

Chapter 3: Authorship and ownership

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The UK courts have dealt with the issue of joint authorship in the context of musical works, theatre plays and film scripts on a number of occasions.¹ Under the UK Copyright, Designs and Patents Act 1988, crucial to joint authorship is the making of a ‘significant and original’ contribution to the work. The key question is: has the purported joint author made the ‘right kind’ of creative contribution?² On music, the at times contradictory nature of UK jurisprudence can be observed by considering two key music cases we look at in Chapter 3: *Hadley v Kemp* (1999)³ and *Fisher v Brooker* (2006).⁴ 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’.⁵ However, this must now be considered in light of the subsequent ruling in *Fisher*, 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 sufficient to confer a share of authorship onto the organ player, Matthew Fisher. A rare theatre joint authorship case that made it to court is the 2004 case of *Brighton v Jones*, which concerned a dispute over the authorship of the commercially successful play ‘Stones in His Pockets’.⁶ It is notable that the court emphasised writing over other forms of creative input, denying that the director’s non-writing input was sufficient.

This privileging of writing is now in doubt due to a recent decision regarding the (joint) authorship of a screenplay: *Kogan v Martin* [2019] EWCA 1645. Here the Court of Appeal of England and Wales overturned a decision of the Intellectual Property Enterprise Court

¹ R. Arnold, ‘Are Performers Authors? *Hadley v Kemp*,’ 21 *European Intellectual Property Review* (1999) 464 and R. Arnold, ‘Reflections on “The Triumph of Music”: Copyrights and Performers’ Rights in Music,’ *Intellectual Property Quarterly* (2010) 153.

² *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818. *Beckingham v Hodgens* [2003] EWCA Civ 143.

³ *Hadley v Kemp* [1999] EMLR 589, 644-650.

⁴ *Fisher v Brooker* [2006] EWHC 3239 (Ch); [2007] EMLR 9 at para 36. The case went to the Court of Appeal – *Fisher v Brooker* [2008] EWCA Civ 287; [2008] Bus LR 1123. On further appeal to the House of Lords, it was held that Fisher could receive a share of future royalties, despite the fact that he had waited 40 years before taking the case. *Fisher v Brooker* [2009] UKHL 41; [2009] 1 WLR 1764.

⁵ *Hadley v Kemp* [1999] EMLR 589, 644-650.

⁶ *Brighton & Dubbeljoint v Jones* [2004] EWHC 1157 (Ch); [2004] EMLR 507.

(IPEC) concerning the authorship of screenplay for Stephen Frears' 2016 film, *Florence Foster Jenkins*.⁷ Nicholas Martin was attributed as its writer upon the film's release, and in 2017 his sole authorship claim was upheld by the IPEC.⁸ 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 makes a remarkably clear-headed statement of the law on joint authorship, even drawing an interesting analogy between the working relationship between T.S. Eliot and Ezra Pound:

'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 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.'

This contextual approach taken by the Court of Appeal is laudable and demonstrates how far acknowledgement of the 'collective authorship' critique has penetrated copyright jurisprudence.

⁷ *Kogan v Martin* [2019] EWCA 164. The case will now be retried at the IPEC.

⁸ [2017] EWHC 2927 (IPEC).