sup>82</sup> and some take a more nuanced and contextual approach<sup>83</sup>.

*Cala Homes v Alfred McAlpine Homes*, the classic case on joint authorship, suggests that the joint authorship test might be able to accommodate communal authorship of the type that occurred in *Bulun Bulun*. That case involved drawings made by draftsmen to precise specifications given by the design director of a company that designed and built homes. The design director was held to be a joint author along with the draftsmen – the court emphasising that what was required was ‘something approximating penmanship’. In this case contribution of the concept, the provision of precise specifications and ongoing control over the creative process was held to be sufficient to establish joint authorship. In many ways an Indigenous elder (acting on behalf of the tribe) is comparable to the design director in that case and will often exercise even greater control. Ritual knowledge provides the source for the ‘concept’; the apprenticeship of the artist provides him or her with ‘precise specifications’ in relation to the execution of the artwork; and customary law provides at least as significant a means of exercising artistic control as a contract between designer and draftsmen.

Justice von Doussa held that the common law could not recognise Indigenous customary law provisions on communal ownership, because section 8 of the Copyright Act provides that copyright law is ‘entirely a creature of statute’. Yet, he also assumed that the meaning of joint authorship was limited by certain doctrines drawn from

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<sup>82</sup> *Sawkins v Hyperion* (n80); *Interlego v Tyco Industries* [1989] AC 217.

<sup>83</sup> *Cala Homes v Alfred McAlpine Homes* [1995] EWHC 7.

precedent which cannot be found in the Act, such as the idea/expression dichotomy<sup>84</sup>. As Indigenous communal authorship had not been previously considered in any case law, these doctrines might have been applied in a different and more accommodating manner, especially given the inherent flexibility in the joint authorship test which allows it to be applied in a factually specific way. Indeed, from the Indigenous point of view the painting was clearly a collaborative endeavour<sup>85</sup>.

Justice von Doussa suggests that the Indigenous community may have only contributed unprotectable 'ideas'. The idea/expression dichotomy is a notoriously slippery distinction. Bowrey notes that from an Indigenous point of view, ritual knowledge (recast as an idea) could not be separated from the artwork (conceived of as the expression of that idea). She argues that by imposing an interpretation that displaces the contributions of Bulun Bulun's ancestors and the ongoing role of contemporary Indigenous elders to the artistic work (as embodied in ritual knowledge) and focusing only on Bulun Bulun's direct contributions, the Court effectively constructed an entirely new work, by a process which obliterates the significance of the original artwork from an Indigenous point of view<sup>86</sup>. The conception of authorship employed by the court seems to import temporal and mechanical divisions into the production of the work which operate to separate the idea from the expression<sup>87</sup>; and, which in this case, led the judge to suggest that the community had not made the right kind of contribution at the

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<sup>84</sup> K Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture' (2001) 12 L and Critique 75, 81.

<sup>85</sup> *ibid* 81.

<sup>86</sup> *ibid* 82.

<sup>87</sup> *ibid* 81.

right moment in time, to be considered ‘authors’<sup>88</sup>. In so doing, Bowrey criticises the judge’s commitment to established liberal values which privilege certain interests and certain legal subjects over others<sup>89</sup>. In this way the judgment demonstrates a discursive gap between copyright law’s notion of authorship and Indigenous conceptions of authorship.

Although judges claim to be applying copyright law’s rules of subsistence in an aesthetically neutral manner, the application of these rules necessarily involves making value judgments about who is entitled to credit as an author, a decision which has a hidden political dimension. Bowrey contrasts Justice von Doussa’s approach with the more liberal approach taken to the subject matter in which copyright might subsist in cases involving new technologies<sup>90</sup>. In *Sega v Galaxy*, for example, a video game was held to be sufficiently ‘embodied’ to be a ‘cinematographic film’ as the possible sequences of 3D images existed in the minds of the designers and in various 2D models, despite the fact that sequences of images did not actually materialise until the game was played by a user. Considering this arguably creative conception of the material form required for copyright subsistence, the court’s decision in *Sega* might seem analogous to the Ganalbingu community’s claim: their ritual knowledge existed in their minds alongside an anticipation that the knowledge would be embodied in an artwork created under authorisation in a way that allowed community elders to significantly influence the content of the artwork (as executed by the artist). It may be that *Sega* was

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<sup>88</sup> *ibid* describing this as the requirement of ‘materiality’.

<sup>89</sup> *ibid*.

<sup>90</sup> Bowrey cites *Kalamazoo v Compact Business Systems* (1983) 5 IPR 213 (blank accounting forms held to constitute a ‘literary work’) and *Sega Enterprises v Galaxy Electronics* (1996) 35 IPR 161, (1997) 37 IPR 462 (video games were a ‘cinematographic film’) attributing the judicial approach in these cases to a ‘legal infatuation with serving the perceived needs of actors in the so-called information economy’. *ibid* 78.

incorrectly decided or incomparable to the facts of *Bulun Bulun*<sup>91</sup>. Yet, Bowrey's analysis still raises interesting questions about copyright law's notions of authorship and joint authorship, which appear to privilege certain legal subjects over others, as the rules for establishing the subsistence of copyright are malleable allowing judges to expand the scope (and the beneficiaries) of protection where there appear to be good reasons for doing so<sup>92</sup>.

I have argued that the joint authorship test is flexible, so it might be able to adapt to a variety of different creative contexts. In the case of Indigenous art which incorporates ritual knowledge and has been created with permission pursuant to Indigenous customary law, the authorial contribution of the community is directly reflected in the expression of the artwork – by the control over the subject matter, style, depiction of encoded meanings; and through the initiation and apprenticeship of the artist. The significance of the community's role is reflected by the requirement for artists to consult and obtain approval from elders in relation to the creation and subsequent uses of the work. Furthermore, there are good policy reasons to recognise that Indigenous communities' interest in art made in accordance with customary law amounts to an authorship interest as this: (a) recognises the social reality for Indigenous artists; (b) allows Indigenous communities recognition for their contributions; and (c) gives those communities the ability to better control and manage artworks (together with the artist), which in a very real sense, are seen as communally authored.

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<sup>91</sup> In *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 54, 224 CLR 193 [86] (Gleeson CJ, Gummow, Hayne and Heydon JJ) '...amicus curiae rightly pointed to difficulties to which that case gives rise' although neither side challenged *Sega*. *Sega* was distinguished in *Aristocrat Leisure Industries v Pacific Gaming* [2000] FCA 1273 [67] but the principle that intellectual property legislation must be liberally interpreted, especially in the case of video games, was approved.

<sup>92</sup> Bowrey (n84) 95: 'The reinvention of copyright concepts to accommodate new technologies need not be confined to the cause of investors in new technologies alone'. See: *Sawkins v Hyperion* (n80).

### ***4.3 Other Solutions for the Protection of Indigenous Cultural***

#### ***Expressions***

After *Bulun Bulun*, most scholars tend to agree that copyright law has reached its conceptual limits in providing protection for Indigenous communities' interests in their art<sup>93</sup>. Indigenous people have looked to a patchwork of other legal doctrines to fill the gaps, such as: judicial discretion in relation to the award of damages<sup>94</sup>; fiduciary duties<sup>95</sup>; breach of confidence<sup>96</sup>; planning legislation<sup>97</sup>; contract<sup>98</sup> and consumer protection law<sup>99</sup>. Overall, most scholars now agree that the issue of protecting Indigenous cultural expressions, with all its complexities, is probably best addressed with a sui generis legislative scheme that can incorporate a balancing of policy concerns. In the absence of the legislative will to enact such a scheme, private ordering mechanisms can provide a flexible 'bottom up' solution, although they are most effective in relation to those already motivated to protect Indigenous cultural expressions and they tend to be compromised by imbalances of power. Given the social and cultural disadvantages that many Indigenous communities face, measures which rely on market forces, such as collective trade marks; or private bargaining power, such

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<sup>93</sup> Mackay (n73), K Bowrey, 'Alternative IP?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 Macquarie LJ 65, D Burkitt, 'Copyrighting Culture – The History and Cultural Specificity of the Western Model of Copyright' (2001) IPQ 146.

<sup>94</sup> *Milpurrruru* (n14)

<sup>95</sup> For example, the fiduciary duty in *Bulun Bulun* (n2). See also J Gibson, 'Justice of Precedent, Justice of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property' (2001) 6(4) Australian Indigenous L Reporter 1.

<sup>96</sup> *Foster v Mountford* [1976] 29 FLR 233, *Aboriginal Sacred Sites Protection Authority v Maurice; Re the Warumbingu Land Claim* (1986) 10 FCR 104.

<sup>97</sup> See text at n16 and Ayres (n16).

<sup>98</sup> See, for example: Rimmer (n74).

<sup>99</sup> *Australian Competition and Consumer Commission v Australian Dreamtime Creations* [2009] FCA 1545.



as contract, are likely to have limited success. Legislative attempts to improve protection for Indigenous artists to date have either only addressed a small part of the problem (eg, resale royalties legislation<sup>100</sup>); or have fallen off the legislative agenda (eg, the Communal Moral Rights Bill<sup>101</sup>).

In this section, I assess four of the best candidates for a non-copyright based solution to the problem of protecting Indigenous cultural expressions: protocols/codes of conduct; collective/certification trade marks; contracts; and sui generis legislation.

#### **4.3.1 Protocols and Codes of Conduct**

Protocols and codes of conduct might be useful in enhancing the protection of Indigenous cultural expressions<sup>102</sup>. They encourage good practice in commercial dealings in reproductions of Indigenous cultural expressions and often provide informal dispute resolution mechanisms<sup>103</sup>. Over the previous years a number of such protocols have been developed by arts organisations<sup>104</sup>. In October 2009 the Australian Federal

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<sup>100</sup> Resale Royalty Right for Visual Artists Act 2009 (Cth).

<sup>101</sup> An exposure draft of the Copyright Amendment (Indigenous Communal Moral Rights) Bill (Cth) was circulated in 2003. The introduction of the bill was postponed ostensibly until 2006, however, it has still not been reintroduced into Parliament.

<sup>102</sup> Janke (n21) 26.

<sup>103</sup> Informal dispute resolution mechanisms are considered inappropriate in situations involving significant imbalances of power, see: G Clark and I Davies, 'Mediation – When is it not an appropriate dispute resolution process?' (1992) 3(2) *Australian Dispute Resolution* J 70, 78-79; R Field, 'Mediation and the art of power (im)balancing' (1996) 12 *QUTLJ* 264, 266-267; D Eliades, 'Power in mediation – some reflections' (1999) 2(1) *ADR Bulletin* 4, 6.

<sup>104</sup> Melbourne City Council developed a code of conduct for galleries and retailers of Indigenous art: 'Code of Practice for Galleries and Retailers of Indigenous Art' <<http://www.melbourne.vic.gov.au>> 23 December 2008. Protocols have also been developed by the Australia Council for the Arts, 'Publications' <[www.australiacouncil.gov.au](http://www.australiacouncil.gov.au)>; Screen Australia, 'Indigenous Filming Protocol' <<http://www.afc.gov.au/filminginaustralia/indigproto/fiapage9.aspx>>; and SBS, 'The Greater Perspective – Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities' (2nd edn, 1997).

Government, as well as State and Territory governments endorsed the Indigenous Australian Art Commercial Code of Conduct<sup>105</sup>. Although protocols and codes of conduct are helpful in raising awareness of the issues, their effectiveness is undermined by the fact that they are voluntary so there are limited provisions to ensure compliance (ie, the publication of non-compliant members' names online). These measures are likely to be most effective in relation to parties already interested in, and committed to, compliance. Even where this is not the case, the poor socio-economic position of many Indigenous artists may make it difficult for them to negotiate the inclusion of such protocols in a contract for the sale of their art<sup>106</sup>.

#### **4.3.2 Collective/Certification Trade Marks**

Certification or collective trade marks are often employed by groups of traders to promote their collective interest<sup>107</sup>. The success of this strategy is ultimately dependent upon how well and how widely the marks are implemented, regulated and policed<sup>108</sup>. The *Our Culture: Our Future* Report proposed the adoption of a National Indigenous Authentication Trade Mark<sup>109</sup>. In 1999 the National Indigenous Arts Advocacy

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<sup>105</sup> <<http://www.indigenousartcode.org>>. The Code was a key recommendation of the Senate Report (n21) which revealed widespread endemic patterns of unscrupulous commercial behaviour by dealers within the Indigenous arts industry.

<sup>106</sup> MacKay (n73) 20 argues that one context in which protocols might be effective is where government or other funding grants are made conditional on compliance with the protocol.

<sup>107</sup> Trade Marks Act 1995 (Cth) s162, s169. See: Janke (n21) 23.

<sup>108</sup> L Wiseman, 'The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity' (2001) EIPR 14, 25.

<sup>109</sup> Janke (n16) 198. S McCausland, 'Protecting Communal Interests in Indigenous Artworks after the Bulun Bulun Case' (1999) 4(22) Indigenous L Bulletin 4 suggests that notices might also be put on artwork in order to deter unauthorised reproductions.

Association ('NIAAA') introduced an Indigenous Label of Authenticity<sup>110</sup>. However, the Label of Authenticity suffered from a number of practical problems: delays in implementing the scheme<sup>111</sup>; overly strict registration requirements<sup>112</sup>; a failure to adequately publicise the scheme; and quality control issues in the administration of the scheme<sup>113</sup>. The scheme was not widely accepted by the Indigenous community as the requirement to prove 'authenticity' was considered insulting and inappropriate<sup>114</sup>. In 2002 the Australia Council suspended funding to NIAAA, which meant that the label of authenticity scheme was rendered practically defunct<sup>115</sup>. Some suggest that local trademarks for Indigenous artistic centres might be more successful and help to empower local communities (if accompanied with the proper administrative infrastructure)<sup>116</sup>. The usefulness of such marks is limited, however, because they depend upon the market: consumers must understand the significance of the mark and be motivated to buy the authorised/genuine products bearing the mark. In the souvenir market, where problems of unauthorised and offensive reproductions of Indigenous art are rife, consumers are likely to be more concerned with price, than provenance.

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<sup>110</sup> <<http://www.culture.com.au/exhibition/niaaa/labelqa.htm>>.

<sup>111</sup> M Rimmer, 'Australian Icons: Authenticity Marks and Identity Politics' 2004(3) *Indigenous LJ* 139

<sup>112</sup> 75% of the initial applications failed to have sufficient supporting documentation (the applicant's Aboriginality had to be attested to in writing with the common seal of two Indigenous organisations): Rimmer *ibid* 156.

<sup>113</sup> *ibid* 164.

<sup>114</sup> *ibid* 262. The scheme also failed to adequately distinguish between Indigenous groups

<sup>115</sup> *ibid* 160-161 this was associated with concerns related to poor governance and management of NIAAA and the fact that it did not include regional representation.

<sup>116</sup> *ibid* 165. A number of regional arts centres successfully use registered trade marks, eg Desert.

### 4.3.3 Contract

Organisations, such as the Arts Law Centre of Australia, have developed model contracts and licensing agreements and provide free or low cost legal advice to Indigenous people to help them to develop arrangements which suit their needs<sup>117</sup>. The Bangarra Dance Troupe provides a good example of the use of contract to protect Indigenous cultural interests<sup>118</sup>. The company entered into a private agreement with the Munyarrun Clan recognising Clan copyright ownership of particular traditional dances and songs and agreeing to pay a fee for the permission to reproduce their themes in its performances. The agreement includes provisions designed to ensure that the company takes care to ensure respectful treatment of the cultural property. Yet, the Bangarra Dance Troupe is probably an exceptional case in terms of its legal literacy<sup>119</sup>. Further, insofar as the agreement intends to circumvent and modify the scope of copyright there are real questions as to its enforceability<sup>120</sup>. Similar arrangements are unlikely to be replicated with parties that do not share the Dance Troupe's motivation to respect Indigenous culture. Contracts offer the benefit of promoting self-determination, allowing for more management and negotiation at the local level<sup>121</sup>. Yet, contract does

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<sup>117</sup> As recommended in Janke (n21) 24. For example Arts Law provide a free sample Indigenous Art Centre and Gallery Consignment Agreement: <<http://www.artslaw.com.au/Indigenous/IndigenousArtistAndArtCentreAgreement.asp>>.

<sup>118</sup> Rimmer (n74).

<sup>119</sup> *ibid* 274.

<sup>120</sup> Rimmer, *ibid* cites Netanel's concerns over contracts which seek to circumvent copyright law provisions in the digital context – specifically: N Netanel, 'Copyright and Democratic Civil Society' (1996) 106 Yale LR 283, 305-6, 382-5.

<sup>121</sup> Bowrey (n93) 75 argues that private ordering allows one to capture the voice of a community instead of presuming to speak for it, as legislation might. Cf P Drahos with J Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Routledge 2002); also S Sell, *Private Power, Public Law: The Globalisation of Intellectual Property Rights* (CUP 2003).

not work well where there is unequal bargaining power (a key issue in this context)<sup>122</sup> and contracts cannot be enforced against third parties.

#### **4.3.4 Sui Generis Legislation**

MacKay argues that sui generis legislation might meet the ‘urgent need to reshape the conceptual landscape’<sup>123</sup>. Sui generis legislation could be specifically tailored to fit the needs of Indigenous artists and their communities, for example, providing more scope for non-Western concepts such as communal ownership; reflecting the unimportance of originality or novelty; and taking into consideration the intergenerational nature of Indigenous cultural property. It might also extend to a broader range of subject matter not protected by conventional intellectual property law, providing a more holistic approach to protecting Indigenous cultural expressions and traditional knowledge<sup>124</sup>. Sui generis legislation could take into account the role of customary law in Indigenous communities. Any such legislation should be drafted with a view, not only to preserving Indigenous culture, but also to ensuring and promoting its continuation. A sui generis system might have the additional benefit of being empowering and promoting self-determination for Indigenous people. Caution must be expressed on this point, however, as this is likely to depend on the degree of Indigenous involvement in the drafting and implementation of such a scheme.

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<sup>122</sup> MacKay (n73) 21. This is supported by the Arts Law Centre of Australia’s experiences (p65) and *Yumbulul* (p67).

<sup>123</sup> MacKay (n73) 10.

<sup>124</sup> T Lopez Romero, ‘*Sui Generis* Systems for the Protection of Traditional Knowledge’ (2005) 6 *International Law: Revista Colombiana de Derecho Internacional* 301-339.

Yet, a sui generis solution is not wholly uncontroversial. Although few would dispute that Indigenous artists need and deserve special protection. Some have argued that sui generis regulation might merely serve to further marginalise Indigenous people and their cultural interests<sup>125</sup>. Such a ‘top down’ approach risks being seen to lack legitimacy and, thus, may be ineffective in practice<sup>126</sup>. This risk could be addressed by ensuring extensive and broad consultation with Indigenous artists and their communities. In addition, any such system ought to be complementary to the current legal system, not constructed in opposition to it<sup>127</sup>. Unfortunately, there has been very little investigation of the potential details and scope of a sui generis approach to date<sup>128</sup>.

#### ***4.4 Insights for Copyright Law***

There is a tension between the function of the authorship of artistic works within Indigenous communities and the conception of authorship that is protected by copyright law. For Indigenous communities the process of creating art is essential to the preservation and continuation of their culture; it is an act that establishes and reinforces the identity of the author within the social structure of the community. The author is a custodian of the ritual knowledge which he or she is allowed to depict and is held responsible to the community for the appropriate and respectful use of that knowledge

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<sup>125</sup> Bowrey (n93) 88.

<sup>126</sup> On the methodological issue of speaking ‘for’ Indigenous people see: K Bowrey and J Anderson, ‘The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?’ (2009) 18 *Social and Legal Studies* 479.

<sup>127</sup> MacKay (n73) 26 citing also M Dodson and O Barr, ‘Breaking the Deadlock: Developing and Indigenous Response to Protecting Indigenous Traditional Knowledge’ (2007) 11(2) *Australian Indigenous LR* 19, 23.

<sup>128</sup> This is surprising given that such legislation has been successfully adopted elsewhere, for example: Pacific Model Law (Model for the Protection of Traditional Knowledge and Expressions of Culture 2002).

both in the artwork itself, and in relation to subsequent uses of the artwork by others. The ritual knowledge is seen as owned by the community as a whole, entrusted to certain elders and initiated artists for safekeeping, preservation and continuation. There is a mismatch between the ‘identifying’ function of authorship as an indicator of the origin of the work in a specific sense linked to its ‘material form’ (a Western notion reflected in copyright law); and the ‘identity’ function of authorship as an indicator of status within, and belonging to, a particular community (an Indigenous notion). In Indigenous communities, authorship has a strong ‘responsibility’ value which corresponds to the idea of cultural custodianship. The cases demonstrate some capacity to take this value into account within the Australian legal system, for example, in the damages award for culturally-based harm in *Milpururru* and in the fiduciary duty in *Bulun Bulun*. Yet, courts are unwilling to recognise the flipside of Indigenous authorial responsibility: the controlling influence of community norms (as embodied in customary law) over the creative process. Courts are unwilling to apply these norms especially when this involves claims against those outside of the relevant Indigenous community, as might be inferred from the extremely narrow scope of the fiduciary duty in *Bulun Bulun*.

*Bulun Bulun* was a lost opportunity to formulate the values which copyright law protects in cultural terms<sup>129</sup>. A more thorough application of the test for joint authorship might have revealed a number of areas in which Indigenous customary law could legitimately have been taken into account as part of the relevant factual matrix. Justice von Doussa’s judgment is cast in an aesthetically neutral light, appearing to apply copyright law’s rules of subsistence in a way that might seem free of value

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<sup>129</sup> Bowrey (n84) 82.

judgments external to those legal principles. Yet, when employing vague concepts like the idea/expression dichotomy, Justice von Doussa seems to be influenced by cultural pre-conceptions about who can be called an ‘author’. The lack of analytical clarity about the way in which the joint authorship test ought to be applied makes it vulnerable to cultural pre-conceptions, which are particularly likely to affect the assessment of whether a putative author has made a significant contribution of the right kind. Judicial insistence on aesthetic neutrality in decision-making hides the inherently political dimension of copyright law cases in which judges must decide which subjects are ‘authors’ and what counts as an ‘artistic work’.

A critical analysis of *Bulun Bulun* reveals the perception of Indigenous communal authorship as something that is fundamentally different from, and even potentially threatening to, copyright’s own conceptions of authorship and joint authorship<sup>130</sup>. Indeed, Indigenous cultural expressions are different from traditional ideas of intellectual property in many ways: they are seen as the object of communal rather than individual rights; although they might evolve over time, they are generally not concerned with originality or novelty. Some argue that it does not make sense to conceive of Indigenous interests in their cultural expressions in terms of ‘property’<sup>131</sup>. From this angle Indigenous people appear to be caught in a difficult situation: in trying to fit their cultural property into Western categories they may gain partial protection, however, in trying to conform to dominant notions of ownership Indigenous people may be displacing their own cultural identity<sup>132</sup>. This argument might be countered by

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<sup>130</sup> Hence, Justice von Doussa’s resort to principles of equity in *Bulun Bulun* (n2).

<sup>131</sup> Diver (n16) citing *Bulun Bulun* (n2) and *Yumbulul* (n34) as authorities for this proposition.

<sup>132</sup> *ibid.*



asserting the empowering potential of ‘authorship’ from the point of view of democratic participation and cultural self-determination. Whether or not Indigenous cultural expressions are best protected by intellectual property law is a complex question, which cannot be adequately addressed within the context of this thesis. It might suffice to say that copyright law alone is not best-equipped to deal with this issue, although it might do more to protect Indigenous art than is apparent from the court’s decision in *Bulun Bulun*. Ultimately the best solution is likely to be a comprehensive sui generis approach, which deals with all the interests that Indigenous people seek to protect and which recognises differences within and between Indigenous communities<sup>133</sup>.

This case study shines a light on the concepts of authorship and joint authorship in copyright law, thus providing a clearer view of the limitations and glimpses of the possibilities of these concepts. Whether or not one accepts the influence of the romantic author construct upon copyright law, it does appear clear that copyright law envisages a model of creativity which relies upon individuals or at the most very small groups of creators. Larger-scale creativity is only explicitly dealt with in the context of employment (where the employer presumptively owns copyright) or of a collective work (where those who select and arrange contributions are first owners of copyright in the whole work, and those who contribute distinct parts are the first owners of copyright in those parts). This may have contributed to Justice von Doussa’s reluctance to admit the possibility of ‘communal’ authorship in *Bulun Bulun*. A commitment to aesthetic neutrality has meant that judges tend to elide many considerations that relate to the context of creativity – focusing upon the skill, labour or judgment that go into the act of fixation rather than the skill, labour or judgment which go into the ‘expression’ of the

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<sup>133</sup> There may still be 200 Indigenous legal systems in operation in Australia: Dodson and Barr (n127) 25.

work in a broader sense. This Chapter has tried to show that this apparently aesthetically neutral approach might mask the influence of conceptions of authorship which reflect economic, historical, social and cultural hierarchies of power and influence.

Courts have been willing to take Indigenous customary law into account in the assessment of damages and in the procedures adopted during hearings. Indigenous customary law provides a significant untapped resource that might be used to help answer questions of fact in the application of the joint authorship test. I have tried to show how, despite the ruling in *Bulun Bulun*, the joint authorship test might be applied in a more contextual manner allowing for the recognition of important contributions to a work which are directly reflected in its expression, although they might have involved an intellectual or creative, rather than a mechanical or physical, contribution to the material form. In doing so, I would like to suggest the possibility of re-imagining the concepts of authorship and joint authorship in copyright in a more contextual way that might be better adapted to the dynamics of creativity that occur across the wide range of creative collaborations which exist – whether they rely upon new technology or customary practices which are ancient in origin. In the next Chapter, I explore this argument further considering a very different type of collective authorship: scientific collaborations.

## Chapter 5: Scientific Collaborations

Collaboration is becoming an increasingly important, and in some areas an indispensable, feature of modern science. As a result, lists of authors on scientific journal articles have tended to grow longer and longer. At the same time, practices of authorial attribution on journal articles have increasingly been the subject of criticism for the ‘inflation’ or ‘dilution’ of two traditional values of authorship in science: credit and responsibility. This Chapter focuses on two disciplines in which there is a particularly strong imperative for scientists to collaborate: biomedical science and particle physics. In these fields it has become virtually impossible to make significant advances without the cooperation of a variety of specialists and technicians. These disciplines provide an interesting point of comparison as each has attempted different solutions to the problems of allocating authorship in respect of collaborative work. The benefits and limitations of these solutions might provide some insights for copyright law.

The Chapter begins with an introduction to the context of scientific authorship<sup>1</sup>. I consider the important functions of authorship within science’s reputational economy (as a locus for credit and responsibility) and how these functions are challenged by the attribution practices of large collaborations. The second section of this Chapter contrasts two different scientific communities’ approaches to the problem of regulating authorship. Particle physics collaborations’ inclusive approach to authorship seems to

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<sup>1</sup> This Chapter considers authorship by reference to common practices of authorial attribution on scientific journal articles; for other views of the ‘author’ in science, see: H Rheinberger, “‘Discourses of Circumstance’: A Note on the Author in Science’ in M Biagioli and P Galison (eds) *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 309, 311.

have been more successful than biomedical journals' attempts to isolate 'dominant' authorial contributions. The third section briefly considers the subsistence of copyright in journal articles which report the research of large scientific collaborations and comments on the little case law on scientific authorship and copyright. The case law suggests both the value, and the potential dangers, of incorporating social norms in copyright decisions. The final section suggests insights that this case study offers for copyright law, arguing that the special characteristics of large scientific collaborations provide support for an inclusive, contextual approach to the application of the joint authorship test.

### ***5.1 Authorship Dynamics: Constructing Authority***

This section considers the dynamics of authorship in science. I begin by considering the norms that govern science and the role of authorship in science's reputation economy as a locus for credit and responsibility. Authorship has an important role in the process of establishing the authority of a scientific claim. The traditional notion of authorship in science was very individualistic, which has meant that the contributions of technicians and other less powerful players were often elided. I consider how the collectivisation of science has disrupted this traditional notion of scientific authorship.

Historians and sociologists of science have done much work to clarify the prevailing concept of authorship in the sciences, examining how it has transformed in modern times<sup>2</sup>. Although attribution practices vary between disciplines<sup>3</sup>, the scientific

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<sup>2</sup> M Biagioli and P Galison, *Scientific Authorship: Credit and Intellectual Property in Science* (n1) provides a set of interdisciplinary perspectives on this question.

community shares some common assumptions about the essential features of scientific authorship. Science aims to produce knowledge about nature and to be useful<sup>4</sup>. Scientific authorship is best understood as a step in an epistemological process that establishes the authority or truthfulness of a scientific claim and, by extension, its author<sup>5</sup>. This authority is established by adherence to conventions developed by the scientific community which establish the basis for trusting the claim. Robert Merton<sup>6</sup> famously identified the norms which embody the normal expectations of the scientific community as:

- (i) communalism (discoveries should be freely shared with the scientific community)<sup>7</sup>;
- (ii) universalism (impersonal and objective criteria should be used to evaluate claims);
- (iii) disinterestedness (scientists should subordinate their own biases and interests to the advancement of knowledge);
- (iv) organized scepticism (a new claim should not be accepted into the canon of scientific knowledge until it has been subjected to systematic scrutiny and validation); and

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<sup>3</sup> M Biagioli, 'Rights or Rewards? Changing Frameworks of Scientific Authorship' in Biagioli and Galison (n1) 260, 274.

<sup>4</sup> J Ziman, *Of One Mind: The Collectivisation of Science* (American Institute of Physics Press 1995) 239.

<sup>5</sup> J Ziman, *Science in Civil Society* (Imprint Academic 2007) 7; E Garfield, 'Giving Credit Only Where it is Due: The Problem of Defining Authorship' (1995) 9(19) *The Scientist* 13.

<sup>6</sup> RK Merton, *The Sociology of Science: Theoretical and Empirical Investigations* (Chicago UP 1973) 310. These norms are now widely accepted: D Burk, 'Research Misconduct: Deviance, Due Process, and the Disestablishment of Science' (1995) 3 *George Mason U Independent LRev* 305, 310.

<sup>7</sup> The original term used by Merton was 'communism', however, he later adopted the term 'communalism', which is now commonly used by modern sociologists of science: eg, J Ziman, *Real Science: What it is, and What it Means* (CUP 2000) 33. See also K Strandburg, 'User Innovator Community Norms: At the Boundary Between Academic and Industry Research' (2009) 77 *Fordham LRev* 101

- (v) originality (scientists should investigate novel and unanswered questions)<sup>8</sup>.

These norms might be said to embody the normal expectations of the scientific community and are often collectively referred to as CUDOS, an allusion to their role in establishing the criteria for recognition, which is valuable within science's reputational/sharing economy<sup>9</sup>. Works of scientific authorship demonstrate compliance with these norms and with the scientific method<sup>10</sup>. This helps establish their claims as non-fictional and hence authoritative. Both the presentation and evaluation of scientific claims depend upon trust<sup>11</sup>.

In the eyes of the scientific community, an author is not viewed as the originator of a particular claim about nature, but rather, the person who uncovered it – that is, the person who first hypothesised, tested, identified and verified the claim. The element of originality or novelty valued by the scientific community relates to the selection of the problem and/or the methodological approach taken in investigating it. In contrast to copyright law, science tends to value creativity or effort expended in relation to the ideas in a work, rather than in relation to their expression. Despite this, considerable attention is paid to the presentation of scientific claims. Scientific writing is usually cast in

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<sup>8</sup> Merton's original list did not include originality. Originality may be less important than the others given that it is also seen as good practice to retest a claim. The meaning of this term in the context of science is explained at p89.

<sup>9</sup> The acronym alludes to the importance of adhering to these norms for retaining one's reputation and attaining the recognition of one's peers within the scientific community.

<sup>10</sup> This term is surprisingly slippery: the exact content of the 'scientific method' is not uncontroversial and some even claim that it does not exist. S Shapin, 'How to be Antiscientific' in JA Labinger and H Collins (eds) *The One Culture? A Conversation about Science* (Chicago UP 2001) 99.

<sup>11</sup> S Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago UP, 1994); J Pila, 'Authorship and E-science: Balancing Epistemological Trust and Skepticism in the Digital Age' (2009) 23 *Social Epistemology* 1.

emotionally-neutral authoritative tones and phrased in the passive voice<sup>12</sup>. The best examples of scientific writing are said to be impersonal, brief, clear, precise and direct<sup>13</sup>. This is because a scientific claim has the greatest chance of being accepted by the scientific community when it is framed as an objective statement about nature and not as the scientist's opinion<sup>14</sup>.

Sociologists and historians of science locate the primary motivation for authorship in science in the benefits that it brings within the context of the reputation or gift economy of academic science<sup>15</sup>. This gift economy is a system of exchange premised on reciprocity, reputation and responsibility<sup>16</sup>. Publication is beneficial for scientists in two ways: (i) it is a marker of achievement and thus often linked to funding, promotion and professional opportunities; and (ii) it allows a scientist to build a reputation which is beneficial per se and may also lead to tangible benefits<sup>17</sup>. The flip side of the credit value of authorship within the scientific community is responsibility. Responsibility centres on good faith and scientific rigor reflecting the crucial role that

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<sup>12</sup> C Bazerman, 'Emerging Perspectives on the many dimensions of scientific discourse' in JS Martin and R Veal (eds) *Reading Science: Critical Functional Perspectives on Discourses of Science* (Routledge 1988) 15.

<sup>13</sup> I Valiela, *Doing Science: Design, Analysis, and Communication of Scientific Research* (OUP 2001) 108, 127.

<sup>14</sup> Ziman (n4) 188.

<sup>15</sup> Biagioli (n3) and C McSherry, 'An Uncommon Controversy' in C McSherry, *Who Owns Academic Work: Battling for Control of Intellectual Property* (Harvard UP 2001) 68.

<sup>16</sup> C McSherry, 'Uncommon Controversies: Legal Mediations of Gift and Market Models of Authorship' in Biagioli and Galison (n1) 225, 225.

<sup>17</sup> Biagioli (n3) 266 claims that scientific authorship is more about 'reward' than it is about 'rights'.

trust plays within the scientific community<sup>18</sup>. Therefore, the author is held responsible for adhering to the requirements of the scientific method and other ethical obligations<sup>19</sup>.

This gift economy is constructed in direct opposition to the market economy<sup>20</sup>. So, for example, to be credible, scientific authors must be seen as not primarily motivated by monetary concerns<sup>21</sup>. Information which might need to be kept secret if it is to have value in the commercial market, might only be valuable in the reputation market if it is made public<sup>22</sup>. By situating scientific authorship outside the realm of the marketplace, an air of neutrality and, thus credibility, is established<sup>23</sup>. Yet, there is a tension between market forces and the reputational economy because monetary concerns inevitably affect scientists who must earn a living, whose studies require funding and whose inventions might be economically valuable<sup>24</sup>. McSherry sees authorship as the primary site for this tension between the gift economy and the market economy models in science<sup>25</sup>.

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<sup>18</sup> Valiela (n13) 274; Shapin (n11) Ch1.

<sup>19</sup> This responsibility includes not exaggerating or falsifying results; not negligently failing to control the appropriate variables; and avoiding potential conflicts of issues or other ethical violations. In this sense responsibility is more about 'playing by the rules' than it is about accountability for the truthfulness of a particular claim about nature.

<sup>20</sup> McSherry (n15).

<sup>21</sup> Indeed, conflicts of interest are seen as unethical.

<sup>22</sup> Ziman (n4) 333.

<sup>23</sup> McSherry (n16) 227 citing M Walshok, *Knowledge Without Boundaries: What America's Research Universities Can Do for the Economy, the Workplace, and the Community* (Jossey-Bass 1995) 191.

<sup>24</sup> See R Eisenberg, 'Proprietary Rights and the Norms of Science in Biotechnology Research' (1987) 97 Yale LJ 177.

<sup>25</sup> McSherry (n16) 245 noting that 'one of the things that helps authorship mediate gift and market economies is the shared assumption that the two models do not share important assumptions'.



The traditional narrative of science is very individualistic<sup>26</sup>. The history of science is filled with stories of extraordinary individuals who resemble the romantic author<sup>27</sup>. In the early years of science, scientific knowledge seemed to grow by accretion as a result of the activities of these observers and thinkers. Yet, although an individual generally stood behind a scientific claim<sup>28</sup>, science has always been a collective undertaking in some sense, developing cumulatively as a result of interactive processes such as peer review<sup>29</sup>. Indeed, the idea of the scientist as a lonely seeker after the truth is often historically inaccurate. Many such scientists relied on artisans, craftsmen and laboratory technicians<sup>30</sup>. The extensive contributions of such helpers were often dismissed as mere routine labour and rendered virtually invisible on surviving documentation of their work<sup>31</sup>. One explanation for this is the tendency for scientific authorship to gravitate to persons with institutional authority. Thus, Shapin argues that Robert Boyle was the author of his papers, despite the considerable input of technicians such as Denis Papin who ran experiments and even wrote up results, because Boyle had authority over the investigations in the sense of taking responsibility for them. He had control over the

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<sup>26</sup> Ziman (n4) at 133.

<sup>27</sup> For example: S Shapin and S Schaffer, *Leviathan and The Air-Pump: Hobbes, Boyle, and The Experimental Life* (Princeton UP 1985).

<sup>28</sup> Shapin (n11): these individuals were usually ‘gentlemen’ thought to be bound by a code of personal honour, which, along with their financial independence, was seen to guarantee the trustworthiness of their claims.

<sup>29</sup> Ziman (n4) 98; NS Steinberg, ‘Regulation of Scientific Misconduct in Federally Funded Research’ (2000) 10 South California Interdisciplinary LJ 39, 43; A Warwick, “‘A very hard nut to crack’ or Making Sense of Maxwell’s *Treatise on Electricity and Magnetism* in Mid-Victorian Cambridge’ in Biagioli and Galison (n1) at 133 offers the example of a technically difficult textbook, which, by the inclusion of many Cambridge mathematicians’ attempts to understand and clarify it for their students in the second edition, became an increasingly interactive, collective product.

<sup>30</sup> MW Jackson, ‘Can Artisans Be Scientific Authors? The Unique Case of Fraunhofer’s Artisanal Optics and the German Republic of Letters’ in Biagioli and Galison (n1) 113.

<sup>31</sup> S Shapin, ‘The Invisible Technician’ (1989) 77 American Scientist 554.

workplace and work agenda, as well as the final decision on the content and form of the work<sup>32</sup>.

As scientific research is increasingly done by large scale collaborations, science's traditional individualistic narrative is being openly challenged<sup>33</sup>. In modern scientific collaborations it is difficult to identify a Boyle-like figure with overall authority or control over research projects, and the work of many expert contributors is less easily rendered invisible. This has had consequences for science's concept of authorship and its role in establishing the authority of scientific claims.

Over the last decades, there has been a rapid shift in focus for science from autonomous basic research towards more directed commercial research. Ziman associates this with the 'collectivization' of science<sup>34</sup>. Others have called this the rise of 'Big Science'<sup>35</sup>. According to Ziman now 'scientists have to work in teams, hunt in packs and share the use of many expensive instruments'<sup>36</sup>. Large collaborative projects such as NASA, the CERN collaborations, or the Human Genome Project are becoming an increasingly important and sometimes indispensable part of modern science. These collaborations often require extensive contributions from scientists in other disciplines

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<sup>32</sup> *ibid* 560.

<sup>33</sup> W Vesterman, 'The Death of the Scientific Author: Multiple Authorship in Scientific Papers' (2002) 8 *Common Knowledge* 439; Ziman (n4) 241-2.

<sup>34</sup> Ziman (n4) 242 argues that science is being collectivized in two senses: (1) scientists are increasingly being forced to work together to achieve a 'collective effect'; (2) science is increasingly under the control of collectives such as government agencies and large industrial corporations.

<sup>35</sup> This is a term that has been attributed to AM Weinburg in 'Impact of Large-Scale Science on the United States' (1961) 134(3473) *Science* 161. It is usually used '...to describe a series of changes in science which occurred in industrial nations during and after World War II, as scientific progress increasingly came to rely on large-scale projects usually funded by national governments or groups of governments': <[http://en.wikipedia.org/wiki/Big\\_Science](http://en.wikipedia.org/wiki/Big_Science)>.

<sup>36</sup> Ziman (n4) 241.

and a variety of supporting personnel (eg, technicians, statisticians, managers, software developers). The need to acknowledge and reward a diverse range of contributors to such projects has resulted in lists of authors on journal articles growing longer<sup>37</sup>, resembling the long lists found in film credits<sup>38</sup>. This fragmentation of authorship has disrupted the reputational economy of science<sup>39</sup>.

Currently, being listed as an author may imply any number of different connections to a scientific article. A person might be designated as an author because of a contribution at any point in the process of creation, such as designing a study, carrying out experiments, providing funding, supervising the project, designing software or other equipment used, collecting or analysing data, or providing technical assistance. Interpersonal relationships affect decisions about the attribution of authorship, with senior scientists more influential than their junior colleagues in deciding authorship issues<sup>40</sup>. Controversially, sometimes authorship may be attributed to someone with a tenuous connection to the project, for example, a senior colleague whose name is added to increase chances of publication<sup>41</sup>. A survey of the world's 20 most prolific scientists indicated an average of at least 3.9 days between each of their publications from 1981 to 1990<sup>42</sup>. It seems obvious from these figures that these scientists could not

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<sup>37</sup> For example: 'The ATLAS Experiment at the CERN Large Hadron Collider' published in the *Journal of Instrumentation* listed 2926 authors from 169 research institutions. P Davis, 'An Authorship Accelerator' dated 8 December 2008 <<http://scholarlykitchen.sspnet.org/2008/12/08/hep-authorship>>.

<sup>38</sup> T Conley 'End Credits', Biagioli and Galison (n1) 360.

<sup>39</sup> Biagioli (n3).

<sup>40</sup> AG Mainous III, MA Bowen, JS Zoller, 'The Importance of Interpersonal Relationship Factors in Decisions Regarding Authorship' (2002) 34 *Family Medicine* 462, 467.

<sup>41</sup> This contribution might be characterized as putting one's reputation on the line.

<sup>42</sup> Valiela (n13) at 136.

have contributed significantly to all the papers on which their names appear<sup>43</sup>. This has implications for the credit and responsibility values attached to authorship in science.

Authorship norms vary depending upon the scientific community to which the author belongs. They are inevitably affected by structural dynamics and power relations in particular scientific communities<sup>44</sup>. Journals often have specific guidelines on attribution practices<sup>45</sup>. Scientific readers make inferences about a particular author's contribution from their position in the list of authors. In many disciplines it is common to list the person who is responsible for most of the writing and is most directly involved in the project first, and the supervisor or person who obtained the funding for the study last. These are typically the two most prestigious positions. The attribution of authorship and the order of authors vary from discipline to discipline, sometimes from institution to institution, and even from project to project. The answer to the question 'who is the author?' in respect of a scientific journal article will depend to some extent upon who is asking. Whilst journal editors are keen to define a locus of responsibility for published work, researchers may have more pragmatic concerns just to 'get the job done', using the reward of authorship as a cost-free way of getting busy people to participate<sup>46</sup>. The importance of the order in which authors are listed is a notion that is alien to copyright and even to the attribution right. Indeed, copyright law tends to weigh the contributions of authors equally when it comes to the distribution of

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<sup>43</sup> It appears to be common for scientists to be listed as authors on papers that they have not even read: J Birnholtz, 'When Authorship Isn't Enough: Lessons from CERN on the Implications of Formal and Informal Credit Attribution Mechanisms in Collaborative Research' (2008) 11(1) *J of Electronic Publishing* <<http://dx.doi.org/10.3998/3336451.0011.105>>.

<sup>44</sup> T Scott, 'Changing Authorship System Might Be Counterproductive' (1997) 315 *British Medical J* 744.

<sup>45</sup> Rheinberger (n1) 310.

<sup>46</sup> R Phillips, 'Researchers' Objective is to Get the Job Done' (1997) 315 *British Medical J* 747.

royalties amongst joint copyright owners<sup>47</sup>, except in cases where factual circumstances rebut this inference<sup>48</sup>.

The correlation between authorship, professional recognition, and financial benefit is not easily measured. Yet, it is clearly an issue of great practical significance<sup>49</sup>. As author lists grow longer, it becomes increasingly difficult to assess the contributions of each author<sup>50</sup>. This has led to a concern that credit is being impermissibly inflated and responsibility becoming impermissibly diffuse. Rennie, Yank and Emanuel conceptualise scientific authorship as a coin with a 'credit' value on one side and a 'responsibility' value on the other<sup>51</sup>. They argue that as the number of authors increases, in practice, the amount of responsibility for each author seems to diminish faster than the credit, separating the two sides of the coin from each other<sup>52</sup>. Intuitively it seems fair that if you are to share the reputational benefits of scientific authorship, then you must also accept some of the responsibilities. This idea unravels, however, in the context of many large scale collaborative projects where there may be

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<sup>47</sup> *Godfrey v Lees* [1995] EMLR 307, 329.

<sup>48</sup> For example: *Bamgboye v Reed* [2002] EWHC 2922 [42]; *Fisher v Brooker* [2009] UKHL 41.

<sup>49</sup> For this reason alphabetical order has been criticized as resulting in winners and losers on arbitrary grounds. Ziman (n4) 372; Valiela (n13) 135 cites a similar solution: 'Order of authorship was decided from the outcome of a game of croquet played on the grounds of CCCC College'.

<sup>50</sup> Davis (n37).

<sup>51</sup> D Rennie, V Yank and L Emanuel, 'When Authorship Fails: A Proposal to Make Contributors Accountable' (1997) 278 JAMA 579, 580.

<sup>52</sup> Biagioli (n3) 263-4 agrees that concerns relating to the inflation of credit may be less well founded than concerns relating to responsibility. M Biagioli, 'Documents of Documents: Scientists' Names and Scientific Claims' in Annelise Riles (ed), *Documents: Artifacts of Modern Knowledge*, (U of Michigan Press 2006) 129, 149. Cf S Seymore, 'How Does My Work Become Our Work? Dilution of Authorship in Scientific Papers, and the Need for the Academy to Obey Copyright Law' (2006) 12 Richmond J of L & Tech 11; Vesterman (n33).

good reasons to give credit to valuable contributors who could not fairly be asked to bear responsibility for the article as a whole.

## ***5.2 Regulating Authorship with Private Ordering***

Mario Biagioli has explored the different ways in which the attribution practices of biomedical science and particle physics collaborations have challenged the conventional notion of scientific authorship<sup>53</sup>. The diffuse nature of responsibility in large collaborations has been a cause for concern leading to arguments for stricter control of authorial attribution in the biomedical sciences. Particle physics collaborations, on the contrary, seeking to credit a range of valuable contributors, have expanded the notion of authorship. This section revisits Biagioli's comparison with a view to determining what insights these experiences might offer copyright law.

### **5.2.1 Biomedical Science Collaborations: An Authorship Crisis**

The challenges of allocating authorship in large scientific collaborations have been felt particularly acutely in the biomedical sciences, where there is perceived to be a crisis in authorship. This is due, in part, to the disruption that long author lists cause to the authority or responsibility value of authorship. This section argues that the strategy adopted by many biomedical journals of restricting authorship claims has had only limited success because it is not adapted to the realities of large collaboration. Although aimed at identifying those who can be held responsible for an article, this approach does not seem to have prevented authorship gravitating to those with the

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<sup>53</sup> Biagioli (n3).

most institutional authority. The section ends by considering Sean Seymore's argument that scientific attribution practices ought to be realigned with copyright law norms.

Intellectual limitations caused by necessary specialisation make it virtually impossible for one person to have enough knowledge across specialisations to make significant advances in modern biomedical science<sup>54</sup>. As author lists on articles produced by large collaborations have grown longer, attribution practices have come to be associated with a number of high profile incidents of scientific misconduct, which in turn, lead to fears of a crisis in authorship<sup>55</sup>. Scientists and journal editors have become concerned that in large collaborations the credit value of authorship might become inflated and the responsibility value might become impermissibly diffuse – disrupting science's reputation economy and undermining the trust on which science depends. Some authorship practices regularly seen to be inappropriate include:

- (i) *Gift or guest authorship*: adding the name of a person who has contributed little to the publication. This might be to acknowledge earlier influence on the primary author's career; to make the paper appear more authoritative; or to increase its chances of publication. It may even be done to acknowledge someone who has provided access to facilities, data or funding. In some cases the gift author may not even be aware of being listed as an author<sup>56</sup>.

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<sup>54</sup> RC Dreyfuss, 'Collaborative Research: Conflicts on Authorship, Ownership and Accountability' (2000) 53 Vanderbilt LRev 1161, 1171.

<sup>55</sup> R Epstein, 'Academic Fraud Today: Its Social Causes and Institutional Responses' (2010) 21 Stanford L & Policy Rev 135; Steinberg (n29).

<sup>56</sup> R Bhopal et al, 'The Vexed Question of Authorship: Views of Researchers in a British Medical Faculty' (1997) 314 (7086) British Medical J 1009: A study of 66 staff of a University medical faculty revealed that although gift authorship was perceived as unethical it was seen as common practice and, indeed, seemed to be encouraged by academic reward systems. 64 per cent of respondents had exper-

- (ii) *Coercion authorship*: where superiors who have had little or no direct involvement in the research ask to be listed as an author – the importance of maintaining good working relationships may make it difficult to refuse such a request<sup>57</sup>.
  - (iii) *Mutual support authorship*: where authors agree to put each other's names on papers where no direct contribution is made to 'pad' their curriculum vitae.
  - (iv) *Ghost authorship*: where someone who has made a significant contribution to the work is not acknowledged as an author. This may be to make the report appear independent from that person or their organisation<sup>58</sup>, or may involve junior researchers whose contributions are not acknowledged by their superiors<sup>59</sup>.
- Scientific authorship here is under-inclusive in copyright law terms.

Ghost and guest authorship are particularly problematic, since both have been frequently associated with cases of scientific misconduct and even fraud<sup>60</sup>. Fraudulent authors have often sought prestigious co-authors to lend credibility to their papers. In the early 1980s, John Darsee infamously falsified a number of studies at Emory and

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experienced difficulties with authorship, the most common difficulty was being excluded from authorship when it was apparently merited.

<sup>57</sup> Providing access to equipment, providing materials or being a head of department may be contributions relied upon by people making such claims. L Claxton, 'Scientific Authorship Part 2: History, Recurring Issues, Practices, and Guidelines' (2005) 589 *Mutation Research* 31, 35.

<sup>58</sup> S Stern and T Lemmens, 'Legal Remedies for Medical Ghostwriting: Imposing Fraud Liability on Guest Authors of Ghostwritten Articles' (2011) 8(8) *PLoS Med.* e1001070; A Matheson, 'How Industry Uses the ICMJW Guidelines to Manipulate Authorship – And How They Should Be Revised' (2011) 8(8) *PLoS Med* 1001072.

<sup>59</sup> Claxton (n57) 36.

<sup>60</sup> Stern and Lemmens (n58); AJ Fugh-Berman, 'The Haunting of Medical Journals: How Ghostwriting Sold "HRT"' (2010) 7(9) *PLoS Med* e1000335: 'the pharmaceutical company Wyeth used ghostwritten articles to mitigate the perceived risks of breast cancer associated with HT, to defend the unsupported cardiovascular "benefits" of HT, and to promote off-label, unproven uses of HT'; L McHenry, 'Of Sophists and Spin-Doctors: Industry-Sponsored Ghostwriting and the Crisis of Academic Medicine' (2010) 8(1) *Journalology* 129.



Harvard Universities. Many of the papers concerned included prominent heads of department as co-authors. These people had not fabricated the data, but were criticized for allowing their names to appear on work about which they knew too little<sup>61</sup>. The controversy revealed divergent attitudes to the social incidents of authorship, namely, whether the heads of department had acted appropriately and what sanctions, if any, ought to be imposed on them.

The pharmaceutical industry, in particular, has been criticized for using senior scientists to add credibility to studies and to mask the commercial function of journal articles which may be used to help advertise particular products<sup>62</sup>. The use of a well-known scientist as a first author to give the impression that the scientist instigated or controlled the study and endorses the results is apparently widespread in biomedical publications<sup>63</sup>. Even where the content of the study is not suspect, this practice poses a serious problem for scientists who need to know the true origin of an article in order to appropriately judge the information in it<sup>64</sup>. The trust upon which science depends may accordingly be undermined.

A number of groups have created guidelines to address this crisis in authorship<sup>65</sup>. The International Committee of Medical Journal Editors ('ICMJE')

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<sup>61</sup> J Smith, 'Gift Authorship: A Poisoned Chalice?' (1994) 309 British Medical J 1456.

<sup>62</sup> Matheson (n58); S Sismondo, 'Ghosts in the Machine: Publication Planning in the Medical Sciences' (2009) 39 Social Studies of Science 171.

<sup>63</sup> Matheson, *ibid.*

<sup>64</sup> *ibid.*

<sup>65</sup> Claxton (n57) 38-43. These include: the UK Organization Committee on Publication Ethics (COPE), the National Institutes of Health, University of Pennsylvania, University of California at San Francisco, the American Chemical Society, the American Statistical Society, and the Danish Committee on Scientific Dishonesty. See also: Rennie, Yank and Emanuel (n51) 584.

guidelines are the most accepted<sup>66</sup>. They are quite prescriptive in requiring that each name listed in the by-line refers to a person who takes full responsibility for the contents of the entire article and who has made substantial contributions to (i) the conception and design, or analysis and interpretation of data; (ii) drafting the article or revising it critically for important intellectual content; and (iii) who has also given final approval of the version to be published (the ‘triple lock formula’)<sup>67</sup>. This approach is designed to reduce the number of contributors who might be named as authors. It attempts to single out particular types of contributions that, in combination, count as authorial because they ensure that authors are adequately involved in the instigation, control, and writing up of a study so as to be properly held responsible for the article<sup>68</sup>. These guidelines aim to ensure that authorship is granted only to those who are best placed to ensure compliance with science’s norms and assume authority for the article’s claims.

To date, the ICMJE guidelines appear to have had only limited success<sup>69</sup>. This seems to be because they largely ignore the exigencies of large scientific collaborations, where authorship is seen as a cost-free way of getting busy people to participate or as *quid pro quo* for funding or access to equipment<sup>70</sup>. They are also insensitive to the fact

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<sup>66</sup> Garfield (n5).

<sup>67</sup> ‘Uniform requirements for Manuscripts Submitted to Biomedical Journals’ (1997) 277 JAMA 928. Participation solely in the acquisition of funding or collecting of data, and general supervision of the group will not be sufficient to establish authorship.

<sup>68</sup> In this way the guidelines seem to echo historical practices which seemed to ‘erase’ the contributions of technicians as discussed in the previous section, see Shapin (n31).

<sup>69</sup> PC Gøtzsche et al, ‘Ghost Authorship in Industry-initiated Randomised Trials’ (2007) 4 PLoS Med e535; E Wager, ‘Authors, Ghosts, Damned Lies, and Statisticians’ (2007) 4(1) PLoS Med e34. A Hudson Jones, ‘Can Authorship Policies Help Prevent Scientific Misconduct? What Role for Scientific Societies?’ (2003) 9 Science and Engineering Ethics 243.

<sup>70</sup> Claxton (n57) 35; R Horton, ‘The Signature of Responsibility’ (1997) 350 Lancet 5-6.

that collaborative work often necessitates a division of labour. It might not be possible for any one person to have sufficient expertise fully to understand and be fairly held responsible for every part of a complex collaborative study. The exclusion of statisticians has been a particular cause for concern given how vital their work is for understanding the significance of, and interpreting, results<sup>71</sup>.

In a recent article Matheson shows how pharmaceutical industry publication planning strategies rely upon selective interpretations of the ICMJE guidelines to boost the credibility of their publications by exaggerating the apparent contributions of some academic authors and understating the contributions of employed commercial writers<sup>72</sup>. This is because the so-called ‘triple-lock’ formula allows an academic to be named as an author as long as he or she makes some contribution to the design of a study or data analysis, makes some revisions to the manuscript, and approves it. Conversely, even if industry representatives do most of the design, data collection, analysis, and writing, if final approval is given by an academic then those representatives are disqualified from authorship. Even a person who has actually written an article is denied authorship if he or she was not involved in any other aspects of the study.

Part of the challenge in addressing pharmaceutical company publication strategies is that doing so might open a Pandora’s Box, as these practices mirror other practices which are widely tolerated and in some quarters considered entirely

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<sup>71</sup> Wager (n69); RA Parker and NA Bergman, ‘Criteria for Authorship for Statisticians in Medical Papers’ (1998) 17(20) *Statistics in Medicine* 2289.

<sup>72</sup> Matheson (n58).

appropriate<sup>73</sup>. Laboratory directors, departmental chairs and supervisors often ask to be listed as authors on publications on the basis of their institutional position rather than any significant contribution to the article<sup>74</sup>. The attribution of authorship is often affected by power relations: the problem of the senior professor who insists on being listed as an author on all of the papers of junior colleagues is apparently notorious<sup>75</sup>. Indeed, the supervisor/student relationship is at the heart of a number of legal disputes on employment matters and breaches of fiduciary duties, which frequently also affect the allocation of credit for scientific work<sup>76</sup>. As a practical matter, the most senior scientist involved in the research project will often have the final say about who is listed as an author, and in what order, even if that scientist may not have been directly involved in the actual writing of the report. In stressing the importance of giving final approval, the ICMJE guidelines tend to reinforce these power dynamics.

Sean Seymore suggests that realigning scientific practices of attributing authorship with (US) copyright law norms might help address this crisis of authorship<sup>77</sup>. Seymore locates problems of the dilution or inflation of authorship primarily with the expanding number of authors listed in the middle of a by-line who may have contributed the mere labour of carrying out experiments or collecting data or may be

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<sup>73</sup> Stern and Lemmens (n58).

<sup>74</sup> PC Gøtzsche et al, 'What Should Be Done To Tackle Ghostwriting in the Medical Literature?' (2009) 6(2) PLoS Med e1000023.

<sup>75</sup> Ziman (n4) 372.

<sup>76</sup> *Chou v University of Chicago* 254 F3d 1347, 1361 (Fed Cir 2001); *Johnson v Schmitz* 119 FSupp 2d 90, 91 (D Conn 2000); M Astala, 'Comment, Wronged by a Professor? Breach of Fiduciary Duty as a Remedy in Intellectual Property Infringement Case' (2003) 3 Houston Bus & Tax LJ 31.

<sup>77</sup> Seymore (n52) [27]: claiming that '[s]cientific misconduct might subside if science professors were taught basic intellectual property law' (referring to US law). Although the UK joint authorship test operates differently to the US test, much of his argument still translates in the UK context.

gift or coercion authors. He approves of copyright's joint authorship test because he sees it as linking authorship to creativity (ie, some intellectual contribution above mere labour) and focusing on contributions which go to the planning, writing and reviewing of an article<sup>78</sup>. Here Seymore may overstate the level of intellectual or creative input that the requirement for 'creative spark' implies, as it is generally accepted that fairly mundane works reach this standard. Seymore also approves of the fact that the joint authorship test has been applied with the deliberate aim of reducing the number of authors. In the UK context, I have called this the instrumental/pragmatic approach because it does not follow naturally from the wording of the statute, but rather, is an interpretation adopted for pragmatic or instrumental reasons. Seymore implies that the ICMJE guidelines are a step towards copyright norms. The way in which these guidelines have been implemented by pharmaceutical companies, however, demonstrates that they might be both under-inclusive and over-inclusive from a copyright point of view.

Problems of scientific misconduct are unlikely to be solved by deferring to copyright norms. Although a reduction in the number of authors listed might make it easier to find individuals to hold responsible for the article, copyright law will not always select the most appropriate contributors from science's point of view: those who establish the authority of the article and can take responsibility for its claims. Copyright authorship primarily relates to the origin of the expression of a work rather than ethical responsibility to the scientific community for its content. The role of scientific authorship in constructing authority would be undermined if it were granted to those who contributed the written expression of an article over those who take responsibility

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<sup>78</sup> *ibid* [29]-[32].

for the process of making the claims of scientific significance in the article. Further, this approach does not address the reason for the increase in named authors: the globalisation of science and the growing need to co-operate across large teams. Many of the contributors whose work is considered to be very valuable within particular scientific collaborations would be unlikely to be considered to be authors for copyright purposes<sup>79</sup>. Seymore's appeal to copyright norms, however, highlights the potential role of copyright law as a source of good authorship standards. In particular, copyright law might provide a benchmark minimum standard for determining authorship based upon responsibility for the creation of the expression of a work. This will be considered in further detail in Chapters 7 and 8<sup>80</sup>.

### **5.2.2 Particle Physics Collaborations: The Bureaucratisation of Authorship**

Particle physics collaborations have been far more successful than their biomedical science counterparts at dealing with attribution issues. Large group collaboration is virtually unavoidable in the particle/high energy physics community. CERN, for example, is run by 20 European member states and includes scientists from 608 institutions and universities. Half of the world's particle physicists come to CERN for their research<sup>81</sup>. Particle physics collaborations tend to adopt a corporate approach to credit, responsibility and the attribution of authorship. They have a very bureaucratic structure and produce standardised protocols on authorship that prioritise the coherence

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<sup>79</sup> This might be because their contributions: are not directly reflected in the expression; are not the product of activities that copyright considers 'authorial'; or because they are distinct. A Stokes, 'Authorship, Collaboration and Copyright a View from the UK' (2002) *Entertainment LRev* 121.

<sup>80</sup> See, particularly, 7.8 and 8.2.

<sup>81</sup> <<http://public.web.cern.ch/public/en/About/Global-en.html>>.

of the collaboration over the recognition of the specific contributions of individuals<sup>82</sup>. Indeed, due to the heterogeneity of such collaborations, it is often true that when the collaboration speaks it says something that no one individual could say from first-hand knowledge<sup>83</sup>. Responsibility is managed collectively through the use of internal review processes.

The Collider Detector at Fermilab ('CDF') Collaboration is a typical example. It has a standard alphabetic author list which appears on all publications. Criteria for being added and removed from the list are determined by guidelines developed by a committee. Authorship is conceived of in terms of credit for accumulated labour dedicated to the common endeavour<sup>84</sup>. A person may, therefore, be listed on a publication whilst on a leave of absence: for, without all the contributors no research could have been done<sup>85</sup>. Prior to publication an article must be preliminarily approved by a publication committee; it is then posted to an internal webpage and all members of the collaboration can comment on it. After a revised version is posted, those on the Standard Author List may withdraw their names if still unsatisfied with the article. This leads to an interesting result: an article with fewer names appears to be less credible than an article with more names (in contrast to the biomedical sciences where the worry is that more authors dilute responsibility)<sup>86</sup>. The Stanford Linear Detector ('SLD') collaboration policies on authorship differed depending on the scope of the audience for

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<sup>82</sup> P Galison, 'The Collective Author' in Biagioli & Galison (n1) 329, 332; Ziman (n4).

<sup>83</sup> Galison (n82) 352.

<sup>84</sup> Biagioli (n3) 270.

<sup>85</sup> Birnholtz (n43).

<sup>86</sup> Biagioli (n3) 273.

the publication and the knowledge claim made within it<sup>87</sup>. Conference proceedings, for example, were to be signed ‘The SLD Collaboration, presented by a particular person’ with a footnote naming all of the SLD authors; whereas the authorship of internal memoranda was a matter for the writers to decide.

Names such as ‘SLD Collaboration’ or ‘CERN’ operate like brand names that perform a trust function, acting as a placeholder for the contributions of many individuals<sup>88</sup>. This is reminiscent of historical practices whereby the individual contributions of scientists to large group projects were gathered together under the name of ‘sacralised’ individuals standing for groups<sup>89</sup>. The largest hydrogen bubble chamber collaboration at Lawrence Berkeley Laboratory in the 1960s, for example, was referred to as the ‘Alvarez Group’. Luis Alvarez could be seen to be responsible for the work because ultimately he made all the decisions about the physics results to be published and all funding for the group passed by him<sup>90</sup>. Particle physics collaborations take this model, but use consensus-based decision-making processes to establish the authority of the group over the claims that it makes. Although not the name of an individual scientist, ‘CERN’ conveys relevant information about the source of its publications and who takes responsibility for them. Internal processes for gaining or losing authorship, producing articles, and reviewing them before publication are crucial to establishing this corporate identity and the sense that the collaboration has a mind of its own. These

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<sup>87</sup> Galison (n82) 333-4.

<sup>88</sup> On the trade mark function of authorship: J Ginsburg, ‘The Author’s Name as a Trade Mark: A Perverse Perspective on the Moral Right of “Paternity”?’ (2005) 23 *Cardozo Arts & Ent LJ* 379; G Lastowska, ‘The Trade Mark Function of Authorship’ (2005) 85 *Boston U LRev* 1171.

<sup>89</sup> H Gusterson, ‘The Death of the Authors of Death: Prestige and Creativity among Nuclear Weapons Scientists’ in Biagioli and Galison (n1) 281, 282 gives the example of the atomic bomb which was credited to Robert Oppenheimer despite the key roles of a number of other scientists.

<sup>90</sup> Galison (n82) 329-330.



procedures play an important role in establishing the authority of the authors over the claims (thus, maintaining trust), as long alphabetical author lists convey little information on responsibility.

Particle physics collaborations can adopt corporate solutions to the problem of authorship, because there is a strong community culture: scientists are often located in the same place or share a piece of equipment. Such a solution is unlikely to work in the biomedical sciences where the membership of collaborations tends to fluctuate over time according to the requirements of the specific task undertaken. There is likely to be little cohesion amongst a group of scientists collaborating on a clinical trial who may never have met, might be located in different places, and might even be competing for funding. In biomedical science, authorship is part of a struggle for professional advancement, whereas in the small cohesive particle physics community it is just a fact of life<sup>91</sup>. This is not to suggest that attribution of authorship is never controversial. Rather, for individuals working in particle physics the focus may be more on getting noticed in informal settings than having a publication record<sup>92</sup>.

In adopting this model, particle physics communities have experienced not just a redefinition of the role of authorship within the reputational economy, but also an evolution in attribution norms towards a more expansive view of what counts as authorship and a procedural means for collectively establishing responsibility or authority. Particle physics collaborations have been more successful at regulating authorship than biomedical journals, because they have been able to develop a

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<sup>91</sup> Biagioli (n3) 272.

<sup>92</sup> Birnholtz (n43).

framework of processes which are better adapted to the different way that large collaborations author articles.

### ***5.3 The Application of Copyright Law***

The experiences of biomedical science and particle physics collaborations might offer a number of insights for copyright law. Before considering these, it might be useful to look at the application of copyright law's rules of subsistence to journal articles which report the research of large scientific collaborations.

A scientific journal article will almost always be considered an original literary work for the purposes of the CDPA. It is a more complicated task to determine which contributors to a large collaborative study will be considered to be 'authors'. It seems likely, however, that many of those listed in the by-line will not pass the joint authorship test. As discussed in Chapter 2, it is difficult to predict how the test will apply to cases of collective authorship. A few general comments, however, might be made.

First, very trivial contributions might not qualify for joint authorship as they are not 'significant'. In addition, many contributors will not have made contributions of the 'right kind'. This would tend to exclude preparatory contributions not reflected in the expression of the work; the contribution of 'ideas'<sup>93</sup>; and activities which are not of an 'authorship type'<sup>94</sup>. Thus, planning, controlling and directing experiments; carrying

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<sup>93</sup> *Anya v Wu* [2004] EWCA Civ 755.

<sup>94</sup> *Donoghue v Allied Newspapers* [1938] 1 Ch 106, *Brighton v Jones* [2004] EWHC 1157, [2005] FSR 288, *Fylde Microsystems v Key Radio Systems* [1998] FSR 449 (Ch).

out experiments; securing funding; providing access to samples or equipment; designing software or machines used in experiments; proof-reading papers, etc. may not be sufficient. Such contributions might be relevant where accompanied by more than a trivial contribution to the expression of the work, although there is little guidance in the case law on this point. The authorship limb of the joint authorship test is likely to exclude a large number of contributors who are currently named authors on many scientific publications. Those who have made no contribution to the journal article will certainly be excluded (eg, guest/gift authors, and contributors who have left particle physics collaborations but who must still be attributed according to the relevant protocol). Conversely, joint authorship might be available to those who have made authorial contributions but who are not listed as authors (ghost authors). For the purposes of UK copyright law it is not enough to agree to be an author<sup>95</sup>.

The instrumental/pragmatic approach to the joint authorship test is impossible to implement in the case of scientific collaborations. There are two types of candidates for authorship under the instrumental/pragmatic approach. The first is the person(s) responsible for the actual writing of the article (most likely a junior scientist). This requires one to exclude many contributors, such as those who designed and supervised the study; those who provided the content for different parts of the article; and those who checked it. The second is the person(s) who supervised the study and had most control over the research process (most likely a senior scientist). Yet, that person is unlikely to have made much of a direct contribution to the writing. Both choices seem wrong in principle as they tend to divorce authorship from the creation of the protected

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<sup>95</sup> Copinger et al [4.01], [4.38] citing *Levy v Rutley* (1871) LR 6 CP 523, 531 and *Wiseman v George Weidenfeld* [1985] FSR 525, 529 (where the point was accepted on all sides). Cf *Prior v Lansdowne Press* [1977] RPC 511 (SC of Victoria).

*expression*. The first requires a myopic focus on the process of fixation; and the second grants authorship to the most powerful player. In addition, this approach requires one to ignore the many people who have made contributions which have valuably added to, and shaped, the expression of the work. The failure of biomedical collaborations to reduce the number of authors of a scientific article by focusing only on dominant contributors is a lesson in the ineffectiveness of such a restrictive approach.

To be a joint author, the relevant contribution made must not be distinct. This may exclude authors of diagrams<sup>96</sup>. The requirement for collaboration is not particularly demanding, as it does not require proof of a specific intention to be a joint author<sup>97</sup>. Compliance with the social norms that govern the authorial group might indicate that a contributor is part of a collaborative endeavour, ie, that they share a common design. Even if a ‘gift’ or ‘guest’ author satisfied the authorship limb of the test (unlikely), they may fail the joint authorship test at this point, as they might not be seen to be collaborating with the other joint authors.

I have suggested that a restrictive approach to the joint authorship test may make it difficult to apply in a way that seems credible in light of the creative realities of a scientific collaboration. In addition, the presumption of authorship which arises where one’s name is on the work (s104(2)) is likely to be misleading when applied in cases of collective authorship in science, as the lists of authors on articles are often both over-

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<sup>96</sup> Where such a contribution is distinct, it may constitute a work in which copyright subsists independently of the rest of the article. In *Carlos v Javier and Maria Cruz* [2002] ECDR 23 (Madrid CA, 12th Section) it was held that originality will not be denied to a diagram merely because the concepts represented in it are commonly known, or are regularly described in, textbooks.

<sup>97</sup> *Weissmann v Freeman* 684 FSupp 1248 (SDNY, 1988); 868 F2d 1313 (2nd Cir, 1989) provides an interesting example of how an intention requirement might be interpreted in the context of scientific authorship.

inclusive and under-inclusive from a copyright law point of view<sup>98</sup>. Although the presumption may go some way towards indirectly incorporating the authorial norms of particular scientific communities in the determination of copyright disputes, it provides no room to accommodate the different hierarchies of authorial importance communicated to a scientific reader by the order in which authors are listed.

There are few cases on the subsistence and ownership of copyright in scientific journal articles<sup>99</sup>. This is likely to be due to the importance of authorship in science's reputational economy, which is constructed in opposition to the market economy. The right to royalties and control ensured by copyright, for example, seems to clash with scientific norms which encourage open dissemination and economic disinterestedness. The attribution of authorship lies right at the point of tension between market and reputation economies, as authorship (in addition to implying copyright ownership) influences the allocation of credit for scientific work<sup>100</sup>. On occasion, where the stakes in the reputational economy are high, scientists have turned to courts to resolve attribution issues<sup>101</sup>. False attribution of authorship was at the heart of *Weissmann v*

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<sup>98</sup> Even though this presumption might be easily displaced where there has been no contribution to the expression whatsoever, it may tip the evidentiary scales in favour of named authors in unclear cases.

<sup>99</sup> I have not been able to locate any cases concerning the application of the joint authorship test to a scientific journal article with a large number of authors. Disputes which implicate issues of authorship in science have tended to concern access to data or samples; defamation (*Noah v Shuba* [1991] FSR 14 (Ch)); misleading claims/fraud; or employment issues (eg, unfair dismissal following an authorship dispute). See: Dreyfuss (n54). In the US there are some cases which have found a fiduciary duty exists between students and supervising academics: *Chou* (n76); *Johnson v Schmitz* (n76).

<sup>100</sup> McSherry (n15) 245.

<sup>101</sup> In *Noah v Shuba* (n99) 33, for example, an epidemiologist initiated legal proceedings in relation to a magazine article which reproduced a portion of his work adding to it in a misleading manner, which seemed to suggest that he approved of certain products. In awarding damages for false attribution of authorship in respect of the added sentences, the court took into account the '... author's interests in his reputation and integrity of his work'. A perception of unfair attribution contributed to the dispute and tragic events in: *Fabrikant c. Swamy* (2011) QCCS 1385 (Superior Court of Quebec, Canada).

*Freeman*, a high-profile copyright dispute involving scientists in the US<sup>102</sup>. This case demonstrates that judicial characterisation of the context of creativity can be pivotal when it comes to applying the joint authorship test.

Dr Heidi Weissmann had worked for many years under the supervision of Dr Leonard Freeman. They had authored many articles together and had devised a syllabus together, which over the years they had both updated and revised independently. Weissmann independently published an updated altered version of the syllabus ('P-1'), which Freeman then reproduced without her permission under his own name. A key question was whether P-1 was a work of joint authorship they both owned or an original derivative work solely owned by Weissmann. The trial and appeals courts took significantly different views of the context, which influenced their assessment of each scientist's contributions to P-1.

Judge Pollack at trial construed P-1 as a 'stock piece' in evolution and therefore a work of joint authorship owned by both scientists. He was influenced by the pre-existing professional relationship between the two scientists. He emphasised Freeman's senior position and stressed that Weissmann's career had developed under Freeman's 'supervision, guidance and control'<sup>103</sup>. Judge Pollack observed that as 'principal investigator' Freeman was frequently responsible for the experiments that they had both been involved in, even though Weissmann typically did most of the

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<sup>102</sup> Trial judgment: *Weissmann v Freeman* 684 FSupp 1248 (SDNY 1988). Appeal: *Weissmann v Freeman*, 868 F2d 1313 (2nd Cir 1989). See also: C McSherry (n15) 68.

<sup>103</sup> More than half the judgment is dedicated to background and the relationship between the parties.

writing up<sup>104</sup>. Judge Pollack upheld Freeman's joint authorship claim because of his role in providing the authority for their joint work – focusing on his contribution to the ideas of scientific significance evidenced in the syllabus, rather than on the origin of its expression<sup>105</sup>. Judge Pollack even accepted Freeman's view as an expert opinion on whether the syllabus was relevantly original, dismissing Weissmann's arguments on this point as 'merely echo[ing] legal language found in the reported cases'<sup>106</sup>.

The Court of Appeals by a 2:1 majority reversed this decision, finding that P-1 was an original work solely authored by Weissmann, and that Freeman had infringed Weissmann's copyright by reproducing it. Whilst Judge Pollack had characterised the dispute as an 'uncommon controversy', Judge Cardamone of the Court of Appeals considered the case to be 'the paradigm of the problems that arise when a long relationship between accomplished professor and brilliant assistant comes to an end'<sup>107</sup>. Judge Cardamone acknowledged Weissmann's efforts to break away from her apprenticeship with Freeman by developing her own approach. In that context, their previous collaboration was seen as an example of science's slow evolutionary development in which innovations are necessarily based on pre-existing, often joint works<sup>108</sup>. In Judge Cardamone's assessment, Freeman had not made a relevant contribution to P-1 and there was no intention for joint-authorship. Further, in determining that the defence of fair use was not available, Judge Cardamone

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<sup>104</sup> *Weissmann v Freeman* (trial, n102) 1253-4: noting Freeman's name 'lent authority' to Weissmann's work.

<sup>105</sup> *ibid* 1256.

<sup>106</sup> *ibid* 1257.

<sup>107</sup> *Weissmann v Freeman* (appeal, n102) 1315.

<sup>108</sup> *ibid* 1319.

considered that in attributing authorship to himself Freeman stood to gain something valuable within the scientific community, which is ‘ill-measured in dollars’ but which might often influence professional advancement<sup>109</sup>.

In an attempt to reach a decision that took into account the peculiar context of scientific authorship, the trial judge was unduly influenced by the power dynamics which have often given senior scientists control over the attribution of authorship<sup>110</sup>. Judge Cardamone’s reasoning in the appeal decision is preferable because it incorporates a more nuanced understanding of scientific authorship, whilst remaining attentive to copyright law principles. For copyright, authorship is a question of law and not a matter of agreement amongst the parties<sup>111</sup>. The heart of copyright’s concept of authorship is the idea that authorship is about more than who ‘signs’ a work – it relates to the origin of the expression<sup>112</sup>. In this way copyright might provide a bulwark against power imbalances within authorial communities, a particular issue in science where authorship is associated with authority and tends to gravitate upwards. This is not to say that judges ought not to take into account social norms in determining authorship, but merely that it is inappropriate to defer to such norms<sup>113</sup>.

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<sup>109</sup> *ibid* 1324.

<sup>110</sup> (trial, n102) 1252, Judge Pollack even discussed Freeman’s conduct first, ‘in the order of seniority’.

<sup>111</sup> Stokes (n79) 124.

<sup>112</sup> See, Ginsburg (n88) discussing the dispute between Alexandre Dumas and his ghostwriter, August Maquet, as dramatized in the play *Signé Dumas* by Cyril Gely and Eric Rouquette.

<sup>113</sup> J Rothman, ‘The Questionable Use of Custom in Intellectual Property’ (2007) 93 Virginia LRev 1899, 1899 warns of the dangers of deferring to custom.



*Weissmann v Freeman* provides a warning of the dangers of uncritically adopting community norms governing the attribution of authorship<sup>114</sup>. The previous two sections have shown how values of authorship in modern scientific collaborations can be complex, varying from group to group, evolving over time, and even being contested within particular groups<sup>115</sup>. This case demonstrates how easily such norms are misconstrued. Yet, even where properly identified, social norms might enshrine power dynamics that risk distorting copyright's core notion of the author as the originator of expression protected as a copyright work. *Weissmann v Freeman* also provides an example of the value of retaining a legal notion of authorship in copyright law that is independent of community norms. It would have been difficult for Weissmann to obtain any redress within the scientific community. Indeed, during the dispute she was dismissed and Freeman was promoted<sup>116</sup>.

Although the reputation economy of science tends to operate in opposition to the market economy, scientists still depend upon copyright. Publications are necessary in order to obtain jobs, funding, and promotions, and journals rely on the copyright subsisting in articles to be able to market their publications<sup>117</sup>. The attribution of authorship on articles also establishes a locus for credit and responsibility for scientific claims. In this context, copyright might have an important norm-setting role in

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<sup>114</sup> *ibid.*

<sup>115</sup> Biagioli (n3).

<sup>116</sup> R Kaufman, 'After 5 Years, Heated Controversy Persists in Science Copyright Case', *The Scientist*, 14 September 1992 at: <<http://www.the-scientist.com/?articles.view/articleNo/12483/title/After-5-Years-Heated-Controversy-Persists-In-Science-Copyright-Case/>> accessed 26 August 2013.

<sup>117</sup> Scientists also benefit from broad circulation of their work to their peers in reputable journals. Birnholtz (n43).

establishing a legally enforceable standard for authorship which, in most jurisdictions, also entails a moral right of attribution<sup>118</sup>.

#### ***5.4 Insights for Copyright Law***

This section considers the insights this case study of scientific collaborations might offer copyright law. First, such collaborations demonstrate the importance of the noneconomic benefits of authorship. Second, they provide examples of imperfect solutions that copyright ought not to adopt wholesale because: (i) the ICMJE guidelines are under-inclusive; (ii) particle physics approaches are over-inclusive; and (iii) social norms ought to be approached with caution. Copyright law has an important role to play as a source of good authorship standards, although it may not be able to solve the authorship ‘crisis’ in the biomedical sciences. In the previous section I suggested that it might be difficult to apply the joint authorship test to collective authorship in science, particularly if the instrumental/pragmatic approach is taken. In this section I argue that there is enough flexibility within the joint authorship test to take into account the special characteristics of large collaborations as demonstrated in this Chapter without compromising copyright’s core notion of authorship.

The example of scientific authorship demonstrates the importance of the noneconomic consequences of authorship to some creative communities. This raises broader questions about common incentive-based justifications for copyright which others have considered elsewhere<sup>119</sup>. The intrinsic value of the label of ‘author’ is worth

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<sup>118</sup> Pila (n11); Dreyfuss (n54).

<sup>119</sup> The literature on IP’s negative spaces helpfully summarised by E Rosenblatt, ‘A theory of IP’s Negative Space’ (2011) 34(3) *Columbia J of L and the Arts* 317. See also p8 text at n37.

more within the scientific community than the possibility of recouping royalties. Attribution of authorship is something that scientists might negotiate prior to collaborative work and might even go to court to protect. The importance of the attribution of authorship, independent of economic rights such as copyright, reinforces the need to keep the concepts of authorship and ownership separate. The importance of the noneconomic consequences of authorship for scientists undermines one of the key assumptions of the instrumental/pragmatic approach: that streamlining the exploitation of the copyright interest is more important than ensuring that creators are recognised as authors. Indeed, most of the cases that have been brought to court concerning the authorship of scientific articles appear to have been motivated by the need to ensure accurate attribution of a work rather than a concern to recoup royalties<sup>120</sup>.

The processes by which large scientific collaborations create articles differs significantly from the romantic author model. A great level of organisation is required, and a division of labour is essential. The efforts of a number of highly specialised individuals, with considerable autonomy in relation to their own tasks, are coordinated with a view to achieving a common goal. The specialist knowledge or skills of many contributors means that in a real sense the final product could not exist without most, if not all, the contributions. Few, if any, contributors have the expertise to be held responsible for the work as a whole, but many are incentivised to contribute by the prospect of authorship credit. The ICMJE guidelines, which restrict authorship claims to dominant contributors, respond poorly to this creative model. They allow authorship to gravitate towards those with institutional authority, eliding the contributions of junior scientists. The particle physics approach is better adapted to the way that large groups

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<sup>120</sup> *Weissman v Freeman* (n102); *Noah v Shuba* (n99); *Anya v Wu* (n93).

create. Its inclusive, non-hierarchical attribution practices reward many contributors and internal consensus-based processes allow for the collective management of responsibility. The downside of this approach is that it results in long author lists which convey too little information about the origin of an article and tend to divorce authorship from expression. It would not be appropriate for copyright to adopt either of these approaches, because both clash with copyright's core notion of authorship as understood in terms of the origin of the protected expression.

Yet, whilst it is important to maintain a core independent legal notion of authorship in copyright law, this concept ought to be applied in a way that takes into account the peculiar nature of large group collaboration. Despite the hazards of incorporating social norms, it is important that copyright law remains connected to creative communities' own understandings about authorship in order to maintain its credibility as an important tool for encouraging and regulating creativity<sup>121</sup>. *Weissman v Freeman* demonstrates the value of an independent legal standard of authorship, which can be implemented in a way that is sensitive to the context of creativity. The current application of copyright's joint authorship test, with its impoverished understanding of collaboration, assumes an integrated notion of authorship that lacks sophistication in determining authorship in large collaborations, which often require a division of labour. The instrumental/pragmatic approach is difficult to apply as it is hard to identify one or two dominant authors. Attempts to do so are likely to reinforce power dynamics which are already thought to be unsatisfactory in science because they divorce authorship from the act of creation.

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<sup>121</sup> L Bently, 'Authorship of Popular Music in UK Copyright Law' (2009) 12(2) *Information Communication & Society* 179.

I would suggest that the joint authorship test already contains tools which might be used to gauge the value of contributions to large collaborative projects in a contextual way. In applying the joint authorship test, judges have tended to treat the requirement that a contribution be ‘significant’ together with the requirement that it be of the ‘right kind’<sup>122</sup>. Despite their flaws, social norms might provide a useful metric for determining which contributions are considered to be significant within the context of a particular collaborative project. This would imply taking a qualitative approach to the requirement for a significant contribution that incorporates contextual considerations. The requirement for a common design, not comprehensively elaborated in UK case law, might provide a conceptual apparatus to capture the different nature of creative processes in large collaborations. In this way, the common design requirement might also provide a helpful benchmark in determining whether a contribution to a joint project is ‘significant’. In the context of science, for example, the design of a study in accordance with the scientific method and the interpretation of results, are likely to be ‘significant’ contributions to the expression.

Most cases on joint authorship turn upon judicial characterisation of the contributions, particularly, whether a putative author has made the right kind of contribution<sup>123</sup>. For these purposes, preparatory contributions and the contribution of ideas tend not to count<sup>124</sup>. This might suggest that many valuable contributors to scientific collaborations, such as those involved in planning, controlling, and directing experiments; carrying out experiments; designing software or machines used in

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<sup>122</sup> See 2.2.3.

<sup>123</sup> *Hadley v Kemp* [1999] EMLR 589 (Ch); *Beckingham v Hodgins* [2002] EWHC 2143 (Ch), [2002] EMLR 45; *Bamgboye v Reed* (n48).

<sup>124</sup> *Robin Ray v Classic FM* [1998] FSR 622 (Ch); 4.4 above.

experiments; and proof-reading papers, do not make the right kind of contributions. Yet, as argued in the previous Chapter, the *expression* of the work ought not to be conflated with the *fixation* of that expression, as what is required is ‘something approximating penmanship’<sup>125</sup>. Some recent case law has seemed to take a more restrictive approach, privileging contributions to fixation over less tangible contributions to the expression<sup>126</sup>. The example of scientific collaborations, however, indicates the need to take a flexible approach to expression that takes into account the necessity of divisions of labour in large collaborations<sup>127</sup>. Other case law supports this approach<sup>128</sup>. Although copyright law ought to be wary of granting authorship to those who have no more than ‘signed’ a work, lending their authority to it, sometimes when ‘authority’ is combined with control over the creative process that results in a contribution which is evident in the expression, evidence of a relevantly authorial contribution may be found<sup>129</sup>.

The requirement that a contribution be of the right kind has been used as a way of enforcing copyright’s core notion of authorship<sup>130</sup>. In this way the joint authorship test might avoid the pitfalls of particle physics collaborations’ over-inclusive approach, by filtering contributions through copyright’s core notion of authorship, which favours

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<sup>125</sup> *Cala Homes v Alfred McAlpine Homes* [1995] EWHC 7, [1995] FSR 818.

<sup>126</sup> In *Ray v Classic FM* (n124) 636, Lightman J describing *Cala Homes* as likely to be exceptional. See also the discussion in L Zemer, ‘Contribution and Collaborations in Joint Authorship: Too Many Misconceptions’ (2006) 1(4) JIPLP 283. See discussion at p23 above.

<sup>127</sup> Zemer, *ibid* also argues for such an approach.

<sup>128</sup> *Cala Homes* (n125); *Heptulla v Orient Longman* [1989] 1 FSR 598 (HC of India); *Donoghue v Allied Newspapers* (n94).

<sup>129</sup> *Hadley v Kemp* (n123).

<sup>130</sup> *Fylde Microsystems* (n94) a technician who tested and debugged software was not a joint author of that software, because his work was more akin to proof-reading than authorship.

intellectual/creative contributions over mechanical ones and focuses on contributions evident in the expression (broadly construed). Courts have sometimes tended to adopt a restrictive interpretation of the joint authorship test, favouring those contributors who appear ‘dominant’ to the exclusion of other contributors<sup>131</sup>. This resembles the approach taken by biomedical journals in selecting a few authors who appear more worthy than others. This strategy is poorly adapted to the way in which large collaborations work together to create. The temptation to reduce the number of authors might be explained by instrumental concerns that arise from one of the consequences of joint authorship: joint ownership. Yet, authorship is a question that is conceptually distinct from ownership. Designations of authorship also usually entail moral rights, which have consequences that are quite separate from copyright’s economic rights.

Although the conventional notion of scientific authorship differs from copyright law’s concept of authorship, both are challenged by the activities of large collaborations. This Chapter has suggested that the ways in which scientific communities have responded to the authorship challenges posed by large scale collaboration might offer insights for copyright law. I have argued that the joint authorship test ought to be applied with an appreciation that large group authorship is a special kind of authorship. This requires taking into account the process of collaboration and not simply trying to identify a small number of dominant contributors. As collaborations grow in size, there is a necessary division of labour. Even when a collaboration is hierarchically organized, often no one contributor may be held responsible for its creative products. For these reasons, the joint authorship test ought to be sensitive to the relative importance of contributions within the particular context of a collaboration.

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<sup>131</sup> *Hadley v Kemp* (n123); *Brighton v Jones* (n94).

It is also important that the joint authorship test does not merely reproduce power relations, but tells us something about who is responsible for the creation of the expression of a work. For copyright, authorship ought to remain a question of law and not an empty vessel for unquestioningly incorporating external conceptions of authorship that might be unstable and contested within a creative community. Yet, the joint authorship test is flexible enough to allow it to be more sensitive to the creative processes of large collaborations than might commonly be thought. The joint authorship test, for example, might better allocate authorship within large collaborations by (i) taking an expansive, qualitative view of which contributions are ‘significant’ with reference to the joint project (common design); and balancing this by (ii) applying the restrictive filter of copyright’s core understanding of authorship.



## Chapter 6: Film

Films are, perhaps, the archetypal example of collective authorship as they tend to be a product of the efforts of a large number of specialised contributors. Unlike the other case studies considered in this thesis, the authorship of films has been specifically addressed by the CDPA. Films are to be treated as works of joint authorship<sup>1</sup>, with the producer and the principal director taken to be their authors<sup>2</sup>. This approach has been adopted as a response to the high risk, high investment nature of the film business. In this context, there appears to be good reasons to concentrate copyright ownership. But is the statutory designation of authorship to two particular contributors an effective solution to the problem of determining the authorship of works created by a large collaboration?

The legislative approach mirrors the film industry's historical tendency to hold one or two powerful players, often the director and/or producer, 'responsible' for a film. Yet, this view of authorship has constantly been under siege from different interest groups<sup>3</sup>. The recent trend is towards a more inclusive notion of authorship in line with the reality of the film-making process. Whilst economic control of a film tends to be streamlined through the assignment of rights by most contributors via contract; social perceptions of authorship are dispersed in long credits that make it impossible to tell

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<sup>1</sup> CDPA s10. Unless the producer and the principal director are the same person.

<sup>2</sup> CDPA s9(2)(ab).

<sup>3</sup> P Decherney, *Hollywood's Copyright Wars: From Edison to the Internet* (Columbia UP 2012) 90.

exactly where it begins or ends<sup>4</sup>. The film industry uses this ambiguity about authorship strategically as a way of encouraging contributors – by showing that, great or small, their contributions matter. In this way, as with some of the previous case studies, the economic and reputational incidents of authorship are separated<sup>5</sup>. Contracts, as well as being a vehicle to concentrate and redistribute copyright ownership in the production company, also have an important role to play when it comes to the noneconomic consequences of authorship, eg attribution.

Although the provisions on film copyright were intended to streamline determinations of the authorship of a film, the reality is far more complex. Films which are cinematographic works might also be dramatic works whose authorship is determined according to the joint authorship test<sup>6</sup>. This means that such works have many potential authors, and films are not insulated from the problems of applying the joint authorship test to works of collective authorship discussed in previous Chapters. Matters are further complicated by the fact that there are likely to be many different layers of copyright or underlying rights embodied in some films (each with potentially different authors). Indeed, I suggest that a restrictive approach to the application of the joint authorship test is likely to increase pressure on judges to recognise copyright in underlying works in order to provide remedies to creators<sup>7</sup>.

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<sup>4</sup> Screen credit seems to be part way between a designation of authorship and mere acknowledgement of a contribution. This can be seen by the controversial position of the ‘film by...’ or ‘possessory’ credit, to which screenwriters’ guilds have consistently objected. C Fisk, ‘The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000’ (2012) 32 Berkeley J of Employment and Labour L 215, 256-258.

<sup>5</sup> Chapter 3 (Wikipedia) and Chapter 5 (scientific collaborations).

<sup>6</sup> *Norowzian v Arks (No 2)* [2000] FSR 363 (CA).

<sup>7</sup> This may seem counter-intuitive given that such an approach tends to be motivated by a desire to reduce the number of creators with copyright interests in the same subject matter (2.3.2).

This Chapter begins with an overview of the contested nature of film authorship; the trend towards a more inclusive approach; and the pragmatic use of authorship credit in the film industry. The second section considers the complex layers of copyright that might subsist in a feature film, and the different rules that are used to determine the authorship of each layer. The third section looks at the use of private ordering solutions to resolve authorship questions and, in particular, the role of collective bargaining in strengthening the bargaining power of groups of contributors. The final section considers the insights for copyright law that arise from this case study.

Although in the CDPA ‘film’ might include many different works (eg, amateur video, news reports, footage of sporting events, surveillance footage), in this Chapter I focus on commercial feature films, because they are the clearest examples of collective authorship.

### ***6.1 Authorship Dynamics: The Pragmatic Value of Authorship***

In this section, I consider the dynamics of film authorship. Dominant views about the authorship of films have been constantly under siege as the film industry has grown and as power has shifted between different industry players. Historically, authorship of a film was seen as residing with the most powerful industry players, such as producers or directors<sup>8</sup>. In modern times, the industry/social understanding of authorship is more ambiguous, covering shifting sands and often employed pragmatically in the promotion of films. Authorship is atomised or fragmented in film credits for pragmatic reasons: to

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<sup>8</sup> In this context, authorship tends to be understood in terms of responsibility for the creative content of a film. In particular, because of their control over the production process, these figures have tended to be held responsible for whether a film is ‘good’ and also whether it is commercially successful.

encourage and reward a broad range of contributors. Although film credits are long, they are not meaningless. In fact, credit is a matter of great importance to industry players<sup>9</sup>.

Feature film production shares a number of characteristics with the other case studies of collective authorship. A large number of individuals are often involved in making a film. There is usually a division of labour that is organised hierarchically<sup>10</sup>. Most contributors have very specialised skills. They might include producers, directors, cinematographers, scriptwriters, actors, composers, visual effects technicians, set designers, costume designers, managers, microphone operators, location scouts, and many more. The types of contributions made to a film vary and include creative contributions, technical support, management, promotional work, logistics, funding, etc. Many contributors have a significant amount of control and autonomy over decisions within their sphere of responsibility. Most contributors work collaboratively with other contributors<sup>11</sup>. Some players have an important role in giving feedback and approving or contesting the contributions of others. The actions of contributors are guided by industry practices, instructions from senior players, their own aesthetic sensibilities, their view of the common project, and their skills base<sup>12</sup>.

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<sup>9</sup> C Fisk, 'Credit Where It's Due: The Law and Norms of Attribution' (2006) 95 Georgetown LJ 49, 80, 109.

<sup>10</sup> J Naremore 'Authorship' in T Miller and R Stam (eds) *A Companion to Film Theory* (Blackwell Publishing 2005) there is a mix of industrialised, technical, theatrical and artisanal practices.

<sup>11</sup> The screenplay, for example, is a highly collaborative undertaking that might evince the contributions of a number of key players. P Bloore, *Managing Creativity and Script Development in the Film Industry* (Routledge 2013) 10.

<sup>12</sup> Bloore (n11) 10 describing film production as an 'industrial collaboration of different creative and commercial agendas'.

Film resists traditional, romantic, notions of authorship<sup>13</sup>. In a real sense, a film could not be made without the contributions of all of these individuals. Yet, historically, authorship of a film has often been seen as residing with a few powerful players, typically producers, studios and directors<sup>14</sup>. These contributors all tend to have a great degree of control over the film-making process, particularly, the ability to grant or restrict the creative freedom of other contributors and even to replace them. The producer's and the studio's claim to authorship is justified by their investment in, and overall control of, the film making process and personnel<sup>15</sup>. The director's claim is based on their control over the creative aspects of the process such as the positioning of cameras, directing the actors, etc<sup>16</sup>. The precise amount of control exercised by these figures varies from production to production.

Most other contributors are credited in a way that resembles acknowledgements rather than authorial by-lines. Screen credits are governed by complicated rules negotiated by the various talent guilds. The extent to which other contributors ought to be considered authors is obfuscated because film credits do not indicate where authorship begins or ends<sup>17</sup>. This ambiguity is strategic, as it allows a wide range of

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<sup>13</sup> A Notaro, 'Technology in Search of an Artist: Questions of Auteurism/Authorship and the Contemporary Cinematic Experience' (2006) 57 *The Velvet Light Trap* 86, 87.

<sup>14</sup> Decherney (n3) 89.

<sup>15</sup> FJ Dougherty, 'Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under US Copyright Law' (2001) 49 *UCLA LRev* 225, 282-4, 311-13.

<sup>16</sup> *ibid* 311-13.

<sup>17</sup> Decherney (n3) 90: 'Hollywood authorship exists as a spectrum – one that is constantly in flux and always under siege'. The most significant contributors (the producer, the director, major actors, the screenwriter, the composer, etc) are often mentioned in opening credits as well as closing credits.

contributors to be rewarded and acknowledged<sup>18</sup>. Authorship is atomised, so each contributor is credited as the author of their specific contribution<sup>19</sup>. In respect of authorial works, copyright has a mechanism for recognising that contributors might have different shares of responsibility for the creation of a work, in the possibility that joint authors might be entitled to unequal shares of ownership of the copyright subsisting in their joint work<sup>20</sup>. Yet, in the case of film copyright, the designation of joint authorship to the producer and the principal director appears to preclude the possibility of such a nuanced approach to authorship<sup>21</sup>.

A possessory authorship credit to the director is often a powerful tool in the marketing of a film, for example, ‘A Stanley Kubrick Film’ (*The Shining*) or ‘A film by Quentin Tarantino’ (*Pulp Fiction*)<sup>22</sup>. This sort of credit has a role akin to a trade mark in that it suggests something about the quality or character of a film to potential theatregoers<sup>23</sup>. ‘A Steven Spielberg film’ such as *Jurassic Park*, for example, might be expected to have spectacular special effects. The value of leaving the question of film

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<sup>18</sup> Although those listed in the opening credits and at the beginning of the closing credits are considered to have made contributions of a more authorial-type, than those listed towards the end of the closing credits.

<sup>19</sup> They might also be celebrated for their particular contribution in award ceremonies and trade magazines.

<sup>20</sup> Based on the quantity and the quality of their contributions to the work, see n121, p27. There are no provisions, however, for a particular order in the attribution of authorship.

<sup>21</sup> Although where a film is also a dramatic work this approach might be implemented.

<sup>22</sup> A Martin, ‘Possessory Credit’ (2004) 45 (1) Framework 95. The possessory credit does not always refer to director: for example, in the case of ‘Tim Burton’s *The Nightmare Before Christmas*’ Tim Burton was a writer and producer, not the director. Possessory credits have also sometimes been used to refer to the writer of a work upon which a film is based, for example, ‘Bram Stoker’s *Dracula*’.

<sup>23</sup> On the importance of the label of ‘author’ outside the copyright context, see p36.

authorship undetermined is so significant that these sorts of possessory credits have long been resisted by other stakeholders, particularly writers<sup>24</sup>.

In contrast to the other case studies, film production is usually characterised by high costs and high risks<sup>25</sup>. The film industry is often seen as dominated by a few major (Hollywood) studios. The studio structure facilitates the funding of films and mitigates the risks of film production. Studios can rely on a few high profit earning films or ‘tent-poles’ to finance the majority of films<sup>26</sup>. Preferred locations for filming and producing films change from year to year according to the availability of favourable regulatory regimes. In the UK, commercial film production is dominated by independent film productions which usually require funding to be amassed from a variety of public and private sources<sup>27</sup>. These sorts of productions rely on a delicate coordination of interests<sup>28</sup>, and even critically successful independent production companies can face

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<sup>24</sup> Dougherty (n15) 293; Fisk (n4).

<sup>25</sup> Film production in the UK is precarious and often unprofitable. See: R Murphy, ‘Postscript: A Short History of British Cinema’ in R Murphy (ed) *The British Cinema Book* (3rd edn, Palgrave Macmillan 2009) 417, 423.

<sup>26</sup> J Garon, ‘Content, Control, and the Socially Networked Film’ (2010) 48 U of Louisville LRev 771, 777-778.

<sup>27</sup> A significant proportion of film funding comes from government schemes and the distribution of Lotto funds. The BFI website provides information about available funding: <<http://www.bfi.org.uk/film-industry>>. See also: ‘A Future For British Film: It begins with the audience...’, Film Policy Review, Department for Culture Media and Sport, 2012, 40. On the use of subsidies to promote creativity (instead of intellectual property rights): S Breyer, ‘The Uneasy Case For Copyright: A Study of Books, Photocopies and Computer Programs’ (1970) 84(2) Harvard LRev 281; J Love and T Hubbard ‘The Big Idea: Prizes to Stimulate R&D for New Medicines’ (2007) 82 Chicago-Kent LRev 1519. Different concerns relate to the production of short films, which can often be produced on a shoe string budget.

<sup>28</sup> Channel 4, BBC Films and the UK Film Council generally support films only as partners in complicated co-production deals that sometimes take years to set up: R Murphy, ‘Postscript: A Short History of British Cinema’ in R Murphy (ed) *The British Cinema Book* (3<sup>rd</sup> ed, Palgrave Macmillan 2009) 423.

chronic financial difficulties<sup>29</sup>. Where a number of different companies are involved in financing and distributing a film, rights management can be a complex affair<sup>30</sup>.

As risk is such a dominant feature of the industry, studios and production companies generally seek ownership of all intellectual property rights that might arise as a result of their investment<sup>31</sup>. Production companies consolidate their ownership of rights through contracts with all the various contributors to ensure they are unimpeded in their exploitation of the final product – so they can recoup their investment. The need to streamline distribution was an important factor in the reforms which lead to the designation of the producer as the author of a film in the UK<sup>32</sup>. Indeed, the addition of the principal director was an afterthought, primarily implemented to comply with the EU Duration Directive<sup>33</sup>. Since the first moving pictures, views on film authorship have been influenced by power struggles between different categories of contributors to determine the content of copyright law with respect to film<sup>34</sup>. Lobbying has been particularly important in this context. The effective lobbying of groups representing the interests of producers and directors goes some way to explaining the special protection they are awarded under the CDPA.

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<sup>29</sup> J Barnett, 'Hollywood Deals: Soft Contracts For Hard Markets' Duke LJ (forthcoming, available at SSRN: <<http://ssrn.com/abstract=2118918>>) 7-8.

<sup>30</sup> Complicated arrangements to share revenues from distribution can result in disputes, see M Rimmer, 'Heretic: Copyright Law and Dramatic Works' (2002) 2(1) QUT LRev 131, 137-9.

<sup>31</sup> Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community of 6 December 2002, COM (2002) 691.

<sup>32</sup> P Kamina, *Film Copyright in the European Union* (CUP 2004) 138.

<sup>33</sup> L Bently and B Sherman, *Intellectual Property Law* (OUP 2009) 124.

<sup>34</sup> Rimmer (n30); Decherney (n3) 7-10, 89.



Although copyright law provisions on film authorship appear to be in the producer's favour, the significant economic investment that many films require has led production companies to be cautious of relying upon the uncertainties of copyright to regulate the authorship and ownership of films. Decherney carefully outlines how the film studios have used contract to stay one step ahead of copyright law<sup>35</sup>. This may suggest that copyright law's provisions have little practical effect, yet, as I argue in 6.3, they are an important source of default standards<sup>36</sup>. These standards are particularly important for those in weaker bargaining positions as they may help them to gain recognition and fair remuneration for their contributions<sup>37</sup>. Additionally, copyright law is important, as not everything is comprehensively anticipated with contracts, particularly in the early stages of a project when greater flexibility is needed<sup>38</sup>.

As the film industry has transformed over time, different players have enjoyed prominence as authors. In the marketplace and in the eyes of the general public, film authorship has often been linked to financial clout and/or control of the creative process<sup>39</sup>. This was particularly the case at the height of the production of studio films by the 'majors' or the 'big five' Hollywood studios<sup>40</sup>. Films were originally sold on the

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<sup>35</sup> Decherney (n3) 99-101.

<sup>36</sup> On the significance of legal rules in providing bargaining endowments, see: R Mnookin and L Korhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LRev 950, 968.

<sup>37</sup> This is a more favourable outcome than granting them non waivable rights, as it still allows for the consolidation of copyright ownership (via contract) in the hands of the more powerful player, who is likely to best placed to ensure the most effective exploitation of the work. Contributors have an incentive to enter into such contracts, because most cannot exploit their copyright interest separately, see p159.

<sup>38</sup> Often much is left to an oral agreement or handshake at these stages and with 'key talent': Barnett (n29).

<sup>39</sup> Charlie Chaplin was presented as a romantic author figure in his times: Decherney (n3) 67-76

<sup>40</sup> From 1928 to 1949 these were: Loew's/MGM, Paramount, Fox (which became 20th Century-Fox after a merger in 1935), Warner Bros and RKO.

basis of the novelty of the technology. Initially, producers of that technology, such as Thomas Edison, were the most important figures in the film industry<sup>41</sup>. With the rise of the studio system, some corporate executives took on the role of ‘impresario’ and were highly visible. At that time, screenwriters and other contributors were paid employees of studios on long-term contracts and so were seen more as delegates than authors<sup>42</sup>. As auteur theory came to prominence, there came to be a greater appreciation of the role of the director, particularly certain directors who had a signature style, such as, Alfred Hitchcock<sup>43</sup>.

Since its early days, film production has also been closely linked to the cult of celebrity. In some situations celebrity names are used in a way that implies quasi-authorship. The ‘star system’ particularly encouraged credit to gravitate towards the celebrities whose names brought attention to movies. Agents might use their client’s star power as a bargaining chip to negotiate credit for the star as an ‘executive producer’. Credit is so significant that stars might accept less remuneration for a better credit. Investment in films might be shored up by the commitment of a famous star that has a certain pulling power in attracting audiences. Whilst it is true that one might garner some information about the likely quality of a film from the names of certain stars – such as Tom Cruise, Charlie Chaplin or Anthony Hopkins – star names are generally employed somewhat cynically for their ability to assure ‘bums on seats’.

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<sup>41</sup> Decherney (n3) Ch 1.

<sup>42</sup> J Schwab, ‘Audiovisual Works and the Work For Hire Doctrine in the Internet Age’ (2011) 35 Columbia JL & Arts 141, 147.

<sup>43</sup> P Watson, ‘Cinematic Authorship and the Film Auteur’ in J Nelmes (ed) *Introduction to Film Studies* (5<sup>th</sup> ed, Routledge 2012) 142, 148-152.

Whilst stars are sometimes held responsible for box office flops<sup>44</sup>, on other occasions they are able to successfully distance themselves from films by arguing that they lacked control over the end product<sup>45</sup>. Stars are rarely seen as responsible as an author of the overall film in the same way studios or directors might be (unless they also had some involvement in producing, writing or directing it).

In the film industry, groups compete for status. Those viewed as artists have tended to be granted more prestige than those who are considered technicians or craftsmen. Yet, no one is clearly *the* author of a film. After the dissolution of the studio system in the 1950s, contributors tended to be contracted to work on a film by film basis<sup>46</sup>. This led to an improvement in status for ‘creative’ contributors, partly because they appeared more like authors than those who made mechanical or technical contributions<sup>47</sup>. Since this time, contributors’ attempts to vie for more control, remuneration, and credit have tended to be linked to claims of responsibility for important creative elements in a film. Less powerful contributors have also begun drawing attention to the creative aspects of their work in an attempt to improve their status. The screenwriters’ guild, for example, stressed the creative nature of writers’ contributions as part of their bargaining to improve the terms of collectively bargained agreements<sup>48</sup>. Those arguing for an improvement in conditions for visual effects artists

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<sup>44</sup> C Rosen, ‘“Transcendence” is a Real Bad Flop for Johnny Depp’, *The Huffington Post*, 21 April 2014 <[http://www.huffingtonpost.com/2014/04/21/johnny-depp-transcendence-flops\\_n\\_5184999.html](http://www.huffingtonpost.com/2014/04/21/johnny-depp-transcendence-flops_n_5184999.html)>; G Macnab, ‘Johnny Depp’s New Film Transcendence is Yet Another Expensive Flop – So Has The Star Lost His Mojo?’ *The Independent*, 30 April 2014.

<sup>45</sup> For example, K Finbow ‘Nicole Kidman: ‘I had not control over Grace of Monaco’ *Digital Spy*, 27 May 2014.

<sup>46</sup> Schwab (n42) 147.

<sup>47</sup> Decherney (n3) 89-90.

<sup>48</sup> *ibid.*

also stress their effect on the overall aesthetic of the film<sup>49</sup>. Thus, authorship is used as a tool to improve a contributor's bargaining position with more powerful industry players.

Authorship remains a greatly disputed issue for film studies today. It is not necessary to give a comprehensive account of film scholarship here, but suffice to make the following points. Early philosophy of film struggled with the question of whether film could be recognised as an art form<sup>50</sup>. As a popular cultural form, cinema appeared too vulgar to be considered on the same level as opera, theatre or poetry<sup>51</sup>. The idea of the director as *auteur* was first suggested by François Truffaut, who became one of the central directors in the French New Wave<sup>52</sup>. He argued that the only films worth valorising as 'art' were those in which the director had direct control over production and screen writing as well as in relation to the actors' performances<sup>53</sup>. His ideas were picked up by film theorist Andrew Sarris and auteur theory grew in importance within the context of film studies<sup>54</sup>. Limiting the number of 'authors' of a film made it look

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<sup>49</sup> E Rome, 'Oscars: Visual Effects Artists Protest Outside Dolby Theatre' *Entertainment Weekly*, 25 Feb 2013 <<http://insidemovies.ew.com/2013/02/25/oscars-visual-effects-protest-life-of-pi/>> citing Bill Westenhofer's comments in support of fellow striking visual effects artists: 'Visual effects is not just a commodity that's being done by people pushing buttons... *Life of Pi* shows that we're artists not just technicians'.

<sup>50</sup> T Wartenberg, 'Philosophy of Film' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2014) <<http://plato.stanford.edu/archives/fall2014/entries/film/>>. Copyright law has similarly struggled with whether to treat film as an authorial or entrepreneurial work, see 6.2.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.* Truffaut's manifesto 'A Certain Tendency of the French Cinema' published in *Cahiers du Cinéma* January 1954 (No 31) translated and reproduced in B Keith Grant (ed), *Auteurs and Authorship: A Film Reader* (Blackwell 2008) 9.

<sup>53</sup> Wartenberg (n50).

<sup>54</sup> In 1962 Andrew Sarris called the approach, referred to as *la politique des auteurs*, the auteur theory: A Sarris, 'Notes on the Auteur Theory in 1962' in Keith Grant, *ibid* 35. See also A Astruc, 'The Birth of the Avant Garde: Le Caméra Stylo', *L'Écran français* (30 March 1948).

less like a product of technicians and more like a work of art, the product of a romantic author: the director. By adopting literature's romantic author trope as the dominant paradigm for understanding film, theorists paved the way for the acceptance of film as a respectable art and this allowed for the growth of film studies as a discipline<sup>55</sup>.

Auteur theory has since been largely discredited because of its neglect of other important contributions to a film<sup>56</sup>. The strategies by which the number of authors of a film was restricted appeared artificial and highly constructed<sup>57</sup>. Yet, auteurism succeeded in cementing the authorial role of the director in public understanding<sup>58</sup>. Now, a director's reputation might sell a film almost as effectively as the reputation of its stars<sup>59</sup>. It also profoundly affected Hollywood's view of its own past<sup>60</sup>. Auteurism is not universally accepted in the film community (it is now primarily seen as a marketing tool)<sup>61</sup>. Instead, film-making is widely acknowledged to be a cooperative, collaborative activity<sup>62</sup>. The vast majority of contemporary film scholarship also favours an inclusive approach in which multiple authorship is embraced as a better model than auteurism<sup>63</sup>.

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<sup>55</sup> Naremore (n10) 10-11.

<sup>56</sup> It was thought to have distorted the way that films were understood. Wartenberg (n50) describes the theory as 'clearly flawed'. See also: A Martin, 'Possessory Credit' (2004) 45 (1) *Framework* 95.

<sup>57</sup> B Gaut, 'Film Authorship and Collaboration' in R Allen and M Smith (eds) *Film Theory and Philosophy* (OUP 1997) 149.

<sup>58</sup> Fisk (n4) 257, 276 describes it as a threat to screenwriters in addition to the work for hire doctrine in the US.

<sup>59</sup> Notaro (n13) 87.

<sup>60</sup> Naremore (n10) 16.

<sup>61</sup> Watson (n43) 157-161 discussing Quentin Tarantino as a contemporary case for auteurism (within the context of an overall argument in favour of a pragmatic approach to film authorship).

<sup>62</sup> Rimmer (n30) 135-6.

<sup>63</sup> Gaut (n57) 149; P Livingston, 'Cinematic Authorship' in Allen and Smith (n57) 132; P Livingston, *Art and Intention* (OUP 2005); P Livingston, 'On Authorship and Collaboration' (2011) 69(2) *J of Aesthetics and Art Criticism* 221; P Sellors, 'Collective Authorship in Film' (2007) 65 *J of Aesthetics and Art*

Although a discussion of individual directors' styles remains a relevant project, contemporary film scholarship pays more attention to the context in which films are produced (influenced by cultural studies and semiotic analysis). The debate on film authorship remains, however, a lively topic in aesthetics where the focus is on how to conceptualise the authorial group responsible for creating a film<sup>64</sup>. This view of the dynamics of film authorship suggests that an inclusive approach to the joint authorship test would be more aligned with the prevailing social norms<sup>65</sup>.

## ***6.2 The Subsistence of Copyright***

In this section I argue that copyright law fails to provide adequate means of determining the authorship of a film because it struggles to conceptualise the subject matter of protection<sup>66</sup>. Whilst from one angle a film is an industrial product, a recording best treated as an entrepreneurial work<sup>67</sup>; from another it is a highly creative work best treated as an authorial work. The current hybrid approach to the treatment of films in the UK reflects this ambiguity. In so doing it eschews the certainty that the introduction of (first fixation) film copyright was expected to provide. I argue that the recognition of

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Criticism 263; S Bacharach and D Tollefsen, 'We Did It: From Mere Contributors to Coauthors' (2010) 68(1) *J of Aesthetics and Art Criticism* 23; S Bacharach and D Tollefsen, 'We Did It Again: A Reply to Livingston' (2011) 69(2) *J of Aesthetics and Art Criticism* 225; DH Hick, 'Authorship, Co-Authorship, and Multiple Authorship' (2014) 72(2) *J of Aesthetics and Art Criticism* 147.

<sup>64</sup> Whether by the intentional contribution of artistically relevant features (Gaut); according to various types of shared intention (Livingston, Sellors); by membership of an artistic group that shares a joint commitment (Bacharach & Tollefsen); or in terms of responsibility for the form of the expression (Hick). Citations above.

<sup>65</sup> See 8.2 on the limits of incorporating social norms in legal decision-making.

<sup>66</sup> Copyright law also struggles to define the boundaries of the literary work(s) on Wikipedia, see 3.2.1.

<sup>67</sup> Barnett (n29) 7: 'A Hollywood studio... is primarily a vehicle for coordinating the inputs required to assemble a film project and financing, promoting and distributing films produced by internal production divisions and independent production entities'.

additional layers of copyright flows from the imperative to protect creators who would otherwise be excluded by the narrow view of the joint authorship of a film. I begin by briefly introducing the history of copyright protection for film. Then, I consider the potential complexity of copyright interests in a film (6.2.2). The next sections look at the subsistence of copyright in a film as a first fixation (6.2.3); and as a dramatic work (6.2.4). I end this section with a comment on the use of pragmatic reasoning in a US decision on the authorship of a film, which has been much commented upon: *Aalmuhammed v Lee*.

### **6.2.1 A Brief Historical Note**

The way that copyright law has dealt with film has evolved over time. The 1911 Act provided that the individual frames of a film could be protected as photographs. In addition, a dramatic work was expressly defined to include ‘any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character’<sup>68</sup>. In 1952, the Gregory Report recommended that film be protected as a distinct type of work, in large part due to the practical worry that too many people might claim authorship of a film, resulting in a complexity of claims<sup>69</sup>. The Gregory Report considered that films bore more resemblance to industrial products than they did to authorial works<sup>70</sup>. The perceived complexity of the collective product led to the recommendation of a fixation-only form

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<sup>68</sup> 1911 Act s35(1). Before then, individual frames of a film could be protected as a series of photographs under the Fine Arts Copyrights Act 1862 and the dramatic content of a film could potentially be protected under the Dramatic Copyright Act 1833.

<sup>69</sup> ‘Report of the Board of Trade Copyright Committee’ (Her Majesty’s Stationery Company, October 1952) (‘Gregory Report’) 37.

<sup>70</sup> *ibid* 34 for this reason a relatively short duration of protection was recommended.

of protection. Accordingly, the subsequent 1956 Act protected cinematograph films as a first fixation, entrepreneurial-type work and explicitly removed any protection for film as an authorial work. Copyright was owned by the maker (the person who would now be considered to be the ‘producer’ under the CDPA)<sup>71</sup>. This history is relevant because it shows a tendency to prefer to treat films as industrial products, and thus, to award copyright to the entrepreneur who took initiative and invested in the project. In this way the law was shaped to fit industry practice, rather than existing copyright principles on creative subject matter<sup>72</sup>.

It seems counter-intuitive to recognise films as the product of creative collaboration, but then to deny copyright protection to potential film authors simply on the basis that there are too many of them<sup>73</sup>. This tension between two conceptions of a film (as an industrial product, but also as a creative work) might explain the hybrid protection that films enjoy today that includes mechanical protection of the fixation (‘film’); and more traditional protection of the cinematographic work (‘dramatic work’)<sup>74</sup>. As a compromise and concession to Europe, eventually the director was also considered to be an author of a film. Film copyright reflects a historical view of film as a craft and the policy concern to reward investment. However, the true complexity of film authorship is reflected by judicial development of the law in the acknowledgement

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<sup>71</sup> 1956 Act s13(10).

<sup>72</sup> M Handler, ‘Continuing Problems with Film Copyright’ in F Macmillan (ed) *New Directions in Copyright Law: Volume 6* (Edward Elgar 2007) 173, 177. In the Gregory Report this was partly explained by the fact that no *single* creator of a film could be found. This comment appears to confirm the fears of some scholars, that copyright law is unduly influenced by a romantic notion of authorship, see 2.4.

<sup>73</sup> *ibid.*

<sup>74</sup> The distinction is probably best understood by reference to the distinction made in the 1956 Act between (authorial) ‘works’ and ‘other subject matter’ (entrepreneurial works).



that a film might be a dramatic work (likely to have more authors); and in the recognition that individual contributions might constitute separately protectable copyright works. I argue that these developments are a response to the evidently authorial characteristics of most films and the underlying imperative in copyright law to protect creators.

### **6.2.2 The Complexity of Film Copyright**

Determining the subsistence of copyright in film is a complicated matter. There are likely to be a number of overlapping copyright interests, as contributors may make separate copyright works which are used in a film. Indeed, according to Kamina, the main problem is the diverse nature of the numerous different contributions made to a film, rather than simply the large number of people who have contributed<sup>75</sup>. These contributions can cover the whole spectrum of types of work protected by copyright and may be made at different points in the production process. Some may exist autonomously so as to be capable of being exploited independently of the film (eg, props and costumes); whereas others may be inseparable from the film (eg, editing). Some autonomous elements will not be protected by copyright, as they do not fall within any of the categories for copyright works (for example, mise-en-scene). Therefore, fictional characters will not be afforded copyright protection<sup>76</sup>, although drawings of cartoon characters in animated film may be protected as artistic works<sup>77</sup>.

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<sup>75</sup> Kamina (n32) 130. *Lucasfilm v Ainsworth* [2008] EWHC 1878, [2009] FSR 103.

<sup>76</sup> Kamina (n32) 103 summarises the authorities: *Kelly v Cinema Houses Ltd* [1928-35] Macq Cop Cas 362 (cf dicta of May LJ in *O'Neill v Paramount* [1983] CAT 235).

<sup>77</sup> *King Features Syndicate v O and M Kleeman* [1941] AC 417 (HL) (Popeye); *Mirage Studios v Counter-Feat Clothing* [1991] FSR 145 (Ch) (Teenage Mutant Ninja Turtles).

Facial makeup may not be permanent enough to attract copyright<sup>78</sup>. There may be copyright in the music used as a musical work (or musical works) and also as a sound recording. The actors are likely to have performance rights in respect of their performances<sup>79</sup>. The screenplay is a dramatic work and the final film might be considered to be a derivative (dramatic) work of that screenplay<sup>80</sup>.

Prior to *Lucasfilm v Ainsworth*, the general position appeared to be that sets, costumes or props may be artistic works<sup>81</sup>. In *Shelley Films v Rex Features* there was held to be a serious issue to be tried as to whether copyright subsisted in costumes and prostheses as works of artistic craftsmanship and it was held plainly arguable that copyright could subsist in a film set as a work of artistic craftsmanship<sup>82</sup>. In *Creation Records* Justice Lloyd could ‘readily accept that a film set does involve craftsmanship’, distinguishing it from an assembly of ‘objets trouves’ (he made no comment on whether it might be considered ‘artistic’)<sup>83</sup>. In *Lucasfilm* (HC) Justice Mann thought that a Storm Trooper helmet was plainly a work of craftsmanship, but that it was not *artistic*<sup>84</sup>. The careful arrangement of a set might be considered to be a compilation, although it

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<sup>78</sup> *Merchandising Corporation of America v Harpbond* [1983] FSR 32 (CA).

<sup>79</sup> See Pt II CDPA.

<sup>80</sup> It is unlikely to be seen as a literary work given that this category of work explicitly excludes anything that might be considered a dramatic work (s3(1) CDPA).

<sup>81</sup> Cf *Lucasfilm* (n75).

<sup>82</sup> [1994] EMLR 134, 143 (Mann QC sitting as Deputy High Court Judge): ‘In principle this would seem correct [that copyright can subsist in a film set as a work of artistic craftsmanship] since, if the set is imaginatively conceived and implemented overall as a work of artistic craftsmanship, it cannot matter that it happens to be made up of numerous, perhaps many thousands, of components in some of which, when considered separately, copyright might not exist, provided the effect and intent overall is artistic’.

<sup>83</sup> [1997] EMLR 444, 449.

<sup>84</sup> *Lucasfilm* (n75). For similar reasons that it was held that the helmet was not a sculpture, as discussed in the next paragraph. The issue was not considered on appeal: *Lucasfilm v Ainsworth* [2009] EWCA Civ 1328, [2010] Ch 503.

may not be a collage<sup>85</sup>. Although a compilation is a type of literary work (and a film set might not seem to be naturally characterised as a literary work), this interpretation is plausible given the definition of a literary work as including anything that is ‘written’<sup>86</sup>. In the CDPA, ‘writing’ is defined very broadly to include ‘any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded’<sup>87</sup>.

*Lucasfilm v Ainsworth*, however, might seem to suggest that props will only be considered to be artistic works in rare cases. In that case, the Supreme Court affirmed lower court decisions that a Storm Trooper helmet from the film *Star Wars* was not a sculpture<sup>88</sup>. The court stressed that it was the film itself that was the ‘work of art’, and that, as a step in the production process – the stormtrooper helmet was necessarily utilitarian, rather than artistic<sup>89</sup>. This was despite the fact that it contributed to the artistic effect of the finished film. Although the Supreme Court did not interfere with the trial judge’s findings on this point, it did express some hesitation in accepting them

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<sup>85</sup> In *Creation Records* (n83) the arrangement of a scene was held to be too ephemeral to constitute a collage. The court also thought that the placement of objects (without any sticking or gluing) precluded finding it to be a collage. The court did not consider whether the scene might be protected as a compilation.

<sup>86</sup> CDPA s3(1).

<sup>87</sup> This argument does not apply in relation to musical works on the score because a literary work is defined as excluding musical works. An editor’s selection and arrangement of the scenes is also unlikely to be able to be protected as a compilation because it is not relevantly written in any notation or code.

<sup>88</sup> *Lucasfilm v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208. At first instance (n75), Mann J held that the helmet was not a work of artistic craftsmanship (not challenged on appeal). He set out a multifactor test for determining whether a work constitutes a ‘sculpture’ that was accepted by the UKCA and the UKSC.

<sup>89</sup> *ibid* [44]: ‘But it was the *Star Wars* film that was the work of art that Mr Lucas and his companies created. The helmet was utilitarian in the sense that it was an element in the process of production of the film’.

given the ‘imagination that went into the concept’ of the helmets<sup>90</sup>. In this way, the court seems to consciously leave space for the protection of highly imaginative and artistic props, sets, or costumes as artistic works as long as they satisfy the multi-factor test identified by Justice Mann at first instance.

Oddly, the trial court considered that the preliminary paintings that the Storm Trooper costumes were based upon (but that were not included in the film) might be artistic works<sup>91</sup>. By extension, this suggests that storyboards might be protected as artistic works. Yet, it is difficult to see why the helmet is a utilitarian object on the basis that it is a step in the production process; whereas the paintings it is based upon are artistic works. The main difference is incorporation into the final product (the film)<sup>92</sup>. The best way of understanding this strained reasoning, is that the court is construing the boundaries of the ‘work’ so as to avoid overlapping copyright interests. If copyright law’s imperative to incentivise and reward creators is to be taken seriously, surely the corollary of refusing to recognise copyright subsisting in component parts of a film, ought to be a broader approach to construing the authorship of the film as a whole<sup>93</sup>. Indeed, *Lucasfilm* follows the recognition that some films will also be dramatic works

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<sup>90</sup> *ibid.* Even Mann J, at first instance, had accepted that the helmet was one of the most abiding images of the film.

<sup>91</sup> They were considered to be original graphic works. This appears to have been conceded by Mr Ainsworth (n75) [89].

<sup>92</sup> Another explanation might be that a helmet has a non-artistic purpose (protecting the head), which a painting does not. Yet, this ignores the fact that this helmet was designed so as to suggest various qualities of the character of a Storm Trooper. The creator’s aesthetic purposes in making the Storm Trooper helmet seem to be impliedly accepted in the court’s reasoning that a replica helmet in a twentieth century war film would be less likely to be a sculpture (n88) [44].

<sup>93</sup> The Gregory Report (n69) 36-7 relied upon the comparable reasoning (in the opposite sense) when it justified the narrow definition of film authorship which it proposed on the basis that many contributors to a film would have separate copyrights in the underlying works they had created.

in *Norowzian v Arks (No 2)*<sup>94</sup>. Yet, in stressing the utilitarian nature of the helmet, the reasoning of the court in *Lucasfilm* obscures more than it reveals. This is essentially an aesthetic judgment, although it is not entirely clear which parts of the evidence specifically supported it<sup>95</sup>. Surely the decision would have had more secure foundations if the court had connected its reasoning to the common design of contributors to the film<sup>96</sup>. As a step in the production of the film, the creation of the helmet might potentially entitle its creator to joint authorship of the film as a dramatic work (although it is unlikely to count as a significant contribution of the right kind). The court could have held that, as a component of a joint work that is ‘not distinct’, there is no separate copyright in the helmet.

The complex issue of the underlying rights in a film is further complicated by CJEU’s suggestion in *Infopaq* that parts of a work that reflect the author’s own intellectual creation may be separately protected as copyright works. On this view, a particular scene of a film (or component parts) might be separate copyright works where they are the intellectual creation of its author. This is at odds with UK decisions that stress the necessity of objectively determining the scope of the work, as copyright should not be seen as a ‘legal millefeuilles’ in which a claimant might try to claim various layers of protection by asserting that small parts of a work are independent works, thus making it easier to establish that an infringer has copied a substantial part of

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<sup>94</sup> Considered at 6.2.4 below. More contributors are likely to count as authors of a dramatic work than do as authors of a film.

<sup>95</sup> J Pila, ‘The “Star Wars” Copyright Claim: An Ambivalent View of the Empire’ (2012) LQR 15, 17 arguing that the court’s approach was correct insofar as the multi-factor test focused on the intent of the creator and the view of society with respect to the nature of the creation; but that the suggestion that objects created as a step in *any* production process would not be artistic works is more problematic.

<sup>96</sup> There is some space for consideration of these factors in the multi-factor test for a sculpture adopted by Justice Mann (n75).

the work<sup>97</sup>. In Chapter 3, I argued that this approach is problematic in the context of Wikipedia and the same appears true here for film<sup>98</sup>.

In addition to the potential complexity of underlying rights in component parts of a film; many films are likely to enjoy dual protection as a whole<sup>99</sup>. A film which is a cinematographic work may be protected as a dramatic work, and the recording of that film (or first fixation) is potentially protected by film copyright. The next two subsections consider the authorship of both these types of work.

### 6.2.3 Film as a First Fixation

Film copyright is a mechanical-type of copyright that subsists in the recording of images and sound<sup>100</sup>. Copyright is acquired by the act of first recording, irrespective of any personal labour or skill<sup>101</sup>. Copyright will subsist in the film as long as it is not simply copied<sup>102</sup>. The definition of a film is broad, and includes, ‘recording on any medium from which a moving image may by any means be produced’<sup>103</sup>. In *Spelling Goldberg v BPC Publishing* there were said to be three characteristics of film: (i) a sequence of images; (ii) recorded on material; (iii) capable of being shown as a moving

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<sup>97</sup> *IPC Media v Highbury-Leisure Publishing* [2004] EWHC 2985, [2005] FSR 20 [23] (Laddie J), approved in *Coffey v Warner/Chappell Music* [2005] EWHC 449 (Ch), [2005] FSR 34 (Ch) [10] (Blackburne J).

<sup>98</sup> As argued above, p48.

<sup>99</sup> Bently and Sherman 60: they ‘occupy a space between authorial and entrepreneurial works’. The Rental and Related Rights Directive and the Duration Directive also distinguish between ‘cinematographic works’ and related rights in mere fixations, called ‘films’ or ‘videograms’.

<sup>100</sup> *Norowzian v Arks (No 1)* [1998] FSR 394 (Ch).

<sup>101</sup> CDPA s5B(4). Laddie et al [3.100], 125.

<sup>102</sup> This means that it must not be copied from another film.

<sup>103</sup> CDPA s5B.

picture<sup>104</sup>. The soundtrack is treated as part of the film, but this does not affect any copyright subsisting in the film soundtrack as a sound recording<sup>105</sup>. Although film copyright arises easily without the usual requirement of an original contribution, it subsists only in the fixation and, therefore, is only infringed by literal copying (taking the actual images or sounds recorded in the film)<sup>106</sup>. This means that there is no infringement of copyright in a film to transcribe it, to perform it as a play, or even to reshoot it scene by scene (although this may infringe underlying works included in the recording). A film is presumed to be a work of joint authorship, with its authors deemed to be the producer and the principal director<sup>107</sup>.

The producer is the ‘person by whom the arrangements necessary for making the film are undertaken’<sup>108</sup>. The producer is not the person who makes the recording in the literal sense of the one holding the camera. Direct organisational control over the process of production is required, thus, the producer is the person who organises, coordinates and controls the production of the work<sup>109</sup>. It is not enough just to commission or provide finance for a film (otherwise a bank might be an author), but

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<sup>104</sup> [1981] RPC 283.

<sup>105</sup> CDPA s5B(2) and (5).

<sup>106</sup> *Norowzian v Arks (No 1)* (n100). Section 17(4) provides that the copying of a film includes ‘making a photograph of the whole or any substantial part of any image forming part of the film – so the infringing use need not be as a ‘moving image’. See: *Spelling Goldberg Productions v BPC Publishing* [1981] RPC 283 (CA) (a single frame); *Football Association Premier League v QC Leisure (No 2)* [2008] EWHC 1411 (Ch) (four frames of a video stream not a substantial part); *R v Higgs* [2008] EWCA 1324, [2009] 1 WLR 73 ([9] Jacob LJ, obiter, a single frame ‘probably’ infringement). There is no adaptation right in relation to film (s21(1)).

<sup>107</sup> Unless these are the same person, CDPA s9(2)(ab).

<sup>108</sup> CDPA s178.

<sup>109</sup> *Adventure Films v Tully* [1993] EMLR 376.

these contributions could be relevant when combined with other contributions<sup>110</sup>. This definition is significant because it means that investors will not automatically be considered authors unless they have ‘made arrangements necessary for the making of the film’, which implies some input in coordinating the film or setting the production in motion. There is no definition of ‘principal director’, but this is likely to be the person who has creative control over the making of a film<sup>111</sup>. It might be problematic to determine the authorship of films which do not appear to naturally have ‘producers’ or ‘directors’, such as home video<sup>112</sup>. It will generally be easy to identify these figures in the case of feature films, although this depends upon the facts<sup>113</sup>.

In *Slater v Wimmer*, for example, Wimmer planned and performed a skydive over Mount Everest, which he arranged for Slater to film<sup>114</sup>. Both parties subsequently used the footage without the consent of the other. Unusually, there was no written agreement and no express term in the oral contract as to the ownership of copyright in the film, so the court was left to decide the matter according to the statutory rules on film authorship. Judge Birss held that Wimmer was the producer as it was ‘his project’ – he had made all the arrangements for the dive to be filmed and had paid the costs of filming (including Slater’s travel expenses). Slater was the principal director as ‘he decided what to film and how to do it’ – this included controlling the settings of the

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<sup>110</sup> *Beggars Banquet v Carlton* [1993] EMLR 349; *Century Communications v Mayfair Entertainment* [1993] EMLR 335. This may mean that a commissioner might be considered an author.

<sup>111</sup> *Slater v Wimmer* [2012] EWPCC 7 [72]; Laddie et al [7.41] suggest that the use of the word ‘principal’ limits the scope for recognition of those who have made a lesser level of creative input to the film.

<sup>112</sup> Handler (n72) 186-7; Kamina (n32) 140.

<sup>113</sup> *Slater v Wimmer* (n111) [80].

<sup>114</sup> [2012] EWPCC 7.



camera and choosing the relevant angles<sup>115</sup>. The court did not imply any terms requiring the transfer of intellectual property rights from director to producer noting that although Wimmer had reimbursed Slater's expenses, he did not pay any additional fee or salary for his work as a cameraman<sup>116</sup>. This was seen as indicative of a need for Slater to retain control over the footage, ie a copyright interest in the film.

Slater and Wimmer were held to own copyright in the film as tenants in common in equal shares<sup>117</sup>. This finding meant that both had infringed the rights of the other in the film. Bonadio characterises this as an 'unpleasant lock-in situation' of the sort that presents a serious obstacle to the exploitation of rights in the film in the absence of a prior written agreement on intellectual property rights<sup>118</sup>. The decision also highlights the value to individual creators of having copyright authorship as a bargaining chip, which might be used to help them to ensure fair remuneration. The court implicitly recognises this in the reasoning given for failing to imply a transfer of rights. This lock-in situation may seem ironic, given that the default rules on film authorship are designed to avoid exactly such a situation<sup>119</sup>. In this way the decision elevates fairness over efficiency, providing an important reminder that it is creators (authors) who are at the centre of copyright law.

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<sup>115</sup> *ibid* [73].

<sup>116</sup> *ibid* [95].

<sup>117</sup> *ibid* [89].

<sup>118</sup> E Bonadio, 'Joint Ownership of Films in the Absence of Express Terms' (2012) 7(7) *JiPLP* 493.

<sup>119</sup> This situation may have been more satisfactorily resolved had the case been decided under US law, which provides each joint owner has the right to licence uses of the work without the consent of the other joint owners: See MB Nimmer and D Nimmer, *Nimmer on Copyright* (Matthew Bender 2011) §6.10[A][1][a] or [3-36].

The designation of the producer and the principal director as the authors of a film is justified by the need to have few owners so that films might be efficiently exploited, and investment recouped. Similar concerns underlie the treatment of employee works, except in this case the CDPA provides for presumptive employer ownership of copyright in works created by employees within the course of their employment<sup>120</sup>. Yet employees are still the authors of their work and might explicitly agree to retain their ownership of copyright<sup>121</sup>. The stronger approach to film might be explained by the need to create a sense of certainty given the large capital investment and high risk nature of the industry. In fact, the reason is more likely to be related to the powerful lobbying of the film industry for special protection. The complex layers of copyright interests that subsist in many films, however, likely undermine this sense of certainty<sup>122</sup>.

Section 13B of the CDPA provides that film copyright expires 70 years from the last to die of: the principal director; the author of the screenplay; the author of the dialogue; or the composer of music specially created for and used in the film. This is an unusual state of affairs, because copyright tends to adopt the author as the point of reference for the duration of protection. These contributors are not recognised as authors, for reasons of expediency: the need to concentrate rights in the hands of the producer and director in order to facilitate exploitation of the film. Perhaps this provision reflects an acknowledgement of the significant creative contributions made by these contributors. In addition, the producer as an orchestrator (rather than a creator)

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<sup>120</sup> CDPA s11(2).

<sup>121</sup> The different treatment of film might seem to be related to the moral rights consequences of authorship. But these have been modified in the case of employee works (CDPA s79(3), s82); a similar solution could have been adopted for film.

<sup>122</sup> This may not have much of a practical impact, given that the film industry relies primarily upon contract to deal with issues of copyright ownership, 6.3 below.

does not have moral rights in relation to the film<sup>123</sup>. These provisions seem to inch towards an acknowledgment of the creative contributions to a film and the fact that the creative aspects of the reality of film production tend to clash with the notion that it is an industrial product. The case law has gone much further as the next section demonstrates.

#### 6.2.4 Film as a Dramatic Work

Film copyright leaves any underlying rights intact, thus preserving the possibility that a film may also be a dramatic work<sup>124</sup>. A dramatic work includes a work of dance or mime, but otherwise the statutory definition is open-ended<sup>125</sup>. Case law establishes that a dramatic work is a ‘work of action, with or without words or music that is capable of being performed before an audience’<sup>126</sup>. There must be ‘sufficient unity’ to a dramatic work for it to be capable of being performed<sup>127</sup>, which is likely to exclude computer games<sup>128</sup>, news reels<sup>129</sup> and sports matches<sup>130</sup>. A film might be a recording of a dramatic

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<sup>123</sup> Unlike the director, the producer’s more creative co-author (CDPA s77(1), s80(1)).

<sup>124</sup> T Rivers, ‘Norowzian Revisited’ (2000) EIPR 389 suggests this was probably not the intention of the legislature. On the debate about overlapping categories compare I Stamatoudi, ‘“Joy” for the Claimant: Can a Film Also be Protected as a Dramatic Work’ (2000) 1 IPQ 117 and R Arnold, ‘Joy: A Reply’ (2001) 1 IPQ 10. Films which came into existence before the 1956 Act came into force were, and continue to be, dramatic works or photographs only.

<sup>125</sup> CDPA s3(1)(d).

<sup>126</sup> *Norowzian (No 2)* (n6) 367 (Nourse LJ).

<sup>127</sup> *Green v Broadcasting Corporation of New Zealand* [1989] 2 All ER 1056 (PC).

<sup>128</sup> *Nova Productions v Mazooma Games* [2006] EWHC 24 (Ch) [116] this point not challenged on appeal: [2007] EWCA Civ 219; [2007] RPC 25 [3].

<sup>129</sup> Laddie et al [3.117], 137 also suggesting that security footage may not be a dramatic work, although the ‘the latest 24 hour Internet shows’ may be.

<sup>130</sup> Copinger et al [3-39] consider that although a football match is not an intellectual creation (C-403/08 *Football Association Premier League v QC Leisure* [2012] 1 CMLR 29 [98]), a film of a sports event may be a dramatic work where it has been filmed in such a way as to increase its impact.

work and it might also be a dramatic work itself following *Norowzian v Arks (No 2)*<sup>131</sup>. This is significant, because a person recreating the dramatic work may be sued for infringement, which would not be the case in relation to the film copyright<sup>132</sup>.

*Norowzian v Arks (No 2)* concerned ‘Joy’ a short film made using a technique called jump-cutting so that it featured a person who appeared to perform a sequence of movements that in reality could not be physically performed by an actor<sup>133</sup>. The film was the inspiration for a commercial which depicted a man dancing with the same surreal effect in front of a pint of Guinness. The commercial did not infringe the film copyright in ‘Joy’ because no part of it had been directly, photographically reproduced. At first instance, Justice Rattee held that a film could not be a dramatic work per se, but it could record a dramatic work (although he thought that in this case it did not, as the dance depicted was incapable of being performed)<sup>134</sup>. The Court of Appeal disagreed on the first point, and held that a film was capable of being a dramatic work per se<sup>135</sup>. For these purposes, ‘capable of being performed’ included performance by artificial means, such as the screening of a film. The Court of Appeal held that the film itself was a dramatic work, but the judges differed in their reasoning<sup>136</sup>. Lord Justice Nourse came

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<sup>131</sup> Affirmed in *Dramatico Entertainment v British Sky Broadcasting* [2012] EWHC 268, [2012] RPC 27 [63].

<sup>132</sup> *Norowzian (No 1)* (n100).

<sup>133</sup> n6.

<sup>134</sup> It is hard to make sense of this part of the reasoning because it seems to imply that the underlying dramatic work embodied in the dance had somehow disappeared during the editing of the film. Rivers (n124).

<sup>135</sup> Stamatoudi (n124) criticises the decision suggesting that a film ought not to be seen as a dramatic work per se. Cf. Arnold (n124).

<sup>136</sup> A film could also be a recording of a dramatic work. In this case there may have been a recording of the dance in the initial film or ‘rushes’, however, this was not relevant as the claim concerned the particular surreal ‘dance’ evident in the film. As a result of such extreme editing the original dramatic work could no longer be said to be recorded in the film (n6) 210.

to this conclusion in light of the broad definition of dramatic work in the Act, which he thought would often, although not always, include a film. Lord Justice Buxton, on the other hand considered the need to interpret the CDPA consistently with the UK's obligations under the Berne Convention, which required all cinematographic works to be included within the Act's definition of a dramatic work even in cases where the natural meaning of this term might not embrace the particular film in question. As Berne equates cinematographic works with other authorial works, he reasoned that they ought to be given the same level of protection<sup>137</sup>.

The court in *Norowzian v Arks (No 2)* was likely to have been, at least, partly motivated to recognise the existence of a dramatic work in film because film copyright provides thin protection and fails to recognise and reward creators<sup>138</sup>. Thus, the court sidesteps the legislature's solution to concentrate authorship in the hands of one or two contributors seeking an approach that better reflects creative realities. In this light, it should be no surprise post-*Norowzian* to see a resistance in *Lucasfilm* to separating out individual contributors to the joint creative process. In the absence of an authorial-type protection for the cinematographic work in a film, the only other way to reward creative contributors is to find that they created distinct copyrightable works – which seems to be the approach taken prior to *Lucasfilm*<sup>139</sup>.

As most films are the product of editing, they will almost certainly be dramatic works distinct from any other dramatic works underlying them, such as the screenplay.

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<sup>137</sup> Arnold (n124).

<sup>138</sup> A Barron, 'The Legal Properties of Film' (2004) 67 MLR 177, 207 citing the judge's comment that Joy was a 'striking example of the film director's art'.

<sup>139</sup> As was anticipated in the Gregory Report (n69) 36-7, see text at n93.

In this way, a film may be a dramatic work and also a record of another pre-existing dramatic work (the screenplay). The joint authorship test must be applied to determine the authorship of these dramatic works. Although this will depend in large part upon the specific context of a film, generally the editor, the screenwriter and the director will have strong claims to be joint authors (where they are responsible for originating the action portrayed)<sup>140</sup>. Whether or not any of the other contributors might count as joint authors is more uncertain (for reasons explained more fully at 2.3 above); and will depend upon the approach taken to the application of the joint authorship test.

Most contributors to a film that is a dramatic work are likely to satisfy the requirement for *collaboration or common design*<sup>141</sup>. The scriptwriter might not be collaborating where the script has been written before the concrete idea of the film is set in motion. In this case, the scriptwriter will be the author of the screenplay, but not a joint author of the resulting cinematographic work. There also may not be collaboration present where a person is contracted to provide certain contributions (eg, costumes or props) with little knowledge of the use their works will be put to. In some cases these may be protectable as distinct works.

Another requirement is that a joint author's contribution must not be *distinct*. Although this point rarely causes issues in the case law on joint authorship, it is surprisingly difficult to pin down the meaning of the word 'distinct'. A contribution is not distinct merely because it is identifiable. Instead, the question is whether the work

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<sup>140</sup> Copinger et al 238 [4-22] suggesting that the authors of the screenplay and any underlying works are not authors of the dramatic work – rather, they are authors of their separate literary or dramatic works.

<sup>141</sup> *Beckingham v Hodgens* [2003] EWCA Civ 143, [2003] EMLR 18.

would be different in character without the contribution<sup>142</sup>. Another way of conceptualising this is to consider whether the contribution is integral to work<sup>143</sup>. Probably the best way to make sense of this requirement is to consider the function of this part of the test – which is to distinguish between a case involving the collocation of different works by different authors; and a joint work, that is, one work, by two or more authors. In this way the individual authors of encyclopaedia entries (where each has written a single entry, unaided by the other authors) are not together, joint authors of the encyclopaedia as a whole. Where a work is separately exploitable this might seem to suggest that it is ‘distinct’, although separate exploitability is probably not a requirement<sup>144</sup>. There appears to be a bias toward treating works separately whenever this is possible, which reinforces the idea that copyright is influenced by a romantic notion of authorship (or at least a preference for avoiding group authorship). This results in the recognition of many layers of copyright protection, which does not avoid the problem of many rightholders that the instrumental/pragmatic approach seeks to rein in.

The screenplay is likely to be distinct from the dramatic work embodied in the film<sup>145</sup>. Kamina suggests that those who contribute and arrange the music; the art director and those who help design costumes, props, etc. would not be considered authors of the resultant dramatic work because their contributions are separate. This

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<sup>142</sup> In other words does the contribution form an integral part of the work. See: *Beckingham v Hodgins* (n141) – although the violin part of the song could be identified separately in terms of musical notation, it was not ‘distinct’ because the part was dependent upon what was already there. It would have sounded odd and lost its meaning on its own.

<sup>143</sup> *Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764; [2009] ECDR 17.

<sup>144</sup> Kamina (n32) 144, 146 commenting on the 1956 Act.

<sup>145</sup> By analogy with *Chappell v Redwood Music* [1980] 2 All ER 817, [1981] RPC 337 (HL).

really comes down to the question of how to draw the boundaries of the ‘work’, which is a difficult question to pin down. If props are not considered to be artistic works because of their role as utilitarian objects in the film production process, surely the corollary of this is that their creators ought to be considered potential authors of the dramatic work to which they contribute. This would suggest that such contributions ought not to be generally regarded as ‘distinct’. That said, there is precedent (pre-*Lucasfilm*) that suggests that the contribution of costumes is not sufficient to establish authorship of a dramatic work in the case of a theatre production<sup>146</sup>. Similarly, Copinger et al suggest sets do not constitute part of a dramatic work<sup>147</sup>.

This most significant hurdle is the requirement that a joint author must make a *significant contribution of the right kind*. Contributions of investment alone will not be sufficient. Certain pre-expressive contributions may not count, as they will not be evident in the expression of the work – for example, set or costume design drawings. These may, however, be separate copyright works (as in *Lucasfilm*). In relation to the contribution being of the right kind it has been held that ‘interpretation’ is not an authorship-type contribution, which may exclude the contributions of actors<sup>148</sup>. A performance is not a separately copyrightable work, but an actor may have performance rights in relation to his or her performance<sup>149</sup>. Similarly, ‘proof-reading’ is not an

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<sup>146</sup> This conclusion might still be justified on the basis that making costumes is not a significant contribution of the right kind.

<sup>147</sup> (n130) [3-37].

<sup>148</sup> *Hadley v Kemp* [1999] EMLR 589 (Ch) 646. Cf. D Free, ‘Beckingham v Hodgins: The Session Musician’s Claim to Music Copyright’ (2005) 1(3) Entertainment and Sports LJ 93 available at <<http://www.warwick.ac.uk/go/eslj/issues/volume1/number3>>.

<sup>149</sup> *Tate v Fullbrook* [1908] 1 KB 821 (CA).



authorship-type contribution<sup>150</sup>. This might be problematic for producers who suggest small changes or visual effects technicians who clean up the film by removing minor errors. The most problematic aspect of the exclusion of proof-reading is that it seems that even a significant amount of time and effort will not suffice (as in *Fylde Microsystems*)<sup>151</sup>. It will not be sufficient to suggest the concept or idea for the film<sup>152</sup>. *Norowzian* establishes that the use of an editing technique is also considered to be an idea (thus not protectable).

Joint authors are those who originated the protectable elements of the dramatic work<sup>153</sup>. Yet, it is difficult to precisely determine the sort of skill, labour and judgment that will be required, although it is a fairly low standard. Copinger et al suggest a person will be an author of a dramatic work where he or she adds something of *dramatic* significance, for example, choice of camera angle, lighting or editing<sup>154</sup>. The greatest challenge is working out what counts as a ‘dramatic’ contribution. The similarities between film and photography are great. The case law on photographs suggests that an author makes a relevant contribution when they make decisions in relation to lighting, camera angle, etc<sup>155</sup>. Does this also apply to dramatic works? On the other hand, in the context of a cinematographic film, there are reasons to suppose that a court may be

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<sup>150</sup> *Fylde Microsystems v Key Radio Systems* [1998] FSR 449 (Ch).

<sup>151</sup> *ibid.* Although the case might be distinguished on the basis that it concerned a literary, rather than a dramatic work.

<sup>152</sup> *Tate v Fullbrook* (n149). In *Tate v Thomas* [1921] 1 Ch 503: contribution to scenic effects and the stage ‘business’ were not of the right kind, and other contributions suggesting the name of the play and a few catch lines and words were too negligible.

<sup>153</sup> *Rivers* (n124) suggesting that it is problematic that most of these cases concern the very different context of the theatre.

<sup>154</sup> (n130) 93, [3-39]. This appears to be similar to the approach taken to determining the existence of an artistic work in *Lucasfilm* (n75).

<sup>155</sup> *Painer v Standard Verlags* [2012] ECDR 6.

more concerned with contributions that have an impact on the visual and emotive character of the work. Following this reasoning, there is a strong case that an editor will be an author – as they cut shots together to create the dramatic feel and flow to the action of a film. Similarly, those responsible for the dialogue and the acting directions would also potentially have a good claim to joint authorship. By the same token, any music created to accompany the action and add to its dramatic quality might entitle its creator to joint authorship (as long as it is not held to be distinct). Kamina suggests that there needs to be some sort of story for there to be dramatic work, yet this is probably unduly restrictive. The dramatic quality of a film dramatic work relates more naturally to the aesthetic aspects of work (its look and feel) as well as its content.

Although one would think that film producers would be inclined to argue against the proposition that many of the other contributors are authors of the dramatic work in a film, the opposite may be true in some cases. Where strong contractual arrangements provide for the assignment of any copyright interest owned by film contributors, production companies may wish to argue that many contributors are authors so as to prolong the duration of copyright (which will be seventy years from the death of the last surviving joint author)<sup>156</sup>. In cases where copyright ownership is less clear, those who have heavily invested in the production will have a strong incentive to argue for few authors of the dramatic work.

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<sup>156</sup> CDPA s12(2), s12(8).

### 6.2.5 The Pitfalls of Pragmatic Reasoning

Although US law is beyond the scope of this thesis, a brief digression to consider the US case *Aalmuhammed v Lee* is worthwhile, because it provides an interesting example of the influence of pragmatic concerns about joint ownership on determinations of the authorship of a film<sup>157</sup>. In that case, Jefri Aalmuhammed claimed to be a joint author of *Malcolm X*, a film directed, produced and written by Spike Lee (with others). Mr Aalmuhammed had assisted Denzel Washington prepare for the film; reviewed the script suggesting extensive revisions to ensure historical accuracy; directed the actors on occasions; created two additional scenes; translated for subtitles; supplied his voice for voiceovers; edited parts of the film in post-production and provided technical help in relation to the location. Although he had asked for a credit as a co-writer, he was listed as ‘Islamic Technical Consultant’ far down the list of credits.

Circuit Judge Kleinfeld acknowledged that Mr Aalmuhammed had made substantial contributions, but held that he was not a joint author of the film. In coming to this decision the judge considered that the test for joint authorship ought to be applied in a much stricter manner in the case of a multi-author work. In addition to the usual requirement of having made an original copyrightable contribution, a joint author must have ‘super intended the work by exercising control’; there must be objective manifestations of shared intent to be co-authors; and the audience appeal of the work must turn upon the contributions such that the share of each in its success cannot be appraised<sup>158</sup>. The judge specified that ‘control in many cases will be the most important

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<sup>157</sup> 202 F3d 1227 (9th Cir, 2000).

<sup>158</sup> *ibid* [22].

factor’<sup>159</sup>. The judge was explicitly concerned with facilitating the exploitation of highly collaborative works. In particular, he worried that contributors might hold a film entrepreneur to ransom, or that film entrepreneurs might be discouraged from consulting with others for fear of losing control of the work<sup>160</sup>. The judge considered that this test ‘would 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’<sup>161</sup>.

Dougherty has criticised this decision as a missed opportunity to formulate a test for the authorship of joint works that fairly rewards contributors for their contributions<sup>162</sup>. The court implies that there is a higher standard of authorship for motion pictures, appearing to imply that only one person might be considered an author<sup>163</sup>. The case falsely equates creative control with sole authorship, in a way that seems likely to mean that few of the most collaborative types of works will be considered joint works<sup>164</sup>. This approach required the court to deny many of the fundamental concepts of copyright authorship<sup>165</sup>. Although the court’s intention was to provide clarity, in departing from established precedent it seems to leave the law in a more uncertain state. Dougherty considers the control standard (understood in terms of

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<sup>159</sup> (n157) 1235.

<sup>160</sup> (n157) [27-28]. The concern in the US relates to the risk of licences being granted too readily, rather than to hold-ups (because a joint owner might licence a work without the permission of the other joint owners), see n119.

<sup>161</sup> (n157) 1233. This is much more explicit reasoning than can be found in the UK caselaw, see 2.2.

<sup>162</sup> Dougherty (n15).

<sup>163</sup> *ibid* 277.

<sup>164</sup> M LaFrance, ‘Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors’ (2001) 50 Emory LJ 193.

<sup>165</sup> Dougherty (n15) 275 argues that the court significantly departed from precedent.

the ability to accept or reject a contribution) to be particularly unhelpful because although control is an important factor in determining whether there is a work-for-hire, it is irrelevant to *authorship*<sup>166</sup>. This approach creates the possibility that a film might have no authors where the person who has control does not also contribute the required creative expression<sup>167</sup>. Dougherty considers that the complications that might arise from a finding of joint ownership would have been better dealt with by reconsidering the prevailing interpretations of the consequences of joint ownership<sup>168</sup>. This argument is supported by the findings of this thesis that distorting the application of the joint authorship test to reduce the number of potential joint owners is likely to result in side effects that are substantially worse than the disease it aims to cure.

A recent case, *Google v Garcia*, hints at some of the strange results that might follow from this view of joint authorship. In that case, the Judge Kozinski held that a claim that an actress had copyright in her performance in a short film was likely to succeed<sup>169</sup>. He did not impose the higher standard for originality developed in *Aalmuhammed* because her claim was in respect of her performance and not in relation to the joint ownership of the film as a whole. She was held to have granted the producer an implied licence to reproduce her performance in the anticipated film, although this licence did not extend to the offensive short film that was in fact produced because it differed so radically from anything that she could have imagined when cast. Although Judge Kozinski recognised the creative contribution of the actress this is an

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<sup>166</sup> *ibid* 279. Control is also an important factor in distinguishing contributions to fixation from contributions to original expression (so a scribe is not an author).

<sup>167</sup> Dougherty, *ibid* 280 considers that this may mean that commercial motion pictures may rarely be held to be joint works.

<sup>168</sup> *ibid* 281, 306, 319.

<sup>169</sup> Note the equivocation in the amended opinion filed 11 July 2014 at 11.

extremely unsatisfactory decision as it involves creating an additional layer of copyright protection. A restrictive approach to the joint authorship test results in real creators being denied their rights. In this case the court has sought to compensate for this by creating new levels of protection. Yet this appears to be an inadequate response that does not fully capture the collaborative nature of a film. The fragmentation of copyright in film in this way has also been apparent in the UK law, discussed above (6.2.2). A restrictive approach to authorship that flies in the face of creative realities tends to push judges to fragment the copyright work in order to provide a remedy for creators.

These decisions show the difficulties judges have in serving the two contradictory purposes of concentrating rights to ensure efficient exploitation and protecting the interests of those who have made creative contributions to a work.

### ***6.3 Private Ordering***

The practical problems of determining the authorship of a film are elided by the combination of the employer's presumptive ownership of copyright in the works created by his/her/its employees and the use of (express or implied) contracts to transfer copyright from creators to producers/exploiters<sup>170</sup>. The significant costs involved in the production and distribution of films means that it makes sense to concentrate rights in this way<sup>171</sup>. Given the complexity of copyright interests that may subsist in a film, production companies rely upon contracts with all participating parties to ensure that they are assigned ownership of intellectual property rights in any copyrightable

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<sup>170</sup> Dougherty (n15) 238, 317-18, 327-33; *Garcia v Google* (Unreported, Docket Number: 12-57302) (9<sup>th</sup> Cir, 2014) 12.

<sup>171</sup> Schwab (n42) 149.

contributions made to a film. Under the classic studio system that prevailed in Hollywood from the 1920s to the late 1940s most ‘talent’ was employed under long-term contracts with a studio. Nowadays, contributors tend to be hired as independent contractors rather than employees, so the importance of dealing with copyright ownership issues by contract is heightened<sup>172</sup>.

Contracts tend to be very effectively used to regulate ownership issues in relation to film<sup>173</sup>. Indeed, this is one of the reasons given in the European Commission’s 2002 opinion that there is no need to further harmonise film protection<sup>174</sup>. The Commission stressed both the practical need to place rights in the hands of the producer and the need to respect the basic principles of author’s rights protection (granting copyright to creators)<sup>175</sup>. Contract provides a helpful way of ensuring both imperatives. The default entitlement under copyright law is important because it increases the ability of creative contributors to gain recognition for their contributions and helps them to improve their bargaining position in other negotiations (conditions, remuneration, etc)<sup>176</sup>. There is an incentive for contributors to agree to transfer ownership rights to producers as ensuring broad and effective exploitation also serves the interests of contributors<sup>177</sup>. Indeed, it is

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<sup>172</sup> G Poll, ‘Harmonization of Film Copyright in Europe’ (2002) 50 J of the Copyright Society of the USA 519, 532.

<sup>173</sup> G Dworkin, ‘Authorship of Films and the European Commission Proposal for Harmonising the Term of Copyright’ (1993) EIPR 151, 152 noting that this is the reason for the lack of litigation. Bently and Sherman (n33) 124.

<sup>174</sup> Report on the question of authorship of cinematographic or audiovisual works in the Community (n31) 691: ‘In practice, potential difficulties in exploitation of the works that arise due to the fact that there may be more than one author, are overcome by contractual arrangements.’

<sup>175</sup> *ibid* 4.

<sup>176</sup> Dworkin (n173) 153.

<sup>177</sup> EI Obergfell, ‘No Need For Harmonising Film Copyright in Europe?’ (2003) 4 European Legal Forum 199, 200.

rarely possible for contributors to a film to monetise their contributions separately from the film<sup>178</sup>. This incentive to cooperate is often incorporated into film contracts that link payment of a part of copyright compensation with the success of a film. Uncertainty about the scope of copyright interests and conflict of laws issues that arise with transnational productions provide a strong incentive to compel producers to ensure that issues related to the ownership of intellectual property are settled in advance<sup>179</sup>.

Screen credit tends to be governed by collectively bargained agreements with the various talent guilds<sup>180</sup>. This allows some of the benefits of authorship to be shared more widely than copyright law appears to allow, and it helps contributors improve their bargaining position<sup>181</sup>. There are a number of different guilds that represent many contributors to a film<sup>182</sup>. The guilds have a number of collective bargained agreements with standard terms that reflect a compromise between the various parties. These agreements cover issues related to working conditions, pay and credit. There is a guild that represents most of the major contributors to film: writers, production crew, actors, musicians, cinematographers, producers, directors, independent production companies, editors, etc<sup>183</sup>. There are craft guilds that represent location scouts, camera technicians,

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<sup>178</sup> Schwab (n42) 149.

<sup>179</sup> Obergfell, *ibid* 201 disagrees with the Commission's opinion that there is no need to harmonise on this point for this reason.

<sup>180</sup> C Fisk, 'The Jurisdiction of the Writers Guild to Determine the Authorship of Movies and Television Programs' (2010) 48 English Language Notes 15, <<http://ssrn.com/abstract=1694043>> 8.

<sup>181</sup> Fisk (n4) 250.

<sup>182</sup> *ibid* 221.

<sup>183</sup> These include: Writers Guild of Great Britain; Broadcasting, Entertainment, Cinematograph and Theatre Union; EQUITY; Musician's Union; British Society of Cinematographers; Production Guild; Directors Guild of Great Britain; Producers Alliance for Cinema and Television; Guild of British Film and Television Editors.



stunt action co-ordinators, etc<sup>184</sup>. The Guilds organise collective strike action to protect the interest of their members, for example, the 2008 Writers Guild of America strike on the issue of the calculation of residual payments for the reuse of writers' work in new media<sup>185</sup>. The rules of the Writers Guild can provide a valuable source of information about the relative value of different writers' contributions<sup>186</sup>. The Guild procedure is limited, however, in that its effectiveness may be undermined by external powers as occurred with the blacklisting of certain writers during the Cold War<sup>187</sup>.

The film case study shows a splitting of the financial and the reputational incidents of authorship<sup>188</sup>. Whilst studios have fought to retain control and ownership of films, they have been prepared to support a complicated system of self-regulation of the credit associated with a film. Authorship credit is significant because it can affect, for example, how contributors get paid, their future employment prospects, how they are regarded within the community, and how films are interpreted by critics<sup>189</sup>. Fisk analyses the bureaucratisation of the process of determining authorship credit by the Writers Guild of America set out in the Screen Credits Manual<sup>190</sup>. The processes of the Guild are determined democratically by its members. The Guild's view of authorship in large part 'treats authorship as an historical fact reflecting degrees of creative

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<sup>184</sup> For a list of film industry trade union bodies see Copinger et al [26-246].

<sup>185</sup> Fisk (n180) 13 arguing that this is because they are fairly transparent, arise as a result of participatory processes, are fairly equitable and provide due process. On the usefulness and limitations of incorporating social norms in legal determinations, see 8.1 and 8.2 below.

<sup>186</sup> Fisk (n9).

<sup>187</sup> Fisk (n4) 231.

<sup>188</sup> As in the case of Wikipedia (Chapter 3) and scientific collaborations (Chapter 5).

<sup>189</sup> Fisk (n180).

<sup>190</sup> *ibid* 7.

contribution to be deduced based on the significance of the various writers' work<sup>191</sup>. Guilds also seek to restrict the number of people that can be credited as a writer so that the value of credits is not too diluted<sup>192</sup>. The Guild offers an arbitration service, much like the Writer's Guild of Great Britain. These rules represent a trade-off between the benefits of attributing authorship to contributors and the benefits of concentrating the financial and reputational rewards/punishments with those whose contributions are the most significant<sup>193</sup>. This self-government of credit resembles the practices of large particles physics collaborations (see 5.2.2). Similarly, it results in people being listed as authors on works that have been substantially changed following their contribution<sup>194</sup>. A crucial difference with the case of particle physics is the limit on the number of credited writers, which has been adopted to enhance the status of writers vis-a-vis directors<sup>195</sup>. This may result in a list that is under-inclusive from a copyright perspective.

Film studios rely on a mix of soft and hard contracts to govern relationships among the multiple parties that supply inputs to any film project<sup>196</sup>. Oral contracts are most frequently used with high-value talent such as actors and directors, even where

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<sup>191</sup> *ibid* 8.

<sup>192</sup> Dougherty (n15) 285, n322.

<sup>193</sup> Fisk (n180) 11; (n4) 244.

<sup>194</sup> Fisk (n4) 218 gives the example of Robert Towne who won the Oscar and got sole credit for the screenplay for *Chinatown* even though the owner of the film had changed the ending to one that he had not written and did not want.

<sup>195</sup> *ibid* 244.

<sup>196</sup> See Barnett (n29) for a justification of the economic rationales for doing so.

large sums are at stake<sup>197</sup>. Unsigned ‘deal memos’ can be used as the basis of an oral contract, especially where it is necessary to act while an idea is ‘hot’<sup>198</sup>. Oral contracts might be used for a number of reasons. They are likely to be expedient, as they are not too costly in terms of time or momentum<sup>199</sup>. As the film industry is fairly close-knit, parties may feel uncomfortable demanding a written and signed agreement, as this may imply distrust of the other party. This will be particularly important in relation to powerful individuals who may have a great degree of clout and a sensitive ego<sup>200</sup>. Oral contracts might also be relied upon out of habit, as parties are likely to defer to the norm where it is too difficult or costly to work out whether an oral or written contract is best<sup>201</sup>. This explains why some contracts are not formalised, even where this might be relatively easily achieved.

Barnett provides an interesting analysis of the use of ‘soft contracts’ in Hollywood, which he describes as: ‘a mix of legal and reputational governance situated between the standard alternatives of short-term contracting governed solely or primarily by law and repeat-play relationships governed solely or primarily by reputation’<sup>202</sup>. Parties use strategic ambiguity as to the existence of a contract to manage the ‘chicken-

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<sup>197</sup> GM McLaughlin, ‘Oral Contracts in the Entertainment Industry’ (2001) 1(1) *Virginia Sports and Entertainment LJ* 101, 103, 118 noting that Charlton Heston did not sign a complete contract prior to filming 60 of his films.

<sup>198</sup> *ibid* 119, 126.

<sup>199</sup> *ibid* 127.

<sup>200</sup> *ibid* 130.

<sup>201</sup> E Posner, ‘Norms, Formalities, and the Statute of Frauds: a Comment’ (1996) 144 *U Pennsylvania LRev* 1971, 1974.

<sup>202</sup> Barnett (n29) 19 argues that they are adopted as ‘a prudent response to a challenging environment characterized by three major features: (i) high holdup risk and project risk, (ii) high specification and enforcement costs, which reduce the efficacy of formal contract; and (iii) positive but weak reputational constraints, which demand some recourse to formal contract’.

and-egg problem' caused by the multiple inputs, severe uncertainty and extended timing of a film<sup>203</sup>. A studio or outside investor may not be willing to commit until a star is signed up; the star may not be willing to commit until the investor is signed up; and the distributor may not be willing to commit until both the star and investor are signed up, etc<sup>204</sup>. To address this problem studios use time-limited option contracts which condition performance obligations on the occurrence of certain events; or they use a mix of uncertain communications which constitute an 'unsigned deal'<sup>205</sup>. Soft contracts are most prevalent between studios or other production entities and higher-value 'star' talent (such as, actors and directors). They tend to be effective because of the availability of reputational sanctions for unreasonable behaviour. These are particularly effective in small close-knit industries where parties may need to deal repeatedly with the same players, as is the case with the film industry where a few major studios dominate<sup>206</sup>. In this context, a bad reputation might significantly harm a contributor's career progression.

Although the film industry manages authorship issues very well through a mixture of hard and soft contracts, there are limitations to private ordering. Parties in weaker bargaining positions are not always able to adequately protect their interests. This can be seen by the need to develop collective bargaining organisations. Their endurance and success is a testament to the need they respond to.

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<sup>203</sup> *ibid* 9.

<sup>204</sup> *ibid* 10.

<sup>205</sup> *ibid*.

<sup>206</sup> McLaughlin (n197) 130.

## 6.4 *Insights for Copyright Law*

Private ordering has been very successful at regulating authorship in film. It has enabled a separation of the economic and reputational incidents of authorship. Both the success of private ordering, and the importance of the noneconomic incidents (ie, reputational) incidents of authorship demonstrate that the assumptions that the instrumental approach relies upon are mistaken<sup>207</sup>. Private ordering provides a flexible solution that can be tailor-made to the context. In the case of film, for example, authorship is dispersed in film credits so as to provide an incentive and reward contributors in a graduated manner. Private ordering can compensate, in part, for the uncertainty in the law.

Copyright law, nonetheless, has an important normative role to play in providing good authorship standards<sup>208</sup>. Copyright law sets the default position from which contributors must bargain and, thus, it influences the behaviour of parties in negotiations on issues of credit, remuneration and ownership<sup>209</sup>. These rules shift the dynamics in negotiations when they favour one party over another as bargaining occurs in the shadow of the law. Large motion picture companies are not known for their generosity to relatively minor participants in the film-making process<sup>210</sup>. In this context, it may not be advisable to leave it to private ordering to remedy the defects in film copyright<sup>211</sup>. As has been argued in the preceeding Chapter, copyright law has a

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<sup>207</sup> See further: 8.4.3.

<sup>208</sup> Handler (n72) 182-192 on the importance of this role for copyright law in the context of film.

<sup>209</sup> Decherney (n3) discusses the impact that copyright law has had on business models in the US film industry over time.

<sup>210</sup> Dougherty (n15) 325. See, for example, the dispute in *Aalmuhammed v Lee* (n157) and the facts of *Slater v Wimmer* (n111).

<sup>211</sup> Handler (n72).

particularly important potential role to play in protecting the interests of creators who are in a less favourable bargaining position.

In the commercial film industry, authorship historically tended to gravitate to powerful figures with control over the film-making process. The legislative solution to the problem of film authorship appears to adopt this industry custom. This view of authorship has been contested in the film industry and in film scholarship as unnecessarily narrow, eliding the important contributions of many others. This can be seen in the activities of the guilds, particularly, the Writers' Guild's strong reaction to the use of possessory credits. This resistance is mirrored in film theory that has generally abandoned auteurism in favour of more inclusive approaches.

Film studies takes a normative approach to film authorship which considers the reality of creativity, rather than the pragmatic approach taken when the aim is to facilitate exploitation. Although the copyright law's purposes differ from those of film studies, there are good reasons for copyright to favour a normative approach over the pragmatic one. Pragmatic solutions preferable to the parties can be achieved through private ordering. The best role for copyright law to play in this context is to provide a default minimum standard to aid creators in their negotiations with investors and disseminators who tend to be in a better bargaining position. The norm of holding the director and the producer solely responsible for a film does not provide a good authorship standard because it is not representative and substantively fair<sup>212</sup>.

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<sup>212</sup> J Rothman, 'The Questionable Use of Custom in Intellectual Property' (2007) 93 Virginia LRev 1899 and 8.2 below.

Yet, the legislative solution to the problem of determining the authorship of a film, primarily responds to the practical problem that film producers need to be in possession of all relevant rights to be able to exploit a film commercially. This has led to laws being designed to facilitate this task and to minimise disruption to commercial practices, seemingly with little regard to protecting *creators*<sup>213</sup>. Yet, Michael Handler points out that there is little evidence of a causal relationship between particular legal designations of authorship and/or ownership of film copyright and the costs involved in managing rights for the exploitation of films<sup>214</sup>. Copyright is often accused of being too preoccupied with protecting disseminators, publishers and others who invest in creative works, rather than those who actually create them. Film copyright seems to provide support for this view.

The pragmatic legislative approach does not avoid uncertainty by designating two contributors as the only authors of a film<sup>215</sup>. The restrictive interpretation of the work favoured by the Gregory Report to avoid the problem of collective authorship has been reversed in light of the realities of film (*Norowzian*). I argue that this has occurred, in part, because the legislative solution clashes with copyright law's imperative to protect creators. In response to this imperative, judges have found two potential safety valves by recognising that: (i) contributors might own copyright in their separate contributions; and (ii) many films will embody or record dramatic works (which will have true creative authors). In light of the contextual approach to the joint authorship test which I

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<sup>213</sup> Handler (n72) 177 describing film fixation copyright as a 'triumph of pragmatism'.

<sup>214</sup> *ibid* 183. This is likely to be due to the fact that issues of authorship and ownership generally tend to be successfully managed with private ordering.

<sup>215</sup> See *Slater v Wimmer* (n111), although this is probably an unusual case. Most of the uncertainty is due to the complexity of underlying works.

argue for in this thesis, the common design of the joint authors of the dramatic work can be used as a guide to determining which of these two valves is most appropriate in respect of a particular contribution.

One might suggest that the copyright law position does not matter given that the film industry appears to be able to rely very successfully on contract<sup>216</sup>. Yet, sometimes contracts will not be agreed as in *Slater v Wimmer* and *Aalmuhammed*. Copyright has an important role to play in acknowledging and rewarding creators. Instead of concentrating on the possibility of unreasonable claims of joint authorship by relatively minor contributors, it would be better to focus on providing copyright protection to all of the creators who merit that protection. This reasoning is particularly compelling considering that the current legislative solution does not actually prevent a lock-in situation (see *Slater v Wimmer*). Private ordering might also be affected by power imbalances. Although this might sometimes be addressed by collective bargaining, there remains an important role for copyright law in providing a minimum standard of protection for creators. This can help improve the quality of private ordering and provide recourse for creators where no written agreement exists.

The treatment of film provides an example of the tension between two competing conceptions of it: (i) as an industrial product which is made by many contributors organised by a few entrepreneurs; and (ii) as a work of art which is the product of one or two romantic authors. Modern conceptions of film authorship in film studies scholarship and in the film industry increasingly resist this false dichotomy (to different degrees). Copyright law appears caught in the dichotomy, conceptualising film in part

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<sup>216</sup> Dworkin (n173) 151, 152.



as an industrial product (the fixation); and in part as a work of art in the many layers of copyright protection for individual contributions (which I argue would be the likely corollary of a restrictive approach to the application of the joint authorship test to the dramatic work). Instead of striving to choose between these two conceptions, copyright law ought to take a third way and embrace an *inclusive, contextual* approach to determining the authorship of a film as a dramatic work.

The instrumental/pragmatic approach to the joint authorship test is likely to lead to authorship gravitating to the most powerful players, or those with the most control. In discussing *Aalmuhammed* I suggested the dangers of using control as a proxy for authorship. Screenwriters, for instance, provide a very significant creative input, yet notoriously lack any control<sup>217</sup>. Proper recognition of the range of collaborators who actually *create* a film as joint authors of that film is clearly preferable to the copyright thicket that results from attempts to accommodate their legitimate interests by creating new layers of copyright. The common design of the contributors to a film ought to be the focus of the application of the joint authorship test and provides a better point of reference for determining whether a contribution is ‘significant’ enough to make the contributor a joint author; and also whether the contribution is ‘distinct’ (thus possibly a separate copyright work).

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<sup>217</sup> Dougherty (n15) 294.

## **Chapter 7: Characteristics of Collective Authorship and the Role of Copyright Law**

This Chapter draws upon the prior case studies to discern a number of characteristics of collective authorship and features of the treatment of such authorship by copyright law.

These are dealt with in five sections as outlined below.

The first section of this Chapter sets out the special features of the creative process in collective authorship. When groups work together to create there tends to be a division of labour with creative control shared among a number of contributors. This makes any attempt to identify one or two authors a difficult, highly artificial task; therefore, a more inclusive approach to determining authorship better reflects the creative realities of collective authorship. Collective authorship groups also rely upon social norms to coordinate and regulate their creative activities. These social norms provide a useful source of information to help answer questions of fact that relate to the creative process.

The second section explores the different meanings of ‘authorship’ in each collective authorship group. In light of the diverse meanings of authorship, the factual specificity of the joint authorship test in copyright law appears to be a feature, not a defect. Despite these different meanings of authorship, in each case, authorship shares a core feature in that it signifies responsibility for what is considered valuable about the work. As what is considered valuable depends upon the particular group, the significance and nature of a contribution is best understood contextually in relation to

the common design of contributors. Authorship is often associated with belonging to a particular group and usually entails reputational benefits in that context. These benefits are frequently more important to creators than ownership of the copyright interest in a work of collective authorship. As the attribution of authorship may be affected by power dynamics within authorial groups; copyright law provides an important independent minimum standard for the legal recognition of authorship.

The third section sets out two gaps between copyright law and the reality of collective authorship. First, copyright law assumes that authors desire control over reproductions of their works or financial benefits, whereas contributors to works of collective authorship are more concerned about the reputational consequences of authorship. This undermines the incentive rationale for copyright law and reinforces the importance of maintaining separate concepts of ‘authorship’ and ‘ownership’. Second, the current approach to the joint authorship test is a poor fit for collective authorship because there is not enough emphasis given to the collaboration limb of the test.

The fourth section considers private ordering mechanisms that have been adopted to bridge the gap between copyright law and the realities of collective authorship. I consider the benefits, as well as the limitations, of relying on private ordering. The success of private ordering reveals that the instrumental/pragmatic approach is based upon the mistaken assumption that finding that there are many authors of a work will cause logistical problems that impede the exploitation of the work. This analysis also reveals that although copyright can rely on private ordering to sort out many of the practical problems that might arise in cases of collective authorship, there remains an important role for copyright law. In particular, copyright provides an important source

of default standards that can be used to bolster the bargaining position of authors with other more powerful players.

Finally, the fifth section further investigates the argument that copyright law has an important role to play in the regulation of collective authorship, finding that its role sometimes appears complex. Copyright law provides an important source of standards and copyright law's rules about authorship influence creative communities, although not always in straightforward ways.

### ***7.1 The Nature of Collective Authorship***

Collective authorship differs from individual authorship, and even from collaborations involving only two or three people. This is because collective authorship requires: (i) a division of labour; (ii) the responsibility for the creative or intellectual content of the work to be shared among many contributors; and (iii) social norms which regulate the creative process. In this section, I argue that the special characteristics of collective authorship provide two important insights for copyright law. First, the search for one or two authors (the instrumental/pragmatic approach) requires one to completely disregard the reality of the creative process in cases of collective authorship; therefore, an inclusive approach to the application of the joint authorship test is preferable. Second, social norms provide a useful source of information about the creative process that can help answer questions of fact and therefore, improve the quality of decisions on joint authorship.

The first characteristic of collective authorship – a division of labour – arises by necessity from the fact that a large number of people contribute to the work.

Contributors to works of collective authorship often make highly-specialised, diverse contributions. In large scientific collaborations no one contributor is likely to have sufficient expertise to understand every aspect of the collaboration's work. Similarly, films require contributions from a broad range of professionals, artisans and technicians. This division of labour may be structured hierarchically as is the case for many commercial feature films; or it may develop in an organic, ad hoc way as it does on Wikipedia. As in the case of Wikipedia there may be fluidity in the division and distribution of labour; or the division of labour may be fixed as it is in indigenous communities, where the nature of a contribution to an artistic work is limited by factors such as descent, initiation and permission from elders.

Although a division of labour is bound to arise when more than one person creates a work, the division of labour is particularly important for large groups. The particular ways in which large groups share the labour that goes into creating a work reveals much about how they 'author' works. The large numbers of contributors means that the division of labour has two other important characteristics: contributors tend to have significant autonomy in relation to the form of their contribution; and the group must adhere to rules which help coordinate and regulate the creative process. Because of these characteristics, the creative process of a group is relevantly different from the creative process of an individual creator. In other words, it is not generally accurate to conceive of collective authorship as involving many contributors acting as metaphorical arms, mechanically implementing one person's vision.

When many people work together to create, for practical reasons, each contributor usually has some amount of control over their own contribution<sup>1</sup>. This tends to result in the diffusion of creative control among many contributors. This is even more likely to be the case where contributors are highly specialised, as they are in film and science. In these cases, some amount of creative control must be delegated in order for contributors to effectively perform their roles in the collaboration<sup>2</sup>. Even when contributors are organised in a strict hierarchy, they often retain significant scope for creative or intellectual input in relation to their own contribution<sup>3</sup>. This is because directions from above require some interpretation or personal choices in their implementation, except in the case of simple mechanical tasks.

The degree of creative control of each contributor is greatest in the case of Wikipedia. Anyone can add, change or delete content from Wikipedia (although their contribution, in turn, can easily be reverted or changed by another contributor). Even where creative freedom is most strictly limited, as it is for Indigenous artists bound to observe customary law, there is scope for the artist to add their own personal touches. Indeed, the case law recognises that the creation of Indigenous art involves enough skill, labour and judgment or intellectual creation to satisfy copyright law's demands

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<sup>1</sup> Where large numbers of authors are involved it is often impossible, or at least impractical, for one person to control the activities of each contributor. Thus, Wikipedia, for instance, relies on the collective wisdom of a group of regular contributors that share common views about the nature of the project.

<sup>2</sup> The head of a scientific research project, for example, may not have the knowledge or expertise to understand the work of all its contributors. This means that he or she can only direct the activities of other contributors in a general sense and must leave a large measure of 'creative control' in the hands of each contributor.

<sup>3</sup> One might take the example of film. Although a producer might express the desire that a costume reflect a particular aesthetic, the costume designer might take inspiration from a variety of sources and come up with costumes that reflect his or her view of how that aesthetic is best realised.

for originality<sup>4</sup>. In cases of collective authorship, authorship is distributed widely, that is, many contributors make contributions of an ‘authorship-type’ in the copyright sense. This remains the case even where it is possible to identify some contributors who have more control over the creative process than others, such as, a director or film producer. The fact that many contributors have some creative control over their contributions provides support for an inclusive approach to determining the authorship of such works for copyright purposes.

In contrast to the dominant position in copyright law, reflected in cases such as *Hadley v Kemp*, the view that the work of a large collaboration might be authored by a single individual that has exercised a controlling influence on the creative process is considered outmoded in most of the non-legal scholarship reviewed in this thesis. Historians of science have revealed the hidden technicians, whose valuable inputs were erased from records of their work<sup>5</sup>; and the important contributions of the many scientists united behind one sacralised individual, eg the Alvarez Group<sup>6</sup>. These practices no longer sit well with modern attribution practices in science which are much more inclusive<sup>7</sup>. Similarly, film theorists have argued that auteurism is a fallacy, exposing the artificial strategies used to prove that the director is the sole author of a film. Even the most controlling film director’s directions are brought to life by a myriad

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<sup>4</sup> The question of the originality of Indigenous artworks was laid to rest in: *Milpururru v Indofurn* (1994) 54 FCR 240 (Fed. Ct. of Australia).

<sup>5</sup> S Shapin, ‘The Invisible Technician’ (1989) 77 *American Scientist* 554.

<sup>6</sup> P Galison, ‘The Collective Author’ in M Biagioli and P Galison (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 329, 329-330; H Gusterson, ‘The Death of the Authors of Death: Prestige and Creativity among Nuclear Weapons Scientists’ in M Biagioli and P Galison (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 281, 282 makes a similar point. He gives the example of the atomic bomb which was credited to Robert Oppenheimer despite the key roles of a number of other scientists.

<sup>7</sup> See Chapter 5.

of other contributors who bring their own perspective to bear on the interpretation and implementation of those directions. Most modern film theorists accept that films are a product of multiple authors, although they disagree on the best way of identifying those authors. Despite the different meanings of the concept of authorship for different creative groups and different academic disciplines, the scholarly literature is fairly united in the trend away from the collapsing of authorship into singular romantic author figures<sup>8</sup>. Copyright scholars are similarly critical of the influence of the romantic author construct, but this critique has yet to be translated into concrete proposals for reform of the joint authorship test<sup>9</sup>.

The fact that many contributors have some control over the creative, aesthetic or intellectual content of the work results in a need to coordinate behaviour. This need is solved by contributors observing the prevailing social norms of their creative community; or, where these are inadequate, by developing social norms better adapted to the group project. The Wikipedia community, for example, has developed its own social norms to help coordinate behaviour and foster the community spirit that is important in motivating contributors. Social norms establish the benefits, and police the responsibilities, of authorship within the collective authorship group. They also embody the group's shared views about the creative process<sup>10</sup>. Social norms help determine what distinguishes a mere contributor who might be acknowledged, from an author who can be held responsible for the work.

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<sup>8</sup> This is no doubt due at least in part to the seminal works of Roland Barthes and Michel Foucault on the death of the author: R Barthes, 'The Death of the Author' in S Heath (trans) *Image, Music, Text* (Fontana, 1977) 142; M Foucault, 'What is an Author?' in D Bouchard (ed) *Language, Counter-Memory, Practice: Selected Essays and Interviews by Michel Foucault* (Cornell UP 1977).

<sup>9</sup> See 2.4.

<sup>10</sup> Norms have been described as the grammar of social interactions: C Bicchieri, *The Grammar of Society: the Nature and Dynamics of Social Norms* (CUP, 2006).



Social norms can provide answers to the factual questions that form part of the joint authorship test. Social norms provide a useful metric for assessing how the value of an individual's contribution is understood by the other contributors and even by its target audience. They also give an insight into contributors' shared views about the creative process. Thus, they indicate when collaboration is present and provide information about the common design of contributors. Social norms provide a transparent basis for assessing the existence of collaboration and the significance of a particular contribution for the purposes of the joint authorship test that does not require judges to make value judgements about the aesthetic merit of the work, or of contributions to that work. Social norms vary substantially from collaboration to collaboration (compare, for example, biomedical science and particle physics collaborations)<sup>11</sup>. By considering the social norms that apply to a particular collective authorship group, the joint authorship test can be applied in a flexible way that is sensitive to the creative context.

The application of social norms that regulate the creative process reveals an important aspect of the nature of a work of collective authorship. Contributors make their own contributions to the work but they also have a role to play in creating, observing and enforcing social norms which govern the creative process. Such a work would not exist but for the involvement of all the contributors in making their contributions, but also by their actions and attitudes which establish the norms which govern the group as a whole. In this way, a work of collective authorship is best

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<sup>11</sup> 5.2.

conceptualised as greater than the sum of individual contributions<sup>12</sup>. When understood from this angle, the search to find one or two controlling minds who might be identified as the authors of a work of collective authorship seems to fundamentally miss the point of how large groups work together in the creative process. Indeed, widespread application of the instrumental/pragmatic approach is likely to undermine the credibility of copyright law by making it seem disconnected from the realities of creativity<sup>13</sup>. In the eyes of contributors to works of collective authorship, the selection of only one or two authors, at best, appears arbitrary; and at worst, rewards powerful players at the expense of true creators<sup>14</sup>.

## ***7.2 The Different Meanings of Authorship for each Collective***

### ***Authorship Group***

This section employs the case studies to enhance our understanding of what it means to be called an author in the different cases of collective authorship (ie, how authorship is attributed and what this signifies in each context). Four propositions emanate from this analysis:

- (i) authorship has a different meaning in each collective authorship group;
- (ii) authorship signifies responsibility for the work (determined according to community-specific criteria);
- (iii) authorship is a status that signals belonging to a particular community; and

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<sup>12</sup> This maps onto the conception of a work of joint authorship assumed by the CDPA (p19). For this reason, collective authorship cannot be seen as one of intellectual property's 'negative spaces'. For the literature on 'negative spaces': see p8, n37.

<sup>13</sup> See 8.1 and 8.4.3.

<sup>14</sup> For example, the risk of authorship gravitating to producers and directors at the expense of other contributors to a film, see Chapter 6.

- (iv) the attribution of authorship can be affected by power dynamics.

I consider each proposition in turn, commenting upon its significance for copyright law.

### **7.2.1 Authorship Has a Different Meaning in Each Collective Authorship Group**

The dynamics of creativity are very different in each case study. The concept of authorship has a different role to play in each creative community that is linked to the community's values. This means that authorship signifies different things in different creative contexts. A contributor must satisfy different requirements to count as an author; and there are different consequences (ie benefits and responsibilities) of being credited as an author in each context. As the different meanings of authorship have been considered in some detail in the previous Chapters, here, I only set out a few brief points.

In Chapter 3, I argued that rather than being a space of non-authorship<sup>15</sup>, the Wikipedia community has created its own concept of authorship that is tailor-made to the project's needs. On Wikipedia, authorship is an inclusive and community-orientated notion built on sharing. It is a dynamic concept that is defined in terms of participation in a project with altruistic goals. 'Good' Wikipedians (who adhere to its goals and policies) receive rewards in the behind-the-scenes areas of Wikipedia; whereas 'bad' contributors might have their contributions 'reverted' or even be banned from contributing.

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<sup>15</sup> As C Sunstein, *Infotopia: How Many Minds Produce Knowledge* (OUP 2006) 153 appears to suggest.

Australian Indigenous communities have a very different understanding of authorship. For Indigenous people, the authorship of art is an act of religious significance expressing and maintaining a relationship to the land. It is an important way of preserving and transmitting significant cultural beliefs. Indigenous artists are custodians of cultural knowledge. Although the ritual knowledge depicted in an artwork belongs to the community as whole, individual artists are held responsible for disrespectful uses of the artwork even where he or she had no control over, or knowledge of, the use<sup>16</sup>.

In science, publications are the main means through which new claims are presented to the scientific community to be evaluated, retested and eventually accepted into the canon of scientific knowledge<sup>17</sup>. Authorship entails a credit value as a marker of scientific achievement; and often also a responsibility value as the author is expected to adhere to the requirements of the scientific method and other ethical obligations. The responsibility value establishes the trustworthiness of particular claims, which helps support science's epistemological claim to produce knowledge or 'truth'. Although there is a common idea of the scientific author, there are different interpretations of who fits the bill. This is evident by the fact that attribution practices vary significantly from discipline to discipline and even from collaboration to collaboration.

The concept of authorship in film has changed over time as it has been constantly under siege from different interest groups<sup>18</sup>. Historically, authorship tended to gravitate

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<sup>16</sup> p85.

<sup>17</sup> 5.1.

<sup>18</sup> 6.1.

to those who could exercise the most creative control, or to the entrepreneurs who have invested in the project. In modern times, authorship is used as a marketing tool (particularly in relation to directors with distinctive styles), because of its trade mark-like function. Some actors' names are used in a way that appears to imply quasi-authorship, but actors are rarely held responsible for the overall film in the same way as a director or a producer<sup>19</sup>. Although there is a trend towards a more inclusive approach to film authorship, the question of authorship remains hotly contested. The atomisation of contributions in film credits provides a useful compromise, as it gives the impression that there are grades of authorship without defining the precise boundaries of the concept<sup>20</sup>. These credits have significant reputational consequences within the industry<sup>21</sup>.

In light of the wide range of meanings of authorship and the different attribution practices in collective authorship groups, the factual specificity of the joint authorship test is an important feature. The factual specificity of the joint authorship test allows it to be flexible to the dynamics which operate in different creative contexts. The differences between the case studies also provides support for a contextual approach to determining authorship, that is more likely to correspond to the creative realities of collective authorship.

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<sup>19</sup> Film stars are often able to successfully distance themselves from 'bad' films by arguing that they lacked 'control' over the end product. See: K Finbow 'Nicole Kidman: 'I had no control over Grace of Monaco'', *Digital Spy*, 27 May 2014.

<sup>20</sup> Chapter 6.1.

<sup>21</sup> Indeed, some contributors will accept less remuneration for a better credit.

### 7.2.2 Authorship Signifies Responsibility for the Work

Although authorship has different meanings in different creative contexts, it has a stable core feature: in every case authorship signifies responsibility for what is seen as valuable about a work. What is valuable depends upon the authorial group and tends to include many different contributions to the creative process. This suggests that the common design of the authorship group might be a useful gauge of the relative significance of a particular contribution. Further, the question of whether a contribution is made to the ‘ideas’ or to the ‘expression’ of a work is best determined in light of the creative context.

Whether a contributor is responsible for what is valuable about a work tends to be assessed with reference to their role in the *creative process* (and not by reference to the final form of the work considered in isolation). So, for example, creative contributions to film are more highly valued than technical or mechanical contributions. The value of a particular contribution to a scientific article is assessed by reference to the process-orientated requirements of the scientific method as well as the ongoing ethical requirements embodied in Merton’s norms. Similarly, a contribution to Wikipedia is assessed by reference to its adherence to a set of community-developed policies and norms that are crafted to reflect the project’s aims. Indigenous art is one step in a process of handing down cultural knowledge to the next generation. The artist is responsible for the faithful and respectful depiction of ritual knowledge; and subsequent uses made of his or her artwork. This focus on process, suggests that it would be unrealistic to try to assess the significance of a particular contribution to a work of collective authorship without regard to the common design of the contributors. This provides support for refocusing the joint authorship test towards the collaboration limb

and for a more contextual approach to determining the significance of a particular contribution to a joint work.

The focus on value created in the creative process best fits with Justice Laddie's broad approach to the idea/expression dichotomy in *Cala Homes*. Justice Laddie's approach pays less attention to the mechanical process of fixation and concentrates on the concepts, emotions and other content embodied in the form of the expression. In Chapter 4, I argued that the court's narrow approach to the idea/expression dichotomy in *Bulun Bulun* might be the result of a cultural bias in favour of those contributors who most closely resemble the romantic author<sup>22</sup>. Cultural biases against non-Western modes of creativity seep into the decision because of the court's acontextual approach to the application of the idea/expression dichotomy. A broader, more inclusive approach would have allowed for the recognition of the communal origin of artwork, which made the artwork meaningful from an Indigenous point of view<sup>23</sup>. In light of the special features of collective authorship identified in the first section of the Chapter, a broader, contextual approach to the idea/expression dichotomy also better reflects the process of creativity, which involves sharing responsibility for the creative or intellectual content of the expression.

In some cases, the view that authorship signifies responsibility for the work has resulted in a gradation of authorship. On film credits, producers and directors are usually listed first so they probably count as authors. A contributor probably stops

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<sup>22</sup> Chapter 4, p75.

<sup>23</sup> The contributions of the Indigenous community are evident in the expression of the artwork in the same way that the design director's contributions were evident in the drawings made by the draftsmen in *Cala Homes v Alfred McAlpine Homes* [1995] EWHC 7, [1995] FSR 818. See Chapter 4, p77.

counting as an author towards the end of the list where one might find, for example, the caterers and logistical support. The film industry uses this ambiguity to its advantage, as a way of rewarding and incentivising contributors with credits that designate their responsibility for specific aspects of the production process, whilst avoiding selective distribution of the label ‘author’<sup>24</sup>. In scientific collaborations, the order in which a contributor is listed in the by-line communicates information to the scientific reader about their importance and their role in the creative process. The first and last positions are particularly prestigious. Copyright has a mechanism for recognising the different shares of responsibility that contributors may have for the creation of a work, in the possibility that contributors might be held to own unequal shares of a copyright interest based on the quantity and the quality of their contributions to the work<sup>25</sup>.

As the dynamics of authorship vary greatly, the case studies suggest that it would be inaccurate to evaluate a contributor’s contribution in isolation from its context in a particular collaboration. This suggests that the collaboration limb ought to be given a greater role in the application of the joint authorship test<sup>26</sup>.

### **7.2.3 Authorship Signals Belonging to a Particular Community**

The attribution of authorship is used to signal belonging to, or an elevated status within, a particular community. In many contexts authorship is used as a reward for

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<sup>24</sup> Although those who make contributions which are recognised to be ‘creative’ tend to find it easier to establish that they are authors than those whose contributions are regarded as purely technical (6.1). The connection between authorship and creativity is reflected in the CDPA both in the definition of the author as the ‘creator’ of a work and also in the more generous scope of copyright awarded to authorial works as opposed to entrepreneurial works (2.1).

<sup>25</sup> There are no provisions, however, for a particular order in the attribution of authorship.

<sup>26</sup> As argued at p19.



accumulated labour to a particular project (for example, scientific collaborations, Wikipedia and film). Authorship signals belonging and status most strongly in the case of Indigenous art. The whole process of the creation of Indigenous artworks (and the preparation for their creation by initiation rites, etc) promotes community cohesion and helps socialise young members of the group into a particular worldview. All members of the tribe have an ongoing connection to the artwork and artists have a special place in the hierarchy of access to cultural knowledge as custodians of ritual knowledge.

Authorship indicates belonging to a particular joint endeavour and is inextricably linked to community norms<sup>27</sup>. The reputational consequences of authorship within authorial communities are often far more important to contributors than their copyright interest. Indeed, in the context of collective authorship, authorship is sometimes consciously distanced from remuneration (Science, Wikipedia, Indigenous art) and from control (Wikipedia). This view of authorship contrasts starkly with the instrumental view of copyright law that assumes authors are motivated by the ability to control reproductions of their works in order to recoup royalties (see 7.3 below). This aspect of collective authorship also reinforces the need to keep the concepts of authorship and ownership separate in copyright law, given the important ramifications of authorship other than copyright ownership, for example, the right to attribution. Furthermore, it provides an additional reason for an inclusive approach to the joint authorship test, as the reputational value of authorship credit might often be more important to contributors than ensuring the efficient exploitation of the copyright interest.

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<sup>27</sup> For example, positive contributions to Wikipedia can build the esteem of a particular contributor among the community of regular contributors; collectively such contributions help constitute the culture of sharing which sustains Wikipedia (3.1). As to the constitution and content of such norms in collective authorship groups, see 7.1.

#### **7.2.4 The Attribution of Authorship Can Be Affected by Power Dynamics**

The attribution of authorship in collective authorship groups may be affected by power dynamics within those groups. This is particularly apparent in film and scientific authorship. In the context of biomedical science, there are ongoing controversies about inappropriate attribution practices, which tend to favour powerful players. Senior scientists and heads of laboratories often ask to be added to this list of authors on an article where they could not be reasonably considered responsible for the scientific work in it. Sometimes these figures are added without their knowledge as a way of increasing the likelihood of publication of the article. These practices are mirrored in film where authorship tends to gravitate to the most powerful players such as the director (with creative control) or the producer (with financial might and possibly also creative control). The endurance of possessory credits, despite strong resistance from many film contributors, is a testament to the ability of powerful players (in this case directors) to claim more than their authorship share.

As demonstrated by the US case of *Weissman v Freeman* discussed in Chapter 5, copyright law has the potential to act as a bulwark against such power dynamics by ensuring that authorship is only granted to a person who has made a creative or intellectual contribution that is evident in the expression of the work. In this way copyright law can provide a source of authorship standards that are independent from the power dynamics that operate in collective authorship groups. In the context of film (Chapter 6), I argued that copyright might provide an important default position that weaker parties can use to improve their bargaining power in contractual negotiations on authorship issues such as credit or remuneration. Thus, copyright law has an important

role to play in supporting positive social norms and undermining negative ones that may not be compatible with copyright law's core notion of authorship.

### ***7.3 The Gap between Copyright Law and Creative Realities***

There is a gap between copyright law and the creative reality of collective authorship. This gap is twofold. First, copyright law's assumptions about the motivations for authorship in most cases do not correspond with the primary motivations for creation in cases of collective authorship. Second, the relative insignificance of the collaboration limb in the application of the joint authorship test does not fit the creative realities of collective authorship.

The fact that contributors to works of collective authorship are often motivated by intrinsic reasons suggests that an instrumental view of copyright is incomplete. In the different contexts of Wikipedia, science, and Indigenous art, the primary motivation for creativity tends to be unrelated to the ability to extract royalties. Wikipedians contribute to Wikipedia for fun, out of boredom, for altruistic reasons, or because they might gain esteem within the community of regular contributors. In science, recognition by academic peers and reputational benefits are key motivating factors for authorship. Indeed, scientists consciously distance themselves from financial incentives because disinterestedness is one of the foundational norms of science. Although the sale of artwork can be an important lifeline for Indigenous communities, the creation of art is first, and foremost, a matter of religious significance. Even in the context of film, the most commercially significant case study, some contributors will accept less remuneration in return for a better credit.

In some cases a sharing economy is an important factor in motivating contributions<sup>28</sup>. The success of Wikipedia is often attributed to a sense of community that is sustained by many individual acts ‘donated’ to the shared project. Indigenous art is seen as belonging to the community and scientific articles are presented as gifts to the scientific community. Even in the case of film, the possessory credit (which suggests that a particular person is *the* author) is widely seen as an illegitimate power grab, which undermines the sharing of authorship or quasi-authorship among many contributors in the otherwise extremely inclusive film credits.

Credit is highly valued because of the reputational benefits that it might bring. Contributors to works of collective authorship often value credit more than financial benefits or control. The importance of credit is evident in the fact that particle physics collaborations tend to establish authorship protocols to govern how credit will be distributed before any measurements are taken. Similarly, scientific journals record much academic debate about which contributors in large collaborative projects deserve to be credited and the order in which they ought to be credited. This suggests that there are good reasons to ensure that authorship and ownership are treated as distinct concepts in the CDPA. This is because authorship leads to moral rights as well as economic rights. The experience of collective authorship suggests that in determining who counts as an author it is better to ensure that enough creators can access the right of attribution, than to restrict authorship on the basis that this might streamline the

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<sup>28</sup> Sharing economies often operate in opposition to the market economy (eg, Wikipedia and science). The opposition between these two different systems of exchange, might also explain arguments that Indigenous peoples risk losing an important dimension of their traditional cultural expressions by trying to fit them into Western categories of protection for cultural property which are premised upon its commodification (4.4). On Copyright and the commodification of culture, see: A Barron, ‘The Legal Properties of Film’ (2004) 67 MLR 177; F MacMillan, ‘The Cruel C: Copyright and Film’ (2002) EIPR 483.

economic exploitation of the work. This is further supported by the fact that ownership issues tend to be successfully managed with private ordering (see 7.4 below).

The attribution of authorship is far more nuanced in creative communities than it appears to be in copyright law. Copyright tends to assume that authorship is like an on/off switch: you are either an author or you are not. In film and science, the order in which contributors are listed is of great significance and affects the reputational value associated with the credit. In this way, it is possible to have different degrees of authorship according to the significance of the contribution to the whole. The current approach to the joint authorship test lacks an appropriate framework for taking these subtleties into account. In the following Chapter, I suggest a contextual approach to the joint authorship test that would allow for the relative value of particular contributor's contribution to be taken into account when determining whether they qualify as a joint author. At present, copyright law's joint authorship test does not give enough weight to the collaboration limb of the test. I argue that the common design shared by the contributors can provide a valuable metric for determining the significance of a particular contribution in the context of the activities of the collective authorship group as a whole.

The thesis forms part of the growing body of literature that suggests that the incentive justification for copyright law is inaccurate, or at least, incomplete<sup>29</sup>. The incentive theory is often attacked on the basis that many creators do not rely upon

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<sup>29</sup> J Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (Stanford Press 2014); D Zimmerman, 'Copyright as Incentives: Did We Just Imagine That?' (2011) 12 *Theoretical Inquiries in L* 29; N Elkin-Koren, 'Tailoring Copyright to Social Production' (2011) 12 *Theoretical Inquiries in L* 309; K Raustiala and C Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 *Virginia LRev* 1687, 1762-65.

copyright law's incentives. The activities of these creators are sometimes referred to as 'IP's negative spaces', because they often relate to the works that do not fit within copyright law's rules of subsistence (for example, the activities of magicians, chefs, comedians, etc)<sup>30</sup>. The case studies considered in the thesis provide a more direct challenge to the incentive theory, because they concern copyright law's heartland as they involve works that fall neatly within the copyright law's rules of subsistence. The case studies also are not confined to small creative niches, but rather, concern activities of significant cultural and economic importance. In light of the limitations of the incentive justification for copyright law, this thesis provides support to the arguments of some that the incentive story can only provide a shaky foundation for the copyright expansionism that has occurred in its name<sup>31</sup>.

The case of collective authorship demonstrates that copyright law seems disconnected both from the motivations for creativity and from the ways in which authorial groups value their own creative activities<sup>32</sup>. In light of this disconnect, it is unsurprising that most collective authorship groups turn to private ordering mechanisms to regulate their own creative practices. The next section considers the benefits and limitations of relying upon private ordering to regulate authorship issues. The following section builds upon this analysis and looks at the complex ways in which copyright law

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<sup>30</sup> Rosenblatt (n12) provides an overview of the literature, drawing together common themes to construct a theory of IP's negative spaces. See also p8, n37.

<sup>31</sup> Zimmerman (n29) 58.

<sup>32</sup> This finding is supported by empirical scholarship: CJ Buccafusco, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?' (2007) 24 *Cardozo Arts & Entertainment LJ* 1121; D Oliar and C Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy' (2008) 94 *Virginia LRev* 1787; E Fauchart and EA von Hippel, 'Norm-Based Intellectual Property Systems: The Case of French Chefs' available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=881781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781)>.

affects collective authorship groups: in particular, its role as a source of ‘good’ authorship standards, and a bargaining chip for creators in private ordering negotiations.

#### ***7.4 Private Ordering: Bridging the Gap between Copyright Law and Creative Reality***

In this section I consider the private ordering mechanisms that collective authorship groups have adopted to bridge the gap between copyright law and creative realities. Private ordering is a fairly broad term that can be understood as referring to a variety of regulatory mechanisms which do not originate from the state<sup>33</sup>. In the case studies, the attribution of authorship and its consequences have frequently been affected by such mechanisms. These have included: journal guidelines, contracts, collectively bargained agreements, protocols, codes of conduct, copyleft licences and social norms. In general, the attribution and consequences of authorship tend to be fairly successfully managed by collective authorship groups with private ordering mechanisms. This ought not to be surprising, as Ellickson and others have shown that people often rely primarily on norms and customs to govern their behaviour (rather than law)<sup>34</sup>.

I begin by considering the most successful examples of the regulation of authorship issues with private ordering (Wikipedia, particle physics collaborations and film). Then, I consider the least successful attempts at private ordering (Indigenous art

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<sup>33</sup> MJ Radin and RP Wagner, ‘The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace’ (1998) 73 Chicago-Kent LRev 1295 noting that many such mechanisms rely upon the law of property or the law of contract. S Schwarcz, ‘Private Ordering’ (2002) 97 Northwestern U LRev 319, 324.

<sup>34</sup> In his seminal work on the social norms that operate among farmers and ranchers in Shasta County, California, Ellickson suggested that legal theorists persistently overestimate the role of law. R Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Harvard UP 1991) 137-8, 280-81. See also E Posner, *Law and Social Norms* (Harvard UP 2009).

and biomedical science collaborations). Finally, I compare the benefits and the limitations of private ordering. This analysis reveals two main insights for copyright law. In particular, the success of private ordering measures suggests that the instrumental/pragmatic approach to the joint authorship test is based upon the mistaken assumption that groups of creators cannot themselves effectively organise the exploitation of a work. Further, copyright law has an important role to play in minimising the limitations of private ordering and, in particular, it might provide a bulwark against the effects of power imbalances in collective authorship groups.

#### **7.4.1 Successful Examples of Private Ordering**

The most successful examples of the regulation of authorship with private ordering mechanisms are Wikipedia, particle physics collaborations and film.

Copyleft licences are crucial to the success of Wikipedia, because they facilitate the highly iterative process of creation that it relies upon<sup>35</sup>. Each contributor, when submitting their contribution to the site, must agree to allow anyone to reproduce, change or delete their contribution for free at any time in the future. This provides subsequent contributors with a defence to potential future claims of copyright infringement in respect of previous contributors' contributions. Copyleft licences allow for the constant re-working or refactoring of Wikipedia in real time (without the need to pay royalties or ask permission). The licences alleviate the uncertainty about who might count as an author by treating all contributors equally. They allow the community to tap into some of the values of copyright law's notion of authorship whilst discarding others.

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<sup>35</sup> 3.3.



They also provide for ways of attributing authorship that are better suited to the internet age<sup>36</sup>.

Copyleft licenses also have a more subtle role to play on Wikipedia. The association of copyleft licences with the Creative Commons and free software communities bolsters the sharing ethic which motivates many contributors to Wikipedia. This creates a community spirit that encourages more positive than negative contributions to Wikipedia. The role of copyleft licenses as an embodiment of Wikipedia's social norms is far more significant than their role as legal instruments. The most significant force governing the social incidents of authorship are these social norms, which are developed and implemented by regular contributors. Contributors create and enforce these norms when they engage in the behind-the-scenes parts of Wikipedia (for example, awarding each other barnstars, reverting the contributions of vandals, or participating in the resolution of disputes).

In the context of science, protocols developed by particle physics collaborations have been effective in regulating the complex issues that arise in relation to authorship in large collaborations<sup>37</sup>. These protocols enshrine mechanisms of ensuring group responsibility for the scientific content of collectively authored articles. Preliminary versions of articles, for example, may be posted on an internal webpage where all members of the collaboration may comment on them. Mechanisms for determining the attribution of authorship vary depending upon the context, for example, attribution practices differ for journal articles and conference papers. These protocols have enabled

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<sup>36</sup> For example, by including a hyperlink to the Wikipedia page concerned, see p56.

<sup>37</sup> 5.2.2.

particle physics communities to use credit liberally as a reward for accumulated labour, whilst ensuring that the group takes responsibility for the scientific content of articles. As these protocols are often determined before most of the research has been undertaken, they shape the expectations of all contributors who join the collaboration from the outset.

In film, private ordering mechanisms also tend to be very successful<sup>38</sup>. Most authorship issues appear to be quite well managed with contracts. This is important given the high risk, high investment nature of the film business. The ability of contributors to increase their bargaining power by joining guilds has helped to improve the quality of contractual negotiations. Collective bargaining by the talent guilds has been a significant force in the negotiation of terms for members on issues of pay, conditions and credit. Collective bargaining agreements promote cooperation and even up the unequal bargaining power between contributors and production companies. Of course, those who are not represented by a guild may struggle to negotiate favourable terms, as can be seen in the visual effects sector. Contributors in more favourable bargaining positions sometimes rely on soft contract measures, using option agreements and unexecuted contracts as a way of promoting cooperation, whilst maintaining flexibility. In doing so the parties rely upon the prevailing industry social norms, specifically, they expect the possibility of reputational sanctions to deter unreasonable conduct by other parties.

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<sup>38</sup> 6.3.

### 7.4.2 Less Successful Examples of Private Ordering

The least successful examples of the regulation of authorship issues with private ordering are Indigenous art and biomedical sciences.

Within ‘traditional’ Indigenous communities, customary law is effective at regulating the creative process and the consequences of authorship<sup>39</sup>. Yet, as customary law is not enforced by the Australian legal system it is ineffective vis-à-vis outsiders. Most scholars agree that copyright law cannot provide adequate protection for the range of interests that Indigenous communities seek to protect in their artwork. Indigenous communities have sometimes turned towards private ordering as a way of addressing these gaps. Codes of conduct and protocols have only tended to be successful in regulating the conduct of those who are already motivated to respect Indigenous communities’ interests. There are limits to the effectiveness of relying upon contract, because Indigenous artists are likely to be in a relatively weak bargaining position. Although there are some examples where contract has been successfully used<sup>40</sup>, as for codes of conduct, this approach is most likely to work with those who are already motivated to respect Indigenous cultural interests. Even where favourable contractual terms can be agreed, they do not burden third parties to the contract. Attempts to adopt a collective trade mark have also been unsuccessful. Although the main reason that this scheme was abandoned was because it was poorly drafted and ineffectively publicised; it is unlikely that a market-based solution would be effective as consumers may not

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<sup>39</sup> 4.3 above.

<sup>40</sup> M Rimmer, ‘The Bangarra Dance Theatre: Copyright and Indigenous Culture’ (2000) 9(2) Griffith LRev 274.

make the effort to seek out and pay more for genuine Indigenous art (particularly in the tourist market)<sup>41</sup>.

Biomedical journals' have adopted guidelines that attempt to restrict the number of contributors who can be credited as authors on articles to those who have made contributions at a number of different stages of the process (the triple lock formula)<sup>42</sup>. These appear to have been fairly unsuccessful, because they do not reflect the reality of collective authorship. It may be impossible for one person to completely understand, let alone be held responsible for, every part of a complex study. Restricting authorship to a few contributors fails to recognise the nature of scientific collaborations which necessarily involve a division of labour wherein many individual contributors have a significant degree of autonomy in relation to their own contribution. Further, credit can be a powerful way of facilitating collaboration, encouraging and rewarding contributors for participating in a joint project. In light of these realities, another reason for the lack of success of the guidelines is that there is no genuine consent to them by the people to whom they apply<sup>43</sup>. In addition, the guidelines are ineffective at addressing the power dynamics which may operate in biomedical collaborations. Less powerful contributors may not be in a position to resist requests for 'guest authorship' by more powerful

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<sup>41</sup> This approach, however, has been more successful in other jurisdictions. See: M Annas, 'The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin' (1997) 3(90) *Aboriginal Law Bulletin* 4.

<sup>42</sup> See 5.2.1.

<sup>43</sup> Private ordering is generally seen as undesirable where there is no genuine consent. This explains the existence of legislation restricting the use of contracts of adhesion and consumer protection law in general. See also JH Reichman & JA Franklin, 'Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information' (1999)147(4) *U of Pennsylvania LRev* 875.

players; and they may even find themselves made ‘ghost authors’ on publications to which they have made substantial contributions<sup>44</sup>.

### **7.4.3 The Benefits and Limitations of Relying Upon Private Ordering**

As these examples suggest, there are benefits and limitations to relying upon private ordering mechanisms to regulate authorship issues. The most obvious benefits are flexibility and efficiency<sup>45</sup>. Private ordering might also have intrinsic benefits, such as, promoting creators’ autonomy, self-determination and liberty. There are limits to the desirability and effectiveness of private ordering mechanisms where there are imbalances of power; where they are applied top-down to those who have not consented to them; and when there are public interests at stake. This analysis of private ordering leads to a number of insights for copyright law: (i) private ordering can be a desirable way of regulating authorship; (ii) public structuring of private ordering is necessary to minimise the limitations of such mechanisms; and (iii) the general success of private ordering mechanisms in regulating issues relating to the exploitation of collective authorship works suggests that the instrumental/pragmatic approach is based upon flawed assumptions.

The most significant benefit of private ordering is that it provides flexibility<sup>46</sup>. This includes the ability to adapt regulatory strategies over time and to changing

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<sup>44</sup> Worse still, pharmaceutical companies may be able to undermine the spirit of the guidelines by selectively applying them, see p93.

<sup>45</sup> M Lemley, ‘Intellectual Property and Shrinkwrap Licenses’ (1995) 68 Southern California LRev 1239 outlining the benefits of contract.

<sup>46</sup> J Macey, ‘Public and Private Ordering and the Production of Legitimate and Illegitimate rules’ (1997) 82 Cornell L Rev 1123; S Dusollier, ‘Sharing Access to Intellectual Property Through Private Ordering’

circumstances. Particle physics collaborations, for example, each have their own protocols and committees to deal with authorship issues. Protocols might be amended, and committees might act, to adapt practices to changing circumstances. There are usually different rules of attribution for different contexts and dispute resolution procedures. Some methods of private ordering offer more flexibility than others. Because of their standard form, for example, copyleft licences have been criticised for lacking flexibility and interoperability with other copyleft licences<sup>47</sup>. Yet, it is worth remembering that the primary role of copyleft licences is in supporting the social norms that govern creativity on Wikipedia (and those social norms are very flexible)<sup>48</sup>.

Private ordering allows communities to tailor their responses to regulatory challenges<sup>49</sup>. In this way private ordering might be better able to reflect the concerns of the relevant players, than judges and legislatures who are confined to a much smaller regulatory tool box<sup>50</sup>. Public ordering is more restricted in its approach to regulatory challenges, especially where it needs to be generalisable as in the case of legislation<sup>51</sup>. The CDPA, for example, provides broad categories of works for which there is a single definition of authorship and a single joint authorship test<sup>52</sup>. For example, although a

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(2007) 82(3) Chicago-Kent LRev 1391 noting the use of private ordering to expand or change rights, which has been observed in the case of Wikipedia.

<sup>47</sup> Copyleft licences are difficult, if not impossible, to amend: RW Gomulkiewicz, 'Open Source License Proliferation: Helpful Diversity or Hopeless Confusion?' (2009) 30 Washington U J of L and Policy 261.

<sup>48</sup> On the usefulness of relying upon social norms to regulate behaviour: 8.1 below.

<sup>49</sup> Dusollier (n46).

<sup>50</sup> W Fisher, 'Property and Contract on the Internet' (1998) 73 U Chicago-Kent LRev 1203, 1252.

<sup>51</sup> M Madison, 'Legal-ware: Contract and Copyright in the Digital Age' (1998) 67 Fordham LRev 1025, 1137.

<sup>52</sup> Whether or not the definition is unitary is up for debate. Indeed, some cases appear to suggest that the category of work affects the type of contribution required to count as an author, eg *Sawkins v Hyperion Records* [2005] EWCA 565, [2005] 1 WLR 3281; *Lucasfilm v Ainsworth* [2011] UKSC 39, [2012] 1 AC

literary work may be a novel, a scientific journal article, a page of Wikipedia, a computer program or a database, the same definition of ‘work’ and ‘author’ will apply to it. Private ordering allows for more varied conceptualisations of authorship and consequences of authorship than the CDPA’s one-size-fits-all regime.

The case studies show a very wide range of different approaches to regulating the attribution and the consequences of authorship with private ordering. In this way, private ordering allows for the flourishing of a greater diversity of creative models, some of which may be impeded by the ordinary operation of copyright law (eg, Wikipedia). These models can provide lawmakers with a source of inspiration and, over time, they might provide valuable information on the merits of a range of different approaches to the regulation of creativity.

Where the interests of the relevant parties are not represented in the private ordering process, private ordering does not tend to work well. This can be seen from the unsuccessful top-down attempts of biomedical journals to change the attribution practices of large collaborations<sup>53</sup>. By involving members of the collaboration in decision-making, particle physics groups have been able to regulate authorship issues more successfully than biomedical journals<sup>54</sup>. Copyleft licences are successful at regulating authorship on Wikipedia even though they reflect the will of strong norm

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208, etc. It is uncertain whether this will still be the case as some recent European cases suggest that the closed list categories of work ought to be irrelevant to copyright protection (particularly Case C-393/09, *Bezpečnostní softwarová asociace v Ministerstvo Kultury* [2011] ECDR 3, [2011] FSR 18; and Case C-403/08 & C-429/08 *Football Association Premier League v QC Leisure* [2012] 1 CMLR 29, [2012] ECDR 8). The current European jurisprudence suggests a unitary definition of authorship, see Case C-5/08 *Infopaq v Danske Dagblades Forening* [2009] ECR I-6569. Yet, the type of work in question may still affect the sorts of choices which indicate that it is the author’s own intellectual creation, see p15, n43.

<sup>53</sup> 5.2.1.

<sup>54</sup> 5.2.2.

entrepreneurs<sup>55</sup>. Although copyleft licences are a top-down regulatory mechanism, the crucial difference is that they are a good fit for the Wikipedia project and they do not favour one category of contributor over another<sup>56</sup>. Again, it is worth remembering that copyleft licences are effective on Wikipedia primarily because of their role in supporting the social norms that govern authorship on Wikipedia. These social norms arise as a result of consensus-driven measures that are created, and consented to, by the community of regular contributors (and thus are adequately representative)<sup>57</sup>.

In some situations it may be more efficient to allow groups to regulate themselves via private ordering<sup>58</sup>. Indeed, much of the literature on social norms stresses their ability to ensure efficiency and welfare maximisation. Social norms may reduce the cost of regulation in terms of capital and labour. The parties themselves are in the best position to evaluate the advantages of different regulatory arrangements. Private ordering, thus, increases the possibility of finding consensual solutions that reflect the preferences of all the parties<sup>59</sup>. In addition, private ordering allows for different

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<sup>55</sup> F Marrella and CS Yoo, 'Is Open Source Software the New Lex Mercatoria?' (2006–7) 47 *Virginia J of International L* 807. This may be changing as copyleft licences become increasingly prevalent and widely accepted in particular domains, such as self-publishing on the internet.

<sup>56</sup> Cf. J Rothman, 'The Questionable Use of Custom in Intellectual Property' (2007) 93 *Virginia LRev* 1899, 1971 who considers them favourably because they have 'aspirational goals'. Some are concerned about their tendency to enshrine a view which might devalue authorship, making free access to works the politically correct way for an author to exercise his or her rights. Thus, Dusollier compares copyleft licences to other social constructions which can operate to undervalue labour: S Dusollier, 'The Master's Tools v the Master's House: Creative Commons v Copyright' (2005) 29 *Columbia J of L and Arts* 271, 288.

<sup>57</sup> This is a feature of norms which makes them amenable to incorporation in judicial decision-making, see: 8.2 and 8.3.

<sup>58</sup> Macey (n46) 1140.

<sup>59</sup> R Mnookin, 'Divorce Bargaining: The Limits on Private Ordering' 18(4) *J of L Reform* 1015, 1018.



standards of authorship in different contexts, which makes them flexible in a low cost way<sup>60</sup>.

The more tight-knit a group, the better they are able to collectively manage authorship issues with private ordering mechanisms<sup>61</sup>. For this reason, particle physics collaborations have been more effective at regulating authorship issues than biomedical collaborations. Wikipedia is created by a large disparate group of volunteers located all over the world – yet, is also very successful at private ordering. The architecture of the wiki software and the use of automated tools to perform repetitive maintenance tasks are crucial in this respect because they provide tools to facilitate the development and enforcement of consensus-based policies. Although many proponents of private ordering claim that it is most likely to work in close-knit communities, it seems likely that the key is iterative transactions – which would explain why Wikipedia works so well<sup>62</sup>.

Private ordering, particularly contract, has sometimes been supported on the basis that it promotes individual liberty because it increases choice<sup>63</sup>. Private ordering is also thought to have the intrinsic benefits of promoting autonomy and self-determination<sup>64</sup>.

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<sup>60</sup> On the value of the flexibility offered by private ordering see Fisher (n50) 1211-1212, 1237-1239. According to Mnookin (n59) 1018 private ordering might avoid resort to litigation thus reducing public and private costs as well as minimising emotional upset (taking the example of divorce settlements).

<sup>61</sup> Social norms are generally seen as more effective at regulating tight-knit communities: Ellickson (n34) 156-66.

<sup>62</sup> T Sagy, 'What's So Private About Private Ordering' (2011) 45(4) L and Society Rev 923 (arguing there is an important relationship between private ordering and social hierarchy).

<sup>63</sup> Mnookin (n59) 1018.

<sup>64</sup> K Bowrey, 'Alternative IP?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 Macquarie LJ 65.

This is most likely to be the case where self-regulation arises as a result of a fair, transparent, representative procedure to people who have consented to it<sup>65</sup>. Where the group concerned is marginalised, as in the case of Indigenous communities, if self-regulation bolsters self-determination it is likely to be an especially desirable means of regulation<sup>66</sup>. Yet, private ordering has not proved an effective means for Indigenous communities to enforce their interests in art. This is because the application of customary law within an Indigenous community does nothing to promote self-determination in relation to the wider Australian community which does not support customary law with legal sanctions. This reveals another characteristic of private ordering: it is most effective when supported and structured by public ordering<sup>67</sup>.

Private ordering is highly susceptible to imbalances of power and other defects of the market<sup>68</sup>. This potentially limits the usefulness of relying on private ordering unless players are in a reasonably equal bargaining position<sup>69</sup>. Thus, Indigenous artists have found contract to be a relatively unhelpful tool, given they tend to be in a weaker

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<sup>65</sup> Mnookin (n59) 1019 argues that capacity is a limit to private ordering, as private ordering presupposes rational, well-informed, self-interested participants. The possibility of temporary diminished capacity or 'transactional incapacity' is discussed by R Eisenberg, 'The Bargain Principle and its Limits' (1982) 95 Harvard LRev 741, 763.

<sup>66</sup> Private ordering may be seen to promote cultural autonomy: G Barzilai, *Communities and Law: Politics and Cultures of Legal Identities* (U of Michigan P 2003) 13.

<sup>67</sup> G Dinwoodie, 'Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring' (2004) 160 J of Institutional and Theoretical Economics 161.

<sup>68</sup> Mnookin (n59) 1017, 1024-1031 arguing that relative bargaining power is one reason to limit private ordering (he argues that there are two others: capacity concerns and externalities).

<sup>69</sup> In some situations, for a variety of reasons, people might not be thought to have the capacity to properly consent to private ordering. See the private ordering literature especially in the area of family law (eg Mnookin (n59)). There do appear to be cases involving Indigenous art where capacity to understand the full implications of a contract could be called into question – as may have been the case in *Yumbulul v Reserve Bank of Australia* [1991] FCA 332, 21 IPR 481 (Fed. Ct. of Australia), see p67 and also Arts Laws' experiences, p69. There are a number of examples of Indigenous artists selling their artwork in circumstances of undue influence or unconscionable conduct, see J Oster, 'Proposal for a Regulated Indigenous Art Industry' (2006) 6 (18) Indigenous L Bulletin 21.

bargaining position than those with whom they are contracting. Different types of contributors to films have organised themselves in talent guilds to promote their interests and shape contractual negotiations on issues of pay, credit and working conditions<sup>70</sup>. Collective bargaining is an effective way of ensuring solutions to the regulation of authorship issues that adequately reflect the interests of different parties, because it can help redress the imbalances of power between them. Law also has a significant role to play in redressing power imbalances to ensure that private ordering functions effectively<sup>71</sup>. There are many examples of legal rules that exist to shape private ordering in this way, for example, the *contra proferentum* rule in contract law; equitable doctrines, such as, unconscionability; and consumer protection law.

Another well-recognised limit of private ordering is that it is indifferent to the interests of third parties or outsiders<sup>72</sup>. Further, private ordering often arises without a thought for important public interests<sup>73</sup>. Contract law shapes private ordering in order to constraint its potential limitations<sup>74</sup>. Thus, it imposes limits on the freedom to contract to promote economic public order (eg, free competition) and protective public order (eg, to protect weaker parties to transactions)<sup>75</sup>. Similarly, fundamental rights often

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<sup>70</sup> Where there is a less tight-knit community, formal measures might help.

<sup>71</sup> R Mnookin and L Korhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LRev 950, 968 arguing that legal rules create bargaining endowments or 'bargaining chips'. This affects negotiations because it modifies the parties' best alternative to a negotiated agreement (BATNA). R Fisher and W Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin 1981) 45 explain the role of the BATNA concept in negotiation.

<sup>72</sup> Lemley (n45) 1285.

<sup>73</sup> N Elkin-Koren, 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons' (2005) 74 Fordham LRev 375, 1197-99; Mnookin (n59) 1017, 1031-35.

<sup>74</sup> Mnookin (n59) 1031.

<sup>75</sup> L Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 123.

trump private ordering<sup>76</sup>. Private ordering might sometimes conflict with other important policy goals that are embodied in legislation<sup>77</sup>. The interaction between copyright law and contract law, particularly, the extent to which private ordering can be used to avoid copyright law's standards, is a matter that has caused much scholarly debate<sup>78</sup>. On the question of authorship the situation is relatively clear: authorship is ultimately a legal question, not a matter of agreement<sup>79</sup>. When it comes to determining the authorship of a copyright work, the CDPA provides a definition that embodies a balance of the policy goals that copyright law seeks to achieve: a contribution of creative or intellectual choices to the protected expression<sup>80</sup>.

Private ordering is often thought to lack the legitimacy of the legislative process, generally, on the basis that it does not represent the interests of outsiders (third parties and the public)<sup>81</sup>. Sometimes, however, private ordering does not even represent the interests of all those to whom it applies<sup>82</sup>. For these reasons, despite the benefits of private ordering in terms of efficiency, dynamism and contextualism, there remains an important role for law in helping to address some of the limitations of private ordering and protecting important public interests<sup>83</sup>. Eric Posner argues that there is an important

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<sup>76</sup> Guibault, *ibid.*

<sup>77</sup> Mnookin (n59) 1016 stressing the importance of considering fairness and other societal considerations.

<sup>78</sup> Eg, Elkin Koren (n73); Madison (n51); Guibault (n75).

<sup>79</sup> This point is discussed in Copinger et al [4-38]. See also *Samuelson v Producers Distributing* [1932] 1 Ch 201, (1932) 48 RPC 580, 586 and *Wiseman v George Weidenfeld* [1985] FSR 525.

<sup>80</sup> See 2.1.

<sup>81</sup> J Weinberg, 'ICANN and the Problem of Legitimacy' (2000) 50 Duke LJ 187, 191, 257. Schwarcz (n33) 324.

<sup>82</sup> A good example is contracts of adhesion, see Radin and Wagner (n33) 1311-1313.

<sup>83</sup> Radin and Wagner (n33) 1317 stressing the importance of a baseline of due process and public policy limits on contractual private ordering.

place for law in enhancing good social norms and undermining bad ones<sup>84</sup>. To this end Fisk suggests that community practices on the attribution of authorship ought to be assessed in relation to six criteria: transparency, participation, equality, due process, efficiency and substantive fairness<sup>85</sup>.

Overall, issues relating to the ownership of the copyright subsisting in a work of collective authorship generally appear to be successfully managed with private ordering. Most contributors to films, for example, sign contracts with the production company at the outset. Powerful players sometimes use options and unexecuted contracts, relying upon social norms and default legal rules as a disincentive for unreasonable behaviour. This gives them increased flexibility and helps individuals manage the large risks involved in film projects. Some collective authorship groups are unconcerned with remuneration and thus are able to resolve ownership issues very easily. Wikipedians, for example, all agree to copyleft licences that remove any possibility of ownership conflicts, because they agree not to exercise their rights to control or remuneration, as a condition of participation in the project.

Scientific authors often assign or exclusively licence their copyright interest to journal publishers as a condition of publication. This concentrates ownership rights in one entity. Even where this is not the case as, for example, with open source publishing, scientists are often happy to allow reproductions of their work because the reputational value of authorship increases on wide distribution. Royalties for individual scientific

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<sup>84</sup> Posner (n34).

<sup>85</sup> C Fisk, 'Credit Where It's Due: The Law and Norms of Attribution' (2006) 95 Georgetown LJ 49. These factors have much in common with the vectors that Rothman uses to assess whether the custom ought to be incorporated into a copyright decision: J Rothman, 'The Questionable Use of Custom in Intellectual Property' (2007) 93 Virginia LRev 1899, see further 8.2 and 8.3 below.

journal articles are likely to be negligible (or nil in the case of open source publishing). Conflicts on issues of remuneration are unlikely to arise because this conflicts with science's norm of disinterestedness. Disputes amongst scientific authors are far more likely to occur on matters relating to the attribution or false attribution of authorship than they are on ownership issues<sup>86</sup>.

From these examples it appears clear that the issue of coordinating ownership and the exploitation of works is not as problematic as the instrumental/pragmatic approach assumes it to be. There is a possible objection that might be made to this point. I have argued that an Indigenous community might be considered to be joint authors of an artist work made in accordance with customary law if a more inclusive, contextual approach were taken to the application of the joint authorship test. If this were the case, the community would be able to impede the exploitation of the work and, indeed, they would be very likely to seek to do so where a proposed reproduction would be offensive or cause cultural harm. In light of the special spiritual significance of Indigenous art, and the urgent need to ensure the continuation of Indigenous culture, this restriction should be seen as a tolerable limit on copyright law that serves policy goals, equally valuable as copyright law's own goals. Further, this is the most desirable outcome given that Indigenous communities are best placed to determine when offensive uses are being made of their cultural artefacts.

Whilst private ordering can be a good way of bridging the gap between copyright law and creative realities, there are limitations to this approach. Private ordering is not

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<sup>86</sup> The few legal cases on scientific authorship all arise from concerns about attribution: see: *Noah v Shuba* [1991] FSR 14 (Ch); *Weissmann v Freeman* 684 FSupp 1248 (SDNY, 1988); 868 F2d 1313 (2nd Cir, 1989); *Anyia v Wu* [2004] EWCA Civ 755.

very effective where there are imbalances of power between parties and where there are broader public interests at stake. These limitations of private ordering indicate that there remains an important role for copyright. In particular, copyright can provide a source of authorship standards that are independent from imbalances of power within the creative authorship group. Copyright law's default standard can help shape private ordering to further important policy goals, particularly, copyright law's purposes to reward and incentivise *creators*. Therefore, there is an important role for copyright law in shaping private ordering<sup>87</sup>.

The figure of the author is at the heart of copyright law. The author has the right to first ownership of any copyright subsisting in his or her work. This right ought to be granted to all those who qualify as authors because of their role in creating the work. This cornerstone of copyright law is significantly undermined by adopting an instrumental/pragmatic approach that requires one to ignore the existence of a number of authors, granting authorship rights only to a chosen few. This clearly results in a less satisfactory result (because it is inflexible and acontextual); and an unfair result (some authors are treated as more worthy than others).

Private ordering and the law might interact in two main ways. First, private ordering might be within a range of valid alternative regulatory mechanisms that the law tolerates (or even upholds)<sup>88</sup>. Second, private ordering may be taken into account in the application of legal rules, as part of the matrix of relevant facts. In this section I

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<sup>87</sup> Private ordering often presupposes some public ordering: Radin and Wagner (n33) 1296; S Dusollier, 'The Master's Tools v the Master's House: Creative Commons v Copyright' (2005) 29 Columbia J of L and Arts 271; (n46).

<sup>88</sup> Or even actively encourages: Mnookin (n59) 1036 argues that the primary function of the legal system at the time of divorce is to *facilitate* private ordering.

have been mostly concerned with the first type of interaction, as I considered how collective authorship groups use private mechanisms to bridge the gaps between their creative reality and copyright law's provisions. Some collective authorship groups, for example, have used private ordering mechanisms to implement a gradation of authorship credit, which provides for more possibilities than the CDPA's binary author/non-author approach to attribution. This has been very useful in encouraging and rewarding contributors to scientific collaborations and films. The private regulation of attribution in this way is permitted by copyright law in the sense that it is not prohibited<sup>89</sup>. It may even be upheld as a result of the operation of statutory presumptions on authorship. This is a useful example of how the legal regime leaves space for parties to resolve certain issues in a manner that better suits their needs via private ordering<sup>90</sup>. There is an important role for public ordering in shaping these private ordering mechanisms<sup>91</sup>. In relation to the gradation of authorship credit, copyright law provides a basic structure for private ordering practices by providing that certain contributors (in certain circumstances) have a legally enforceable right to be included (the attribution right); and certain people have the right to not be included (the right to object to false attribution). The next section of this Chapter further considers the role of copyright law in collective authorship.

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<sup>89</sup> L Bently and L Biron, 'Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, if anything, is to be done?' forthcoming in M van Eechoud (ed), *The Work of Authorship* (Amsterdam UP 2014) 237.

<sup>90</sup> L Guibault, 'Wrapping Information in Contract: How Does it Affect the Public Domain?' in L Guibault and PB Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons in Information* (Kluwer Law International 2006) 87, 103 noting that public ordering governance regimes have an important symbolic role in that they embody the idea that certain activities are so important that they ought not to be manifested purely in private transactions. Thus, she argues that privatization regimes that undercut that symbolic role are presumptively offensive.

<sup>91</sup> Dinwoodie (n67).



The following Chapter considers the second way in which private and public ordering may be enmeshed. In that Chapter I consider the extent to which social norms ought to be taken into account in the application of the joint authorship test. Social norms, it must be observed, are a form of private ordering. An important distinction ought to be made at this point. Although social norms might be evidenced by private ordering mechanisms, such as protocols or contracts; those mechanisms are not coterminous with the social norms. In the following Chapter I suggest an inclusive, contextual approach to the application of the joint authorship test, which takes into account the social norms which operate to regulate creativity in cases of collective authorship. I also consider the limits of such an approach. But first, I review the complex role that copyright law currently plays in the regulation of collective authorship.

### ***7.5 The Role of Copyright Law and its Concepts***

Copyright law forms part of the background upon which collective authorship groups organise their creative activities. Rosemary Coombe argues that law and culture relate to one another in an ‘ongoing mutual rupturing’<sup>92</sup>. Indeed, culture appears to influence law. Some argue that copyright has been influenced by the literary trope of the romantic author. In Chapter 2, I argued that copyright decisions necessarily incorporate aesthetic values, in so doing judges are likely to be influenced by prevailing cultural values<sup>93</sup>. The opposite is also true, that is, that copyright law influences cultural practices. The

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<sup>92</sup> R Coombe, ‘Contingent Articulations: A Critical Cultural Studies of Law’ in A Sarat and T Kearns (eds) *Law in the Domains of Culture* (University of Michigan Press 1998).

<sup>93</sup> Roland Barthes defined a text as ‘a tissue of quotations drawn from the innumerable centres of culture’: ‘The Death of the Author’ in S Heath (trans) *Image-Music-Text* (Hill and Wang 1977) 142, 146. See Chapter 4 for a critique of the influence of Western notions of authorship in copyright decisions on Indigenous art.

example of collective authorship reveals that copyright law does not always affect cultural practices in straightforward ways. Copyright can modify the bargaining positions of contributors in private ordering processes. Copyright can provide a source of good authorship standards (although these might sometimes be reinterpreted). In other cases copyright's normative force is reshaped and repurposed in order to better suit the needs of the collective authorship group. Murray, Piper and Robertson suggest that intellectual property is often appealed to in creative communities in 'pragmatic ways, opportunistically and instrumentally'<sup>94</sup>. Their suggestion appears to be borne out in the case studies on collective authorship.

Copyright law is sometimes appealed to for its expressive function, that is, its capacity to provide an authoritative pronouncement on authorship. The attribution of the label of 'author' in copyright law has significance for the public at large because Intellectual Property can serve as a valuable source of 'default rules, policy and public interest safeguards'<sup>95</sup>. Copyright pronouncements on authorship have a symbolic meaning that can support or detract from certain contributors' abilities to assert that they are authors. Copyright law also provides an important default position that can help or hinder contributors in negotiations with other contributors as well as with distributors.

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<sup>94</sup> L Murray, S Tina Piper and K Robertson, *Putting Intellectual Property in its Place: Rights Discourses, Creative Labor, and the Everyday* (OUP 2014) 14.

<sup>95</sup> J Pila, 'Authorship and e-Science: Balancing Epistemological Trust and Skepticism in the Digital Environment' (2009) 23 *Social Epistemology* 1; RC Dreyfuss, 'Collaborative Research: Conflicts on Authorship, Ownership and Accountability' (2000) 53 *Vanderbilt LRev* 1161; R Coombe *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Duke UP 1998) particularly the Introduction.

Copyright is clearly a matter of great importance in the film industry as a tool for investors to recoup their investment<sup>96</sup>. Production companies and other investors carve up the distribution and licensing rights to a film<sup>97</sup>. Hollywood studios are probably best conceived of as intellectual property management companies rather than film producers. Yet, interestingly most of the language in the film industry seems to avoid use of the term author. The relevant textbooks speak of rights management, residuals and ‘credits’<sup>98</sup>. Contributors generally sign contracts which involve the assignment of copyright in their contributions to the producer or production company even where they negotiate some share of resulting profits. The default positions provided by copyright might offer important bargaining chips which can increase the bargaining power of contributors. This is because there is a strong preference for the resolution of intellectual property issues via contract rather than in accordance with the default position provided by the law<sup>99</sup>.

The preference for private ordering is most likely due to the size of the investment involved in making a film and ‘tentpole’ model of many production company businesses which rely on revenue from a few big successes to sustain a number of ongoing projects which may not make a profit<sup>100</sup>. As films increasingly rely upon merchandising and toy sales to boost profits there may be an increase in disputes brought by the creators of costumes, etc where they have not effectively assigned their

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<sup>96</sup> 6.3.

<sup>97</sup> 6.3.

<sup>98</sup> Eg, P Bloore, *The Screenplay Business: Managing Creativity and Script Development in the Film Industry* (Routledge 2012); G Doyle, *Understanding Media Economics* (2nd edn, Sage 2013); D Gray, *Setting up and Managing a Production Company* (Medialex Publications 2006).

<sup>99</sup> This might seem odd given the amount of lobbying on the issue of film copyright.

<sup>100</sup> p111.

copyright interest to the producers (eg, *Lucasfilm*)<sup>101</sup>. It seems that judges will normally be prepared to imply the transfer of copyright in such circumstances, especially where the contributor has been adequately remunerated (in a way that represents payment for the rights as well as for the labour)<sup>102</sup>.

Even where copyright law is seen as irrelevant, or an obstacle to the joint project (eg, Wikipedia), it has a valuable, but complicated, role to play. *Wikipedia*'s culture of sharing both relies upon, and is partly constituted by, copyleft licences. The fact that copyleft licences rely upon copyright law for their effectiveness and as a source of standards means that the shadow of copyright law still casts itself over the norms which operate to create and regulate this alternative system of self-regulated creativity. The Wikipedia community taps into some of the values of copyright's notion of authorship, whilst discarding others. Contributors retain copyright in their contributions and in choosing to forgo many of the benefits of that copyright interest in the name of the Wikipedia project, they help constitute the sharing norms which sustain the community. Despite the fact that Wikipedia's model of creativity seems to resist copyright law's notion of authorship, the importance of copyright is something that is stressed on Wikipedia, and a good deal of effort is spent flagging and removing copyright infringing content. There is even a barnstar for this activity. In some ways the fact that contributors are seen to be contributing something of value bolsters Wikipedia's sharing economy.

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<sup>101</sup> 6.2.2.

<sup>102</sup> The opposite suggestion was a way not to imply such a right in the case of *Slater v Wimmer*, see p123.

In a sense, the use of copyleft licences might have the effect of appearing to amplify who might be considered an author, as every contributor agrees to such a licence regardless of how great or small their contribution may be. Copyleft licences establish a presumption that in order to copy or modify a contribution subsequent contributors must follow the terms of the licence. This may not be strictly true from a legal point of view (as bare licences copyleft licences likely operate only as a defence to a claim of copyright infringement, which will not arise if copyright does not subsist in the contribution in the first place, as may be the case for trivial contributions). More contributors enjoy the right to be attributed as authors under the terms of the copyleft licences than they would under moral rights provisions. In this way, copyleft licences expand authorship rights in one sense (attribution) whilst contracting them in another (control).

In appealing to copyright law as a source of standards, scholars and key players within creative communities do not always appear to have a clear understanding of the actual provisions of the law. At the very least, sometimes, a selective view of copyright law is presented. In the biomedical science context, for example, scholars have appealed to copyright law as an authoritative source of support for propositions to restrict the attribution of authorship to fewer contributors. Sean Seymore argues that the authorship crisis in the biomedical sciences might be addressed by realigning journal practices with (US) copyright norms<sup>103</sup>. Seymore's view relies upon a selective understanding of US copyright law focusing upon the requirement for 'some creative spark'. Yet he may overstate the level of intellectual or creative input that this requirement implies, as it is generally accepted that fairly mundane works reach this

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<sup>103</sup> See p93.

standard. Seymore implies that the ICMJE guidelines are in line with copyright norms, however, they might be both under-inclusive and over-inclusive from a copyright point of view. The trend in some joint authorship decisions to favour contributors who have exercised control over the creative process might actually exacerbate the practices of assigning guest authorship to powerful players. Whilst Seymore's approach may have the result of reducing the number of people who could be attributed as authors, it is by no means clear that the authors chosen would align with those who ought to be considered responsible for the article from a scientific point of view. Further, copyright can provide no guidance on the order in which authors are attributed, which is a matter of considerable significance for scientists (as both authors and readers).

Although Seymore elides the potential mismatch between copyright's concept of authorship and science's concept of authorship, his analysis does suggest an important basic component of copyright authorship which seems attractive. That is, the fact that copyright law identifies the creator of the expression as the author. In this way copyright law provides support for the normative view that those responsible for creating the work *qua* copyright work are authors. The difficulties of establishing scientific responsibility are exacerbated as attribution is increasingly distanced from the actual creation of the work. Indeed, many of the most problematic practices involve the attribution of those who have had very little to do with the creation of the work (gift authorship, coercion authorship, mutual support authorship), or the failure to attribute those who were closely connected to its creation (ghost authorship). In this respect copyright law's notion of authorship might provide a good source of standards.

This appeal to copyright norms might appear surprising in the context of science, because many of science's assumptions are opposite to copyright law's assumptions. Copyright law assumes that authors want control over their works, which may allow them to extract royalties for uses of it. On the contrary, science values openness and economic disinterestedness. From this point of view, it might seem that science and copyright law have little in common. Yet, there is some convergence between these two worlds on the issue of authorship. Copyright is necessary for scientists to be able to publish their work in reputable journals<sup>104</sup>. Publication is important for science, and copyright facilitates this by allowing publishers to profit from publications without fear of free-riding. Whilst royalties might not be a relevant concern for scientists, the accurate attribution of authorship to the creators of the work is important because authorship is a locus for credit and responsibility within the scientific community.

Although copyright law has an important role to play as a source of good authorship standards, the dominant approach to the joint authorship test leaves it ill-equipped to play this role. In Chapter 1, I observed that many copyright scholars suggest that the joint authorship test might not be well-adapted to collective authorship. The analysis of the case studies have borne this out, revealing that the instrumental/pragmatic approach is based upon a number of misassumptions about collective authorship and risks, denying many genuine authors the rights to which they would otherwise be entitled under the CDPA. The emphasis on the authorship limb, at the expense of the collaboration limb, means that the joint authorship test lacks the tools to make sense of a work such as Wikipedia. Under the current approach Wikipedia

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<sup>104</sup> Cf the open science movement which is gaining increasing momentum, particularly, in response to the perceived expensiveness and unfair commercial practices of some of the larger scientific publishers. See: A Swan, 'Open Access and the Progress of Science' 95 *American Scientist* 198; L Guibault and C Angelopoulos, *Open Content Licensing: From Theory to Practice* (Amsterdam UP 2011), Ch 6.

might be conceived of in an unreal way as a series of derivative works (many of which will lack originality), instead of a joint work authored by many contributors with a common design<sup>105</sup>. The acontextual approach to the joint authorship test caused the Federal Court of Australia in *Bulun Bulun* to elide the role of the community in the creation of the expression of the artistic work. The court focused on Bulun Bulun's role in fixing the artwork; ignoring the community's role in the selection of the subject matter of the painting, determining how that subject matter was depicted, the techniques used to depict it, and its ongoing control over subsequent uses of the artwork. Indeed, the community may have made a more significant contribution to the expression of the artwork, than the design director made to the drawings prepared by technical draftsmen in *Cala Homes*.

Although collective authorship groups are generally able to regulate authorship effectively with private ordering, there remains an important role for copyright law: (i) as a source of good authorship standards that are independent from the power dynamics which operate in creative communities; and (ii) as a method of promoting copyright's policy goals. In order to be able to effectively regulate collective authorship, the joint authorship test ought to be applied in a way that appreciates the nature of collective authorship and the context in which it occurs. This might go some way towards addressing the problem identified by Jessica Litman that although people tend to buy into copyright norms, they do not tend to translate them into rules in the same way that the copyright statute provides<sup>106</sup>.

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<sup>105</sup> There are similar difficulties in construing the boundaries of the work in the case of film. A broader approach to the application of the joint authorship test to the dramatic work, might make it easier to avoid a thicket of underlying rights.

<sup>106</sup> J Litman, 'Copyright Noncompliance (or why we can't "just say yes" to licensing)' (1996) 29 NYU J of Intl L and Politics 237, 238.



## **7.6 Summary**

In summary, the case studies have revealed a number of insights about collective authorship:

- Collective authorship is a different process to individual authorship;
- Social norms have an important role to play in motivating and regulating authorship;
- Responsibility for the creative, aesthetic or intellectual content of a work is shared among many contributors;
- Authorship has different meaning, and is attributed differently, in different contexts;
- The attribution of authorship can be affected by power dynamics
- Attribution is often more important to creators than financial benefits or control;
- Authorship issues are often successfully managed with private ordering mechanisms;
- There are limits to the desirability of relying on private ordering mechanisms alone; and
- Copyright law norms matter to creative communities (although perhaps not in straightforward ways).

In light of these insights, a number of points must be borne in mind when applying the joint authorship test to cases of collective authorship. These are as follows:

- (i) Authorship has important ramifications for creators other than copyright ownership.
- (ii) The factually specific application of the joint authorship is a feature, rather than a defect, because it allows the test to be flexible to different creative contexts.

- (iii) Social norms provide a handy source of information about the creative process (particularly in relation to what contributors consider to be a valuable contribution and other shared assumptions).
- (iv) An inclusive approach to the application of the joint authorship test reflects the creative realities of collective authorship better than the instrumental/pragmatic approach.
- (v) The joint authorship test ought to be applied in a way that is sensitive to the creative context.
- (vi) ‘Authorship’ in copyright law is an important legal standard that is independent from the power dynamics that operate in authorial groups.
- (vii) There are good reasons to be cautious about how social norms are taken into account in legal decision-making.

In light of these points, the next Chapter proposes an inclusive and contextual approach to the joint authorship test. In so doing the Chapter considers both the usefulness and the limitations of considering the social norms which apply in various creative communities when judges apply the joint authorship test.

## **Chapter 8: An Inclusive, Contextual Approach to the Joint**

### **Authorship Test**

Copyright law is said to be undergoing a credibility crisis, because it seems disconnected to modern creative practices<sup>1</sup>. Anne Barron has suggested that ‘...copyright discourse is perpetually haunted by the problem of reconciling the often conflicting demands of certainty and legitimacy’<sup>2</sup>. This thesis has shown that when it comes to collective authorship, current copyright law appears to fail on both accounts. The instrumental/pragmatic approach sacrifices legitimacy for certainty, concentrating authorship in the hands of a few dominant contributors in order to streamline the exploitation of a copyright work. This approach distances authorship both from the creative context and from copyright’s own notion of the ‘author’. Legitimacy concerns lie behind the judicial preoccupation with aesthetic neutrality. This preoccupation tends to lead to a lack of analytical clarity in judicial reasoning, which makes it extremely difficult to tell how the joint authorship test might be applied to works of collective authorship. Nevertheless, it is virtually impossible to apply the joint authorship test without reference to aesthetic criteria. When such criteria are latently considered both the certainty and the legitimacy of the law might be compromised. This thesis argues that copyright law has an important role to play in the regulation of collective authorship. However, in order to effectively play this role, the creative realities of collective authorship should be taken into account in the application of the joint

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<sup>1</sup> N Elkin-Koren, ‘Tailoring Copyright to Social Production’ (2011) 12 Theoretical Inquiries in L 309, 310.

<sup>2</sup> A Barron, ‘The Legal Properties of Film’ (2004) 67 MLR 177, 204-5.

authorship test. The joint authorship test contains the tools and the inbuilt flexibility to do this. With this in mind, I suggest a recalibration of the joint authorship test to restore the balance between the conflicting demands of certainty and legitimacy.

This Chapter proposes an approach to the application of the joint authorship test that is *inclusive* (of all those who have made a more than de minimis contribution of creative choices to the expression) and *contextual* (in that it takes the context of creativity into account). I argue that such an approach is best suited to the realities of collective authorship and copyright law's purposes to encourage and reward creativity. Instead of adopting the instrumental/pragmatic approach, judges ought to consider the social norms that apply within collective authorship groups. These social norms provide information that is highly pertinent to a determination of whether there is 'collaboration' and whether a contributor has made a 'significant' contribution to the work. They provide a useful point of reference that does not require judges to make subjective value judgements on aesthetic matters. Yet, there are some dangers in uncritically incorporating social norms in judicial decision-making. Thus, I suggest a three-prong framework for filtering norms based on their certainty, representativeness, and policy implications. In addition, the requirement that a contribution be of the 'right kind' is an important safety mechanism that ensures that authorship is only granted to those who have made a more than de minimis creative or intellectual contribution to the protected *expression* (filtering out contributions solely of an investment or orchestration type).

This Chapter begins by considering why social norms might be relevant to judicial decision-making in this context. I argue that judges should take social norms

into account in their decisions for three reasons: (i) they provide important information about the facts of a case; (ii) the credibility of copyright depends upon its ability to correspond with reality at least in a minimal sense; and (iii) people are more likely to obey copyright law where it appears to be fair and legitimate. The second section considers the limits of incorporating social norms in judicial decision-making. I argue that social norms should not be simply deferred to; rather, they should be carefully assessed. The third section suggests a framework for assessing when norms ought to be incorporated into judicial decision-making. The fourth section revisits the three critiques of the joint authorship test (see Chapter 2). The fifth section proposes an inclusive, contextual approach to the application of the joint authorship test bearing in mind both the usefulness, and limitations, of incorporating social norms in copyright cases. It also elaborates on how this approach might work in practice by providing a few examples.

### ***8.1 The Relevance of Social Norms***

Social norms have been extensively studied in the social sciences, particularly, by anthropologists, sociologists and economists<sup>3</sup>. The body of literature on law and social norms has recently been growing<sup>4</sup>. In the legal context, scholars have argued that the state might more effectively achieve certain regulatory outcomes by choosing to ignore, strengthen or undermine particular social norms<sup>5</sup>. Some take an optimistic view of

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<sup>3</sup> C Bicchieri & R Muldoon, 'Social Norms', *Stanford Encyclopaedia of Philosophy* <<http://plato.stanford.edu/entries/social-norms/>>.

<sup>4</sup> Posner suggests that this scholarship grew out of the Legal Realist scholarship of the early 20<sup>th</sup> century. E Posner, 'Introduction' in E Posner (ed), *Social Norms, Nonlegal Sanctions, and the Law* (Edward Elgar 2007) ix.

<sup>5</sup> Posner (n4).

social norms, arguing that they can be a more efficient and flexible way of regulating behaviour than legal rules<sup>6</sup>. It may also be considered important to uphold norms in order to fulfil parties' expectations or to promote their interests in autonomy<sup>7</sup>. Others are more pessimistic, focusing on the dangers of relying on social norms that cause social costs or that conflict with fundamental values, such as distributive justice. These groups disagree on whether it is best for law to be imposed by the state from the top down or to grow from the bottom up by enforcing social norms<sup>8</sup>. Ultimately, this is likely to depend upon the particular issue to be regulated. Even where a top-down approach is preferred, it is important to have an understanding of the social norms that operate in a given community in order to understand the actual effects of legal rules on that community<sup>9</sup>.

At first blush, copyright law might appear too standardised to fit the vast range of creative works to which it is intended to apply<sup>10</sup>. A single definition of authorship and of joint authorship applies across all categories of work. In Chapter 2, however, I showed that there is, in fact, a considerable amount of flexibility built into copyright law. Although judges have sought to take the facts of the case into account, they have

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<sup>6</sup> E Posner, *Law and Social Norms* (Harvard UP 2000); R Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard UP 1991) argues that social norms are welfare maximising.

<sup>7</sup> M Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004); L Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002); R Mnookin, 'Divorce Bargaining: The Limits on Private Ordering' 18(4) *J of Law Reform* 1015, 1018; G Barzilai *Communities and Law: Politics and Cultures of Legal Identities* (U of Michigan P 2003) 13.

<sup>8</sup> R Cooter, 'Normative Failure Theory of Law' (1997) 82 *Cornell LRev* 947.

<sup>9</sup> E Posner, 'The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action' (1996) 63 *U of Chicago LRev* 133, 193.

<sup>10</sup> On the possibility that social norms might alleviate the problem of a one-size-fits-all intellectual property regime see: D Oliar and C Sprigman 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy' (2008) 94 *Virginia LRev* 1787, 1839-40.

not tended to explicitly consider the appropriate sources of those ‘facts’ or the point at which they ought to be incorporated in the application of the joint authorship test. Given that the application of the joint authorship test depends upon the facts of the case, it is important to accurately establish those facts. The case law provides little guidance on this point. Further, current copyright scholarship rarely elaborates on which aspects of the facts *ought* to be relevant in determining the authorship of a work<sup>11</sup>.

The previous case studies show that collective authorship groups share a number of characteristics<sup>12</sup>. One of these is the role of social norms in governing the creative process. Contributors adopt social norms as a response to the need to solve coordination problems that are likely to develop as a result of the large number of contributors, the division of labour, and the necessary diffusion of creative control amongst contributors. These social norms might be created by the group or they might come from external sources (eg, predominant norms in the particular discipline or genre)<sup>13</sup>. They provide a good source of information about the creative reality and shared assumptions of creators on a particular project. Social norms can provide answers to factual questions relevant to determining the authorship of works created by large groups. They provide information about whether contributors are *collaborating* in the relevant sense, because they offer insights on how the project is understood by contributors. They also provide

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<sup>11</sup> This is likely to be due to the fact that much copyright scholarship remains similarly committed to the exclusion of aesthetic considerations from copyright decision-making on questions of authorship. See further, Chapter 2.

<sup>12</sup> See 7.6.

<sup>13</sup> This is not to suggest that they are explicitly created; rather, they are the unexpected/unplanned result of individuals’ interactions: Bicchieri and Muldoon (n3).

information about the value of a particular person's contribution to the project, which is of particular relevance in determining the *significance* of their contribution<sup>14</sup>.

As argued in Chapter 2, it is very likely that judges already take social norms into account in their decision-making. This can be seen in the case law which implies requirements for a contribution of a 'musical' or 'artistic' kind, etc<sup>15</sup>. It can also be seen in the acceptance of musicologist evidence that performance is not a contribution of an authorship kind<sup>16</sup>. Yet, judges rarely set out their view of the facts in terms that make it clear which aesthetic perspectives they consider to be relevant to the case in issue. The cases are also ambiguous about the particular parts of the joint authorship test to which such perspectives might be relevant. Later in this concluding Chapter I set out a framework for the incorporation of social norms in answering questions of fact that arise in the application of the joint authorship test.

The problem with current copyright jurisprudence is this failure to engage *explicitly* with social norms in judicial reasoning<sup>17</sup>. I argue that this is due, in part, to an anxiety about aesthetic neutrality<sup>18</sup>. Yet, there is no violation of the principle that a judge should not be influenced by his or her judgment of the aesthetic merits of the work, in taking aesthetic considerations into account when determining the authorship of the work. Indeed, explicitly taking social norms into account may be the best way of

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<sup>14</sup> This requirement ought to be a qualitative one: 2.2.3.

<sup>15</sup> *Sawkins v Hyperion Records* [2005] EWCA 565, [2005] 1 WLR 3281; *Interlego v Tyco Industries* [1989] AC 217 (PC).

<sup>16</sup> *Hadley v Kemp* [1999] EMLR 589 (Ch).

<sup>17</sup> Rothman discusses this problem in 'The Questionable Use of Custom in Intellectual Property' (2007) 93 Virginia LRev 1899, 1902.

<sup>18</sup> 2.3.3.



ensuring aesthetic neutrality, because it appeals to the aesthetic views of the relevant creative community and not the judge's own subjective views. Doing so would also improve the quality and the clarity of decisions. The failure to explicitly engage with social norms has reduced the visibility of important contextual factors that weigh in favour of an inclusive definition of joint authorship. This enhances the appeal of the instrumental/pragmatic approach which presents itself as a simple and efficient answer. However, this thesis argues that the instrumental/pragmatic approach is rarely likely to lead to the right answer when it comes to determining the authorship of a work created by a large group of people<sup>19</sup>.

There are at least two other reasons to explicitly take social norms into account in judicial decision-making. The first is that the credibility of copyright law depends on its ability to correspond, at least in a minimal sense, with reality<sup>20</sup>. One might ask how copyright law can claim to be the principal legal mechanism for the regulation of creativity, if it is out of touch with the realities of creative communities. The designation of authorship must ultimately be a legal question because of the central role of this concept in the scheme of the CDPA. However, that legal determination must both relate, and seem relevant, to the creative realities of creators. Indeed, it is virtually impossible to make a decision on joint authorship without latently considering such factors. It is vital for the ongoing credibility of copyright law that these considerations are dealt with openly. This is also likely to enhance the quality of decision-making by

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<sup>19</sup> Indeed, this approach is likely to result in side effects that are significantly worse than the disease it aims to cure. It distorts the application of the joint authorship test, distancing it both from the reality of creativity and from copyright's notion of the author.

<sup>20</sup> L Bently and L Biron, 'Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, if anything, is to be done?' forthcoming in M van Eechoud (ed), *The Work of Authorship* (Amsterdam UP 2014) 237 argue that realigning legal and social authorship norms is important for the sake of copyright law's legitimacy. See also: J Tehranian, 'Infringement Nation: Copyright Reform and the Law/Norm Gap' (2007) *Utah LRev* 537.

inviting more explicit and thoughtful consideration of the validity and usefulness of particular norms<sup>21</sup>.

Secondly, as an instrumental matter, the public is more likely to obey laws that they consider to be fair and legitimate<sup>22</sup>. All law relies on a certain amount of self-enforcement and co-operation from the community to ensure its effectiveness in regulating behaviour<sup>23</sup>. Psychologists have found promoting self-compliance to be more effective than deterrence factors<sup>24</sup>. The perceived *fairness* of a law appears to be the single most important factor in shaping compliance<sup>25</sup>. In order to promote compliance with intellectual property law, prominent psychologist Tom Tyler suggests trying to understand the public's feelings about what is fair in order to tap into those feelings<sup>26</sup>. A significant element of the perceived fairness of copyright law is the way in which the

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<sup>21</sup> M Madison, 'Legal-ware: Contract and Copyright in the Digital Age' (1998) 67 Fordham LRev 1025,1137-8 argues that exposing the legal system directly to community norms ensures that they are reconciled with copyright policy and also that, over time, judicial decisions produce relatively stable bodies of rules that reflect community standards of fairness.

<sup>22</sup> Tom Tyler's work is very influential in this field, see especially: *Why People Obey the Law* (Princeton UP 2006).

<sup>23</sup> Tyler (n22) 271. Also, D Kahan, 'Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem' (2000) 97 U of Chicago LRev 607 suggesting that authorities tend to hold back from enforcement of laws that greatly contradict social norms.

<sup>24</sup> Tyler (n22) 270. Some of the literature is outlined in: J Tankebe, 'Viewing Things Differently: The Dimensions of Public Perceptions of Police Legitimacy' (2013) 51 Criminology 103; T Tyler and J Jackson, 'Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement' (2014) 20(1) Psychology Public Policy and L 78.

<sup>25</sup> Even more important than the likelihood of being caught and punished. Tyler, *ibid*.

<sup>26</sup> T Tyler, 'Compliance with Intellectual Property Law: A Psychological Perspective' (1996) 29 International L and Politics 219, 227. Indeed, he suggests that it is particularly important to consider how to promote compliance with intellectual property laws, at a time when non-compliance appears to be a serious issue with the rise of file sharing and the proliferation of copying on the internet (at 219). See also J Litman, 'Copyright Noncompliance (or why we can't "just say yes" to licensing)' (1996) 29 International Law and Politics 237.

beneficiaries of copyright are viewed<sup>27</sup>. Ensuring that the ‘authors’ protected by copyright law correspond to common expectations, at least in a minimum sense, is a simple step towards promoting compliance. As Jessica Litman succinctly puts it in discussing copyright licensing, ‘[p]eople don’t obey laws that they don’t believe in’<sup>28</sup>. Inadequate and irrelevant legal provisions are likely to be ignored or avoided. Wikipedia, for example, adroitly sidesteps the potentially restrictive and uncertain concept of authorship in copyright law with copyleft licences<sup>29</sup>. The instrumental/pragmatic approach is likely to clash with what most contributors to works of collective authorship consider ‘fair’. Granting authorship to a few dominant players and denying it to other valuable contributors disconnects authorship from the creation of the expression<sup>30</sup>. The ineffectiveness of the ICJME journal guidelines for biomedical collaborations, for example, shows that a regulatory strategy that is disconnected from creative realities is unlikely to be successful<sup>31</sup>. Where the law accords with public views about what is fair, it can also have an important symbolic function which, in turn, promotes compliance<sup>32</sup>.

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<sup>27</sup> This explains lobbyists’ frequent appeals to the figure of the deserving author when arguing for copyright law reform: see L Bently, ‘R v Author: From Death Penalty to Community Service’ (2008) 32(1) *Columbia J of L & the Arts* 1.

<sup>28</sup> Litman (n26) 239; M Schultz, ‘Fear and Norms and Rock & Roll: What Jambands Can Teach Us about Persuading People to Obey Copyright Law’ (2009) *Berkeley Technology LJ* 651 also argues that copyright law ought to be realigned with social norms in order to promote compliance.

<sup>29</sup> 3.3.

<sup>30</sup> This clashes with the understanding, common in all the creative communities considered in the case studies, that authorship signifies responsibility for what is considered valuable about the work: 7.2.2.

<sup>31</sup> 5.2.1.

<sup>32</sup> Litman points out that ‘...laws that we keep around for their symbolic power can only exercise that power to the extent that people know what the laws say’ (n26) 237. Thus, it is also important to promote analytical clarity in judicial decision-making.

The perceived *legitimacy* of the law can also promote compliance<sup>33</sup>. Thus, people are more likely to obey laws that they believe serve reasonable social purposes and that are not simply efforts to create profits for special interest groups, such as large corporations<sup>34</sup>. This provides another good reason to favour an inclusive, contextual approach to the joint authorship test over the instrumental/pragmatic approach<sup>35</sup>. The latter approach appears to unfairly advantage powerful players, some of whom, such as film producers, already constitute special interest groups that have been able to secure greater protection of their interests through lobbying<sup>36</sup>. The concept of the author as a creator of protected expression is at the heart of copyright law's claims to legitimacy<sup>37</sup>. The instrumental/pragmatic approach distances the beneficiaries of copyright protection from copyright law's *raison d'être*: to reward and encourage authors<sup>38</sup>. Thus, there is a good instrumental reason to ensure that copyright law's concept of authorship is in touch with creative realities (so as to appear 'fair' to those to whom it applies); and

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<sup>33</sup> Tyler (n26) 224 discusses two strategies which his study finds to be more effective in promoting compliance than deterrence. One is based on legitimacy ('one's feelings that one ought to obey the law'), the other is based on morality ('an individual's personal feelings about what is right or wrong'). He suggests that the legitimacy-based strategy is more difficult to implement than the morality-based strategy, given the recent decline in public respect for legal authorities in the US (Tyler, 230). A similar trend is likely to exist in the UK: D Bloomfield, K Collins, C Fry and R Munton, 'Deliberation and Inclusion: Vehicles for Increasing Trust in UK Public Governance' (2001) 12 *Environment and Planning C: Government and Policy* 501, 508-9; C Pettie, P Seyd, P Whiteley, *Citizenship in Britain: Values, Participation and Democracy* (CUP 2004).

<sup>34</sup> Tyler, *ibid* 233.

<sup>35</sup> The existing copyright literature on this point focuses on the need to recognise the interests of users as well as the powerful interest groups that tend to influence the legislative process. C Jensen, 'The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms' (2003) 56(2) *Stanford LRev* 531; Litman (n26).

<sup>36</sup> Jensen, *ibid* 540.

<sup>37</sup> W Cornish, 'The Author as Risk-Sharer' (2002) 26 *Columbia J of L & the Arts* 1, 12: copyright law derives most of its legal and moral force from the act of creating. See also, RR Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the US* (Stanford UP 2009) on the morality of copyright law.

<sup>38</sup> Some argue that copyright law is primarily a mechanism for disseminators, publishers and other intermediaries to recoup their costs, thus, ensuring the widespread distribution of creative works (rather than their production). This view requires one to ignore the fact that the author is put before the disseminator according to both the letter and the spirit of CDPA. Thus, the conceptual divide between authorship and ownership. See further: Chapter 2.

reflects the underlying purpose of copyright law to incentivise and reward creators of protectable expression (in order to enhance the ‘legitimacy’ of the law).

## ***8.2 The Dangers of Deferring to Social Norms***

In the previous section, I argued that there are a number of good reasons for judges to take social norms into account in the application of the joint authorship test. Few, if any, theorists suggest that social norms ought to be completely disregarded in legal decision-making. Most counsel for caution in incorporating social norms, industry practices, and customs in legal decision-making for three main reasons. First, the incorporation of social norms in judicial decisions risks colonising independent legal standards<sup>39</sup>. Second, it may be difficult to identify the content of social norms with certainty. Third, the content of a particular social norm might be cause for concern on the basis of its lack of reliability, efficiency, desirability, or fit with the law. In this section I consider how these three concerns relate to one another. In light of these concerns, I argue that in applying the joint authorship test social norms should be considered *carefully*.

Social norms might not be sufficiently stable or reliable. This is particularly likely to be the case where the content of the norm is unclear or contested. The case study of science, for example, reveals how norms on attribution have varied over time and between disciplines<sup>40</sup>. Legal rules ought to satisfy certain minimum standards of clarity,

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<sup>39</sup> Rothman (n17) 1908.

<sup>40</sup> 5.1

openness, and predictability<sup>41</sup>. This is particularly the case for copyright law, where the provisions on authorship provide the basis for the ownership of property rights. The scope of such rights and their owners must be capable of being identified without too much uncertainty. This dictates the consideration of social norms in the application of the joint authorship test only where the content of the norm is fairly certain, and the norm is widely accepted and stable. According to these criteria, for example, the practice of listing the head of a laboratory as an author on a biomedical science journal where that person has made no contribution to the research is unlikely to qualify because it is too contested<sup>42</sup>.

Some warn that the extolled virtues of social norms in terms of efficiency are not universally applicable<sup>43</sup>. Although inefficient social norms should not be adopted as solutions to normative problems (ie, answers to legal questions), the inefficiency of a norm does not diminish its value as a source of information about the realities of the creative process. Indeed, I have argued that social norms are primarily relevant for reasons other than their efficiency. One of the most important reasons is the fact that taking into account the realities of creativity might enhance the credibility of copyright law, which is valuable for intrinsic as well as instrumental reasons.

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<sup>41</sup> J Raz, 'Rule of Law and its Virtue' in J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 210.

<sup>42</sup> See 5.2.1.

<sup>43</sup> Rothman (n17); E Posner, 'Law, Economics and Inefficient Norms' (1996) 144 U Pennsylvania LRev 1697; A Katz, 'Taking Private Ordering Seriously' (1996) 144 U Pennsylvania LRev 1745, 1749.

Some argue that social norms do not actually represent the parties' expectations. Indeed, social norms are not explicitly made or consented to<sup>44</sup>. Social norms are particularly unlikely to be representative where there are imbalances of power within the relevant group. Norms which develop in these situations are unlikely to represent a satisfactory balancing of the interests of all parties. This can be seen in the relative ineffectiveness of relying upon contracts and codes of conduct to protect Indigenous peoples' interests in art<sup>45</sup>. There are good policy reasons not to incorporate unequal or unrepresentative social norms in legal decision-making<sup>46</sup>.

Jennifer Rothman has provided a leading critique of the incorporation of social norms in intellectual property decisions<sup>47</sup>. Rothman is particularly concerned about the incorporation of industry practices in determining what might count as a 'fair' use, because these practices are unlikely to be representative of public interests, which ought to weigh heavily in the fair use analysis<sup>48</sup>. However, there may be less reason to be concerned about the incorporation of social norms in the application of the joint authorship test, where the question is which contributors are joint authors. In this case the most relevant parties are the other contributors. Where a norm is stable and uncontested amongst an authorial group, it is likely to be appropriately representative of

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<sup>44</sup> J Gardner, 'Some Types of Law' in D Edlin (ed), *Common Law Theory* (CUP 2007) 51; see also Bicchieri and Muldoon (n3).

<sup>45</sup> See 4.3.1 and 4.3.3.

<sup>46</sup> On the importance of equality as a substantive value in a theory of justice, see, for example, E Chemerinsky, 'In Defense of Equality: A Reply to Professor Westen' (1983) 81 *Michigan LRev* 575, 585-91.

<sup>47</sup> Rothman (n17) 1908, 1902 is concerned that custom has 'tremendous influence on IP law'; see also J Rothman, 'Copyright, Custom and Lessons from the Common Law' in S Balganesch (ed) *Intellectual Property and the Common Law* (CUP 2013) 230.

<sup>48</sup> Rothman (n17) 1937, especially the interests of users.

those contributors. Still, even in this context a norm should be rejected where it conflicts with copyright law's purposes or other policy goals<sup>49</sup>.

Questions which are essentially legal in nature ought to be answered independently by judges guided by the policy and purposes of the CDPA. As the concept of originality helps determine the scope of protection, much of the analysis on this point must be an independent legal evaluation. Yet this only accounts for the requirement in the joint authorship test that a contribution be of the 'right kind'. There is more scope for incorporating social norms in answering factual questions which go towards establishing whether a contributor is a joint author. Therefore, concerns about the incorporation of social norms are less compelling in relation to determinations of the significance of a contribution or the existence of a common design among contributors<sup>50</sup>. Although generally sceptical about the incorporation of norms in intellectual property decisions, even Rothman admits that they are valuable evidence of parties' intentions and of what is generally done in an industry<sup>51</sup>.

Authorship cannot be a purely legal inquiry, because it needs to adapt across industries, in very different contexts, and over time. This need for flexibility supports recourse to social norms in answering factual questions. Nevertheless, not all social norms can provide appropriate answers to these questions. Theorists tend to be highly critical of the desirability of norms that develop in situations where there is great

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<sup>49</sup> One such policy goal might be substantive equality among contributors who qualify as authors.

<sup>50</sup> These ought to be treated as factual questions: 2.2.4.

<sup>51</sup> Rothman (n17) 1937.



inequality of bargaining power between parties<sup>52</sup>. In addition, social norms ought not to be adopted where they may result in third party or societal costs; or harm other important policy interests. These objections counsel caution in the way in which norms are incorporated in judicial decision-making.

The next section provides a framework for assessing the desirability of norms. Following a restatement of the critiques of the joint authorship test raised in Chapter 2, the final section presents an inclusive, contextual approach to the application of the joint authorship test that attempts an appropriate incorporation of social norms in reaching legal determinations.

### ***8.3 A Framework for Considering Social Norms***

Although some of the literature on law and social norms is relatively new, the idea that it is important for judges to have regard to customary practice is quite old. Indeed, recourse to custom as a source of legal rules is at the heart of the common law method<sup>53</sup>. From the early days of the common law, judges developed rules to consider whether it was appropriate to recognise custom as law<sup>54</sup>. According to Blackstone, a custom was a good candidate to be incorporated into the common law if it satisfied the following requirements: antiquity, continuing peaceable use, certainty, reasonableness,

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<sup>52</sup> *ibid* 1956. Although powerful interest groups may also affect the legislative process, Rothman considers that these groups will have a more pronounced impact on custom which does not develop in the context of open debate and public commentary. See also: Posner (n43) 1709 who provides a critique of the reliance on norms as a source for legal rules on the basis that the asymmetrical position of parties is likely to result in inefficient norms.

<sup>53</sup> Rothman (n47).

<sup>54</sup> Since the sixteenth century it has been necessary to prove the antiquity, continuity, certainty and reasonableness of a custom. A Loux 'The Persistence of the Ancient Regime: Custom, Utility and the Common Law in the Nineteenth Century' (1993) 79 *Cornell LRev* 183, 189.

compulsoriness and consistency<sup>55</sup>. These requirements might be boiled down to two central concerns relating to the proof of the existence and the reasonableness of the custom<sup>56</sup>. These requirements filter out the aspects of custom that are potentially arbitrary and burdensome to non-community members<sup>57</sup>. The need to ensure that illegitimate or undesirable customs do not spread and are not upheld by the law was recognised from these early days<sup>58</sup>.

This thesis does not suggest that courts ought to adopt social norms and enforce them as if they were legal rules. Rather, social norms provide an important source of contextual information that may help answer questions of fact in the application of the joint authorship test<sup>59</sup>. As part of the factual matrix which existed at the time of creation, social norms provide important information about the existence and parameters of a common design; and what constitutes a significant contribution in light of that common design. In this section, I suggest a three-prong framework to guide the incorporation of social norms in the application of the joint authorship test, drawing upon the limits to the incorporation of custom that the common law has recognised<sup>60</sup>.

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<sup>55</sup> W Blackstone, *Commentaries*, Volume 1, 76-78.

<sup>56</sup> Loux (n54) 186. *Halsbury's Laws of England* (5th edn, LexisNexis 2012) Volume 32, 1(3)(i)6 describes the requirements in the following terms: 'To be valid, a custom must have four essential attributes: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in its terms, and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to affect; and (4) it must have continued as of right and without interruption since its immemorial origin'.

<sup>57</sup> H Smith, 'Community and Custom in Property' (2009) 10(1) *Theoretical Inquiries in Law* 5, 10.

<sup>58</sup> Smith (n57) 11.

<sup>59</sup> Rothman (n17) 1968 argues that custom should only be relevant in relation to questions about what the parties intended or what is generally done. She thinks it should not be used to answer normative questions (ie, what ought to be done).

<sup>60</sup> Rothman (n17) sets out a detailed and compelling argument for the assessment of custom according to these principles. She takes these rules as an inspiration for the 6 vector approach that she suggests to guide the incorporation of custom in intellectual property decisions. Her vectors include: certainty,

This framework, thus, addresses the three potential defects of social norms noted above: their lack of certainty; the influence of power imbalances on their development; and the fact that they develop without regard for public interests and the interests of third parties. I suggest that the desirability of a social norm might be ascertained by considering: (i) its certainty; (ii) its representativeness; and (iii) the policy implications of adopting it. This framework requires proof that the social norm exists in a stable form and that it does not enshrine values that might be repugnant to the law's overall purposes.

### **(i) Certainty**

A number of problems may arise in discovering the relevant norms and in dealing with changing norms. For this reason, the requirement for certainty is important. Courts ought not to incorporate social norms into legal decisions unless they are identifiable, stable and widely accepted<sup>61</sup>. The ICJME guidelines discussed in Chapter 5 might not quite reach this level of certainty because they are not widely accepted<sup>62</sup>. On the other hand, Indigenous customary laws on the authorship of art will satisfy the requirement of certainty<sup>63</sup>. Social norms may change over time. When it comes to determinations of joint authorship, judges ought to inquire into the social norms that existed at the time the work was created. Proof of certainty provides a measure of transparency and

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motivation, representativeness, application of the custom (against whom), application of the custom (for what proposition), implications of the custom. See also Rothman (n47).

<sup>61</sup> It does not make much sense to apply the requirement of immemorial existence in this context, although as a general matter the stability of the norm over time ought to be required. The length of time might vary depending on the characteristics of the creative industry in question.

<sup>62</sup> 5.2.1.

<sup>63</sup> Australian courts have often accepted evidence on these matters in copyright cases, see 4.2.

stability, which attenuates concerns that the incorporation of social norms might potentially inject an element of arbitrariness to joint authorship cases<sup>64</sup>.

Although it might be said that powerful parties will more easily be able to prove the existence of a social norm that favours them<sup>65</sup>, this is no more likely to be the case here than in relation to any other aspect of an intellectual property case. The use of expert evidence on issues of copyright subsistence (including authorship) is already common<sup>66</sup>. Judges are very accustomed to, and adept at, determining industry practice in other contexts, for example, in contract cases<sup>67</sup>. There is no reason to suppose that discovering the social norms that operate in creative communities will be any more challenging in this context than it is in others. In any case, getting joint authorship right is surely worth the price of any problems of proof that may arise from the explicit consideration of social norms. The case studies discussed in this thesis show that the benefits the instrumental/pragmatic approach seeks are not likely to be worth the price paid: a fundamental disconnect between copyright law and the reality of collective authorship<sup>68</sup>.

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<sup>64</sup> C Fisk, 'Credit Where It's Due: The Law and Norms of Attribution' (2006) 95 Georgetown LJ 49 considers these to be important characteristics of desirable private ordering regimes.

<sup>65</sup> Rothman (n17) 1959, also noting that formal written statements of social norms, such as guidelines, are more likely to be developed by powerful players and are easy to prove, yet these written statements may not reflect actual practice.

<sup>66</sup> See: L Bently, 'Authorship of Popular Music in UK Copyright Law' (2009) 12(2) Information Communication & Society 179 who has criticised the over-reliance on the evidence of classically-trained musicologists who have a particular point of view that may make them ill-suited to comment on genres such as popular music.

<sup>67</sup> S Carter 'Custom, Adjudication and Petrushevsky's Watch: Some Notes from the Intellectual Property Front' (1992) 78 Virginia LRev 129, 130 (although he expresses some scepticism about judicial expertise to do so in exercises of what he calls 'judicial anthropology').

<sup>68</sup> See 2.3.2, 7.1 and 7.2.2.

## (ii) Representativeness

Custom has its greatest legitimacy when applied to the community that generated it<sup>69</sup>. The common law has always held that customs should only apply to those who demonstrate consent to them. The requirement for consent might seem to underlie Blackstone's requirements for the custom's continuity, and existence since time immemorial; and that it be peaceable (undisputed) and compulsory<sup>70</sup>. In this sense, 'consent' was a legal fiction, particularly given the requirement of the immemorial existence of the custom<sup>71</sup>. Social norms arise as an unplanned result of individuals' interactions<sup>72</sup>. In light of the absence of active consent to a social norm, I prefer the term 'representativeness'. Under this second prong, I suggest that norms that are developed with the input and participation of contributors are to be preferred to top-down norms. Similarly, courts should not incorporate customs that only serve one party's interest<sup>73</sup>.

This part of the framework provides a bulwark against undesirable norms which can result from imbalances of power within creative communities. In the case study of scientific collaborations, it has been observed that power imbalances can negatively impact prevailing social norms. Thus, senior scientists are able to exert a great deal of control over the attribution of authorship, in ways which distance authorship from the

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<sup>69</sup> *Millar v Taylor* (1769) 4 Burr 2303, 2368 (Yates J): custom is '*lex loci*, the law of the place'.

<sup>70</sup> Rothman (n47) 243-244.

<sup>71</sup> Loux (n54) 208. *Chapman v Smith* (1754) 2 Ves Sen 506, 510 (Lord Hardwicke LC) for legal purposes this date was fixed at the year 1189.

<sup>72</sup> See Bicchieri and Muldoon (n3); and Gardner (n44) 60-3 noting that custom is not expressly made and not intentionally made.

<sup>73</sup> Rothman (n17) 1970-4; Fisk (n64) 74-6.

creation of the work and even from scientific responsibility for it<sup>74</sup>. Likewise, some directors have used their superior bargaining power to obtain a possessory credit on a film seemingly implying that they are its sole author<sup>75</sup>. The literature on social norms supports the observation that power dynamics within groups can prevent community norms from being ideal in terms of efficiency and fairness<sup>76</sup>. The need to protect weaker parties is also recognised in many parts of the law and commentators have made similar suggestions in slightly different contexts<sup>77</sup>. Fisk, for example, suggests that attribution regimes ought to be assessed on the basis of equality, substantive fairness and participation<sup>78</sup>. And, Rothman argues that before incorporating a custom in an intellectual property decision, judges must consider those to whom it would apply and the ‘motivations’ of a custom<sup>79</sup>. Collectively bargained agreements on screen credit and particle physics authorship protocols provide evidence of social norms that are representative<sup>80</sup>.

### **(iii) Policy Implications**

The court should take policy considerations into account when considering whether to incorporate a particular social norm. The requirement of reasonableness was one of the

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<sup>74</sup> 5.2.1.

<sup>75</sup> See pp135, 179, 181.

<sup>76</sup> Smith (n57) 14.

<sup>77</sup> This might be seen, for example, in the *contra proferentum* rule in contract law, or in the equitable doctrine of unconscionability.

<sup>78</sup> Fisk (n64) 74-6.

<sup>79</sup> Rothman (n17) 1970-4.

<sup>80</sup> See 5.2.2 and 6.3.

most important restrictions on the incorporation of custom into the common law<sup>81</sup>. Even where a custom was widely accepted and long-standing, it was not appropriate for judges to defer to it as a proxy for what is reasonable<sup>82</sup>. This allowed judges to assess the substantive fairness of a custom and also to consider public interests. In the previous section, I observed that one of the key limitations of social norms is that they are developed without regard for the interests of third parties and other public policy concerns. The third prong of this framework assures the primacy of copyright law's policy goals and filters out undesirable norms<sup>83</sup>. This involves the independent evaluation of whether the end result of the adoption of a particular norm into law would be objectively desirable<sup>84</sup>. It also has the added benefit of allowing the incorporation of social norms to evolve, rather than being locked in by courts<sup>85</sup>.

#### ***8.4 Revisiting the Critiques of the Joint Authorship Test***

Before suggesting an approach to the application of the joint authorship test that is better suited to collective authorship, I briefly return to the three critiques of the application of the joint authorship test (discussed in Chapter 2)<sup>86</sup>.

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<sup>81</sup> *Halsbury's Laws of England* (5th edn, Lexis Nexis 2012) Volume 32, 1(3)(iii)9.

<sup>82</sup> Rothman (n47) 244.

<sup>83</sup> Rothman (n17) 1977.

<sup>84</sup> *ibid* 1976.

<sup>85</sup> *ibid*.

<sup>86</sup> 2.3.

### **8.4.1 The Factual Specificity of the Joint Authorship Test**

In Chapter 2, I suggested that the factual specificity of the joint authorship test makes it difficult to predict the outcome of a particular case, especially where no similar cases have been previously decided<sup>87</sup>. In light of the very different dynamics of creativity in collective authorship groups, the factually specific nature of the joint authorship test is a very useful feature because it gives the test the flexibility to adapt to the creative context. In this context, it is important to ensure that the ‘facts’ are correctly understood. The social norms which regulate creativity in collective authorship groups provide a good source of information about the creative process (as long as their limitations are borne in mind).

### **8.4.2 The Preoccupation with Aesthetic Neutrality**

In Chapter 2, I argued that the principle that judges should not be affected by their own view of the aesthetic merits of the work in making copyright decisions has led to a general anxiety about aesthetic neutrality<sup>88</sup>. It is very difficult to make judgments about who should be an author without some regard to aesthetic considerations. Given the inescapable relevance of aesthetic considerations, social norms might provide a handy point of reference that avoids the dangers of judges making subjective decisions about the aesthetic merits of a work. Collective authorship groups themselves are best placed to determine the relative value of each contributor’s contribution to the whole. By taking into account the social norms that operate in particular creative contexts, judges

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<sup>87</sup> 2.3.1.

<sup>88</sup> 2.3.3. J Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 U of California Davis LRev 1151, considers this anxiety to be reflected in copyright scholarship, leading to a preference for abstraction and a propensity to ignore the context of creativity.



can define relevant aesthetic criteria which help establish joint authorship, whilst devolving any questions of aesthetic merit to the collective authorship group. Adopting social norms as a point of reference for aesthetic matters is likely to result in better quality decisions that more accurately reflect creative realities. The first section of this Chapter suggests that an open, transparent, contextual approach such as this may enhance the credibility of copyright law as a tool to encourage, reward and regulate creativity<sup>89</sup>. This may have the knock on effect of enhancing compliance.

### **8.4.3 The Instrumental/Pragmatic Approach**

The case studies suggest that adopting the instrumental/pragmatic approach to the application of the joint authorship test is misguided, because that approach divorces the test from both copyright's core concept of authorship and the reality of collective authorship.

The instrumental/pragmatic approach divorces the joint authorship test from copyright's concept of authorship by implying that a higher standard applies in the case of joint works. This risks undermining copyright law's goal to reward and incentivise *creators* of protected expression, because one or two contributors will receive too much of an authorship share, whilst many more will receive no authorship share at all. Worse still, authorship is likely to gravitate to the most powerful or dominant contributors, who tend to be orchestrators and investors, rather than *creators*. Although these figures are very important to the creative process, the CDPA already provides for their protection with specially adapted entrepreneurial copyrights (that belong to 'makers' as

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<sup>89</sup> 8.1.

distinct from ‘authors’), and with the presumption that copyright in works created by employees during the course of their employment is owned by their employer unless terms to the contrary have been agreed<sup>90</sup>. The provisions of the CDPA make it clear that ‘author’ is intended to imply creator, not orchestrator or investor<sup>91</sup>. It is clearly problematic that the instrumental/pragmatic approach to the joint authorship test requires judges to distance themselves from the core meaning of authorship in copyright law, applying a more restrictive approach in the case of joint works. Not only does this approach result in too few authors, it also results in the wrong contributors being granted too much of an authorship share.

Furthermore, the instrumental/pragmatic approach divorces the joint authorship test from creative realities. The nature of collective authorship is that creative responsibility is shared amongst a large number of contributors. The instrumental/pragmatic approach requires judges to construct a fiction about how a work is created in order to elevate the contributions of one or two individuals and deny the contributions of the other contributors. These legal fictions, based on instrumental concerns rather than legal principles, are likely to lead to unpredictability in the case law<sup>92</sup>.

The instrumental/pragmatic approach also relies on the assumption that many joint owners will struggle to effectively exploit a work. The case studies, however, indicate that this may not be a significant concern, as private ordering can often be very

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<sup>90</sup> Even here there is provision for express terms to trump investor rights.

<sup>91</sup> See 2.1.

<sup>92</sup> 2.3.2.

effectively used to regulate authorship issues such as attribution or copyright ownership. The Wikipedia community has adopted creative commons licences that virtually eliminate some of the coordination problems that can arise from multiple ownership, whilst retaining the right to attribution, which is clearly important to its contributors<sup>93</sup>. These licences also provide for workable ways of implementing the attribution requirement in the digital environment<sup>94</sup>.

Contract can be a particularly valuable tool for resolving ownership issues which might result in cases of multiple ownership, because it can be flexible and context-specific. The benefits of relying upon contract include efficiency, flexibility, and intrinsic benefits such as promoting autonomy and self-determination. The example of film demonstrates that contract can be a very effective means of dealing with issues that might arise in relation to the copyright ownership of works of multiple authorship<sup>95</sup>. In some cases such issues are unlikely to arise in the first place, as authors have no interest in controlling future uses of their work or because a sharing economy is a more important factor in authorship than the ability to charge royalties (eg, science and Wikipedia)<sup>96</sup>.

There are limitations on the effectiveness of relying upon contracts where there is no capacity to agree, where parties have unequal bargaining power, and where there are societal costs. Therefore, contract is not well-adapted to deal with Indigenous art, as

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<sup>93</sup> 3.3.

<sup>94</sup> For example, it is considered sufficient acknowledgment to provide a hyperlink to the relevant page (see p52).

<sup>95</sup> 6.3.

<sup>96</sup> 3.1, 5.1.

Indigenous artists may not have equal bargaining power with art dealers and museums who wish to purchase their work<sup>97</sup>. A contract is also limited to those who are parties to it and cannot affect the conduct of third parties. A precondition to reliance on contract to deal with ownership issues is that it requires parties to anticipate difficulties and take the step of actually entering into a contract. Indigenous artists may not realise the need to ensure explicit protection of their cultural interests<sup>98</sup>. Where authorship takes on its main significance in a sharing economy, contributors may not care to deal with ownership issues that might arise. In these cases copyright provides an important source of default rules. Yet, as has been considered above, these rules will only be helpful where they reflect creative realities. Based on the analysis of the case studies, this thesis suggests that an inclusive approach to joint authorship is preferable. This approach would remain faithful to the same core notion of authorship that exists for individually authored works. Such an approach more accurately reflects the reality of collective authorship<sup>99</sup>, and provides less powerful contributors with a bargaining chip that may improve the overall quality of contractual negotiations<sup>100</sup>. The example of film shows how certain creative players have sought to be recognised as ‘authors’ or ‘creatives’ as a means of improving their bargaining position in contractual negotiations over pay and credit<sup>101</sup>.

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<sup>97</sup> The Bangarra Dance troupe are a notable exception: M Rimmer, ‘The Bangarra Dance Theatre: Copyright and Indigenous Culture’ (2000) 9(2) Griffith LRev 274.

<sup>98</sup> *Yumbulul v Reserve Bank of Australia* [1991] FCA 332, 21 IPR 481 (Fed. Ct. of Australia) seems to provide an example of this, p67 above.

<sup>99</sup> These groups require the input of a large number of specialised contributors, only some of whom undertake completely mechanical, non-creative tasks.

<sup>100</sup> Dominant contributors are unlikely to need the bargaining help they receive from the application of the instrumental/pragmatic approach. See RC Dreyfuss, ‘Collaborative Research: Conflicts on Authorship, Ownership and Accountability’ (2000) 53 Vanderbilt LRev 1161, 1207.

<sup>101</sup> p139.

The instrumental/pragmatic approach elides the concepts of authorship and ownership in an unhelpful way. By focusing solely on the economic consequences of a designation of joint authorship (ie, joint ownership), the instrumental/pragmatic approach ignores the fact that a designation of joint authorship is also likely to lead to moral rights. The right to be attributed as an author is particularly valued in a number of the creative communities considered<sup>102</sup>. Authorship and ownership are separate and conceptually distinct questions.

There are other better ways of dealing with the potential unsuitability of the rules of joint ownership than taking a restrictive approach to the joint authorship test<sup>103</sup>. The best option would be legislative amendment by, for example, including a presumption that only a majority of owners need to consent to license a work in cases involving a large number of owners (unless all owners agree to the contrary)<sup>104</sup>. The ‘majority’ might be calculated in terms of ownership share, which case law establishes may be unequal among the contributors. At the very least, it would be helpful to introduce a provision that unless the contrary is explicitly agreed to, one joint owner cannot unreasonably withhold consent to licence a work<sup>105</sup>.

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<sup>102</sup> The importance of attribution within collective authorship groups raises the question of whether the current provisions on the right of attribution offer too little protection (particularly in light of the requirement to assert the right).

<sup>103</sup> The question of joint ownership is not within the scope of this thesis, so I only provide a few brief suggestions on this point.

<sup>104</sup> This would be to adopt an intermediate position between the UK and the US approach. In the US any owner might consent to license the work (subject to a duty to account for profits), for more see: M LaFrance, ‘Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors’ (2001) 50 Emory LJ 193; MB Nimmer and D Nimmer, *Nimmer on Copyright* (Matthew Bender 2011) §6.10[A][1][a].

<sup>105</sup> The absence of a solution on this issue is considered problematic by D Vaver *Intellectual Property Law* (Irwin Law 2011) 122.

The rules on joint ownership largely arise from case law, applying the rule of statutory interpretation that the singular implies the plural<sup>106</sup>. Given the absurdity of the results of this interpretation in cases of large group authorship, there may be grounds for a different judicial interpretation of the statute in cases of collective authorship. It is clearly unworkable to allow one of a hundred joint authors to hold up the exploitation of the work. In this context, it would certainly be plausible for a court to adopt a different and more nuanced approach to the application of the rules on joint ownership<sup>107</sup>. Failing this, a solution may be also found by implying terms into contracts or by implying licences allowing certain uses. This will usually be supported by reasons of business efficacy. Many large collaborations have evolved models of collective decision-making to deal with these challenges (eg, particle physics protocols). Judges should strive to uphold these consensually developed strategies for managing collective authorship whenever reasonably possible.

### ***8.5 An Inclusive and Contextual Approach to the Joint Authorship Test***

Building on the insights from the case studies, I propose an approach to the application of the joint authorship test that is:

- adapted to the ways in which collective authorship groups work together to create (Chapter 7);
- sensitive to the relevance of social norms (8.1); but also
- mindful of the dangers of uncritically incorporating social norms (8.2).

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<sup>106</sup> s10(3).

<sup>107</sup> The potential flexibility of the rules on joint ownership can be seen in a case where on the specific facts a husband and wife were said to own copyright in commissioned wedding photos as joint tenants rather than as tenants in common, contrary to most of the case law: *Mail Newspapers v Express Newspapers* [1987] FSR 90 (Ch).

What do the case studies reveal about the best way of applying the joint authorship test to works of collective authorship? They reveal, first, that the joint authorship test should be applied *contextually*. Authorship should be a flexible concept that can adapt to creative practices that change over time and that differ between creative communities. This is the best way to make a one size fits all copyright regime work in a credible way. Second, they reveal that the test should be *inclusive*, rather than restrictive. At the very least, the authorship requirement should not be stricter in the case of joint authorship than it is for individual authorship. This best reflects the realities of collective authorship and provides protection for those contributors who have made significant contributions to the expression but who may find themselves in weaker bargaining positions.

An inclusive, contextual approach to the joint authorship test can be achieved in the following way. First, judges should take social norms into account in determining whether contributors are collaborating. Second, in light of the common design of the contributors, the question of whether or not a contribution is significant ought to be a qualitative inquiry that takes into account the social norms which operate to govern the creative activities of the contributors to the work. Overall, this approach entails a shift in emphasis in the application of the test from an abstract consideration of whether an individual contribution is ‘authorship’ to focus on the collaborative nature of the joint work. This involves explicitly considering the prevailing social norms which regulate authorship in a particular context. This is not to say that judges should simply adopt an authorial community’s view of who is an author. But, rather, that social norms provide a valuable source of information about the collaborative nature of a joint work, which may help assess the contributions made to it.

Given the dangers of the uncritical incorporation of social norms expressed at 8.2, there is a need to exercise caution in the incorporation of norms when applying the joint authorship test. I suggest a two-fold filter. First, norms should be assessed according to the three-prong framework suggested above, based on their certainty, representativeness and the policy implications of adopting them. Second, social norms ought to feed into the legal test for authorship (requiring a contribution of the right kind). This requires a more than *de minimis* contribution of creative choices which are evident in the expression. This means that pure investment will never be enough; and creative control alone will not be enough – unless it is coupled with creative choices evident in the expression. In the rest of this section, I explain this approach in further detail, offering examples of how it might work in practice.

Whether a contributor has made a *significant* contribution is best determined in light of the specific collaboration concerned. In Chapter 2, I argued that it makes more sense to adopt a qualitative, rather than a quantitative, approach to the question of whether a contribution is significant<sup>108</sup>. One of the main objections to the adoption of a qualitative approach is the possibility of subjective judgments of aesthetic merit seeping into the decision-making<sup>109</sup>. This risk can be minimised by explicitly incorporating social norms at this point, devolving the decision of which sorts of contributions are significant to the best source of information about the relative value of contributions, ie: the social norms governing creativity in the particular creative context. This approach avoids the pitfalls and analytical obfuscation associated with an acontextual approach to

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<sup>108</sup> 2.2.3.

<sup>109</sup> p82.



determining the relative value of particular contributions to a joint project<sup>110</sup>. On this view, a statistician who analyses the results of scientific experiments might make a ‘significant’ contribution to a journal article reporting the results of that study<sup>111</sup>. Similarly, a Wikipedia contributor might make a significant contribution when they edit a page so as to make it comply with the Neutral Point of View policy<sup>112</sup>.

Whether or not there is *collaboration* or a *common design* is also best assessed with regard to the shared assumptions of the creators. In Chapter 2, I argued that this part of the joint authorship test has the important function of distinguishing joint works from a series of derivative works<sup>113</sup>. The question of whether a highly iterative work such as Wikipedia is a series of derivative works or a number of joint works may seem quite a challenging question to resolve on its face. A consideration of the social norms which operate in this context, however, makes the question significantly easier to answer. From this point of view, it is apparent that Wikipedia is not a series of individually authored derivative works, but its pages are joint works. The main reason for this is that the social norms establish collaboration amongst the regular contributors<sup>114</sup>.

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<sup>110</sup> An example of an acontextual approach can be seen in the ‘elephant test’ for artistic works (you know one when you see one) suggested by the Court of Appeal in *Lucasfilm v Ainsworth* [2009] EWCA Civ 1328 [77] and regarded with scepticism by the Supreme Court: *Lucasfilm v Ainsworth* [2012] 1 AC 208 [47].

<sup>111</sup> 5.1 (the norms of science) and p115 (the significance of the work of statisticians).

<sup>112</sup> p51.

<sup>113</sup> 2.2.2.

<sup>114</sup> See further, Chapter 3, p50.

Although there is no need for a subjective intention to be a joint author<sup>115</sup>, as argued in Chapter 2, the requirement of collaboration necessarily requires some intention to work together<sup>116</sup>. It is difficult to see how one might accidentally or unwittingly collaborate with another person. Social norms provide important information about the shared assumptions of contributors to creative works<sup>117</sup>. These assumptions are particularly relevant when they satisfy the requirements of the three-prong framework suggested at 8.3<sup>118</sup>. Such norms are pertinent in determining whether there can be said to be a common design especially where they are stable, fairly uncontested and representative.

An understanding of the nature of the common design shared by contributors may also help shed light on the significance of various contributions. So, for example, in the context of a scientific collaboration: involvement in the design of a study in accordance with the scientific method is likely to be a significant contribution in light of the common design of contributors to produce research that will be accepted as valid by the relevant scientific community. By the same token, a screenwriter who writes humourous dialogue is also likely to have made a significant contribution to a film in light of the common design of contributors to make a romantic comedy<sup>119</sup>.

When it comes to considering whether the contribution is of the *right kind* (ie, authorship) this needs to be done partly with an eye to the reality of creativity. This

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<sup>115</sup> *Beckingham v Hodgens* [2003] EWCA Civ 143, [2003] EMLR 18.

<sup>116</sup> 2.2.2.

<sup>117</sup> 7.1.

<sup>118</sup> The three prongs are: certainty, representativeness and policy implications.

<sup>119</sup> p139, p152.

information should feed into copyright's own legal notion of authorship, which requires a more than de minimis contribution of creative choices which are evident in the expression (Chapter 2). The important role of the concept of authorship in the CDPA means that there is a normative dimension to the authorship requirement<sup>120</sup>. This part of the test is a legal question that is common to joint works and single author works. At this stage in the analysis, therefore, the purposes of the CDPA and the limits of copyright protection need to be taken into account. The idea/expression dichotomy is one of the principles that have been used to police the boundaries of the scope of copyright protection. The categories of work have also sometimes been used in this way<sup>121</sup>. This provides a stable legal core to the joint authorship test<sup>122</sup>.

In addition to ensuring that the purpose of copyright law is fulfilled and that other policy goals are served, there is another reason for the need to have a legal dimension to the joint authorship test: to ensure that this important question is not completely subordinated to market forces. The legal dimension of the joint authorship test provides protection for creators in weaker bargaining positions. In this way it might, for example, help contributors to a film ensure adequate remuneration for their contributions<sup>123</sup>. Indeed, a central justification for the copyright regime itself is premised on the need to protect authors who are in a position that makes them vulnerable to free-riding due to

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<sup>120</sup> 2.1.

<sup>121</sup> The requirement that a contribution be relevant to the category of work, ie, that it be 'musical' or 'artistic' in nature. The ongoing relevance of this limitation on the scope of copyright protection may now be in doubt following the Court of Justice of the European Union's opinions in Case C-393/09, *Bezpečnostní a softwarová asociace v Ministerstvo Kultury* [2011] ECDR 3, [2011] FSR 18 and Case C-403/08 & C-429/08 *Football Association Premier League v QC Leisure* [2012] 1 CMLR 29, [2012] ECDR 8. But see, p15 n43.

<sup>122</sup> Bently and Biron (n20) note that this is important because authorship forms the basis upon which property rights are granted.

<sup>123</sup> This is inherent in the court's reasoning in *Slater v Wimmer*, see p148.

the nature of their creations, which are costly to create, but inexpensive to copy. There is a natural relationship between copyright and contract law. The scheme embodied in the CDPA assumes that authors will contract with publishers and other disseminators (assigning or licensing their copyright interest) and that they will grant licences to other users of their works. In order for this scheme to be effective, there needs to be a bare minimum level of equality of bargaining power<sup>124</sup>. An inclusive default approach to the joint authorship test serves this purpose by providing an incentive for more powerful parties to define issues of ownership at the outset by potentially raising the costs of not doing so. This is what many film contributors have tried to achieve by joining guilds which have the power to make more favourable collective agreements with producers on their behalf, than those contributors would be able to negotiate individually<sup>125</sup>. An inclusive approach is also preferable even where there is no inequality of bargaining power, or where contributors are not concerned about the ownership of copyright, because it better reflects the reality of collective authorship<sup>126</sup>.

Adopting an inclusive, contextual approach to the joint authorship test means, for example, that a scientific author who deletes important inaccuracies in an article might count as an author<sup>127</sup>. This contribution is seen as significant according to the scientific community and it also counts as a contribution of creative choices that is evident in the

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<sup>124</sup> There are many examples of important legal principles that are premised on the need to protect those in weaker bargaining positions: consumer protection laws; equitable rules on unconscionable conduct; the *contra proferentum* rule, etc.

<sup>125</sup> 7.4.1, p159, p163.

<sup>126</sup> 7.1.

<sup>127</sup> In a case involving a scientific article, the Polish Supreme Court held that one might become a joint author by deleting content which is factually incorrect (Case II CSK 527/10, 22 June 2010): T Targosz, 'Authorship By Deletion', *Kluwer Copyright Blog*, <<http://kluwercopyrightblog.com/2011/11/02/authorship-by-deletion-supreme-court-june-22-2010-ii-csk-52710/>> dated 2 November 2011.

expression. Recourse to the Mertonian norms of science is also likely to pass the three-prong framework suggested at 8.3 above<sup>128</sup>.

To take an example from the case law, this approach, may have allowed for the recognition of communal authorship in a case such as *Bulun Bulun*<sup>129</sup>. In light of customary law, it seems quite clear that there was a common design between *Bulun Bulun* and his community, as represented by its Elders: the transmission and preservation of sacred cultural knowledge. In light of this common design, the contribution of the community was significant. The apprenticeship of the artist and the ongoing control of the community over subsequent uses of the artwork attest this. The Federal Court of Australia held that the community had contributed unprotectable ideas. As has been argued in Chapter 4, the community contributed to the expression (although not to the fixation of the work). Once the context of creativity is taken into account, there seems to be little distinction between *Bulun Bulun* and *Cala Homes* in which a design director was held to be a joint author of drawings made by draftsmen under his direction<sup>130</sup>. Indeed, the decision in *Bulun Bulun* seems best explained as a result of a Western bias toward individual authorship<sup>131</sup>. Thus, it fails to reflect the reality of the authorship of art in the Indigenous community concerned.

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<sup>128</sup> p105.

<sup>129</sup> 4.2.

<sup>130</sup> p93.

<sup>131</sup> p94. See also Bowrey's critique of the decision: 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture' (2001) 12 L and Critique 75.

The two-fold filter suggested ensures that undesirable norms are not uncritically adopted into law<sup>132</sup>. For example, the attribution practices that many have criticised in biomedical science would not be accepted because they are not stable and uncontested. Furthermore, gift authorship and guest authorship will not meet the legal requirement for a contribution of the right kind to the expression of the work. Instances of irrational discrimination will also fall foul of the last part of the framework: the implications of adopting the social norm<sup>133</sup>.

## 8.6 Conclusion

In popular culture, peppered throughout the case law, and in much of the scholarship considered here, one might discern a concept of the ‘author’ as puppeteer or orchestrator. Although the romantic author has been convincingly exposed as a myth and pronounced ‘dead’, its ghost still seems to haunt copyright law today. The romantic author has taken on a modern guise in the pragmatic insistence on the need to incentivise those who take risks and choose to invest in creative projects<sup>134</sup>. This approach tends to divorce copyright from creative realities and also from its own core notion of authorship. Although historically, it has been expedient to be able to hold one person responsible for a collective work in some circumstances, this does not accurately reflect the way in which groups actually work together to create. This has been

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<sup>132</sup> The first filter is the requirement that the contribution be of the *right kind*. The second filter is the three-prong framework for assessing norms suggested at 8.3 above.

<sup>133</sup> Social discrimination can affect attribution practices, see for example, M Terrall, ‘The Uses of Anonymity in the Age of Reason’ in M Biagioli and P Galison (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 91 discussing the historical use of anonymity in relation to works that pushed the boundaries of propriety at the time of publication or for reasons related to the public status of the author (eg, female scientists).

<sup>134</sup> A Casey and A Sawicki, ‘Copyright in Teams’ (2013) 80 U of Chicago LRev 1683 use the theory of the firm to argue for the concentration of IP rights with managers.

appreciated in disciplines where romantic author figures have been prominent in the past, such as science and film, but which now have moved towards more inclusive approaches to authorship.

The concept of authorship in copyright law is not about control; rather, it is about creative contribution to the expression of a work. From a copyright perspective, authorship is about more than who signs a work<sup>135</sup>, it is about the person who *creates* it<sup>136</sup>. This thesis reaffirms the importance of maintaining separate concepts of authorship and ownership in copyright law. The importance of the noneconomic functions of authorship to authors, and the influence of sharing economies in motivating their activities, casts the limitations of the incentive justification for copyright law in sharp relief. The fact that the case studies considered here concern works which fall within copyright law's heartland adds gravity to this critique, and suggests that the incentive story can only provide a shaky foundation for the copyright expansionism that has occurred in its name. There are important intrinsic and social dimensions to creativity, which require a more nuanced, contextual approach to the implementation of copyright law. In particular, an appreciation of the creativity reality of collective authorship suggests a need to critically assess the way in which instrumental reasoning shapes the development of copyright law more broadly.

The experience of collective authorship suggests that in determining who counts as an author, it is better to ensure that enough creators can access the right of attribution, than to restrict authorship on the basis that this might streamline the

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<sup>135</sup> J Ginsburg, 'The Author's Name as a Trade Mark: A Perverse Perspective on the Moral Right of "Paternity"?' (2005) 23 Cardozo Arts and Entertainment LJ 379.

<sup>136</sup> CDPA s9.

economic exploitation of the work. This is further supported by the fact that ownership issues tend to be successfully managed with private ordering. Private ordering allows for the flourishing of different creative models, some of which would be impeded by the ordinary operation of copyright law<sup>137</sup>. Private ordering also allows creators to separate the economic and reputational incidents of authorship, allocating them to contributors in ways that best support their needs. Although the case studies demonstrate the natural interaction between private ordering and copyright law, they also indicate the need for some regulation of this relationship. To this end, there is an important role for copyright as a source of good authorship standards. This is enhanced by the interaction between legal standards and community standards that takes place in the application of the joint authorship test (partly a legal, and a partly a factual, question).

This thesis has argued for an inclusive, contextual approach to the joint authorship test that would result in better quality decisions that correspond to creative realities and do not simply replicate power dynamics in creative communities. Authorship should be a flexible concept that can adapt to creative practices that differ over time, from place to place, and between creative communities<sup>138</sup>. By considering the social norms that apply to a particular collective authorship group, the joint authorship test can be applied in a flexible way that is sensitive to the creative context and that would allow the one size fits all copyright regime to work in a credible way. This approach might also help counteract the effect of cultural biases and elitist tendencies in the application of the

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<sup>137</sup> These might provide a valuable source of information for copyright policy makers about the merits of different approaches to the regulation of creativity.

<sup>138</sup> The lack of international harmonisation of copyright on this point reflects the fact that the concept of authorship is partly contingent on local conditions.



authorship standard, by devolving the assessment of aesthetic criteria to creators rather than judges.

The proposal that judges ought to take social norms into account in applying the joint authorship test does not require a paradigm shift. Indeed, the case law suggests that judges already take social norms into consideration when applying the test, although they tend to do so latently. I have argued that there is value in a more explicit, and cautious, consideration of the social norms that regulate collective authorship groups, in the application of the joint authorship test<sup>139</sup>. As mass collaboration is becoming increasingly common, if copyright law is to retain its credibility as the primary tool for regulating creativity, it must come to terms with the challenge of determining the authorship of works of collective authorship. It is hoped that the approach proposed in this thesis would not only bring the joint authorship test in line with the reality of collective authorship, but also provide a useful analytical framework to promote greater clarity in judicial decision-making.

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<sup>139</sup> G Dinwoodie, 'Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring' (2004) 160 *J of Institutional and Theoretical Economics* 161 on the value of the public structuring of private ordering.

## Bibliography

- , ‘Creative Nation’, Commonwealth Cultural Policy Statement, October 1994
- , *Dracula* (1992) (Film)
- , *Halsbury’s Laws of England* (5th edn, LexisNexis 2012)
- , *Jurassic Park* (1993) (Film)
- , *Pulp Fiction* (1994) (Film)
- , ‘Report of the Board of Trade Copyright Committee’ (Her Majesty’s Stationery Company October 1952) (‘Gregory Report’).
- , ‘Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community of 6 December 2002’ COM (2002) 691
- , ‘Report of the Royal Commission into Aboriginal Deaths in Custody’, tabled in the Australian Federal Parliament on 9 May 1991
- , *The Nightmare Before Christmas* (1993) (Film)
- , *The Shining* (1980) (Film)
- , ‘Stopping the Rip-Offs’ Issue Paper, Australian Federal Government, October 1994 <<http://www.ag.gov.au/Publications/Pages/StoppingtheripoffsOctober1994.aspx>>
- , ‘The 7.30 Report’, *ABC*, 19 August 2010 <<http://www.abc.net.au/7.30/content/2010/s2988038.htm>>
- , ‘Uniform requirements for Manuscripts Submitted to Biomedical Journals’ (1997) 277 JAMA 928
- Adeney E, ‘Unfixed Works, Performers’ Protection, and Beyond: Does the Australian Copyright Act Always Require Material Form?’ (2009) IPQ 77
- Adler A, ‘Against Moral Rights’ (2009) 97 California LRev 263
- Albertson Fineman M, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004)
- Annas M, ‘The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin’ (1997) 3(90) Aboriginal L Bulletin 4
- Arnold R, ‘Joy: A Reply’ (2001) 1 IPQ 10

Astala M, 'Comment, Wronged by a Professor? Breach of Fiduciary Duty as a Remedy in Intellectual Property Infringement Case' (2003) 3 Houston Bus & Tax LJ 31

Astruc A, 'The Birth of the Avant Garde: Le Caméra Stylo', *L'Écran français*, 30 March 1948

Australian Senate Standing Committee on Environment, Communications, Information Technology and the Arts, 'Indigenous Art – Securing the Future: Australia's Indigenous Visual Arts and Craft Sector', June 2007 ('Senate Report')

Ayres R, 'The Wandjina Case Illustrates the Lack of Protection for Indigenous Culture', *Art+Law*, Issue 3, September 2010

Bacharach S and Tollefsen D, 'We Did It Again: A Reply to Livingston' (2011) 69(2) *J of Aesthetics and Art Criticism* 225

Bacharach S and Tollefsen D, 'We Did It: From Mere Contributors to Coauthors' (2010) 68(1) *J of Aesthetics and Art Criticism* 23

Barlow JP, 'The Economy of Ideas: Selling Wine Without Bottles on the Global Net' <<https://projects.eff.org/~barlow/EconomyOfIdeas.html>>

Barnett J, 'Hollywood Deals: Soft Contracts For Hard Markets' *Duke LJ* (forthcoming) available at SSRN: <<http://ssrn.com/abstract=2118918>>

Barron A, 'Copyright and the Claims of Art' (2002) 4 *IPQ* 368

Barron A, 'Copyright Law and Musical Practice: Harmony or Dissonance?' (2006) 15(1) *Social and Legal Studies* 25

Barron A, 'The Legal Properties of Film' (2004) 67 *MLR* 177

Barthes R, 'The Death of the Author' in S Heath (trans) *Image, Music, Text* (Fontana, 1977) 142

Barzilai G, *Communities and Law: Politics and Cultures of Legal Identities* (U of Michigan Press 2003)

Bazerman C, 'Emerging Perspectives on the many dimensions of scientific discourse' in Martin JS and Veel R (eds), *Reading Science: Critical Functional Perspectives on discourses of Science* (Routledge 1988) 15

Beebe B, 'Intellectual Property and the Problem of Aesthetic Progress', Ninth Annual International Intellectual Property Lecture, Emmanuel College, University of Cambridge, 11 March 2014

Behrendt L, Cunneen C, Libesman T, *Indigenous Legal Relations in Australia* (OUP 2009)

- Bently L, 'Authorship of Popular Music in UK Copyright Law' (2009) 12(2) *Information Communication & Society* 179
- Bently L, 'Copyright and the Death of the Author in Literature and Law' (1994) 57 *MLR* 973
- Bently L, 'R v Author: From Death Penalty to Community Service' (2008) 32(1) *Columbia J of L & the Arts* 1
- Bently L and Biron L, 'Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, if anything, is to be done?' forthcoming in van Eechoud M (ed), *The Work of Authorship* (Amsterdam UP 2014) 237
- Bently L and Sherman B, *Intellectual Property Law* (OUP 2009)
- Bhopal R et al, 'The Vexed Question of Authorship: Views of Researchers in a British Medical Faculty' (1997) 314 (7086) *British Medical J* 1009
- Biagioli M and Galison P (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003)
- Biagioli M, 'Documents of Documents: Scientists' Names and Scientific Claims' in Riles A (ed), *Documents: Artifacts of Modern Knowledge* (U of Michigan Press 2006) 129
- Biagioli M, 'Rights or Rewards? Changing Frameworks of Scientific Authorship' in Biagioli M and Galison P (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 260
- Bicchieri C & Muldoon R, 'Social Norms' in *Stanford Encyclopaedia of Philosophy* <<http://plato.stanford.edu/entries/social-norms/>>
- Bicchieri C, *The Grammar of Society: the Nature and Dynamics of Social Norms* (CUP 2006)
- Birnholtz J, 'When Authorship Isn't Enough: Lessons from CERN on the Implications of Formal and Informal Credit Attribution Mechanisms in Collaborative Research' (2008) 11(1) *Journal of Electronic Publishing* <<http://dx.doi.org/10.3998/3336451.0011.105>>
- Biron L and Cooper E, 'Copyright and Multiple Authorship: Insights from the Philosophy of Art', HERA Working Paper, 21 June 2013 (on file with the author)
- Blackstone W, *Commentaries*, Volume 1
- Bloomfield D, Collins K, Fry C and Munton R, 'Deliberation and Inclusion: Vehicles for Increasing Trust in UK Public Governance' (2001) 12 *Environment and Planning C: Government and Policy* 501

Bloore P, *Managing Creativity and Script Development in the Film Industry* (Routledge 2013)

Bloore P, *The Screenplay Business: Managing Creativity and Script Development in the Film Industry* (Routledge 2012)

Bonadio E, 'Joint Ownership of Films in the Absence of Express Terms' (2012) 7(7) JIPLP 493

Bowrey K, 'Alternative IP?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 Macquarie LJ 65

Bowrey K, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture' (2001) 12 L and Critique 75

Bowrey K, *Law and Internet Cultures* (CUP 2005)

Bowrey K and Anderson J, 'The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?' (2009) 18 Social and Legal Studies 479.

Boyle J, 'Second Enclosure Movement and the Construction of the Public Domain' (2003) 66 L and Contemporary Problems 33

Boyle J, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard UP 1996)

Bracha O, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American copyright' (2008) 118 Yale LJ 186

Breyer S, 'The Uneasy Case For Copyright: A Study of Books, Photocopies and Computer Programs' (1970) 84(2) Harvard LRev 281

Bruns A, *Blogs, Wikipedia, Second Life, and Beyond: from Production to Produsage* (Peter Lang 2008)

Buccafusco CJ, 'On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?' (2007) 24 Cardozo Arts & Entertainment LJ 1121

Burk D, 'Research Misconduct: Deviance, Due Process, and the Disestablishment of Science' (1995) 3 George Mason U Independent LRev 305

Burkitt D, 'Copyrighting culture – the history and cultural specificity of the Western model of copyright' (2001) IPQ 146

Burns Coleman E, *Aboriginal Art, Identity and Appropriation* (Ashgate 2005)

Carter S, 'Custom, Adjudication and Petrushevsky's Watch: Some Notes from the Intellectual Property Front' (1992) 78 Virginia LRev 129

Casey A and Sawicki A, 'Copyright in Teams' (2013) 80 U of Chicago LRev 1683

- Chander A and Sunder M, 'The Romance of the Public Domain' (2004) 92 California LRev 1331
- Chemerinsky E, 'In Defense of Equality: A Reply to Professor Westen' (1983) 81 Michigan LRev 575
- Chon M, 'New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship' (1996) 75 Oregon LJ 257
- Clark G and Davies I, 'Mediation – When is it not an appropriate dispute resolution process?' (1992) 3(2) Australian Dispute Resolution J 70
- Claxton L, 'Scientific Authorship Part 2: History, recurring issues, practices, and guidelines' (2005) 589 Mutation Research 31
- Cohen J, 'Creativity and Culture in Copyright Theory' (2007) 40 U of California Davis LRev 1151
- Commonwealth Department of Communications, Information Technology and the Arts, 'Report of the Contemporary Visual Arts and Crafts Inquiry', June 2002 ('Myer Report')
- Conley T, 'End Credits' in Biagioli M and Galison P (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 360
- Coombe R, 'Contingent Articulations: A Critical Cultural Studies of Law' in Sarat A and Kearns T (eds), *Law in the Domains of Culture* (U of Michigan Press 1998)
- Coombe R, 'Fear, Hope and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property' (2003) 52 DePaul LRev 1171
- Coombe R, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Duke UP 1998)
- Cooter R, 'Normative Failure Theory of Law' (1997) 82 Cornell LRev 947
- Corbett S, 'Creative Commons Licences, the Copyright Regime and the Online Community: Is there a Fatal Disconnect?' (2011) 74(4) MLR 503
- Cornish W, 'The Author as Risk-Sharer', (2002) 26 Columbia J of L & the Arts 1
- Cornish W, Llewelyn D and Aplin T, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th edn, Sweet & Maxwell 2013)
- Craig C, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011)

Davis P, 'An Authorship Accelerator'

<<http://scholarlykitchen.sspnet.org/2008/12/08/hep-authorship>> dated 8 December 2008

Decherney P, *Hollywood's Copyright Wars: From Edison to the Internet* (Columbia UP 2012)

Department for Culture Media and Sport, 'A Future For British Film: It Begins With The Audience...' Film Policy Review, 2012

Derclaye E, 'Database Sui Generis Right: What is a Substantial Investment? A Tentative Definition' (2005) 36(1) Intl Rev of Intellectual Property and Competition L 2

Derclaye E, 'Databases Sui Generis Right: Should We Adopt the Spin Off Theory?' (2004) 26(9) EIPR 402

Derclaye E, 'Do Sections 3 and 3A of the CDPA violate the Database Directive? A Closer Look at the Definition of a Database in the UK and its Compatibility with European Law' (2002) 24(10) EIPR 466

Derclaye E, 'The Court of Justice Interprets the Database Sui Generis Right for the first time' (2005) 30(3) Eur LR 420

Derclaye E, 'What is a Database? A Critical Analysis of the Definition of a Database in the European Database Directive and Suggestions for an International Definition' (2002) 5(6) JWIP 981

Dietz A, 'The Concept of Authorship Under the Berne Convention' (1993) 155 Revue Internationale du Droit d'Auteur 3

Dinwoodie G, 'Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring' (2004) 160 J of Institutional and Theoretical Economics 161

Diver A, '"A Just War": Protecting Indigenous Cultural Property' (2004) 6(4) Indigenous L Bulletin 7

Dodson M and Barr O, 'Breaking the Deadlock: Developing and Indigenous Response to Protecting Indigenous Traditional Knowledge' (2007) 11(2) Australian Indigenous LR 19

Dougherty FJ, 'Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under US Copyright Law' (2001) 49 UCLA LRev 225

Doyle G, *Understanding Media Economics* (2nd edn, Sage 2013)

Drahos P with Braithwaite J, *Information Feudalism: Who Owns the Knowledge Economy?* (Routledge 2002)

Drassinower A, 'From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law' (2009) 34(4) J of Corporation L 991

Dreyfuss RC, 'Collaborative Research: Conflicts on Authorship, Ownership and Accountability' (2000) 53 Vanderbilt LRev 1161

Dusollier S, 'Open Source and Copyleft: Authorship Reconsidered?' (2003) 26 Columbia J of L and Arts 281

Dusollier S, 'Sharing Access to Intellectual Property Through Private Ordering' (2007) 82(3) Chicago-Kent LRev 1391

Dusollier S, 'The Master's Tools v the Master's House: Creative Commons v Copyright' (2005) 29 Columbia J of L and Arts 271

Dworkin G, 'Authorship of Films and the European Commission Proposal for Harmonising the Term of Copyright' (1993) EIPR 151

Ebersbach A, Glaser M and Heigl R, *Wiki: Web Collaboration* (Springer 2006)

Eisenberg R, 'Proprietary Rights and the Norms of Science in Biotechnology Research' (1987) 97 Yale LJ 177

Eisenberg R, 'The Bargain Principle and its Limits' (1982) 95 Harvard LRev 741

Eliades D, 'Power in Mediation – Some Reflections' (1999) 2(1) ADR Bulletin 4

Elkin-Koren N, 'Tailoring Copyright to Social Production' (2011) 12(1) Theoretical Inquiries in L 309

Elkin-Koren N, 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons' (2005) 74 Fordham LRev 375

Ellickson R, *Order Without Law: How Neighbors Settle Disputes* (Harvard UP 1991)

Ellison D, 'Unauthorised Reproduction of Traditional Aboriginal Art' (1994) 17 UNSWLJ 327

Endicott T, 'Questions of Law' (1998) 114 LQR 292

Epstein R, 'Academic Fraud Today: Its Social Causes and Institutional Responses' (2010) 21 Stanford L & Policy Rev 135

Everard D, 'Code of Conduct for Indigenous Art', *Art+Law*, June 2009, available at <<http://www.artslaw.com.au/artlaw/archive/2009/09CodeOfConduct.asp>>

Fauchart E and von Hippel EA, 'Norm-Based Intellectual Property Systems: The Case of French Chefs' available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=881781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781)>



- Field R, 'Mediation and the Art of Power (Im)balancing' (1996) 12 QUTLJ 264
- Finbow K, 'Nicole Kidman: 'I had no control over Grace of Monaco'', *Digital Spy*, 27 May 2014
- Fisher R and Ury W, *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin 1981)
- Fisher W, 'Theories of Intellectual Property' in S Munzer (ed), *New Essays in the Legal and Political Theory of Property* (2001) <<http://www.tfisher.org/publications.htm>>
- Fisher W, 'Property and Contract on the Internet' (1998) 73 U Chicago-Kent LRev 1203
- Fisk C, 'The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000' (2012) 32 Berkeley J of Employment and Labour L 215
- Fisk C, 'Credit Where It's Due: The Law and Norms of Attribution' (2006) 95 Georgetown LJ 49
- Fisk C, 'The Jurisdiction of the Writers Guild to Determine the Authorship of Movies and Television Programs' (2010) 48 English Language Notes 15, available at SSRN: <<http://ssrn.com/abstract=1694043>>
- Foucault M, 'What is an author?' in D Bouchard (ed) *Language, Counter-Memory, Practice: Selected Essays and Interviews by Michel Foucault* (Cornell UP 1977)
- Fox M, Ciro T and Duncan N, 'Creative Commons: an Alternative, Web-based Copyright System' (2005) 16(6) Entertainment LR 111
- Fox PS, 'Preserving the Collaborative Spirit of American Theatre: The Need for a 'Joint Authorship Default Rule' in Light of the Rent Decision's Unanswered Question' (2001) 19 Cardozo Arts & Entertainment LJ 497
- Free D, 'Beckingham v Hodgens: The Session Musician's Claim to Music Copyright' (2005) 1(3) Entertainment and Sports LJ 93 available at <<http://www.warwick.ac.uk/go/eslj/issues/volume1/number3>>
- Fugh-Berman AJ, 'The Haunting of Medical Journals: How Ghostwriting Sold "HRT"' (2010) 7(9) PLoS Med e1000335
- Galison P, 'The Collective Author' in Biagioli M and Galison P (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 329
- Gardner J, 'Some Types of Law' in Edlin D (ed), *Common Law Theory* (CUP 2007) 51
- Garfield E, 'Giving Credit Only Where it is Due: The Problem of Defining Authorship' (1995) 9(19) The Scientist 13

- Garnett KM, Davies G, Harbottle G, Copinger WA and Skone James EP, *Copinger and Skone James on Copyright* (16th edn, Sweet & Maxwell 2011)
- Garon J, 'Content, Control, and the Socially Networked Film' (2010) 48 U of Louisville LRev 771
- Gaut B, 'Film Authorship and Collaboration' in Allen R and Smith M (eds), *Film Theory and Philosophy* (OUP 1997) 149
- Gibson J, 'Justice of Precedent, Justice of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property' (2001) 6(4) Australian Indigenous L Reporter 1
- Ginsburg J, 'The Author's Name as a Trade Mark: A Perverse Perspective on the Moral Right of "Paternity"?' (2005) 23 Cardozo Arts and Entertainment LJ 379
- Ginsburg J, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52 De Paul L Rev 1063
- Goldstein P, *Copyright: Principles, Law and Practice* (Little Brown & Co 1989)
- Golvan C, 'Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments' (1999) EIPR 549
- Golvan C, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 11(10) EIPR 346
- Golvan C, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 14(7) EIPR 227
- Gomulkiewicz R, 'Conditions and Covenants in License Contracts: Tales from a Test of the Artistic License' (2009) 17(3) Texas Intellectual Property LJ 335
- Gomulkiewicz R, 'General Public License 3.0: Hacking the Free Software Movement's Constitution' (2006) 42(4) Houston LRev 1015
- Gomulkiewicz R, 'Open Source License Proliferation: Helpful Diversity or Hopeless Confusion?' (2009) 30 Washington UJ of L and Policy 261
- Gonzalez AG, 'Viral Contracts or Unenforceable Documents? Contractual Validity of Copyleft Licences' (2004) 26(8) EIPR 331
- Gøtzsche PC et al, 'Ghost Authorship in Industry-Initiated Randomised Trials' (2007) 4 PLoS Med e535
- Gøtzsche PC et al, 'What Should Be Done To Tackle Ghostwriting in the Medical Literature?' (2009) 6(2) PLoS Med. e1000023
- Graber C and Taubner G, 'Art and Money: Constitutional Rights in the Private Sphere?' (1998) 18 OJLS 61

Graber C, 'Aboriginal Self-determination vs the Proprietisation of Traditional Culture: The Case of Sacred Wanjina Sites' (2009) 13(2) Australian Indigenous L Report 18

Gray D, *Setting up and Managing a Production Company* (Medialex Publications 2006)

Griffin J, 'The Changing Nature of Authorship: Why Copyright Law Must Focus on the Increased Role of Technology' (2005) IPQ 135

Guibault L, 'Wrapping Information in Contract: How Does it Affect the Public Domain?' in Guibault L and Hugenholtz PB (eds), *The Future of the Public Domain: Identifying the Commons in Information* (Kluwer Law International 2006) 87

Guibault L, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002)

Guibault L and Angelopoulos C, *Open Content Licensing: From Theory to Practice* (Amsterdam UP 2011)

Gusterson H, 'The Death of the Authors of Death: Prestige and Creativity among Nuclear Weapons Scientists' in Biagioli M and Galison P (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 281

Halbert DJ, *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights* (Quorum 1999)

Handler M, 'Continuing Problems with Film Copyright' in Macmillan F (ed), *New Directions in Copyright Law: Volume 6* (Edward Elgar 2007) 173

Hargreaves I, 'Digital opportunity: A Review of Intellectual Property and Growth for HMG' (2011) available at: <<http://www.ipo.gov.uk/ipreview>>

Hawkins C, 'Stopping the Rip Offs: Protecting Aboriginal and Torres Strait Islander Cultural Expression' [1995] Aboriginal L Bulletin 3

Henley M, 'Jacobsen v Katzer and Kamind Associates – an English Legal Perspective' (2009) 1(1) IFOSS L Rev 41

Hick DH, 'Authorship, Co-Authorship, and Multiple Authorship' (2014) 72(2) J of Aesthetics and Art Criticism 147

Horton R, 'The Signature of Responsibility' (1997) 350 Lancet 5

Huang T, 'Gaiman v McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material' (2005) 20(1) Berkeley Technology LJ 673

Jackson MW, 'Can Artisans be Scientific Authors? The Unique Case of Fraunhofer's Artisanal Optics and the German Republic of Letters' in Biagioli M and Galison P (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 113

Janke T, 'Briefs: Copyright – The Carpet Case' [1995] *Aboriginal L Bulletin* 13; (1995) 3(72) *Aboriginal L Bulletin* 36

Janke T, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke & Co 2009)

Janke T, *Minding Culture: Case studies on intellectual property and traditional cultural expressions* (WIPO 2003)

Janke T, *Our Culture: Our Future A Report on Australian Indigenous Cultural and Intellectual Property Rights* (Michael Frankel & Co and Terri Janke 1998)

Jaszi P, 'Towards a Theory of Copyright: The Metamorphoses of Authorship' (1991) 2 *Duke LJ* 455

Jaszi P, 'On The Author Effect: Recovering Collectivity' in Woodmansee M and Jaszi P (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke U Press 1999) 29

Jensen C, 'The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms' (2003) 56(2) *Stanford LRev* 531

Johnson P, "'Dedicating" Copyright to the Public Domain' (2008) 71(4) *MLR* 587

Jones AH, 'Can Authorship Policies Help Prevent Scientific Misconduct? What Role for Scientific Societies?' (2003) 9 *Science and Engineering Ethics* 243

Kahan D, 'Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem' (2000) 97 *U of Chicago LRev* 607

Kamina P, *Film Copyright in the European Union* (CUP 2004)

Katz A, 'Taking Private Ordering Seriously' (1996) 144 *U Pennsylvania LRev* 1745

Kaufman R, 'After 5 Years, Heated Controversy Persists in Science Copyright Case' *The Scientist*, 14 September 1992 at: <<http://www.the-scientist.com/?articles.view/articleNo/12483/title/After-5-Years-Heated-Controversy-Persists-In-Science-Copyright-Case/>>

Keen A, *The Cult of the Amateur: How Today's Internet is Killing our Culture* (Doubleday/Currency 2007)

Keith Grant B, *Auteurs and Authorship: A Film Reader* (Blackwell 2008)

Kleinart S and Neale M, *The Oxford Companion to Aboriginal Art and Culture* (OUP 2000)

Kwall RR, 'Author-Stories: Narrative's Implications For Moral Rights And Copyright's Joint Authorship Doctrine' (2001) 75 *Southern California LRev* 1

- Kwall RR, 'The Author as Steward "for Limited Times": A Review of "The Idea of Authorship in Copyright" (Lior Zemer, Ashgate Press, 2007)' (2008) 88(3) Boston U LRev 685
- Kwall RR, *The Soul of Creativity: Forging a Moral Rights Law for the US* (Stanford UP 2009)
- Lacey LJ, 'Of Bread and Roses and Copyright' [1989] Duke LJ 1532
- Laddie H, Prescott P and Vitoria M, *The Modern Law of Copyright and Designs* (4th edn, LexisNexis 2011)
- LaFrance M, 'Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors' (2001) 50 Emory LJ 193
- Lastowska G, 'The Trade Mark Function of Authorship' (2005) 85 Boston U LRev 1171
- Lemley M, 'Intellectual Property and Shrinkwrap Licenses' (1995) 68 Southern California LRev 1239
- Lemley M, 'Romantic Authorship and the Rhetoric of Property' (1997) 75 Texas LRev 873
- Lessig L, *Free Culture: How Big Media uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press 2004)
- Lessig L, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008)
- Lessig L, *The Future of Ideas: The Fate of the Commons in a Connected World* (Vintage Books 2002)
- Lipton J, 'Wikipedia and the European Union Database Directive' (2010) 26 Santa Clara Computer & Technology LJ 631
- Litman J, 'Copyright Noncompliance (or why we can't "just say yes" to licensing)' (1996) 29 NYU J of Intl L and Politics 237
- Livingston P, 'Cinematic Authorship' in Allen R and Smith M (eds), *Film Theory and Philosophy* (OUP 1997) 132
- Livingston P, 'On Authorship and Collaboration' (2011) 69(2) J of Aesthetics and Art Criticism 221
- Livingston P, *Art and Intention* (OUP 2005)
- Lopez Romero T, 'Sui Generis Systems for the Protection of Traditional Knowledge' (2005) 6 International L: Revista Colombiana de Derecho Internacional 301

- Loren LP, 'Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright' (2007) 14 George Mason LRev 271
- Loshin J, 'Secrets Revealed: How Magicians Protect Intellectual Property without Law' in Corcos C, *Law and Magic: A Collection of Essays* (Carolina Academic Press 2008) 123
- Love J and Hubbard T, 'The Big Idea: Prizes to Stimulate R&D for New Medicines' (2007) 82 Chicago-Kent LRev 1519
- Loux A, 'The Persistence of the Ancient Regime: Custom, Utility and the Common Law in the Nineteenth Century' (1993) 79 Cornell LRev 183
- Macey J, 'Public and Private Ordering and the Production of Legitimate and Illegitimate rules' (1997) 82 Cornell L Rev 1123
- Mackay E, 'Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach' (2009) 32(1) UNSWLJ 1
- MacMillan F, 'The Cruel C: Copyright and Film' (2002) EIPR 483
- Macnab G, 'Johnny Depp's new film Transcendence is yet another expensive flop - so has the star lost his mojo?' *The Independent*, 30 April 2014
- Madison M, 'Legal-ware: Contract and Copyright in the Digital Age' (1998) 67 Fordham LRev 1025
- Mainous III AG, Bowen MA, Zoller JS, 'The importance of interpersonal relationship factors in decisions regarding authorship' (2002) 34 Family Medicine 462
- Manton B, 'Russian Ice Dancers Should Re-think their Routine' *Sydney Morning Herald*, 21 January 2010 <<http://www.smh.com.au/opinion/politics/russian-ice-dancers-should-rethink-their-routine-20100121-mnwj.html>>
- Marrella F and Yoo CS, 'Is Open Source Software the New Lex Mercatoria?' (2006–7) 47 Virginia J of International L 807
- Martin A, 'Possessory Credit' (2004) 45 (1) Framework 95
- Matheson A, 'How Industry Uses the ICMJW Guidelines to Manipulate Authorship – And How They Should Be Revised' (2011) 8(8) PLoS Med. 1001072
- McCausland S, 'Protecting Communal Interests in Indigenous Artworks after the Bulun Bulun Case' (1999) 4(22) Indigenous L Bulletin 4
- McHenry L, 'Of Sophists and Spin-Doctors: Industry-Sponsored Ghostwriting and the Crisis of Academic Medicine' (2010) 8(1) Journalology 129

- McLaughlin GM, 'Oral Contracts in the Entertainment Industry' (2001) 1(1) Virginia Sports and Entertainment LJ 101
- McSherry C, 'An Uncommon Controversy' in C McSherry, *Who Owns Academic Work: Battling for Control of Intellectual Property* (Harvard UP 2001) 68
- Merges R, *Justifying Intellectual Property* (Harvard UP, 2011)
- Merges R, 'Locke for the Masses: Property Rights and the Products of Collective Creativity' (2008) 36(4) Hofstra LRev 1179
- Merges R, 'The Concept of Property in the Digital Era' (2008) 45(4) Houston LRev 1239
- Merton RK, *The Sociology of Science: Theoretical and Empirical Investigations* (Chicago UP, 1973)
- Mnookin R and Korhauser L, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LRev 950
- Mnookin R, 'Divorce Bargaining: The Limits on Private Ordering' 18(4) J of L Reform 1015
- Moglen E, 'Free Software Matters: Enforcing the GPL, I' <<http://emoglen.law.columbia.edu/publications/lu-12.pdf>>
- Morphy H, *Ancestral Connections: Art and an Aboriginal System of Knowledge* (U of Chicago Press 1991)
- Murphy R, 'Postscript: A Short History of British Cinema' in R Murphy (ed) *The British Cinema Book* (3rd edn, Palgrave Macmillan 2009) 417
- Murray LJ, Tina Piper S and Robertson K, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (OUP 2014)
- Naremore J, 'Authorship' in Miller T and Stam R(eds) *A Companion to Film Theory* (Blackwell Publishing 2005) 9
- Netanel NW, 'Copyright and Democratic Civil Society' (1996) 106 Yale LR 283
- Nimmer D, 'Copyright in the Dead Sea Scrolls: Authorship and Originality' (2001) 38 Houston LRev 1
- Nimmer MB and Nimmer D, *Nimmer on Copyright* (Matthew Bender 1998, 1976 and 2011 editions)
- Notaro A, 'Technology in Search of an Artist: Questions of Auteurism/Authorship and the Contemporary Cinematic Experience' (2006) 57 The Velvet Light Trap 86

- O'Reilly T, 'What is Web 2.0?'  
<<http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>>
- O'Sullivan M, 'The Pluralistic, Evolutionary, Quasi Legal Role of the GNU General Public Licence in Free/Libre/Open Source Software (FLOSS)' (2004) 26(8) EIPR 340
- Obergfell EI, 'No need for harmonising film copyright in Europe?' (2003) 4 European Legal Forum 199
- Oliar D and Sprigman C, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy' (2008) 94 Virginia LRev 1787
- Ong B, 'Originality from Copying: Fitting Recreative Works into the Copyright Universe' (2010) 2 IPQ 165
- Oster J, 'Proposal for a Regulated Indigenous Art Industry' (2006) 6 (18) Indigenous LBulletin 21
- Parker RA and Bergman NA, 'Criteria for Authorship for Statisticians in Medical Papers' (1998) 17(20) Statistics in Medicine 2289
- Perry M and Margoni T, 'Ownership in complex authorship: a comparative study of joint works' (2012) 34(1) EIPR 22
- Pettie C, Seyd P, Whiteley P, *Citizenship in Britain: Values, Participation and Democracy* (CUP 2004)
- Phillips J, 'Authorship, Ownership and Wikiship: Copyright in the Twenty-First Century' (2008) 3 (12) JIPLP 788
- Phillips R, 'Researchers' Objective is to Get the Job Done' (1997) 315 British Medical J 747
- Pila J, 'An Intentional View of the Copyright Work' (2008) 71(4) MLR 535
- Pila J, 'Authorship and e-Science: Balancing Epistemological Trust and Skepticism in the Digital Environment' (2009) 23 Social Epistemology 1
- Pila J, 'The "Star Wars" Copyright Claim: An Ambivalent View of the Empire' (2012) LQR 15
- Poll G, 'Harmonization of Film Copyright in Europe' (2002) 50 J of the Copyright Society of the USA 519
- Posner E (ed), *Social Norms, Nonlegal Sanctions, and the Law* (Edward Elgar 2007)
- Posner E, 'Introduction' in Posner E (ed), *Social Norms, Nonlegal Sanctions, and the Law* (Edward Elgar 2007)



Posner E, 'Law, Economics and Inefficient Norms' (1996) 144 U Pennsylvania LRev 1697

Posner E, 'The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action' (1996) 63 U of Chicago LRev 133

Posner E, *Law and Social Norms* (Harvard UP 2009)

Posner E, 'Norms, Formalities, and the Statute of Frauds: a Comment' (1996) 144 U Pennsylvania LRev 1971

Posner R, *Law and Literature* (3rd edn, Harvard UP 2009)

Price M and Pollack M, 'The Author in Copyright: Notes for the Literary Critic' in Woodmansee M and Jaszi P (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke U Press 1999) 439

Radin MJ and Wagner RP, 'The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace' (1998) 73 Chicago-Kent LRev 1295

Rafaeli S and Ariel Y, 'Online Motivational Factors: Incentives for Participation and Contribution in Wikipedia' in Barak A (ed), *Psychological Aspects of Cyberspace: Theory, Research, Applications* (CUP 2008)

Rahmatian A, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011)

Raustiala K and Sprigman C, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 Virginia LRev 1687

Raymond E, 'The Cathedral and the Bazaar'  
<<http://www.catb.org/~esr/writings/cathedral-bazaar/cathedral-bazaar/>>

Raz J, 'Rule of Law and its Virtue' in J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 210

Reichman JH & Franklin JA, 'Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information' (1999) 147(4) U of Pennsylvania LRev 875

Rennie D, Yank V and Emanuel L, 'When Authorship Fails: A Proposal to Make Contributors Accountable' (1997) 278 JAMA 579

Reynolds W and Moringello J, 'Survey of the Law of Cyberspace: Electronic Contracting Cases 2008-2009' (2009) *The Business Lawyer* 65 available at  
<<http://ssrn.com/abstract=1437162>>

Rheinberger H, "'Discourses of Circumstance": A Note on the Author in Science' in Biagioli M and Galison P (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge, 2003)

Richardson W, *Blogs, Wikis, Podcasts, and Other Powerful Web Tools for Classrooms* (Corwin Press 2006)

Ricketson S, 'The Concept of Originality in Anglo-Australian Copyright Law' (1991) 9(2) Copyright Reporter 1

Ricketson S, 'People or Machines? The Berne Convention and the Changing Concept of Authorship' (1991) 16 Columbia J of L and the Arts 1

Rimmer M, 'Australian Icons: Authenticity Marks and Identity Politics' 2004(3) Indigenous LJ 139

Rimmer M, 'The Bangarra Dance Theatre: Copyright and Indigenous Culture' (2000) 9(2) Griffith LRev 274

Rimmer M, 'Heretic: Copyright Law and Dramatic Works' (2002) 2(1) QUT LRev 131

Rivers T, 'Norowzian Revisited' (2000) EIPR 389

Rome E, 'Oscars: Visual Effects Artists protest outside Dolby Theatre' *Entertainment Weekly*, 25 February 2013 <<http://insidemovies.ew.com/2013/02/25/oscars-visual-effects-protest-life-of-pi/>>

Rosati E, 'Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision' (2011) 33(12) EIPR 746

Rose M, 'Copyright and its Metaphors' (2002) 50 UCLA LRev 1

Rose M, 'The Author as Proprietor: Donaldson v Beckett and the Geneology of Modern Authorship' (1988) 23 Representations 51

Rose M, *Authors and Owners: The Invention of Copyright* (Harvard UP 1993)

Rosen C, "'Transcendence' is a real bad flop for Johnny Depp", *The Huffington Post*, 21 April 2014 <[http://www.huffingtonpost.com/2014/04/21/johnny-depp-transcendence-flops\\_n\\_5184999.html](http://www.huffingtonpost.com/2014/04/21/johnny-depp-transcendence-flops_n_5184999.html)>

Rosenblatt E, 'A Theory of IP's Negative Space' (2011) 34(3) Columbia J of L and the Arts 317

Ross M, 'Authority and Authenticity: Scribbling Authors and the Genius of Print in Eighteenth Century England' (1992) 10 CAELJ 495

Rothman J, 'Copyright, Custom and Lessons from the Common Law' in Balganesch S (ed) *Intellectual Property and the Common Law* (CUP 2013) 230

Rothman J, 'The Questionable Use of Custom in Intellectual Property' (2007) 93 Virginia LRev 1899

- Sackville R (Justice), 'Legal Protection of Indigenous Culture in Australia' (2003) 11(2) *Cardozo J of International and Comparative L* 711
- Sagy T, 'What's So Private About Private Ordering' (2011) 45(4) *Law and Society Rev* 923
- Sanger L, 'WHO SAYS WHAT WE KNOW: On the New Politics', *The Edge*, <[http://www.edge.org/3rd\\_culture/sanger07/sanger07\\_index.html](http://www.edge.org/3rd_culture/sanger07/sanger07_index.html)>
- Sarris A, 'Notes on the Auteur Theory in 1962' in Keith Grant B (ed) *Auteurs and Authorship: A Film Reader* (Blackwell 2008) 35
- Saunders D, *Authorship and Copyright* (Routledge 1992)
- Schwab J, 'Audiovisual Works and the Work for Hire Doctrine in the Internet Age' (2011) 35 *Columbia JL & Arts* 141
- Schwarcz S, 'Private Ordering' (2002) 97 *Northwestern U LRev* 319
- Scott T, 'Changing Authorship System Might be Counterproductive' (1997) 315 *British Medical J* 744
- Sell S, *Private Power, Public Law: The Globalisation of Intellectual Property Rights* (CUP 2003)
- Sellors P, 'Collective Authorship in Film' (2007) 65 *J of Aesthetics and Art Criticism* 263
- Seymore S, 'How does my work become our work? Dilution of authorship in scientific papers, and the need for the academy to obey copyright law' (2006) 12 *Richmond J of L & Tech* 11
- Shapin S and Schaffer S, *Leviathan and The Air-Pump: Hobbes, Boyle, and The Experimental Life* (Princeton UP 1985)
- Shapin S, 'How to be Antiscientific' in Labinger JA and Collins H (eds), *The One Culture? A Conversation about Science* (Chicago UP 2001)
- Shapin S, 'The Invisible Technician' (1989) 77 *American Scientist* 554
- Shapin S, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago UP 1994)
- Sherman B, 'What is a copyright work?' (2011) 12(1) *Theoretical Inquiries in L* 99
- Schultz M, 'Fear and Norms and Rock & Roll: What Jambands Can Teach Us about Persuading People to Obey Copyright Law' (2009) *Berkeley Technology LJ* 651
- Silbey J, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (Stanford Press 2014)

- Simone D, 'Copyright or Copyleft?: Wikipedia as a Turning Point for Authorship' (2014) 25(1) *Kings LJ* 102
- Simone D, 'Recalibrating the Joint Authorship Test: Insights from Scientific Collaborations' (2013) 26(1) *Intellectual Property J* 111
- Sismondo S, 'Ghosts in the Machine: Publication Planning in the Medical Sciences' (2009) 39 *Social Studies of Science* 171
- Smith H, 'Community and Custom in Property' (2009) 10(1) *Theoretical Inquiries in L* 5
- Smith J, 'Gift Authorship: A Poisoned Chalice?' (1994) 309 *British Medical J* 1456
- Spence M, *Intellectual Property* (OUP 2007)
- Spence M and Endicott T, 'Vagueness in the Scope of Copyright' (2005) 121 *LQR* 657
- Stamatoudi I, "'Joy" for the Claimant: Can a Film Also be Protected as a Dramatic Work' (2000) 1 *IPQ* 117
- Steinberg NS, 'Regulation of Scientific Misconduct in Federally Funded Research' (2000) 10 *South California Interdisciplinary LJ* 39
- Stern S and Lemmens T, 'Legal Remedies for Medical Ghostwriting: Imposing Fraud Liability on Guest Authors of Ghostwritten Articles' (2011) 8(8) *PLoS Med* e1001070
- Stokes A, 'Authorship, Collaboration and Copyright a View from the United Kingdom' (2002) *Entertainment LRev* 121
- Strandburg K, 'User Innovator Community Norms: At the Boundary Between Academic and Industry Research' (2009) 77 *Fordham LRev* 101
- Sunstein C, *Infotopia: How Many Minds Produce Knowledge* (OUP 2006)
- Swan A, 'Open Access and the Progress of Science' 95 *American Scientist* 198
- Tankebe J, 'Viewing Things Differently: The Dimensions of Public Perceptions of Police Legitimacy' (2013) 51 *Criminology* 103
- Tapscott D and Williams A, *Wikinomics: How Mass Collaboration Changes Everything* (Atlantic Books 2008)
- Targosz T, 'Authorship by Deletion', *Kluwer Copyright Blog*, <<http://kluwercopyrightblog.com/2011/11/02/authorship-by-deletion-supreme-court-june-22-2010-ii-csk-52710/>>
- Tehrani J, 'Infringement Nation: Copyright Reform and the Law/Norm Gap' (2007) *Utah LRev* 537

Terrall M, 'The Uses of Anonymity in the Age of Reason' in Biagioli M and Galison P (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003)

Todd A, 'Painting a Moving Train: Adding "Postmodern" to the Taxonomy of Law' (2008) 40(1) U of Toledo LRev 105.

Truffaut F, 'A Certain Tendency of the French Cinema' (1954) 31 *Cahiers du Cinéma* translated and reproduced in Keith Grant B, *Auteurs and Authorship: A Film Reader* (Blackwell 2008) 9

Tyler T and Jackson J, 'Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement' (2014) 20(1) Psychology Public Policy and L 78

Tyler T, 'Compliance with Intellectual Property Law: A Psychological Perspective' (1996) 29 International L and Politics 219

Tyler T, *Why People Obey the Law* (Princeton UP 2006)

Valiela I, *Doing Science: Design, Analysis, and Communication of Scientific Research* (OUP 2001)

van Eechoud M, 'Along the Road to Uniformity – Diverse Readings of the Court of Justice's Judgments on Copyright Work' (2012) 1 JIPITEC 60

Vaver D, *Copyright Law* (Irwin Law, 2000) 76

Vaver D, *Intellectual Property: Copyright, Patents and Trade-Marks* (2<sup>nd</sup> ed, Irwin Law 2011)

Versteeg R, 'Defining "Author" for Purposes of Copyright' (1996) 45 American U LRev 1323

Vesterman W, 'The Death of the Scientific Author: Multiple Authorship in Scientific Papers' (2002) 8 Common Knowledge 439

Wacha J, 'Taking the Case: Is the GPL Enforceable?' (2005) 21 Santa Clara Computer & High-Technology LJ 451

Wager E, 'Authors, Ghosts, Damned Lies, and Statisticians' (2007) 4(1) PLoS Med e34

Walshok M, *Knowledge without Boundaries: What America's Research Universities Can Do for the Economy, the Workplace, and the Community* (Jossey-Bass 1995)

Wartenberg T, 'Philosophy of Film' in Zalta EN (ed) *The Stanford Encyclopedia of Philosophy* (2014) <<http://plato.stanford.edu/archives/fall2014/entries/film/>>

- Warwick A, “‘A very hard nut to crack’ or Making Sense of Maxwell’s Treatise on Electricity and Magnetism in Mid-Victorian Cambridge’ in Biagioli M and Galison P (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (Routledge 2003) 133
- Watson P, ‘Cinematic Authorship and the Film Auteur’ in Nelmes J (ed) *Introduction to Film Studies* (5<sup>th</sup> ed, Routledge 2012) 142
- Weatherall K, ‘Culture, Autonomy and Djulibinyamurr: Individual and Community in the Construction of Rights to Traditional Designs’ (2001) 64 MLR 215
- Weinberg J, ‘ICANN and the Problem of Legitimacy’ (2000) 50 Duke LJ 187
- Weinburg AM, ‘Impact of Large-Scale Science on the United States’ (1961) 134 (3473) Science 161
- Wendland W, ‘Intellectual Property, Traditional Knowledge and Folklore: WIPO’s Exploratory Program – Part 1’ (2002) International Review of Intellectual Property and Competition L 485
- Wiseman L, ‘The Protection of Indigenous Art and Culture in Australia: the Labels of Authenticity’ (2001) EIPR 14
- Woodmansee M, ‘On the Author Effect: Recovering Collectivity’ in Woodmansee M and Jaszi P (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke U Press 1999) 15
- Woodmansee M, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”’ (1983-1984) 17 Eighteenth Century Studies 425
- Woodmansee M and Jaszi P (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke U Press 1999)
- Zemer L, ‘Contribution and Collaborations in Joint Authorship: Too Many Misconceptions’ (2006) 1(4) JIPLP 283
- Zemer L, ‘Is Intention to Co-author an Uncertain Realm of Policy?’ (2007) 30(4) Columbia J of L and the Arts 611
- Zemer L, *The Idea of Authorship in Copyright* (Ashgate 2007)
- Ziman J, *Of One Mind: The Collectivisation of Science* (American Institute of Physics Press 1995)
- Ziman J, *Real Science: what it is, and what it means* (CUP 2000)
- Ziman J, *Science in Civil Society* (Imprint Academic 2007)
- Zimmerman D, ‘Copyright as Incentives: Did We Just Imagine That?’ (2011) 12(1) Theoretical Inquiries in L 29

## Websites

All websites last accessed on 30 September 2014.

<[http://en.wikipedia.org/wiki/Big\\_Science](http://en.wikipedia.org/wiki/Big_Science)>

<[http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page)>

<<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>>

<<http://en.wikipedia.org/wiki/Wikipedia:Copyrights>>

<[http://en.wikipedia.org/wiki/Wikipedia:Text\\_of\\_the\\_GNU\\_Free\\_Documentation\\_License](http://en.wikipedia.org/wiki/Wikipedia:Text_of_the_GNU_Free_Documentation_License)>

<<http://en.wikipedia.org/wiki/Wikipedia:Etiquette>>

<[http://en.wikipedia.org/wiki/Wikipedia:Five\\_pillars](http://en.wikipedia.org/wiki/Wikipedia:Five_pillars)>

<[http://en.wikipedia.org/wiki/Wikipedia:List\\_of\\_policies\\_and\\_guidelines](http://en.wikipedia.org/wiki/Wikipedia:List_of_policies_and_guidelines)>

<[http://en.wikipedia.org/wiki/Wikipedia:Ownership\\_of\\_articles](http://en.wikipedia.org/wiki/Wikipedia:Ownership_of_articles)>

<<http://en.wikipedia.org/wiki/Wikipedia:Barnstars>>

<[http://en.wikipedia.org/wiki/Wikipedia:Text\\_of\\_Creative\\_Commons\\_Attribution-ShareAlike\\_3.0\\_Unported\\_License](http://en.wikipedia.org/wiki/Wikipedia:Text_of_Creative_Commons_Attribution-ShareAlike_3.0_Unported_License)>

<[http://en.wikipedia.org/wiki/Wikipedia:Welcoming\\_committee/Welcome\\_to\\_Wikipedia](http://en.wikipedia.org/wiki/Wikipedia:Welcoming_committee/Welcome_to_Wikipedia)>

<<http://public.web.cern.ch/public/en/About/Global-en.html>>

<[http://www.afc.gov.au/filminginaustralia/indigproto/fiapage 9.aspx](http://www.afc.gov.au/filminginaustralia/indigproto/fiapage%209.aspx)>

<<http://www.alexa.com/siteinfo/wikipedia.org#>>

<<http://www.artslaw.com.au/Indigenous/IndigenousArtistAndArtCentreAgreement.asp>>

<<http://www.australiacouncil.gov.au>>

<<http://www.bfi.org.uk/film-industry>>

<<http://www.creativecommons.org>>

<<http://www.culture.com.au/exhibition/niaaa/labelqa.htm>>

<<http://www.indigenousartcode.org>>

<<http://www.melbourne.vic.gov.au>>

<<http://www.oed.com>>

<<http://www.wikipedia.org>>