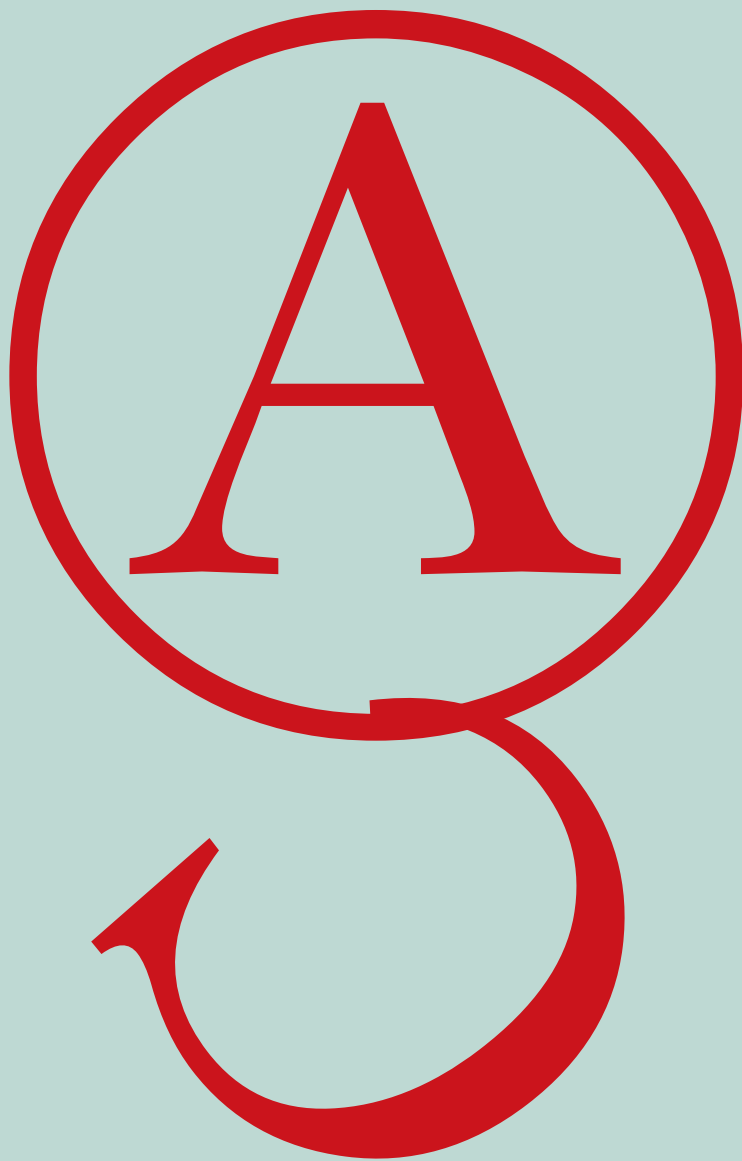


Edited by Mireille van Eechoud

The Work of Authorship



Amsterdam
University
Press

The Work of Authorship

Edited by
Mireille van Eechoud

Amsterdam University Press

This book is published in print and online through the online OAPEN library (www.oapen.org).

OAPEN (Open Access Publishing in European Networks) is a collaborative initiative to develop and implement a sustainable Open Access publication model for academic books in the Humanities and Social Sciences. The OAPEN Library aims to improve the visibility and usability of high quality academic research by aggregating peer reviewed Open Access publications from across Europe.

Amsterdam University Press English-language titles are distributed in the US and Canada by the University of Chicago Press.

ISBN 978 90 8964 635 4

e-ISBN 978 90 4852 300 9

NUR 820 / 823

Creative Commons License CC BY NC ND

(<http://creativecommons.org/licenses/by-nc-nd/3.0>)



© All authors / Amsterdam University Press B.V., Amsterdam, 2014

The authors assert their moral rights, including the right to be identified as the author of their respective contributions to *The Work of Authorship*.

Some rights reserved. Without limiting the rights under copyright reserved above, any part of this book may be reproduced, stored in or introduced into a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording or otherwise), for non-commercial purposes.

Contents

Voices near and far	7
Introduction	
<i>Mireille van Eechoud</i>	
Creative work and communicative norms	19
Perspectives from legal philosophy	
<i>Laura Biron</i>	
Romantic authorship in copyright law and the uses of aesthetics	45
<i>Erlend Lavik</i>	
Creativity, autonomy and personal touch	95
A critical appraisal of the CJEU's originality test for copyright	
<i>Stefvan Gompel</i>	
Adapting the work	145
<i>Mireille van Eechoud</i>	
Reassessing the challenge of the digital	175
An empirical perspective on authorship and copyright	
<i>Elena Cooper</i>	
Creativity and the sense of collective ownership in theatre and popular music	215
<i>Jostein Gripsrud</i>	
Discontinuities between legal conceptions of authorship and social practices	237
What, if anything, is to be done?	
<i>Lionel Bently and Laura Biron</i>	
About the authors	277

Creativity and the sense of collective ownership in theatre and popular music

Jostein Gripsrud

If one asks people what they think of when hearing the expression 'the artist at work', the chances are overwhelmingly that they will picture a painter in front of his (rather than her) canvas or a writer alone at a desk or table where there is a piece of paper, a typewriter or a computer. What lies behind this, is of course the Romanticist idea of the artist as an individual with particular expressive needs and gifts. The simple historical fact that much or perhaps even most art has routinely been created by more than one person – from the work of Michelangelo's assistants to the creation of performances and orchestral concerts – has not significantly altered this standard image of the lone creator. The image even pops up in recent arguments that digital technologies are challenging it (cf., e.g. Woodmansee, 1994, p. 25) – as if it had not been challenged already by actual artistic practices.

Clearly, to the extent that such an individualistic notion of creative practice underlies copyright law, a critical look at how art is actually made may be useful with a view to possible sensible revisions of such laws. On the other hand, even when the production of art takes a collective form, the individuals involved may still think of themselves and their work in terms of the Romantic image of artistic creation, regardless of the extent to which this is adequate.

With this as a background, the purpose of the research presented here has been to investigate empirically how practising artists, in art forms where production is predominantly of a collective nature, feel and think about the nature of their contribution to the finished whole. More precisely, the idea is to explore to which extent those involved in the collective production of art have a sense or feeling of ownership vis-a-vis the outcome of the creative process, and what they think this might entail in terms of financial and other rewards. On this basis, I wish to raise some questions regarding the role of current copyright law in relation to actual artistic practices.

Norwegian law closely follows copyright laws of other Nordic countries as these have traditionally developed copyright policy in cooperation. Because of Norway's membership in EFTA, the large body of EU copyright norms is also implemented in Norwegian copyright law (see G. Karnell, 2012). Both in theatre and music the roles of creative contributors are governed

by either copyright law (copyright in a play, set design, costume design, choreographies, and other works of authorship) or so-called neighbouring rights for performing artists (visual, musical, dance). Rights of performing artists are typically limited and centre on their right to authorise the recording of their performance. Subsequent copying and distribution of such recordings also requires their authorisation. Unlike authors protected under copyright law proper however, the law does not give them a claim against adaptations or copying of the performance by other performers. That is, rights only rest in a particular recording of their performance, not in the performance as such. The director of a play has, from a legal point of view, a less clear position. In the intellectual property landscape, the director seems situated between authorship (creating a work) and performance. The details of the legal distinctions made in black letter laws do not necessarily feature in contractual practices.

Imagining that perceptions of and practices relating to these matters might vary from one form of collective art to another, I decided to look more closely at production practices in two very different arts: Professional theatre and popular music, both professional and semi-professional. Theatre is an art form with ancient origins that still relatively low-tech in terms of production, relying almost completely on live performances before a public assembled in the same space at the same time. Popular music certainly also has ancient origins, but it has to a much greater degree become a relatively high-tech art form in several respects: Its history over the last 100 years is closely related to modern (and changing) technologies of recording, reproduction and distribution and it now relies to a great extent on electronic equipment also for the composing as well as for the live performance of musical works. A comparison between the two arts may thus be interesting also in terms of how very different forms of production, distribution and consumption might influence how participants in the respective creative processes experience their contributions and their relationship to them.

The data was gathered in two periods – October/November 2011 and March/April 2013. The first of these periods was mainly devoted to the study of theatre. I observed rehearsals of a play by Australian playwright Alan Bovell, *When the Rain Stops Falling*, at the public repertory theatre in Bergen, Norway, *Den Nationale Scene* ('The National Stage'), and I did very loosely structured interviews with a middle-aged male actor, Stig Amdam, and a young female actress, Ida Cecilie Klem, the female art director (*scenograf*), Siri Langdalen, and the male director (*regissør, iscenesetter*) Svein Sturla Hungnes. I also interviewed the theatre's male director at the time, previously and currently a nationally prominent actor, Bjarte Hjelmeland, and an

experienced playwright, who is also one of Norway's most acclaimed poets, Cecilie Løveid. As for popular music, I interviewed Mats Lyngstad Willassen and Aksel Gaupås Johansen, two amateur musicians in their twenties with some experience of contributions to the professional music scene (mainly record productions) in October/November of 2011 and then, in March/April of 2013 a leading, very internationally-oriented male owner of record labels and a management agency in Bergen, Mikal Telle, plus two professional musicians, Frank Hovland and Eirik Glambek Bøe, and a (female) singer and producer with considerable professional experience, Kate Augestad. In terms of genres, the interviewees represented a broad variety of popular musical forms, including rap, r&b, largely acoustic pop, rock, electronica and jazz. I further studied the media coverage of and documents pertaining to a recent (February 2013) court case in Bergen over the rights to two electronic pop songs associated with the internationally renowned group Röyksopp.

The following account of my findings is organised around three key questions: (1) What is the nature of collaborative creative work in these two art forms – how is it organised, which structures or relations of power can be discerned? (2) What are the current copyright regimes like in theatre and music respectively? (3) Do copyright issues influence creative processes, and if so, how? But I will start out by sketching the Romantic notion of artistic creation against which the specificities of collective authorship are to be interpreted.

The Romantic notion of artistic creation

The modern understanding of artistic work as 'creation' has a long prehistory, but basic elements in its present form were established in the 18th century and decisively shaped by representatives of the Romantic movement in the arts from the late 18th century on.

It is on the one hand tied to spiritual, i.e. religious, thinking, in that it links artistic creation to the original divine creation of the world out of nothing (cf. the notion of inspiration from above). According to the Romantic German author Novalis, for example, artistic creation is 'as much an end in itself as the divine creation of the universe, and one as original and grounded on itself as the other: because the two are one, and God reveals himself in the poet as he gives himself corporeal form in the visible universe' (cited in Taylor, 1985, p. 230). As once pointed out by Danish literary scholar Morten Thing (1973), many portraits of poets in the Romantic period show them looking upward into the air rather than downward on the piece of paper

they are supposed to write on. The religious understanding lingers in the many statements by much more current artists who describe themselves as the mouthpieces of a muse or some other extra-worldly force. For instance, John Lennon is said to have distinguished between the songs he wrote just to complete an album, and the 'real music ... the music of the spheres, the music that surpasses understanding ... I'm just a channel ... I transcribe it like a medium' (Negus and Pickering, 2004, p. 3, citing Waters, 1988).

On the other hand, the Romantic idea of authorship also attributed creativity to the psychology of the artist. The voice of the spirit, also known as the voice of Nature, was to be found within the individual artist. As put by Keith Negus and Michael Pickering, the artist was seen 'as someone whose 'inner' voice emerges from self-exploration and whose expressive power derives from imaginative depth' (ibid., p. 4). They argue that artistic creation has since 'become synonymous with this sense of exploration and expressive power', but also note that this understanding has exerted considerable 'influence over the development of the trend towards subject-centredness in modern culture, along with the accompanying ideal of authenticity' (ibid.).

Importantly, it is also inextricably linked to the modern notion of the individual, which underpinned not least the pioneering declarations of human rights in the late 18th century. American historian Lynn Hunt (2007) has convincingly argued that these declarations were fundamentally marked by Western élites' experience of reading epistolary novels such as those by Samuel Richardson, primarily *Pamela: Or, Virtue Rewarded* (1740) and *Clarissa: Or, The History of a Young Lady* (1748), and Jean Jacques Rousseau: *Julie, ou la nouvelle Héloïse* (1761). These inspired empathy across divisions between nations, classes and genders, based on an understanding of an 'inner life' that all humans have in common in spite of differences. Rousseau's novel has, along with much else of his work, been regarded as a source of inspiration for Romanticist criticism and thinking more generally. What the understanding of the artist's creativity is tied to is thus no less than the tenets of our modern understanding of the individual, of subjectivity, of the self. One cannot simply declare it dead – it won't lie down since it is thoroughly bound to fundamentals of (Western, at least) civilization.

Even the structuralist and post-structuralist critiques of Romantic notions of authorship can be seen as moving around in the same old paradigm. They have (officially) refused to accept that authors are 'ventriloquists who speak through their works', i.e. the psychological dimension of authorship according to Romanticism; instead they cast them 'in the role of dummy, manipulated by the hidden hands of language' (Murdock, 1993, p.131). 'Lan-

guage' or the total 'Text', in principle consisting of all texts ever produced, has taken the place of the external, higher spiritual powers that inspired artists in the Romantic understanding. I for my part think it is simply naïve to take eminent French structuralist and post-structuralist writers such as Roland Barthes and Michel Foucault in complete earnest when they argue for 'the death of the author':

It is particularly ironic that Barthes, who insisted so forcefully on the death of the author, should have taken so much care to develop a voice that is instantly recognisable as his. While this is entirely understandable in the context of Parisian intellectual life, where style is a decisive weapon in the struggle for ascendancy, it hardly squares with his stress on the relative autonomy of textual codes. If Barthes served a life sentence in the prison house of language, his works strive remarkably hard to give the impression that he is out on parole' (ibid.).

What all of this entails is that artistic creation is undeniably and irreversibly tied to culturally ingrained notions of individuals and their interiority – their experience, sentiments and knowledge – their subjectivity. We can hardly envision it otherwise, in practice. We are moderns, and therefore in a sense Romanticists, to some extent. However, if authorship, in the Romantic understanding, remains fundamentally tied to the individual, how can we then understand collective creativity, collective creation of works of art? Is it possible at all?

Creation in the collective arts: theatre

The production of a theatre performance in today's publicly funded repertory theatres in Norway is a rather complex affair, involving a number of decisions made at different levels of the organisation. First, the theatre's director, who is responsible for its repertoire, selects a certain play from the vast list of options, ranging from international and national classics to current or recent pieces available in the market. In some rare instances, a play might also be ordered from a particular playwright whose talent the theatre director trusts. Having made a choice, and signed a contract, the theatre director then chooses a director (*regissør, iscenesetter* – in French '*metteur en scène*') for the play. The theatre director is thus a key person in what appears like a pyramidal structure of power. In the context of copyright, however, it is worth mentioning that theatres, contrary to film

production companies, do not have any formal rights to their own productions in Norway, say, in the case of recordings or transmissions.¹

The director of *Den National Scene*, born and raised in the Bergen area, was near the end of his successful four-year term when he chose to have *When the Rain Stops Falling* staged. He turned 41 in the autumn of 2011, and could already look back on a long and varied career in Norwegian theatres. Having decided already very young that he wanted to become an actor and not a rock star as he originally had dreamed of (he played in a few bands as a teenager and in fact released a country music CD recorded in Nashville, Tennessee, in 2008), he chose a high school offering drama as a specialty at 16. He entered the school but he almost immediately 'ran away with the circus', as he put it, i.e. he left school and joined a touring group at the regional theatre. He says he had set aside several years for preparing his entry to the national school of acting in Oslo, but was accepted at his first try when he was only 17 – much too early in his view: He was not mature enough to make proper use of what the school offered. He 'entered the school as a natural talent and left it as a natural talent with a poor education', he said. But his barely cooked talent was evidently much appreciated and he was given a variety of important roles early on. After only a few years he ended up in the most prestigious of Norwegian theatres, the National Theatre in Oslo.

After developing very much as an actor there, he was given together with two other young actors, the responsibility of running the National Theatre's branch *Torshovteatret*, which is situated in a working class area of Oslo in the process of being gentrified. They did so successfully, both in terms of critical acclaim and audience numbers, for a few years. Having been warned by friends not to get stuck in the safety of the grand old theatre institution, he then joined a group of freelancing comedians, *Lompelandslaget*, where he also contributed to the writing of sketches and gags, before returning to *Nationaltheatret* where he again took on several high profile roles. He was continuing the practice of participating in outside projects, including at least one in Copenhagen, and also worked as a director of several plays. Wanting to realise his interest in (and previous experience of) selecting a repertoire in a regular repertory public theatre, he applied for the job of Director at the Theatre in his hometown and got the job.

The point of telling this story in such detail is to show how this artist's successful career indicates the importance of a strong 'natural talent' combined with a daredevil's taste for new challenges and risky choices – of several sorts: Early on he went public with his being gay (useful not least since his appearance is far from the stereotypes of gay men); and he is

probably the only director of a high culture institution anywhere in the world to have released a country music CD when in office. He has done practically every possible type of role in the theatre, including drag show characters. He said his engagement with every role probably made him a demanding collaborator for directors, since he would argue quite hard for his own conception of the character if it differed from the director's. His interest in directing came from his interest in the interpretation of a play as a whole, and his interest in directing a whole theatre sprang in a related way from his interest in public theatre as an institution, in negotiating the demands for artistic quality on the one hand and popular entertainment on the other. Typically, at the time I interviewed him, in January 2012, he was in the process of co-writing a character-based one-man show with strong elements of stand-up comedy – which ended up commercially successful. What all of this also entails is that his choice, both of the play *When the Rain Stops Falling* and the person who was to direct it, was very well informed. While he had at other times chosen to give quite inexperienced people a chance to direct a play, several times having to step in himself to make a performance work toward the end of rehearsals, he knew this Australian play was so demanding there was a need for a highly competent, strong director.

A theatre director is as a rule of course not (unless there is some major crisis) directly involved in the practical creative process leading to the actual performance. Neither normally is the playwright: In my interview with the experienced poet and playwright Cecilie Løveid, who started her writing career in her teens, she described the organisation of the production of a play as a 'Christmas tree' where the director is the star at the top – the playwright is expected only to look at the tree from a distance. She or he is normally not consulted when changes are made in the original manuscript.

The director of the play is the star of the Christmas tree because he or she is expected to 'translate' the written text into an on-stage, live performance. This involves developing a thorough, coherent interpretation of the text in question as a whole, based on an analysis of its concrete motif(s), its thematic content (i.e. its key conflict(s)), its narrative (if any) and its characters. It is by way of this analytical and interpretive work that the director then arrives at decisions on how to realise the text's potentials in the most artistically rewarding way: What are the play's most important elements and how can they best be communicated to the theatre's public? What will this entail in terms of the visual aspects of a performance, i.e. the décor, the ways in which characters move and gesticulate, the way the stage is lit and so on?

How should the play sound, i.e. what sounds are to be involved outside of the characters' voices, how should these voices be used?

The Norwegian Intellectual Property Law (*Åndsverksloven*) mentions in its list of examples of protected works in section 1: 'stage works, both dramatic and musical-dramatic as well as choreographic works and pantomimes, and radio plays' (my translation of '*sceneverk, så vel dramatiske og musikkdramatiske som koreografiske verk og pantomimer, samt hørespill*'). The specific roles of directors and scenographers are not mentioned in the law. But according to the standard agreement concerning the work of directors and scenographers/costume designers in Norwegian theatre², any particular staging of a play is the director's 'property' and cannot be used again after two years of the original staging unless the director agrees and is compensated again. This agreement is between the national association of orchestras and theatres (NTO) on the one hand and the national organisations of 'stage directors' and scenographers and applies to both categories whether in permanent positions or hired for a particular staging. Amateur theatres hiring professional directors and scenographers are to follow the agreement as well. Interestingly, the director I interviewed seemed not to be aware of his legal rights to his conception and solutions; he seemed only to think of moral rights: He thought of what he regarded as a German copy or near copy of his Norwegian outdoor staging of Ibsen's *Peer Gynt* as immoral rather than illegal.

In the course of this work, the director will most often make changes in the playwright's text. The current agreement between Norwegian theatres and dramatists³ states in point C 5 ('Alterations in the work') that '[t]he theatre cannot make significant changes in the work except by agreement with the dramatist'. What 'significant' means is not clarified there, but two of my informants mentioned what appears to be a rule of thumb: The director may delete or otherwise change up to 30 per cent of the drama text without consulting the playwright. In practice, the counting of percentages never takes place, and in the production I studied, it is likely that much more was deleted or altered in other ways – and this is not an extraordinary case. I asked the director how he would react if the playwright showed up and protested these changes. 'I would lose all respect for him.' The director was very much convinced that the changes he had introduced vastly improved the play.

This strong confidence in his own interpretation and aesthetic judgement is also clearly useful when the set design is to be discussed with the scenographer. While the scenographer has her or his own artistic competence and ideas, it is the director's comprehensive vision of the performance as a

whole that must guide the design job. It is most probably quite normal to do as the director and scenographer did in the case at hand, i.e. meet early on and several times later for discussions on how to solve questions raised by the director's interpretation. This may well entail forgetting much or most of the playwright's descriptions of the space in which the action takes place. In the case I studied, the director selected an experienced scenographer he knew and whose previous work he knew and liked. In other words, he chose a scenographer he knew he could cooperate well with and whose creative contributions would be likely to support and possibly improve his own ideas. While the scenographer obviously contributes significantly in her or his own right, it still seems reasonable to say the director has the upper hand in this relationship.

The director also most certainly has the upper hand in the relationship with the play's actors. Not only is it the director who selects which actors he wants to work with (choosing mostly from among the public repertory theatre's regular staff), the director also almost totally controls the interaction that takes place during rehearsals. As I followed two rehearsals on *When the Rain Stops Falling*, I was very impressed with the thoroughness of the director's preparations – and his instructions to the actors addressed their performance in minute detail.

The original manuscript had not only been cut and altered in other ways, it had also been segmented in small bits, each of which seemed to carry a particular significance related to the overall conception of the play. The director required not only certain movements across the stage, not only particular ways in which the actors should position themselves vis-à-vis each other, not only particular intonations of lines – he also had particular ideas on arm movements and other gestures much as a choreographer of a dance performance would have.

Both the director himself and the actors I interviewed were well aware that this directorial style would be located quite far toward an authoritarian pole in an imaginable spectrum of such styles, which vary greatly from one director to another. I was told stories of directors who would start the rehearsal period with exercises reminiscent of psychodrama or related practices – also instances of the power awarded to the directorial function, one might add – but then, during the actual rehearsals would be much more open to the creative contributions of the actors involved. This is not to say, however, that the director in my case study did not allow for such contributions, there were very short discussions and occasional signs of disagreement, but on the whole the actors appeared to be held on a pretty tight leash.

Given the above, my interviews with actors were not least about the ways in which they experienced their ability to actually contribute creatively to the final shape of the performance. Interestingly, it turned out that both the young female and the middle-aged male actor I talked to were also artistically active in other media – the female was painting and the male was writing, predominantly drama. This gave them a basis for comparing the space for creativity in the two artistic professions. They both commented on the ways in which the very strict directorial style I had observed limited their possibilities for co-creativity. But they still insisted that there was a space for them (albeit minimal) in which to manoeuvre, through ideas they had accepted by the director and through (attempted) protests where their own understanding of their role conflicted with that of the director. Still, compared with the freedom experienced when painting or writing, they also agreed that the space for creativity was very limited for an actor.

In fact, the limitations of the role of actor was a primary reason why the director had decided to quit his long, varied and critically acclaimed acting career in stage drama, film and television. He talked about his interest in being an actor as if it were a youthful folly; it was definitely something he 'grew out of'. He was for a while, he said, the sort of argumentative actor he himself now hated to work with. The middle-aged male actor's attitude seemed akin to this – his artistic interest was increasingly in his activity as a playwright. The acting was still of considerable interest, but it was perhaps more importantly what paid for his bread and butter. The young actress also treasured the freedom she experienced when painting, but she was, not surprisingly, less inclined than the middle-aged actor to think of an end to her acting career for this reason.

The scenographer (born 1957) had a solid education. She first studied at the Academy of Fine Arts and Design in Oslo, originally in furniture design, but early on oriented herself toward scenography, also doing stage design for student productions at the Opera School in Oslo while still a student herself. In order to perfect her skills she took a year of painting classes in the same school after her diploma, before embarking on her career as a scenographer at various Norwegian theatres. She also did work in film and television and was, about 25 years ago, hired in a regular position in the public broadcaster NRK's drama division. Since then (2000–01), she also studied film and production design in film and television in London. Regularly taking unpaid leaves of absence between NRK productions she has worked on a large number of theatre productions and other projects over the years.

The scenographer described her contribution to the production of *When the Rain Stops Falling* as an original idea she arrived at having read the play. She brought it to her first meeting with the director, who she knew well from previous collaboration. He also brought some sketches and ideas to the first meeting, but quickly agreed to work with her proposal. She saw their relation as one between equals, but conceded that in case of a conflict, his opinion would be decisive: 'it was his production'. Somewhat surprisingly, she seemed not to be aware she had any legal rights to her scenography, which she has in accordance with the same agreement as directors. She had, however, in fact exercised her (moral) rights, for example when refusing the use of props she had designed for particular drama productions outside of the original context in NRK television programs.

The scenographer thought of herself explicitly as an artist, doing creative work much like any other visual artist. She was constantly working on new ideas – also for plays not yet written! This free artistic work might one day be exhibited. But she also saw some of her stage designs for actual performances as installations that could well deserve exhibition as stand-alone visual art and might one day choose to concentrate on work as an independent visual artist. She was, however, very content with her present situation, especially since she was able to take on such different projects: Between two major productions of television drama, she would soon after my interview travel to Greenland to do the scenography for an Inuit dance performance.

The two major differences between her work as a scenographer and work as a free visual artist were first, that it involved a lot of communication with other people involved in a production and might include that changes to her original ideas were made necessary by other people's opinions (the director's in particular) and, second, that she had to work within much tighter time frames: a production process, whether in film, television or theatre involves a large number of people and is very expensive – all of these people can't be asked to wait around while she refine her ideas. A scenographer is simply a team member and must adapt her work to the organisation of the production process.

As for the question of the relationship of copyright to artistic creativity in the theatre, it is well worth noting the following: All of those interviewed decided early on in their lives that they wanted a career in the theatre or related arts. The issue of copyright law appears marginal at best to all, with the possible exception of the playwright, while the copying – more or less – of someone else's work or ideas was morally condemnable, not *comme il faut* in any of the involved arts or professions. An exception worth mentioning

here is the theatre director's opinion that if he saw a performance he liked and someone said the staging had been stolen from London, he couldn't care less: What works well, works well. When I mentioned this position to the CEO of the Association of Norwegian Theatres and Orchestras, he said the theatre director thought like that because he is 'a theatre animal'. What the theatre director did, however, was take the point of view of the audience. Maybe this ability is what basically defines a true 'theatre animal'?

The alleged copying of the director's staging of *Peer Gynt* in Germany did not lead to his hiring a lawyer to punish those involved. The scenographer said it would be damaging to the reputation of someone in her profession to be caught replicating solutions successful in London or elsewhere. Both seemed unaware of – or at least did not mention – the rights they had to any performance they produced according to the standard agreement I referred to above. I had myself, at the time of the interviews, the impression that the director's work did not have any copyright protection while the work of the scenographer did. This misunderstanding was expressed in some of my questions to the director, the scenographer and the theatre director but not corrected by any of them. This low level of awareness, knowledge and interest in copyright law, in addition to the strong impression they all conveyed of being driven into the arts by wishes, desires and dreams that were at work no matter what the legal status of their work would be, may be said in itself to testify to the modest importance of copyright protection of creative work in the arts for creativity itself.

Creaton in the collective arts: popular music

Music is as old as mankind, but popular music is a considerably younger phenomenon if a distinction between folk and popular music is accepted. Common usage of the term popular music refers to music in the age of mass communication, and developed at first through the mass distribution of printed songs and sheet music. In England, it has been estimated that popular music in this sense replaced traditional folk music in many areas before the mid-19th century.⁴ Since the introduction of recorded music in the early 20th century, this has been a primary medium for the production and distribution of popular music. The use of various kinds of sound technologies in live performances has also been a characteristic of popular music, even if acoustic instruments and singing has retained a place within the field. The recording of popular music was for decades little more than the quite straightforward recording of studio performances, but this changed decidedly in the mid-1960s when

The Beatles – in an interesting sort of dialogue with serious contemporary music's experiments – made the studio itself a laboratory and instrument for new sounds, new forms of musical expression. Technological developments since then have made significant parts of modern popular music more or less unimaginable without advanced electronic and digital technologies in composition processes, production, recording, distribution and live performances.

Over the last ten to fifteen years, digital technologies have radically changed the ways in which most popular music is produced and especially distributed. Outside of the folk and singer-songwriter genres, it has always been a collective enterprise, but with digital technology the possibilities for cooperation in a variety of forms grew tremendously. Music began to consist of pieces assembled from a multitude of sources, anything from everyday sounds, bass lines, rhythmic figures and melodic motifs could be voluntarily or involuntarily contributed by a number of creators in the form of samples or more or less sketchy drafts or complete elements of a final recorded product. These developments challenged previously established notions of single artists creating musical works, perhaps with the product of a similarly single lyricist added in songs to be performed by a singer and/or an orchestra/band. However, the lone creator was already a somewhat problematic character in popular music, especially since the group or band format gained hegemony in the 1960s. Which band members actually contributed what to which songs have been the subject of innumerable quarrels in thousands of bands worldwide since then.

In order to have a closer look at the conditions of creativity in popular music and the conundrum of copy- and other rights in this area, I interviewed people in Bergen, Norway involved in popular music in very different ways at very different levels and the following is a report on what I was told.

My first two interviews were with two men in their twenties both of whom had been involved in the production of music as amateurs who occasionally contributed to concerts and/or recordings – also recordings which generated significant sales internationally. They both discovered the joys of music early on, including the joys of making music – composing and writing lyrics. One of them, Johansen, talked about playing with cassette recorders with friends, eventually composing music with them; the other, Willassen, talked of playing in bands and eventually discovering hip hop music, especially rap, to which he had since devoted his musically creative energies.

They had both in more mature years – late teens, early twenties – actually contributed bits and pieces to professional productions, as mentioned above. One of them had, for instance, contributed beats (a sound sequence of chords and rhythm instruments to which one writes a melody and lyrics) to two albums in a genre located somewhere between r&b and rap, by an

originally Canadian artist, the former opera singer Kinny, who has been living and recording on and off in Bergen and performing and selling records internationally.⁵ The other had contributed to several hip hop recordings and performances, including rapping and singing in his northern Norwegian dialect on a successful record where the featured artist was a Norwegian artist living in Los Angeles (Big Ice: *Trunk of Funk*, 2010). The very international nature of current popular music is something I will return to shortly.

Perhaps the most relevant information to be gained from these two interviewees in relation to the issue of copyright is their confirmation of the perception that the motivation for productive efforts in music is not money or careers in the music business. The love of music, perhaps certain genres or styles in particular, is what inspires the largely playful creative activities that take a collective form from early on. Both talked about the sharing of musical ideas and sketches between friends via mobile phones or via computers hooked up to the Internet. G-mail was a very useful service, since it allowed for very large (in term of bytes) attachments that could be stored in people's mailboxes if necessary. Bits and pieces communicated in this way could later form the basis for the actual making or construction of a finished piece in a professional studio. If others used these pieces the answer to questions of rights could vary. In some cases it would just feel good to know they had contributed something to a piece that sounded good. In other cases they would feel that a mentioning of their names on the cover of the record would be sufficient compensation, adding to their 'cred' and self-esteem. If they felt they had contributed considerably to a production that became commercially successful, however, they would feel entitled to a share of the profits. But such success is very hard to foresee, and the money to be derived from a success at the level in question would be limited anyway, so generally neither of the two were very concerned about the issue of rights.

I also talked to a mature professional musician, Frank Hovland, born 1962, whose main instrument is the electric bass but who is also a singer and songwriter who has worked extensively as a record producer. He has been a leading member of a number of Bergen rock groups with national reputation, he has participated in innumerable recording sessions and one-off band constellations, and he has over the last fifteen years toured Europe and North America with artists such as Chris Thompson (once member of Manfred Mann's Earth Band and a contributor to a large number of records, concerts and international tours with celebrity artists besides his own career) and Terje Rypdal (globally acclaimed Norwegian jazz guitarist with a rock background). Hovland agreed with my two younger interviewees that money

was not the motivation for his embarking on a musical career, and money or sales would never be the basic motivation for his creation of songs and writing of lyrics. Once a song was written, however, and especially when it had been recorded, things were different. For Hovland, when music becomes a full-time profession, money and issues of rights are certainly not without interest.

When playing the bass as a member of the orchestra at the city's public repertory theatre, or in recording sessions where other musicians realised their projects, Hovland was okay with a regular salary or, in the latter case, a one-off honorarium. He mentioned that this would be normal also for session musicians in studios where world famous stars record their material, even if it is often these musicians and their ideas that make these records interesting and successful. But his work as a composer and writer of songs was something else. In some cases, he did everything himself – and would of course expect the complete rights to such a musical and lyrical piece of work. But he also provided an example of a somewhat more complicated process: A friend had approached him with something he had created – a drum pattern, a couple of guitar riffs, a vague idea of a form. But there was no melody and no lyrics. My interviewee wrote a melody and lyrics for the song and so wanted the rights for music and lyrics attributed to him. The guy who came with the bits and pieces actually only provided key elements of the arrangement of the song, and so he should settle for arrangement rights, the bass player and songwriter thought. But his collaborator protested: There would have been no song had he not approached the bass player with his drum pattern, riffs and formal ideas, or, perhaps there would have been a quite different song written by himself. 'There was a bit of shouting and teeth-grinding, but we arrived at a 50/50 share of all rights to the song.' The reason for this was of course social – he referred to this solution as 'doing a Lennon-McCartney': They both wanted to remain friends and collaborators on future projects, and a struggle over who did what on this particular song should not be allowed to jeopardise this.

This sort of solution is quite common in bands, since it is common knowledge that struggles over who contributes most to what in a production are also among the most common reasons for bands – and friendships – breaking up. I also interviewed one member of the Bergen based duo Kings of Convenience, Eirik Glambek Bøe, who have sold over one million copies of their three first albums and are among the most streamed artists in services such as Spotify⁶. Their success internationally has led to their touring the world, e.g. all over South America and in several Asian countries such as Indonesia – and they recently received an invitation to do a gig in Ulan Bator: 'You guys should come to Mongolia, people love you here'. My interviewee admitted there had been a lot of quarrelling between the two partners over the years,

but that they had arrived at a 50/50 share of the rights for all songs – ‘even if I would argue that the correct figures would be 60 for me and 40 for him, and he would, given his character, probably say 70 for him and 30 for me’. Income from the use of their recordings in movies and advertising would consequently always be equally shared. Concert revenues, that constitute the major part of the duo’s income, would of course always be split 50/50.

These musicians thus saw the issue of rights as partly distinct from the question of who contributed what to the creation of a piece of music: They may maintain a special feeling in relation to some songs as being their offspring, so to speak, but handle the question of legal and economic rights in a pragmatic manner. The actual act of artistic creation is one thing, rights and income something else.

Further underlining this distinction is the complex area where the music industry operates between musicians and their audiences. I interviewed a key person in Bergen popular music, Mikal Telle, who started his career at nineteen, in 1995, when he opened a shop in the city centre exclusively for vinyl records – the shop was called Primitive Records – some three years after the CD had (seemingly) completely taken over the market. The shop became a hangout for young people seriously interested in music and eventually, in 1998, he started a record label – the first of several, one for each genre or style. The background for this was that he discovered his international suppliers of records could also function as distributors for vinyl records produced in Bergen. He had no contracts and made only about 500 copies of each. Working exclusively from his social capital (his economic capital was close to zero) and his gut feeling for interesting music (he has no musical education, plays no instrument) he became the key person behind a series of Bergen-based bands and artists, several of which have had national and not least international success – among the artists who originally launched their international careers through his tiny labels are Røyksopp and Kings of Convenience.⁷ He is currently concentrating mostly on the management of a number of artists, mostly people who are up-and-coming.

The experience Telle has with negotiations on all levels and in all areas of the music business makes him an interesting source on rights issues. He talked, for instance, about the need for bands to accept very meagre deals with major record companies in exchange for the distribution and attention such deals may provide, crucial not least in today’s business where live performance is the major source of income for most if not all musicians. According to Telle, Norwegian musicians in general are inclined to be too inflexible in rights issues for their own good, i.e. they would intuitively refuse record deals that give the lion’s share to an international record company

even if the deal would move them up to a different league internationally. Composers of a song would not always themselves think of sharing a bit, e.g. a third, of their rights with the other members of their band for the sake of peace and collective creativity. So a part of his job as a manager would be to convince his clients through discussions of the benefits of strategic thinking in this area. Still, as evidenced in my interview with Frank Hovland, the bass player, as well as in the interview with Eirik Glambek Bøe, one of the two members of Kings of Convenience, pragmatic solutions to such issues are not at all alien to the musicians themselves: They mostly arrive at them without the intervention of a manager.

Solutions such as an equal 50/50 split of revenues are probably easier to arrive at when there is (relatively) little money at stake, though. Furthermore there may be cases where a composer may grant rights to someone because he or she feels under pressure from a record producer or manager with some sort of hold on them. This is indicated also by a high profile lawsuit in Bergen in February 2013 concerning publishing rights to a particular Røyksopp song. The history behind the case is complex and it is impossible here to go into the details of the court proceedings and the decision. But for our purposes the following summary, based on Røyksopp's view of the case, confirmed in court, should suffice.⁸

When the members of the duo Røyksopp were still teenagers and living in the northern Norwegian city of Tromsø, they were perceived as electronica musicians with remarkable talents by a considerably older DJ, Rune Lindbæk, who also participated in the popular music milieu there. They formed a band/group where Lindbæk became a leading member because of his contacts and management skills – he had ideas concerning sound and marketing, but never produced a melody or anything else that was musically important. His younger partners later discovered that he had credited himself as one of the composers for every piece of music he registered with the Norwegian musical rights organisation TONO.

When living in Oslo in the late 90s, one of Røyksopp's later members, Torbjørn Brundtland, recorded songs for an album and Lindbæk was present in the studio some of the time. A particular song, 'Lift', was already more or less created in Brundtland's head when he arrived at the studio one morning, and the recording of it was almost done when Lindbæk showed up. Lindbæk suggested there should be a 'take off' effect, with no further specification, when the last part of the song started after a 'breakdown', but otherwise contributed nothing. He used to repeat 'nothing leaves this studio without me being credited as composer', and so the song 'Lift' was registered with TONO with him as one of its creators. The real creator was at that point so

tired of Lindbæk and his practices that he moved to Bergen where he teamed up with his old Tromsø friend Svein Berge to form Röyksopp.

A first single, 'So Easy', was released on one of Mikal Telles' local labels, and led to Röyksopp being signed by the international company Wall of Sound Recordings (according to Mikal Telle, he told Wall of Sound to talk to the musicians directly, wanting nothing for himself). Eventually, their major international hit, the album *Melody AM* was released. One of the tracks on this album was called 'A Higher Place'. Years later, Rune Lindbæk approached Röyksopp and wanted to be paid for his composer's rights in that track, arguing that it was a near copy of the song 'Lift' that Brundtland had recorded in Oslo back in 1998. He pointed to two elements in the song as his creations, one of them the 'take off' before the last part of the song, the other a melodic motif. After a number of attempts to get his way through e-mails and the like, he had his story of 'theft' by Röyksopp told in a ten-page article in the weekend magazine of a major national daily, *DN*, and then, finally, sued Röyksopp.

The court case in Bergen in February 2013 was highly publicised and involved, among a number of witnesses and others present, Röyksopp demonstrating concretely, with all or much of their technical machinery in the courtroom, how they go about composing a song/musical piece. The court finally ruled in favour of Röyksopp on all accounts. The verdict contains a highly informed and interesting piece of musical analysis that compares the songs 'Lift' and 'A Higher Place' in detail, most probably written by one of the two lay judges in the case, an internationally acclaimed composer of contemporary serious electronic music, Asbjørn Schaathun.⁹ It concludes that the two pieces are very different, that the idea of a 'take off' does not constitute a significant contribution without any further specification, and that the melodic motif Lindbæk claimed to have created, and which was used in both recordings, in fact had been sampled from the work of Jean Michel Jarre and thus was no product of Lindbæk's.

What this case illustrates, I think, is the following points: 1) Popular music is, at its highly creative, lower, local levels, marked by a shared, strong interest in music and productive collaboration where the interest in issues of rights and revenues are of anything from low to modest importance. 2) If sales take off, though, these issues may become important. Strong feelings regarding the moral ownership of a piece are at work also in battles that may take a juridical form – Röyksopp had no interest in any compromise with Lindbæk. 3) Between musicians, solutions are as a rule pragmatic, as evidenced in my interviews with the bass player and the member of Kings of Convenience above – there has not, to my knowledge, been a struggle over rights between the two members of Röyksopp. 4) The verdict is of course based in copyright law, but would have

been impossible without the solid musical competence of one of the lay judges, since he was able to convincingly argue for the conclusion with reference to the musical material itself. This is probably an example of the most important place in copyright law for people in aesthetic academic disciplines: The best of them have skills that can meaningfully analyse a piece of art and make sustained arguments about the importance of this or that element.

Comparison and tentative conclusions

In spite of all the differences between a publicly funded repertory theatre ('high culture') and the private enterprise-dominated (yet now also publicly supported) field of popular music ('low culture'), it seems to me that some important similarities or parallels may be pointed out. They are tied to the fact that both cultural arenas are marked by the persistence of a modified version of the Romantic notion of creativity. But both are also marked by a willingness to operate in pragmatic ways if real life conditions challenge a clear-cut, dogmatic version of the ideal norm.

First, there are notions of talent (genius), self-realisation, self-expression and recognition. All artists involved in both media have as a rule been drawn to the art in question at an early age, i.e. in their teens or even as children. They tend to experience their choice of profession as resulting from a particular gift for such work and as something tied to quite intense pleasures experienced when performing it. Being an artist is more so than most professions tied to self-realisation and self-expression – and to gaining public recognition for this. The traditional, romantic understanding of creativity lies behind this and is further supported through its being practised in the arts.

Second, there is an undisputed distinction between creative and non-creative contributions to the realisation of a collective work of art. There are office workers, artisans and people doing all kinds of necessary physical labour involved who never get credited for their efforts (unlike film credits, where every driver et cetera may be mentioned). In music, there may be studio technicians and, 'gofers' and sound and lighting people at concerts who basically do what they are told to do, and so are as a rule not counted as creative. A record producer is mostly seen as creative, though, and there are light designers who would be counted as creative personnel. In other words, there are sliding scales involved in some technical functions in spite of the apparent absoluteness of the creative/not creative distinction.

Third, related to the sliding scales just mentioned, there are hierarchies of creativity in both fields. Actors are at or near the bottom of the theatre

hierarchy, but are still seen as creative and in some cases highly important to the end result of the collective process. This is roughly equivalent to the role of 'rank and file' band members in a rock band where one or two people do the writing of songs. Their creativity is invited and welcomed but they also basically told what to do.

The scenographer is or at least may be much more independent in her or his work than an actor and bases her or his work on an interpretation of the dramatic text in question as a whole. The director is above the scenographer, though, deciding which solutions the scenographer should work on or not. It should perhaps be mentioned that the strong position of the director in Norwegian theatre is due to it being tied to a strong continental European tradition of a 'director's theatre'. Still, the tensions between the director and the other obvious key person 'behind' a performance, the playwright, indicate that the director is not necessarily at the top of the hierarchy. This may for instance vary with the position of the playwright in the larger cultural field. I know of no Norwegian court cases on the copyright of a director versus that of the playwright, such as the *British Brighton & Dubbeljoint v. Jones* case.¹⁰

In popular music there is no exact parallel to the relation between the director and the playwright, but there is quite a bit of similarity in the tensions between those who created a song over who contributed the most important part. And if, for example, the lead singer in a band also wrote the song, he or she would be the undisputable top of the pyramid, even if every other member of the band, as well as the producer, have thrown in a variety of ideas as to the arrangement of the song in question.

Fourth, pragmatism in the handling of issues of rights is common in both the theatre and in popular music. In the theatre, it was striking how little the artists I interviewed seemed to know about their legal rights to their work, and so they were not inclined to feel very bound by them either. Neither were they seriously worried or irritated over a limited recognition of their rights. The playwright's say in the staging of a play would vary with a number of factors, and especially with the extent to which he or she had clout in the form of cultural and social capital.

Musicians for the most part knew more about rights than theatre people. But this is understandable given the fact that they make a living by way of copyright and people in the theatre don't. Still, there is, as exemplified above, considerable room for pragmatic solutions to disputes simply because of the fact that maintaining friendship and productive cooperation is in most cases seen as more important than the extra money gained from a higher percentage of revenues from a particular song or record. A different sort of pragmatism is involved in the negotiations between musicians and

their administrative associates – management and record companies. This is about strategic thinking about marketing – where the limits seem mostly to be drawn on the basis of artistic integrity, much less on the basis of percentages and up-front settlements.

This latter point actually leads to a final one, which concerns possible future research in this area. It seems to me that the role of various kinds of social power in the cultural fields is of great importance when it comes to the actual handling of copyright issues both in theatre and in popular music, and I see little reason why it would be much different in other art forms. The ways in which *stars* can dictate conditions for their participation in both artforms is one indication: The bass player I interviewed is highly competent but has to accept a fixed honorarium for a job that an internationally famous bass player might demand to be listed as co-composer for. The nature of different kinds of bargaining power in the complex variety of music industry contexts as well as the worlds of theatre, film and television, would be a good topic for highly interesting and useful research both for copyright scholars and the sociology of culture.

Notes

1. Point made by Director Morten Gjeltten at Norsk Teater-og Orkesterforening (Association of Norwegian Theatres and Orchestras) in telephone interview, 22 April 2013.
2. The agreement can be found here: <<http://spekter.compendia.no/kunder/nto/avtaler.nsf/oversikt?ReadForm&kuni=COMW-7RZBU3>>, accessed 15 April 2013. This is the relevant part of the Norwegian text of the agreement's § 9.1.: Sceneinstruktør og scenograf/kostymetegner har de rettigheter til sitt verk som følger av lov om opphavsrett til åndsverk mv. av 12. mai 1961. Verket er opphavsmannens eiendom, og denne overenskomst gir teatret bare rett til (ikke enerett) i inntil 2 år (for Den norske Opera i 6 år) å fremføre verket på de av teatrets faste scener det er laget for.
3. Agreement between Norsk Teater- og Orkesterforening and Norske Dramatikeres Forbund, dated 28 October 2012, downloaded from: <<http://dramatikere.no/wp-content/uploads/2012/09/Protokoll-og-avtale-26.10.2012.pdf>>, accessed 6 April 2013.
4. The historian Eric Hobsbawm suggested that the 1840s in England 'marked the end of an era when folksong remained the major musical idiom of industrial workers' (Chambers 1986, p.30).
5. One example: <<http://www.youtube.com/watch?v.=jECbrAoCXs4&list=RD02WjTg8UtClNc>>.
6. An example of their music: <<http://vimeo.com/32738987>>.

7. Cf.: <<http://en.wikipedia.org/wiki/BergenWave>>, and this recent piece from *The Guardian*: <<http://www.guardian.co.uk/music/2013/mar/15/bergen-norway-new-music-scene>>..
8. The following is based on a 45-page document originally published on the internet at *royksoppsvarer.com*, dated 20 April 2011 (on file with the author), and the decision from Bergen Tingrett of 6 March 2013, published in the database *Lovdata*, document no. TBERG-2012-86032-2.
9. Cf.: <<http://www.schaathun.org/en/>>
10. For an overview of the case, cf.: <<http://www.5rb.com/case/brighton-dubbeljoint-v-Jones>>. <http://www.5rb.com/case/Brighton--Dubbeljoint-v-Jones>. Reference: [2004] EWHC 1157 (Ch); [2004] EMLR 507; Court: Chancery Division; Judge: Park J; Date of Judgment: 18 May 2004.

References

Books and articles

- Chambers, I., 1986. *Popular Culture: The Metropolitan Experience*. London: Methuen.
- Hunt, L., 2007. *Inventing Human Rights: A History*. New York: W. W. Norton.
- Karnell, G., 2012. 'Norway'. In: P. Geller (ed.), *International copyright law and practice*. New York: Matthew Bender (looseleaf).
- Murdock, G. [1980] 1993. 'Authorship and Organisation', *Screen Education* no. 35, summer; reprinted in M. Alvarado, E. Buscombe and R. Collins (eds): *The Screen Education Reader: Cinema, Television, Culture*. London: Macmillan.
- Negus, K. and Pickering, M., 2004. *Creativity, Communication and Cultural Value*. London, Thousand Oaks, New Delhi: Sage Publications.
- Taylor, C., 1985. *Human Agency and Language: Philosophical Papers I*. Cambridge, London, New York: Cambridge University Press.
- Thing, M., 1973. *Ideologier og litteratur*. Copenhagen: Kurasje.
- Waters, J., 1988. 'Deus ex Machina: The Band Who Grew to Earth'. In: E. Dunphy (ed.), *The Unforgettable Fire: The Story of U2*. Harmondsworth: Penguin.
- Woodmansee, M. (1994). 'On the Author Effect: Recovering Collectivity'. In: M. Woodmansee and P. Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature*. Durham and London: Duke University Press.

Cases

- Dubbeljoint v. Jones* (2004) EWHC 1157 (Ch); (2004) EMLR 507
Røyksopp (2013) Lovdata no. TBERG-2012-86032-2, Bergen Tingrett 06.03.2013