



Intellectual Property Law (6th edn)

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p.135 5. Authorship and First Ownership

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Abstract

This chapter examines the concept of authorship, as it is understood in copyright law, as well as the first ownership of copyright and the various exceptions to this rule. It begins by discussing the author of a work as defined in the Copyright, Designs and Patents Act 1988 before elaborating on the task of determining who the author of a work is, including difficulties raised by joint authorship. The chapter also looks at exceptions to first ownership, including works created by employees, those governed by Crown copyright or made under the direction or control of Parliament, and commissioned works.

Keywords: copyright, authorship, joint authorship, collaboration, first ownership, employees, work-for-hire, commissioned works

1 Introduction

2 Authorship

3 First Ownership

1 Introduction

A considerable amount has been written about authorship and the role that it plays in copyright law. It has become clear from these discussions that the concept of authorship that operates in copyright law is not the same as that used in many other fields.¹ One explanation for this relates to the particular role that the author plays in copyright law. More specifically, it is because, in copyright law, the author acts as a focal point around which many of the rules and concepts are organized. For example, as we have just seen, the status of the author helps to determine whether a work qualifies for protection. Where relevant, the contribution that

an author makes will also influence whether the resulting work is original. In other situations, the duration of many types of work is determined by reference to the lifespan of the author. Similarly, the moral rights that are recognized in the United Kingdom attach to the author of the work in question.

In this chapter, we explore two closely related themes. First, we look at the concept of authorship, as it is understood in copyright law. In turn, we look at one of the most important consequences that flow from being identified as author of a work—namely, first ownership of copyright and the various exceptions to this general rule.

2 Authorship

The author of a work is defined in the Copyright, Designs and Patents Act 1988 (CDPA 1988) as the person who creates the work.² Special provisions deal with the situation in which more than one person is involved in the creation of a work.³ While to describe the ↗ creator of a painting or a sculpture as an ‘author’ may jar, few problems arise in ascertaining who is the author of most literary, dramatic, musical, and artistic works.⁴ This is because, in relation to the traditional categories of literary, dramatic, musical, and artistic work, there is a general consensus as to which of the various people involved in the production of a work is to be treated as the creator or author of it.

More problems arise, however, in relation to entrepreneurial works and computer-generated works. In part, this is because the concept of authorship does not sit comfortably with the way in which we tend to think about such works—that is, we do not normally think of a sound recording, a typographical arrangement, or a broadcast as having an author, even in the broad sense in which it is used in copyright law. In these circumstances, it is important to appreciate that the ‘author’ is an artificial construct, a legal fiction, which is used to allocate rights. This can be seen in the fact that, in relation to sound recordings, broadcasts, and typographical arrangements, the ‘author’ is (effectively) defined as the person who made the work possible (as distinct from the creator). In the case of a literary, dramatic, musical, or artistic work that is computer-generated (which by definition has no author), the ‘author’ is ‘the person by whom the arrangements necessary for the creation of the work are undertaken’.⁵

The task of determining who is the author of a work is made easier because the 1988 Act sets out a series of statutory presumptions as to who is the author of a work. Section 104 provides that the name that appears on a literary, dramatic, musical, and artistic work as published, or on the work when it is made, shall be presumed to be the author. Section 105 establishes similar presumptions with respect to sound recordings, films, and computer programs.⁶ The upshot of these presumptions, which operate only in civil matters, is that the burden of proof is placed on the person claiming that someone other than the ‘named’ author is the true creator of the work in question.

2.1 Authorship of Literary, Dramatic, Musical, and Artistic Works

The author of literary, dramatic, musical, or artistic work is the person who creates it.⁷ No further guidance is given in the 1988 Act as to what this means. The only exception to this is to be found in section 3(2), which indicates that the author need not necessarily be the person who fixes or records the work (although this will

usually be the case).⁸ The lack of statutory guidance as to the way in which the author is to be construed in this context does not matter that much given that there are few problems in identifying who is the author of a literary, dramatic, musical, or artistic work.

Having said that, problems have occasionally arisen in determining whether a person involved in the production of a literary, dramatic, musical, or artistic work is to be regarded as an author (or creator). The way in which this question is answered is similar to the way in which the originality of a work is determined. Basically, in order for someone to be classified as an author, it is necessary for them to be able to show that their contribution to the work is of the *type and amount* that is protected by copyright—that is, that the contribution would be sufficient to confer originality on the relevant work.⁹ Hitherto, this has tended to be expressed by saying that they must contribute ‘skill and labour of the right kind’ (reflecting the traditional British test of originality). However, as the United Kingdom adjusts to the new European standard of originality explained in Chapter 4, one would expect a shift in the terminology, so that a person will be regarded as an author only where they contribute towards the ‘intellectual creation’.¹⁰

Whatever concepts are deployed, it is unlikely that a stenographer, an amanuensis, or a person who merely photocopies or traces a work would ever be considered an author.¹¹ This is either because the skill and labour is of the wrong kind, or because the contribution does not involve ‘creative choices’ regarding the expressive form of the work (in ‘Euro-copyright speak’). However, if the person makes creative choices in producing the work, even if only a very small amount, it is more likely that they will be treated as an author. This can be seen, for example, in *Cummins v. Bond*,¹² in which it was held that a spiritualist who produced ‘automatic writing’ dictated to her from beyond the grave at a séance was the author of the resulting work. Because the spiritualist exercised great speed in writing down the messages and used great skill in translating the spiritual communication given in an ‘unknown tongue’ into ‘archaic English’, it was held that she had exercised sufficient ‘skill, labour, and effort’ (the relevant test of originality at that time) to justify her being treated as author.

Where the contribution made by someone is at an abstract level, such as the idea for a play, or a book, or a structure of a computer program, they are unlikely to be treated as an author of the resulting work. Thus, for example, the telling of a person’s experiences to form the basis of a ‘ghostwritten’ book is (without more) unlikely to render the narrator of the tales an author of the resulting book; rather, the ghostwriter who determines the way in which the stories are expressed will be regarded in law as the author.¹³ The more specific the contribution, however, the more likely it is that the person in question will be treated as an author. Thus, at the opposite extreme to that of the ghostwriter, in the case of a person who dictates text and punctuation to another who merely follows the instructions, UK law would regard the dictator rather than the amanuensis as the author.¹⁴ In between the two extremes lies a host of possibilities. In one case, it was held that a person who developed an idea for a house design that he had explained in detail (both verbally and through sketches) to a technical draftsman was joint author of the plans that the draftsman subsequently produced.¹⁵ Similarly, a political figure who dictated his memoirs to a friend, then read every word and altered parts of the manuscript, was held to be joint author of the resulting book.¹⁶

As we saw in relation to the originality requirement, the mere fact that a person expended labour in the creation of a work will not necessarily mean that the resulting work is original (or that the person is an author) if it is the ‘wrong type’ of contribution. In the case of a book, for example, while the copy-editor plays

an important role in giving shape to the final product, they will not normally be treated as author of the resulting literary work.¹⁷ Similarly, while copyright law has few problems in categorizing the person who wrote a play as the author of the play, in one case it was held that a person who had suggested the title, the leading characters, a few catchwords, and the scenic effects for the play had not contributed sufficiently to the play to justify being treated as a joint author.¹⁸ In *Brighton v. Jones*,¹⁹ Park J held that the suggestions made by a director to a playwright, prompted by problems with the script encountered during rehearsals, were not of the right kind to justify the director's claim to co-authorship. He said that the director had failed to establish 'that the contributions which she made were contributions to the creation of the dramatic work rather than contributions to the interpretation and theatrical presentation of the dramatic work'.²⁰

2.1.1 Computer-generated works

In the case of literary, dramatic, musical, or artistic works that have been computer-generated, the creator is 'the person by whom the arrangements necessary for the creation of the work are undertaken'.²¹ While the identification of the relevant person will depend on the facts, it seems that in an appropriate case it might include the person who operates the computer, the person who provides inputs for the computer system, or even the programmer.²²

2.1.2 Unknown authorship

In certain situations, it may not be possible to ascertain who is the author of a literary, dramatic, musical, or artistic work. This may be because the name of the author is not attached to the work and it is not possible to ascertain authorship by other means. In other cases, an author may wish that their works be published anonymously, under a false name or a pseudonym. Because the author acts as the focal point around which many of the rules of copyright are organized, this creates a number of potential problems. To remedy this, the CDPA 1988 includes the notion of 'unknown authorship'. A work is a work of unknown authorship if the identity of the author is unknown and it is not possible for a person to ascertain the author's identity by reasonable inquiry.²³ While, in this situation, the author remains the first copyright owner, since it is impossible to know when the author of such a work died, the duration of copyright is limited to 70 years from the date on which the work was first made available to the public (or 70 years from the date on which the work is made, if it is not made available before the expiry of that period).²⁴

p. 139 2.2 Entrepreneurial Works: Statutory Authors

As we mentioned earlier, authorship does not sit comfortably with the way in which we tend to think about entrepreneurial works. Any potential difficulties in having to identify who is the author of, say, a broadcast or a sound recording are resolved by section 9(2) of the CDPA 1988, which defines who is the author of each of the different entrepreneurial works.

2.2.1 Sound recordings: the producer

Section 3(2)(aa) provides that the author of a sound recording is the ‘producer’.²⁵ In turn, the ‘producer’ is defined as the ‘person by whom the arrangements necessary for the making of the sound recording are undertaken’. In most cases, the ‘producer’ of a sound recording will be the record company. This may change, however, where a sound recording is produced cooperatively, or where non-traditional modes of distribution (such as the Internet) are used. The question of what is meant by ‘the producer’ is discussed in more detail in the next section.

2.2.2 Films: the producer and the principal director

When the 1988 Act was enacted,²⁶ for the purposes of determining authorship, films were treated in a similar fashion to sound recordings: the author was defined as ‘the person by whom the arrangements necessary for the making of the film are undertaken’. In order to bring UK law into line with the Term Directive, the 1988 Act was amended so that the authors of a film made on or after 1 July 1994 are the producer *and the principal director* of the film. The principal director and producer are treated as joint authors, except where they are the same person.²⁷ The recognition of the principal director as author of the film marks an important change in the way in which films are regarded by British copyright law, from being treated as a type of entrepreneurial work to being treated as a hybrid of entrepreneurial and authorial works.

The ‘principal director’ is not defined in the 1988 Act. In *Slater v. Wimmer*, Judge Birss QC held that the director was ‘the person who had creative control of the making of the film’ and, in the case of a small-scale film about sky-diving on Everest, that person was the cameraman.²⁸ In more expensive productions, the director will rarely operate the cameras, but will likely be more involved in instructing the actors. Problems with identifying authorship are often resolved through industry practice, which carefully controls who is to be designated as an author.²⁹ In turn, the CDPA 1988 states that where a film bears a statement that a particular person was the director (or principal director) of the film, this shall be presumed to be correct until the contrary is proved.³⁰ Section 105(6) adds that, where a person is named as the director of a film, this shall be presumed to mean that they are the principal director.

The ‘producer’ of a film is defined as ‘the person by whom the arrangements necessary for the making of the film are undertaken’.³¹ This is the same definition as is used to describe the producer of a sound recording. The question of whether a person is a ‘producer’ of a film or a sound recording is a question of fact.³² For the most part, there will be few problems in determining who is the producer of a film or a sound recording. Most questions regarding the allocation of ownership of copyright will be dealt with contractually. Problems may arise, however, because the production of sound recordings and films frequently involves the input of a range of different people, many of whom may lay claim to having helped to organize and facilitate the making of the sound recording or the film. Although the term ‘producer’ is used to define who is the creator, it should be noted that the courts have emphasized that there is a distinction between someone who ‘makes’ a recording and someone who ‘makes the arrangements for the production of a recording’: it is the latter who is the author, rather than the person who actually records or makes the sound recording or film (the person who operates the recording system).³³

The notion of the ‘producer’ presupposes that, at the core of the production process, there is a person (or more often a company) that coordinates, controls, and organizes the production of the work.³⁴ It seems that, to be a ‘producer’, a person must exercise some degree of direct (organizational) control over the process of production.³⁵ If a person operates at the periphery of the process, such as the person who merely commissions the making of the recording, or merely provides the finance for a film or a sound recording, that person will not be regarded as a producer. If this were not the case, banks and other lending institutions would qualify as authors. However, provision of finance may be one of the organizational matters that, in combination with others, amount to a ‘necessary arrangement’.³⁶

2.2.3 Broadcasts

In the case of sound and television broadcasts, the author is the person who makes the broadcast.³⁷ Where a person receives and immediately retransmits a broadcast, the author is the maker of the original broadcast rather than the person who relays it.

2.2.4 Typographical arrangements

The author of a typographical arrangement of a published edition of a work is the publisher.³⁸

p. 141 2.3 Joint Authorship

Collaborative research and creation is often a fruitful and productive way for authors to work.³⁹ Copyright recognizes this mode of creation through the notion of joint authorship.⁴⁰ A number of important consequences, such as the way in which the work can be exploited, flow from a work being jointly authored.⁴¹ While joint authorship is normally associated with literary, dramatic, musical, and artistic works, it is possible for any work to be jointly authored. As we saw earlier, the 1988 Act specifically provides that films are treated as works of joint authorship between the principal director and the producer, unless those are the same person.⁴² The 1988 Act also extends the concept of joint authorship to a broadcast ‘where more than one person is taken as making the broadcast’—namely, those ‘providing’ or taking ‘responsibility’ for the contents of the programme, and those making the ‘arrangements necessary for its transmission’.⁴³ No special definition of joint authorship is applied to sound recordings or to published editions.

In cases other than those special circumstances under which joint authorship is deemed, a general principle applies: a work is a work of joint authorship if it is ‘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’.⁴⁴ The components of joint authorship were subject to a recent restatement by the Court of Appeal, in *Martin v. Kogan*,⁴⁵ a case concerning the writing of a screenplay for the film, *Florence Foster Jenkins* (dir. Stephen Frears, starring Meryl Streep) about a woman who aspired to be a singer (and ended up performing at Carnegie Hall). The defendant, Julia Kogan, who was herself an opera singer and author, had suggested to her then partner, who hitherto had written material for television, that he develop the screenplay and, over various drafts, had offered a number of suggestions that made their way into its final form. In overturning the ruling of the IPEC that Martin was the sole author (and ordering a retrial at which it was found that

the test had been met),⁴⁶ the Court of Appeal stated that a work is one of joint authorship if it satisfies four conditions: (a) collaboration; (b) authorship; (c) contribution; and (d) non-distinctness of contribution.⁴⁷ We look at each in turn.

2.3.1 Collaboration

The first requirement that must be satisfied for a work to be one of joint authorship is that the work must have been produced through a process of *collaboration* between the authors. This means that, when setting out to create a work, there must have been some common design, cooperation, or plan that united the authors (even if only in a very loose sense).⁴⁸ So long as the authors have a shared plan of some sort, there is no need for them to be in close proximity for them to collaborate. Indeed, it is possible for the collaboration to take place over long distances (a practice made much easier because of email and video-calling).⁴⁹ There is no additional requirement that the parties must have intended to create a work of joint authorship.⁵⁰

The upshot of this requirement is that, although two people may work on the same project, unless there is a shared goal, they will not be classified as joint authors. This means, for example, that where one person writes a poem and another person translates it into another language, the author of the original poem will not be a joint author of the translation. Similarly, where a musician arranges an existing musical work, the author of the original musical piece will not be able to claim joint authorship over the subsequent work; instead, there will be separate copyrights in the two pieces.⁵¹

The requirement of collaboration also excludes from joint authorship claims those who offer advice on work that has been drafted: as the Court of Appeal explained, ‘friends of the author who make suggestions otherwise than in the course of a collaboration will not become joint authors’.⁵² This is because they are ‘acting as a friend and critic and not a collaborator in a common design’. The court seemed clear, too, that the relationship between an author and researcher would not be treated as a ‘collaboration’.⁵³ However, the requirement of collaboration does not preclude joint authorship merely because one of the collaborators has ‘the final say’:⁵⁴ this proved very important in *Martin v. Kogan*, where Kogan was held to be joint author of the screenplay even though it had been accepted that Martin had the final say in deciding whether Kogan’s ideas and suggestions made their way into the film script.⁵⁵

p. 143 2.3.2 Authorship

The second requirement to claim joint authorship is—perhaps not surprisingly—authorship. We have reviewed this to some extent already. However, in the context of joint authorship, in *Martin v. Kogan*, the Court of Appeal emphasized that this concept is not limited to ‘the person who pushes the pen’. According to the court, authorship involves the creation, selection, and combination of concepts or emotions into expressive form. Given that authorship extends below the surface of the words used, ‘[t]oo much focus on who pushed the pen is likely to detract attention from what it is that is protected, and thus from who the authors are’.⁵⁶ Indeed, in that case, Kogan was ultimately found to be a joint author, even though Martin had controlled the keyboard on which the script was typed. The court added that it did not think an enquiry into

who accepts responsibility for the form of expression in the work is a helpful concept, particularly in a collaborative work.⁵⁷ Indeed, Martin could take responsibility for the final screenplay and Kogan still be a joint author (as the court would ultimately conclude).

The Court of Appeal was also keen to emphasize that what counts as authorial might vary with the type of the work itself. In particular, matter that might seem minor or trivial in another context, might be a vital part of the authorship of a screenplay.

A screenplay is concerned with providing a plot and dialogue which enable the reader to visualise what is going to happen on the screen, and get a feeling for what the audience will experience. The author is directly concerned with such matters as the choice of characters and the incidents in the film which will bring out those characters, and display their emotions. The storyline and plot are also of direct concern to the author and are a part of what he or she creates. These aspects of a screenplay can, in principle, amount to a contribution of an authorial kind.

This was important, because Kogan's contributions included identifying songs that the character would sing, and the language her voice coach might use. These might be regarded as mere contribution of factual matter in a different context,⁵⁸ but in the context of the screenplay they were central to establishing the character of the protagonist.⁵⁹ It also led the Court of Appeal to reject the distinction, developed by HH Judge Hacon at the initial trial,⁶⁰ between 'primary' and 'secondary' skills. As the Court of Appeal emphasized:

The judge's distinction between primary and secondary skills in assessing contribution has no basis either in the statute or in decided cases. To draw such a distinction tends to imply that less weight is to be given to ideas than to written words, when both are essential components of the work. In our view the distinction is positively unhelpful. Depending on the facts, the person who contributed the ideas may be the 'major' author.⁶¹

This emphasis on the type of work is also reflected in the requirement, mentioned in other cases, that the authorship contribution be of the 'right kind': a contribution to the words of a song will normally give rise to joint authorship of the literary work, but not of the music; and a contribution to the 'performance' of a piece of music will not render the performer a co-author of the musical work, because it is not an 'authorial' contribution.⁶² Equally, a contribution to 'interpretation and theatrical presentation' is not to be regarded as an authorial contribution to the creation of a dramatic work, as opposed to its rendition in performance.⁶³

2.3.3 Contribution

Third, it is necessary to show that each of the authors *contributed to the making of the work*. In order to render a person a joint author, the contribution must be 'original'. This merely requires that the claimant's contribution is an expression of their 'own intellectual creation', that is, that the person in question had expressed themselves by making free choices. It is a 'relatively undemanding threshold'.⁶⁴ The more restrictive the choices the less likely it will be that they satisfy the test.⁶⁵ References in older case law to 'skill and effort' should, accordingly, be treated with caution (as neither is regarded as relevant to assessing

intellectual creation). As a result, non-creative acts, such as scanning a design so as to digitize it and using software to ‘clean off’ any unwanted specs that appeared from the scanning, are not original, and cannot make such person a joint author.⁶⁶

Earlier case law required that the contribution be ‘significant’, as well as ‘original’.⁶⁷ This had proved more problematic than the requirement that the contribution be ‘original’ (which was especially easy to satisfy under the old ‘skill and effort’ test) and was prone to introducing qualitative (even aesthetic) judgement.⁶⁸ The better view was that ‘significant’ here meant ‘substantial’, or ‘considerable’, or ‘non-trivial’, rather than ‘aesthetically important’.⁶⁹ The criterion of ‘significance’ featured less prominently in the restatement made by the Court of Appeal in *Martin v. Kogan*, where it is referred to in the context of the second condition for joint authorship, ‘authorship’. There, the court states: ‘[j]oint authors must be authors, in the sense that they must have contributed a → significant amount of the skill which went into the creation of the work.’⁷⁰

Given the Court of Appeal’s embracing of the alignment of the ‘contribution’ test for joint authorship with the test for originality and ‘part’ of a work in *Infopaq*—where substantiality or significance are not relevant—it is unclear what the basis could be for requiring that the authorial contribution be ‘substantial’.⁷¹

It is also clear that joint authorship does not require that the respective contributions be in equal proportions.⁷² Courts are now able and willing to apportion shares that correspond to different levels of contribution.⁷³ In *Martin v. Kogan* itself, Meade J recognized that the process of deciding on appropriate shares was ‘a highly subjective one and may be approached on a broad-brush basis’;⁷⁴ as a result of the retrial Meade J found Kogan was entitled to a 20 per cent share of the copyright.⁷⁵ The Judge ‘cross-checked’ this figure by looking at their respective involvement in the production of the screenplay over two periods and the relative importance of each period to the development of its final form.⁷⁶

2.3.4 Non-Distinctness

Finally, for a work to be jointly authored, the respective contributions must not be *distinct* or *separate* from each other. In more positive terms, this means that the contributions must merge to form an integrated whole (rather than a series of distinct works).⁷⁷ For example, if the contributions of two authors were to merge in such a way that no single author were able to point to a substantial part of the work and say ‘that is mine’, the authors would be joint authors. If, however, one author were to write the first four chapters of a book and the other author, the remaining six chapters, instead of the resulting book being a joint work, the respective authors would have copyright in the particular chapters that they wrote.⁷⁸ Similarly, a song that comprises music and lyrics is not a work of joint authorship if one author writes the lyrics, while the other composes the music: the music and lyrics are distinct works, each of which has a single author.⁷⁹ In relation to a more difficult set of facts, it has been held that where one person added an → introduction to the music of a song, this introduction was not ‘distinct’ because it was ‘heavily dependent’ on the rest of the tune and because, by itself, it would ‘sound odd and lose meaning’.⁸⁰

The requirement that the contribution is ‘not distinct’ sits in tension with the other requirement that the contribution be ‘original’ (and possibly ‘significant’): if the contribution cannot be distinguished from the whole, how can it be shown to be significant and original? In *Martin v. Kogan*,⁸¹ in the initial hearing, HHJ Hacon required Kogan, who claimed joint authorship of a film script, to identify the parts of the script that she had contributed, so that he could assess whether such contributions were mere ideas or facts, or rather

creative expression. The Court of Appeal identified this as an error of law: as the statutory test required the contributions not to be distinct, it was inappropriate to require the claimant to identify specific language in the script for which she could claim responsibility.⁸² The Court of Appeal emphasized instead Kogan's contribution to the process of developing the script, and in the retrial Meade J, while focusing on the examples given by Kogan, acknowledged the limitations in so doing.⁸³

3 First Ownership

Authorship and ownership have long been closely intertwined in copyright law. Indeed, one of the notable features of the 1709/10 Statute of Anne was that it recognized authors as first owners of the literary property that they created. This basic formula is repeated in the CDPA 1988, which declares that the author of a work is the first owner of copyright.⁸⁴ The rule that copyright initially vests in the author is, however, subject to a number of exceptions. The first and most important concerns works made by employees.⁸⁵ Exceptions also exist in relation to Crown copyright, parliamentary copyright, and works created by officers of international organizations.⁸⁶ Judicially originated exceptions also exist where a work is created in breach of a fiduciary duty or in breach of confidence.

Before looking at these in more detail, it is important to note that, although the author is usually the first owner, it is possible for an author to assign their copyright to third parties. This means that the question of who is the copyright owner at any particular point of time will depend upon what has happened to the copyright since it was first created. Since valid agreements can be made in relation to the transfer of future copyright, it may be that, when copyright arises, the first owner of copyright under the statutory scheme is immediately divested of their rights in favour of an assignee. It is also important to note that, while the law recognizes that a person other than the author may be first owner, the question of who is the author remains a distinct one (and an important one). A work made by an employee author, for example, has a duration dependent on the life of the author ↵ (that is, the employee) even if first ownership vests in the employer. Equally, issues of qualification and moral rights are determined by reference to authorship (not first ownership).

3.1 Works Created by Employees

Section 3(2) of the 1988 Act provides that, in the absence of an agreement to the contrary, where a literary, dramatic, musical, or artistic work, or a film is made in the course of employment, the employer is the first owner of any copyright in the work.⁸⁷ While employees retain moral rights in the works that they create, these are subject to a number of limitations.⁸⁸

Critics have suggested that, by granting first ownership of works made by employees to employers, British law fails to provide creators with sufficient additional incentives to create.⁸⁹ It is also said that British law also fails to acknowledge the natural rights that employee-authors have in their creations.⁹⁰ In so doing, it is suggested that British law fails to follow the underlying rationales for copyright. In response to contentions of this sort, it is argued that, while employers might not create works, they provide the facilities and materials that enable the act of creation to take place. In so doing, they make an important contribution to the

production of new works. It is argued that granting first ownership to employers encourages employers to invest in the infrastructure that supports creators. Because employers are often in a better position than employees to exploit the copyright in a work, it is also suggested that it makes more sense to give copyright to employers than to employees. Another argument in favour of giving ownership to employers is that, in the absence of a provision that formally granted first ownership to employers, employers would require employees to assign their copyright to them. As section 11(2) achieves what would otherwise happen in practice, it thus serves to reduce transaction costs. In response to the argument that, in granting first ownership to employers, employees are not properly rewarded for their creative efforts, it is suggested that employees are rewarded through other means, such as pay, continued employment, and promotion.⁹¹

However problematic may be the arguments in favour of granting first ownership of employee works to employers, they have dominated UK policy in this area. In particular, while, under the Copyright Act 1956, employee journalists presumptively shared copyright with the newspapers, this ‘anomaly’ was removed in the 1988 Act.⁹² As a result, under the current law, copyright in all works made in the course of employment belongs to the employer (unless there is an agreement to the contrary).

- p. 148
- ↳ For an employer to be first owner of copyright, it is necessary to show that:
 - (i) the literary, dramatic, musical, artistic work, or film was made by an employee;
 - (ii) the work was made in the course of employment; and
 - (iii) there is no agreement to the contrary.⁹³

We will deal with each of these in turn.

3.1.1 Who is an employee?

An ‘employee’ is defined in the 1988 Act as a person who is employed under a contract of service or apprenticeship.⁹⁴ A contract of service is frequently distinguished from a contract for services. In general, it is easy to determine whether someone is an employee or not. However, there are many different sorts of work relationship, some of which are less easy to designate as employment relations. In such situations there is no simple way in which to tell whether the contract is an employment contract. At various times, courts have emphasized different elements, such as the degree of control that one party exercised over another or whether one party was part of the ‘organization’ of the other. Chitty on Contracts suggests the following eight factors:

- (1) the degree of control exercised by the employer;
- (2) whether the worker's interest in the relationship involved any prospect of profit or risk of loss;
- (3) whether the worker was properly regarded as part of the employer's organisation;
- (4) whether the worker was carrying on business on his own account or carrying on the business of the employer;
- (5) the provision of equipment;
- (6) the incidence of tax and national insurance;
- (7) the parties' own view of their relationship;
- (8) the structure of the trade or profession concerned and the arrangements within it.⁹⁵

3.1.2 Was the work made in the course of employment?

In order for an employer to be first owner of copyright, it is also necessary to show that the work was made in 'the course of the employment'. Even though an author is an employee, if the work was not created in the course of employment, the author retains ownership of copyright. The question whether a work has been made in the course of employment will depend on the particular circumstances of the case in hand. A 'multifactor test' has been used, according to which relevant factors include (but are not limited to):⁹⁶

- p. 149
- (a) The terms of the contract of employment;
 - (b) Where the work was created;
 - (c) Whether the work was created during normal office hours;
 - (d) Who provided the materials for the work to be created;
 - (e) The level of direction provided to the author;
 - (f) Whether the author can refuse to create the work/s; and
 - (g) Whether the work is 'integral' to the business.

Although no single factor will ordinarily be determinative, we offer a few illustrations from the case law as to the application of the test. In the first two, the work was held to fall outside the course of employment; in the third, it was said that it was arguably within it.

In *Stevenson Jordan v. MacDonald & Evans*,⁹⁷ the question arose as to whether an accountant or his employer (a firm of management consultants) owned copyright in a series of public lectures that the accountant had given about the budgetary control of businesses. Morris LJ noted that the employer had paid the expenses of the lecturers; that the employee-accountant could have prepared the lectures in the company's time, used its library, and had the lectures typed up by company secretaries; and that the lectures were a useful accessory to his contracted work.⁹⁸ Nonetheless, Morris LJ found that, since it was not shown that the accountant could have been ordered to write and deliver the lectures, they were not created in the course of his employment. As such, the copyright belonged to the employee rather than to the employer.

In *Noah v. Shuba*,⁹⁹ Dr Noah claimed copyright in a book called *A Guide to Hygienic Skin Piercing*, which he had written. During the proceedings, it was argued that, when Dr Noah wrote the guide, he was employed as a consultant epidemiologist at the Public Health Laboratory Service; as such, the copyright vested in his employer. While there was no doubt that Dr Noah was an employee of the Public Health Laboratory, it was less clear as to whether the guide had been written in the course of his employment. Dr Noah discussed his work with colleagues, made use of the services of the Public Health Laboratory Service library, and had the manuscript typed up by his secretary. In addition, the guide was published by the Public Health Laboratory Service at its own expense. Nonetheless, Mummery J held that the guide had not been written in the course of Noah's employment. One factor that influenced this decision was that Dr Noah had written the draft at home in the evenings and at weekends. Another was that Noah's contract required him to publish articles, but did not require him to write books.

In contrast, in *Missing Link Software v. Magee*,¹⁰⁰ the Court held that it was arguable that copyright in software written by the defendant had been written in 'the course of employment' and so belonged to the claimant. This was so, even though the software had been written by the employee outside work time and on his own equipment. The Court held that because writing the software fell within the scope of the tasks that the defendant was employed to carry out, the computer programs could be said to have been created within the course of his employment.

p. 150 **3.1.3 Agreements to the contrary**

Finally, it should be noted that the copyright in works made in the course of employment will not be treated as belonging to the employer where there is an agreement to the contrary. Such an agreement may be written or oral, express or implied.¹⁰¹

In some cases, such agreements have been implied from custom. For example, in *Noah v. Shuba*, Mummery J said that if the skin-piercing guide had been written in the course of Dr Noah's employment, he would nonetheless have implied a term into Dr Noah's contract that the copyright remained with the employee.¹⁰² The reason for this was the Public Health Laboratory Service's long-standing practice of allowing its employees to act as if they owned copyright in their works: it allowed employees to assign copyright to publishers, to claim royalties, and (with respect to the case itself) did not assert that it owned copyright. This decision has important ramifications where employers allow employees to act as if they own copyright.

3.2 Crown Copyright

Another exception to the general rule that the author is the first owner relates to works governed by Crown copyright. Where a work is made by an officer or servant of the Crown in the course of their duties,¹⁰³ copyright in the work belongs to the Crown and not to the author of the work.¹⁰⁴

3.3 Parliamentary Copyright

Where a work is made under the direction or control of the House of Commons or the House of Lords, the respective House owns copyright therein.¹⁰⁵ Such parliamentary copyright lasts for 50 years from the year in which the work was made. All Bills introduced into Parliament attract parliamentary copyright, but this ceases on royal assent, withdrawal, or rejection of the Bill.¹⁰⁶

3.4 International Organizations

Where a literary, dramatic, musical, or artistic work is made by an officer or employee of an ‘international organization’,¹⁰⁷ the organization is the first owner of the resulting copyright.¹⁰⁸

p. 151 3.5 Commissioned Works and Equitable Assignment

Another exception to the general rule that the author is first owner arises, in limited circumstances, where a person commissions someone to make a work. Under the CDPA 1988, copyright in a commissioned work belongs to the author of the commissioned work.¹⁰⁹ However, in certain circumstances, the courts may infer that an independent contractor is subject to an implied obligation to assign the copyright to the commissioner. This may give rise to a trust with respect to the copyright in the commissioned work and render the commissioner the equitable owner. A good example is provided by *R. Griggs Group v. Evans*,¹¹⁰ in which Griggs, distributors of DR MARTEN’S AIRWAIR, commissioned the advertising agency, Jordan, in 1988 to produce a logo for it. Evans, who did freelance work for Jordan, produced the logo and was paid at his standard rate of £15 an hour. Nothing was said about copyright in the logo. In 2002, Evans purported to assign copyright in the artistic work to Raben Footwear, an Australian competitor of Griggs. In response, Griggs brought an action seeking a declaration that it was beneficial owner of copyright and an assignment of legal title. Peter Prescott QC, sitting as deputy High Court judge, granted the relief sought. He held that while Evans was the author and first owner of the legal title, an agreement that copyright was to belong to Griggs was to be implied. Such an agreement was necessary to give business efficacy to the arrangement, under which it was clearly contemplated that Griggs would be able to use the logo and stop others from using it.¹¹¹ This could be achieved only if the implied agreement was to assign the copyright or give a perpetual exclusive licence (and the latter solution would be less convenient for Evans). The Court of Appeal affirmed.

Implied agreements to assign have also been found where a choreographer undertook to arrange certain dances for the Russian ballet,¹¹² a design of a trade mark was produced,¹¹³ a person upgraded a previous version of a computer program,¹¹⁴ a person arranged for the making of a sound recording,¹¹⁵ and a person developed a prototype of a mask based on an artist’s sketches.¹¹⁶ These decisions amount to judicial variations of a clear legislative scheme.¹¹⁷ Clearly, the judges are looking at transactions after the event

p. 152 ↵ and are motivated by gut feelings of justice to prevent opportunistic behaviour by creators. However, the impact of the decisions is to undermine a clear scheme that is designed both to achieve certainty in transactions and to protect authors.¹¹⁸ It does so by requiring parties to allocate ownership through written assignments and, in so doing, requires those acquiring rights to specify what they want, thus giving authors an opportunity to reflect upon whether they wish to transfer all of those rights.¹¹⁹ Under that scheme, the penalty for those commissioners who fail to organize their legal rights properly is that they risk having to

bargain for them later. The courts, by repeatedly responding to their sense that rights should follow money, remove this ‘penalty’ and, with it, undermine the goals that the statutory scheme aims to achieve. The better view is that these cases should be confined to their specific facts¹²⁰ and implied assignments found only in exceptional cases.¹²¹

3.6 Breach of Confidence

It also seems that copyright in works that are created in breach of a fiduciary duty or in breach of confidence will be held on constructive trust for the person to whom the duty was owed.¹²² The same may be true of works made ‘in circumstances involving the invasion of legal or equitable rights of the [claimant] or breach of the obligation of the maker to the [claimant]’.¹²³

Notes

¹ Frequently, it is more expansive, treating as legal authors those whose effort might not reach the creative levels of literary authorship. See e.g. *Walter v. Lane* [1900] AC 539. But at other times ‘social’ conceptions of authorship are more plural. For the example of ‘scientific authorship’, see M. Biagioli, ‘Rights or Rewards? Changing Frameworks of Scientific Authorship’, in M. Biagioli and P. Gallison (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (2003), 253–80. For thoughts on the legal implications, see D. Simone, ‘Recalibrating the Joint Authorship Test: Insights from Scientific Collaborations’ (2013) 26 *IPJ* 111; L. Bently and L. Biron, ‘Legal and Social Conceptions of Authorship: What, if Anything, Is to Be Done?’, in M. van Eechoud, *The Work of Authorship* (2015), 237 ff; D. Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (2019), ch. 5. For an overview, see C. Fisk, ‘Credit Where It’s Due: The Law and Norms of Attribution’ (2007) 95 *Georgetown LJ* 49.

² CDPA 1988, s. 9(1). For comparative analysis, see J. Ginsburg, ‘The Many Faces of Authorship: Legal and Interdisciplinary Perspectives’ (2003) 52 *DePaul L Rev* 1063.

³ See section 2.3, pp. 141–6.

⁴ For consideration of the question of whether an amanuensis is an author, see *Donoghue v. Allied Newspapers* [1938] 1 Ch 106. But note that a medium who transcribed messages from the spiritual world was the author of the work: *Cummins v. Bond* [1927] 1 Ch 167 (Eve J held that the medium ‘had exercised sufficient skill, labour and effort to justify being treated as author’).

⁵ CDPA 1988, ss 9(4), 178.

⁶ CDPA 1988, s. 105.

⁷ CDPA 1988, s. 9(1).

⁸ CDPA 1988, s. 3(2).

⁹ Because the type of labour that confers originality is the same as that which enables someone to be classified as an author, reference should be made to the earlier discussions on this topic: see Chapter 4, section 3, pp. 100 ff.

¹⁰ *Martin v. Kogan* [2019] EWCA Civ 1645, [53](vii) and [139].

¹¹ *Donoghue v. Allied Newspapers* [1938] 1 Ch 106.

¹² [1927] 1 Ch 167. See also *Leah v. Two Worlds Publishing* [1951] 1 Ch 393.

¹³ *Donoghue v. Allied Newspapers* [1938] 1 Ch 106 (reporter was author of stories about jockey Steve Donoghue's life); *Celebrity Pictures v. B. Hannah* [2012] EWPCC 32, [8] (providing a 'general' brief to a photographer as to the types of pose that the party commissioning the photographs wanted did not make that party a joint author); *Martin v. Kogan* [2017] EWHC 2927 (IPEC), [54] (contributions to editing not sufficient).

¹⁴ *Donoghue v. Allied Newspapers* [1938] 1 Ch 106, 109–10.

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

¹⁶ *Heptulla v. Orient Longman* [1989] FSR 598 (Indian High Court).

¹⁷ A technician expending skill and labour in testing software, detecting bugs, and providing information towards debugging was likened to a proofreader and therefore was not a joint author, since he did not contribute to the authorship of the software as such: *Fylde Microsystems v. Key Radio Systems* [1998] FSR 449. See 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* (2014) (exploring conceptual art and editing).

¹⁸ *Tate v. Thomas* [1921] 1 Ch 503.

¹⁹ [2005] FSR (16) 288.

²⁰ Ibid., [56].

²¹ CDPA 1988, s. 178 (where a work is created by a computer in circumstances such that there is no human author of the work). For discussion of the problem of defining 'originality' for such works, see Chapter 4, section 3.7.8, pp. 127–8, where we suggest that such works might be regarded under EU law as productions protected by the United Kingdom as related rights.

²² *Nova Productions v. Mazooma Games* [2006] EWHC 24 (Ch), [105]–[106] (author of computer-generated videogame was author of graphics and software, rather than player of the game).

²³ CDPA 1988, s. 9(4), (5).

²⁴ CDPA 1988, s. 12(3).

²⁵ CDPA 1988, s. 9(2)(aa).

²⁶ CDPA 1988, s. 9(2)(ab).

²⁷ CDPA 1988, ss 9(2)(ab) and 10(1A).

²⁸ [2012] EWPCC 7, [13].

²⁹ For a discussion of credit practices in the US film industry, see C. Fisk, 'The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938–2000' (2011) 32 *Berkeley J Emp & Lab L* 215.

³⁰ CDPA 1988, s. 105(5).

³¹ CDPA 1988, s. 178. It is unclear whether the term 'principal director' will be treated as narrower than the term 'director' when used in relation to moral rights.

5. Authorship and First Ownership

³² *Beggars Banquet Records v. Carlton Television* [1993] *EMLR* 349, 361; *A & M Records v. Video Collection* [1995] *EMLR* 25, 29.

³³ *Adventure Films v. Tully* [1993] *EMLR* 376; *A & M Records v. Video Collection* [1995] *EMLR* 25; *Bamgboye v. Reed* [2004] *EMLR* (5) 61, 84, [77]; *Slater v. Wimmer* [2012] *EWPCC* 7, [85].

³⁴ See also *Century Communications v. Mayfair Entertainment* [1993] *EMLR* 335 (film made under restrictive conditions in China was produced by organizer outside China).

³⁵ *Adventure Films v. Tully* [1993] *EMLR* 376.

³⁶ *Ibid.*, 378–9. See also *Beggars Banquet Records v. Carlton Television* [1993] *EMLR* 349 (arguable claim that person who provided finance and arranged access to venue where event was filmed was a person who made arrangements); *Century Communications v. Mayfair Entertainment* [1993] *EMLR* 335 (person had undertaken the arrangements necessary for the production of the film when they initiated the making of the film, organized the activity necessary for making it, and paid for it).

³⁷ CDPA 1988, s. 9(2)(b).

³⁸ CDPA 1988, s. 9(2)(d).

³⁹ R. Dreyfuss, ‘Collaborative Research: Conflicts on Authorship, Ownership and Accountability’ (2000) 53 *Vand L Rev* 1159. For consideration of the issues raised by mass collaboration, such as Wikipedia, see D. Simone, ‘Copyright or Copyleft: Wikipedia as a Turning Point for Authorship’ (2014) 25 *Kings LJ* 102. For a discussion of legal issues surrounding a historical precursor, see E. Cooper, ‘Copyright and Mass Social Authorship: A Case Study on the Making of the Oxford English Dictionary’ (2015) 24(4) *S & LS* 509.

⁴⁰ Contrast the notion of a ‘work of co-authorship’, i.e. ‘a work produced by collaboration of the author of a musical work and the author of a literary work where the two works are created in order to be used together’, in CDPA 1988, s. 10A, introduced with effect from 1 November 2013 by the Copyright and Duration of Rights in Performances Regulations 2013 (SI 2013/1782), reg. 4, to implement Directive 2011/77/EU. See Chapter 7, section 2, pp. 201–2.

⁴¹ A joint owner (or other co-owner of copyright) can sue an infringer independently and can also bring an action against another co-owner.

⁴² CDPA 1988, ss 9(2)(ab) and 10(1A). Note, however, that the general scheme applies to determine authorship, or co-authorship, of the ‘dramatic work’: on which, see Kamina (2nd edn), 155–65.

⁴³ CDPA 1988, s. 10(2), cross-referenced to s. 6(3).

⁴⁴ For valuable comparative work, see M. Perry and T. Margoni, ‘Ownership in Complex Authorship: A Comparative Study of Joint Works’ [2012] *EIPR* 22; E. Cooper, ‘Joint Authorship in Comparative Perspective’ (2015) 62 *J Copyright Soc'y USA* 245.

⁴⁵ *Martin v. Kogan* [2019] *EWCA Civ* 1645, [53]. On this important case, see D. Simone, ‘Kogan v Martin: A New Framework for Joint Authorship in Copyright Law’ (2020) 83 *MLR* 877 (stating, at 891, that *Martin v. Kogan* is ‘a landmark case in which the Court of Appeal provides a new framework for the application of the joint authorship test that entrenches a pro-collaboration default standard’). On the retrial, see D. Simone, ‘Screenplay Collaborator Granted Authorship Credit in IPEC “encore”’ (2021) 16 *JPLP* 201.

⁴⁶ *Martin v. Kogan* [2021] *EWHC* 24 (Ch) (Meade J).

5. Authorship and First Ownership

⁴⁷ *Martin v. Kogan* [2019] EWCA Civ 1645, [31] (though the Court notes, too, that ‘joint authorship is ultimately a unitary concept’).

⁴⁸ *Levy v. Rutley* (1871) LR 6 CP 583; *Martin v. Kogan* [2019] EWCA Civ 1645, [32], [53](2).

⁴⁹ *Cala Homes (South) v. Alfred McAlpine Homes East* [1995] FSR 818, 835. In *Martin v. Kogan*, *ibid.*, [136], Martin and Kogan sometimes worked together in the same place, but at other times had conversations over Skype.

⁵⁰ *Beckingham v. Hodgens* [2003] FSR (14) 238, 249.

⁵¹ *Chappell v. Redwood Music* [1981] RPC 337. Cf. *Godfrey v. Lees* [1995] EMLR 307 (claimant who provided orchestral arrangements of existing songs was treated as a co-author); *Beckingham v. Hodgens* [2003] FSR 238 (session musician who added an introduction to a song was held to own 50 per cent of the copyright in the new arrangement). It seems that, where the author of a song collaborates in a new arrangement thereof, they acquire co-ownership of the arrangement even where they contribute nothing new.

⁵² *Martin v. Kogan* [2019] EWCA Civ 1645, [33].

⁵³ *Ibid.*, [120].

⁵⁴ *Ibid.*, [51].

⁵⁵ *Ibid.*, [61] (so-called ‘ultimate arbiter’); *Martin v. Kogan* [2021] EWHC 24 (Ch), [312]–[313], where Meade J found that while there had been no formal planning meeting to allocate tasks, it was understood that Martin would ‘hold the pen’ and have the final say, while each would contribute possibilities for such characters, feeling, main events, and musical content. They knew and recognized that they were on the path towards a screenplay. This amounted to a common design as to general outline and a sharing of labour.

⁵⁶ *Martin v. Kogan* [2019] EWCA Civ 1645, [41].

⁵⁷ *Ibid.*, [42].

⁵⁸ HHJ Hacon described them dismissively, at [85], as ‘useful jargon, along with helpful criticism and some minor plot suggestions’.

⁵⁹ In his judgment following the retrial, Meade J, in *Martin v. Kogan* [2021] EWHC 24 (Ch), at [310], concluded that this ‘input was of great importance to all the central characters’.

⁶⁰ [2017] EWHC 2927 (IPEC), [43–][52].

⁶¹ [2019] EWCA Civ 1645, [61].

⁶² *Peter Hayes v. Phonogram* [2003] ECDR (11) 110, 128; *Hadley v. Kemp* [1999] EMLR 589, 643. See R. Arnold, ‘Are Performers Authors?’ [1999] EIPR 464. Expert evidence may need to be employed to assist the court in distinguishing between what is the work and what is performance: *Barrett v. Universal Island Records* [2006] EWHC 1009, [356].

⁶³ *Brighton v. Jones* [2005] FSR (16) 288, [56].

⁶⁴ *Martin v. Kogan* [2019] EWCA Civ 1645, [139].

⁶⁵ *Martin v. Kogan* [2019] EWCA Civ 1645, [53](vii) (reflecting the ‘*Infopaq* test’ discussed in detail in Chapter 4, section 3.4, pp. 105–11); cf. *Mei Fields Designs v. Saffron Cards & Gifts* [2018] EWHC 1332 (IPEC), [76] (D. Stone) (still using the language of ‘labour, skill and judgment’) and *Martin v. Kogan* itself, at [119] and [120], where the Court of Appeal refers to the ‘skill and labour which went into creating the work’.

5. Authorship and First Ownership

⁶⁶ *Mei Fields Designs v. Saffron Cards & Gifts* [2018] EWHC 1332 (IPEC), [76] (D. Stone); *Celebrity Pictures v. B. Hannah* [2012] EWPCC 32, [8] (providing a ‘general’ brief to a photographer as to the types of poses the party commissioning the photographs wanted did not make that party a joint author).

⁶⁷ *Godfrey v. Lees* [1995] EMLR 307, 325–8; *Hadley v. Kemp* [1999] EMLR 589; *Brighton v. Jones* [2005] FSR (16) 288, [34]. See also *Fylde Microsystems v. Key Radio Systems* [1998] FSR 449 (suggestions not sufficient); *Robin Ray v. Classic FM* [1998] FSR 622.

⁶⁸ One can contrast the decision of *Godfrey v. Lees* [1995] EMLR 307 (classically trained musician who acted as orchestral arranger for a rock band was held to be joint author of a number of arrangements that included orchestral passages linking the verses and choruses) with *Hadley v. Kemp* [1999] EMLR 589 (contribution of saxophonist, singer, and drummer insufficient to render them co-authors because contributions were simply what one would have expected). See A. Barron, ‘Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice’ (2006) 15 *S & LS* 25; L. Bently, ‘Authorship of Popular Music in UK Copyright Law’ (2009) 12(2) *Information, Communication and Society* (Special issue) 179.

⁶⁹ *Fisher v. Brooker and Onward Music* [2007] FSR (12) 255, [46] (Blackburne J preferred to ask whether the claimant’s contribution was ‘non-trivial’); *Martin v. Kogan* [2019] EWCA Civ 1645, [69] (‘It is preferable simply to ask whether the joint author contributed a substantial part of the relevant creative skill which is protected by the copyright in the work’).

⁷⁰ *Martin v. Kogan* [2019] EWCA Civ 1645, [53](v).

⁷¹ The Court of Appeal does, however, use the term when it criticizes the judge, at [119], for failing to have determined ‘whether the total contribution was a substantial part of the skill and labour which went into creating the work’.

⁷² *Martin v. Kogan* [2019] EWCA Civ 1645, [52].

⁷³ Joint authorship will usually be presumed to lead to equal shares, but this may be varied either by the court, where it feels comfortable evaluating the contributions—as in *Bamgboye v. Reed* [2004] EMLR (5) 61, 86, [85]; *Fisher v. Brooker and Onward Music* [2007] FSR (12) 255 (Fisher, author of the organ solo for ‘A Whiter Shade of Pale’, was awarded a 40 per cent share); *Martin v. Kogan* [2021] EWHC 24 (Ch), [325]–[330]—or according to the agreement of the parties: *Beckingham v. Hodgens* [2003] FSR (14) 238, 249 (equal shares); *Minder Music v. Sharples* [2015] EWHC 1454 (IPEC), [73], [84]–[90] (A. Michaels) (a producer who added string elements to song by The Fall was entitled to 20 per cent share in music copyright); *Peter Hayes v. Phonogram* [2003] ECDR (11) 110, 123 ff (agreement as to size of share).

⁷⁴ *Martin v. Kogan* [2021] EWHC 24 (Ch), [331].

⁷⁵ Ibid., [354].

⁷⁶ Ibid., [355].

⁷⁷ In some legal systems, most notably France, there is no such ‘integration’ requirement at all. Article L. 113–2 of the French Intellectual Property Code of 1992 defines a ‘collaborative work’ as one ‘to the creation of which several natural persons have contributed together’, implying collaboration and contribution, but not necessarily integration: P. Kamina, ‘France’, in L. Bently (ed.), *International Copyright: Law and Practice* (2021), FRA 48–50. Belgian copyright law explicitly distinguishes between two types of collaborative work—referred to as ‘divisible’ and ‘indivisible’—each category having particular rules as to whose consent is required to exploit the contribution: see further M. Perry and T. Margoni, ‘Ownership in Complex Authorship’ [2012] EIPR 22.

5. Authorship and First Ownership

⁷⁸ CDPA 1988, s. 10(1).

⁷⁹ But this will count as a work of ‘co-authorship’, a designation with implications in terms of term of protection, but not the rights of the contributors: CDPA 1988, ss 10A, 12(8).

⁸⁰ *Beckingham v. Hodgens* [2003] FSR 238, 248. In any case, the introductory fiddle music was repeated a number of times elsewhere in the arrangement. Cf. *Hadley v. Kemp* [1999] EMLR 589, in which Park J suggested that a saxophone solo in the middle of Spandau Ballet’s ‘Gold’ might be a distinct work.

⁸¹ *Martin v. Kogan* [2017] EWHC 2927 (IPEC), [11]–[12].

⁸² [2019] EWCA Civ 1645, [57]. The Court made an analogy with crosswords: ‘If two people try to solve a crossword puzzle together, it may be easy to say who first uttered the correct answer to a clue, but more difficult to answer who contributed to it when the solution emerged from a prior discussion.’

⁸³ *Martin v. Kogan* [2021] EWHC 24 (Ch), [310] (‘One cannot easily reflect this kind of contribution by pointing to specific dialogue or scenes because it suffuses the whole screenplay’).

⁸⁴ CDPA 1988, s. 11(1).

⁸⁵ CDPA 1988, s. 11(2).

⁸⁶ CDPA 1988, s. 11(3).

⁸⁷ In the United States, related, but distinct, principles operate in relation to so-called ‘works made for hire’. On the history, see C. Fisk, ‘Authors at Work: The Origins of the Work for Hire Doctrine’ (2003) 15 *Yale JL & Human* 1.

⁸⁸ CDPA 1988, ss 79(3) and 82.

⁸⁹ For a useful review, see M. Birnhack, ‘Working Authors’, *Tel Aviv University Law Faculty Working Papers* No. 97 (2008).

⁹⁰ A. Quaedvlieg, ‘Concepts of Authorship and Their Relevance to IP Entitlement—Personalist vs Entrepreneurial Approaches’, in N. Bruun and M. L. Mansak, *Research Handbook on IP and Employment Law* (2021), 132.

⁹¹ The Whitford Committee considered whether a scheme should be implemented, such as that which exists under the Patents Act 1977, providing for extra reward for particularly successful works: Cmnd 6732 (1977), [555]–[575]. The idea was quickly abandoned: *Reform of the Law relating to Copyright, Designs and Performers’ Protection* (Cmnd 8302, 1981) (pointing to practical difficulties).

⁹² More specifically, under the previous law, copyright in a work made by an author in the course of employment by the daily or periodical press presumptively vested in the employer for purposes of its publication in the newspaper or periodical: CA 1956. s. 4(2).

⁹³ While the CDPA 1988 introduced changes on point, effective from 1 August 1989, the initial ownership of copyright continues generally to be determined by the law in effect when the materials in question were made: CDPA 1988, Sch. 1, para. 11.

⁹⁴ CDPA 1988, s. 178.

⁹⁵ H. G. Beale (ed.), *Chitty on Contracts* (32nd edn, 2015), [40–010] (cited in *Chadwick v. Lypiatt Studio Ltd* [2018] EWHC 1986 (Ch), [84] (Spearman QC), and holding that the sculptor, Lynn Chadwick, was an employee of the company he had established, with his wife, as his trading business, and therefore it was first owner of Chadwick’s copyrights).

5. Authorship and First Ownership

⁹⁶ *Mei Fields Designs v. Saffron Cards & Gifts* [2018] EWHC 1332 (IPEC), [42] (D. Stone) (where it was held that the claimant, who was a ‘design director’ for a company that made and sold greeting cards, created the designs for cards, some of which the company had exploited, outside the course of her employment, because she did so at home and without direction, and could not have been ordered by the company to do so).

⁹⁷ (1952) 69 RPC 10, 10 *TLR* 101. However, a journalist who wrote a confidential memorandum to colleagues about a possible article was acting in the course of her employment: *Beloff v. Pressdram* [1973] 1 All ER 241. For background to this holding, see J. Bellido, ‘The Failure of a Copyright Action: Confidences in the Papers of Nora Beloff’ (2013) 3 *Media & Arts L Rev* 249.

⁹⁸ In *Byrne v. Statist* [1914] 1 KB 622, a journalist made a translation to be used in the newspaper in his own time; this was held not to be in the course of his employment.

⁹⁹ [1991] FSR 14.

¹⁰⁰ [1989] FSR 361.

¹⁰¹ *Mei Fields Designs v. Saffron Cards and Gifts* [2018] EWHC 1332 (IPEC), [59]–[60] (the same factors which led to the conclusion that the works were made outside the course of employment also implied an understanding between the parties that the artist was to retain copyright in greeting cards, and thus an ‘agreement to the contrary’). As we will see, there is a general requirement that assignments of copyright be in writing. However, such formality is unnecessary with respect to the agreement reversing the presumption of initial ownership, which can be oral or implied. But to refer to a relationship as not being one of employment was not an implied agreement that copyright was to vest in the employee: *Robin Ray v. Classic FM* [1998] FSR 622.

¹⁰² *Noah v. Shuba* [1991] FSR 14, 26–7.

¹⁰³ CDPA 1988, ss 163, 164.

¹⁰⁴ CDPA 1988, s. 163. It lasts for 125 years from when the work is made or 50 years from its commercial publication. Crown copyright also exists in all Acts of Parliament and Measures of the General Synod of the Church of England.

¹⁰⁵ CDPA 1988, s. 164. The Government of Wales Act 1998, Sch. 12, has added to this list ‘any sound recording, film, or live broadcast of the National Assembly for Wales which is made by or under the direction or control of the Assembly’.

¹⁰⁶ CDPA 1988, ss 165–7.

¹⁰⁷ This means an organization the members of which include one or more states: CDPA 1988, s. 178.

¹⁰⁸ CDPA 1988, s. 168.

¹⁰⁹ Under the Copyright Act 1956, a party commissioning a photograph, portrait, or engraving for value presumptively acquired copyright in that work: CA 1956, s. 4(3), Sch. 8, para. 1(a). When this position was changed in the 1988 Act, commissioners of photographs and films for private and domestic purposes were ‘compensated’ with the so-called ‘moral’ right of ‘privacy’: CDPA 1988, s. 85. The right covers issuing of copies of the work to the public, its exhibition in public, and its communication to the public.

¹¹⁰ [2004] FSR (31) 673, [2005] FSR (31) 706 (CA). This decision is remarkable in two respects. First, the implied assignment is in favour of a third party, Griggs, rather than the design company, Jordan. The more orthodox (if artificial) view would be that there are two implied agreements: one between Jordan and Evans; and another between Griggs and Jordan. The distinction would have been important if, e.g., Jordan had decided that the logo supplied by Evans was unsuitable. Second, the agreement to assign is implied in this case even though Evans did not know of the

5. Authorship and First Ownership

use intended by Griggs, Evans thinking the use was for point-of-sale only. The Judge seems to have ignored this on the ground that Evans was ‘indifferent’ to the use and, had he known, he would have accepted the more extensive use without charging a different fee.

¹¹¹ [2004] *FSR* (31) 673, [57].

¹¹² *Massine v. De Basil* [1936–45] *MacG CC* 223. See also *Brighton v. Jones* [2005] *FSR* (16) 288, [57]–[58] (contributions of director to play were made on behalf of theatre and so director was unable to claim copyright therein).

¹¹³ *Auvi Trade Mark* [1995] *FSR* 288; *R. Griggs Group v. Evans* [2003] *EWHC* 2914.

¹¹⁴ *Flanders v. Richardson* [1993] *FSR* 497, 516–19 (Ferris J held that where a computer program was improved, in circumstances under which there was an acceptance or understanding that the plaintiff owned all of the rights in the program, the court would hold the plaintiff to be the copyright owner, relying on *Massine v. De Basil* [1936–45] *MacG CC* 223).

¹¹⁵ *A & M Records v. Video Collection* [1995] *EMLR* 25.

¹¹⁶ *Lucasfilm v. Ainsworth* [2010] *Ch* 502 (CA), 556–7.

¹¹⁷ *Clearsprings Management v. Businesslinx* [2006] *FSR* (3) 21, [9] (Floyd J).

¹¹⁸ *Effects Associates, Inc. v. Cohen*, 908 F.2d. 555 (9th Cir. 1990). But cf. D. Booton, ‘Informal Dealings with Copyright’ [2011] *IPQ* 28.

¹¹⁹ In *Effects Associates, Inc. v. Larry Cohen; Larco Productions, Inc. & New World Entertainment*, 908 F.2d. 555, 15 USPQ. 2d. 1559 (9th Cir. 1990), Judge Alex Kozinski explained §204A of 17 USC thus: ‘Section 204 ensures that the creator of a work will not give away his copyright inadvertently and forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price ...’.

¹²⁰ E.g. *Saphena Computing v. Allied Collection Agencies* [1995] *FSR* 616, distinguishing *Warner v. Gestetner* [1988] *EIPR* D-89.

¹²¹ There are, in fact, many cases in which claims to equitable assignments have failed: *Tate v. Thomas* [1921] 1 Ch 503; *Robin Ray v. Classic FM* [1998] *FSR* 622; *Clearsprings Management v. Businesslinx* [2006] *FSR* (3) 21; *Slater v. Wimmer* [2012] UKPCC 7.

¹²² *A-G v. Guardian* (No. 2) [1990] AC 109, 263, 276. Insofar as the constructive trust analysis is adopted, there is no obvious reason why the analysis should be restricted to cases of breach of duties owed to the Crown: see *Ultraframe UK v. Clayton* (No. 2) [2003] EWCA Civ 1805 (director held unregistered design rights on trust for company). See Chapter 30, section 3, pp. 841–2.

¹²³ *Australian Broadcasting Corp. v. Lenah Game Meats Pty* (2001) 208 CLR 199, [101]–[102] (Gummow and Hayne JJ), and [309] (Callinan J).

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