

Copyright and Collective Authorship: Locating the Authors of Collaborative Work

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Chapter 1: Copyright Law and Collective Authorship

1.1 Introduction

Large-scale collaboration is becoming increasingly widespread and is now a prominent feature of the economic and cultural landscape¹. This is due, in large part, to advances in digital and communications technology which have made it easier than ever before for people to work together. The most iconic symbol of modern collaboration, Wikipedia, averages 515 new articles per day². Thousands of contributors collaborate in adding to, editing and contesting Wikipedia's content – in June 2018, for example, each article on Wikipedia had been edited, on average, 98 times³. Contemporary examples of large-scale collaboration are numerous⁴ (consider: open source software, 'citizen science' projects, and the crowdsourcing of architectural designs⁵, films⁶, books⁷, advertising⁸ and 3D printer product designs, to name just a few). Indeed, some suggest that collaborative efforts may now have become the paradigmatic form of creativity⁹. Although collaborative creativity is by no means new, large-scale collaboration, or collective authorship¹⁰, creates unique challenges (as well as

¹ D Tapscott and A Williams, *Wikinomics: How Mass Collaboration Changes Everything* (Atlantic Books 2008); K Sawyer, *Group Genius: The Creative Power of Collaboration* (Basic Books 2007) 15; K Sawyer, *Explaining Creativity: The Science of Human Innovation* (OUP 2nd ed 2012) 231-33; MM Biro, 'Smart Leaders and the Power of Collaboration', *Forbes* (3 March 2013) <<http://www.forbes.com/sites/meghanbiro/2013/03/03/smart-leaders-and-the-power-of-collaboration/>>; 'The Collaborative Economy: Impact and Potential of Collaborative Internet and Additive Manufacturing' (Science and Technology Options Assessment Panel Study, European Parliament, PE 547.425, Dec 2015) <[http://www.europarl.europa.eu/thinktank/fr/document.html?reference=EPRS_STU\(2015\)547425](http://www.europarl.europa.eu/thinktank/fr/document.html?reference=EPRS_STU(2015)547425)>. All websites referred to were last accessed on 17 August 2018 unless otherwise stated.

² <<https://en.wikipedia.org/wiki/Wikipedia:Statistics>> (considering only the English version of Wikipedia).

³ <<http://stats.wikimedia.org/EN/TablesWikipediaEN.htm>>. At the time of writing, 120,446 contributors had performed an edit within the previous 30 days: <<http://en.wikipedia.org/wiki/Wikipedia:Wikipedians>>.

⁴ There are countless tools that facilitate such collaboration, from the wiki software that Wikipedia uses to a more a generic tool, such as Amazon's Mechanical Turk, which provides a platform for the distribution of small tasks to many workers at low prices: <<https://www.mturk.com/mturk/welcome>>.

⁵ For example: <<http://www.arcbazar.com/>>.

⁶ For example: <<https://www.userfarm.com/en>>.

⁷ Such as the cookbook <<http://www.gooseberrypatch.com/>> or the novel 'One Million Penguins' described at <http://fanfiction.wikia.com/wiki/A_Million_Penguins>.

⁸ For example: <<http://www.victorsandspoils.com/>>.

⁹ A Bell and G Parchomovsky, 'Copyright Trust' (2015) 100 Cornell LRev 1015.

¹⁰ Throughout the book, a 'work of collective authorship' refers to any work that is created by many contributors. It is not intended to be confined by the meaning of 'collective work' in s178 of the Copyright Designs and Patents Act 1988 ('CDPA'), although most works of collective authorship are likely to fall within this definition. 'Collective' is preferred to 'collaborative' to avoid confusion when considering which contributors might be joint authors of such work (given that collaboration is a requirement for joint authorship). The term 'group authorship' has been avoided, as it might seem to imply cohesion between contributors, which is unnecessarily under-inclusive.

opportunities)¹¹. This book is concerned with the challenges that collective authorship poses to copyright law.

In today's information economy, intellectual property law is of fundamental importance. It provides the main set of rules governing the allocation of property-style rights in a broad array of intellectual products. In this context, the question of how to determine the authorship, and hence the first ownership of copyright, in works created by groups of people requires urgent attention. Yet, copyright law does not provide a coherent or consistent answer to this question. In the UK there have been no cases explicitly considering the authorship of works created by many potential authors¹². The copyright case law on joint authorship is confined to situations involving disputes between only a few contributors, and scholars have observed that the reasoning adopted in many such cases lacks the analytical clarity necessary to provide general guidance¹³. This is the first book to engage with the problem of determining the authorship of works of collective authorship from a copyright law point of view.

The book offers a comprehensive analysis of copyright law's concept of authorship and, in particular, joint authorship. This analysis provides the doctrinal foundation upon which the book's general argument – that copyright law's joint authorship test needs to be recalibrated for the digital age – is constructed. In addressing the question of how copyright law ought to determine the authorship of a collaborative work, the book primarily follows an inductive approach. Four cases studies, broadly representative of the phenomenon of collective authorship, are considered in detail. Each of these cases studies break new ground in exploring the significance for copyright law of the mismatch between creative norms in environments in which collaboration flourishes (Science, Film, Indigenous art, Wikipedia) and copyright law's rules on authorship. The book, thus, employs insights from the ways in which collaborators understand and regulate issues of authorship themselves to assess copyright law's approach to joint authorship critically.

This book is written during a period when copyright law appears to be suffering from a crisis of legitimacy¹⁴. In recent decades, the successful lobbying of rights holders and the

¹¹ In their best-selling book, *Wikinomics*, Tapscott and Williams (n1) 31-33 make the bold claim that 'mass collaboration changes everything'. They identify a fundamental shift in the way that work and innovation are conducted, which they foresee will ultimately transform the current economic system – arguing that businesses must 'collaborate or perish'.

¹² With the exception of some cases on film copyright where the joint authorship test has not been applied because the principal director and the producer are deemed to be the joint authors of a film. There have been a number of cases considering the joint authorship of film in the US: 2.5.3, 6.2.5. The question has also arisen in Australia, for example, *Telstra v Phone Directories* [2010] FCA 44; [2010] FCAFC 149 (joint authorship of a telephone directory, largely compiled using computer software with some human input not established).

¹³ L Zemer, 'Contribution and Collaborations in Joint Authorship: Too Many Misconceptions' (2006) 1(4) *JIPLP* 283, A Stokes, 'Authorship, Collaboration and Copyright a View from the UK' (2002) *Entertainment LRev* 121.

¹⁴ eg S Dusollier, 'Open Source and Copyleft: Authorship Reconsidered?' (2003) 26 *Columbia J of L and Arts* 281: 'The institution of copyright is in ill repute these days'; N Elkin-Koren, 'Tailoring Copyright to Social Production' (2011) 12(1) *Theoretical Inquiries in L* 309, 310: '... a regime in crisis'.

internationalisation of copyright law has led to the expansion of copyright protection¹⁵. This has resulted in a copyright regime which has often been accused of being geared more towards protecting the corporations involved in producing and distributing creative works, than it is towards rewarding and incentivising authors¹⁶. At the same time, non-compliance with copyright law is becoming increasingly widespread, and in some quarters, normalised (viz. the anti-copyright law platform of the Pirate Party, the ‘Guerrilla open access movement’¹⁷, etc). The Creative Commons and the Free Software movements, which cast themselves as an ‘ethical alternative’ to copyright, have also been gaining popularity. As copyright law is frequently accused of being out of touch with modern creative realities, non-compliance may appear unsurprising¹⁸. Indeed, psychologists have demonstrated that people are more likely to obey laws they consider to be legitimate and fair¹⁹. In light of this legitimacy crisis, a search for the best way to apply the joint authorship test ought to begin with the reality of creativity²⁰. As Jane Ginsburg argued over a decade ago, refocusing on authors and the act of creating may help restore a proper perspective on copyright law²¹. In this spirit, this book focuses on the dynamics of creativity in four instances of collective authorship.

¹⁵ The entertainment, software and database industries have been particularly important drivers of copyright expansionism. Acknowledging the influence of ‘lobbysmics’ on UK copyright policy: I Hargreaves, ‘Digital Opportunity: A Review of Intellectual Property and Growth for HMG’ (2011) available at: <<https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>> p18.

¹⁶ Whilst the subject-matter and scope of exclusive rights has been broadened, there appears to have been relatively little corresponding effort to ensure that actual creators benefit. Creators, dependent on intermediaries to fund/disseminate their work, often make little money from their creations and any control which they might exercise over them is likely to be short-lived. Despite the enormous value that copyright industries add to the economy, most creators cannot earn a living from their creative work: J Litman, ‘Real Copyright Reform’ (2010) 96(1) Iowa LRev 1; J Ginsburg, ‘How Copyright Got a Bad Name For Itself’ (2002) 26(1) Columbia J of L and the Arts 61; R Giblin and K Weatherall, ‘A Collection of Impossible Ideas’ in R Giblin and K Weatherall (eds) *What if we could reimagine copyright?* (ANU Press, 2017), 316.

¹⁷ B Bodó, ‘Pirates in the Library – An Inquiry into the Guerrilla Open Access Movement’ (8th Annual Workshop of the International Society for the History and Theory of Intellectual Property, CREATE, University of Glasgow, UK, 6-8 July 2016) available at <<http://ssrn.com/abstract=2816925>>.

¹⁸ T Tyler, ‘Compliance with Intellectual Property Law: A Psychological Perspective’ (1996) 29 International L and Politics 219, 227 arguing that people are more likely to obey a law that reflects public morality. On the link between the perceived lack of transparency with respect to the beneficiaries of intellectual property protection and this crisis of legitimacy: C Geiger, ‘The Social Function of Intellectual Property Rights’ in GB Dinwoodie (ed) *Intellectual Property Law: Methods and Perspectives* (Edward Elgar 2013) 153, 155.

¹⁹ For example, the important work of T Tyler, *Why People Obey the Law* (Princeton UP 2006) and *ibid.* Of course the allocation of copyright is only one part of this complex question. The scope of copyright protection and its limitations also affect perceptions of its fairness; and there is no doubt that the ease of infringement coupled with the challenges of enforcement greatly facilitate non-compliance.

²⁰ RR Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the US* (Stanford UP 2009) 5 draws upon Tyler’s work to argue that laws governing authors’ rights are likely to be ignored if they fail to embrace widely shared norms regarding authorship. Similarly, J Ginsburg, ‘The Author’s Place in the Future of Copyright’ in R Okediji (ed) *Copyright in an Age of Exceptions and Limitations* (CUP, 2015) 60, 62: ‘The disappearance of the author moreover justifies disrespect for copyright—after all, those downloading teenagers aren’t ripping off the authors and performers, the major record companies have already done that’.

²¹ J Ginsburg, ‘The Concept of Authorship in Comparative Copyright Law’ (2003) 52 De Paul L Rev 1063, 1071; also L Bently, ‘R v Author: From Death Penalty to Community Service’ (2008) 32(1) Columbia J of L & the Arts 1.

The figure of the author is at the heart of copyright's sense of its own identity and purpose²². Although 'authorship' bears significant doctrinal and normative weight, as a concept, it remains extremely vague and open-textured. Despite increasing interest in legal scholarly literature in recent times, authorship remains relatively under-theorised²³. In the case law its meaning is often treated as self-evident. Such vagueness may have been a rhetorical asset, as strategic ambiguity permits copyright law to serve competing regulatory purposes simultaneously²⁴. Since the birth of copyright law, authorship has been a hotly contested issue, as stake holders battle to define the beneficiaries and reach of copyright protection²⁵. (The so-called 'monkey selfie' dispute is a recent example that has received much media attention²⁶). Legal scholarship's relative historical neglect of the bounds of authorship might be attributed to a reluctance to open this 'can of worms'²⁷.

Now is the right time to start prising the can of worms open for at least two reasons. First, part of the response to copyright's crisis of legitimacy ought to be realignment with its *raison d'être*: the encouragement of authorship and the protection of authors. Second, changes to the creative landscape facilitated by digital technology mean that courts are increasingly likely to be faced with disputes that require definition of the outer limits of the concept of

²² This is notwithstanding the fact that copyright law has often been seen to grant greater benefits to distributors, publishers and other distributors than creators. The protection, reward and incentivisation of authors has always been at the heart of copyright law and policy, even though it has sometimes been used to protect against unfair competition: 2.1, n34.

²³ Much theoretical scholarship has focused upon the philosophical underpinnings of copyright law, assigning authorship an instrumental role according to the scholars' preferred view. Ginsburg (n21) provides a notable exception. Recently, there has been more interest in authorship. In Europe, for example: M van Eechoud (ed) *The Work of Authorship* (Amsterdam UP, 2014); Bently (n21). In the US following *Aalmuhammed v Lee* 202 F3d 1227 (9th Cir, 2000) and *Garcia v Google* 743 F3d 1258 (9th Cir, 2014); 786 F3d 733 (9th Cir, 2015), for example, C Buccafusco, 'A Theory of Copyright Authorship' (2016) 102 Virginia LRev 1229; J Tehranian 'Sex, Drones & Videotape: Rethinking Copyright's Authorship-Fixation Conflation in the Age of Performance' (2017) 68 Hastings LJ 1319; S Balganes, 'Causing Copyright' (2017) 117(1) Columbia LRev 1, 5 n17 referring much of this scholarship. In Australia, following *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, (2009) 239 CLR 458 and *Telstra v Phone Directories* [2010] FCA 44; [2010] FCAFC 149, for example: E Adeney, 'Authorship and Fixation in Copyright Law: A Comparative Comment' (2011) 35 Melbourne University LRev 677; J McCutcheon, 'The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law' (2013) 36(3) Melbourne LRev 915.

²⁴ M Spence, *Intellectual Property* (OUP 2007), ch 2.

²⁵ The contours of the concepts of authorship, originality and the copyright work together outline the boundaries of copyright entitlement. Although the CJEU in Case C-5/08 *Infopaq v Danske Dagblades Forening* [2009] ECR I-6569 seems to suggest the primacy of originality in determining copyright subsistence, there are likely to be some restrictions on what might be considered a protectable 'work'. The CJEU will have to grapple with this directly in the pending reference C-310/17 *Levola Hengelo* (see opinion of AG Wathelet, ECLI:EU:C:2018:618).

²⁶ The dispute is outlined in Tehranian (n23) 1352-55.

²⁷ As authorship is necessarily bound up with the rationale for copyright protection, to the extent that a coherent normative underpinning for copyright law remains elusive, scholarly caution may be warranted. W Fisher 'Theories of Intellectual Property' in S Munzer (ed), *New Essays in the Legal and Political Theory of Property* (2001) <<http://www.tfisher.org/publications.htm>> explains how each of the mainstream justifications for copyright protection all contain flaws. He concludes that, at best, these theories can facilitate dialogue.

authorship²⁸. Although a complete theory of authorship is beyond the scope of this book, its more modest aim is to take us a step further down the path to defining the copyright law's concept of authorship. It tests copyright law's ability to meet the two challenges of legitimacy in, and suitability for, the digital age by probing one particularly difficult scenario: collective authorship.

Although scholars broadly agree that current copyright law is ill-equipped to meet the challenges of determining the authorship of highly collaborative works, they proffer different explanations. Some suggest that the influence of the 'romantic author', a literary trope which presents the author as a solitary creative genius, has left copyright law ill-adapted to collaborative creativity²⁹. Others offer a more fundamental critique of copyright law, suggesting that it simply lacks the conceptual tools to deal with the forms of creativity that flourish in the modern digital world (many of which are highly collaborative)³⁰. This book does not ask *why* copyright might be ill-suited to collaborative creativity. Instead, it tackles the underlying assumption that copyright law *is* unable to deal with collective authorship. I argue there are appropriate tools to determine the authorship of works of collective authorship, provided that when applying the joint authorship test, judges make better use of their conceptual tool box.

1.2 Methodological Approach

In his report for the UK government on the reform of copyright law, Ian Hargreaves stresses the importance of evidence-based policy making³¹. Such policy-making is not possible unless scholarly work helps to join the dots between legal concepts and creative reality. In recent times there has been a significant growth in interest amongst intellectual property law scholars in empirical projects and economic analysis. Yet these methodologies are not always the best equipped to capture some of the less quantifiable aspects of copyright law. This book takes a broad, interdisciplinary approach, drawing on the expertise of a wide range of scholars from the Humanities and Social Sciences who have thought deeply on the issues of authorship and collaborative work from different perspectives and in a variety of contexts. The book seeks to embrace complexity in order to develop a richer, more nuanced understanding of the role of copyright law within creative communities, with the view that such an approach is more likely to generate realistic workable solutions.

²⁸ US courts have already confronted some of these challenges: Tehranian (n23); Buccafusco (n23) 1233-1234. Collective authorship is only one such challenge. New media and artificial intelligence provide new avenues for creativity and with the ready availability of smart phones and other technological tools anyone can be a creator.

²⁹ See M Woodmansee and P Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke UP, 1994); M Rose, *Authors and Owners: The Invention of Copyright* (Harvard UP 1993); D Saunders *Authorship and Copyright* (Routledge 1992); J Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard UP 1996). Others suggest that there are better explanations of the current state of copyright law, eg Bently (n21).

³⁰ JP Barlow, 'The Economy of Ideas: Selling Wine Without Bottles on the Global Net' <<https://www.eff.org/pages/selling-wine-without-bottles-economy-mind-global-net>>.

³¹ Hargreaves (n15).

Compelling arguments have been made that the relationship between copyright law and creativity needs to be rethought³². This book takes up this challenge. It forms part of a growing body of work which reacts to the abstract approach of much previous copyright scholarship³³. Indeed, the book adopts a primarily practical, inductive approach by evaluating the dynamics of creativity and the regulation of the incidents of authorship in cases of collective authorship. This research is also situated within the ongoing debate on the distance between social norms and copyright law³⁴. By taking creative practice as its starting point, the book proposes ways in which copyright law might use social practices to bridge this gap, and thereby reclaim some of its lost credibility.

The four case studies considered in this book have been chosen because they provide complementary pieces of the jigsaw of ‘real-world’ collective authorship. They concern the creation of different types of copyright works (literary, artistic, dramatic, film) in very different economic sectors. They are fairly representative of the range of collaborative practices, encompassing both a new form of creativity (Wikipedia) and one with an ancient origin (Australian Indigenous art). They embrace hi-tech (Science, Film) as well as amateur (Wikipedia) examples. In each case, authorship is driven by different impulses, from largely commercial motivations (Film), to religious and spiritual motivations (Indigenous art), to reputation and knowledge creation motivations (Science) and even as a recreational pursuit (Wikipedia). They also provide examples of a range of different ways in which issues of authorship might be self-regulated.

Adopting the interdisciplinary, inductive method identified above, this book asks how the joint authorship test ought to be applied to yield a suitable mechanism for determining the authorship of collective authorship works. For these purposes, *suitable* is taken to mean:

- a test that serves copyright law’s purposes to incentivise and reward creativity³⁵; and

³² J Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 University of California Davis LRev 1151.

³³ *ibid*; RK Walker and B Depoorter, ‘Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard’ (2015) 109(2) Northwestern University LRev 343.

³⁴ L Bently and L Biron, ‘Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, if anything, is to be done?’ in van Eechoud (n23) 237; LJ Murray, S Tina Piper and K Robertson, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (OUP 2014); M Schultz, ‘Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law’ (2006) 21 Berkeley Technology Law Journal 651, 654; J Tehranian, ‘Infringement Nation: Copyright Reform and the Law/Norm Gap’ (2007) Utah LRev 537.

³⁵ Although these are most commonly cited by commentators, there are a number of other possible purposes of copyright law. For example, encouraging the distribution of creative works, promoting individual flourishing or fostering the achievement of a just and attractive culture. See Fisher (n28) for an overview of the many different views on the theoretical underpinnings of copyright law. In chapter 2 I argue that the concept of authorship might be affected by one’s view of copyright law’s purpose and offer a definition of the minimum core of authorship, similar to a ‘mid-level principle’ of the sort discussed by R Merces, *Justifying Intellectual Property* (Harvard UP, 2011), see further ch2, n88.

- a test that is credible to creators and the creative community concerned (because of the importance of some congruency between law and social norms, both in enhancing the law's perceived legitimacy and in promoting compliance)³⁶.

This book primarily focuses upon the interpretation of the joint authorship test in UK copyright law, as influenced by European law. The fruits of this analysis will, however, be of interest to scholars and practitioners in other jurisdictions which face similar issues. Indeed, the analysis in chapter 4 considers Australian law, while chapters 2, 6 and 8 refer to the law of the United States. Different national approaches to questions of authorship, joint authorship and joint ownership provide an interesting counterpoint to UK law.

1.3 A Roadmap

In order to provide a solid foundation for the argument, the book begins with a doctrinal and theoretical analysis of the concepts of authorship and joint authorship in UK copyright law (chapter 2). I consider the impact of recent jurisprudence of the Court of Justice of the European Union ('CJEU'), since its strides towards harmonisation of the originality requirement feeds directly into copyright law's conception of authorship. Although the contours of the concept of authorship are uncertain, I identify its stable core: a more than de minimis contribution of creative choices or intellectual input to the protected expression³⁷.

Then, I turn to the joint authorship test found in the Copyright, Designs and Patents Act 1988 ('CDPA')³⁸. I argue that the definition of a work of joint authorship implies that it is the result of creators working together to create something that is *greater* than the sum of its parts³⁹. I argue that this conception serves as useful guide in the application of the test. An analysis of the case law reveals that it is difficult to assess whether, or not, the current statutory test provides a suitable mechanism for determining the authorship of works of collective authorship because the case law is limited, and the test is rarely applied in an analytical manner. Three themes are discussed: (i) the factual specificity of the joint authorship test; (ii) the pragmatic instrumental approach to the implementation of the test; and (iii) the preoccupation with aesthetic neutrality⁴⁰. Although factual specificity results in an uncertain jurisprudential picture, ultimately it is a strength of the test allowing it the flexibility to adapt to different creative contexts⁴¹. The second and third themes are more

³⁶ See 8.1. Tyler (n18); K Burleson, 'Learning from Copyright's Failure to Build its Future' (2014) 89(3) Indiana LJ 1299; also Q4, FAQs on Copyright <<https://euipo.europa.eu/ohimportal/en/web/observatory/faqs-on-copyright-hr>>; GN Mandel 'The Public Perception of Intellectual Property' (2014) 66 Florida LRev 261. See further 8.1.

³⁷ 2.1.

³⁸ Unless otherwise indicated throughout this book statutory provisions refer to sections of the CDPA.

³⁹ 2.2.

⁴⁰ 2.3.

⁴¹ 2.3.1.

problematic as they lead to lack of analytical clarity in judicial reasoning which hampers predictability and risks a chilling effect on collaborative creativity.

A trend, evident in copyright scholarship and the case law, is associated with the second theme that favours a restrictive approach to the application of the joint authorship test⁴². I refer to this as the *pragmatic instrumental approach*. Its proponents have been persuaded, primarily for pragmatic reasons, that authorship should be concentrated in the hands of one or a few dominant creators. The worry is that a work's exploitation will be impeded if it has too many joint owners who are unable to agree⁴³. The pragmatic instrumental approach is undesirable for a number of reasons. Most notably, it tends to conflate the (importantly separate) concepts of authorship and ownership, and it seems to impose a higher standard of authorship for joint works than is justified by the wording of the CDPA and the case law on authorship.

The third theme is a preoccupation with aesthetic neutrality. I argue that judicial concern about passing judgment on the aesthetic merits of a work has led to a reticence to explicitly engage with aesthetic criteria in the application of the joint authorship test⁴⁴. Yet, as the case law demonstrates, it is difficult, if not impossible to apply the joint authorship test without resort to aesthetic criteria.

I conclude the discussion of the case law on joint authorship by laying groundwork for more analytical approach to the application of the test in distinguishing the questions of fact, from the question of law at the heart of the joint authorship test (what constitutes protectable authorial input?)⁴⁵. The final sections of chapter 2 seek insights from the scholarly literature on authorship to further enrich this doctrinal analysis⁴⁶.

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

- (i) Wikipedia (chapter 3);
- (ii) Australian Indigenous art (chapter 4);

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

⁴³ On this view, the more owners there are the greater the possibility of hold-ups occurring. On joint ownership of copyright: 8.6.1.

⁴⁴ 2.3.3.

⁴⁵ 2.4. I argue that the questions of fact relate to the existence of 'collaboration' and a 'significant' contribution which is 'not distinct'.

⁴⁶ 2.5.

- (iii) Scientific collaborations (chapter 5); and
- (iv) Film (chapter 6).

Each case study has been approached with similar questions in mind and the chapters follow a common structure. Each chapter includes four parts: an analysis of the dynamics of creativity and the social norms which operate to regulate the attribution and social incidents of authorship in that particular context; an attempt to apply copyright's subsistence rules to the case study subject matter, thereby identifying any gaps or uncertainties; an assessment of any private ordering measures adopted to address these gaps; and identification of the insights which the case study may provide for copyright law. The four parts are ordered in the sequence which best aids a clear presentation of the relevant issues.

Chapter 7 draws together the many disparate insights from the case studies to develop five broad themes which elucidate the role of copyright law in regulating collective authorship. These might be summarised, in broad-brush terms, as follows:

1. **The nature of collective authorship**⁴⁷ – Collective authorship tends to involve: a division of labour (with the sharing of responsibility for the creative or intellectual content of the work among many contributors); and social norms that regulate the creative process, often also determining the rights and responsibilities of contributors. In this light, it is obvious that the search for one or two 'controlling minds' to be identified as the authors of a work of collective authorship misses the mark because it fails to reflect how large groups work together to create.
2. **The different meanings of authorship**⁴⁸ – Although authorship dynamics differ in each collective authorship context, authorship is usually understood as signifying responsibility for what is considered valuable about the work (according to community-specific criteria). Authorship often signals a special status within a particular creative community with power dynamics in that community sometimes affecting who receives authorial credit.
3. **There is a gap between copyright law's assumptions about authorship and creative reality**⁴⁹ – In particular, copyright's assumptions regarding the incentives which motivate authors to create often fails to tally with the primary motivations for works of collective authorship, which are typically non-economic in nature. Furthermore, the attribution and regulation of authorship is often nuanced and varies greatly in different creative contexts. This contrasts to copyright law's standard one-size-fits-all approach.

⁴⁷ 7.1.

⁴⁸ 7.2.

⁴⁹ 7.3.

4. Private ordering: bridging the gap between copyright law and creative reality⁵⁰ –

In general, collective authorship groups are fairly successful in self-managing the incidents of authorship. This is achieved by drawing upon a variety of private ordering mechanisms which can offer flexible, tailored and context-specific solutions. Private ordering, however, proves less successful where a power imbalance exists within the authorship group. In this context, legal standards have the potential to play an important role in enabling collective action and improving the quality of private ordering.

5. The role of copyright law and its concepts⁵¹ – Copyright law rules about authorship establish a standard having both legal *and* expressive value, but the manner in which the law influences creative communities is sometimes complex or indirect.

Chapter 8 applies the case study lessons to the previous theoretical and doctrinal analysis of joint authorship. I explain why the working premise originally proposed in chapter 2 – that a work of joint authorship is one which is greater than the sum of its parts – is a good fit for collective authorship. Adopting this view, chapter 8 proffers an *inclusive, contextual approach* to the joint authorship test, which reflects the concept of authorship at the heart of UK copyright law and aligns with the realities of collective authorship. I outline a few of its key elements here⁵².

An *inclusive* approach, ie one which is more open to the possibility of a work having multiple authors, best reflects the way in which collective authorship groups work together to create copyright works.

- This inclusive approach sets an ‘authorship’ threshold for a joint work which is on par with that already established for a work of individual authorship, not one which is more demanding⁵³.
- The case studies reveal that the fears underlying the pragmatic instrumental approach are ill-founded or over-stated. Rather than facing exploitation hold-ups, collective authorship groups seem generally adept at managing ownership issues supported by social norms or other private ordering mechanisms such as contracts⁵⁴.
- Even where private ordering proves less satisfactory, the case studies still support an inclusive approach to joint authorship because receiving the title of ‘author’ may prove to be a valuable bargaining chip in any negotiations with more powerful players⁵⁵.

⁵⁰ 7.4.

⁵¹ 7.5.

⁵² See further 8.6.

⁵³ p50.

⁵⁴ 7.4.

⁵⁵ 6.3, 7.4.3, 7.5.

- Finally, a restrictive approach to authorship restricts access to moral rights too. The case studies reveal that collaborators may be more concerned about attribution, and other, non-economic consequences of authorship, than they are about, eg remuneration or control.

A *contextual* approach to joint authorship might be achieved by taking direct account of the social norms which govern authorial groups when determining questions of fact which arise in the joint authorship test⁵⁶. This calls for a rebalancing in the way the joint authorship test is applied, with more emphasis on the collaboration limb of the test.

- One of the strengths of the current joint authorship test is that it is flexible enough to adapt to different creative contexts. The case studies reveal that there is no single dynamic for collective creativity. Thus, flexibility is an essential feature of any joint authorship test if it is to remain in touch with the creative realities of authorship.
- The principle that judges ought not to adjudicate the subsistence of copyright based upon the aesthetic merits of the work is consistent with the use of aesthetic criteria⁵⁷. However, it is vital that judicial reasoning refers to such criteria explicitly, rather than being obscured behind a cloak of aesthetic neutrality.
- The social norms that govern creativity within a particular authorship group are an independent source of information that is likely to be helpful in answering questions of fact⁵⁸.

Yet, as well as potential benefits, there are also dangers inherent in incorporating social norms in legal decision-making⁵⁹. I, therefore, suggest a framework for assessing the usefulness of social norms based on their (i) certainty, (ii) representativeness and (iii) policy implications⁶⁰. In the CDPA, authorship is also ultimately and importantly, a legal question⁶¹. In the joint authorship test, the requirement for authorship is expressed as a requirement that the contribution be of the ‘right kind’ in the copyright sense. This requirement provides an additional filter when it comes to the incorporation of social norms in copyright decisions.

It is hoped that the approach proposed in this book would not only bring the joint authorship test closer in line with the reality of collective authorship, but also provide a useful analytical framework to promote greater clarity in judicial decision-making. This solution draws upon the natural strengths of the UK’s common law legal system and the flexible, incremental and problem-based approach to law-making that it allows. Although this book is primarily about authorship and joint authorship, there are inevitable implications of this analysis for the law of joint ownership. These are considered in 8.6, which sets out the

⁵⁶ 8.5.

⁵⁷ 2.3.3, 8.4.2.

⁵⁸ 2.2.4, 8.1.

⁵⁹ 8.1, 8.2.

⁶⁰ 8.3.

⁶¹ 2.4.

current approach to joint ownership, considers some alternatives and proposes modest legislative amendment.

Chapter 8 concludes with some more general food for thought which arises from the analysis of collective authorship in the book⁶². In particular, this research supports the view that it is time to review the influence which instrumental, economic incentives-based reasoning wields in shaping the ongoing development of copyright law and policy⁶³. Previous scholarship exploring non-economic motivations for authorship and the role of social norms in regulating creativity has called this ‘incentive story’ of copyright protection into question⁶⁴. Yet, most of this of this literature has focused on ‘negative spaces’ – domains in which creativity thrives despite little, or no, copyright protection being available⁶⁵. It is open to debate whether such activities ought to be regulated by copyright law. The case studies considered here, however, provide a more serious challenge to the incentive story *because* they fall squarely within copyright law’s recognised domain. The case studies demonstrate that authorship is a more complex and multi-dimensional phenomenon that current copyright law appears to give it credit for.

This book also underlines the important role which copyright law serves as a touchstone for good authorship standards. At its best, copyright law can provide a valuable bulwark against unhealthy power dynamics within creative communities which cause authorship to gravitate to dominant players at the expense of other creators. At its worst, copyright law might end up bolstering the positions of such dominant players (typically, orchestrators and investors) at the expense of the real creators, simply because of a misplaced desire to simplify rights and ensure efficient exploitation. The latter scenario would seem to support the view that copyright law’s ideal is out-of-touch with creators’ experiences. Thus, this book urges an approach that would allow copyright law to reconnect both with creative realities and also with its own *raison d’être*: rewarding and incentivising creators. Although

⁶² 8.7.

⁶³ An important resource in this debate is: J Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (Stanford Press, 2014). See also: JC Fromer, ‘Expressive Incentives in Intellectual Property’ (2012) 98 *Virginia LRev* 1745; O Bracha and T Syed ‘Beyond Efficiency: Consequence-Sensitive Theories of Copyright’ (2014) 29 *Berkeley Tech LJ* 229. The importance of the noneconomic incidents of authorship in motivating creators suggests a need to take a broader approach to implementing moral rights than the UK has been comfortable with to date: I Stamatoudi, ‘Moral rights of authors in England: the missing emphasis on the role of creators’ (1997) 4 *IPQ* 478, J Ginsburg, ‘Moral Rights in the Common Law System’ (1990) 1(4) *Entertainment LRev* 121.

⁶⁴ Elkin-Koren (n14); Silbey *ibid*.

⁶⁵ For example: magic tricks, jokes and chef’s recipes. E Rosenblatt, ‘A Theory of IP’s Negative Space’ (2011) 34(3) *Columbia J of L and the Arts* 317 provides an overview of this literature. See also: K Raustiala and C Sprigman, ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’ (2006) 92 *Virginia LRev* 1687; D Oliar and C Sprigman, ‘There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy’ (2008) 94 *Virginia LRev* 1787; E Fauchart and EA von Hippel, ‘Norm-Based Intellectual Property Systems: The Case of French Chefs’ available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781>; CJ Buccafusco, ‘On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?’ (2007) 24 *Cardozo Arts & Entertainment LJ* 1121; J Loshin, ‘Secrets Revealed: How Magicians Protect Intellectual Property without Law’ in C Corcos, *Law and Magic: A Collection of Essays* (Carolina Academic Press 2008) 123.

the CDPA may seem to offer little guidance on the definition of authorship, as the next chapter will show, in fact, its description of the author as the one who *creates* a work clearly reveals the heart of this concept.