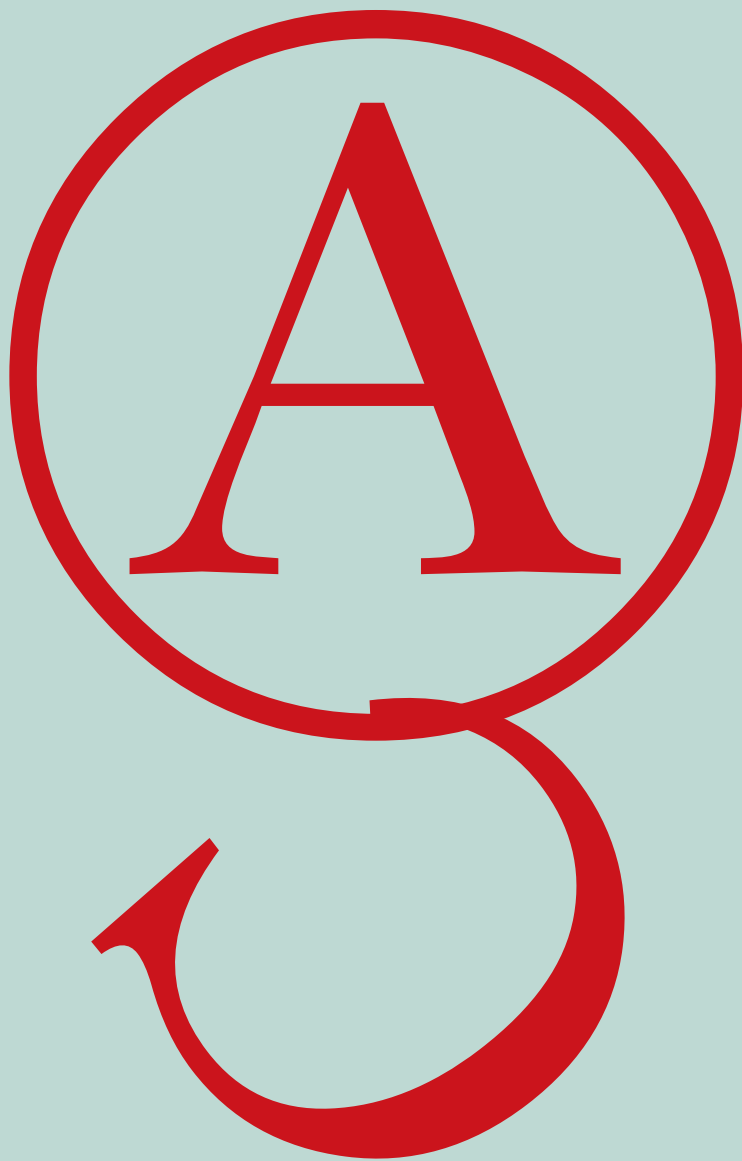


Edited by Mireille van Eechoud

The Work of Authorship



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Press

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Discontinuities between legal conceptions of authorship and social practices

What, if anything, is to be done?

Lionel Bently and Laura Biron

Authorship is central to the operation of copyright as a regulatory tool, but copyright law's conception of 'authorship' appears to be 'out of sync' with a wide range of social practices: either copyright makes authors-in-law out of social 'non-authors', or vice versa. After offering three examples (scientific credit, conceptual art and literary editing)¹ this contribution considers why these differences have emerged and whether these discontinuities should be thought of as a matter of concern. It appraises a number of academic proposals as to what might be done about these discontinuities, and offers its own suggestion, namely, the deployment of a more open-textured concept of authorship, one that is able to respond flexibly to varied contexts, social understandings and practices, but limited in application to matters of attribution.

Legal conceptions of authorship

Although there is no universal 'copyright law', so that statements about copyright depend on the specific laws and jurisprudence of any given territory, 'authorship' typically plays a number of different roles in any particular jurisdiction's copyright law. These include circumscribing the term of protection (by reference to a fixed period after the life of the last author to die), and, perhaps most obviously, identifying the initial beneficiary of economic rights. Although copyright laws take a single author model as the paradigm, they also recognise the need to find rules for determining authorship of works to which more than one individual may have contributed. One such set of rules relate to joint authorship (though many jurisdictions also operate rules of collective authorship and some recognise notions of corporate authorship).² In determining claims to joint authorship, most regimes consider three elements: the relationship between the participants;

the level and kind of participation; and the degree of integration of the contributions. For example, section 10 of the UK's Copyright, Designs and Patents Act 1988 (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'. Here the relationship must be one of 'collaboration'; the level and kind of participation is referred to as a 'contribution'; and the level of 'integration' is 'non-distinctness'.

The 'relationship' dimension refers to the context of the putative joint author's creative activity. At the very least, it requires that the activity is undertaken in coordination with the other author, as opposed to independent addition, alteration or improvement, which may create an original derivative work of its own. Under British law, the requirement of 'collaboration' means that, when setting out to create a work, there must have been some common design, cooperation or plan that united the authors, even if only in a very loose sense (*Levy v. Rutley*, 1871, pp. 528–530; *Cala Homes v. McAlpine*, 1995, p. 835; *Beckingham v. Hodgens*, 2003, pp. 389–90, [51] (CA)). This is to be distinguished from the 'subsequent independent alteration of a finished work', such as a translation or a serialisation, which would not count as a collaboration (*Beckingham v. Hodgens*, 2002, p. 58, [44]). In some other jurisdictions, the relationship aspect of joint authorship may require something more than collaboration: for example, in the United States there must be an intention to become joint authors.

The second requirement is that a putative joint author participate sufficiently in the creation of the work. Once again, the details vary from jurisdiction to jurisdiction as to the precise kind and level of participation. In the United States there is a debate amongst scholars, reflected in a division between circuits, as to whether the contribution must itself be copyrightable. In the UK, the test demands that a co-author provides 'a contribution', the nature of which case law has clarified in the following ways. First, the contribution must be of 'the right kind' – to the creation of the work, not to the performance or interpretation of the work (*Tate v. Thomas* (1921), pp. 510–11; *Hadley v. Kemp* (1999), pp. 643–644; *Brighton v. Jones* (2004), p. 304, [34]). Second, the author must contribute to expression, not simply to 'ideas' or subject-matter (*Evans v. E Hulton & Co Ltd* (1923–8), 131 LT 534; *Springfield v. Thame* (1903), 89 LT 242; *Nottage v. Jackson* (1883), pp. 632, 634, 636). Third, although the author need not literally put pen to paper for their contribution to count (*Cala Homes South v. Alfred McAlpine Homes East Ltd* (1995), p. 835), they must display 'something akin to penmanship' in the sense of being directly responsible for the expressive form of

the work (*Robin Ray v. Classic FM* (1998), p. 636). Finally, the contribution must be ‘significant and original’, as would be the case for a contribution of single authorship (*Godfrey v. Lees* (1995), p. 325; *Hadley v. Kemp* (1999), p. 643), though each author need not contribute an equal amount (*Levy v. Rutley* (1871), pp. 528–530).

The third requirement for joint authorship is one of ‘integration’ of the contributions of each author into some sort of whole. Article 7 of the Spanish Copyright Act similarly defines a collaborative work as ‘a work that is the *unitary* result of the collaboration of two or more authors’. Under UK law, it is required that each author’s contribution is ‘not distinct’ from that of the other contributors. In more positive terms, this means that the contributions must merge to form an integrated whole, rather than a number of distinct works (*Beckingham v. Hodgens* (2002), p. 59, [46]). In Italy, it is required that the contributions are not only dependent upon one another, but are ‘indistinguishable’ (Perry and Margoni, (2012), p 23). In some legal systems, most notably France, there is no such ‘integration’ requirement at all. Article L. 113–2 of the French I.P. Code defines a ‘collaborative work’ as one ‘to the creation of which several natural persons have contributed together’, implying collaboration and contribution, but not necessarily integration (Lucas and Kamina, in Geller, 2012, sec. 1[3]). The Belgian Copyright Law explicitly distinguishes between two types of collaborative work – referred to as ‘divisible’ and ‘indivisible’ – each category having particular rules as to whose consent is required to exploit the contribution.³

Discontinuities between authorship in law and practice

A number of ‘social practices’ seem to be at odds with legal notions of authorship. These illustrate both the ways in which copyright law is unable to recognise authors as such, turning ‘social authors’ into ‘legal non-authors’, as well as copyright law’s capacity to turn ‘social non-authors’ into ‘legal authors’, constructing authors-in-law out of practices that are conventionally self-defined as non-authorial. Here we highlight three examples.

Scientific authorship

The first example we consider is that of scientific authorship.⁴ It is commonplace to think of scientific authorship as collaborative, and to expect scientific publications to identify a number of named authors. Indeed, as long ago as 1963, Derek de Solla Price described the dramatic increase in

the numbers of authors as 'one of the most violent transitions that can be measured in recent trends of scientific manpower and literature'. Examining the trend for authors cited in *Chemical Abstracts*, Price found that the number of articles with four or more authors had increased from about 2.7 percent in 1946 to about 9.5 percent in 1963, and he predicted that 'if the trend holds more than half of all papers will [have three or more authors] by 1980 and we shall move steadily towards an infinity of authors per paper' (de Solla Price, 1963, p. 89). While this predicted growth has of course not occurred, the first paper to be issued from the collaboration over the Large Hadron Collider at Cern, from the Compact Muon Solenoid (CMS) project, in 2009, is formally attributed to the CMS Collaboration, but also contains an appendix listing over 2400 contributors. In the medical field, one article in the *New England Journal of Medicine* in 1993 was attributed to 976 authors, and another in *Nature* in 1997 to 151 (Smith and Williams Jones, 2012, p. 201). Meanwhile, concern with the increase in scientific authorship spread from chemistry to bio-medicine, astronomy and particle physics, and from there, to ecology (Weltzin et al., 2006) and even the social sciences.

There are, of course, many reasons for the expansion in scientific collaboration, and related increase in attribution. Most obvious is the changing nature of scientific research which has often come to require massive teams designing and building machines that ultimately produce information that in turn will be analysed by others (Haeussler & Sauermann, 2013, p. 688; Wuchty et al., 2007; Dreyfuss, 2000, p. 1162). Many of these projects, such as the Large Hadron Collider, involve co-operation between institutions and academics from all around the world. (If author citations for the LHC look extraordinary, it is worth bearing in mind that the LHC involves 111 nations at a cost of over US\$2.65 billion). However, even where the subject is more modest, it has become more and more common for academics to collaborate across disciplines, in recognition that the research goals can only be reached with the benefit of multiple disciplines (Smith and Williams Jones, 2012, p. 200). In addition to these, some responsibility for the shift in attribution can also be explained by the ways in which research is funded, the ways academics are appraised and rewarded, and changes in mechanisms of appraisal (Dreyfuss, 2000, p. 1190; Biagioli and Galison, 2003, pp. 2–7; Fisk, 2006, pp. 81–85).

These changes have been accompanied by transformations in notions of 'authorship', such that the definition of authorship in science has come to encompass a wide range of contributions, and this in turn has led to intensification of attribution. As the ethical guidelines for publication

issued by the *Royal Society of Chemistry* state, '[t]here is no universally agreed definition of authorship'. Different fields, such as chemistry, particle physics, astronomy, biological and medical science and ecology, it seems, can and do define authorship differently and operate their own sets of attribution practices (Smith and Williams-Jones, 2012, p. 200). As we will see, many such definitions require authorship attribution to a wide range of participants in the research process (many of whom will have had little role in structuring, phrasing or editing the final paper).

For example, the guidelines issued by the *Royal Society of Chemistry* further state that:

As a minimum, authors should take responsibility for a particular section of the study. The award of authorship should balance intellectual contributions to the conception, design, analysis and writing of the study against the collection of data and other routine work. If there is no task that can reasonably be attributed to a particular individual, then that individual should not be credited with authorship. All authors must take public responsibility for the content of their paper. The multidisciplinary nature of much research can make this difficult, but this may be resolved by the disclosure of individual contributions (1995, p. 12A).

The guidelines seem to recognise that both intellectual contributors and those involved in more routine work should be recognised. This no doubt recognises the importance of cohesive teamwork, thereby avoiding the development of divisions or cliques. There is no laboratory aristocracy. Moreover, literary notions of authorship that focus on expression are sufficient, but by no means necessary. Pre-expressive intellectual contributions that are recognised as equally sufficient include conception, design and analysis. The only overarching requirement seems to be that authorship is linked to responsibility (Biagioli, 2000, p. 90; Dreyfuss, 2000, p. 1208; Fisk, 2006, p. 83; Smith and Williams-Jones, 2012). If a contributor is not prepared to stand by the paper, then they should not accept or permit attribution. The American Chemical Society guidelines, which are similar in their inclusiveness, equally emphasise responsibility, stating that '[t]he co-authors of a paper should be all those persons who have made significant scientific contributions to the work reported and who share responsibility and accountability for the results'.

Another example is provided by the Ecological Society of America's Code of Ethics. This states that:

[...] researchers will claim authorship of a paper only if they have made a substantial contribution. Authorship may legitimately be claimed if researchers

- (a) conceived the ideas or experimental design;
- (b) participated actively in execution of the study;
- (c) analyzed and interpreted the data; *or*
- (d) wrote the manuscript (ESA 2006, emphasis added).

The criteria suggested are alternative, so merely conceiving ideas, designing a study, collecting or interpreting data might do. So, as with the Royal Society of Chemistry, involvement in writing an article is a sufficient but not a necessary condition of authorship. However, in contrast to the examples from Chemistry, responsibility is not emphasised.

What is of interest to us is how widely some of these definitions vary from the definition of authorship recognised in copyright law (Biagioli, 2012, pp. 454, 458; Fisk, 2006, p. 82). Indeed, from the perspective of copyright law, the majority of co-authored scientific publications would not, if challenged, meet the legal test for co-authorship. For example, many of the contributions that count as authorial from the standpoint of science – data collection, experiment planning, project supervising, and so on – would not usually be considered to be ‘of the right kind’ to meet the legal test of ‘contribution’, because they are contributions of ‘ideas’ rather than to expression (see section 2 above). With copyright, authorship is a matter of the work, i.e. the manuscript, rather than the research project, and thus for copyright the focus is on the verbal expression, the choice and ordering of the words, rather than generating the data or ideas (*Anya v. Wu*, 2004). Moreover, copyright has nothing to say about the order in which authors are to be credited, a topic which is, in contrast, of some significance in many scientific fields, where in some cases the first author is regarded as the primary contributor, and in others the final author listed is assumed to be the senior author (Kwok, 2005, p. 554; Baerlocher et al., 2007, p. 177; Tschardt et al., 2007, p. 13; Smith and Williams-Jones, 2012, p. 200).

This disparity between legal and scientific authorship is even more pronounced when it comes to mammoth collaborative ventures such as CERN’s Large Hadron Collider, the LIGO Scientific Collaboration, the ALICE (A Large Ion Collider Experiment) Nuclear Collaboration, the Belle Experiment (based in Tsukuba, Japan) or the collider detector at Fermi National Accelerator Lab (Fermilab) project in Tevatron (near Batavia, Illinois). In these situations, most of the publications emerging from the lab include the

names of everyone who has put substantial work into the project, including those who have left within a specified period (LIGO, [2A], sub-para 1). That is, the default position is that the authorship is attributed to the complete author list for the project as a whole, though it is usually possible for persons to decline to be included (LIGO, [2A], sub-para 6; ALICE, [9.1]). The norm is that names are cited in alphabetical order (LIGO, [2.B], para 1; ALICE, [9.2]). In the ALICE guidelines each qualified author has to confirm that he or she has read the paper and agree with the contents (ALICE, section 9). The LIGO policy recognises that 'in keeping with the goal of the LSC to promote the visibility of its members in the scientific community at large, there may be cases where a limited author list is more appropriate' (LIGO, [2.B] sub-para 3).

As Mario Biagioli describes, in his discussions of Fermilab policies, the sense of authorship at play here is 'credit for accumulated labour' (Biagioli, 2000, p. 101). All scientists and technicians, including the designers of the machines that make the experiment, observation and analysis possible, are all viewed as part of a corporate team. Each must input their labour and expertise, usually for a minimum period of six months (though this will vary with the status of the participant). Like employee-shareholders, or employees who pay into a pension fund, when the project yields profits in the form of journal publications, all participants are duly recognised. Such recognition is granted for publications even after the contributor quits the project, at least for some limited period. This is a far cry from copyright's conception of authorship as requiring actual skill or labour, understood in terms of penmanship or expression.

Conceptual art

Our second example of discontinuity between copyright law and social practice is that of conceptual art, in particular that in the United States in the 1960s and 1970s. The conceptual art movement, if it can be called a movement, in many ways sought to relocate the art object away from individual instantiations (paintings, sculpture and so on), and to re-focus attention on immaterial ideas, on thought, on language, on philosophy, rather than on physical objects. As Le Witt explained:

When an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. The idea becomes a machine that makes the art (Le Witt, 1967, p. 79).

In emphasising the 'idea', conceptual art also challenged the disciplinary categories, which depend largely on form, and related ways of perception and evaluation. In some ways itself an elaboration of the breakthrough ideas of Marcel Duchamp, conceptual art both challenges the role of the visual, and interrogates the notion of art itself (Joseph Kosuth, quoted in Green, 2001, p. 7).

The range of conceptual art in this period was vast. The works of Joseph Kosuth (1945–), often regarded as the pioneer of the movement, for example, include many that comprise only text – such as the lists published in various newspapers, for example: III, – *Communication of Ideas* (1969) or VI *Time (Art as Idea as Idea)* (1969) from *The Second Investigation* (Green, 2001, pp. 2, 13, 16). Other works by Kosuth include a collection of books, *Fifteen People Present Their Favourite Book* (1968), and a neon installation of the words 'neon electrical light English glass letters white eight', *One and Eight: A Description* (1968) (Green, 2001, pp. 4, 11). Other conceptualists used more conventional forms: Alighiero Boetti/Alighiero e Boetti (1940–1994), usually associated with the movement *Arte Povera*, often used embroidery: *Ordine e Disordine* (1973), for example, comprises one hundred embroidered squares, each 7 x 7 inches squared, with each square divided into four, with each quarter containing four letters. The embroidered squares were made by Afghan women, each of whom chose at least some of the colours. Although apparently simple, such works are frequently interrogating important questions as to the relationship between art and language (where meaning is generated in ideas or form), the place and the role of the 'artist' (and the artist's 'personal touch'), the significance of materiality and the place of the object in processes of commodification.

In many cases, conceptual artists have operated by providing ideas in written form, as sets of instructions, leaving their execution or instantiation to others (Green, 2001, p. 10). Charles Green argues that this:

represented the elimination of a certain type of overinflated subjectivity signified by the artist's personal touch or signature. This was a type of long-distance artistic collaboration – or delegation – in which the assistant's work was essential to the project's very success and integrity (Green, 2001, p. 10).

Green explains that the process of delegation was different for conceptual artists than it had been in the past, under the atelier system, when artists such as Paul Rubens and Jacques-Louis David had employed assistants, because conceptualists such as Kosuth and Boetti 'sought the co-operation

of others to enable their authorship to be camouflaged so that the immateriality of the work would be stressed'. Importantly, the role of the executants was not 'itself revalued upward in order to create another artist' (Green, 2001, p. 11).

Many examples of such conceptual art involved very general notions (e.g. 'a cube without a cube', 'straight lines in differing colors'). Some of the best-known examples of such practices are the 'wall drawings' associated with the American artist, Sol LeWitt (1928–2007). LeWitt's wall drawings consist of general guidelines or simple diagrams by LeWitt, which are drawn or painted by assistants directly onto a gallery wall, then usually removed after the exhibition has finished. For example, for Wall Drawing No 146, there is a simple description: 'All two-part combinations of blue arcs from corners and sides, and blue straight, not straight and broken lines'. This is accompanied by two diagrams, one which divides the wall into squares, each containing two numbers, and the other indicating by numbers the types of marking to be included in the square. The wall painting was first installed in the Kunsthalle in Berne Switzerland in 1972 and LeWitt signed a certificate identifying the first drawers as B. Blasi, E. Martin, B. Schlup, P. Siegenthaler, S. Widmer and Sol LeWitt. A later version appears to have been executed at Varese in Italy (Buskirk, 2003, pp. 50–51).

Readers who are unfamiliar with LeWitt's work can view examples on the website of the Massachusetts Museum of Contemporary Art, which in 2008 opened a twenty-five year Wall Drawing Retrospective. One example, Wall Drawing 797, was derived from the following instructions:

The first drafter has a black marker and makes an irregular horizontal line near the top of the wall. Then the second drafter tries to copy it (without touching it) using a red marker. The third drafter does the same, using a yellow marker. The fourth drafter does the same using a blue marker. Then the second drafter followed by the third and fourth copies the last line drawn until the bottom of the wall is reached'.

Evidently, a lot of discretion is left to the first drafter. When the work was first executed at Amherst College, the drafter chose to base the line on the nearby landscape (see <http://www.massmoca.org/lewitt/walldrawing.php?id=797>).

Although Kimmelman reports that 'characteristically, [LeWitt] would then credit assistants or others with the results', (cf. Kosuth, as reported in Green, 2001, p. 22) and the MassMOCA exhibit does list the 'initial drawers', the wall drawings are, of course, primarily known as the works of

LeWitt. As David Carrier has observed ‘presenting the idea for an artwork suffices to get credit for making the work’ (Carrier, 1980, p. 192). Indeed, the use of certificates, which had already been pioneered by the likes of Carl Andre and Flavin, as guarantors of authorship, and thus authenticity of their works (and can be traced back to Duchamp’s L.H.O.O.Q. (1919)), reinforced the unique place of the conceiver as artist (Alberro, 2003, p. 23). In contrast, in many cases the actual executants are not identified (for example, the drawers of the Varese version are not attributed in Buskirk, 2003, pp. 50–51). According to the authorship conventions of conceptual art, then, it seems LeWitt’s assistants would not be regarded as co-authors of the wall drawings.

From the standpoint of copyright, however, the reverse would appear to be the case. The executants of the wall drawings would likely be treated as making significant, original contributions to expression, something certainly ‘akin to penmanship’ – and thus very likely to count as co-authors. This is particularly the case where choices that determine the final expressive form have been left to the executants. According to Michael Kimmelman:

With his wall drawing, mural-sized works that sometimes took teams of people weeks to execute ... he always gave his team wiggle room, believing that the input of others – their joy, boredom, frustration or whatever – remained part of the art (Kimmelman, 2007).

Another commentator confirms:

With these notes, LeWitt provided methods and techniques for the team to follow – such as, for #613, “Rectangles formed by 3 in. (8cm) wide India ink bands meeting at right angles” – while still allowing room for a certain amount of self expression (Anon, 2010, p. 127).

More surprisingly still, LeWitt himself might be described as a legal non-author, at least in those cases where all he contributed was a very general plan or idea for the execution of the work. As the Court of Appeal explained in *Nottage v. Jackson* (1883), (when considering authorship of a photograph):

Certainly [the author] is not the man who simply gives the idea of a picture, because the proprietor may say, “Go and draw that lady with a dog at her feet, and in one hand holding a flower”. He may have the idea, but still he is not there [...] (Nottage, 1883, p. 632).

Indeed, it is notable that many of the 105 wall drawings executed for MASSMoCA were completed after LeWitt's death by students, guided by LeWitt's assistants: (Anon, 2010, p. 128). In these cases it is almost unthinkable that copyright law would treat LeWitt as an author of the wall drawings, as there could be no relevant 'collaboration' between the living and the dead.

Of course, there are some that were made in his lifetime in which he was one of the 'first drawers', and might claim legal co-authorship on that account. There are also some where the details in the instructions were sufficient to control the detailed expression. One account explains:

LeWitt's wall drawings were the products of the artist's carefully conceived systems of lines and colours, which could then be executed by others. A team of assistants that worked with the artist produced the drawings according to **detailed** diagrams and written instructions [...] (Anon, 2010, p. 127).

Moreover, there are certain examples where LeWitt had exercised supervisory control over how the other drawers executed the work. Kimmelman reported that 'like many more traditional artists, he became more concerned in later years that his works look just the way he wished' and thus 'he might decide whether a line for which he had given the instruction "not straight" was sufficiently irregular without becoming wavy'. In these cases, a claim to co-authorship (or even sole authorship) is not out of the question. As Laddie J. explained in the case of *Cala Homes v. Alfred McAlpine Homes* (1995, p. 835), holding that an architect was a co-author of plans which had been executed by his assistants:

In my view, to have regard merely to who pushed the pen is too narrow a view of authorship [...] 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 [...] It is wrong to think that only the person who carries out the mechanical act of fixation is the author.

This might allow us to describe some conceptual artists as authors-in-law, but only where they oversaw the work of the executants, correcting it where appropriate, and controlling the decision over when the work as expressed was complete. As Laddie J. emphasises, what matters for copyright is who authors the expression.

Of course, works of conceptual art pose a range of problems for copyright law, including the identification of anything that can be described as a 'work' in the first place – a problem particularly for copyright regimes that identify a closed enumeration of subject-matter, as is the case in the UK (Barron, 2002). Perhaps because revenue streams deriving from reproduction of such works (and from high art more generally) remain of relatively minor importance, compared with revenues deriving from the sale of unique, material artefacts, the processes of certification developed by the conceptualists have been sufficient to make a market for, and in some ways effectively sustain, these practices. As a consequence, the difficult questions that conceptual art raises for the existence of copyright seem rarely to have been tested in litigation. However, when conceptual art pieces are realised or materialised, as with LeWitt's wall drawings, the question of 'authorship' comes into play. Viewed from the perspective of copyright law, a 'conceptual artist' such as LeWitt would not usually be regarded as the author of the resulting artistic work (and certainly not the sole author). In contrast, copyright law would likely regard the assistants as co-authors, when conventionally they would not be viewed as such. The perspectives are not merely 'out of sync', but outright contradictions.

Literary editors

It might be objected that the discontinuities between copyright law's notion of authorship and social practices that we have discussed so far come from the 'margins' of what copyright law was ever intended to protect (and, in the case of conceptual art, inevitably follows from the practices of an art movement that sought to reject conventional understanding, and thus inevitably developed in a manner that was inconsistent with the ways of thinking necessarily incorporated within copyright law's concepts). While it might, in turn, be disputed that scientific writing was not at the heart of copyright law's thinking, at least in its early days, when the purpose was described in terms of the 'encouragement of learning' (and, in the United States Constitution 'promoting science'), we want to suggest that the same types of discontinuities can also be found right in the centre of copyright law's heartland, literary authorship. For our third example concerns literary works, particularly works of fiction and the contributions of editors to what are usually considered single-authored works.

Literary editors, of course, are not generally regarded as 'authors', nor do they think of themselves as such. As Holman explains, an editor is 'an indispensable recruiter, guide, friend, confessor and co-worker with

writers of genius and a shaper of great literary careers' – but not an author or co-author (Holman, 1978, p. 572). Editors are facilitators, midwives assisting at the literary birth of each novel, but leaving no doubt as to whom the parent is. One of the great American editors of the mid-20th century, Maxwell Perkins, the literary editor at Scribners, who edited the works of F. Scott Fitzgerald, Thomas Wolfe and Ernest Hemingway, was clear about the non-authorial role of an editor:

An editor does not add to a book. At best he serves as a handmaiden to an author. Don't ever get to feeling important about yourself, because an editor at most releases energy. He creates nothing (Perkins, in Berg, p. 6; quoted by Inge, 2001, p. 626).

This belief has been acknowledged judicially. In the US case of *Childress v. Taylor*, Judge Newman reasoned about the distinction between writer and editor, and their respective intentions regarding authorship, as follows:

[...] a writer frequently works with an editor, who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet *very few editors and even fewer writers would expect* the editor to be accorded the status of joint author [...] (*Childress* para. 38).

However, when examined more closely, literary editors have often done much more than merely facilitate the creation of a particular work: they have often contributed significantly to the structure, narrative, characterisation and text, through suggested deletions and amendments. In his important overview, *The Myth of Solitary Genius*, University of Illinois Professor of English, Jack Stillinger, has drawn attention to the joint and collaborative nature of many literary works that are often seen as works of single authorship. Even the most seemingly 'romantic' poets like John Keats (1795–1821) relied greatly on suggestions and alterations from editors including Richard Woodhouse (1788–1834) and John Taylor (1781–1864) (Stillinger, 1991, pp. 26–30). Another well-known example concerns the contribution of the poet, Ezra Pound (1885–1972), to the writing of T. S. Eliot's poem *The Waste Land* (1922). Pound, through multiple suggestions, led Eliot to cut the poem from over one thousand lines to 434 (Stillinger, 1991, Ch. 6, esp. pp. 127–8). Other well-documented examples include the assistance given by Hiram Haydn (1907–1973), literary editor at Bob-Merrill from 1950–54, to American

novelist (and former student of Haydn's) William Styron (1925–2006), which include multiple suggested amendments to the structure, characterisation and text of Styron's first work, *Lie Down in Darkness* (Casciato, 1980).

Although Max Perkins' relationship with authors has been described as a 'departure from the traditional relationship of author, editor and publisher' (Litz, 1968, p. 97), a closer look at his practices is revealing. For while Perkins publicly denied his contribution to the authorship of the works produced by Scribners under his supervision, surviving documents suggest he frequently had a very significant involvement with the texts sent to him by his authors. Sometimes Perkins initiated the ideas for works, such as his suggestion to Marjorie Kinnan Rawlings (who had just finished *South Moon Under*) that she write a book about 'a child in the scrub' (Berg, 1978, p. 212, p. 297–300) or to Douglas Southall Freeman that, having completed a biography of Robert E Lee, he write a biography of Washington (Berg, 1978, p. 181–2). More frequently, he received a manuscript, immersed himself in it and offered suggestions as to improvements. Some of these suggestions are clear from the various collections of letters that survive between Perkins and his authors, and they vary in type and extent. In some circumstances, as with Fitzgerald's famous novel *The Great Gatsby* (1925), various manuscripts survive from different stages of the process leading to publication, including the original handwritten manuscript at Princeton University Library. In the case of Wolfe's relationship with the process, significant insights are also provided from his *The Story of a Novel*.

In the case of Fitzgerald's *The Great Gatsby*, Fitzgerald submitted the manuscript and Perkins suggested changes including most importantly the elaboration of the James Gatz/Jay Gatsby character (Nov. 24, 1924 in Kuehl & Bryer, 1971, p. 82; Buccoli & Baughman, 2004, p. 27; Berg, 1978, p. 65). Fitzgerald reacted favourably to the suggestions and incorporated the ideas including one that the character use the phrase 'old sport', which Fitzgerald used a dozen times (Berg, 1978, p. 69). Moreover, Perkins rejected many of Fitzgerald's suggestions as to a title, such as 'Among the Ash-Heaps and Millionaires', 'Gold-Hatted Gatsby', 'The High-Bouncing Loner', 'On the Road to West Egg', 'Trimalchio in West Egg', 'Trimalchio', 'Gatsby' and Fitzgerald's ultimate choice, 'Under the Red, White and Blue' (Berg, 1978, pp. 62, 64, 67; Brucoli, 1974, p. 6 n. 4, pp. 31–32).

Perkins' involvement in the finalisation of Tom Wolfe's manuscripts for *Look Homeward, Angel* (1929) and *Of Time and the River* (1935) is reputed to have been much more substantial. According to Roger Shugg, 'it is well known that Perkins alone made Tom Wolfe publishable by helping him to select from boxes and bales of manuscript the pages and sections that

would have coherence as a book' (Shugg, 1968, p. 11). Scott Berg describes Perkins' reaction to the 1114-page manuscript (some 330,000 words) of what was provisionally called '*O Lost*' when he first received it in 1928, and his correspondence with Wolfe. Perkins thought it needed reorganisation and substantial cutting, and Wolfe acknowledged this, admitting his inability to criticise his own writing and his desire to get advice on the 'huge monster' of a manuscript (ibid., pp. 128 ff). In this account, Perkins not only advised on what needed to go, but what needed to be retained (in the face of Wolfe's erratic inclinations). According to one account, the pair worked day-after-day until over a quarter of the book (90,000 words) was cut, including the first 1377 lines, and the work reframed as seen through the memories of the boy, Eugene (cutting sections where Wolfe spoke directly to the reader) (Berg, 1978, pp. 134–5). Ultimately, Perkins asked Wolfe to alter the title, approving instead the alternative, *Look Homeward, Angel* (a phrase from John Milton's *Lycidas*) (ibid., p. 136). Subsequent scholars have gone over the same ground and although Perkins' contribution is diminished, it nevertheless remains impressive. For example, Dr Park Bucker, from the University of South Carolina Sumter, who has conducted a scrupulous analysis argues that some of the claims as to Perkins' contribution are exaggerated. He suggests that in the case of *Look Homeward, Angel*, Perkins: '... moved one major episode, Grant's Homecoming, from Book II to Book I; recommended the cutting of 60,000 words (22% of the work); and advised Wolfe to write connecting passages bridging the cuts' (Bucker, 2000, p. xvii).

In the case of *Time and the River*, Perkins was involved from the start. Following the publication of *Look Homeward, Angel*, Perkins suggested to Wolfe that he write about 'a man's quest for his father' (Berg, 1978, pp. 137–8, 163, 167). Wolfe took the suggestion seriously and spent the next four years writing. In 1933, Perkins called time on Wolfe, who delivered a manuscript of over a million words twice the length of Tolstoy's gargantuan *War and Peace* (ibid., pp. 235–6). Importantly, Perkins identified that the manuscript contained two distinct stories, each of which needed separate treatment, so that one was carved off and published later (ibid., p. 236). Thereafter, Perkins and Wolfe worked on the novel, in Perkins' office in New York, every evening, six days a week, for much of 1934 (ibid., 1978, p. 237). Perkins' directions were often detailed (ibid., p. 237).

Perkins was thus an editor who was very close to the manuscripts of the authors he worked with. In some situations, Perkins' close involvement in finalising manuscripts even led to suggestions that he was in fact a co-author. This was most notoriously the case with Tom Wolfe's *Of Time and the River*, with one critic arguing that '[s]uch organizing faculty and critical

intelligence as have been applied to the book have come not from inside the artist, not from the artist's feeling for form and esthetic integrity, but from the office of Charles Scribner's Sons' (De Voto, 1936, p. 3ff). Indeed, some were led to suggest that Wolfe left Scribners (for Edward Aswell at Harper's) because of the rumours that Perkins was, in effect, not his editorial mentor, but a co-author (Shugg, 1968, p. 11). While Perkins asserted that 'The book belongs to the author' (Maxwell Perkins to Tom Wolfe, 16 Jan 1937, in Bruccoli and Bucker, 2000, pp. 235, xvii), the question that interests us is whether the contributions by Perkins to the various manuscripts would – or could – have been such as to render him a joint author in the eyes of copyright law?

First, we might ask whether an editor and a writer are collaborators for the purposes of copyright? The British case law indicates that collaborators pursue a 'common design'. In relation to *The Great Gatsby*, for example, Arthur Walton Litz notes: 'Perkins and Fitzgerald obviously shared the same vision of the finished novel, and as the title fluctuated among a half-dozen alternatives they worked together to sharpen the narrative focus' (Litz, 1968, pp. 104–5). Bruccoli observed that Fitzgerald 'trusted Perkins and counted on him to attend to the mechanics of his prose' (Bruccoli, 1974, p. 21).

There is some suggestion that collaboration goes further, and also requires joint control: it is not enough that two persons contribute towards a shared goal if one of them has control over which contributions are accepted and which rejected. Thus in *Hadley v. Kemp*, one member of a band was regarded as the songwriter because he controlled whether the contributions of the others accorded with his 'vision' (in which case they were incorporated) or did not (and thus were rejected). Perkins might well have sought to deny that an editorial relationship involved an appropriate sort of 'collaboration', arguing instead that the author was the ultimate decision-maker, and that this element of control meant that an editor's involvement could not be described as collaboration.

Thus, for example, Perkins wrote to Fitzgerald: 'Do not ever defer to my judgment' (Wheelock, 1950, p. 30; Bucker, 2000, p. xvii) and, to Marjorie-Kinnan Rawlings, that 'a book must be done according to the writer's conception of it as nearly as possible' (Berg, 1978, p. 298). Nevertheless, even if one accepts that collaboration does require joint control, it is difficult to regard an editor such as Perkins as lacking such control. Indeed, not only did authors typically accept his suggestions, but the publication of a work depended on his approval of the manuscript. The advice from Perkins that the author should guard his or her expressive autonomy was made in the face of the reality that the publisher called the shots. Elsewhere, Perkins recognised that authors were pliable:

Editors aren't much, and can't be ... They can only help a writer realise himself, and they can ruin him if he's pliable. ... That is why the editors I know shrink from tampering with a manuscript and do it only when it is required of them by the author (Bucker, 2000, p. xvii).

Yet, Perkins was not like those editors he describes – he did involve himself intimately with the manuscript. And, individually, he was soon so highly respected – ‘the sole and only excuse ... for Fitzgerald having been as successful as he is’ (Madeleine Boyd, quoted in Berg, 1978, pp. 133–134) – that it is difficult to see that any author could regard his ‘suggestions’ as really optional. In the case of Wolfe, Perkins observed ‘Tom demanded help. He had to have it’ (Shugg, 1968, p. 11), while Wolfe explained ‘I have great confidence in him and I usually yield to his judgment’ (Berg, 1978, p. 134).

Second, we must consider the type and extent of the contributions. As we have already noted, the provision of ideas is not enough. Thus Perkins clearly has no claim on that account to be a co-author of Freeman's seven-volume life of Washington, nor Rawlings' Pulitzer Prize winning *The Yearling*. And even though he urged Janet Taylor Caldwell that she write a historical novel (Berg, p. 400), Perkins is not a co-author of her successful works on Saint Paul, Cicero or Pericles. Nor would merely helping to choose the title, as Perkins often did, be likely to render a literary editor a joint author. The titles – *The Great Gatsby* (which Perkins chose from a bunch of suggestions from the indecisive Fitzgerald) (Brucoli, 1991, vii), or *The Yearling* (which Perkins selected from Rawlings' other suggestions of *The Fawn*, *The Flutter Mill* and *Juniper Island* (Berg, pp. 297–299) et cetera – contain too few creative choices to justify a co-authorship claim (cf. *Newspaper Licensing Agency v. Meltwater*, CA, holding that some newspaper headlines might be works of authorship).

For co-authorship in British copyright law, there must be significant and original contributions to expression. While it does not appear that Perkins provided any text to Fitzgerald or Wolfe (Bucker, 2000, xvii), it is clear in many cases that he contributed to the deletion of large passages of text, and in the case of Wolfe, the selection and arrangement of the manuscript. In the case of Fitzgerald's works, these changes were probably not substantial enough to justify a claim to co-authorship under copyright's rules. In the case of *Time and the River*, the matter is less clear. It was Perkins who identified that the manuscript contained two distinct stories, each of which needed separate treatment. This process of ‘selection’ and ‘arrangement’ of texts has been frequently recognised as relevant to the assessment of whether a work is original for the purposes of deciding whether copyright subsists, though has

been seldom discussed in the context of co-authorship disputes. Nevertheless, given its recognition as 'the right kind' of skill labour and judgment (or, in European terminology 'creative choice'), there can be little doubt that these types of contributions (which Brucker, 2000, p. xvii, calls 'structural skills') could warrant a finding of joint authorship under British law.

Were these contributions 'significant'? Scholars of Fitzgerald, such as Robert Emmet Long and Matthew Brucoli, have sought to minimise the importance of Perkins' contribution. Long calls the changes prompted by Perkins minor especially when viewed as part of Fitzgerald's own 'relentless process of polishing' (Long, 1979, pp. 188, 199–200). One way to assess significance is to pay attention to what the authors said. Fitzgerald acknowledged the value of Perkins's assistance to *The Great Gatsby*: 'With the aid you have given me', he declared, 'I can make *Gatsby* perfect' (Fitzgerald to Perkins, Dec 20, 1924, in Kuehl & Bryer, p. 89 and Buccoli and Baughman, p. 32; Turnbull, 1963, p. 172). Another way to assess significance is to consider the reaction of readers, and critics, regarded as valuable components of the works. In the case of *The Great Gatsby*, which received praise for 'its structure' Fitzgerald wrote to Perkins:

Max, it amuses me when praise comes in on the 'structure' of the book – because it was you who fixed up the structure, not me. (Fitzgerald to Perkins, July 10, 1925 in Kuehl & Bryer, pp. 117–118; Buccoli & Baughman, p. 27; Inge, 2001, p. 626).

Brucoli, who has closely analysed the various surviving manuscript and proof versions says that, in so stating, Fitzgerald gave too much credit to Perkins whose participation in re-writing the novel was 'not intimate' (Brucoli, 1991, pp. x, xi). Nevertheless, it seems strange that he should have been so effusive, and Brucoli admits that one possible explanation is that there may be a lost set of galleys on which Perkins made 'detailed recommendations' (ibid, xii).

There is no suggestion that Perkins contributed substantial text to either Fitzgerald or Wolfe. Other editors, however, have not been so restrained. One example is Saxe Commins (1892–1958), a literary editor for American publishing firm Random House from 1933 to his death, who famously acted as editor to Eugene O'Neill, William Forster and W.H. Auden. His experiences were represented in his letters and journal entries, and were collected and published after his death (Commins, 1978, pp. 153–169). One of his less glamorous assignments was to assist novelist Parker Morell (1906–1943) to put the finishing touches on his biography of the American actress and

singer Lillian Russell (1860–1922), entitled *Lillian Russell: The Era of Plush*. The book was being pushed out by the publisher to coincide with a film about Russell. The publisher had provided Morell with a researcher who had worked for eight weeks collecting materials on the actress in the New York Public Library. As the deadline approached, Commins was sent to assist Morell to whip it into shape or, as Commins wittily put it, to ‘gild the lily’. Unfortunately for Commins, Morell was suffering from bouts of dizziness, and had not even made a start on the biography. Commins set about agreeing a table of contents with Morell, and for a week sought to assist him to meet the deadline. Commins generously produced text, but found that the author made no further progress, or that whatever he did do was largely plagiarised (Commins, 1978, p.157). In his journal, Commins described Morell as ‘psychotic, unstable, imbecilic. He simply cannot do the job’ (ibid., p.155). By the first weekend, when Commins returned to New York, determined to tell his employers what was going on, six chapters out of 22 were complete. Apparently, Random House was uninterested in the details and merely wanted the novel finished on time. Commins ended up returning to help Morell complete the book. In effect, Commins had written 300 pages in two weeks. He was disgusted with himself and what he had to do (ibid., pp. 155, 166), and became even more worried as Morell started to recognise that Commins had written more of the book than he had. Commins wanted nothing to do with suggestions that he be co-author or receive half the royalties (ibid., pp. 163, 167). This was ‘a penalty, a sentence, an expiation, a penance – anything but my book, it must be understood’. Doubtless the author for copyright purpose, Commins wanted nothing to do with being recognised as such.

Summation

We have now highlighted a number of examples in which the norms of social and legal authorship point us in quite different directions. In each case there is a disparity between social conventions of authorship and the question of who counts as an author in law. Copyright law is supposed to be committed to the proposition that authorship is a matter of fact, and it assumes that authorship conventions are, generally speaking, fixed and stable across a variety of social practices. With the above examples discussed and analysed, we can now see some important ways in which this assumption might be called into question. What has gone wrong? How might we explain this conflict? Where might we look for solutions? The remainder of the paper is devoted to these questions.

Thinking about these discontinuities

Facilitating discontinuity

In thinking about the apparent differences between legal conceptions of authorship, and how social and cultural practices identify authorship, the first point to note is that the dichotomy between the 'legal' sphere and the 'social' sphere is itself artificial and problematic in a number of respects. Perhaps most importantly, the social sphere does not exist 'outside law', so the differences in legal and social conceptions are themselves, in some respects, a product of law. In other words, while the legal system identifies authorship according to specific criteria, it does not prohibit social practices that attribute authorship in a different manner. On the other hand, in applying its criteria, the legal system frequently invokes social practices as important considerations in reaching legal conclusions about authorship. Both points deserve elaboration.

At first glance, it may seem odd to claim that the existence of a dichotomy between legal conclusions on authorship and social practices of attribution are themselves, in part, the result of law. On reflection, the claim is not strange at all. This is because the legal system requires the identification of authorship as a mechanism for achieving certain functions, most obviously as regards the initial allocation of copyright, as well as determination of the term of protection. However, traditionally the British and US legal systems have not treated the legal definition of authorship as determining of attribution practices. The latter have rather been treated as questions of contractual agreement: a legal author (and first owner of copyright) can transact with a publisher to be named, or not to be named, on the work as published. Through these principles of freedom of contract, the legal system allows for the emergence of the discontinuities between authorship in law, and particular or more generalised practices of attribution. Although UK law has recognised a right of attribution, vested in the legal author, since 1989, it requires that this right be operationalised by an act of 'assertion', typically in a contract, and provides that this right can be waived, for example, in a contract. The effect of this is that the legal system specifically facilitates not merely practices of non-attribution (as for example, of article writers in *The Economist*), but even permits agreement that others – non-legal authors – are attributed as authors. Social attribution of authorship to persons who would not be regarded as authors-in-law is itself legally facilitated.⁵

Perhaps the most obvious example of such legal collaboration in the generation of these discontinuities is provided by the case of ghost authorship,

that is the knowing, conscious writing by one person of a work that will be attributed to another. Often, ghost-writing is used to overcome some of the problems celebrities face in composing their own, 'auto-biographies', but the practice extends well beyond that field (Erdal, 2004), as the Saxe Commins-Parker Merrell example indicates. Another instance of such 'ghosting' is of the first *Star Wars* novel which was in fact written by Alan Dean Foster, but was attributed to George Lucas. Lucas would likely have had neither the time nor the energy to write the novel (which was published before the film was complete and released), but the writer was happy to receive \$5000 for the job and apparently content to have his identity concealed. Indeed, when asked as to whether he resented the attribution of the novel to Lucas, Foster is reported to have said: 'Not at all. It was George's story idea. I was merely expanding upon it. Not having my name on the cover didn't bother me in the least. It would be akin to a contractor demanding to have his name on a Frank Lloyd Wright house' (Pollock, 1999, p. 195).

'Ghost writing', however, is a good example of the way that copyright law is complicit in the social practice of misrepresenting authorship. This is not because copyright law would not recognise a ghost writer as the author of the work – it would. Rather, it is because it would permit the parties to attribute authorship to someone else. This might be possible, in some legal systems, by agreement as to who constitutes the author, or in the United States if the writer was an employee under the so-called 'work-for-hire' doctrine (Lastowka, 2005, pp. 1221–1228). However, even in the United Kingdom, which has since 1989 recognised an author's moral right of attribution, the law allows the author to agree by contract to waive that right. Matters are more complex in other European countries which do not permit waiver of the 'droit moral'. For example, while French law permits authors to consent to such misattribution, should the author change their mind, they will then be permitted to assert their right of attribution (but may have to indemnify the co-contractant).

Accommodating social practice

While copyright law thus might be said to be complicit in, or at least facilitative of, these discontinuities, in other respects the law does attempt to take social practices seriously, and its search for factual marks of authorship is inevitably influenced by authorship practices outside of the legal sphere. Most legal systems reduce room for dispute in relation to determinations of authorship by operating presumptions that a person designated as the author on a published version of the work is in fact the author. Indeed,

Article 5 of the EU's Directive on the Enforcement of Intellectual Property⁶ requires Member States to recognise a presumption that where 'his/her name ... appear[s] on the work in the usual manner', then the author of a literary or artistic work is to 'be regarded as such, and consequently to be entitled to institute infringement proceedings', in the absence of proof to the contrary. Implementing this, the French IP Code, Article L. 113–1 provides: 'Absent proof to the contrary, the status of author belongs to the person or persons under whose names the work has been divulged'; while the UK CDP, s. 104(2) states that 'where a name purporting to be that of the author appeared on copies of the work as published or on the work when it was made, the person whose name appeared shall be presumed, until the contrary is proved ... (a) to be the author of the work'. Although no such presumption is included in the US Copyright Act, US law looks explicitly for 'factual indicia' of joint authorship in terms of attribution, such as billing and crediting (*Thomson v. Larson*, 1998, at para. 32).

However, it remains the case that, when social facts about authorship explicitly conflict with the legal test, copyright law will likely disregard the social conventions. In the English case of *Bamgboye v. Reed*, for example, the High Court rejected evidence that the claimant was not co-author of the musical work *Bouncing Flow* on the basis that 'he would not have been thought of as a "collaborator", in the way that the word might normally be used in the industry' – this was considered irrelevant to the legal question of whether he had 'creative input into the music ...' (*Bamgboye*, 2002, para. 61). When it comes to factual questions about authorship, then, copyright law is selective in its appeal to social facts, at least regarding linguistic expectations about the use of the term 'author', and also the extent to which these expectations reflect how the parties might agree to define their roles.

Would it be desirable to align legal and social understandings of authorship?

Would it be (and, to the extent that it already occurs, is it) desirable for copyright law to ascertain legal facts about authorship from social conventions? First, we might note that copyright law needs to put forward a conception of authorship that is relatively stable and fixed. This is, first, because copyright is a property right and its very existence often depends on the identification of the author of a work. As Farwell L.J. put it in the case of *Tate v. Fullbrook*: 'The Act creates a monopoly, and in such a case there must be certainty in the subject-matter of such monopoly in order to avoid injustice to the rest of the world' (p. 832).

In contrast, social authorship conventions are far from stable, even within specific cultural fields. For example, looking at the case of editors, an interesting literature has developed about editorial principles, and the extent to which editors do view themselves as taking on an authorial role when they prepare works for publication. In our exposition of the role of editors above, we took it for granted that editors would be considered social non-authors. However, according to an approach Peter Schillingsburg calls the 'aesthetic orientation', editing is described as producing a 'best' text of a work, rather than the more traditional 'authorial orientation', which sees the editor's role as one of constructing 'a purified authorial text', capturing most fully the author's intentions prior to the intervention of editors or publishers. The aesthetic orientation challenges certain views of editorial authorship we took for granted, according to which 'there is assumed to be an absolute distinction between author and editor – the editor is supposed to be the servant of the author's intentions, not a co-writer' (Eggert, 1990, p. 24). If the editor is seen as a person who produces the 'best' text out of a number of inferior versions attributed to the author, he becomes a 'collaborator with the author, doing better what the originating production crew did poorly' (Schillingsburg, 1996 p. 42).

Similar points might be made about the changing social conventions of authorship practices in the artistic, commercial and scientific spheres.⁷ Indeed, the question of the proliferation of attribution of authorship for scientific publications became a matter of such concern that attempts were made to codify social norms. The most widely adopted of these is the action of the International Committee of Medical Journal Editors (Dreyfuss, 2000; Fisk, 2006, p. 84). These rules state that:

Authorship should be based only on a substantial contribution to:

- i) Conception and design or analysis and interpretation of data; and
- ii) Drafting the article or revising it critically for important intellectual content; and
- iii) Final approval of the version to be published.

Although widely adopted, for example, by all PLOS journals, as well as the Royal Society, the requirements have not gone without criticism (Kwok, 2005, p. 554; Smith and Williams-Jones, 2012, p. 202), in part because they are a rather strict set of rules. Indeed, they might even deny attribution to some who would be regarded as authors by copyright law (for example, someone who wrote the article but did not conceive the project). Indeed, there are suggestions that the rules have had no significant impact upon the

rates of attribution (Baerlocher, 2009; Haeussler, 2013, p. 690). Regardless of their effectiveness, we draw attention to the ICMJE rules here to highlight the capacity for social norms to transform over time.

Second, we observe that copyright law needs a conception of authorship that can be applied across a great diversity of cultural fields, which means that its legal framework needs to be broad enough to accommodate the vast differences between the various creative practices it proposes to protect. Although there are discontinuities between copyright law's conception of authorship and the conceptions recognised in relation to conceptual art, scientific authorship or literary editing, it should be clear that these three 'social' conceptions are themselves very different. When one factors in all sorts of other spheres which copyright law seeks to regulate – music production, screenwriting, theatre (Gripsrud, 2014), film-making (Bently and Biron, 2014; Lastowka, 2005, p. 1230), – one can see that discontinuities are inevitable. When reflecting on the possibility of the introduction of a moral right of attribution, these complexities led Rebecca Tushnet to observe that '[l]egitimate claims for credit are simply too varied and contextual, and copyright law already too complex and reticulated, for an attribution right to be a valuable addition to copyright's arsenal' (Tushnet, 2007a, p. 789).

Third, it might be argued that, even though it may produce discontinuities, copyright's conception of authorship usefully limits the possibilities of highly fragmented ownership. In limiting the types of contributions, and requiring collaboration, copyright ensures the concentration of rights in few hands (what, elsewhere, has been referred to as 'agglomeration'). In some jurisdictions, such as the United Kingdom, no joint author (or co-owner) can exploit the work without the consent of other joint authors, so multiple ownership raises issues of potential 'hold ups' (as economists might say). Take the example of the article in *Nature* with 151 attributed authors: if each of these were really a legal joint author, all would have to grant permission to publish (and if 150 had agreed, the 151st would have enormous power to refuse to publish or exact modifications).

Although the ownership rules vary from jurisdiction to jurisdiction (see, e.g., Dreyfuss, 2000, p. 1207), and some copyright laws include provisions to resolve disagreements between joint owners, courts appear to act on a desire to simplify ownership by agglomerating ownership rights in as few persons as possible. Such a tendency leads to a high threshold for joint authorship. Writing about the United States, Rebecca Tushnet (Tushnet, 2007a, p. 807) explains that 'an important reason that courts have adopted restrictive definitions of joint authorship' lies in the implications for the exploitation of the copyright, namely, the potential licensing problems associated with

the requirement than an exclusive license be agreed by all co-authors (see also La France, 2001, p. 194; Lastowka, 2005, p. 1217).

Fourth, it might be said that any attempt at alignment may also be regarded as futile because there will always be a section of the cultural world that takes its function to be to interrogate the categories of contemporary life, including law (its concepts and practices), by actions and interventions that self-consciously excavate, expose and deliberately destabilise the ideas, assumptions and ways of thinking with which law operates. However hard law reformers work to locate a conception of authorship that is broad and flexible enough to accommodate a wide range of social practices, there will be some artists who nevertheless want to expose and challenge those conceptions. Indeed, our example of conceptual art might be regarded as precisely such a case. While perhaps not focused on challenging copyright law's conception of authorship, its explicit goal of eliminating the 'overinflated subjectivity signified by the artist's personal touch or signature' that was valued in previous art movements (Green, 2001, p. 10) was inevitably going to produce discontinuities with a copyright law whose conception of 'authorship' had emerged in historical environments where such subjectivity and personal touch was regarded as the hallmark of 'authorship'. Even if copyright law could encompass many artistic practices, then, it seems implausible to think it could align itself with every section of the artworld.

Fifth, it might be said that these divergences are unproblematic, possibly even desirable. The discontinuities might be said to be unproblematic because copyright law provides other mechanisms to adjust the initial allocation of rights. The most obvious of these is contract law, as a result of which initial allocations of rights can be varied (as we have seen above). If copyright law designates one person as an author there is – in most laws at least – nothing to stop an arrangement whereby that copyright can be assigned to another (and, in the few cases where copyright law prohibits assignments, an arrangement with an equivalent effect can usually be achieved). Perhaps the best illustration of the importance of contractual remedies to problems of authorship can be seen in film practice: despite longstanding uncertainty and confusion over who should count as a film author, the film industry has nevertheless been able to flourish through contractual provisions that ensure that all the necessary rights end up in a particular film production company. Complicated questions of who is a film author as a matter of law typically only arise in situations of amateur production (see, for example, *Wimmer v. Slater*).

Moreover, it might be suggested that the non-alignment of law's conception of authorship with social practice is a by-product of the relative autonomy of law, an autonomy that is desirable because it creates spaces

that are free from prior social relations of power, especially economic power. Legal non-authors cannot use economic or social power to transform themselves into legal authors, whereas the use of social power to gain attribution in science has received widespread, and almost universally critical, comment (Kwok; Smith and Williams-Jones, 2012, p. 205; and, more generally, Fisk, 2006, p. 102). Most recently, Carolin Haeussler and Henry Sauermann have studied attribution in relation to scientific works and concluded that: 'contributions in the form of carrying out technical steps or laboratory work are more likely to be rewarded with authorship when made by scientists with higher hierarchical status or prior scientific accomplishment' (Haeussler and Sauermann, 2013, p. 689). In fact, what they show is that attribution practices reflect power relations. For copyright law, authorship remains a matter of law, and such contributions would not be relevant for copyright law's assessment of authorship.

Equally, with authorship being a matter of law, the socially less powerful should remain 'authors' if their contributions are in fact contributions to authorship: an actor can become a co-author of a play (whatever the director or playwright may think), a family member who contributes could become a joint author of the resulting work. Consider, for example, the situation in the United States during the 1950s when screen credit was determined not by formal, public legal rules but by the rules and practices of the Screen Writers Guild. While much that the Guild did might be thought of as beneficial to writers, as is well known, a series of writers – Paul Jarrico, Dalton Trumbo, Michael Wilson – who were blacklisted as a result of their 'associations' with Communism were not granted credit on the films (*The Las Vegas Story* (1952), *Roman Holiday* (1954), *The Friendly Persuasion* (1956) to which they had contributed (Fisk, 2006, p. 231–245). The Screen Writers Guild was ineffective to resist the political pressure of the producers. In contrast, it seems fair to assume that judicial designation of authorship would have been less vulnerable to these politically-motivated exercises of economic power.

Of course, we should not overstate the social justice arguments in defence of the legal control of the determination of authorship. For a start, as already noted, these legal determinations do not stand outside power-relations, but are, of course, deeply immersed in complex webs of power. This means that when a court determines whether a contribution is original or substantial, its conclusions will rarely be uncontaminated by social valorisations that in turn reflect relations of power (Bently, 2009). Moreover, in so far as the intention of the parties is relevant to determining questions of joint authorship, as in the United States, questions of self-perception and capacity to act inevitably inform the actors' capacities to form relevant intentions, however

substantial their contributions in fact are. Does an editor, for example, ever intend to become a joint author? Prevalent views of the role of the editor may preclude the formation of the intention to co-author.

Despite all these good reasons to be skeptical about the desirability of any attempt to align copyright's conception of authorship with the varied ideas deployed in specific fields of social practice, something important is at stake in this failure to align copyright's concept of authorship with the understandings of authorship evinced in many – perhaps most – social practices. What is at stake is the credibility and legitimacy of copyright law itself. Copyright law relies heavily for its operation on widespread acceptance of its legitimacy (rather than the sporadic enforcement of its sometimes hefty sanctions). That legitimacy lies in the idea that copyright law promotes cultural flourishing, by giving the weight of law to ideas that artistic and cultural activities warrant recognition, respect and reward. In turn, it is important that different social operators feel a reasonable correspondence between the social norms that underpin their practices and legal norms embodied in copyright law.⁸ For this reason, we think it is at the very least worth considering carefully whether the conception of authorship can be made more consistent with social norms.

Three proposals

We are not alone in thinking that some exploration of whether copyright law can be made more consistent with social norms. For example, Professor Rochelle Cooper Dreyfuss from New York University, one of the most prominent intellectual property scholars in the United States, has proposed the introduction of a whole new category of 'collaborative authorship', while Professor Gregory Lastowka from Rutgers has suggested that US law regulate authorial attribution to give effect to social interests in 'truthful' attribution. Dreyfuss's proposal can be seen as an attempt to make legal constructions more consistent with changed social practices, while Lastowka seeks to cabin 'deviant' (i.e., particularly misleading) social practices to make them more consonant with legal ideas of authorship. We review these in turn, before tentatively making our own suggestion.

Dreyfuss's proposal for a concept of 'collaborative work'

Dreyfuss suggests that copyright laws should recognise a new kind of copyright work: a 'collaborative work' (distinct from 'collective works' or

‘works of joint authorship’), which would arise where the parties indicated an intention that the work should be so treated (either in writing or through other actions) (Dreyfuss, 2000, p. 1222). In so proposing, Dreyfuss consciously builds on some of the more open conceptions of co-authorship that we have referred to above, such as that operative in France and the Netherlands where contributions do not need to be integrated into a work so as to become non-distinct. But Dreyfuss’s proposal goes further than existing copyright regimes, conferring authorship status on ‘every participant who has contributed to such work’, including those who created (non-copyrightable) ideas and facts, those who instigate, find funding, or provide resources (*ibid.*, pp. 1220, 1222–3). Many contributions that are not usually counted as authorial in law would, on this proposal, count, and the definition of contribution would be more expansive and accommodating than on current joint authorship doctrine. Her proposal would ‘give each author pecuniary interests in the work proportional to that party’s input’ (*ibid.*, p. 1220) Building on the US rule on exploitation of jointly authored works (as well as some provisions found in civil law regimes), each author would be allowed to utilise and develop their own contribution, with an implied licence to use that of the other contributors (with proportionate obligations to remunerate those others), but their rights would be unenforceable unless and until all contributors were properly attributed (*ibid.*, p. 1221).

This proposal has a number of attractive features. It would potentially encourage more collaboration between parties, as individuals not usually accorded authorial status would be attracted by the prospect of greater recognition. It would also encourage would-be single authors to think carefully about the influences on their work, and to be clearer about the demarcation of creative roles, and the need to give credit and recognition to other contributing parties. It would work well for cases of legal non-authorship such as scientific publishing, when authors contribute in ways not usually recognised by copyright as contributions ‘of the right kind’. The case of conceptual art is more difficult, however. On the one hand, Dreyfuss’s proposal allows a contribution of an artist like Sol LeWitt to count as authorial, but this is only on the proviso that his work be considered a collaborative one, alongside the contributions of his assistants. Thus, it does nothing to harmonise legal and social conceptions of authorship in the artistic sphere, even if it gets around the difficulty of conceptual artists being viewed as legal non-authors.

More generally, Dreyfuss’s proposal might be seen as problematic to the extent that it actually highlights the disparity between legal authors and social non-authors, providing a way not only for editors, friends and ghosts

to count as legal co-authors when they might conventionally not be so considered (it is arguable that current joint authorship standards already offer this prospect), but also for broader contributions – of publishers, funders or even the public at large, to count as authorial. But why should we inflate (legal) authorship to this extent? One concern is that enabling contributions of ‘ideas’ to count as authorial could threaten to extend copyright protection precisely at a time when scholars are worrying about its ‘over-expansion’. Indeed, copyright law’s idea/expression dichotomy is often justified as a technique which enables courts to balance the interests of copyright owners against those of users, creators and the public at large, preventing the monopolisation of ideas and facilitating a robust public domain. When ‘non-copyrightable ideas’ are viewed as contributions of authorship, as per Dreyfuss’s proposal, this balancing act becomes harder to achieve, because the scope of copyright infringement potentially increases. While a proposal which enables ‘ideas’ to count as authorial has the potential to align legal and social conceptions of authorship, then, we might wonder whether this is too high a price to pay for such alignment.

Moreover, recognition of this problem could lead us to question one of the potential strengths of Dreyfuss’s proposal in encouraging more collaborative ventures: although the proposal might encourage collaborative authorship in one sense, it has the potential to stifle authorship in the more traditional sense of building on the raw materials which copyright law is supposed to safeguard. In our view, this tension could be avoided if copyright law treated attribution rights separately from ownership rights (see below).

Lastowka’s proposal to strengthen attribution

Gregory Lastowka’s starting point is the US Supreme Court in *Dastar Corporation v. Twentieth Century Fox Film Corp* in 2003 which, at its broadest reading may preclude authors relying on trade mark law to prevent misattribution of their work as others’, and possibly others’ work as theirs. Lastowka is concerned that *Dastar* has unjustifiably removed a valuable legal remedy, and proposes the reversal of the decision. In contrast to Dreyfuss, his proposal thus concerns purely questions of authorial attribution, and the vehicle for giving effect to these duties to attribute is trade mark law. Lastowka’s justification for so advocating is not the familiar moral rights theory according to which ‘authors’ have a natural or moral right to attribution in relation to their works (for the mere reason that the works are the products of the author’s personality). Rather, Lastowka argues that ‘accurate

authorial attribution benefits society because it is a type of information that has special social value' (Lastowka, 2005, pp. 1176, 1180–85). Consequently, Lastowka proposes that trade mark law – a form of intellectual property which protects particular signs or marks that are used by traders to identify their goods/services, to indicate the origin of their goods/services, and distinguish them from goods/services produced by other traders – plays a role in ensuring that there is appropriate authorial attribution.

Lastowka's preference for trade mark over copyright is explained not just by his public interest orientation, but also because he also sees US copyright law's conception of authorship as out of step with that in popular understanding (*ibid.*, pp. 1215–1216). As he observes:

If one believes there is a societal interest in accurate attribution, copyright's scheme of authorship ordering is obviously problematic because the legal author controlling attribution is not the person society views as the author (*ibid.*, p. 1216).

Nor would Lastowka want to make the matter one for individual authors. Because he is concerned with promoting 'truth' (*ibid.*, pp. 1193, 1233), leaving policing of attribution to authors 'has a glaring structural defect', namely that authors might agree to misattribution (either because of unfair bargaining, or because they willingly do so for alternative benefits) (*ibid.*, p. 1218). For Lastowka, 'attribution must be bounded to some factual and socially valuable truth about the identity of the true author'.

Thus, Lastowka wants to ensure that legal regulation prevents social practices that misattribute the 'true author'. In his view, for example, ghostwriting should be actionable as a form of reverse passing off (i.e., misrepresentation of one person's work as another's) irrespective of the consent of the author (*ibid.*, pp. 1218, 1233). Such actions should be able to be brought not just by the misattributed or unattributed author or contributor, but also by the public (which, as Lastowka reports, had occurred in the US in the 1990s when the pop duo Milli Vanilli purported to be singing on the album (and single) *Girl You Know Its True* but in fact were lip-synched the recording). Although Lastowka acknowledges that such regulation would often prove ineffective (*ibid.*, p. 1230), his aim is that socially deceptive practices should be brought into line with legal norms, and those legal norms are to reflect 'socially important legal truth'.

But what is less obvious is quite what are the relevant 'truths' in the sorts of situations that we have been discussing. Is the socially important empirical truth that a work was 'conceived by' Sol LeWitt, or 'executed by'

various assistants? Is not the ‘truth’ more a product of attribution practices than an ‘empirical reality’? Is the extent of Perkins’ role in editing Fitzgerald and Wolfe such as to make it deceptive to describe the latter alone as the authors? Unfortunately, Lastowka’s proposal offers too little guidance here to be of value. Moreover, the case of scientific authorship would be left entirely outside the field of legal regulation. This is because Lastowka takes the view that social interests diminish ‘in cases involving more than two or three authors who contribute to a single work’ (ibid., p. 1230), and contributor attribution no longer provides factually meaningful information about a product. As he explains, in ‘the case of collaborative authorship, it seems the justification for the doctrine of reverse passing off falls away’ (ibid., p. 1232). Yet the volume of literature concerning ‘scientific authorship’ suggests there are important individual and social interests at stake here (Fisk, 2006, p. 50).

A more reflexive concept of authorship for attribution

Like Dreyfuss and Lastowka, we see problems with the discontinuities between copyright law’s narrow conception of authorship and social practices. However, in contrast to Dreyfuss, but in common with Lastowka, we think there may be reasons to focus attention on attribution, with a view to considering whether some greater level of consistency between law and social practice can be achieved at least in relation to this question. Thus we suggest greater attention should be given to an idea raised by Rebecca Tushnet – ‘a special type of “attribution authorship”’ (Tushnet, 2007a, p. 807) – an idea we think she dismissed too quickly.

We suggest that a right of attribution – a right already recognised under most copyright regimes (and indeed in a number of international obligations) – could be extended to all relevant contributors to the making of a work (or perhaps to any intellectual endeavour). The notion of ‘contributor’ need not be synonymous with the notion of ‘authors’ as deployed for other purposes within copyright law (in particular, ascribing first ownership). This could be achieved either by recognising that ‘authorship’ has a different meaning when considering rights or duties of attribution, or perhaps less problematically by identifying the beneficiary of a right of attribution by a distinct term such as ‘contributor’. Indeed, it might be that rights of attribution could be removed from the copyright system altogether, and instead be treated as free-standing rights. Attribution itself is a feature not just of copyright law, but of other fields of intellectual endeavour (Tushnet, 2007a, p. 794). ‘Inventors’ and ‘designers’ already receive limited attribution rights (Fisk, 2006, p. 70), and this proposal could also extend to them. Indeed such

a right of contributors to attribution could easily be developed out of notions of rights of personality, commonly recognised in civil law countries, but more embryonically being developed in the jurisprudence of the European Court of Human Rights in its interpretation of Article 8 of the Convention as requiring recognition of a right in one's own name or image.

Re-thinking attribution in terms of 'relevant contributions' would have a number of potential benefits. First, it would free the attribution right from the proprietary logic of copyright, and thereby permit a greater number of potentially qualifying contributions. Catherine Fisk has observed that 'over the last generation there has been a tendency to expand the number of people and the types of contributions that are attributed' (Fisk, 2006, p. 101). These contributions could (but would not necessarily) include contributions to ideas, generating data, even building machines that help generate data as well as contributions to text or expression. Because recognition of such contributions as entitling a person to attribution would not, in turn, implicate questions of ownership, marketability or exploitation of a work, there are no policy reasons for a court or tribunal arbitrarily to exclude them from recognition. More positively, by allowing the broad array of contributions to be taken into account, copyright law can incorporate within its logic what matters, and what is valued, within specific fields of endeavour. The contribution of the conceptual artist would at least be recognised as entitling them to attribution.

Secondly, a 'relevant contribution' test would allow rights of attribution to become more reflective of social norms. Indeed, 'relevant' could be expressly defined so as to take account of social norms in the particular sector. Rebecca Tushnet has observed that there are 'powerful attribution *norms* throughout modern society, rather than a single norm that covers most situations' (Tushnet, 2007a, p. 795). Thus, where such norms are codified textually, for example by industry agreement (as in the case, for example, of the Screen Writers Guild of America) (Fisk, 2006, pp. 77–81; Fisk, 2011), those norms would be determinative (and the resolutions of the relevant dispute-machinery could be given presumptive force). A similar position could be taken where such norms are socially developed, as for example with various scientific societies' statements on attribution, or indeed with editorial practices. If individual literary editors do not wish to be attributed, or editorial contributions – even to structure, sequence, organisation and text – are not treated as relevant contributions under the relevant social norms at the pertinent time, then they would not be entitled to attribution. Of course, care would need to be taken to ensure that individual agreements and social norms do not become opportunities for unfair bargaining

practices, but there are many circumstances in which one can imagine parties giving their full and informed consent to a particular billing. This might be because the billing has been collectively bargained, or because the parties agree that it represents the best way to market the cultural work.

Thirdly, deferring to social norms also raises the possibility of differentiating between categories of relevant contributor. One could easily imagine a legal system differentiating between categories of contributor, such as between 'principal authors' and 'ancillary authors', or 'authors' and 'contributors'. Indeed, this is precisely the solution to the problem of attribution in 'scientific authorship' that has been proposed by the deputy editor of the *Journal of the American Medical Association*, Dr. Drummond Rennie (Rennie, 1997; Rennie, 2000; Dreyfuss, 2000, p. 1190). He has suggested that contributors receive credit for what they did, just as with film credits. It also raises the possibility that contributors could be recognised 'collectively'. As Catherine Fisk has ably demonstrated, such norm-based regimes can be appraised in terms of transparency, participation, equality, due process, efficiency, and substantive fairness (Fisk, 2006, pp. 73–76).

A fourth aspect of the proposed 'contributor's right' would be that it could be formulated to take advantage of the changes to the technological environment within which works are now published. As Catherine Fisk has observed, 'context is everything in determining when credit is due' (Fisk, 2006, p. 76). In contrast with copyright law's concept of 'authorship', which needs to be a stable grounding for exclusive rights that could last over 150 years (life of an author plus 70 years), contribution rights could be made to reflect current social norms. Thus the assessment of whether there is a 'relevant contribution' could fall to be determined at the present time, so that an online publisher could be required to modify attribution of works for the future. Given that the costs of altering attribution information are relatively low, a right of attribution that can respond in this way seems much more feasible than it might ever have been hitherto.

Two commentators, Professors Catherine Fisk and Rebecca Tushnet, have anticipated and critiqued a proposal of this sort. Fisk argues that 'a comprehensive and legally enforceable right of attribution ... is neither feasible nor probably desirable' (Fisk, 2006, p. 109). One of her concerns is that such a system would lack the flexibility of 'norm-based systems' (*ibid.*). Therefore, she proposes a very limited intervention, restricted to the field of employment contracts. However, we are less pessimistic. Although the United States has not, as yet, enacted attribution rights, most copyright systems already include such rights as part of the system of 'droits moraux'. Indeed, Article 6 Bis of the Berne Convention, Article 5 of the WIPO

Performers and Phonograms Treaty and Article 5 of the Beijing Treaty on Audiovisual Performances already require that such rights be conferred on authors of literary and artistic works and performers. We suggest that such rights should be implemented in a way which draws on and is sensitive to existing social norms.

Tushnet criticises the idea of a ‘right of attribution’ as one which would ‘increase the number of line-drawing problems substantially’ (Tushnet, 2007a, p. 807). She is, at least, partly right. If there are a greater number of people with attribution rights, and a greater number of contributions are recognised as entitling the contributor to attribution, the number of instances where decisions need to be made will evidently increase. But that does not mean that ‘problems’ will increase. Indeed, we would suggest that the number of ‘problems’ might well decrease for two reasons. Firstly, because with our suggestion, there would be greater alignment between legal and social norms, and thus we would anticipate that contested claims to attribution would be fewer. Secondly, because the right only relates to attribution, so that questions of ownership are not at issue, we would envisage that the parties would likely be more ready to accommodate one another. By reducing the practical effects of authorship ascription, we would anticipate a corresponding reduction in the intensity of legal fights over authorship.

Of course, many details of this proposal remain to be worked out, and it is beyond the scope of this chapter to offer a detailed defence and analysis. Rather, the purpose of this chapter has been to highlight the underlying discontinuity between legal and social authorship that the proposal is designed to address, to argue that re-aligning legal and social authorship norms is important for the sake of copyright law’s legitimacy, and to suggest that current proposed solutions to this tension are in certain respects problematic. We think the proposal outlined here is a more promising alternative, and submit that it warrants further scholarly attention.

Notes

1. This chapter does not specifically address examples of digital collaboration. However, based on evidence from workshops that took place during the HERA project (in particular, the papers by Eva Northup and Hendrik Spilker at the HERA workshop on ‘Notions of and conditions for authorship and creativity in media production’, 2 November 2012, University of Bergen), our view is that, whilst digital collaboration makes questions about authorship pertinent and pressing, it does not fundamentally change the more general questions

- considered here about authorship norms and roles. For further discussion of the norms of digital artistic collaboration, which relates to the example of conceptual art, please see the chapter in this collection by Elena Cooper.
2. Many jurisdictions give protection to a collective or composite work (such as an anthology) as a distinct category of work. See van Eechoud et al., 2009, esp. ch. 6, for detailed discussion. For reasons of space, this chapter focuses on copyright's definition of joint authorship.
 3. This chapter focuses on questions of joint authorship in terms of the specific contributions and collaborations amongst individuals to a work (a question that courts have been faced with when joint authorship is contested); however, for discussion of how EU and Dutch Courts often disregard these more specific questions about individual contribution when deciding whether a 'work' counts as an 'author's own intellectual creation' for the purposes of copyright protection, please see the chapter in this collection by Stef van Gompel.
 4. Our focus here is largely on the written outcome of scientific research (e.g. journal articles) as opposed to datasets or visualisations formed as part of the publication process. Although we do not discuss the difficult question of the copyright status of these other potential 'works' of authorship, we note here that individuals who collect or manage data are often cited as authors of scientific research articles on the basis of their contributions to the former.
 5. It is worth noting that many collaborative ventures such as Wikipedia rely on open source and open content licensing agreements, and that such collaborative ventures are often facilitated by authorship agreements which bypass questions about authorship attribution. It is beyond the scope of this chapter to discuss such agreements in depth, but we draw the reader's attention to them as other examples of contractual agreements facilitating collaborative authorship, often independently of copyright law.
 6. EU directives are laws which all Member States must implement in their national legal systems: here, we refer to the specific directive which indicates that attribution ought to be recognised as an important presumption in favour of authorship. However, it must be noted that, whilst the process of copyright harmonisation is underway between EU Member States, many differences still exist between different Member States with regards to questions of authorship and moral rights. For an overview of the complexity, see van Eechoud et al., 2009.
 7. For an interesting example of how artistic and scientific authorship norms can combine in certain cases, independently of copyright law, see the examples of digital collaboration discussed in Elena Cooper's contribution to this volume: in particular, the Renaissance Team at the National Centre for Supercomputing Applications (NCSA), University of Illinois at Urbana-Champaign. In this example, all the different contributors to the data

- visualisations are seen as equal players; Cooper argues that they appear uninfluenced by copyright norms in their conceptions of authorship.
8. For discussion of this point with regards to the relationship between copyright law and aesthetic judgments specifically, see the chapter in this volume by Erlend Lavik.

References

Books and articles

- Alberro, A., 2003. *Conceptual Art and the Politics of Publicity*. Cambridge, Mass: MIT Press.
- ALICE, 2012. 'A Large Ion Collider Experiment'. *ALICE Policy for Publications and Presentations*. Available at: <http://aliceinfo.cern.ch/system/files/documents/ALICE_Publication_Policy.pdf>, accessed 20 November 2013.
- American Chemical Society, 2012. *American Chemical Society's Ethical Guidelines to Publication of Chemical Research* (as revised in June 2012). Available at: <http://pubs.acs.org/userimages/ContentEditor/1218054468605/ethics.pdf>, accessed 22 January 2014.
- Anon, 2010. 'Sol Le Witt and Conceptual Art'. *Yale University Art Gallery Bulletin*, pp. 126–129.
- Baerlocher, M. O., Newton, M., Gautam, T., Tomlinson, G. and Detsky, A. S., 2007. 'The meaning of author order in medical research'. *Journal of Investigative Medicine*, 55(4), pp. 174–180.
- Baerlocher, M. O., Newton, M., Gautam, T. and Tomlinson, G., 2009. 'Changing Author Counts in Five Major General Medicine Journals: Effects of Author Contribution Forms'. *Journal of Clinical Epidemiology*, 62, pp. 875–877.
- Barron, A., 2002. 'Copyright law and the claims of art'. *Intellectual Property Quarterly*, 4, pp. 368–401.
- Belle Experiment, 2001. *Authorship Policy: Policy on Authorship of Physics Publications* (Nov 17, 2001). Available at: <<http://belle.kek.jp/belle/rules/pol.author.2002.txt>>, accessed 22 January 2014.
- Bently, L., 2009. 'Authorship of Popular Music in UK Copyright Law'. *Information, Communication and Society*, Special Issue, 12(2), pp. 179–204.
- Bently, L. and Biron, L., 2014. 'The Author Strikes Back: Mutating Authorship in the Expanded Universe'. In: K. Bowrey & M. Handler (eds). *Law and Creativity in the Age of the Entertainment Franchise*, Cambridge: Cambridge University Press.
- Berg, A. Scott, 1978. *Maxwell Perkins: Editor of Genius*. Simon & Schuster, New York: E. P. Dutton.
- Biagioli, M. and Gallison, P., 2003. *Scientific Authorship: Credit and Intellectual Property in Science*. New York: Routledge.
- Biagioli, M., 2000. 'Rights or Rewards? Changing Contexts and Definitions of Scientific Authorship'. *Journal of College and University Law*, 27(1), pp. 83–108.
- Biagioli, M., 2003. 'Rights or Rewards? Changing Frameworks of Scientific Authorship'. In: M. Biagioli and P. Gallison (eds), *Scientific Authorship: Credit and Intellectual Property in Science*. New York: Routledge, pp. 253–280.
- Biagioli, M., 2012. 'Recycling Texts or Stealing Time?: Plagiarism, Authorship and Credit in Science'. *International Journal of Cultural Property*, 19, pp. 453–476.

- Bruccoli, M. J., 1974. *Apparatus for F. Scott Fitzgerald's The Great Gatsby*. Columbia, South Carolina: University of South Carolina Press.
- Bruccoli, M. J. ed., 1991. *F. Scott Fitzgerald's The Great Gatsby*. Cambridge, Cambridge University Press, pp. ix–iv.
- Bruccoli, M. J. and Baughman, J. (eds) 2004. *The Sons of Maxwell Perkins: Letters of F. Scott Fitzgerald, Ernest Hemingway, Thomas Wolfe and their Editor*. Columbia, South Carolina: University of South Carolina Press.
- Bruccoli, M. J. and Bucker, P. (eds) 2000. *To Loot My Life Clean: The Thomas Wolfe-Maxwell Perkins Correspondence*. Columbia, South Carolina: University of South Carolina Press.
- Bucker, P., 2000. 'Introduction: Thomas Wolfe and the House of Scribner'. In: M. Bruccoli and P. Bucker (eds), *To Loot My Life Clean: The Thomas Wolfe-Maxwell Perkins Correspondence*. Columbia, South Carolina: University of South Carolina Press.
- Buskirk, M., 2003. *The Contingent Object of Contemporary Art*. Cambridge, Mass: The MIT Press.
- Carlin, J., 1982. 'Sol LeWitt Wall Drawing: 1968–1981'. *Art Journal*, Spring Issue, pp. 62–64.
- Carrier, D., 1980. 'Paintings, Conceptual Art, and Persons'. *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, 37(2), pp. 187–195.
- Casciato, A., 1980. 'His Editor's Hand: Hiram Haydn's Changes in Styron's *Lie Down in Darkness*'. *Studies in Bibliography*, 33, pp. 263–276.
- Clarke, B. L., 1964. 'Multiple Authorship Trends in Scientific Papers'. *Science*, 143 (3608), pp. 822–824.
- CMS, 2009. CMS Collaboration, *Alignment of the CMS Silicon Tracker During Commissioning with Cosmic Rays*. Available at: <<http://arxiv.org/pdf/0910.2505v2.pdf>>, accessed 22 January 2014.
- Commins, D., 1978. *What is an Editor? Saxe Commins at Work*. Chicago: University of Chicago Press.
- Cronin, B., 2001. 'Hyperauthorship: a postmodern perversion or evidence of a structural shift in scholarly communication practices?' *Journal of American Society for Information Science and Technology*, 52, pp. 558–69.
- De Voto, B., 1936. 'Genius is Not Enough'. *Saturday Review of Literature*, April 25, p. 3.
- Dietz, A., 1993. 'The Concept of the Author under the Berne Convention'. *Revue Internationale de Droit D'Auteur*, 155, p. 2.
- Dougherty, F. J., 2001. 'Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law'. *UCLA Law Review*, 49, pp. 225–334.
- Dreyfuss, R. C., 2000. 'Collaborative Research: Conflicts on Authorship, Ownership and Accountability'. *Vanderbilt Law Review*, 53, pp. 1159–1232.
- Eggert, P. ed., 1990. *Editing in Australia*. Sydney: New South Wales University Press.
- Elbe, K., 1964. 'The Craft of Revision: The Great Gatsby'. *American Literature*, 36, pp. 315–326.
- Erdal, J., 2004. *Ghosting: A Double Life*. Edinburgh: Canongate Books Ltd.
- ESA, 2006. Ecological Society of America, *Code of Ethics*. Available at: <http://www.esa.org/esa/?page_id=857>, accessed 22 January 2014.
- Fisk, C., 2007. 'Credit Where It's Due: The Law and Norms of Attribution'. *Georgetown Law Journal*, 95, pp. 49–118.
- Fisk, C., 2011. 'The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938–2000'. *Berkeley Journal of Employment and Labor Law*, 32, pp. 215–278.
- Foster: interview <<http://www.sffworld.com/interview/41po.html>>
- Geller, P., 2012. *International Copyright Law and Practice*. New York: LexisNexis.
- Ginsburg, J., 2003. 'The Concept of Authorship in Comparative Copyright Law'. *DePaul Law Review*, 52, pp. 1063–1092.

- Ginsburg, J., 2004. 'The Right to Claim Authorship in US Copyright and Trademarks Law'. *Houston Law Review*, 41, pp. 263–308.
- Ginsburg, J., 2005. 'The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of "Paternity"?' *Cardozo Arts and Entertainment Law Journal*, 23, pp. 379–390.
- Green, C., 2001. *The Third Hand: Collaboration in Art From Conceptualism to Postmodernism*. Minneapolis: University of Minnesota Press.
- Grim, K., 2009. 'Credit Where Credit's Due'. *Symmetry Magazine: Dimensions of Particle Physics* (A joint Fermilab/Slac publication), 1 May. Available at: <<http://www.symmetrymagazine.org/sites/default/files/legacy/pdfs/200905/credit.pdf>>, accessed 22 January 2014.
- Gripsrud, J., 2014. 'Creativity and the sense of ownership: Collective authorship in theatre and popular music'. In: M. Van Eechoud (ed.), *The Work of Authorship*. Amsterdam: Amsterdam University Press.
- Gross, G., 1985. *Editors on Editing: A Wide View of What Editors Really Do*. NT: Colophon Books.
- Haeussler, C. and Sauermann, H., 2013. 'Credit where credit is due? The impact of project contributions and social factors on authorship and inventorship'. *Research Policy*, 42(3), pp. 688–703.
- Heymann, L., 2005. 'The Birth of the Authonym: Authorship, Pseudonymity and Trademark Law'. *Notre Dame Law Review*, 80, pp. 1377–1450.
- Heymann, L., 2007. 'The Trademark/Copyright Divide'. *SMU Law Review*, 60, pp. 55–102.
- Holman, C. H., 1978. 'What An Editor Is'. *The Sewanee Review*, 86(4), pp. 572–577.
- Howard, W. H. ed., 1968. *Editor, Author and Publisher*. Toronto: University of Toronto Press.
- Inge, M. T., 2001. 'Collaboration and concepts of authorship', *PMLA*, 116(3), pp. 623–630.
- IUPAP, 2005. 'International Union for Pure and Applied Physics', *Report of the Working Group on Authorship in Large Scientific Collaborations in Experimental High Energy Physics*, C11. Available at: <<http://www.iupap.org/commissions/c11/reports/wg-assessment-08.pdf>>, accessed 22 January 2014.
- Kimmelman, M., 2007. 'Sol LeWitt, Master of Conceptualism, Dies at 78'. *New York Times*, April 9, 2007. Available at: <http://www.nytimes.com/2007/04/09/arts/design/09le Witt.html?pagewanted=all&_r=0>, accessed 22 January 2014..
- Kuehl, J. and Bryer, J. R. eds, 1971. *Dear Scott/Dear Max: The Fitzgerald-Perkins Correspondence*, New York: Scribner.
- Kwok, L., 2005. 'The White Bull Effect: Abusive Co-authorship and Publication Parasitism'. *Journal of Medical Ethics*, 31(9), pp. 554–556.
- Lastowka, G., 2005. 'The Trademark Function of Authorship'. *Boston University Law Review*, 85, pp. 1171–1242.
- Lastowka, G., 2007. 'Digital Attribution: Copyright and the Right to Credit'. *Boston University Law Review*, 87, pp. 41–90.
- LaFrance, M., 2001. 'Authorship, Dominance, and the Captive Collaborator. Preserving the Rights of Joint Authors'. *Emory Law Journal*, 50, pp. 193–264.
- LeWitt, S., 1967. 'Paragraphs on Conceptual Art'. *Artforum*, Summer Issue, 5(10), pp. 79–83.
- LIGO, 2012. *LIGO Scientific Collaboration Publication and Presentation Policy*, LIGO-T010168-06, September 2012. Available at: <<https://dcc.ligo.org/public/0026/T010168/006/T010168-06.pdf>>, accessed 22 January 2014.
- Litz, A. W., 1968. 'Maxwell Perkins: The editor as critic'. In: Howard (ed.), 1968. *Editor, Author and Publisher*. Toronto: University of Toronto Press, pp. 96–112.

- McSherry, C., 2003. 'Uncommon controversies: legal mediations of gift and market models of authorship'. In: Biagioli and Gallison (eds), 2003. *Scientific Authorship: Credit and Intellectual Property in Science*. New York: Routledge, pp. 225–252.
- Morgan, R. C., 1994. *Conceptual Art: An American Perspective*. Jefferson, North Carolina: McFarland and Co.
- Perry, M. and Margoni, T., 2012. 'Ownership in Complex Authorship: A Comparative Study of Joint works'. *European Intellectual Property Review*, pp. 22–32.
- Pollock, D., 1999. *Skywalking: The Life and Films of George Lucas*. Cambridge, Mass: Da Capo Press.
- Rennie, D., Yank, V. and Emanuel, L., 1997. 'When authorship fails: a proposal to make contributors accountable'. *Journal of the American Medical Association*, 278, pp. 579–85.
- Rennie, D., Flanagan, A. and Yank, V., 2000. 'The contributions of Authors'. *Journal of the American Medical Association*, 284, pp. 89–91.
- RSC, 1995. Royal Society of Chemistry, *Ethical Guidelines for Publication in Journals and Reviews*. Available at: <<http://www.rsc.org/pdf/journals/ethicalguidelines.pdf>>, accessed 22 January 2014.
- Schillingsburg, P., 1996. *Scholarly Editing in the Computer Age*. Ann Arbor: University of Michigan Press.
- de Solla Price, D. J., 1963. *Little Science, Big Science*. New York: Columbia University Press.
- Screenwriters Guild, *Screen Credits Manual*. Available at: <http://www.wga.org/uploadedFiles/writers_resources/credits/screenscredits_manual10.pdf>, accessed 22 January 2014.
- Shaw, R., 1951. 'Copyright and the Right to Credit'. *Science*, 113 (2942), pp. 571–573.
- Shugg, R., 1968. 'Author versus Publisher, or Vice Versa'. *Bulletin of the Rocky Mountain Modern Language Association*, 22(1), pp. 3–14.
- Stillingier, J., 1991. *Multiple Authorship and the Myth of Solitary Genius*. New York and Oxford: Oxford University Press.
- Tanselle, G. T., 1976. 'The Editorial Problem of Final Authorial Intention'. *Studies in Bibliography*, 29, pp. 167–211.
- Teixeira da Silva, J. A., 2011. 'The ethics of collaborative authorship: More realistic standards and better accountability are needed to enhance scientific publication and give credit where it is due'. *Science and Society Outlook*, 12(9), pp. 889–893.
- Tscharntke, T., Hochberg, M.R., Resh, V. and Krauss, J., 2007. 'Author Sequence and Credit for Contributions in Multi-authored Publications'. *PLoS Biology*, 5(1), pp. 13–14.
- Turnbull, A. ed., 1963. *The Letters of F. Scott Fitzgerald*. New York: Scribners & Sons.
- Tushnet, R., 2007a. 'Naming Rights: Attribution and Law'. *Utah Law Review*, 3, pp. 781–814.
- Tushnet, R., 2007b. 'Payment in Credit: Copyright Law and Subcultural Creativity'. *Law and Contemporary Problems*, 70, pp. 135–174.
- Van Eechoud, M., Van Gompel, S., Hugenholtz, P. B., Guibault, L. and Helberger, N., 2009. *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Information Law Series 19. Alphen aan den Rijn: Kluwer Law International.
- Weltzin, J.F., Belote, R.T., Williams, L.T., Keller, J.K. and Engel, E.C., 2006. 'Authorship in Ecology: Attribution, Accountability, and Responsibility'. *Frontiers in Ecology and the Environment*, October, 4(8), pp. 435–441.
- Wheelock, J.H. ed., 1950. *Editor to Author: The Letters of Maxwell E Perkins*. New York: Scribners Sons.
- Wuchty, S., Jones, B. and Uzzi, B., 2007. 'The Increasing Dominance of Teams in the Production of Knowledge'. *Science*, 316 (5827), pp. 1036–9.

Cases

- Anyia v. Wu and Ors* [2004] All ER (D) 413 (Feb), [2004] EWCA Civ 755; [2004] All ER (D) 22 (Oct)
- Bagge v. Millar* [1917–1923] MacG CC 179
- Bamgboye v. Reed*, [2002] EWHC 2922 (QB)
- Beckingham v. Hodgins* [2002] EWHC 2143 (Ch), [2003] ECDR (6) 48
- Beckingham v. Hodgins* [2003] EWCA Civ 143, [2004] ECDR (6) 46, [2003] EMLR (18) 376
- Anne Bragance c. Olivier Orban and Michel de Grèce*, Paris, 1re ch., 1 Feb. 1989, R.I.D.A. 1989, no. 142, 301 (*Cour d'appel* of Paris)
- Brighton v. Jones* [2004] EWHC 1147 (Ch); [2005] FSR (16) 288
- Cala Homes v. Alfred McAlpine* [1995] FSR 818
- Childress v. Taylor* 945 F.2d 500 (2nd Cir., 1991).
- Dastar Corporation v. Twentieth Century Fox Film Corp* 540 US 846 (SCOTUS, 2003)
- Donaghue v. Allied Newspapers* [1938] Ch. 106
- Evans v. E Hulton* [1923–8] MacG CC 51
- Fylde Microsystems v. Key Radio* [1998] FSR 449
- Hadley v. Kemp* [1999] EMLR 589
- Heptulla v. Longman* [1989] 1 FSR 598 (Delhi High Court)
- Levy v. Rutley* (1871) L.R. 6 C.P. 523 (CA)
- Maurel v. Smith* 220 F. 195 (D.C.N.Y. 1915)
- Newspaper Licensing Agency v. Meltwater* [2011] EWCA Civ 890
- Nottage v. Jackson* (1883) LR 11 QBD 627 (CA)
- Powell v. Head* (1879) 12 Ch D 686
- Slater v. Wimmer* [2012] EWPC 7
- Tate v. Fullbrook* [1908] 1 KB 821 (CA)
- Tate v. Thomas* [1921] 1 Ch 503 (HC)
- Thomson v. Larson* 147 F.3d. 195 (2nd Cir. 1998)
- Weissmann v. Freeman* 868 F.2d 1313 (2nd Cir.1989)

Legislation

- Belgian Law on Copyright and Neighbouring Rights, 1994
- Copyright, Design and Patents Act, 1988
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property (Enforcement Directive)
- French Intellectual Property Code (Code de la propriété intellectuelle), 1992
- Spanish Copyright Act (Ley de Propiedad Intelectual), 1996
- United States Copyright Act 1976, Title 17

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