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Examining Joint Authorship of Musical Works in the UK

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Introduction

At what point do the performers in a band get 'joint authorship' credit with the main songwriter? When are they entitled to royalties, as co-owners of the copyright? These are the key questions this article seeks to answer. Under UK law a work of 'joint authorship' requires collaboration between two or more authors⁽¹⁾. The two authors jointly own the resulting work⁽²⁾. The criteria under copyright legislation for the establishment of joint authorship can be described as follows. First, it is required that the author's contribution to the work must not be distinct from the contribution (s) of the other author(s)⁽³⁾. It is not necessary for each contribution to have the same weight in size or quality however⁽⁴⁾. Secondly, the contribution must form part of a 'common design' to produce the jointly authored 'work'⁽⁵⁾. Thirdly, the contribution's input must be 'creative'⁽⁶⁾. This final criterion is centred on the idea of a 'significant and original'

(1) CDPA s 10 (1). CRRA s 22 (1).

(2) CDPA s 11 (1), 10 (3). CRRA s TBC. See also *Stuart v Barrett* [1994] EMLR 448 and *Bangboye v Reed* [2004] 5 EMLR 61, 74.

(3) CDPA s 10 (1). CRRA s 22 (1).

(4) *Godfrey v Lees* [1995] EMLR 307 at 325. Furthermore, in *Brighton v Jones* [2004] EWHC 1157 (Ch) the court noted that 'writing' is not necessarily required.

(5) *Godfrey v Lees* [1995] EMLR 307 at 325.

(6) *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818, 834-6. See also Barron, 'Harmony,' *op. cit.*, 27, noting that 'skill and effort crystallised in the work' form part of this 'input'.

contribution. As discussed below, it is the requirement of a 'significant and original' contribution that has often been of crucial importance in case disputes⁽⁷⁾. In the following article I outline how these legal criteria are applied in the UK to cases involving musical collaboration. Ultimately I argue that although there have been some divergences in the past case law in the UK, the legal principle is now established: where an existing composition is in the process of being recorded by a band, it is perfectly possible for a contribution to be made by a performer during the performance/recording process that is significant and original enough to confer a share of joint authorship of the resulting arrangement on that performer. As a result the performer will be considered a joint author of the musical work with the main composer/songwriter.

Exploring the Requirement of a 'Significant and Original' Contribution in relation to Musical Works

Numerous commentators have attempted to analyse the problems associated with assessing 'contribution' and 'collaboration' in cases of joint authorship of musical works⁽⁸⁾. Regarding performance of 'pop songs' the dividing line between interpretation and contribution is often difficult to draw. Arguably, the main reason for this is that musical 'performance' can be described as 'ethereal' and 'fleeting'. In fact, it may be impossible to define⁽⁹⁾.

Obviously, no copyright complications can arise over 'joint' authorship when a single individual composes, performs and records the work himself with no input or use of

(7) D. Free, 'Beckingham v. Hodgens: The Session Musician's Claim to Music Copyright,' *Entertainment Law* 1 (3) (2002), 93, 94.

(8) L. Zemer, 'Contribution and Collaboration in Joint Authorship: Too Many Misconceptions,' *Journal of Intellectual Property Law and Practice* 1 (4) (2006), 283.

(9) *Exp Island Records* [1978] 3 All ER 824, Lord Denning MR at 827. .

material by others (consider, for example, the solo recordings of Joni Mitchell, Elton John or Ed Sheeran). However, when a composer performs and records a work collaboratively as part of a group, authorship tensions can arise. Tensions are especially prone to occur when group members have not formally put in writing the terms of their relationship to each other⁽¹⁰⁾. One of the reasons for this lack of formality is the fact that musicians generally tend to concentrate on the creative aspects of music and they 'typically only think about copyright when they have to'⁽¹¹⁾.

This is clear from the seminal case of *Fisher v Brooker*⁽¹²⁾ which involved the famous song 'A Whiter Shade of Pale' - one of the highest selling singles of all time, generating millions of dollars in sales. The organ player, Matthew Fisher, argued, many decades after the song was released, that he was entitled to a share in the joint authorship of the musical work due to adding the 'hook' to the song in the form of the organ intro and solo. Originally only the main composer of the chords and melody (but not the organ part) - Gary Brooker - had been given credit. In 2005, Fisher sued Brooker in the English High Court to make his claim.

Fundamental to joint authorship under UK law is the making of a 'significant and original' contribution to the work. Included within this requirement are issues concerning whether the purported joint author has made the 'right kind' of creation. This was crucial to the denial of joint authorship in relation to Steve Norman's saxophone solo in the song 'True' in the 1999 case of *Hadley v Kemp*⁽¹³⁾. Although, in

(10) R. Schulenberg, *Legal Aspects of the Music Industry* (New York: Billboard Books, 2005), 3.

(11) A. Rahmatian, 'Music and Creativity as Perceived by Copyright Law,' *Intellectual Property Quarterly* 3 (2005), 267, 268.

(12) *Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] EMLR 9 at para 36. The case went to the Court of Appeal - *Fisher v Brooker* [2008] EWCA Civ 287; [2008] Bus LR 1123. On further appeal to the House of Lords, it was held that Fisher could receive a share of future royalties, despite the fact that he had waited 40 years before taking the case. *Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764.

an even earlier joint authorship case (not involving music) - *Cala Homes v Alfred McAlpine*⁽¹⁴⁾ - Laddie J. had stated that the concepts of ‘detailed… data or emotions’ and ‘expertise’ should be valued when assessing claims of joint authorship⁽¹⁵⁾ the judgment by Park J. in *Hadley* stated that the creation or improvisation of some parts of a song is not enough to establish joint authorship, where the melody, chords and rhythm are already part of the author’s composition⁽¹⁶⁾.

This decision has been criticised. One commentator has remarked that the standard of ‘significant and original’⁽¹⁷⁾, as applied by Park J. in *Hadley* in relation to Norman’s ‘sax solo’, was so burdensome that ‘Charlie Parker would have been struggling to come up with a saxophone solo which would have entitled him to be considered a joint author alongside Kemp’⁽¹⁸⁾. However, subsequent to the 1999 judgment in *Hadley*, several cases have sought to amend and clarify the law. In particular, this decision must now be considered in light of the *Fisher* case, where Blackburne J. stated the following in the High Court in 2006:

“Reviewing the evidence as a whole, it is abundantly clear to me that Mr Fisher’s instrumental introduction (i.e. the organ solo as heard in the first eight bars of the Work and as repeated) is sufficiently different from what Mr Brooker had composed

(13) *Hadley v Kemp* [1999] EMLR 589, 644–650.

(14) *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818.

(15) *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818 at 835.

(16) R. Arnold, ‘Are Performers Authors? *Hadley v Kemp*,’ *European Intellectual Property Review* 21 (9) (1999), 464, 465..

(17) *Fylde Microsystems v Key Radio Systems Ltd* [1998] FSR 449.

(18) D. Free, ‘Beckingham v. Hodgens: The Session Musician’s Claim to Music Copyright,’ *Entertainment Law* 1 (3) (2002), 93, 94.. The use of a jazz musician as a comparison is ironic because as has been noted elsewhere, the contributions of jazz musicians have arguably been undervalued by copyright law. See Notes, ‘Jazz Has Got Copyright Law and That Ain’t Good,’ *Harvard Law Review* 118 (6) (2005), 1940 (hereafter known as ‘Jazz’).

on the piano to qualify in law, and by a wide margin, as an original contribution to the Work. The result in law is that Mr Fisher qualifies to be regarded as a joint author of the Work and, subject to the points to which I shall next turn, to share in the ownership of the musical copyright in it."⁽¹⁹⁾ (emphasis added by author)

Clearly, the court agreed that Fisher had made a 'significant and original' contribution to the work via the composition of the organ solo. Furthermore, the majority of recent cases appeared to have taken a less stringent approach towards the notion of 'significant and original' than is taken in *Hadley*.

It is useful to discuss joint authorship claims made by session musicians. For instance, in a 2002 case - *Beckingham v Hodgens*⁽²⁰⁾ - the violin part of the arrangement of the song 'Young at Heart' was composed during the performance and recording process by the complainant session musician⁽²¹⁾. This was held to be both 'memorable' and a 'significant and original' contribution⁽²²⁾. This decision is hard to reconcile with *Hadley*, where the saxophone solo was surely 'memorable'⁽²³⁾ yet was held to not be 'significant and original'⁽²⁴⁾.

The *Beckingham* decision, along with the *Fisher* ruling, therefore effectively restored the pre-*Hadley* notion, established in 1995 by Blackburne J. in *Godfrey v Lees*⁽²⁵⁾, that

(19) *Fisher v Brooker* [2007] EMLR 9 at para. 42.

(20) *Beckingham v Hodgens* [2002] EWHC 2143 (Ch); [2002] EMLR 45.

(21) The complainant was Robert Beckingham, a session musician who is also known as 'Bobby Valentino'.

(22) *Beckingham v Hodgens* [2002] EMLR 45 at para. 50. See also Zemer, 'Collaboration,' *op. cit.*, 287.

(23) *Hadley v Kemp* [1999] EMLR 589, at 644–650.

(24) R. Jones and E. Cameron, 'Full Fat, Semi-Skimmed or No Milk Today: Creative Commons Licences and English Folk Music,' *International Review of Law, Computers and Technology* 19 (3) (2005), 1, 8 (hereafter referred to as Jones and Cameron).

(25) *Godfrey v Lees* [1995] EMLR 307 (Ch D) at 325–328.

the qualifying threshold for a 'significant and original' contribution is not very high. Indeed Richard Arnold has stated that the decisions in *Beckingham* and *Fisher* are based upon a more accurate understanding of the law in this area than *Hadley*⁽²⁶⁾.

There are further cases of interest: it is apparent from the case of *Stuart v Barratt*⁽²⁷⁾ that collaboration to the work 'through a process of jamming' and improvisation can lead to a successful joint authorship case; in a similar vein, it is clear that a contribution to the percussion of a song or track could be 'significant' enough to give a partial share of authorship⁽²⁸⁾. Furthermore, a recent claim made by a singer involving a wordless vocal by a session musician (singer) featured in the song 'The Great Gig in the Sky' by Pink Floyd was settled out of court⁽²⁹⁾. Interestingly, the fact that this case was settled out of court may indicate that it is not impossible that a contribution based on 'vocal instrumentation' could be a 'significant and original' contribution⁽³⁰⁾.

Are Performers Authors?

It is important to assess the distinction between the role and rights of the 'author' of a work as opposed to the mere 'performer'. As noted in *Beckingham*, via the performance process a performer is capable of making a 'significant and original' contribution to the work, thereafter becoming a joint author of e.g. the musical arrangement. In line with this, Arnold has remarked that it is crucial for the court to establish whether it is the original musical compositional work, or an original arrangement of that work, that has

(26) R. Arnold, 'Reflections on "The Triumph of Music": Copyrights and Performers' Rights in Music,' *Intellectual Property Quarterly* 2 (2010), 153, 163.

(27) *Stuart v Barratt & Others* [1994] EMLR 448.

(28) *Bamgboye v Reed* [2004] EMLR (5) 61. See also partial share awarded to the drummer regarding one Spandau Ballet song in *Hadley v Kemp* [1999] EMLR 589.

(29) *Torry v Pink Floyd Music Ltd* [2005], which settled out of court in 2005.

(30) This is in line with the comments of R. Arnold, 'Reflections on "The Triumph of Music": Copyrights and Performers' Rights in Music,' *Intellectual Property Quarterly* 2 (2010), 153, 164.

been jointly authored by the group⁽³¹⁾. Nonetheless, this point was not apparently considered by Park J. who instead engaged in *Hadley* a discussion of the ‘significant creative originality’ of the contribution as opposed to its ‘significant performing originality’⁽³²⁾. According to Park J., any authorial contributions to a ‘work’ for the purpose of copyright law must ‘be to the creation of musical works, not to the performance or interpretation of them’⁽³³⁾. As Barron has stated, a ‘rigid differentiation of authorship from performance’ can be identified from the decision in *Hadley*⁽³⁴⁾. In addition, Park J. in *Hadley* clearly emphasised ‘a Romantic vision of the author/composer as an individual creative genius’ when discussing the song’s composer Gary Kemp⁽³⁵⁾. The other musicians in the band were seen as merely interpreting the compositions of Gary Kemp, and hence, their performances were not recognised as authorial⁽³⁶⁾.

The *Hadley* judgment of Park J. also ignored the fact that in music, composition often occurs via performance. Unless a musician can read and write musical notation, he or she will compose by playing her instrument i.e. via performance of the musical work in gestation. In this vein, the performance of a work by a group will often be original enough to qualify as an arrangement of the original composition. However, it will probably be required that some element of ‘creativity’ in the composition of

(31) R. Arnold, ‘Reflections on “The Triumph of Music”: Copyrights and Performers’ Rights in Music,’ *Intellectual Property Quarterly* 2 (2010), 153, 159.

(32) R. Arnold, ‘Reflections on “The Triumph of Music”: Copyrights and Performers’ Rights in Music,’ *Intellectual Property Quarterly* 2 (2010), 153, 159–160. *Hadley v Kemp* [1999] EMLR 589 at 644.

(33) *Hadley v Kemp* [1999] EMLR 589 at 643.

(34) A. Barron, ‘Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice,’ *Social and Legal Studies* 15 (1) (2006), 25, 28.

(35) A. Barron, ‘Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice,’ *Social and Legal Studies* 15 (1) (2006), 25, 29. *Hadley v Kemp* [1999] EMLR 589 at 646. Kemp is even compared to Beethoven in this portion of the judgment.

(36) *Hadley v Kemp* [1999] EMLR 589 at 645–6.

independent musical parts occurred via this performance process. This view is sympathetic to the classic position of the musical soloist, who often composes variations on a theme spontaneously. Arguably, this was the position of ‘Bobby Valentino’ (the stage name of the complainant) in *Beckingham*, Matthew Fisher in *Fisher*, and arguably, Steve Norman in *Hadley*. Given the low threshold for originality, such contributions ought to be and are recognised as ‘significant and original’ under the law⁽³⁷⁾.

Despite this argument, it has been remarked that the courts are wary of the potential legal implications of claims of joint authorship, particularly with regard to the potential for disturbing the ‘commercial expectations’ of rights-holders⁽³⁸⁾. In this vein, Blackburne J. neatly summarised the oral arguments made in *Fisher* by Mr. Sutcliffe, who noted that there were practical difficulties associated with holding that the recorded work ‘A Whiter Shade of Pale’ was an arrangement of the underlying composition. Blackburne J. stated:

“He submitted that an approach whereby each musician contributing to the arrangement, provided his contribution is significant (i.e. non-trivial) and original, can share in the copyright of the arrangement gives rise to practical problems. Thus, if a work exists in multiple versions, each entitling its authors to share in the publishing royalties arising from the exploitation of that version, the work will require multiple registrations with the collecting societies and sophisticated monitoring to ensure that

(37) R. Arnold, ‘Reflections on “The Triumph of Music”: Copyrights and Performers’ Rights in Music,’ *Intellectual Property Quarterly* 2 (2010), 153, 163–164.

(38) A. Barron, ‘Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice,’ *Social and Legal Studies* 15 (1) (2006), 25, 47. Barron noted that the fact that joint authors are generally held to be tenants-in-common in equal shares means that courts may be wary of multiplying the number of potential owners from whom licence must be obtained for various transactions.

royalties are paid to the correct parties. Second, he said, if the author of the original work is not one of the arrangers, steps will have to be taken to ensure that a share of the arranger's copyright is paid to the owner of that original work. Third, he said, if all the band members are in principle entitled to a publishing royalty, the result will inevitably be a drastic paring down of the share of royalties payable to the writer and publisher of the original work, especially if there is a multiplicity of versions."⁽³⁹⁾

(emphasis added by author)

Conclusion

It appears that there may be conflicts between the most efficient ways of regulating commerce within the music industry and facilitating the existence of different copyright arrangements between joint authors of musical works. Nonetheless, despite these practical issues, the law in the UK is now quite clear as a matter of principle: where an existing composition is in the process of being recorded by a band, it is perfectly possible for a contribution to be made during the performance process or the production/recording process that is significant and original enough to confer a share of joint authorship of the resulting arrangement. In line with this, Arnold has noted that as a result of *Fisher*, it is now established that a piece of music 'will often be a work of joint authorship between some or all of the musicians'⁽⁴⁰⁾. For this reason, groups in the pop music industry are advised to define, via contract (in writing), their legal relationship to one another, including distribution of copyright ownership and associated royalties.

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(39) *Fisher v Brooker* [2007] EMLR 9 at para. 50.

(40) R. Arnold, 'Reflections on "The Triumph of Music": Copyrights and Performers' Rights in Music,' *Intellectual Property Quarterly* 2 (2010), 153, 163. See also L. Bently, 'Authorship of Popular Music under Copyright Law' *Information, Communication and Society* 12 (2) (2009), 179, 184..