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## Copyright Law and Performing Authorship in Theatre – Exploring the Contrasting Roles of the Playwright, Director and Performers

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### Introduction

Duncan Wu observes that ‘all literary processes are collaborative, but theatre is more so than any other.’<sup>1</sup> This was true in the Elizabethan period and it remains true now. Yet, the precise context of that collaboration and the relationship between the parties matters greatly. Having examined the intertwined history of copyright law, authorship and the dramatic work in print and on stage from 1558–1911 in chapter two, in this chapter I move on to the modern age, with theatre competing with cinema, television, radio and other media for the public’s attention. I explore the way that contemporary works of theatre are created and evaluate the question of how the law should recognise the authors and owners of such works. The very nature of dramatic works makes this exploration a challenge:

As the text is translated into stage action it may acquire qualities entirely dependent on the collision of talents, the precise nature of which remains incalculable.<sup>2</sup>

In surveying contemporary theatre my focus is on a wide range of plays, from those that resemble single-author texts (by Samuel Beckett, Harold Pinter, Martin McDonagh, etc.) to works that feature substantial revision through workshops (by Caryl Churchill, David Edgar, Marie Jones, etc.) to highly collaborative ‘devised’

<sup>1</sup> D Wu (ed), *Making Plays: Interviews with Contemporary British Dramatists* (Basingstoke: Macmillan Press Ltd, 2000) 9.

<sup>2</sup> *ibid.* See also B Salter, ‘Taming the trojan horse: an Australian perspective of dramatic authorship’ (2009) 56 *Journal of The Copyright Society of The USA* 789; B Salter and K Bowrey, ‘Dramatic copyright and the “Disneyfication” of theatre space’ in K Bowrey and M Handler, *Law and Creativity in the age of the Entertainment Franchise* (Cambridge: Cambridge University Press, 2017) 123; D Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge: Cambridge University Press, 2019); YH Lee, ‘The persistence of the text: the concept of the work in copyright law – Part I’ (2018) *Intellectual Property Quarterly* 22 and J Griffiths, ‘Dematerialization, Pragmatism and the European Copyright Revolution’ (2013) 33 *Oxford Journal of Legal Studies* 767, 787–90.

pieces (by Complicité, Frantic Assembly, Forced Entertainment, etc.).<sup>3</sup> UK theatre finds remarkably varied ways to accommodate different forms of creativity. If legal and humanities scholars have attempted to deconstruct the author in the abstract, theatre participants have put such theories into their practice. As we shall see, the development of 'devised' theatre from the 1970s onward can be viewed as an example of this radical challenge to individualist or Romantic authorship.

In order to assess theatrical authorship, in the first part of this chapter I assess the current law on: (i) the copyright work, (ii) originality and (iii) authorship and joint authorship of plays. I explore twentieth century and twenty-first century legislation and case law in the UK jurisdiction on the question of how to define works of drama in light of the concept of originality, making comparative reference to relevant rules and case law approaches in common law jurisdictions such as the US, Canada, Australia and India. The analysis of the original dramatic work in this chapter builds upon recent discussions of the work concept undertaken by scholars such as Griffiths and Sherman.<sup>4</sup> I examine the work's material and immaterial boundaries in the context of theatre.<sup>5</sup>

In the second part of this chapter I explore theatre studies literature concerning the way works of drama are created, referring to insights from the 20 empirical interviews I undertook between 2011–13 with UK theatre participants. On the question of how dramatic works are authored I keep in mind Masten's point that even post-modern collaboration is often viewed 'as a mere subset or aberrant kind of individual authorship'.<sup>6</sup> I aim to show that in contemporary theatre, collaboration is far from aberrant – it is, in fact, the norm. Individual authors sometimes do provide dramatic works to theatre companies that are 'fully-formed'; yet in the case of revised works, collaboration via the workshop and rehearsal process can alter the play before it becomes a final text. In devised theatre the final play as performed is constitutive of a highly collaborative process. In light of this, I consider questions of credit and ownership.<sup>7</sup> I reflect on how authorship relates to ownership, as well as the way plays are licensed and how revenues are distributed.<sup>8</sup> The chapter concludes by considering whether copyright law, as currently legislated, can take account of the above processes, and what reforms, if any, might better facilitate the creative processes of theatre.

<sup>3</sup> S Shepherd and M Wallis, *Drama/Theatre/Performance* (London: Routledge, 2004) 1–8. See also A Field, 'All Theatre is Devised and Text-based' *The Guardian* (April 21 2009), available at [www.guardian.co.uk/stage/theatreblog/2009/apr/21/theatre-devised-text-based](http://www.guardian.co.uk/stage/theatreblog/2009/apr/21/theatre-devised-text-based).

<sup>4</sup> Griffiths (n 2). See also B Sherman, 'What is a work?' (2011) 12 *Theoretical Inquiries in Law* 99.

<sup>5</sup> L McDonagh, 'Plays, Performances and Power Struggles – Examining Copyright's Integrity in the Field of Theatre' (2014) 77 *The Modern Law Review* 533.

<sup>6</sup> J Masten, 'Beaumont and/or Fletcher: Collaboration and the Interpretation of Renaissance Drama' (1992) 52 *English Literary History* 337, 341.

<sup>7</sup> E Cooper, 'Joint authorship and copyright in comparative perspective: the emergence of divergence in the UK and USA' (2015) 62 *Journal of the Copyright Society of the USA* 245.

<sup>8</sup> The 2015 Writers Agreement negotiated by the Writers' Guild of Great Britain aims to deal with such disputes in advance, see [https://writersguild.org.uk/wp-content/uploads/2015/02/WGGB\\_booklet\\_jun12\\_contracts\\_i.pdf](https://writersguild.org.uk/wp-content/uploads/2015/02/WGGB_booklet_jun12_contracts_i.pdf). For data on theatre sales see <https://uktheatre.org/theatre-industry/news/2018-sales-data-released-uk-theatre-and-society-of-london-theatre/>. For the Society for Theatre Research see [www.str.org.uk/publications/annual-publications/](http://www.str.org.uk/publications/annual-publications/). For Theatre collecting societies see [www.concordtheatricals.co.uk/resources/intro-to-licensing](http://www.concordtheatricals.co.uk/resources/intro-to-licensing).

## Understanding the Work in Modern Copyright Law

Turning to the work concept, I outlined in chapter two that the legal rights over plays changed over time during the eighteenth and nineteenth centuries. Initially only the printed text was protected, but by the time of the Copyright Act 1911 it was accepted that copyright ought to be a bundle of rights, protecting texts in print, performances of plays and dramatic adaptations of literary texts such as novels. Here I undertake an in-depth exploration of how copyright law defines and protects the *work*, referring to twentieth and twenty-first century case law in the UK, including relevant EU law aspects. I outline how, despite a range of case law since 1911, the modern work concept remains a conceptually under-developed one within copyright jurisprudence.<sup>9</sup> On this, Sherman argues that the work under copyright is an uncertain, ‘fabricated’ concept; while Pila states it is ‘ontologically unstable’.<sup>10</sup> It may be that this conceptual vagueness stems from a belief on the part of judges that the concept ought to be kept flexible in order to allow various different types of original creativity to be protected. However, this under-development results in a great deal of uncertainty – particularly so in light of recent decisions at the CJEU level concerning originality, as I explore later on.<sup>11</sup> It is clear, however, that although the material boundaries of the work embody the original creation of the author, what is protected by copyright is not limited by this material form. For a performative work such as a play this seems particularly evident.<sup>12</sup>

I begin by examining the law’s conception of the dramatic work, making comparative analysis of the musical work (like drama, a performative work) and the work of literature (which resembles a dramatic work in the textual sense).

### Original Dramatic Works under the Copyright, Designs and Patents Act (CDPA) 1988

Under UK copyright doctrine, copyright arises upon the fixation of an original expression, in this case the dramatic work.<sup>13</sup> There is little guidance in the

<sup>9</sup> Copyright Act 1911 and Copyright Act 1956. See also Dramatic and Musical Performers Protection Act 1925 and Dramatic and Musical Performers Protection Act 1958.

<sup>10</sup> Sherman (n 4) 120, noting that the work is a ‘fabricated concept’ and J Pila, ‘Copyright and its categories of original works’ (2010) 30 *Oxford Journal of Legal Studies* 229, 236–37, noting that the work concept may be ‘ontologically unstable’. See also J Pila, *The Subject Matter of Intellectual Property* (Oxford: Oxford University Press, 2017); A Pottage, ‘Introduction: The Fabrication of Persons and Things’ in A Pottage and M Mundy (eds), *Law, Anthropology and the Constitution of the Social – Making Persons and Things* (Cambridge: Cambridge University Press, 2004) 1 and M Foucault, ‘What Is an Author?’ in JM Marsh, JD Caputo and M Westphal (eds), *Modernity and its Discontents* (New York: Fordham University Press, 1992) 299.

<sup>11</sup> The work concept remains open to claims of copyright over unusual objects eg the ineffable taste of cheese even if such claims rarely succeed – Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2018] Bus LR 2442.

<sup>12</sup> Griffiths (n 2). It is possible for a work to fall into more than one category eg in *Norowzian v Arks Ltd* (No.2) [2000] EMLR 67 it was held that a film can also be a dramatic work. Thus, a literary work such as a novel that is later read out (performed) on stage could be considered as a dramatic work in that context as well as being a literary one in its original form/context.

<sup>13</sup> Copyright Designs and Patents Act 1988 (CDPA), ss 1(1)(a) and 3(2), available at [www.legislation.gov.uk/ukpga/1988/48/contents](http://www.legislation.gov.uk/ukpga/1988/48/contents). Regarding the standard of originality see Case C-5/08 *Infopaq*

Berne Convention<sup>14</sup> or the TRIPS<sup>15</sup> agreement on defining dramatic works.<sup>16</sup> National jurisdictions therefore have a significant amount of discretion as to how to define the work of drama. Yet, the CDPA 1988 does not provide a full definition of 'dramatic work' – although it is stated that a dramatic work includes a work of dance or mime.<sup>17</sup> The courts have deepened the concept, emphasising that the key element is that a dramatic work must be capable of performance.<sup>18</sup> This means that such a work must have sufficient unity and coherence that would allow it to be performed, as in the case of a scripted work, as held by the Judicial Committee of the Privy Council in the case of *Green v Broadcasting Corp of New Zealand*.<sup>19</sup>

There is no doubt that in theatre the work is originated with performance in mind. In the case of a play, what is protected by the law – the script – must be viewed through this allographic lens, as a work which is intended to be realised via performance, typically by people other than the author.<sup>20</sup> Moreover, as I explore over the latter part of this chapter, the dramatic work is often developed, at least in part, via workshops and rehearsals, with directors, actors and producers making contributions.<sup>21</sup> In its early stages a work of theatre is therefore in

*International A/S v Danske Dagblades Forening* [2009] ECR I-6569; Case C-393/09 *Bezpecnostní Softwarová Asociace-Svaz Softwarové Ochrany v Ministerstvo Kultury* [2010] ECR I-1397; Case C-403/08 *Football Association Premier League and Others v QC Leisure and Other* [2011] ECR I-9083; Case C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] ECR I-0000; Case C-145/10 *Painer v Standard Verlags GmbH* [2011] ECR I-0000 and Case C-604/10 *Football Dataco Ltd v Yahoo! UK Ltd* [2012] ECR I-0000. See also *Newspaper Licensing Agency v Meltwater* [2010] EWHC 3099 (Ch); [2011] RPC 7; *Newspaper Licensing Agency v Meltwater* [2011] EWCA Civ 890; [2012] Bus LR 53 and *Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and Others* [2013] UKSC 18. For analysis of the standard see J Davis and A Durant, 'To protect or not to protect? The Eligibility of commercially used short verbal texts for copyright and trade mark protection' (2011) *Intellectual Property Quarterly* 345 and A Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 *IIC* 4.

<sup>14</sup> Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886; revised 1896 (Paris), 1908 (Berlin), 1914 (Additional Protocol), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm), 1971 (Paris) – as amended 1979) hereafter referred to as Berne Convention; available at [www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html).

<sup>15</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (1994) (hereafter referred to as TRIPS); available at [www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm).

<sup>16</sup> S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, 2nd edn (Oxford: Oxford University Press, 2006) 406–7. Ricketson and Ginsburg noted that the Berne Convention in fact covers a number of works which may not always be classed as 'literary or artistic works'. Thus, the scope of this expression is wide.

<sup>17</sup> CDPA 1988, s 3(1). See also C Waelde and P Schlesinger, 'Music and Dance – beyond copyright text?' (2011) 8 *SCRIPT-ed* 257.

<sup>18</sup> *Norowzian v Arks Ltd (No 2)* [2000] FSR 363, noting that a film can be a dramatic work. See also P Kamina, *Film Copyright in the European Union*, 2nd edn (Cambridge: Cambridge University Press, 2016) 78 and Simone (n 2) 186 on whether some element akin to a 'story' is required. See also *Nova Games Ltd v Mazooma Productions Ltd* [2007] RPC 589.

<sup>19</sup> *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056. See also *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd and Others* [2017] EWHC 2600 (Ch).

<sup>20</sup> N Goodman, *Languages of Art* (Indianapolis: Hackett Publishing Co Inc, 1976) 99–123.

<sup>21</sup> CDPA 1988, s 3(2). See also *Brighton and Dubbeljoint v Jones* [2004] EWHC 1157 (Ch); [2004] EMLR 507.

a profound state of flux. Indeed, even some 'finished' dramatic works do not appear to be stable, singular objects of property; subsequent interpretations may push against their boundaries.<sup>22</sup> The work concept can thus fail to provide legal certainty in theatre where there is an *iterative* concept of the work at play. While copyright can take account of this via licensing of adaptations or derivative works (to use US parlance), this can be impractical, and it can necessitate the imposition of legal fictions (such as the finding of implied licences based on the prior behaviour of the parties).<sup>23</sup> On fixation, it is worth taking note of how easy it is to record the work with modern technology – iterative works such as plays can exist in multiple 'fixed' versions (written down by hand, typed into documents stored digitally, or recorded via camera or even smartphone) all of which may have evidentiary usefulness for establishing how the work came to be created, and who contributed to it.

The uncertain nature of the dramatic work can be observed by analysing the 2019 ruling in *Kogan v Martin*. Here, the Court of Appeal held that in the case of a dramatic work that goes through several drafts – in this case the screenplay for the film *Florence Foster Jenkins* – the final version of the screenplay should be considered as the culmination of those drafts, not as several separate adaptations (each with its own, albeit derivative, copyright).<sup>24</sup> Simone argues that the Court of Appeal approach has the advantage 'of being truer to life compared to the alternative, which would require salami-slicing the work in a way that is likely to seem unreal to its creators'.<sup>25</sup> For large scale collaborations such as Wikipedia it is evident that 'salami-slicing' creates complications; if each contribution to Wikipedia creates a separate work the result is a 'millefeuille' of adapted (derivative) copyright works (assuming they are sufficiently original to be protected).<sup>26</sup> Yet, the bond between Wikipedia editors is likely to be less strong than between the various contributors to a play (there will also likely be far fewer contributors to the play). Furthermore, the *Kogan* decision appears to depart from the 2004 High Court decision in *Brighton v Jones* where an initial short scenario – written by the director and used by the playwright as inspiration for her first draft of the play – appeared to be considered a separate dramatic work in its own right

<sup>22</sup>K Wyver, 'Not waiting for Godot: new show tackles Beckett's ban on women' *The Guardian* (18 October 2020), available at [www.theguardian.com/stage/2020/oct/18/not-waiting-for-godot-new-show-tackles-becketts-ban-on-women](http://www.theguardian.com/stage/2020/oct/18/not-waiting-for-godot-new-show-tackles-becketts-ban-on-women).

<sup>23</sup>L McDonagh, 'Rearranging the Roles of the Performer and the Composer in the Music Industry – the Potential Significance of *Fisher v Brooker*' (2012) *Intellectual Property Quarterly* 64. See also CL Fisk, 'Will Work for Screen Credit: Labour and the Law in Hollywood' in P McDonald, E Carman, E Hoyt and P Drake (eds), *Hollywood and the Law* (London: Palgrave, 2015) 235; N Shemtov, *Beyond the Code: Protection of Non-Textual Features of Software* (Oxford: Oxford University Press, 2017) and L McDonagh, 'Protecting traditional music under copyright (and choosing not to do enforce it)' in E Bonadio and N Lucchi (eds), *Non-Conventional Copyright – Do New and Atypical Works Deserve Protection?* (Cheltenham: Edward Elgar, 2018) 151.

<sup>24</sup>*Kogan v Martin* [2019] EWCA Civ 1645. D Simone, 'Kogan v Martin: A New Framework for Joint Authorship in Copyright Law' (2020) 83 *The Modern Law Review* 877. See also the subsequent IPEC ruling – *Martin v Kogan* [2021] EWHC 24 (Ch).

<sup>25</sup>*ibid*, 881.

<sup>26</sup>Simone (n 2) 88–89.

from the play, and thus requiring a licence.<sup>27</sup> The fact that in the *Brighton* case the director and playwright had not begun the process with the explicit mutual intention to collaborate in *writing* a final joint dramatic work together may be a key distinction between *Kogan* and *Brighton*, explaining the different approaches taken to the work concept. In *Kogan*, by refusing to engage in ‘salami-slicing’ of the various drafts of the *Florence Foster Jenkins* script, the court could focus on the *collaboration* aspect of the joint authorship test with respect to the iterative work; whereas in *Brighton* the court focused less on collaboration and maintained a strict separation between two works – Brighton’s early scenario (faxed to Jones) and Jones’ final script (produced post-workshops). I reflect on this further below on the joint authorship test.

## Original Musical Works

Musical works offer a useful counterpoint because, like dramatic works, they are capable of performance and are often authored collaboratively. In the key UK case on musical works – *Sawkins v Hyperion* – Mummery LJ drew attention to similarities between collaborators working towards musical works and dramatic works:

In principle, there is no reason for regarding the actual notes of music as the only matter covered by musical copyright, any more than, in the case of a dramatic work, only the words to be spoken by the actors are covered by dramatic copyright. Added stage directions may affect the performance of the play on the stage or on the screen and have an impact on the performance seen by the audience. *Stage directions are as much part of a dramatic work as plot, character and dialogue*.<sup>28</sup> (emphasis added)

Although the case is often cited for its definition of music under copyright, these comments about drama are highly relevant, confirming that along with the dialogue and characters, stage directions can be protected by copyright.<sup>29</sup> In addition, although musical arrangements of public domain works were at issue, the ruling in *Sawkins* gives weight to the argument that if an author creates a new adaptation of a public domain dramatic work the new version will be protected by copyright to the extent of its new originality (any new dialogue, plot, stage directions, etc).<sup>30</sup> On this Marowitz argues that such adaptations ‘should be entitled

<sup>27</sup> *Brighton and Dubbeljoint v Jones* [2004] EWHC 1157 (Ch); [2004] EMLR 507.

<sup>28</sup> *Sawkins v Hyperion* [2005] EWCA Civ 565; [2005] 1 WLR 3281.

<sup>29</sup> *Corelli v Gray* [1913] TLR 570.

<sup>30</sup> DS Stein, ‘Every Move That She Makes: Copyright Protection for Stage Directions and the Fictional Character Standard’ (2012–2013) 34 *Cardozo L. Rev.* 1571 noting that no US court has as yet upheld a copyright claim over stage directions. See also L Temme, ‘To Be, or Not To Be: The Potential Consequences of Granting Copyright Protection for Stage Directions’ (2018) 9 *Cybaris, An Intellectual Property Review* 1; M Livingston, ‘Inspiration or Imitation: Copyright Protection for Stage Directions’ (2009) 50 *B.C.L. Rev.* 427 and D Leichtman, ‘Most Unhappy Collaborators: An Argument Against

to copyright protection because they are the original outgrowth of a director's imagination.<sup>31</sup>

On the issue of joint authorship musical cases provide useful precedents relevant to drama. On viewing drafts of a joint work cumulatively, the approach taken by the Court of Appeal in *Kogan* (to dramatic works) can be contrasted with that of the view of the Court of Appeal in its 2008 decision in *Fisher v Brooker* (on musical works).<sup>32</sup> In *Fisher* the court regarded the early demo version of 'A Whiter Shade of Pale' composed and recorded by Gary Brooker by himself alone on piano, to be a separate musical work from its later hit arrangement, featuring the famous organ part (and thus, as in *Brighton*, the finding of an implied licence was required for legal use of the first work in the second).<sup>33</sup> The divergence between *Kogan* and *Fisher* may indicate that the question of how to assess works of joint authorship will be framed differently in the case of collaborators who begin a project together with the intention to create a jointly authored work (as occurred with the various drafts of the screenplay for *Florence Foster Jenkins*), than for a project that begins with a single author, with later collaborators adding key elements subsequently (as happened with the hit arrangement of 'A Whiter Shade of Pale').

## Original Literary Works

Although plays are sometimes read as literature, dramatic works are not the same as literary works in UK law: literary works are not required to possess a performative quality.<sup>34</sup> This chimes with the view of scholars of literature and theatre such as Masten, who notes that, for example, a poem is clearly a text designed to be read; whereas a play is not limited to a communication between author and reader, and encompasses a representation of a theatrical experience.<sup>35</sup> Yet, due to the textual similarities between the dramatic and the literary, the way copyright protects works of literature is worth evaluating.

Under the CDPA original pieces of literature can be protected as 'literary works' as long as they are fixed in some medium.<sup>36</sup> There is no specific statutory definition of literariness; nor is there a legislative limit on the length a literary work

the Recognition of Property Ownership in Stage Directions' (1996) 20 *Colum.-VLA J.L. & Arts* 683. See also *Wood v Boosey* (1868) LR 3 QB 223 and *Redwood Music v Chappell* [1982] RPC 109.

<sup>31</sup> C Marowitz, 'Letter to the Editor, Stage Copyrights; What the Director Brings' *The New York Times* (5 February 2006).

<sup>32</sup> *Fisher v Brooker* [2008] EWCA Civ 287. See also *Fisher v Brooker* [2009] UKHL 41.

<sup>33</sup> This can be contrasted with the earlier High Court decision where the court viewed the early version as a 'sketch' – *Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] EMLR 256.

<sup>34</sup> CDPA 1988, s 3. That HH Judge Hacon appeared to treat the script as a literary work, rather than a dramatic work, was a crucial error in the first instance decision in *Martin v Kogan* [2017] EWHC 2927 (IPEC) at para 45.

<sup>35</sup> Masten (n 6) 341.

<sup>36</sup> CDPA 1988, s 3(2). See *Merchandising Corporation of America Inc v Harpbond Inc* [1983] FSR 32.

might be.<sup>37</sup> This has caused a debate within copyright discourse over whether copyright protection applies to very short pieces of text. This has relevance not only for literature but also for dramatic works, given that some *avant garde* plays can feature few words and may be made up mostly of stage directions.<sup>38</sup> The traditional view in UK copyright jurisprudence is that no matter how few or how many words it may contain, to be protected a work must be both sufficiently 'literary' and 'original'.<sup>39</sup> Literariness in this context is not a high standard – it merely means the work should convey some literary meaning. It is clear from the 1982 case of *Exxon* that an original, invented word such as Exxon fails on this count: rather than affording 'information, instruction or pleasure' the word Exxon signifies nothing, and therefore cannot be protected.<sup>40</sup>

Up until recently, very short pieces of text – such as headlines and titles – were generally perceived as falling outside the scope of legal protection in the UK.<sup>41</sup> However, rulings at the EU level over the past decade on originality give credence to the claim that headlines and titles are in fact separate 'original' copyright works to the works which they represent, and are therefore worthy of protection in their own right.<sup>42</sup> In fact, in EU law originality has come to be the main criterion by which to define the work concept.<sup>43</sup>

<sup>37</sup> Pila (n 10) 236–37, noting that the concept of the copyright work may be inherently ontologically unstable. Furthermore, in light of Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministry of Culture of the Czech Republic* [2010] ECR I-1397 (hereafter referred to as BSA), it may no longer be the case that the UK subject-matter categories are valid under (post-Brexit retained) EU law, a point in line with E Rosati, 'Originality in a Work, or a Work of Originality: The effects of the infopaq decision' (2011) 33 *EIPR* 746.

<sup>38</sup> See J Davis and A Durant (n 13); C Moran, 'How much is too much? Copyright protection of short portions of text in the United States and European Union after Infopaq International A/S v. Danske Dagblades' (2011) 6 *Washington Journal of Law, Technology and Arts* 247 and D Vaver, 'Intellectual Property: Still a Bargain?' (2012) 34 *EIPR* 579, 583–84. From the philosophical perspective of 'author's rights', copyright is laid down to protect the rights inherent in authorship itself. For further analysis of the justifications of intellectual property see M Spence, *Intellectual Property* (Oxford: Oxford University Press, 2007) 43–68 and J Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) 68 *Chicago-Kent Law Review* 841; J Litman, 'The Public Domain' (1990) 39 *Emory LJ* 965, 969 and T Parks, 'Does Copyright Matter?' *New York Review of Books Blog* (August 2012); available at [www.nybooks.com/blogs/nyrblog/2012/aug/14/does-copyright-matter/](http://www.nybooks.com/blogs/nyrblog/2012/aug/14/does-copyright-matter/).

<sup>39</sup> *Exxon Corporation v Exxon Insurance Consultants International Limited* [1982] Ch 119. See also *Baigent and Leigh v The Random House Group* [2007] EWCA Civ 247. The first instance decision was *Baigent and Leigh v The Random House Group* [2006] EWHC 719 (Ch).

<sup>40</sup> *ibid.*

<sup>41</sup> Vaver (n 38) 583–84. CDPA 1988, s 16(3)(a); available at [www.legislation.gov.uk/ukpga/1988/48/contents](http://www.legislation.gov.uk/ukpga/1988/48/contents). *Francis Day & Hunter Limited v Twentieth Century Fox Corp Limited* [1940] AC 112; *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273; *Exxon Corporation v Exxon Insurance Consultants International Limited* [1982] Ch 119; Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 ('Infopaq'); *Newspaper Licensing Agency v Meltwater* [2010] EWHC 3099 (Ch) ('Meltwater').

<sup>42</sup> *Infopaq and Meltwater* (n 41).

<sup>43</sup> Rosati (n 37).

## Original Works in EU Copyright Law – Assessing the ‘Dematerialised’ Work of Originality

The UK CDPA in sections 3–8 specifies a limited number of ‘closed’ categories of work. To be protected an expression must meet the requirements of a specific type, that is, literary, musical, dramatic, artistic, etc. As outlined earlier, dramatic works must be performative in nature and must have sufficient unity to be performed.<sup>44</sup> One effect of EU jurisprudence has been to accelerate copyright law’s shift from a focus on the form in which the protected subject-matter is embodied to the ‘intangible essence contained within that form’.<sup>45</sup> In the same vein, European decisions over the past decade indicate that the UK’s traditional work/fixation concepts are no longer tenable within the EU courts’ broad, ‘dematerialized’ requirement of originality, which is founded upon the ‘author’s intellectual creation’.<sup>46</sup> As I explore here, although originality has always been required of works, it is now entwined with the work concept itself.

The 2009 CJEU ruling in *Infopaq* established ‘intellectual creation’ as the standard of originality for all works in the EU.<sup>47</sup> Subsequent CJEU rulings indicate that this can be evidenced by the author making ‘free and creative choices’ (Joined Cases C-403/08 and C-429/08 *Football Association Premier League/Murphy*) or showing a ‘personal touch’ (Case C-145/10 *Painer*).<sup>48</sup> In the same vein, the CJEU in Case C-469/17 *Funke Medien* remarked:

[I]t is for the national court to ascertain whether [...] the author was able to make free and creative choices capable of conveying to the reader the originality of the subject matter at issue, the originality of which arises from the choice, sequence and combination of the words by which the author expressed his or her creativity in an original manner and achieved a result which is an intellectual creation [...], whereas the mere intellectual effort and skill [is] not relevant in that regard [...].<sup>49</sup>

UK case law prior to *Infopaq* had not required creativity as such, but rather ‘skill, labour and judgement’.<sup>50</sup> The UK courts accepted ‘intellectual creation’ as the new originality standard in *Newspaper Licensing Agency v Meltwater*<sup>51</sup> and *SAS Institute*

<sup>44</sup> C Handig ‘Infopaq International a/S v Danske Dagblades Forening: is the term “work” of the CDPA 1988 in line with the European Directives?’ (2010) 32 *EIPR* 53.

<sup>45</sup> YH Lee, ‘The persistence of the text: the concept of the work in copyright law – Part II’ (2018) *Intellectual Property Quarterly* 107, 108.

<sup>46</sup> Griffiths (n 2) 787–90.

<sup>47</sup> *ibid.*

<sup>48</sup> Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd & Others v QC Leisure & Others; Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083; [2012] Bus LR 1321 (‘Murphy’) and Case C-145/10 *Eva Marie Painer v Standard VerlagsGmbH et. al* [2012] ECDR 6 (‘Painer’).

<sup>49</sup> Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* EU:C:2019:623.

<sup>50</sup> *Sawkins v Hyperion* [2005] EWCA Civ 565; [2005] 1 WLR 3281. *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273. See also *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch D 601.

<sup>51</sup> *Meltwater* (n 41).

*v World Programming*.<sup>52</sup> Yet, in UK law it remains unclear whether the originality standard is now higher post-*Infopaq*<sup>53</sup> (intellectual creation) than it was before (skill, labour and judgement) as the cases that have arisen since *Infopaq* involve creative works that would have satisfied either standard.<sup>54</sup>

Further to this dictum on originality, in Case C-310/17 *Levola Hengelo* the CJEU stated that the notion of ‘work’ is an autonomous concept of EU law, meaning it must be applied by national courts in a uniform fashion, and no requirement of aesthetic or artistic value may be applied.<sup>55</sup> It is not entirely clear as to what limitations on the autonomous work concept exist, apart from the fact that a work must be the author’s own intellectual creation.<sup>56</sup> Case law indicates there are some boundaries – in *Murphy* the CJEU emphasised that a football match cannot be a work of intellectual creation, a point perfectly in line with UK case law on dramatic works.<sup>57</sup> In *Levola* the claim for copyright in the taste of cheese was also denied for being ineffable and lacking sufficient permanence – also in tune with prior UK doctrine.<sup>58</sup> Nonetheless, as Griffiths argues, the shift to a general ‘work’ concept since *Infopaq* indicates that the UK’s closed categories are no longer strictly tenable.<sup>59</sup> Arnold J (as he then was) in *SAS Institute Inc v World Programming Ltd* remarked:

In the light of a number of recent judgments of the CJEU, it may be arguable that it is not a fatal objection to a claim that copyright subsists in a particular work that the work is not one of the kinds of work listed in section 1(1)(a) of the Copyright, Designs and Patents 1988 and defined elsewhere in that Act. Nevertheless, it remains clear that the putative copyright work must be a literary or artistic work within the meaning of Article 2(1) of the Berne Convention.<sup>60</sup>

On the work concept in UK doctrine, it is notable that the High Court in *Meltwater* held that in light of *Infopaq* a single newspaper headline could amount to an original literary work in its own right, that is, apart from the article which it represents, provided that it is the author’s intellectual creation.<sup>61</sup> Proudman J apparently

<sup>52</sup> *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch).

<sup>53</sup> *Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and Others* [2013] UKSC 18.

<sup>54</sup> Rosati (n 37).

<sup>55</sup> Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* (n 11).

<sup>56</sup> *Infopaq* (n 41).

<sup>57</sup> *Murphy* (n 48).

<sup>58</sup> Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* (n 11).

<sup>59</sup> Griffiths (n 2).

<sup>60</sup> *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch).

<sup>61</sup> *Meltwater* (n 41), Proudman J at [61] (see also [62]–[67]). Proudman J referred to *Lamb v Evans* [1893] 1 Ch 218; *Francis Day & Hunter Limited v Twentieth Century Fox Corp Limited* [1940] AC 112; *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273; *Exxon Corporation v Exxon Insurance Consultants International Limited* [1982] Ch 119; [1982] RPC 69; *Shetland Times Limited v Wills*

accepted that a headline can be sufficiently literary.<sup>62</sup> Notably, Proudman J did not give much consideration to the idea that something could be original and literary but not a ‘work’.<sup>63</sup> It is possible that in future, courts may give more credence to this notion.<sup>64</sup>

The overall effect of *Infopaq/Meltwater* is that headlines and titles can be protected separately under copyright if they are sufficiently ‘original’ and ‘literary’.<sup>65</sup> Yet there is little guidance as to when a very short work will be sufficiently original<sup>66</sup> and literary and when it will not be.<sup>67</sup> Brexit means that from 2021 UK courts will no longer be obliged to follow CJEU decisions in this regard, though to the extent EU copyright principles have become part of the common law they will remain in place until legislative changes are made or the UK courts alter the doctrine. For present purposes – and in the absence of a UK precedent stating otherwise – I proceed on the basis that the elements of dramatic work identified by the UK courts, such as performativity, are still relevant to assessing whether a work of copyright exists in the context of theatre.<sup>68</sup>

## Original Works – Comparative Insights

There is comparative value in considering the US position on originality of works of drama.<sup>69</sup> Section 102 of the US Copyright Act 1976 provides that original

[1997] EMLR 277 and *IceTV Pty Limited v Nine Network Australia Pty Limited* (‘IceTV’) (2009) 239 CLR 458 and the Federal Court of Australia in *Fairfax Media Publications Pty Limited v Reed International Books Australia Pty Limited* [2010] FCA 984 (‘Fairfax’) at [28]–[50].

<sup>62</sup> Pila (n 10). See also M Husovec, ‘Intellectual Property Rights and Integration by Conflict: The Past, Present and Future’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 239, 261; J Griffiths, ‘Constitutionalising or Harmonising? – The Court of Justice, the Right to Property and European Copyright Law’ (2013) 38 *European Law Review* 65 and M Mimler, ‘The Court of Justice of the European Union finds that copyright does not subsist in the taste of cheese spread (*Levola Hengelo BV v Smilde Foods BV* (Case C-310/17))’ (2019) 115 *Intellectual Property Forum* 96.

<sup>63</sup> For an assessment of the notion of ‘the work’ see Sherman (n 4).

<sup>64</sup> *SAS Institute Inc v World Programming Ltd.* [2013] EWHC 69 (Ch) at [34] noting that something which is considered a ‘language’ is not a copyright work.

<sup>65</sup> Davis and Durant (n 13). J McCutcheon, ‘*Levola Hengelo BV v Smilde Foods BV*: The Hard Work of Defining a Copyright Work’ (2019) 82 *The Modern Law Review* 936.

<sup>66</sup> *Meltwater* (n 41), Proudman J at [63]–[72].

<sup>67</sup> On the ‘literary’ aspect of the analysis Proudman J clearly saw the headline as being a separate work from the underlying article. This point is significant because it arguably veers away from the dicta of Laddie J laid down in the case of *Hyperion v Warner*, where he stated that collapsing one copyright work into several different independent works was not a proper application of the law. Proudman J did not refer to the *Hyperion v Warner* case, but in any event she seemed satisfied that an original headline would be a separate work to the underlying article. *Hyperion Records Ltd v Warner Music (UK) Ltd* 19 May 1991, Ch D, unreported.

<sup>68</sup> Lee (n 2) 44.

<sup>69</sup> US Copyright Act 1976, 17 U.S.C. §§ 101–102. Fixation should be ‘sufficiently permanent or stable’ and thus ‘perceived, reproduced or otherwise communicated’ for a non-transitory period.

works of authorship are protected, but the definition of originality is left up to the courts.<sup>70</sup> In *Feist Publications v Rural Telephone Service Co*, the Supreme Court of the United States (SCOTUS) emphasised independent creation of a work with a ‘minimal degree of creativity’. The decision in *Feist* that a telephone book was not protected was based on the view that a copyright work must have some creativity; whereas, an alphabetically arranged list of names lacked a creative spark or intellectual stamp.<sup>71</sup> Woodmansee reflects that in this narrow sense judges in the US are willing to entertain aesthetic requirements.<sup>72</sup> The US position is therefore not far away from the decisions in cases such as *Infopaq* on originality in the EU (and at present, in the UK post-*Meltwater/SAS*). In the US the categorisation of works is not based on closed categories – in section 102 dramatic works are, however, cited as one type of work that is protected. Dramatisations and adaptations are given specific recognition under section 101.<sup>73</sup> In the 1938 US case of *Seltzer v Sunbrock* the court held this type of work must feature some story elements, such as a simple plot or narrative, or the repetition of some action, speech, or character.<sup>74</sup> It is likely the US protection of dramatic works is comparable with the way UK law protects such works with respect to scripted dialogue, identifiable characters and detailed plot scenarios.<sup>75</sup> Moreover, although it has not yet been made explicit in US case law, Livingston argues that the straightforward application of key copyright principles ‘would dictate that stage directions are subject to copyright protection’.<sup>76</sup>

The Supreme Court of Canada (SCC) in *CCH Canadian Ltd v Law Society of Upper Canada*<sup>77</sup> held that the Canadian originality standard is ‘skill and judgment’.<sup>78</sup> While ruling that the US *Feist* standard was too high a threshold,

<sup>70</sup> I explore the idea/expression dichotomy in ch 4. See, eg *Baker v Selden*, 101 U.S. 99 (1880) 25 L. Ed. 841.

<sup>71</sup> *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340 (1991). See also L Bently, ‘Copyright and the Death of the Author in Literature and Law’ (1994) 57 *The Modern Law Review* 973, 977.

<sup>72</sup> M Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”’ (1984) 17 *Eighteenth Century Studies* 425, 440.

<sup>73</sup> It appears US courts rarely go beyond the categories and works analogous to the UK’s categories – see eg *NBA v Motorola* 105 F. 3d. 841 (2nd Cir. 1997) holding that a basketball game is not a work of authorship).

<sup>74</sup> *Seltzer v Sunbrock* 22 F. Supp 621 (S.D. Cal. 1938).

<sup>75</sup> *Nichols v Universal Pictures Corporation*, 45 F.2d. 119 (2d. Cir. 1930); *Thomson v Larson* 147 F.3d. 195 (2d. Cir. 1998) 203–204 requiring objective indicia of the intent to be joint authors of the musical *Rent*. See also ‘Recent Case, Copyright – Joint Authorship – Second Circuit Holds That Dramaturg’s Contributions to the Musical *Rent* Did Not Establish Joint Authorship with Playwright-Composer – *Thomson v Larson*’ 147 F.3d. 195 (2d. Cir. 1998) (1999) 112 *Harv. L. Rev.* 964, 968–969.

<sup>76</sup> M. Livingston, ‘Inspiration or Imitation: Copyright Protection for Stage Directions’ (2009) 50 *B.C. L. Rev.* 427, 486. See, however, *Garcia v Google* 786 F.3d. 733 (9th Cir. 2015) (en banc) on performances and copyright works.

<sup>77</sup> *CCH Canadian v Law Society of Upper Canada* [2004] SCC 13. See also *Robertson v Thomson Corp* (2006) SCC 43.

<sup>78</sup> As noted earlier, the closest comparator with the UK is Ireland, but there is a lack of case law on point. Certainly, there is no reason to believe that at present the Irish standard of originality is different to the UK standard since both are under the umbrella of EU law’s ‘intellectual creation’ threshold. The originality standard in Ireland under the CRRA 2000 would therefore be ‘intellectual creation’.

the court also rejected the idea that pure ‘sweat of the brow’ labour was sufficient – this indicates that the Canadian standard is somewhere between the traditional UK ‘skill, labour and judgement’ up to 2010 (pre-*Infopaq/Meltwater*) and the US *Feist* standard of creativity.<sup>79</sup> This Canadian standard was cited with approval in the Indian Supreme Court case of *Eastern Book Company v DB Modak*<sup>80</sup> when assessing the literary work concept in the context of compilations.<sup>81</sup> In Ireland the originality standard appears to be in line with *Infopaq* and the subsequent UK case law.<sup>82</sup>

Canada utilises a closed list of categories in section 5(1) of its Copyright Act, including the specific category of dramatic works, in line with the UK approach.<sup>83</sup> However, Canada provides a more detailed definition. Section 2 of the Canadian Copyright Act (1985) defines ‘dramatic work’ to include ‘any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise.’<sup>84</sup> This captures that the dramatic work as a whole need not be fixed in a static form (presumably because, by its nature, it cannot be) in order to be sufficiently fixed for copyright to arise. The term ‘acting form’ is not defined, but it likely includes stage directions, etc. as part of the essential (fixed) elements of the dramatic work. The SCC decision in *Cinar v Robinson* (2013) is relevant to the definition of a dramatic work, insofar as it is about a story board, characters and settings for a proposed TV series.<sup>85</sup> The court noted that the overall architecture, the characters and their interactions, etc. constituted the protected elements when they were the result of skill and judgement.<sup>86</sup> The earlier Canadian case of *Hutton v Canadian Broadcasting Corp.* (1989) (Alba. Q.B.) is also instructive on the ‘dramatic’ character of this kind of work – the court held that a TV show of music videos was not ‘dramatic’ because there was no story-line, no dramatic ‘conceit’ and no dramatic incident.<sup>87</sup>

This similarity between UK and Irish standards may change post-Brexit, as the UK will no longer be bound by the EU standard, and may choose to diverge. See L McDonagh and M Mimler, ‘Intellectual Property Law and Brexit: A Retreat or a Reaffirmation of Jurisdiction?’ in M Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Cambridge: Intersentia, 2017) 159.

<sup>79</sup> CJ Craig, ‘Resisting Sweat and Refusing Feist: Rethinking Originality After CCH’ (2007) 40 *University of British Columbia Law Review* 69.

<sup>80</sup> *Eastern Book Company v DB Modak* (2008) 1 SCC 112.

<sup>81</sup> Copyright Act 1957, s 13 confers protection on literary works, dramatic works, musical works, and artistic works.

<sup>82</sup> The Irish case *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74 remains the leading statement on originality in Irish copyright law, with the court alluding to some aspect of creativity being part of the requirement, a point in line with the later CJEU decisions. The specific topic of the ‘author’s intellectual creation’ was not analysed explicitly in the more recent cases *Phonographic Performance (Ireland) Ltd v Foyle* [2015] IEHC 778 and *Sony Music Entertainment Ireland Ltd v UPC Communications Ireland Ltd* [2016] IECA 231 but there is no reason to believe the Irish threshold is not in line with the EU standard.

<sup>83</sup> Copyright Act, R.S.C. 1985, c. C-42, s 5(1).

<sup>84</sup> *ibid.*, s 2.

<sup>85</sup> *Cinar Corp v Robinson* [2013] 3 SCR 1168.

<sup>86</sup> *ibid.*, at [43]–[46].

<sup>87</sup> *Hutton v Canadian Broadcasting Corp.* [1989] A.J. No. 1193 (Alta. Q.B.) and *Cummings v Global Television Network Quebec, Limited Partnership* [2005] Q.J. No. 6707 (Que. S.C.). The court cited the above US case of *Seltzer v Sunbrock* (n 74).

In Australia, like Canada, copyright law bears the strong influence of the UK system, with a closed list of works and a traditional standard of 'skill, labour and judgement'.<sup>88</sup> Yet, the case of *IceTV* indicates that some element of intellectual creativity forms part of the originality threshold, casting doubt on whether fact-based works can be protected.<sup>89,90</sup> In *IceTV* the court stated that 'original works emanate from authors' and such works should be the product of 'intellectual effort'.<sup>91</sup> The *IceTV* originality standard is thus broadly comparable with the *Infopaq/Meltwater* threshold. As in the UK, a performativity is a necessary quality of dramatic works in Australia.<sup>92</sup> Crucially, the specific issue of very short works – in this case a newspaper headline – was at issue in *Fairfax Media Publications Pty Limited v Reed International Books Australia Pty Limited* in 2010.<sup>93</sup> Unlike in the UK/EU, Bennett J stated that it was unlikely that copyright could subsist in a headline or title:

Headlines generally are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works.<sup>94</sup>

Bennett J also made some important comments on the need for a 'work' to exist:

There may well be writings of original words or phrases that simply do not reach the level of constituting a 'work', regardless of literary merit. This is not just because they are short, as a deal of skill and effort can go into producing, for example, a line of exquisite poetry. It is because, on its face and in the absence of evidence justifying its description as a literary 'work', the writing does not, qualitatively or quantitatively, justify that description.<sup>95</sup>

In Bennett J's view, three requirements exist for copyright to arise – there must be something which is 'original', which is 'literary' and which can be properly described as a 'work' – and broadly in line with UK case law particularly the view expressed by Arnold J in *SAS*.<sup>96</sup> Nonetheless, although the court in *Fairfax* recognised that in most cases headlines were too trivial, Bennett J stated that it was not impossible that a headline or a title could amount to a copyright work. In this regard, the case can be said to be broadly in line with UK authority up to 2010.

<sup>88</sup> Copyright Act 1968, s 10.

<sup>89</sup> *IceTV* (n 61).

<sup>90</sup> J McCutcheon, 'When Sweat Turns to Ice: The Originality Threshold for Compilations Following *IceTV* and Phone Directories' (2011) 22 *Australian Intellectual Property Journal* 87; M Davison, 'Copyright Protection for Compilations: Australia Does a U-Turn' (2010) 32 *European Intellectual Property Review* 457.

<sup>91</sup> *IceTV* (n 61) 493–94 at [95]–[96] and 474.

<sup>92</sup> *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 33. The case of *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056 came to the Privy Council from an appeal from a case in New Zealand.

<sup>93</sup> *Fairfax* (n 61).

<sup>94</sup> *ibid* at [44].

<sup>95</sup> *ibid* at [45]. See also *IceTV* (n 61).

<sup>96</sup> Proudman J in *Meltwater* lacked analysis of the 'work' factor.

## Summary of the UK Position on Originality of Dramatic Works

Until 2010, the potential for copyright in the UK to apply to very short literary or dramatic works tended to be discussed in hypothetical, speculative, and even sometimes negative, terms.<sup>97</sup> While it had never been ruled in the UK that a single headline or title could never be a copyright work, in *Meltwater* it was stated definitively that ‘some of the headlines are independent literary works’.<sup>98</sup> The overriding focus in *Infopaq* and *Meltwater* on originality over work-form may mean that the concept of originality under UK law is now a ‘dematerialised’ one – one that has been stripped of almost any material limitations set by the boundaries of, for example, literariness.<sup>99</sup> If this is the case, then what the law ultimately protects is a dematerialised expression of originality defined by the author’s intellectual creativity. On the other hand, that a headline could be said to be sufficiently literary to be original fits the *Exxon* requirement that a literary work should convey some meaning. Moreover, in *Kogan*, the form of the dramatic work was important to considering whether Julia Kogan had contributed sufficient originality to be a joint author, as detailed below on joint authorship.

In the theatrical context it is likely that a very short play with, for example, 11 words could be protected as a work of copyright. This ought not to be thought of as unusual (or unwelcome) – some avant-garde works can be mostly made up of stage directions (see Samuel Beckett).<sup>100</sup> Many in theatre would no doubt view this as a positive aspect of the law.<sup>101</sup>

Yet, for playwrights who appreciate the ability to quote liberally from other works, or even to refer to the titles of books or everyday newspaper headlines in their plays, copyright law may prove disruptive to such practices. If this is borne out in future cases it could eventually have a considerable negative effect on the ability of literary and dramatic artists involved in ‘intellectual creation’ to make

<sup>97</sup> Vaver (n 38). See also L McDonagh, ‘Headlines and Hyperlinks: UK Copyright Law post-Infopaq’ (2011) 1 *Queen Mary Journal of Intellectual Property* 184 and E Bonadio and L McDonagh, ‘Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity’ (2020) *Intellectual Property Quarterly* 112.

<sup>98</sup> *Meltwater* (n 41), Proudman J at [72] (referred to with approval in [22] of the Court of Appeal judgment).

<sup>99</sup> Griffiths (n 2). For discussion of music cases in light of CJEU decisions on originality see L McDonagh, ‘Is Creative use of Musical Works without a licence acceptable under Copyright?’ (2012) 43 *International Review of Intellectual Property and Competition Law (IIC)* 401.

<sup>100</sup> S Beckett, ‘Act Without Words I’ in *The Complete Works of Samuel Beckett* (London: Faber & Faber, 2006).

<sup>101</sup> ZK Said, ‘Copyright’s Illogical Exclusion of Conceptual Art That Changes over Time’ (2016) 39 *Colum.-VLA J.L. & Arts* 335.

use of very short works in the development of new works.<sup>102</sup> This issue of infringement is explored further in chapter four.<sup>103</sup>

## Authorship and Ownership of the Economic Rights

Legislation has surprisingly little to say about authorship. Academics, however, are fascinated by it.<sup>104</sup> The CDPA merely outlines<sup>105</sup> that the author is the person who creates the work and who is the first owner of the copyright.<sup>106</sup> The economic rights accruing to the author under the CDPA include the exclusive right to, for example, license and assign the work, copy the work, adapt the work, and perform it.<sup>107</sup> Thus, when a theatre company wishes to perform a play which is protected by copyright, the theatre company will attempt to get a licence from the author, or a representative, typically an agent such as Concord (Samuel French).<sup>108</sup> Depending on the circumstances, this licence may cover a single performance or an entire initial run of the play.<sup>109</sup> In practical terms the ownership of a copyright work can be agreed through contractual terms.<sup>110</sup>

<sup>102</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society – available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>. See also Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.), OJ L 130, 17.5.2019.

<sup>103</sup> As I reflect upon later on in ch 4, this may require a creative interpretation of the fair dealing exceptions such as ‘quotation’. See however, the view of J Parkin, ‘The copyright quotation exception: not fair use by another name’ (2019) 19 *Oxford University Commonwealth Law Journal* 55.

<sup>104</sup> See, eg P Jaszi, ‘Towards a Theory of Copyright: The Metamorphoses of Authorship’ (1991) 2 *Duke L.J.* 455; D Saunders, *Authorship and Copyright* (London: Routledge, 1992); M Woomansee and P Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, NC: Duke University Press, 1999); L Zemer, *The Idea of Authorship in Copyright* (Ashgate Publishing, Ltd, 2007); CJ Craig, ‘Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law’ (2007) 15 *Journal of Gender, Social Policy and the Law* 207; G D’Agostino, *Copyright, Contracts, Creators, New Media, New Rules* (Cheltenham: Edward Elgar, 2010); M Van Eechoud (ed), *The Work of Authorship* (Amsterdam: Amsterdam University Press, 2014); C Buccafusco, ‘A Theory of Copyright Authorship’ (2016) 102 *Virginia L. Rev.* 1229.

<sup>105</sup> CDPA 1988, s 3(2).

<sup>106</sup> CDPA 1988, s 9(1) and ss 77–79.

<sup>107</sup> CDPA 1988, s 2(1) and ss 16–27. For a discussion of the meaning of public performance see *Bamgboye v Reed* [2004] EMLR 61.

<sup>108</sup> The UK Writers’ Workshop offers advice to authors on finding an agent, see [www.writersworkshop.co.uk/literary-agents.html](http://www.writersworkshop.co.uk/literary-agents.html).

<sup>109</sup> M Rimmer, ‘Heretic – Copyright Law and Dramatic Works’ (2002) 2 *Queensland University of Technology Law and Justice Journal* 131, 133, noting that a negotiation typically occurs before this licence is granted in which the author-playwright, as copyright owner, may seek to restrict the making of changes to the play, such as textual edits, subtractions or additions, in advance of the envisaged performance.

<sup>110</sup> The Writers Agreement and *The Working Playwright* (Writers’ Guild of Great Britain, 2019) aims to deal with such disputes in advance, see [https://writersguild.org.uk/wp-content/uploads/2015/02/WGGB\\_booklet\\_jun12\\_contracts\\_i.pdf](https://writersguild.org.uk/wp-content/uploads/2015/02/WGGB_booklet_jun12_contracts_i.pdf) and <https://writersguild.org.uk/wp-content/uploads/2019/08/WGGB-Working-Playwright-Agreements-and-Contracts-1.pdf>.

In the UK, copyright in the work lasts for 70 years after the end of the life of the author; subsequent to this, the work falls into the public domain.<sup>111</sup> As noted later on, duration is an important factor in the trajectory of theatrical works. Classic works by luminaries such as Sophocles, Shakespeare and Chekhov are in the 'public domain'.<sup>112</sup> This has a number of consequences. Performances of these plays do not require the payment of royalties; nor does the playwright (long dead) need to be consulted about making radical changes to the play. By contrast, many works by dead playwrights such as Samuel Beckett, Brian Friel, Agatha Christie and Harold Pinter remain in copyright, as do works by notable playwrights who are very much still alive at time of writing, such as Tom Stoppard, Martin McDonagh, Caryl Churchill and Alan Bennett.

## Overview of Joint Authorship

Later in this chapter I use empirical insights to explore the way that the dramatic work is authored via a collaborative workshop process, with several participants – the playwright, the director, the actors – making creative contributions. Before undertaking this examination, I must first outline the law of joint authorship.<sup>113</sup> The CDPA provides in s.10 for 'joint authorship' of a copyright work as 'a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors'.<sup>114</sup> Case law shows that in the UK work of joint authorship must be made in line with a common design and the contributions of the purported joint authors must meet the threshold of originality.<sup>115</sup>

## Joint Authorship of Dramatic Works in the UK

Prior to the CDPA 1988 the most significant case involving joint authorship of a dramatic work (considered under the 1956 Act) was the 1985 case of *Wiseman v George Weidenfeld and Nicholson Ltd*.<sup>116</sup> The case involved a play – *The English*

<sup>111</sup> CDPA 1988, s 12. Under the transitional provisions in Schedule 1 of the CDPA some very old unpublished works remain protected in the UK until 2039 – this potentially includes unpublished works by playwrights whose published works are now in the public domain. See also Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights OJ L 290, 24.11.1993 and Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights OJ L 372/12, 27.12.2006.

<sup>112</sup> J Boyle, *The Public Domain* (New Haven, CT: Yale University Press, 2009).

<sup>113</sup> Simone (n 2).

<sup>114</sup> CDPA 1988, s 10.

<sup>115</sup> *Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] EMLR 256; [2007] FSR 12; [2008] EWCA Civ 287; [2009] UKHL 41.

<sup>116</sup> *Wiseman v George Weidenfeld and Nicholson Ltd* [1985] FSR 525.

*Way of Doing Things* – the text of which was written by William Donaldson (based on his novel). The claimant Wiseman had suggested to Donaldson that he adapt the novel into a play, and Wiseman also provided advice and editorial criticism during the script-writing process. Wiseman claimed this entitled him to a share of joint authorship. The court disagreed, holding that even if Wiseman had offered useful advice and constructive criticism, this did not equate to authorial writing.

There are not many twenty-first century cases involving dramatic works in the UK. We have one significant High Court decision on a stage play (*Brighton v Jones*) as well as a major Court of Appeal decision on a screenplay (*Kogan v Martin*). Apart from that, musical joint authorship cases, and particularly the key case of *Fisher v Brooker*, provide comparative value.

The 2004 case of *Brighton v Jones* concerned the authorship of the commercially successful play *Stones in His Pockets*.<sup>117</sup> This was primarily a dispute between the director of the initial production of the play (Brighton) and the playwright (Jones). *Stones in his Pockets* was first staged by the Dubbeljoint Theatre Company in Belfast in 1996. It was fairly successful in its initial run, but did not become a commercial success immediately. During the late 1990s, the playwright re-wrote the play extensively by herself. This revised version of the play went on to become very popular in the West End and on Broadway.<sup>118</sup> Consequently, it generated large amounts of royalty revenue which accrued to Jones (the playwright), that is, the author/owner of the dramatic work. Following the success of the revised version of the play Brighton and the Dubbeljoint Theatre Company took a High Court copyright case against Jones. Brighton claimed a joint share in the dramatic work, and a proportionate share of royalties. The theatre's claim was based on a contract agreed with Jones at the time of the first production, that the theatre would receive a proportion of later royalties and credit as the first theatre to stage it.

Regarding the main claims, the court in *Brighton* rejected suggestions that the comments and edits provided by the director during the development of the script via the workshop/rehearsal process amounted to a joint authorship contribution of sufficient originality for a share in the work to arise. Due to the fact the court hearing took place almost a decade after the workshop/rehearsal process had concluded, the parties' memories of which person had contributed what were vague. In the face of unclear recollections, the court concluded that Pamela Brighton was merely doing what any director would do in the circumstances of preparing the play to be staged. The court also emphasised the existence of a contract between the Dubbeljoint Theatre Company and the writer, which stated that Jones would receive the resulting copyright.<sup>119</sup>

<sup>117</sup> *Brighton & Dubbeljoint v Jones* [2004] EWHC 1157 (Ch); [2004] EMLR 507.

<sup>118</sup> See for instance this 2011 review of a London performance, available at [www.guardian.co.uk/stage/2011/dec/20/stones-in-his-pockets-review](http://www.guardian.co.uk/stage/2011/dec/20/stones-in-his-pockets-review).

<sup>119</sup> This is broadly in line with the terms of standard contracts, as noted in *The Working Playwright* (Writers' Guild of Great Britain, 2019) which aims to deal with such disputes in advance: see <https://writersguild.org.uk/wp-content/uploads/2019/08/WGGB-Working-Playwright-Agreements-and-Contracts-1.pdf>.

Nonetheless, there was an additional claim. The provision of written instructions, including character and basic scenario details, was capable of creating an authorship interest. In this case the director had faxed written instructions to the writer to try to encourage her to begin work on the play, which was somewhat behind schedule. The director, Pamela Brighton, kept a copy of these written notes and produced them at trial. At the trial Marie Jones admitted that the first scene of the play contained a scenario and characters recognisable from these written notes. In this context, where the play that Jones had written, and subsequently revised, was derivative of the instructions given to Jones by Brighton, the court held that Brighton did have a copyright interest under the law. The court considered the play to be in part an adaptation of the (separate) earlier 'work' created by Brighton and faxed to Jones.

It is notable, and arguably unfortunate, that the court emphasised writing over other forms of creative input, stressing that Jones typed up the script on her laptop.<sup>120</sup> On this, however, it must be remembered that courts inevitably require evidence in order to make their determinations, and clear written evidence tends to persuade judges more readily than vague oral remembrances.

In the 2019 ruling in *Kogan v Martin* the Court of Appeal specified four elements of joint authorship: (a) collaboration, (b) authorship, (c) contribution and (d) non-distinctness of contribution.<sup>121</sup> Here the Court of Appeal of England and Wales overturned a decision of the Intellectual Property Enterprise Court (IPEC) concerning the authorship of screenplay for Stephen Frears' 2016 film, *Florence Foster Jenkins*.<sup>122</sup> Nicholas Martin was attributed as its writer upon the film's release, and in 2017 his sole authorship claim was upheld by the IPEC.<sup>123</sup> The Court of Appeal, however, decided that the IPEC had not properly applied the criteria of joint authorship in considering whether the appellant – Julia Kogan – had made the right sort of 'authorial' contributions to the screenplay to be considered a joint author of the final work. In paragraph 33 the Court of Appeal provided a remarkably clear-headed statement of the law on joint authorship, even drawing an interesting analogy between the working relationship between TS Eliot and Ezra Pound on the important question of when authorship ends, and 'mere' editing begins:

A striking illustration is the contribution made by Ezra Pound to *The Waste Land*. When T.S. Eliot showed him the original draft, Pound proposed very extensive deletions and revisions, with considerable consequences for the poem as published (indeed he became its dedicatee). But neither poet ever considered it a work of joint authorship, and it has not been regarded as such in the century since it was published, even though Pound's contribution is now widely known. This is because he was acting as a friend and critic and not a collaborator in a common design. By contrast, a collaborator may

<sup>120</sup> *Brighton & Dubbeljoint v Jones* [2004] EWHC 1157 (Ch) at [42].

<sup>121</sup> *Kogan v Martin* [2019] EWCA 1645.

<sup>122</sup> *ibid.* Following the subsequent IPEC retrial, Kogan was awarded a 20% ownership share of the copyright in the dramatic work – *Martin v Kogan* [2021] EWHC 24 (Ch).

<sup>123</sup> [2017] EWHC 2927 (IPEC).

become a joint author after an apparently lesser contribution than Pound's. Take, for example, *Beckingham v Hodgens* (cited above) where a successful claim for joint authorship was made by a session musician who contributed a distinctive four-bar riff to a pop song that had been substantially conceived before he was hired. These examples show the importance of identifying the true nature of the interaction between the parties in relation to the work, an assessment that provides the essential context for consideration of questions of authorship and contribution.<sup>124</sup>

This contextual approach taken by the Court of Appeal is laudable and demonstrates how far the critique of singular authorship has penetrated copyright jurisprudence.<sup>125</sup> The case law prior to *Kogan* tended to focus overwhelmingly on the 'authorship' limb of the joint authorship test and thus neglected the requirement for collaboration even though the latter is an express requirement in the CDPA.<sup>126</sup> The *Kogan* ruling puts collaboration front and centre in analysis of joint authorship; it encourages courts to consider the precise context of the collaboration and that authorial, original contributions can be made in varied ways – not just 'writing'. As I discuss later on with respect to the empirical research, this opens up the possibility that the way plays are created eg via methods of 'revising' and 'devising' can be assessed fairly and properly by the courts.

A high-profile and bitter joint authorship row erupted in 2019 between Idris Elba, Kwame Kwei-Armah, Sarah Henley and Tori Allen-Martin over a newly created play – *Tree* – performed at the 2019 Manchester International Festival.<sup>127</sup> From 2013–18 Henley and Allen-Martin had worked with the actor and director Idris Elba on developing the embryonic dramatic work *Tree*, with the two participating in multiple drafts, workshops, and industry performances. However, in 2018 they were surprised to find that in a draft by Kwame Kwei-Armah and in subsequent publicity for the play their names were removed from the project, despite their work being clearly visible in Kwei-Armah's revised script:

Kwame held onto our ideas and work including the premise, timelines and time-zones, most of our characters and their relationships to each other and many of the plot points.<sup>128</sup>

Henley and Allen-Martin did not take legal action after they had been ousted from the project, citing the costs and hassle. This is unfortunate as in light of *Kogan* the UK courts have now moved towards a more contextual analysis of joint authorship,

<sup>124</sup> *Kogan v Martin* [2019] EWCA 1645 at [33].

<sup>125</sup> AM Adler, 'Against Moral Rights' (2009) 97 *California Law Review* 263, 276, referring to R Badenhausen, *T.S. Eliot and the Art of Collaboration* (Cambridge: Cambridge University Press, 2004) 76. See also CJ Craig and I Kerr, 'The Death of the AI Author' (2019) *Osgoode Legal Studies Research Paper* 1.

<sup>126</sup> Simone (n 2) 251–56.

<sup>127</sup> M Brown, 'Writers claim being excluded after creating Idris Elba play' *The Guardian* (2 July 2019), available at [www.theguardian.com/culture/2019/jul/02/writers-claim-being-excluded-after-creating-idris-elbas-play](http://www.theguardian.com/culture/2019/jul/02/writers-claim-being-excluded-after-creating-idris-elbas-play).

<sup>128</sup> S Henley and T Allen-Martin, 'Tree. A Story of Gender and Power in Theatre' *Medium* (2 June 2019), available at <https://medium.com/@toriandsarahburnbright/tree-a-story-of-gender-and-power-in-theatre-23b8a2468224>.

and the two aggrieved parties would likely have had a strong case. I explore this further below.<sup>129</sup>

## Joint Authorship of Musical Works in the UK

On music, the at times contradictory nature of UK jurisprudence can be observed by considering two key music cases: *Hadley v Kemp* (1999)<sup>130</sup> and *Fisher v Brooker* (2006).<sup>131</sup> The courts' key question in both cases was: has the purported joint author has made the 'right kind' of creative contribution?<sup>132</sup> In *Hadley*, Park J held that the addition of a substantial saxophone solo by a band member – Steven Norman – was insufficient to award a share of joint authorship of the Spandau Ballet song 'True'.<sup>133</sup> This decision was controversial – the standard of 'significant and original'<sup>134</sup> as applied by Park J in relation to Norman's saxophone 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 principal composer Gary Kemp.<sup>135</sup> However, this must now be considered in light of the subsequent ruling in *Fisher v Brooker* where the court held that the addition of the famous organ intro to 'A Whiter Shade of Pale' (originally written as a bare piano demo by Gary Brooker) was found to be sufficient to confer a share of authorship onto the organ player, Matthew Fisher. It is therefore

<sup>129</sup> Traditional forms of music provide a clear example where the iconic Western figure recognised by copyright – the individual composer – is largely absent. Historically, traditional music, whether European folk music, indigenous traditional music or jazz/blues, eg J Lind, *A History of European Folk Music* (Rochester, NY: University of Rochester Press, 1997); T Whyton, *Jazz Icons: Heroes, Myths and the Jazz Tradition* (Cambridge: Cambridge University Press, 2010); O Arewa, 'Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use' (2006) 37 *Rutgers L.J.* 277, 278–90; M Kuss, 'Performing Beliefs: Indigenous Peoples of South American, Central America and Mexico' in *Music in Latin America and the Caribbean: An Encyclopedic History* (Austin: University of Texas Press, 2010); P Malm, *Music Cultures of the Pacific, the Near East, and Asia* (Hoboken, NJ: Prentice Hall, 1996); H Kwabena Nketia, *The Music of Africa* (New York: WW Norton & Company, 1974); J Toynbee, 'Copyright, the Work and Phonographic Orality in Music' (2006) 15 *Social and Legal Studies* 77, 79–99. For an account of IP law informed by a critique of racial injustice see A Vats, *The Color of Creatorship: Intellectual Property, Race, and the Making of Americans* (Stanford, CA: Stanford University Press, 2020).

<sup>130</sup> *Hadley v Kemp* [1999] EMLR 589, 644–50.

<sup>131</sup> *Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] EMLR 9 at [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 almost 40 years before taking the case – *Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764.

<sup>132</sup> *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818. See also *Godfrey v Lees* [1995] EMLR 307, *Ray v Classic FM plc* [1998] FSR 622 and *Beckingham v Hodgens* [2003] EWCA Civ 143.

<sup>133</sup> *Hadley v Kemp* [1999] EMLR 589, 644–50.

<sup>134</sup> *Fylde Microsystems v Key Radio Systems Ltd* [1998] FSR 449.

<sup>135</sup> D Free, 'Beckingham v. Hodgens: The Session Musician's Claim to Music Copyright' (2002) 1 *Entertainment Law* 93, 97. See also A Barron, 'Harmony or Dissonance? Copyright Concepts and Musical Practice' (2006) 15 *Social and Legal Studies* 25 and GJ Fleet, 'What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians' (2008) 61 *Vanderbilt Law Review* 1235.

clear that a piece of music ‘will often be a work of joint authorship between some or all of the musicians’ performing and improvising together.<sup>136</sup>

It is worth considering comparative insights into the way that joint authorship is assessed in the US, Canada, Australia and India.

## Joint Authorship – Comparative Insights

Like the UK, statutory copyright law in common law countries such as Ireland, Australia, India, Canada, etc provides expressly that joint authorship requires collaboration and (original) contributions from more than one party that are not ‘distinct’ from one another.<sup>137</sup> In Ireland, for instance, a work of ‘joint authorship’ is defined in precisely this way.<sup>138</sup>

In Australia, as noted earlier, original works must be the product of ‘intellectual effort’.<sup>139</sup> This *IceTV* originality standard is thus what is expected of collaborative joint authors, working pursuant to a common design, for joint authorship of a work to arise. However, in Australia there is a lack of case law involving joint authorship of plays.<sup>140</sup> Generally, the rules applied to joint authorship regarding common design and original contribution follow the precedents established in the UK prior to *Kogan*. There has yet to be a court decision on joint authorship post-*Kogan* – and the Australian cases decided in recent years involve relatively prosaic works such as phone directories, health care info and software rather than creative works such as plays and film scripts.<sup>141</sup>

In India, an important decision on joint authorship is the 1989 Delhi High Court judgment in *Najma Hcptulla v Orient Longman Ltd*.<sup>142</sup> In the process of making the book *India Wins Freedom* in the late 1950s Maulana Azad had described his life’s political experiences in Urdu, and on this basis Prof. Humayun Kabir had written up the draft of the work in English, which Azad then approved. Referring to UK case law, the court held that where the contributions made by two authors – Azad and Prof Kabir – towards a final work were towards a common design and not severable, the literary work created by the two individuals was a collaborative

<sup>136</sup> R Arnold, ‘Reflections on “The Triumph of Music”: Copyrights and Performers’ Rights in Music’ (2010) *Intellectual Property Quarterly* 153.

<sup>137</sup> Copyright Act 1968 (Cth) (Australia), s 10(1); Copyright Act, R.S.C. 1985 (Canada), c. C-42, s 2; CRRA 2000 (Ireland), s 22; Copyright Act 1957 (India), s 2(z). See also Cooper (n 7).

<sup>138</sup> CRRA, s 22(1). In Ireland, the law on joint authorship is likely to be interpreted in the same manner as the law in the UK. See eg *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74.

<sup>139</sup> *IceTV* (n 61) 493–4 at [95]–[96] and 474. McCutcheon (n 90).

<sup>140</sup> Copyright Act 1968 (Cth), s 10(1).

<sup>141</sup> *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCA 44; *Primary Health Care Limited v Commissioner of Taxation* [2010] FCA 419; *Acohs Pty Ltd v UCorp Pty Ltd* [2010] FCA 577; *Career Step, LLC v TalentMed Pty Ltd (No 2)* [2018] FCA 132.

<sup>142</sup> *Najma Hcptulla v Orient Longman Ltd*, AIR 1989 Del 63; 14 IPLR 36 (1989). See also *Nav Sahitya Prakash and Ors v Anand Kumar and Ors*, AIR 1981 All 200 on co-ownership.

work of joint authorship.<sup>143</sup> The court recognised that in joint authorship cases contributions made by both authors ought to be not distinct in the final work, even if each author had contributed differently in the making of the work. However, the court did not lay down any particular standard to assess the degree of collaboration required to determine joint authorship.<sup>144</sup>

In Canada there is an important case on joint authorship of musical works – the 1999 case of *Neudorf v Nettwerk Productions Ltd.*<sup>145</sup> Here, the music producer Darryl Neudorf had produced some tracks with the popular music artist Sarah McLaughlan. Neudorf claimed to be a joint author because as producer he had suggested particular expressive elements (eg a melody line or a bridge to the chorus) that were integrated into the final arrangements of the songs as recorded. For some tracks, the court found his contributions to be insufficient, or held that they were only in the nature of ideas (as suggestions that McLachlan was free to accept or reject). Nevertheless, with respect to one song – ‘Steaming’ – Neudorf had made a substantial contribution to the vocal melody; but the absence of a shared *intent* to be a joint author was fatal to his claim. McLachlan did not consider herself to be co-writing the songs with Neudorf. The court also found that Neudorf was playing a supportive role in the creative process rather than an authorial one. In 2009 the Federal Court expressed doubt the approach of *Neudorf* but did not definitively hold against it.<sup>146</sup> A UK court, post-*Kogan*, might consider that in the context of the creative process that produced ‘Steaming’ Neudorf’s contribution would entitle him to a share of joint authorship. At present, the Canadian judicial approach is somewhere between the UK and US approaches, influenced in particular by the US *Childress* case (discussed below).

The US Copyright Act 1976 defines a jointly authored work as ‘a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole’.<sup>147</sup> The US joint authorship doctrine – as exemplified by *Childress v Taylor* – thus requires both parties to *intend* to be joint authors; and in the absence of such shared intent, the party identified as the ‘dominant author’ will receive sole authorship/ownership.<sup>148</sup> In the subsequent case of *Aalmuhammed v Lee*, the intent requirement prevented the expert consultant – Jefri Aalmuhammed – from being a joint author of the film *Malcolm X* even though, as claimed, he had created two entire scenes with new

<sup>143</sup> The court referred to *Levy v Rutley* (1871) L.R. 6 C.P. 523, *Walter v Lane* [1900] AC 539 and *Donoghue v Allied Newspapers Ltd* [1937] 3 All ER 503.

<sup>144</sup> A Sebastian, ‘Joint Authorship in Cinematographic Films: The Conundrum of the Primary Director’ (2014–2015) 7 *Indian J Intell Prop* L 69.

<sup>145</sup> *Neudorf v Nettwerk Productions Ltd., et al* [1999] B.C.J. No. 2831 (B.C.S.C.). [2000] RPC 935.

<sup>146</sup> *Neugebauer v Labieniec* [2009] FC 666.

<sup>147</sup> 17 U.S.C. § 101. See also SC Brophy, ‘Joint Authorship under the Copyright Law’ (1994) 16 *Hastings Comm. & Ent. L.J.* 451.

<sup>148</sup> *Childress v Taylor*, 798 F. Supp. 981 (S.D.N.Y. 1992).

characters, and had re-drafted parts of the script relating to Malcolm X's historic Haj pilgrimage to Mecca.<sup>149</sup>

In the US the essential case on joint authorship of a work of drama involves the musical *Rent*. In *Thomson v Larson*, the dramaturge who had worked on *Rent*'s development for stage argued she should receive a share of joint authorship (and associated credit).<sup>150</sup> The court found that the writer of the musical had not intended that Thomson would be a joint author, and thus, in line with *Childress*, Thomson could not be recognised as such. Despite this, the court seemed open to the suggestion that what Thomson contributed could amount to a separate copyright interest (somewhat similar to the situation in the UK case of *Brighton* where Pamela Brighton was found to own the early draft scenario as a separate work). The case settled before this could be established. It is clear that in the US (and to some extent, Canada, post-*Neudorf*) joint authorship features an additional hurdle to that of the UK, Australia and India – each of the joint authors must intend to create a work of joint authorship and a joint authorship claim will fail if one purported joint author cannot establish this intention where there is a more plausible or 'dominant' single author.

In the US actors have made claims for authorship rights, at least in the context of films, though such claims do not relate to the underlying dramatic work (script).<sup>151</sup> There have also been several claims by directors in the US asserting a copyright interest in stage directions, but up to now there have been no definitive judicial rulings on the issue.<sup>152</sup> As a result it is not clear whether such stage directions would be part of the original dramatic work itself or whether they would constitute a separate copyright interest, similar to what was considered by the court in *Thomson v Larson*. In relation to the US, Weidman argues that awarding a joint authorship share to directors could create overlapping copyrights engendering problems for later interpreters.<sup>153</sup>

In the UK, since the result of joint authorship is *joint ownership*, the fragmentation of ownership means all joint authors must approve eg licensing of works.

<sup>149</sup> *Aalmuhammed v Lee* 202 F.3d. 1227 (9th Cir. 2000). See also *Richlin v Metro-Goldwyn-Mayer Pictures, Inc.* 531 F.3d. 962, 970 (9th Cir. 2008).

<sup>150</sup> *Thomson v Larson* 147 F.3d. 195 (2d. Cir. 1998) 203–204 requiring objective indicia of the intent to be joint authors of the musical *Rent*. See also 'Recent Case, Copyright – Joint Authorship – Second Circuit Holds That Dramaturg's Contributions to the Musical "Rent" Did Not Establish Joint Authorship with Playwright-Composer – *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998)' (1999) 112 *Harv. L. Rev.* 964, 968–69. See also *Childress v Taylor*, 798 F. Supp. 981 (S.D.N.Y. 1992).

<sup>151</sup> *Garcia v Google, Inc.*, 786 F.3d. 733 (9th Cir. 2015). J Hughes, 'Actors as Authors in American Copyright Law' (2019) *Connecticut Law Review* 409, see [https://opencommons.uconn.edu/law\\_review/409](https://opencommons.uconn.edu/law_review/409).

<sup>152</sup> *Gutierrez v DeSantis*, No. 95–1949 (S.D.N.Y. filed Mar. 22, 1995); *Mantello v Hall*, No. 97cv8196 (S.D. Fla. filed 21 March 1997); *Einhorn v Mergatroyd Productions* 426 F.Supp. 2d. 189 (S.D.N.Y. 2006).

<sup>153</sup> J Weidman, 'The Seventh Annual Media and Society Lecture: Protecting the American Playwright' (2007) 72 *Brook. L. Rev.* 641, 649.

Following a play's initial run, joint ownership rules could have an unpredictable impact on the playwright's ability to get the play performed by a different theatre, and could also affect licensing of adaptations.<sup>154</sup>

## Beyond the Individual – Exploring Theatrical Authorship as a Social Practice

For much of the nineteenth and twentieth centuries, if not earlier, authorship was often linked with Western – typically male – individualism.<sup>155</sup> The post-modern 'death of the author' critique has made authorship a contested concept.<sup>156</sup> Scholars highlight historical studies that show that forms of co-writing have been common throughout literary and dramatic history 'even at the height of the cult of the solitary genius in romanticism'.<sup>157</sup> Taking this further, other commentators argue that the creative process ought not to be attributed just to individual 'genius';<sup>158</sup> rather, it should be acknowledged that authorship is often inherently social and collaborative.<sup>159</sup> Further critical views are put forward by Carys Craig and Daniela Simone: they call for courts to value the social elements

<sup>154</sup> McDonagh (n 23).

<sup>155</sup> See generally CJ Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011).

<sup>156</sup> R Barthes, 'The Death of the Author' in (R Howard, trans, 1967) 5/6 *Aspen: The Magazine in a Box* [www.ubu.com/aspen/aspen5and6/index.html](http://www.ubu.com/aspen/aspen5and6/index.html) and M Foucault, 'What Is an Author?' in JM Marsh, JD Caputo and M Westphal (eds), *Modernity and its Discontents* (New York: Fordham University Press, 1992) 299, 305. See also Aristotle, *Poetics* (A Kenny ed, Oxford: Oxford University Press, 2013).

<sup>157</sup> M Krause, 'Practicing Authorship: The Case of Brecht's Plays' in C Calhoun and R Sennett (eds), *Practicing Culture* (Oxford: Routledge, 2007) 217. See also T Moi, *Sexual/Textual Politics* (London: Methuen, 1985); J Stiller, *Multiple Authorship and the Myth of Solitary Genius* (New York: Oxford University Press, 1991); and CW Zhu, '“Copyleft” Reconsidered: Why Software Licensing Jurisprudence Needs Insights from Relational Contract Theory' (2013) 22 *Social & Legal Studies* 289.

<sup>158</sup> See, eg RJ Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham, NC: Duke University Publishing, 1998); K Bowrey, 'Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 *Macquarie Law Journal* 65; D Wassel, 'From Mbube to Wimoweh: African Folk Music in Dual Systems of Law' (2010) 20 *Fordham Intellectual Property, Media and Entertainment Law Journal* 289; L McDonagh, 'Protecting traditional music under copyright (and choosing not to do enforce it)' in Bonadio and Lucchi (eds) (n 22). See also E Ostrom, *Governing the Commons* (New York: New York University Press, 1990).

<sup>159</sup> S Stern, 'Copyright, Originality and the Public Domain in Eighteenth-Century England' in R McGinnis (ed), *Originality and Intellectual Property in the French and English Enlightenment* (New York: Routledge, 2009) 69, 71. For commentary on the nature of the literary work see J Pila, 'The Literary Work within Copyright Law: An Analysis of its Present and Future Status' (1999) 13 *Intellectual Property Journal* 133.

of authorship – what Craig deems ‘relational authorship’ – prioritising the active input of multiple parties within the creative process.<sup>160</sup>

In theatre these issues are ever-present. Collaboration is a constant, evident in the 1550s, through the Romantic period, and up to our present day.<sup>161</sup> But the nature of this collaboration is not static – Elizabethan polyvocal theatricality is not the same as contemporary devised theatre. In relation to the changing nature of collaborative creativity in theatre Masten asks:

What does ‘composition’ include in such a context? (Re)writing? Copying? Staging? The addition of theatrical gestures? ... When is (the writing, staging, printing of) a text complete?<sup>162</sup>

The turn away from focusing on singular authorship finds particular resonance in theatre because what is protected by the law is a performative work – one that is often developed in collaboration between the playwright, director and performers. As such the idea of an individual author ‘genius’ – so pervasive in romantic history and reflected in copyright theory – is unsettled by the very practices of theatre. Despite this, when one considers the deification of Shakespeare, discussed in the previous chapter, or singular, iconic modern and post-modern figures such as Brecht, Beckett, Pinter, Nottage or Stoppard, it appears the cult of the theatrical author endures. Collaboration may be inherent to the medium, but collaborators are not always given recognition. Krause places the blame on the ‘institution of authorship’ – represented by publishing, literary scholarship and biography – for acting as ‘a real abstraction from the practices of production, which obliterates the role of the collaborators.’<sup>163</sup> Similarly, Smith states that journalists and critics often ‘seek to identify the (singular) “author” of a piece of theatre’ even where the actual creative practices suggest otherwise.<sup>164</sup>

However, it is not always the case that singular authorship is promoted within theatre practice. UK theatre finds remarkably varied ways to accommodate different forms of creativity. If legal and humanities scholars have attempted to deconstruct the author in the abstract, theatre participants have put such theories *into their practice*.<sup>165</sup> The development of ‘devised’ theatre from the 1970s onward encouraged actors to be creative, reflecting ‘a commitment to breaking the authority of directors and, in some instances, to challenging the authorial voice of the

<sup>160</sup> CJ Craig, ‘Reconstructing the Author Self: Some Feminist Lessons for Copyright Law’ (2007) 15 *American University Journal of Gender, Social Policy and the Law* 207 and Simone (n 2).

<sup>161</sup> J Cox and D Kastan (eds), *A New History of Early English Drama* (New York: Columbia University Press, 1997).

<sup>162</sup> Masten (n 6) 340.

<sup>163</sup> Krause (n 157) 216–17.

<sup>164</sup> M Smith, *Processes and Rhetorics of Writing in Contemporary British Devising: Frantic Assembly and Forced Entertainment* (PhD thesis, University of York, 2013) 49–50, see <http://etheses.whiterose.ac.uk/8379/1/Processes%20and%20Rhetorics%20of%20Writing%20in%20Contemporary%20British%20Devising%20-%20MARK%20SMITH.pdf>.

<sup>165</sup> E Govan, H Nicholson and K Normington, *Making a Performance: Devising Histories and Contemporary Practices* (London: Routledge, 2007) 16–19 and 30–36. Of importance in this regard was the removal of state censorship of UK theatrical productions via the Theatres Act 1968.

playwright'.<sup>166</sup> Oddey thus views devised theatre as a challenge to literary or text-based theatre which she argues is co-dominated, often in a patriarchal fashion, by the playwright and director.<sup>167</sup> In contrast, Heddon and Milling argue against such a binary perspective, noting that the rise of the creative actor in devised theatre has at times worked alongside the roles of director and writer, with all playing a role in the creativity.<sup>168</sup> Indeed, as I explore below, rather than a stark opposition between text-based theatre and devised theatre, there are in fact a lot of shared practices between the two.<sup>169</sup> In this vein, Heddon and Milling argue that 'devised performance lies on a continuum with script work'.<sup>170</sup>

Perhaps the most famous early UK example of a company founded to develop texts collaboratively is the Joint Stock Company which was formed in 1973 by Max Stafford-Clark, David Hare and David Aukin.<sup>171</sup> The central idea was to use collectivist working methods to create new plays. Joint Stock's resultant work with the writer Caryl Churchill during the 1970s-80s was profound and truly collaborative.<sup>172</sup> In more recent years, devising companies like Complicité,<sup>173</sup> Frantic Assembly<sup>174</sup> and Forced Entertainment<sup>175</sup> emphasise dialogic collaboration – rather than singular composition – in the way they work and their internal structures.<sup>176</sup>

These kinds of formal structures can have an impact on how the works get created; but, as I describe in detail later on, they can also have an impact on the key legal questions of ownership, credit-sharing and royalty-sharing. Heddon and Milling comment that the problem of 'how collaborations work in practice' and the complexity of managing division of labour tend to be 'recurring issues for

<sup>166</sup> *ibid.*, 16.

<sup>167</sup> A Oddey, *Devising Theatre: A Practical and Theoretical Handbook* (London: Routledge, 1994) 7–11.

<sup>168</sup> D Heddon and J Milling, *Devising Performance: A Critical History* (Basingstoke: Palgrave Macmillan, 2005) 7.

<sup>169</sup> *ibid.*, 34–36.

<sup>170</sup> *ibid.*, 36.

<sup>171</sup> R Ritchie, *The Joint Stock Book: The Making of a Theatre Collective* (London: Methuen, 1987) and T Shank, (ed), *Contemporary British Theatre* (Basingstoke: Palgrave Macmillan, 1996). In the context of Ireland/Northern Ireland see MJ Richtarik, *Acting Between the Lines: The Field Day Theatre Company and Irish Cultural Politics 1980–1984* (Oxford: Clarendon Press, 1994) and T. Eagleton, F. Jameson & E. Said, *Nationalism, Colonialism and Literature* (Minneapolis: University of Minnesota Press, 1990).

<sup>172</sup> C Churchill, *Cloud 9* (London: Methuen, 1984).

<sup>173</sup> H Freshwater, 'Physical Theatre: Complicity and the Question of Authority' in N Holdsworth and M Luckhurst (eds), *A Concise Companion to Contemporary British and Irish Drama* (Oxford: Blackwell, 2008) 171. See also 'Simon McBurney on Devised Theatre – it's absolutely petrifying' *The Telegraph* (3 August 2015) at [www.telegraph.co.uk/theatre/actors/simon-mcburney-on-devised-theatre-absolutely-petrifying/](http://www.telegraph.co.uk/theatre/actors/simon-mcburney-on-devised-theatre-absolutely-petrifying/); also [www.complicite.org/media/1439372000Complicite\\_Teachers\\_pack.pdf](http://www.complicite.org/media/1439372000Complicite_Teachers_pack.pdf) and [www.bl.uk/20th-century-literature/articles/theatre-de-complicite-and-storytelling](http://www.bl.uk/20th-century-literature/articles/theatre-de-complicite-and-storytelling).

<sup>174</sup> See [www.franticassembly.co.uk/about](http://www.franticassembly.co.uk/about); see also S Graham and S Hoggett, *The Frantic Assembly Book of Devising Theatre* (Abingdon: Routledge, 2009).

<sup>175</sup> See [www.forcedentertainment.com/](http://www.forcedentertainment.com/); see also H Freshwater, 'Delirium: In Rehearsal with theatre O' in A Mermikides and J Smart (eds), *Devising in Process* (Basingstoke: Palgrave Macmillan, 2010) 128 and A Frost and R Yarrow, *Improvisation in Drama*, 2nd edn (Basingstoke: Palgrave Macmillan, 2007).

<sup>176</sup> D Williams, 'Killing the Audience: Forced Entertainment's First Night' (2009) 54 *Australasian Drama Studies* 50. See also R Hornby, 'Forgetting the Text: Derrida and the "Liberation" of the Actor' (2002) 18 *New Theatre Quarterly* 355.

devising companies'.<sup>177</sup> Even in devising companies there will often be a 'constant' leader but also a 'tendency to work collaboratively within this hierarchical structure'.<sup>178</sup> For example, Sheffield-based company Forced Entertainment develops performances collaboratively – but artistic director Tim Etchells typically takes on the leadership role of director and writer.<sup>179</sup> Similarly, Simon McBurney is undoubtedly the lead figure in *Complicité*.

In order to examine the legal questions related to joint authorship, I must explore how the text of the script typically comes into being in theatre. This includes the issue of who contributes during workshops and rehearsals to the final version of the play; and the question of whether the law should take account of the unique aspects of theatre when disputes arise. I now turn to theatre studies and to my own empirical research in order to answer these questions.<sup>180</sup>

### Evaluating the Original Dramatic Work as Theatrical Text – 'Fully Formed' or 'Devised/Revised'?

In light of the earlier examination of the dramatic work and originality under copyright law, it is worth considering here what the original dramatic work actually *is* in the context of theatre play-texts. Here I trace the play-text from its origins through to its first performances. My focus is on copyright law and questions of authorship and ownership, so the dramatic work remains the key guiding concept. For present purposes the boundaries of the dramatic work can be said to include all aspects of the theatrical text as performed – not only the dialogue, but also non-literial elements such as detailed plot, characters and stage directions.<sup>181</sup>

Property law may be about boundaries and fixation, but in contemporary theatre is there such a thing as 'the original' version of a play?<sup>182</sup> The allographic nature of dramatic works means that inevitably a different type of 'composition' occurs than in the case of the individual scribe working alone, originating a literary text.<sup>183</sup> Indeed, there is a view that theatre writing – in order to be 'reflective of actual practice among many playwrights' – ought not to be viewed as singular at all, but as 'dialogic'.<sup>184</sup>

<sup>177</sup> Heddon and Milling (n 168) 38.

<sup>178</sup> *ibid.*, 213.

<sup>179</sup> *ibid.*, 213.

<sup>180</sup> McDonagh (n 5).

<sup>181</sup> *Sawkins v Hyperion* [2005] EWCA Civ 565; [2005] 1 WLR 3281. See also *Kogan v Martin* [2019] EWCA Civ 1645.

<sup>182</sup> Sherman (n 4).

<sup>183</sup> Smith (n 164), referring to 'Interview with Sarah Kane: 3 November 1998'. Department of Drama and Theatre: Royal Holloway University of London (2009), see [www.royalholloway.ac.uk/dramaandtheatre/research/researchgroups/contemporarybritishtheatreandpolitics/sarahkane.aspx](http://www.royalholloway.ac.uk/dramaandtheatre/research/researchgroups/contemporarybritishtheatreandpolitics/sarahkane.aspx).

<sup>184</sup> Smith (n 164) 49–50. G Rabkin, 'Is There a Text on This Stage? Theatre/Authorship/Interpretation' (1985) 9 *Performing Arts Journal* 142. See generally N Grene, and C Morash (eds), *The Oxford Handbook of Modern Irish Theatre* (Oxford: Oxford University Press, 2016).

From the available literature and my empirical interviews, it is clear there are, broadly, two principal ways by which new plays get created: the first, involves a playwright providing a relatively *fully-formed* text; whereas the second involves some element of the *devising* of a text through the workshop process or at least the major *revising* of a partially-formed text.<sup>185</sup>

With respect to the first method – whereby the play arrives to the theatre as an already fully-formed text – this is most common at established theatres, eg with commissioned work at The National Theatre. Here the model is more akin to the individual scribe working alone. Such a play may simply need a period of rehearsals before performance. The director Nicholas Hytner, speaking in the late 1990s, commented:

I believe that Pinter just delivers a finished play with every comma in place, and I know for instance that in Kazan's autobiography he says quite unequivocally that the best plays he directed were those that arrived on his desk requiring little or no work: *Death of Salesman* and *Streetcar*. It may be that works as singularly revolutionary as *Death of a Salesman* and *Streetcar* do just arrive; but it's different every time. The play I did a year or so ago, *The Cripple of Inishmaan* by Martin McDonagh, was just that: it required nothing, a few little cuts, that was it.<sup>186</sup>

Thus, in the cases of Arthur Miller, Samuel Beckett or Martin McDonagh the question of joint authorship seems a moot one – singular authorship is the reality. Nonetheless, these are somewhat atypical cases within the diverse UK theatre realm. More common is the second way of creating a play-text, that which occurs at least in part either via conceptual devising or by 'workshopping' and revising the text.<sup>187</sup> This method is most common at smaller, medium-sized and fringe theatres (where the majority of new works are first staged). Devising typically takes place via the collective process of building up a play from scratch. Collective improvisation and radical experiments may provoke inspiration, but at some point a structure will need to be imposed on the process, typically by the 'leader' eg Tim Etchells or Simon McBurney, who will begin to put any creative fragments that have emerged into some form of partial text.<sup>188</sup>

If the writer provides a partial text at the beginning of the process, then it will be 'workshopped' and revised over several weeks (or more) in order to finalise it.

<sup>185</sup> See, eg S Sigal, 'Monstrous Regiment: The Gendered Politics of Collaboration, Writing, and Authorship in the UK from the 1970s Onwards' in K Syssoyeva and S Proudfit (eds), *Women, Collective Creation, and Devised Performance* (New York: Palgrave Macmillan, 2016) 177 and D Williams (ed), *Collaborative Theatre: The Théâtre du Soleil Sourcebook* (London: Routledge, 1999).

<sup>186</sup> Wu (ed) (n 1) 103–4.

<sup>187</sup> Oddey (n 167); A Mermikides, 'Brilliant Theatre-making at the National: Devising, Collective Creation and the Director's Brand' (2013) 33 *Studies in Theatre & Performance* 153; and G McAuley, *Not Magic But Work: An Ethnographic Account of a Rehearsal Process* (Manchester: Manchester University Press, 2012).

<sup>188</sup> A Mermikides, 'Forced Entertainment – The Travels (2002): the Anti-Theatrical Director' in J Harvie and A Lavender (eds), *Making Contemporary Theatre: International Rehearsal Processes* (Manchester: Manchester University Press, 2010) 101.

In either situation, there will be a collaborative, performative process, with the writer, director and actors all present (though not always at the same times).<sup>189</sup>

A play may begin its life, as in *Brighton v Jones*, as an outline scenario, for example, featuring two characters at a specific location, with a few lines of dialogue.<sup>190</sup> In that specific case, one party (the director) started off the process of creating the play *Stones in His Pockets* by writing an outline, which was then fleshed out by another party (the playwright) into a rough draft of the script. That partially-formed script was then probed and performed by the director and actors during several weeks of a workshop process, whereby several key edits and changes were made (with the input of all parties: writer, director, actors). The case demonstrates that even a play that begins its workshop process with a partially-formed script often undergoes major revisions, before materialising as a complete, performative work.

For this reason, the 20 interviewees were broadly in agreement that workshops are usually a necessity to get to a final text. One actor emphasised that the workshop is a 'collective process that goes beyond merely rehearsing a text' whereby the writer, director and actors, and potentially other creative parties such as dramaturges, build up the scenes, characters and dialogue of a play.<sup>191</sup> Another writer told me that 'workshopping the text' is important for allowing everybody 'to see what works and what doesn't'.<sup>192</sup>

In this vein, the legal scholar Susan Keller remarks that a workshop offers 'opportunities to work through the play's problems'.<sup>193</sup> Similarly, in an interview with Duncan Wu, the director Nicholas Hytner stated that in his experience the writer will provide a text in some form, but it will usually be in need of edits, cuts and additions, which he is happy to suggest.<sup>194</sup>

It is clear, therefore, that in the case of devised/revised theatre the text is in an 'unsettled' state during the workshop process. In fact, due to his experiences of workshops, one writer expressed to me his scepticism that there can ever be such a thing as a truly original 'ur-text' in theatre; he emphasised that it is common for theatrical works to pass through many 'filters' before they emerge on stage (or in published text, which generally follows the first staging of the play).<sup>195</sup> The writer Alan Bennett and the director Nicholas Hytner are on record as saying that the workshop process was crucial to their rewriting and reworking of the text of *The Madness of George III* – with Bennett noting:

Well, there's a photograph of the table in the rehearsal room with all the rewrites hung up, and it looks like a load of laundry hanging up to dry, all these sheets that the

<sup>189</sup> See generally KM Syssoyeva and S Proudfit (eds), *Collective Creation in Contemporary Performance* (New York: Palgrave Macmillan, 2013).

<sup>190</sup> *Brighton & Dubbeljoint v Jones* [2004] EWHC 1157 (Ch).

<sup>191</sup> Anon 8.

<sup>192</sup> Anon 3.

<sup>193</sup> S Keller, 'Collaboration in Theater: Problems and Copyright Solutions' (1986) 33 *UCLA Law Review* 891, 908–9.

<sup>194</sup> Wu (n 1) 106.

<sup>195</sup> Anon 2.

poor actors had to take away every day and learn. There was so much rewriting to be done.<sup>196</sup>

In an interview with Duncan Wu, the director Max-Stafford Clark stated that he found workshops essential to the work of Joint Stock during the 1970s–80s. Yet, he notes that the directors of the older generation, such as William Gaskill, came from an older tradition at the Royal Court whereby you ‘rehearsed the script as it was written or you didn’t do it at all’. For Stafford-Clark, however, a script was ‘a starting-point’ – whereas he stated that for the older generation ‘it was a kind of inspirational Holy Grail’.<sup>197</sup>

In more recent decades, a younger generation of theatre-makers has embraced the workshop and the practices of devised theatre. Turner posits the workshop as a demiurgic model for theatrical authorship processes, with collaborators viewing a text as ‘something to glance off’ rather than as a refined singular work.<sup>198</sup> Successful examples of collaborative devising include the many acclaimed theatrical works produced by Forced Entertainment and Complicité<sup>199</sup> or the 2014 play *Blurred Lines* created by writer Nick Payne and the director Carrie Cracknell, performed at The National Theatre.<sup>200</sup>

From a copyright perspective, the fact the play as text may exist in several distinct versions at different times adds complexities. The *Kogan* case suggests that where the purported joint authors have started the project together, the drafts could be considered together as a single, cumulative dramatic work – as opposed to ‘salami-slicing’ the work in to a set of separate adapted (or derivative) works.<sup>201</sup> On the other hand, *Brighton* and *Fisher* suggest that a work started by one party may end up being considered as separate from its later jointly authored adaptation or arrangement.<sup>202</sup> In any event, in order to consider the question of who owns the copyright in the dramatic work(s), it is necessary to evaluate all of the possible authorial contributions.

## Joint Authorship: How Do Dramatic Works Get Created Via the Workshop Process?

As noted earlier, in the case of a playwright who delivers a fully-formed script, any workshop process may be very brief, or may not happen at all – the play may

<sup>196</sup> *ibid*, 82 (Bennett) and 106 (Hytner).

<sup>197</sup> *ibid*, 57.

<sup>198</sup> C Turner, ‘Something to glance off: Writing Space’ (2009) 2 *Journal of Writing in Creative Practice* 217; C Turner ‘Writing for the contemporary theatre: towards a radically inclusive dramaturgy’ (2010) 30 *Studies in Theatre and Performance* 75.

<sup>199</sup> One personal favourite is Complicité’s *The Encounter* (2016), available at [www.complicite.org/productions/theencounter](http://www.complicite.org/productions/theencounter).

<sup>200</sup> See <https://www.curtisbrown.co.uk/client/nick-payne/work/blurred-lines>.

<sup>201</sup> Simone (n 24) 877.

<sup>202</sup> McDonagh (n 23).

just go through a rehearsal process where little is edited or added before staging. The playwright would clearly be the author and owner of that dramatic work. It is therefore in the case of the second type of work – what I broadly define as the devised/revised text – that workshops become crucial and questions of joint authorship arise.<sup>203</sup>

From my interviews and from theatrical scholarship, it is clear the devising/ revising processes of the workshop are quite varied (and to some extent depend on whether the starting point is a theatrical concept or an actual draft text).<sup>204</sup> During a workshop a writer or director may suggest a generalised situation or an emotional scenario to be acted out and improvised, for example, ‘an angry man seeking revenge’; a director may suggest, or even dictate, changes to characters or entire lines of dialogue; or actors may be encouraged to improvise dialogue eg ‘to play with the characters’ as one actor put it to me.<sup>205</sup> The writer will seek to embody any new characters or dialogue additions in the writing up of new versions of the script. The play as eventually performed may end up differing substantially from the original concept (and from the initial or partial script).<sup>206</sup> Thus, there may be several parties making *original contributions* to the play sufficient to create a joint authorship interest.

For example, one actor told me during an interview that in one recent play she had enjoyed the ‘free-form’ workshop improvisation that had led her to come up with several lines of dialogue for her character; she noted that the writer had then ‘gone away’ to do some further writing, using the actor’s familiar ‘speech patterns’ to write the majority of the remainder of her character’s dialogue.<sup>207</sup>

David Edgar has related how scene 6 of his play *Pentecost* – directed by Michael Attenborough – was devised almost from scratch, with the actors adding a ‘tremendous amount’ through ‘improvisations’:<sup>208</sup>

It was a process of character-creation in which I was using the actors’ perceptions in order to build characters in collaboration with those actors.<sup>209</sup>

Michael Attenborough has confirmed that the workshop transformed the play from its initial text:

When we started rehearsals there was a whole scene yet to be written ... The text was so mutable at that point that it would have been impossible to try and get a printed text out for the first performance.<sup>210</sup>

<sup>203</sup> There are of course many different forms of devising – I use the term broadly here to encompass not only devising from scratch but also undertaking major revisions of a draft text – for a thorough overview see D Radosavljević, *Theatre-Making: Interplay Between Text and Performance in the 21st Century* (Basingstoke: Palgrave Macmillan, 2013).

<sup>204</sup> A Dickson, ‘The drama factory: how theatre scripts reach the stage’ *The Guardian* (16 Dec 2009), see [www.theguardian.com/stage/2009/dec/16/new-writing-theatre-slush-pile](http://www.theguardian.com/stage/2009/dec/16/new-writing-theatre-slush-pile).

<sup>205</sup> Anon 7.

<sup>206</sup> C Wilkinson, ‘Noises off: Must directors stick to the script?’ *The Guardian* (23 Aug 2008), see [www.theguardian.com/stage/theatreblog/2008/aug/23/noisesoffmustdirectorssticktothescript](http://www.theguardian.com/stage/theatreblog/2008/aug/23/noisesoffmustdirectorssticktothescript).

<sup>207</sup> Anon 7. See also Freshwater (n 1) 173.

<sup>208</sup> Wu (n 1) 138.

<sup>209</sup> *ibid*, 143.

<sup>210</sup> *ibid*, 148.

Workshops tend to involve short scenes of improvisation involving manipulating clichés and making leaps, starting out with scenarios going from eg A to B, and then, more drastically, from eg A to K – these are processes which are very useful for developing some texts, but less so with others.<sup>211</sup> On this, the playwright Howard Brenton has remarked:

You could never workshop a Pinter play because he goes from A to K all the time. It would just collapse; you couldn't do it.<sup>212</sup>

As noted earlier, such fully-formed texts will not go through the workshop process; they will just be rehearsed and staged. David Hare is best known as a playwright but he has also directed several plays, including *Heartbreak House*, written by George Bernard Shaw. In an interview with Duncan Wu, Hare emphasised that Shaw's is a text that must be performed as written:

... Shaw is very specific ... everything's in a puppet-theatre in his mind, and that if you don't crudely obey his instructions, which are very, very detailed, about the physical layout, you get yourself into terrible trouble ... So there's freedom but there's only freedom if you accept his rules. I don't know another writer so resistant to directorial adaptation.<sup>213</sup>

The same is true of Beckett, another precise playwright prone to working from a highly specified and authored text.<sup>214</sup> By contrast, Brecht (working largely in Germany) made comprehensive use of the workshop process to devise a final text.<sup>215</sup> Indeed, Brecht's workshops can be described as 'an extreme case of sustained collective production'.<sup>216</sup> Shared practices included the collection of material, the translation of original sources, the organisation of rehearsals, and the making of text edits.<sup>217</sup> The playwright Howard Brenton has commented that Brecht appropriated original contributions made by his collaborators:

Brecht used to write with a big long table, and often in the rehearsal room. There'd be new stuff on the table in the morning. Indeed, anyone who had a bright idea would find their bright idea in the text before they knew it. There was a hoovering sort of method about the way Brecht thought, and he always wanted it to be collective – though of course he always dominated it.<sup>218</sup>

One key Brecht collaborator was Elizabeth Hauptmann, who made important contributions to several key works including *Man Equals Man* and *Saint Joan of the Stockyards*.<sup>219</sup> Hauptmann worked intensely with Brecht, taking up his ideas

<sup>211</sup> *ibid.*, 44.

<sup>212</sup> *ibid.*, 44.

<sup>213</sup> *ibid.*, 192.

<sup>214</sup> J Fletcher, *Beckett – The Playwright and his Work*, 2nd edn (London: Faber & Faber, 2006).

<sup>215</sup> Krause (n 157).

<sup>216</sup> *ibid.*

<sup>217</sup> *ibid.*, 220. Key parties in Brecht's circle were the composers Hanns Eisler and Kurt Weill, the writers Hermann Borchart, Emil Hesse-Burri, and Hella Wuolijoki, and the directors Bernard Reich and Slatan Dudow.

<sup>218</sup> Wu (n 1) 44.

<sup>219</sup> P Hanssen, *Elizabeth Hauptmann: Brecht's Silent Collaborator* (New York: Peter Lang, 1995).

and working them through dramaturgically.<sup>220</sup> The work *Man Equals Man* existed only as a very rough sketch until Hauptmann came into the process. It was she who offered the solution to the plot's key problem: the motivation for the main character's involvement with three soldiers, which ended up centring on a discussion between the characters concerning an elephant.<sup>221</sup> Similarly, for the works *Saint Joan of the Stockyards* and *Happy End* several key story elements and characters originated with Hauptmann.<sup>222</sup> Knopf states:

One can conclude from the material that Emil Hesse-Burri and Elisabeth Hauptmann did most of the initial work, including the writing and they provided the structure of the fable; Brecht's work consisted mostly in checking the proposals, editing the texts and expanding them.<sup>223</sup>

Indeed, from my interviews, and from theatre scholarship, it is clear that the creative participants involved (writers, directors and actors) realise not only that collaboration occurs during the workshop, but that different collaborators contribute in original and profound ways to the final text, often altering it significantly.<sup>224</sup> Yet, such contributions often go unrecognised. Later on, I discuss the issues of credit and ownership in detail. For now, it is sufficient to note that many of these examples of collaborative authorship appear to meet the test for joint authorship outlined above – the contributions are likely to be considered sufficiently original; not distinct but essential to the final work; and aimed towards a common design as part of a collaboration. Before focusing on the legal issues arising from these processes, it is necessary to analyse what the typical contributions made by the writer, director and actors are in practice.

## The Role of the Writer

Despite the multifaceted nature of collaboration – or perhaps, because of it – in my interviews I encountered universal respect from all parties for the role of the writer in 'shaping the play'. Moreover, writers tend to feel a sense of duty towards the text from the very beginning of the process. One playwright told me in an interview that during workshops even though he is open to suggestions, he nevertheless feels a need to 'protect' the script to ensure the intended meaning is not lost.<sup>225</sup> The need to do this can be heightened as the process goes on. Another playwright told me that he felt his power to influence the text was strong at the beginning and middle of the process, but was comparatively 'weak' by the end of

<sup>220</sup> *ibid.*, 19.

<sup>221</sup> *ibid.*, 21–22.

<sup>222</sup> *ibid.*, 50–58.

<sup>223</sup> Krause (n 157) 222.

<sup>224</sup> A Field, 'All theatre is devised and text-based' *The Guardian* (21 April 2009), see [www.theguardian.com/stage/theatreblog/2009/apr/21/theatre-devised-text-based](http://www.theguardian.com/stage/theatreblog/2009/apr/21/theatre-devised-text-based).

<sup>225</sup> Anon 1.

the workshop; that he started out 'as the important figure' but by the end he felt the director had 'taken over' – something he ultimately felt was necessary to the final task of getting the play into a workable form for staging.<sup>226</sup>

The director Max Stafford-Clark drew on insights from his experiences working with the playwrights Howard Brenton, David Hare and Caryl Churchill as part of Joint Stock, opining:<sup>227</sup>

What I'm saying is that respect for the writer, handing the material back to the writer, and the kind of acceptance that the writer is the senior collaborator, is very much a part of Joint Stock's success ...<sup>228</sup>

Commenting on this, the playwright Howard Brenton has stated that although several important changes were made to the scripts during workshops with Stafford-Clark for the plays *Bloody Poetry* and *Epsom Downs*,<sup>229</sup> he nonetheless stated that in each case 'I always felt it was my play'.<sup>230</sup>

Likewise, there can be boundaries directors will not cross – the director Michael Attenborough has emphasised that in a workshop he would not add a line to the play without the writer's consent; but he would make suggestions, sometimes even being 'utterly perverse with the text'.<sup>231</sup>

The director Michael Blakemore, commenting on his experiences of workshops with the writer Michael Frayn, has stated that on the final text he would always defer to Frayn as writer:

But he also knows that if he says, 'No I don't like that', there's a point beyond which I won't argue: he wrote the play and I *must* accept his authority.<sup>232</sup>

In devised theatre, the role of the writer may also be played by a leader figure who is not viewed primarily as a playwright as such. Mermikides relates that Tim Etchells does this job in *Forced Entertainment*, commenting that:

... the work as a whole is composite and fragmented. However, once Etchells begins to craft this material into a script, once dramaturgical and aesthetic criteria are applied, then we might ask whether this constitutes the imposition of individual authorship [...] After all, the act of writing is the quintessential expression of authorship: a solitary creative act that commits to paper.<sup>233</sup>

<sup>226</sup> Anon 3.

<sup>227</sup> Smith (n 164) 44 and 58, arguing that it is necessary to weigh up critically the grander polemical claims for the egalitarian structure of the company in light of the power-struggle dynamic. This becomes even more crucial in the context of the 'MeToo' scandal that forced Stafford-Clark to depart his most recent theatrical role – *A Topping*, 'Theatre director Max Stafford-Clark was ousted over inappropriate behaviour' *The Guardian* (20 October 2017) at [www.theguardian.com/stage/2017/oct/20/theatre-director-max-stafford-clark-was-ousted-over-inappropriate-behaviour](http://www.theguardian.com/stage/2017/oct/20/theatre-director-max-stafford-clark-was-ousted-over-inappropriate-behaviour).

<sup>228</sup> Wu (n 1) 57–58.

<sup>229</sup> *Ibid.*, 32.

<sup>230</sup> *Ibid.*, 46.

<sup>231</sup> *Ibid.*, 154.

<sup>232</sup> *Ibid.*, 234.

<sup>233</sup> Mermikides (n 188) 115.

## The Role of the Director

Respect for the director's influence came across strongly in my interviews. Several interviewees stated that in theatre workshops the director is the 'editor' of the text, but there was acknowledgement that the director's role can go beyond mere edits.<sup>234</sup> This view seems widely held within theatre circles. For instance, the playwright Tom Stoppard has acknowledged the importance of the contributions to his plays by his long-time collaborator, the director Peter Wood, in terms of original development and staging.<sup>235</sup> The writer Alan Bennett has remarked that for the play *Habeas Corpus* the director Ronald Eyre was essential to the play's completion – Eyre's task was to work at 'slimming the text down, seeing what one didn't need'.<sup>236</sup> In a similar vein, with respect to his work with the playwright Michael Frayn, the director Michael Blakemore has asserted:

I've had quite a big editorial contribution. That was true of *Noises Off*.<sup>237</sup>

More generally, the director Charles Marowitz opines that directorial conception 'adds an entirely new dimension to a dramatist's work'.<sup>238</sup> In relation to the text, Wu argues the director is 'helping to bring it to completion, as he takes practical control of it, mediating it to those involved in its production'.<sup>239</sup> For this reason Wu opines that a director who contributes to a dramatic work in this way during a workshop becomes more than an editor and is 'very nearly a co-author'.<sup>240</sup> Three of the interview participants I spoke with who had worked as directors referred to a sense of co-creation or co-authorship in achieving the final staged work.<sup>241</sup>

A highly specific contribution may create a particularly heightened sense of joint authorship. On this, the director Michael Attenborough has spoken of the significant contributions he has made to plays, including major alterations to characters.<sup>242</sup> The same is true of the director Richard Eyre, who has commented that in the process of the text's evolution, he sometimes has to make important cuts.<sup>243</sup> In fact, Eyre did exactly this when working with the playwright David Hare, stating:

Actually, the first thing that I did at the end was cut the last line.<sup>244</sup>

<sup>234</sup> Anon 1–6, 15, and 20.

<sup>235</sup> ED Lyman, 'The Page Refigured' (2002) 7 *Performance Research* 90, 100. See also 'Peter Wood: Obituary' *The Guardian* (18 Feb 2016) at [www.theguardian.com/stage/2016/feb/18/peter-wood-obituary](http://www.theguardian.com/stage/2016/feb/18/peter-wood-obituary).

<sup>236</sup> Wu (n 1) 80.

<sup>237</sup> *ibid.*, 234.

<sup>238</sup> Marowitz (n 31).

<sup>239</sup> *ibid.*, 9 and 86.

<sup>240</sup> Wu (n 1) 205.

<sup>241</sup> Anon 9–11.

<sup>242</sup> *ibid.*, 149.

<sup>243</sup> *ibid.*, 181 and 202.

<sup>244</sup> *ibid.*, 203.

Summing up the unsung status of the director's contributions, the writer Michael Frayn has commented on the director Michael Blakemore:

If you want to make your reputation as a director, you need to direct the classics, because if you direct a play everyone has seen before, everyone can see what you've done. If there's a production of *Hamlet* and everyone's going around on roller-skates, they know that's the director's idea ... So the director gets the credit or the blame for this idea. If you do a new play, no one has the faintest idea what was the director's idea and what was the writer's idea, or what the actors suggested in the rehearsal room ... But what a good director does with a new play (and what Michael's always done with me) is to work with the writer first of all, both to get the text right and to make sure he's understood the play – which is quite difficult with a new text, it's not at all obvious. With *Noises Off*, for instance, Michael persuaded me to rewrite great slabs of the play, because they were not clear. He also put forward a lot of ideas of his own which I incorporated into the play, but he doesn't get the best director prizes because no one can see the work that's gone on.<sup>245</sup>

Stage directions are another specific addition that directors often make to a text. Alan Bennett remarked that Ronald Eyre's stage directions for *Habeas Corpus* were essential to its success, so much so that 'it can only be staged in the way he staged it; there isn't enough dialogue to do it any other way'.<sup>246</sup>

The distinction between the play-text and a director's staging flourish can be observed from this description by Duncan Wu of a performance of *The Secret Rapture*, written by David Hare and directed by Howard Davies, at the National Theatre in 1987:

With the female protagonist (Isobel) dead, her sister Marion stood in the garden of Isobel's country house, and spoke the final line of the play: 'Isobel, where are you? Isobel, why don't you come home?'. The published text ended there. But Davies had an audacious touch up his sleeve. At that moment, the actress who had played Isobel appeared at the back of the stage, very dimly seen, behind layer upon layer of stage gauze. The 'ghost' was barely present, barely perceptible, and, almost before it had registered on the mind's eye, the curtain descended. The image resonates whenever I recall that production.<sup>247</sup>

We know from *Sawkins* that stage directions can be protected as part of the dramatic work – but the question of who exactly would own such directions has never come to court in the UK. I reflect further on this ownership question later on.

## The Role of the Actors (Performers)

Actors can influence the final performative text in significant ways. I have already referred to one of my interviewees – an actor – who contributed several lines for

<sup>245</sup> *ibid*, 225–26.

<sup>246</sup> *ibid*, 80.

<sup>247</sup> *ibid*, 3.

her character via improvisation during the workshop that ended up in the final version of the text.<sup>248</sup> It is also the case that actors can suggest cuts – Alan Bennett has stated that the actor Nigel Hawthorne insisted on the removal of a key scene at the end of the play, *The Madness of George III*, where the King takes off his crown and discusses his illness with the Queen.<sup>249</sup>

There is also the addition of new material improvised by actors. The director Michael Attenborough, concerning the improvisation by actors (with the writer David Edgar) that led to Scene 6 of *Pentecost* being created, has commented:

Basically, what they improvised was storytelling, and means of communication. We were just waiting for that moment when David would say ‘Okay, I’ve got enough in my head. Now I’ll go away and write the scene.’ Of course, one of the difficult things about this (and you have to break it to the actors) is that what comes back is not their scene. They think they have created it – and of course they feel proprietorial to a degree – but what they did was *enable* David to write it, and it is *his* scene. And there was, to a degree, an element of ‘But when we improvised we did this, this and this’; and he had to say, ‘Yes you did, but that isn’t how I’ve written it; I’ve written it differently.’<sup>250</sup>

For Scene 6 of *Pentecost*, even if Edgar had ‘written it differently’ the original contributions of the actors could still be visible in the text, and thus form part of the final work. After all, in *Brighton v Jones*, the director Pamela Brighton’s outline scenario was still visible in the final work, and as such her copyright interest in that early scene was protected. So the question of ownership is not as straightforward as claimed by Attenborough here.

## The Final ‘Transcendent’ Work

In light of the above it is possible to argue – per Pierre Bourdieu – that creativity in the theatrical context is a social practice involving power struggles between the various agents active in the field of theatre, such as playwrights, directors and actors.<sup>251</sup> Resolving such power struggles successfully is crucial to the creative process of theatre. Where the workshop process fails, and the collaboration breaks down, the work may fail to materialise. Conversely, from the interviews I conducted it is clear that when the process works it is because there is mutual respect from all parties for each other’s roles. As one director said to me, the writer is ‘in charge’ of the text; the director is ‘in charge’ of the staging; and the actors must be given the ‘freedom to inhabit the roles’, which may require improvisation.<sup>252</sup>

<sup>248</sup> Anon 7.

<sup>249</sup> *ibid.*, 85.

<sup>250</sup> *ibid.*, 154.

<sup>251</sup> P Bourdieu, *The State Nobility: Elite Schools in the Fields of Power* (Stanford CA: Stanford University Press, 1996), 264–74. See also generally P Bourdieu, *The Logic of Practice* (Stanford CA: Stanford University Press, 1990).

<sup>252</sup> Anon 10.

When it succeeds, the eventual work transcends the workshop 'struggle', becoming a true 'amalgam of all these elements'.<sup>253</sup> Thus, the director Michael Attenborough has remarked:

In the end, something happens on stage which transcends that; something like a spirit rises out of the theatrical event which just sweeps everybody along ... If you can't collaborate, making those practical decisions, I don't think you get to the higher plane, you don't get to that subsequent transcendent stage.<sup>254</sup>

Given the profound nature of this collaboration, and the examples described above of specific contributions made by the writer, director and actors to the text, it is now necessary to unpack the legal relationship between all parties to the eventual dramatic work, including joint authorship, credit and ownership.

## Is the 'Workshopped' Play a Work of Joint Authorship?

The collaborative model of creativity at work in theatre devising/revising via workshops – featuring an unsettled text and multiple creative contributors, as evidenced by the above examples – does not lend itself easily to the traditional way copyright recognises authorship or joint authorship.<sup>255</sup> As Smith states, the attribution of authorship is complicated here by the 'multiple collaborations' at the centre of these creative processes.<sup>256</sup>

With respect to the law, copyright lawyers tend to merely ask: who wrote the play? In a case of disputed authorship, a court will usually ascribe economic and moral rights in the dramatic work to the playwright only. The unsettled nature of the text during workshops, as well as the multifaceted nature of the collaboration, creates a situation where it is difficult for the court to distinguish between, for example, the competing claims of the writer and director. In such a dispute, the court tends to hold in favour of the status quo, that the writer should own the dramatic work, as occurred in *Brighton v Jones*.

Nevertheless, a careful application of copyright doctrine may well identify many more co-authors than are typically acknowledged. Multiple parties may have contributed significant, fixed, original expressions to the dramatic work as it evolved. In the UK, Ireland and other common law territories, cases such

<sup>253</sup> Wu (n 1) 233.

<sup>254</sup> *Ibid*, 151–52.

<sup>255</sup> On the point of attribution, an issue I explore in more detail in ch 5, it is important to note that in the theatre world everybody tends to get some form of credit, from the writer and director to the actors and production staff, in the programme. Often, when a new play is published, the original cast of actors will be named at the beginning of the text – all the actors I interviewed found this gesture on the part of the writer to be very favourable as a means of recognition. See a number of examples of the original cast or actors being credited in S Beckett, *The Complete Dramatic Works* (New York: Faber and Faber, 2006).

<sup>256</sup> Smith (n 164) 49–50.

as *Kogan v Martin* and *Fisher v Brooker* offer hope.<sup>257</sup> UK courts can recognise significant original contributions and joint labouring towards a common design, and thus correctly attribute copyright to multiple collaborators in the workshop context. Conversely, this acknowledgment also reveals how the US/Canadian *Childress/Neudorf* requirement of shared intent can sustain the status quo – such contributors are viewed within a non-authorial prism and the law effectively keeps them there. This reveals the extent to which the established expectations of copyright jurists can hold a powerful sway over the practical ordering of the creative relationships.

There may be other factors at play that make it difficult to reward collaborators. Krause argues the institutional requirements of authorship – specifically, the intention to create an attractive singular marketable ‘brand’ – have meant that in the case of the Brecht-Hauptmann collaborations ‘everything work-related became labelled as “Brecht”’ while Hauptmann became ‘invisible’ as a writer.<sup>258</sup> As Krause laments, the impact of this can be seen as both symbolic and material:

The collaborators are alienated from themselves and each other, from their texts and the material and symbolic recognition for those texts. Authorship comes to stand between them and between Brecht and them. Hauptmann sometimes received credit as a translator – she received 12.5 per cent of proceeds from *The Threepenny Opera*. Her name appears as a co-author on several of the plays ... Most of the time, though, once a piece was published under Brecht’s name – even as the result of a consensual strategy – the royalties would automatically go to Brecht’s account.<sup>259</sup>

Thus, by giving one of the agents in the field – the author-playwright – a kind of economic capital in the form of the copyright, the law empowers writers, potentially at the expense of other collaborators.<sup>260</sup> Historically, the courts have tended to enforce the ‘author function’ in a singular form. Yet, as noted earlier, there has been a welcome shift towards taking a contextual view of creativity in recent UK case law on joint authorship.<sup>261</sup>

Out of 20 interviewees, six participants I spoke to shared experiences involving acting or directing where they ended up feeling aggrieved at a lack of recognition for their contributions to the dramatic work; in these cases they considered that due to contributions they made during the collective creation of the play they deserved a share of the copyright via credit (attribution) and/or via proportionate revenue-sharing (ownership).<sup>262</sup>

<sup>257</sup> *Kogan v Martin* (n 24) and *Fisher v Brooker* (n 131).

<sup>258</sup> Krause (n 157) 11–12.

<sup>259</sup> *ibid.*, 14.

<sup>260</sup> See generally, K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019).

<sup>261</sup> *Kogan v Martin* (n 24). Craig and Kerr (n 125). See also MT Sundara Rajan, ‘Moral rights: the future of copyright law?’ (2019) 14 *Journal of Intellectual Property Law & Practice* 257.

<sup>262</sup> Anon 7, 10–11, 13–14, 16.

As in *Brighton v Jones*, proving such cases in court can be difficult.<sup>263</sup> Only four of the 20 interviewees had heard of the legal dispute over *Stones in his Pockets*, and overall, their understanding of copyright law tended to be scattered at best. Furthermore, none of the six aggrieved participants had seriously considered taking legal proceedings against the author-playwright. The reasons given for this included the purported costs of engaging in legal action, as well as the common concern that it would be a 'waste of creative energy', as one director put it.<sup>264</sup> There may also be reputational harm caused within the community from having breached informal norms, which form an important part of how the theatrical community regulates itself.<sup>265</sup>

Indeed, the issue of joint authorship of plays during the early stages of the play's life very rarely results in a court case in the UK. Nonetheless, there have been high profile disputes in recent years, especially in the case of *Tree* in 2019.<sup>266</sup> Notably in that dispute, despite having a plausible argument that they were joint authors of early drafts of the dramatic work, the two purported joint authors decided not to pursue legal action, citing the financial cost involved; instead, they made their complaint in the media.<sup>267</sup> This reluctance to take legal action, even when possessing a relatively strong case, chimes with the experiences of the interviewees I spoke with.

The actor/dramaturge I interviewed stated very clearly that if a lot of improvisation has gone on via the workshop process, then 'credit should be given'. This potentially includes 'a share of ownership' and related revenues being provided to the person who made the contribution. When I asked her if she could quantify when such a contribution would reach the point where shared ownership would become justifiable, she replied by stating that it was a difficult question to answer in the abstract, but that it would have to be 'more than adding a few lines'.<sup>268</sup>

The director Michael Blakemore has spoken of not being credited for his contributions to plays, noting that that 'moments of invention that I'm particularly proud of have been credited to the authors'.<sup>269</sup> Blakemore stated that, despite tensions arising, he came to terms with the writer's pre-eminence as part of the theatrical bargain:

There is a certain antagonism, I think, between writers and directors, built into the job, because the director *has* to accept that the play is, as it were, the first cause. There would be no production without it, and his artistic vision is at the service of someone else's ... I had a successful collaboration with Peter Nichols earlier in my career, but it really did

<sup>263</sup> *Brighton v Jones* (n 20).

<sup>264</sup> Anon 11.

<sup>265</sup> Anon 7 and 11.

<sup>266</sup> M Brown, 'Writers claim being excluded after creating Idris Elba play' *The Guardian* (July 2019), see [www.theguardian.com/culture/2019/jul/02/writers-claim-being-excluded-after-creating-idris-elba-play](http://www.theguardian.com/culture/2019/jul/02/writers-claim-being-excluded-after-creating-idris-elba-play).

<sup>267</sup> Henley and Allen-Martin (n 127).

<sup>268</sup> Anon 14.

<sup>269</sup> Wu (n 1) 233.

break down after about three shows ... Peter was a little bit resentful of the contribution that I made, and I suppose I was resentful because he wasn't quite acknowledging that contribution ... The human mind is extraordinarily proprietorial and protective of the things it invents, the things that it adds to the universe.<sup>270</sup>

One interesting aspect of this comment is that despite a feeling of 'antagonism' Blakemore accepted that a lack of authorial recognition for directors is 'built into' the community architecture of theatre; he did not express a desire to alter this structure. Yet, others are not so sanguine. In our conversations the six interviewees who had gone through a negative experience regarding a lack of credit and ownership indicated a hope that the community structure would become more accepting of their contributions.

## The Importance of Contracts

All the interviewees I spoke with acknowledged that it would be preferable to specify at the beginning of the creative process what the credit and ownership rights situation will be at the end of the project. Yet, they universally agreed that this did not always happen.<sup>271</sup> This not surprising – the focus when starting a new project is, inevitably, on getting the artistic part of the collaboration up and running, rather than dealing with contractual practicalities.

Nonetheless, a failure to agree credit and rights issues beforehand can have important consequences. In the (admittedly rare) case that the devised/revised play starts to generate a lot of revenue, multiple claims could arise. This occurred in *Brighton v Jones*, a case which arose largely because the relevant work – a revised 'workshopped play' – had, unexpectedly, become a big hit, with productions on Broadway and in the West End.<sup>272</sup> In the case of *Brighton v Jones*, the dispute over *Tree*, and the six examples given by my interviewees, parties were left feeling aggrieved when their contributions went unrecognised.

Some clarity is brought to the situation by *The Working Playwright's* outline of the agreement between the Writers' Guild of Great Britain and the major UK theatres. It provides for standard contractual terms and standard fees for writers. Furthermore, it specifies that the copyright in the final work should belong to the writer, even if other contributors add substantially to the text during the workshop:<sup>273</sup>

Crucially, the definition of 'writer' includes 'writer of a play created wholly or partly by improvisation', and the 'play' includes any changes made in the text.

<sup>270</sup> *ibid.*, 246.

<sup>271</sup> Anon 1–20.

<sup>272</sup> *Brighton v Jones* (n 27).

<sup>273</sup> The 2015 Writers Agreement and *The Working Playwright* (Writers' Guild of Great Britain, 2019) aims to deal with such disputes in advance, see [https://writersguild.org.uk/wp-content/uploads/2015/02/WGGB\\_booklet\\_jun12\\_contracts\\_i.pdf](https://writersguild.org.uk/wp-content/uploads/2015/02/WGGB_booklet_jun12_contracts_i.pdf); <https://writersguild.org.uk/wp-content/uploads/2019/08/WGGB-Working-Playwright-Agreements-and-Contracts-1.pdf>.

This means that the writer alone owns the copyright of the play, whether or not others have contributed to its creation or final form. The play includes the stage directions.

In other words, contracts agreed with The Writers' Guild of Great Britain specify that the writer owns copyright in the play regardless of whether other parties make original contributions (including stage directions) sufficient to create a copyright interest.<sup>274</sup> Thus, as a common term of agreement between writers and theatres, playwrights usually obtain the copyright in the dramatic work at the end of the process, regardless of how much collective devising/revising has occurred. These contracts do not, however, apply to all theatres in the UK.<sup>275</sup> Nor would such agreements deal with the scenario that arose in *Tree*, a collaboration involving an actor and several writers/devisers working together. Moreover, even where contracts exist, disputes may yet occur if a non-writer makes an unexpectedly substantial contribution. There was a contract in place in *Brighton v Jones*, and it was ultimately relevant to the outcome in Jones' favour; but it did not preclude the legal claim for joint authorship under copyright from coming to court.<sup>276</sup>

*The Working Playwright* is a laudable attempt to bring legal certainty to a complex situation. The Writers' Guild of Great Britain, and especially the playwright David Edgar as the (now former) Theatre Committees Co-Chair, deserve praise for developing an accessible summary of the legal agreements. Yet, the attempt to create legal certainty for the writer arguably comes at the cost of recognising the *value* of the original, collaborative contributions of the other creative parties (indeed it attempts to pre-empt such claims).

This brings up a question of fairness: what *should* the law protect in such scenarios? Consider the six interviewees (out of 20) who shared experiences with me where they considered it would have been just to share attribution and ownership rights.<sup>277</sup> *The Working Playwright* and associated agreements would not provide a solution for them. They, as per Michael Blakemore,<sup>278</sup> are expected to accept that the structures of theatre prioritise the writer in this way. Not everybody in UK theatre shares this deference to this 'accepted' norm. Companies like Frantic Assembly and Forced Entertainment show a keen awareness of the way that their practices 'do not fit neatly into the institutional constraints and expected structures of copyright, royalties, marketing, and programming'.<sup>279</sup> In the US context, Shechtman remarks:

If it's truly a collaborative art form, then why is it only the author who participates in the subsidiary rights that flow from a successful New York production? The appropriate resolution is to give fair credit to all the artists' contributions. One day, it may end up

<sup>274</sup> *ibid.*

<sup>275</sup> The agreements are broken into three separate ones – one for The National Theatre, the Royal Shakespeare Company and the Royal Court; one for repertory theatres and several other UK theatres that receive public subsidies; and a final one covering some independent theatres.

<sup>276</sup> *Brighton v Jones* (n 20).

<sup>277</sup> Admittedly, this was a minority of those I interviewed, though not an insignificant minority.

<sup>278</sup> Wu (n 1) 233.

<sup>279</sup> Smith (n 164) 49–50.

that the author gets eighty percent, the director ten percent, the original cast X and the designers Z. Because, at bottom, this is all about money.<sup>280</sup>

Even if the Writers' Guild of Great Britain-agreed contract specifies that the writer owns the copyright in the final work, can this be changed if circumstances warrant it? The answer is, of course, yes. If all parties agree, a new contract can be drawn up to share credit and ownership, including royalties. As noted earlier, a recent example of shared credit and ownership by contractual agreement concerns the play *Blurred Lines*, first staged at the National Theatre in 2014, with both writer Payne and director Cracknell sharing the copyright ownership in the dramatic work, and other parties given credit for eg contributing poetry.<sup>281</sup>

One point which came out clearly from the interviews is that, in practice the question of when credit and royalty-sharing actually occurs tends to depend on the playwright's consent as 'default' copyright owner (as envisaged by *The Working Playwright*).<sup>282</sup> In particular, it seems that only in a small number of cases does royalty sharing occur in practice, and whether this occurs tends to depend on the writer's decision. In the case of *Tree*, however, it was the two initial writers – Henley and Allen-Martin – who ended up with neither credit nor ownership/royalties.<sup>283</sup>

On credit, Tony Kushner gave attribution – thought not authorial credit as such – to six separate casts in the first book publication of *Angels in America*, lauding the first cast in particular for having 'transformed' the play during its early workshops.<sup>284</sup> My interviewees generally expressed support for attribution of the original cast of a new play in the published version, and it can offer solace to the actors and director even where this attribution is not specifically authorial. However, there may be cases where attribution may not suffice. The work *A Mouthful of Birds* (1986) was created as an innovative 'play with dance' via a collaboration between Caryl Churchill, the director-playwright David Lan, the choreographer Ian Spink and the artistic director Les Waters.<sup>285</sup> Spink, who had contributed choreography, and was attributed as choreographer, did not receive a share in the copyright ownership of the resulting text, which accrued only to Churchill and Lan. He later stated that it 'did feel very strange' that only Churchill and Lan received royalties for licensing of the play.<sup>286</sup>

<sup>280</sup> J Green, 'Exit, Pursued by a Lawyer' *The New York Times* (29 Jan 2006).

<sup>281</sup> Contemporary reviews commented on the profound nature of their collaboration, see [www.curtisbrown.co.uk/news/3237](http://www.curtisbrown.co.uk/news/3237). The credits are shown in this official National Theatre excerpt: <https://d1hsr9wh84jep.cloudfront.net/newviews-excerpt4-blurredlines-2014-15.pdf>.

<sup>282</sup> The 2015 Writers Agreement and *The Working Playwright* (Writers' Guild of Great Britain, 2019) aims to deal with such disputes in advance, see [https://writersguild.org.uk/wp-content/uploads/2015/02/WGGB\\_booklet\\_jun12\\_contracts\\_i.pdf](https://writersguild.org.uk/wp-content/uploads/2015/02/WGGB_booklet_jun12_contracts_i.pdf); <https://writersguild.org.uk/wp-content/uploads/2019/08/WGGB-Working-Playwright-Agreements-and-Contracts-1.pdf>.

<sup>283</sup> Henley and Allen-Martin (n 128).

<sup>284</sup> T Kushner, *Angels in America – A Gay Fantasia on National Themes* (New York: Theatre Communications Group, 1995).

<sup>285</sup> DR Gobert, *The Theatre of Caryl Churchill* (London: Methuen, 2014) 52–53. Gobert relates that although Caryl Churchill did participate in Joint Stock productions, by the early 1980s she had formed 'Caryl Churchill Ltd' to manage her copyrights.

<sup>286</sup> *ibid*.

On royalties, Lin-Manuel Miranda and producer Jeffrey Seller decided to share royalties – but not authorial credit as such – with the original cast of *Hamilton* in recognition of the contributions made by those actors in the early stages and workshops.<sup>287</sup> *The New York Times* reported:<sup>288</sup>

Last fall, it was reported that members of the cast asked Seller for a share of the gross, though they are not owed that by contract. ‘They are the ones bringing this show to life,’ he told me. ‘It was a powerful argument they made; it was gut-wrenching for me, and I took it seriously.’ (He would not give specifics but said that he had reached an agreement and that the matter was resolved, at least for now.)

As noted earlier, six of my interviewees expressed some discontent about not being credited or rewarded adequately for their creative contributions to particular works. Two other interviewees – both of whom had written works for the stage – shared examples where they *had* agreed to sharing of credit and ownership in a play with another party. The actor/director/writer spoke of an example in his own career when ‘I elected to share credit and ownership’ with another actor who had ‘worked in collaboration’ with him.<sup>289</sup> This had not been the initial plan, but after the process had ended, he realised that the contributions made by the actor were ‘sufficiently weighty’ for it to be the fair thing to do.<sup>290</sup> The other of the two – a writer – stated that one collaborative project he had undertaken with an actor resulted in such a profoundly co-authored work that ‘it would have been wrong for me to claim sole credit and ownership’.<sup>291</sup>

Nonetheless, several of the remaining interviewees had not experienced this, with the rest of the writers in particular opposing authorship-sharing. One writer told me very clearly that he would not ‘share credit or ownership in almost any circumstance’ because even if a suggestion made by another party, for example, an actor, found its way into the play, ‘I am still the person putting that suggestion into expression’.<sup>292</sup> Another playwright stressed that it ought to be the case that ‘the writer should always hold the power’ to decide whether or not to share credit/ownership with others.<sup>293</sup> The same writer also said that the economic model of theatre had influenced his views on this. In this regard, he told me that writers tended to earn ‘very little from their upfront labour’, that is, they received a small payment to cover the licensing of the play for its initial theatrical run. In this context, he saw the retention of copyright in the play, in the event that it did go

<sup>287</sup> R Morgan, ‘How Hamilton’s Cast Got Broadway’s Best Deal’ *Bloomberg* (28 September 2016), available at [www.bloomberg.com/features/2016-hamilton-broadway-profit/](http://www.bloomberg.com/features/2016-hamilton-broadway-profit/). A similar agreement was reached with the writers and producers of another popular musical – *The Book of Mormon*. See P Boroff, ‘Mormon Pays Millions to Workshop Cast as Actors Developing New Shows Find Royalties in Short Supply’ *Broadway Journal* (15 April 2016), available at <http://broadwayjournal.com/mormon-pays-millions-to-workshop-cast-as-actors-lament-rise-of-royalty-free-developmental-labs/>.

<sup>288</sup> M Sokolove, ‘The C.E.O. of ‘Hamilton’ Inc.’ (5 April 2016), available at [www.nytimes.com/2016/04/10/magazine/the-ceo-of-hamilton-inc.html](http://www.nytimes.com/2016/04/10/magazine/the-ceo-of-hamilton-inc.html).

<sup>289</sup> Anon 15.

<sup>290</sup> *Ibid.*

<sup>291</sup> Anon 1.

<sup>292</sup> Anon 4.

<sup>293</sup> Anon 2.

on to generate lots of revenue, as the writer's 'reward'.<sup>294</sup> Of course, directors and actors can also be low paid, so this is not an irrefutable argument.<sup>295</sup> Intriguingly, the same interviewee stated that he would be more open to sharing authorship if the structures of theatre were set up differently, and if his position – particularly in terms of economic support and revenue – was more secure.

Weidman makes a distinction between professionalised TV/film-writing, and writing for the stage. He argues TV and film writers tend to be reasonably well paid in comparison with playwrights; but they often have to cede final control over production and story to the companies they are employed by or that they contract with.<sup>296</sup> By contrast, Weidman calls theatre 'a writer's medium' with ownership of the copyright in the play providing a 'legal firewall guaranteeing that it will remain that way'.<sup>297</sup> Weidman resists calls to allow non-writers such as directors a share in the copyright.

On ownership, the playwright David Edgar has stated that even in the case of Scene 6 of *Pentecost*, where the actors had added substantially to the text, it was still right that he retained full ownership:

It wasn't like they were playing themselves ... they weren't their own creation. In fact, two-thirds of all of the parts were there already. To that extent they were being fantastically helpful, but they weren't producing something which was exclusively theirs – so in this case I didn't see it as a problem. There are certain moral issues about things being created, but artistically I didn't regard that as a problem.<sup>298</sup>

Yet, if it is true that the actors 'weren't producing something which was exclusively theirs' then it is also true that Edgar was not producing something that was *exclusively his*. Edgar's presumption that he should own the resulting text is, of course, not surprising; as noted earlier, he was one of the driving forces behind *The Working Playwright*, which prioritises the writer's ownership.

Overall, the normative presumption of the writers' ownership of copyright seems strong in the theatre community, even if not universally popular. In the field of stand-up comedy, Oliar and Sprigman argue that social norms are the main way by which comedians regulate cases against possible joint authorship, with litigation a rare occurrence. Oliar and Sprigman show that the key norm is that the comedian who comes up with the central premise owns the joke, regardless of whether any other party provided additional input.<sup>299</sup> This seems close to the scenario envisaged by *The Working Playwright*, which states that the writer should own the copyright regardless of who else has made original contributions.<sup>300</sup>

<sup>294</sup> Anon 2.

<sup>295</sup> R Swain, 'Low Pay, No Pay, Fringe Theatre' *The Guardian* (11 June 2013), see [www.guardian.co.uk/culture-professionals-network/culture-professionals-blog/2013/jun/11/low-pay-no-pay-fringe-theatre](http://www.guardian.co.uk/culture-professionals-network/culture-professionals-blog/2013/jun/11/low-pay-no-pay-fringe-theatre).

<sup>296</sup> Weidman (n 153) 641. See also Fisk (n 23).

<sup>297</sup> Weidman (n 153) 642.

<sup>298</sup> Wu (n 1) 143.

<sup>299</sup> 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 VA. L. Rev. 1787, 1825. See also G Pate, *Enter the Undead Author: Intellectual Property, the Ideology of Authorship, and Performance Practices Since the 1960s* (Lanham, Maryland: The Rowman & Littlefield Publishing Group, 2019).

<sup>300</sup> The 2015 Writers Agreement and *The Working Playwright* (Writers' Guild of Great Britain, 2019) aims to deal with such disputes in advance, see <https://writersguild.org.uk/wp-content/uploads/2015/02/>

Yet in the theatrical realm, the lingering impression is of a contradiction: theatre as a field that encourages joint labour to be realized in the form of a collaborative product (the dramatic work), and yet which fails to recognise the authorial nature of those collaborative contributions.<sup>301</sup>

## Assessing the Legal Problems that can Arise from Sharing Ownership

Splitting authorship and ownership can be a fair solution – but it does have significant practical consequences.<sup>302</sup> Weidman argues that awarding, for example, directors a share of ownership will produce complications and could encourage litigation.<sup>303</sup> Similarly, Bently describes the complexities that can result when authorship is split in UK law:

Because a single property owner means that assignments and licences of copyright are easier and cheaper to effect, copyright law prefers to minimise the number of authorial contributions it is prepared to acknowledge rather than reflect the ‘realities’ of collaborative authorship. To simplify ownership in this way may privilege certain contributions over others, but it provides a property nexus around which contractual arrangements can be made recognising the value of those other contributions.<sup>304</sup>

Nevertheless, Simone argues persuasively that contractual arrangements will be far more effective if all the relevant authors have a ‘bargaining chip’ since contractual bargaining occurs in the ‘shadow’ of the law.<sup>305</sup>

An example of the complications that can arise from shared ownership is the playwright Mike Kenny’s work at the Leeds Playhouse Theatre. Kenny agreed to collaborative ‘devising’ which was ‘deliberately egalitarian.’<sup>306</sup> With respect to the pieces created, ownership was shared equally between each individual in the Playhouse – even the stage manager and administrator, who Kenny noted were ‘people who hadn’t been actively involved in putting the words on the paper.’<sup>307</sup> Due to this, Kenny lamented that subsequent productions were ‘administratively difficult’ to put on – and the copyright royalties ended up being ‘split thinly’ between ‘the nine or so people involved.’<sup>308</sup> Kenny also remarked that ‘towards the end of that period it started to feel egalitarian but inequitable’ because of the fact that ‘some people were much more at the heart of creation than others’ yet

WGGB\_booklet\_jun12\_contracts\_i.pdf; <https://writersguild.org.uk/wp-content/uploads/2019/08/WGGB-Working-Playwright-Agreements-and-Contracts-1.pdf>.

<sup>301</sup> Gobert (n 285).

<sup>302</sup> See generally MA Heller, ‘The Tragedy of the anti-commons: Property in the transition from Marx to Markets’ (1998) 111 *Harvard Law Review* 621.

<sup>303</sup> Weidman (n 153) 651.

<sup>304</sup> Bently (n 71) 981–82, citing *Wiseman v Wiedenfeld* [1985] FSR 525.

<sup>305</sup> Simone (n 2) 249–50.

<sup>306</sup> Smith (n 164) 44, referring to an interview he undertook with Mike Kenny in March 2011.

<sup>307</sup> *ibid.*

<sup>308</sup> *ibid.*

everyone received the same share.<sup>309</sup> Thus, it must be acknowledged that recognising collaboration and shared ownership does not always work as well as hoped.<sup>310</sup> Some individuals sometimes end up shouldering more of the burden and may feel aggrieved if credit and ownership are shared equally. Nancy Meckler, director of The Freehold – a pioneering theatre collective in the UK active in the late 1960s until the mid-1970s – has commented to this effect.<sup>311</sup>

## Conclusion

As Stern remarks, ‘we do not, even now, have a standard approach to the concept of the dramatic author’.<sup>312</sup> Nor should we, given the intense variety of ways plays get created, as I have outlined in this chapter. Although there are situations where fully-formed texts are submitted to theatres, in most cases theatrical authorship is profoundly social and centred on devising/revising. There are various creative agents – playwrights, directors and actors – making contributions and the eventual performance on stage is constitutive of the creative acts of all the collaborating parties.<sup>313</sup> Workshop processes are iterative with the play going through several different versions before emerging as the final work. The eventual output of the theatrical workshop – embodied by the script – provides an example of how ‘the spontaneity of mental creativity has to be materialised before it can constitute property’.<sup>314</sup>

Despite this, and more than 50 years after the work of Foucault and Barthes, the myths of singular authorship endure; collective processes still struggle for visibility and legal recognition.<sup>315</sup> Given the practical realities of collaboration in theatre, why is there still a preference, whether among readers, audiences or courts, for single authors? Hirschfeld offers one answer: that post-Barthes/Foucault, some scholars have begun to resuscitate ‘ideas of authorship and of its purposes and agencies; to clarify investments and stakes in the “author function”; and to attend to authorial activities of production and consumption in what Pierre Bourdieu calls “the field of cultural production”’.<sup>316</sup> As in chapter two, this brings to mind

<sup>309</sup> Smith (n 164).

<sup>310</sup> Wu (n 1).

<sup>311</sup> D Heddon and J Milling, *Devising Performance: A Critical History* (Basingstoke: Palgrave Macmillan, 2006) 47.

<sup>312</sup> T Stern, ‘Review of Authorship and Appropriation: Writing for the Stage in England, 1660–1710’ (2002) *The Scriblerian* 73, 74.

<sup>313</sup> P Bourdieu, *The State Nobility: Elite Schools in the Fields of Power* (Stanford CA: Stanford University Press, 1996) 264–74. See also generally P Bourdieu, *The Logic of Practice* (Stanford CA: Stanford University Press, 1990).

<sup>314</sup> A Pottage and M Mundy (eds), *Law, Anthropology, and the Constitution of the Social – Making Persons and Things* (Cambridge: Cambridge University Press, 2004), 1, 9.

<sup>315</sup> Krause (n 157) 219.

<sup>316</sup> H Hirschfeld, ‘Early Modern Collaboration and Theories of Authorship’ (2001) 116 *Theories and Methodologies* 609, 619–20.

the idea that the theatrical text is not just a text – it is a copyright work, a multi-faceted commodity potentially underpinning value in print, performance and adaptation. This puts the issue of ownership to the fore.

As legal property, copyright is at the core of this institutional system that perpetuates individualist notions of authorship. The way that works of theatre are created today is a collaborative reality that copyright law does not easily acknowledge.<sup>317</sup> Publishers and courts have a tendency to prefer singular authors because ownership of property rights is more straightforward – and transactions easier to complete – when there are fewer owners.<sup>318</sup> Creative collaboration is often underplayed and ‘almost always flies under the banner of single authorship’.<sup>319</sup> Royalties and licence fees become the supposed ‘return’ on the investment in the author function. Indeed, for marketing purposes, it can be easier to sell, for example, the works of Brecht’s workshop under the singular brand name of ‘Brecht’ rather than deal with the fractured, collective voices who contributed to the plays. Traditionally, when judges are faced with assessing claims of copyright law, such as in *Brighton*, they tend to focus more on maintaining legal coherence and continuity of ownership than on contextual analysis of fluid creative practices.<sup>320</sup>

Copyright law can thus refuse to recognise important contributions to the play during the workshop where these are classed as mere ‘ideas’. Copyright scholars critique this and argue for the law to be more open to the actual creative practices of authorship.<sup>321</sup> At the same time, as Salter relates, there is a danger that legal reform may disrupt informal theatrical practices.<sup>322</sup>

On this, it is worth recognising that legislative reform may not actually be necessary because the courts in the UK have already begun to revise the joint authorship test – the contextual approach taken in the *Kogan v Martin* case is a step in the right direction.<sup>323</sup> Fairness demands that when deciding questions of authorship and ownership, the courts must continue this recent trend of being open to contextual evidence, weighing up the claims in light of the complexities of the creative field within which the work emerged.<sup>324</sup>

<sup>317</sup> Bently (n 71) 981. Examples include how entrepreneurial works can be protected, eg films and sound recordings under the CDPA and of course, for computer-generated works.

<sup>318</sup> J Bellido and F MacMillan, ‘Music Copyright after Collectivisation’ (2016) *Intellectual Property Quarterly* 231. Concord Theatricals (Samuel French) is the agency that licenses the works of Pinter, Bennett, Beckett, Churchill, Ayckbourn etc for performance. Of importance is the Authors’ Licensing and Collecting Society (ALCS) which collects and distributes royalties to authors for print sale/use, see [www.alcs.co.uk](http://www.alcs.co.uk).

<sup>319</sup> A Lunsford and L Ede in ‘Collaborative Authorship and the Teaching of Writing’ in M Woodmansee and P Jaszi (eds), *The Construction Of Authorship: Textual Appropriation In Law and Literature* (Durham, NC: Duke University Press, 1994) 418.

<sup>320</sup> Bently (n 71) 980.

<sup>321</sup> L Bently and L Biron, ‘Discontinuities between legal conceptions of authorship and social practices: What, if anything, is to be done?’ in M van Eechoud (ed), *The Work of Authorship* (Amsterdam: Amsterdam University Press, 2018) 237, 270–76.

<sup>322</sup> Salter (n 2) 891.

<sup>323</sup> Simone (n 24).

<sup>324</sup> Simone (n 2).

Nevertheless, the costs of litigation – both in monetary terms and in terms of time wasted – remain such that most theatre participants tend to avoid litigation. The recent dispute over the play *Tree* is an example of this – it went unresolved by law and played out instead in the media (and within the theatre community).<sup>325</sup> As such, although the courts should maintain conceptual openness when it comes to joint authorship, we as lawyers cannot expect this alone to suffice. Copyright law is not the be-all and end-all; it remains in many instances a tool of the powerful; but there are times when for unsung parties it can prove to be a powerful tool, the impact of which may be felt outside of the legal system.<sup>326</sup> For instance, it may be the case that a precedent like *Kogan* encourages more joint authorship claims within the theatre field; by contrast, the earlier precedent of *Brighton* may well have discouraged the pursuit of such claims, even within the theatrical community.<sup>327</sup> Many of the new ‘disputes’ may not actually come to court – they may simply be resolved amicably between the parties, such as when the two interviewees I spoke with agreed to share credit and ownership via contract with their respective co-authors. This is encouraging, as is the sharing of copyright in the play *Blurred Lines* created by the writer Nick Payne and the director Carrie Cracknell.<sup>328</sup> Even if it can make licensing of rights more complex, the argument that credit and ownership should be shared proportionately based on what each contributor has added to the work remains compelling.<sup>329</sup>

<sup>325</sup> Henley and Allen-Martin (n 128). Even the costs of litigation at the Intellectual Property Enterprise Court – where recoverable costs are capped at £50,000 – can be off-putting to theatre artists.

<sup>326</sup> M Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (Oxford: Hart, 2016) 289.

<sup>327</sup> RH Mnookin and L Korhauser, ‘Bargaining in the Shadow of the Law: The case of divorce’ (1979) 88 *Yale LRev* 950.

<sup>328</sup> See <https://www.curtisbrown.co.uk/client/nick-payne/work/blurred-lines>.

<sup>329</sup> A George, *Constructing Intellectual Property* (Cambridge: Cambridge University Press, 2012) 177.