



The Idea of Authorship in Copyright

Lior Zemer

APPLIED
LEGAL
PHILOSOPHY

The Idea of Authorship in Copyright

LIOR ZEMER

Interdisciplinary Centre, Radzyner School of Law, Herzliya, Israel
Boston University, School of Law, USA

ASHGATE

© Lior Zemer 2007

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

Lior Zemer has asserted his moral right under the Copyright, Designs and Patents Act, 1988, to be identified as the author of this work.

Published by

Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com
--

British Library Cataloguing in Publication Data

Zemer, Lior

The idea of authorship in copyright. - (Applied legal philosophy)

1. Copyright 2. Authorship 3. Intellectual property

I. Title

346'.0482

Library of Congress Cataloging-in-Publication Data

Zemer, Lior.

The idea of authorship in copyright / by Lior Zemer.

p. cm. -- (Applied legal philosophy)

Includes bibliographical references and index.

ISBN-13: 978-0-7546-2376-2

1. Authorship. 2. Copyright. 3. Authorship--Philosophy.

4. Copyright--Philosophy. I. Title.

K1440.Z46 2007

346.04'82--dc22

2006032545

ISBN 978-0-7546-2376-2

Printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall.

Preface

In a world of intellectual achievers whose creations are safeguarded by robust regimes of rights of exclusion, the public is collectively isolated from and deprived of recognition of its social and cultural contribution to the process of creating intellectual properties. In this book I argue that copyrighted entities represent the authorial collectivity. I advocate the authorial role of the public in the process of copyright creation. This role has been largely ignored and taken for granted. I take the temerity to introduce and develop a socio-legal argument suggesting a property right for the public in *every* copyrighted enterprise.

This book is about copyright theory. It presents a model of public authorship. The upshot consists of a mix of morally viable copyright-specific justice reasons. The discussion is founded upon the argument that a copyright work is a joint enterprise of the public and the author. Every copyright work depends on and is reflective of the decisive authorial contribution the public makes to the formation of authorial and artistic materials. The author's exposure to and consumption of cultural and social elements is what makes the copyright creation successful. These elements are nurtured and stimulated by the public and constitute an integral part of the public's collective identity. Copyright works should therefore, not be regarded as exclusive private property. Since copyright works profit from significant public contribution, both public and authors should own them under a joint title.

As a way to approach the above issues, Chapter 1 introduces my general argument, maps the theories dominating our copyright culture and positions my argument amongst them. Chapter 2 discusses the conceptual aura surrounding copyright discourse, and considers what benefits we can extract from answering the question whether copyright is an essentially contested concept. In Chapter 3 I define the scope of copyright entitlement. I consider to what extent the entitlement paradigm within copyright law mimics the patterns of the common law allocation of entitlement within the institution of traditional property. I argue that copyright confers a bundle of rights on rightholders, and emphasise that this bundle imposes correlative duties on the public.

In order to account for the public authorial role, we have to eliminate well-established misconceptions dominating our copyright realm. Chapter 4 inquires into the role of the public in copyright creation. It examines the social nature of copyright and argues that authorial and artistic works require contribution from two sources: public and authors. I argue that every copyrighted work is limited *ab initio* due to its dependence on the public authorial contribution. Chapter 5 takes the arguments of the preceding chapter a step forward and presents a social constructionist theory and bases on it limits to copyright. In Chapter 6 I attempt to rein in the tendency to assume that Locke's property theory provides a coherent justification for copyright.

I challenge the many modern copyright-Lockeans who claim that Locke did not account for copyright.

Chapter 7 takes joint authorship as its organising principle. Here I provide a comparative analysis of the requirements for joint authorship and show how the public/author relationship satisfies them all. I then present several alternatives to the present ownership pattern in copyright, reflecting the actual collaborations and the proprietary aspirations of the two parties that deserve property right in copyrighted works – public and authors. Chapter 8 concludes the present study. In this chapter I provide a summary of the main arguments I present and the significance of the public authorship model to contemporary copyright law and policy. I also outline further broader conclusions highlighting the misconceptions we cherish in our vision of copyright.

It should be stated that in this book I do not intend to undermine traditional property. In essence, I reject the allocation of exclusive property rights in copyrighted materials. I also do not intend to announce the ‘death of the author’ or the end of copyright. I agree that copyright protection is a necessary economic desideratum and should be encouraged by the incentives and rewards that the system provides. I agree on the assumption that cultural and social properties ought to be brought within the domain of some kind of property institution. This, however, does not mean allocation of rights operating on the axis of ultimate private exclusivity.

Although much of the discussion transcends the law of any particular jurisdiction, the statutory and doctrinal examples are drawn principally from particularities of English copyright law. Where applicable, examples from other jurisdictions are given.

Lior Zemer

Interdisciplinary Centre, Radzyner School of Law, Israel

Boston University, School of Law, USA

January 2007

Acknowledgements

This book is about the concept of authorship and the acute contemporary need to redefine its scope and boundaries. It is a product of a journey. In this journey, which began almost a decade ago, I did not travel without company. There were many passengers, institutions, events, and conversations taking part in the process of building and defending arguments and their eventual expression in this book. I have been fortunate to invite new passengers in almost every corner of the journey and I accumulated debts of gratitude to many people. I owe most, of course, to the supervisor of my doctorate, Leslie Green, for his encouragement, invaluable suggestions and constructive criticism, and for making my research an exciting academic experience. Leslie, I have learned much from you and from our many discussions, and I am confident that it will take many more years for me to fully realise their true impact on my current and future research.

I began exploring the seeds of the arguments presented in this book at Oxford while writing a research project under the supervision of David Vaver. A major part in the very idea of this research began during that period when David introduced me to the contours of academic research, and astutely criticised versions of earlier parts of my research. David, the many lessons I learned from you and skills I obtained during my research keep guiding me whenever I embark on new research. It was during that time that I have met a colleague who became a close friend. Wendy Gordon introduced me to copyright philosophy and the lore of John Locke's legal and social agendas. I am grateful to you for accompanying my research since then, for being such a source of inspiration and support, and a true friend.

Many colleagues and friends have been generous with their time, support, and critical intervention. Mary Jane Mossman, Abraham Drassinower, Carys Craig, Rosemary Coombe, Leslie Jacobs, Joshua Getzler, and the late James Harris deserve special mention for having read and criticised previous versions of the arguments I present here. I hope this work justifies their efforts. I am also indebted to Craig Scott, Liora Salter, Michael Spence, Margaret Llewelyn, David Townend, Elise Histed, Jeremy Philips, Ilanah Simon, Glynis Truter, Robin White, Cosmo Graham, Daniel Goldsein, Herwig Hoffman, Benjamin Geva, Haya Leibowitz, Merav Kropero, Inbal Fogel, Eitan and Nitza Ben-Moshe, Chava and Joseph Pardo, David Freedman, Nitza Shapiro-Libae, Amnon Rubinstein, Amir Licht, Guy Seidman, Eyal Kimel, Ofer Raban, Lea Dooley, Holly Paisey, Jo Goacher, Ronit Golik, Jacob Abir, Sylvie Da Lomba, Tana Spanic, Alen Zysblat, Irena Zolotova, Adina Fleisher, Marc Cogen, Fiona Smith, Edward Vernon, John Vernon, Elisha Shor, Suzie Navot, Michael Meurer, David Bone, Tamar Frankel, June Dilevsky, Fred and Joyce Zemmans, and Judge John D Cooke and Judge S von Bahr of the European Court of Justice. I would like to thank my students in Leicester, Birmingham, Boston and Toronto for

allowing me their views when presenting my arguments in class. I learnt much from you. Rabbi Pink of Leicester, Rabbi Posner of Boston and their families deserve a special mention for their support and warm welcoming to their communities. I would also like to thank the editorial team at Ashgate, John Irwin, Alison Kirk, and Gemma Lowle, for their help and efforts in publishing this book, and to Tom Campbell for allowing me the privilege to publish this book in the series 'Applied Legal Philosophy'.

I am keenly aware, too, of the many institutional debts I have incurred in writing this book. I am grateful to Osgoode Hall Law School for the resources and financial support which it has provided. I would also like to thank Oxford Intellectual Property Research Centre at St. Peter's College, Boston University School of Law, University of Leicester Faculty of Law, the Hebrew University Faculty of Law, Radzyner School of Law of the Interdisciplinary Centre in Herzliya, the British Society of Legal Scholars, and the British Academy, for their intellectual companionship and financial support. Sections of this book were presented at Boston University School of Law, Queen Mary Intellectual Property Research Institute, University of London, and the Radzyner School of Law, Interdisciplinary Centre in Herzliya. In every instance I profited from the discussions that followed.

There are three special people who each deserve a very special mention here. Sharon Pardo, Christine Vernon and Merav Tauber. Without your support and encouragement this research would not have reached this stage.

I owe much to the support I received from Joseph Shaked, my grandfather David Zemer, and to a person that will not see this project complete, my grandmother, Sofia Beni whose vision will always stay with me. Finally, this book is dedicated to three people whose inspiration and support keep guiding me, my parents Rina and Moshe, and my sister Orly. Thank you for being there for me. All the time.

Parts of the introduction to this book were published in 'On the Value of Copyright Theory' (2006) 1 *Intellectual Property Quarterly* 55; Chapter 2 is an expanded version of 'The Conceptual Game in Copyright' (2006) 28(3) *Hastings Communications and Entertainment Law Journal* 409; an earlier version of Chapters 5 and 6 appeared in 'The Copyright Moment' (2006) 43 *San Diego Law Review* 247, and in 'Towards a Conception of Authorial Knowledge in Copyright' (2006) 3(2) *Buffalo Intellectual Property Law Journal* 83; Part of Chapter 6 appeared in 'The Making of a New Copyright Lockean' (2006) 29(3) *Harvard Journal of Law & Public Policy* 891; and parts of Chapter 7 were published in 'We-Intention and the Limits of Copyright' (2006) 24(1) *Cardozo Arts & Entertainment Law Journal* 99, in 'Contribution and Collaboration in Joint Authorship: Too Many Misconceptions' (2006) 1(4) *Journal of Intellectual Property Law & Practice* 283, and in 'Rethinking Copyright Alternatives' (2006) 14(1) *International Journal of Law and Information Technology* 137.

Lior Zemer
January 2007

Table of Cases

<i>Aalmuhammed v Lee</i> 202 F 3d 1227 (9th Cir 2000) (US)	202
<i>Acorn Computers Ltd v MCS Microcomputer Systems Pty Ltd</i> (1983-85) 4 IPR 214	190
<i>Allen v Rawson</i> (1845) 1 CB 551, 135 ER 656	192
<i>Anton Piller v Manufacturing Processes</i> [1976] Ch 55; [1976] RPC 719	70
<i>Apple Computers Inc v Franklin Computer Corp</i> 714 F 2d 1240 (3rd Cir 1983) (US)	107
<i>Ashdown v Telegraph Group Ltd</i> [2002] Ch 149	69, 221
<i>Ashmore v Douglas-Home</i> [1987] FSR 553	192
<i>Availability to the Public, Enlarged BA</i> (opinion) [1993] OJ EPO 277	100
<i>Bamgboye v Reed</i> [2004] 5 EMLR 61	189, 190, 195, 209
<i>Baigent v Random House Ltd</i> [2006] EWHC 719 (Ch. D)	54
<i>Beckingham v Hodgins</i> [2004] 6 ECDR 46 (CA)	53, 195, 200, 203, 209, 214, 217
<i>Beloff v Pressdram</i> [1973] RPC 783	69, 221
<i>Biotrading & Financing OY v Biohit Industries Inc</i> [1989] AC 217	53
<i>Blackborough v Graves</i> (1673) 1 Mod Rep 102; 86 ER 765	206
<i>Blacklock v Pearson</i> [1915] 2 Ch 376	52
<i>Bleistein v Donaldson Lithographing Co</i> 188 US 239 (1903)	107
<i>Bookmakers Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd</i> [1994] FSR 723 (Ch)	53
<i>Bowater Windows Ltd v Aspen Windows Ltd</i> [1999] FSR 759 (Ch)	53
<i>Brighton v Jones</i> [2004] EMLR 507 (Ch)	193, 208, 210, 212
<i>British Oxygen Co Ltd v Liquid Air Ltd</i> [1925] Ch 383	52
<i>Brown v Mcasso Music Production Ltd</i> [2006] EMLR 3 (Cpwt)	194
<i>Bull v Bull</i> [1955] 1 QB 234	189, 207
<i>Burrow-Giles Lithographic Co v Sarony</i> 111 US 53 (1884)(US)	120
<i>Cabera v Treatro Del Sesenta</i> 914 F Supp 743 (PR 1995)(US)	202, 213
<i>Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd</i> [1995] FSR 818	53, 164, 193, 195, 199, 206, 209, 212
<i>Cambridge Water Co v Eastern Countries Leather Plc</i> [1994] 2 AC 264	65
<i>CBS United Kingdom v Lambert</i> [1983] FSR 123 (CA)	70
<i>CCH Canadian Ltd v Law Society of Upper Canada</i> [2004] 1 SCR 339 (Canada)	13, 55, 159
<i>Cescinsky v George Routledge</i> [1916] 2 KB 325	206-207
<i>Chamberlain v Feldman</i> 300 NY 135, 89 NE 2d 863 (1949) (US)	60
<i>Childress v Taylor</i> 945 F 2d 500 (2d Cir 1991)(US)	197, 201-204, 207, 213-217
<i>Clogston v American Academy of Orthopaedic Surgeons</i> 930 F Supp 1156 (USWD Tex 1996)(US)	201

<i>Collis v Carter</i> (1898) 78 LT 613	52
<i>Colls v Home & Colonial Stores Ltd</i> [1904] AC 179 (HL)	65
<i>Community For Creative Non-Violence v Reid</i> 846 F 2d 1485 (DC Cir 1988); aff'd, 490 US 730 (1989) (US)	207
<i>Corbett v Hill</i> (1870) LR 9 Eq 671	43
<i>Darryl Neudorf v Netzwerk Productions Ltd & al</i> [2000] 3 WWR 522	200, 203, 208, 210, 214, 217
<i>Designers Guild Ltd v Russell Williams Textiles Ltd</i> [2000] 1 WLR 2416	67, 168
<i>Donaldson v Beckett</i> (1774) 1 Eng Rep 837	6, 162
<i>Donoghue v Allied Newspapers Ltd</i> [1937] 3 All ER 503	192
<i>Douglas v Hello! Ltd</i> [2003] EMLR 31 (Ch)	221
<i>Drummond Murray v Yorkshire Fund Managers Ltd</i> [1998] FSR 372	207
<i>Edward B Marks Music Corp v Jerry Vogel Music Co</i> 140 F 2d 266 (2d Cir 1944) 267 (US)	196
<i>Eisenman v Qimron</i> CA 2790, 2811/93, 53(4) PD 817 (Israel)	76, 83
<i>Eldred v Ashcroft</i> 537 US 183 (2003) (US)	38
<i>Erickson v Trinity Theatre Inc</i> 13 F 3d 1061 (7th Cir 1994)(US)	213
<i>Evans v E Hulton & Co Ltd</i> [1923-8] Macg Cop Cas 51	192
<i>Express Newspapers Plc v Liverpool Daily Post & Echo Plc</i> [1985] 1 FSR 306	107
<i>Feist Publications, Inc v Rural Telephone Service Co</i> 499 US 340 (1991) (US)	10, 55, 195
<i>Fisher v Klein</i> 16 USPQ 2d 1795 (SDNY 1990)(US)	201
<i>Floreay and Others' Patent</i> [1962] RPC 186	190
<i>Flyde Microsystems Ltd v Key Radio Systems Ltd</i> [1998] FSR 449	192, 194
<i>Fomento v Mentmore</i> [1956] RPC 87 (CA)	100
<i>Football League v Littlewoods</i> [1959] Ch 637	52
<i>Francis Day v Bron</i> [1963] Ch 587	176
<i>Glyn v Weston Feature</i> [1916] 1 Ch 261	67
<i>Godfrey v Lees</i> [1995] EMLR 307	208-211
<i>Hadley v Kemp</i> [1999] EMLR 589	192, 195, 209
<i>Hi Tech Autoparts Ltd v Towergate Two Ltd (No 1)</i> [2002] FSR 15 (Patent County Court)	53
<i>Hickman v Maisey</i> [1900] 1 QB 752	66
<i>Hollinrake v Truswell</i> (1894) 3 Ch 420	66
<i>Humphreys v Thompson</i> (1905-1910) Mac CC 148	51
<i>Hyde Park Residence Ltd v Yelland</i> [2000] 3 WLR 215	221
<i>Hyde Park Residence Ltd v Yelland</i> [2001] Ch 143 (CA)	69
<i>Ibcos Computers v Barclays Mercantile Highland Finance</i> [1994] FSR 275 (Ch)	48, 53
<i>Independent Television Publications v Time Out</i> [1984] FSR 64	52
<i>Interlego A/S v Exin-Lines Bros SA</i> (1989) 48(4) PD 133 (Israel)	55
<i>Interlego AG v Tyco Industries Inc</i> [1989] AC 217	54
<i>IPC Magazines Ltd v MGN Ltd</i> [1998] FSR 431 (Ch)	53
<i>Jones v Tower Hamlets LBC (No.2)</i> [2001] RPC 23 Ch	104

<i>Joy Music v Sunday Pictorial</i> [1960] 2 QB 60	67
<i>Kaiser Aetna v United States</i> 444 US 164 (1979) (US)	50
<i>Kelly v Morris</i> (1866) LR 1 Eq 697	52
<i>Kenrick & Co v Lawrence & Co</i> (1890) 25 QBD 99	192-193
<i>Kirk v Fleming</i> [1928-1935] Mac CC 44	53
<i>Ladbroke (Football) Ltd v William Hill (Football) Ltd</i> [1964] 1 All ER 465	53
<i>Lake v Gibson</i> (1729) 1 Eq Rep 290	189
<i>Lauri v Renad</i> [1892] 3 Ch D 402	190
<i>Levy v Rutley</i> (1871) LR 6 CP 523	190-191, 196, 199-200, 203-204
<i>Lion Laboratories v Evans</i> (1984) 2 All ER 417	69
<i>Mabo v State of Queensland</i> (No 2) (1992) 175 CLR 1 HC (Australia)	79
<i>Macmillan & Co Ltd v Cooper</i> (1924) 40 TLR 186	53, 137
<i>Mail Newspapers Plc v Express Newspapers Plc</i> [1987] FSR 90	190
<i>Marconi Wireless Co v US</i> 320 US 1 (1943) (US)	47
<i>Maurel v Smith</i> 220 F 195 (USDNY 1915) (US)	196, 203
<i>Mayor and Corporation of Bradford v Pickles</i> [1895] AC 587	66
<i>Mazer v Stein</i> (1954) 347 US 201 (US)	9
<i>Meltzer v Zoller</i> 520 F Supp 847 (DNJ 1981) (US)	191
<i>Millar v Taylor</i> (1769) 98 Eng Rep 201	6, 47, 162
<i>Moorhouse v Angus & Robertson No 1 Pty Ltd</i> [1980] FSR 231	60
<i>Najma Heptulla v Orient Longman Ltd</i> (1988) [1989] FSR 598 (HC India)	191
<i>Newspaper Licensing Agency v Marks & Spencer plc</i> [2001] 3 WLR 290	67
<i>Nichols v Universal Pictures</i> 45 F 2d 119 (2d Cir 1930) (US)	110
<i>Parker v British Airways Board</i> [1982] QB 1004 (CA)	79
<i>Phipps v Pears</i> [1965] 1 QB 76	66
<i>Pierce v Promco SA</i> [1999] ITCLR 233	194
<i>Pipe Line Cases</i> 234 US 548 (1913) (US)	56
<i>Portway Press v Hague</i> [1957] RPC 426	52
<i>Powell v Head</i> (1879) 12 Ch D 686	206
<i>Prest v Secretary of State for Wales</i> (1982) 81 LGR 193	70
<i>Prince Albert v Strange</i> (1849) 1 Mac And G 25	60
<i>Prior v Lansdowne Press Pty Ltd</i> [1977] RPC 511	206
<i>Purefoy v Skyes Boxall</i> (1955) 72 RPC 89 (CA)	52
<i>Re Dickens</i> [1935] Ch 267 (CA)	60
<i>Re McKerrell McKerrell v Gowans</i> [1912] Ch D 648	189
<i>Redwood Music Limited v Chappell & Co</i> [1982] RPC 109	51, 53-54, 67, 190, 200
<i>Reject Shop Plc v Manners</i> [1995] FSR 870 (QB)	53
<i>Respect Inc v Committee on Status of Women</i> 815 F Supp 1112 (USND III 1993) (US)	201
<i>Robin Ray v Classic FM Plc</i> [1998] FSR 622	192-194, 196, 206, 208
<i>Rose v Information Services</i> [1987] FSR 254	53
<i>Rowling v Uitgeverij Byblos BV</i> [2004] ECDR 7 (the Netherlands)	67
<i>Rylands v Fletcher</i> [1966] Exch 265	65
<i>Samuelson v Producers Distributing</i> [1932] 1 Ch 201	51

<i>Sawkins v Hyperion Records Ltd</i> [2004] 27 EMLR 542; [2005] RPC 4 (Ch)	54
<i>Sayre v Moore</i> (1785) 1 East 361	159
<i>Shapiro Bernstein & Co v Jerry Vogel Music Co</i> 223 F 2d 252 (2d Cir 1955) (US)	197
<i>Slumber-Magic Adjustable Bed Co v Sleep-King Adjustable Bed Co</i> (1984) 3 CPR (3d) 81 (BCSC) (Canada)	53
<i>Smith's Patent</i> (1905) 22 RPC 57	192
<i>Stuart v Barrett</i> [1994] EMLR 448	190-192, 204
<i>Taplin v Jones</i> (1865) 11 HLC 290, 329	65
<i>Tate v Fullbrook</i> [1908] 1 KB 821	192
<i>Tate v Thomas</i> [1921] 1 Ch 503	192
<i>Taylor v Ishida (Europe) Ltd</i> [2000] FSR 224	100
<i>Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd</i> [2001] FCA 612 (Australia)	55
<i>Thomson v Larson</i> 147 F 3d 195 (2d Cir 1998) (US)	197, 201-202, 208, 213, 215, 217
<i>Time Inc v Bernard Geis Associates</i> 293 F Supp 130 (SDNY 1968) (US)	120
<i>Ultra Marketing (UK), Thomas Alexander Scott v Universal Components</i> [2004] EWHC 468 Ch	168
<i>University of London Press v University Tutorial Press</i> [1916] 2 Ch 601	53-54, 120, 138
<i>Van der Lely v Bamford</i> [1963] RPC 61 (HL)	100
<i>Van Oppen & Co Ltd v Van Oppen</i> (1903) 20 RPC 617	52
<i>West Cumberland Iron and Steel Company v Kenyon</i> [1879] 11 Ch D 782	65
<i>Windsurfing International v Tabur Marine</i> [1985] RPC 59	100
<i>Wiseman v George Weidenfeld & Nicolson</i> [1985] FSR 525	192

Contents

<i>Preface</i>	<i>vii</i>
<i>Acknowledgements</i>	<i>ix</i>
<i>Table of Cases</i>	<i>xi</i>
1 Introduction	1
Against Sole Authorship	1
The Landscape of Copyright Theory	8
A Road Map	23
2 Conceptualising Copyright	27
A Conceptual Challenge	27
‘Concept’ versus ‘Conception’	27
Gallie’s Ideal of Essential Contestability	31
Art, Copyright and the Value of Essential Contestability	35
3 What Copyright Is	43
A Bundle of Rights	43
Copyright Entitlement Structure	55
4 Authorial Collectivity	73
Authorship and the Limits of Original Appropriation	73
Authorship and Collective Intentionality	83
The Authorial Role of the Public	97
Incidents of Authorship and Continuity	109
5 Subjects of Copyright and Social Construction	123
The Social Construction of ‘Whats’	123
Reconstructing the ‘Copyright Moment’	136
6 Lockean Copyright Re-Imagined	147
Challenging Copyright-Lockeans	147
Indisputable Lockean Copyright	151
Natural Rights, Labour and Copyright	157
Locke and Social Construction	178

7	Doctrinal Payoffs: The Public as a Joint Author	187
	The Question Posed	187
	Public and Author as Joint Authors	188
	Applications	208
	Alternatives	218
8	Conclusions: A Blueprint for Just Copyright	227
	<i>Bibliography</i>	233
	<i>Index</i>	261

Chapter 1

Introduction

Against Sole Authorship

Every copyrighted entity represents the creative collectivity. It is a joint enterprise of both the individual author and the public. Contemporary conceptions of copyright reject the collective nature of authorial and artistic creations and invoke copyright to signify entitlement of a certain kind, to mark an individual territory and disregard its social nature. The framework within which the regulation of copyright is examined is embedded with misconceptions and contradictions. At the heart of this definitional complexity is copyright laws' perennial struggle to define the boundaries of when the right to own begins, and when the social realm takes priority. The avenues to resolving this struggle are affected by various implications arising from this complexity. Reaching an effectual balance depends on the success of any definition of copyright in taking into account and rewarding the contribution of key participants in the process of authorial creation.

The law's inability to strike a proper balance between private and public interests in copyright is controlled by the fact that classical notions of property are embedded in policies on cultural and social appropriation. Copyright focuses on authors as a privileged category. It confers a fenced private dominion on rightholders and posits the singular author at the very centre of the copyright creation process. It rejects the very nature of copyright creation as a collectively imagined and produced activity. Hence, the reason for the slogan coined by Boyle: 'Authors tend to win.'¹

As a legal and social institution, copyright is governed by diametrically opposing conceptions of rights. It is a technical name that does not reveal the concept's intrinsic difficulties. It declares ownership over authorial and artistic resources and confers exclusive entitlement and control to a definitive category of creators, engaged in genuine activity vested in original works. It is a system that sanctifies and preserves the right to ownership. It is a system that allows traditional conceptions of property and ownership to control its social commitments.²

Copyright denies the contribution of the public to the copyright creation process and imposes and maintains an imbalance between private and public interests. The

1 J Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Cambridge Mass.: Harvard University Press, 1996) 116.

2 The key questions to ask are: 'Should we have a system of property rights in the products of intellectual labour? If so, what sorts of things should it cover? And what bundles of rights and other incidents of ownership should be included?' LC Becker, 'Deserving to Own Intellectual Property' (1993) 68 *Chicago-Kent Law Review* 609, 609-610.

role the public plays in the copyright creation process has been explored from various standpoints, but no concept has been sufficiently developed to be incorporated into a paradigm of copyright ownership. We are bound to rethink the way in which our copyright system allocates exclusive private rights in cultural and social items. As Coombe argues: 'If, as human selves in human communities, we are constituted by and constitute ourselves with shared cultural symbols, then it is important that legal theorists consider the nature of the cultural symbols "we" "share" in consumer societies and the recognition the law affords them.'³ In this book I argue that copyright creation is a collective enterprise. I approach copyright from a social perspective and claim a right for the public in every copyrighted entity, not merely for the sake of philosophical or academic debate, but for matters of proprietary entitlement and control.

Every copyrighted entity is a social construction. It depends on the consumption of cultural and social properties that make an author capable of interpreting and absorbing the significance of these properties, then translating his creative ability into the language of copyright creation.⁴ The set of rights copyright confers on authors does not reflect the inevitable causal relationship between authors and public. Moreover, as Scafidi asserts, '[t]his exclusive celebration of one individual not only obscures the role of the community and society at large in the development of intellectual property, but it also shifts attention away from the need for a robust public domain...'⁵ Preservation of the collective, and conservation of a rich and diverse array of cultural and social properties rarely conjure a romantic view similar to that of the lone author.

Many plausible arguments justify exclusive property rights over tangibles such as land and chattels. Intellectual property in general, and authorial and artistic works in particular, differ from tangible assets. The distinctions between intellectual and traditional property are three.⁶ First, since a copyrighted work is a form of expression, there is a clear and decisive public role – more than in any other form of property – in shaping methods of expression such as languages, and musical and artistic styles.

Second, copyrighted works such as literature, music and films, are the defining components of our culture and social reality. Treating them as assets that can be subject to exclusive ownership essentially means that our culture and social reality can be owned with the perquisites of buying, selling, transferring and excluding. Not only do the expressions of our culture and social environment define our society as a whole, they are also part of what defines our individual personalities and aspirations.

3 RJ Coombe, 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue' (1991) 69 *Texas Law Review* 1853, 1864.

4 See for example P Jaszi, 'Towards a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) *Duke Law Journal* 455.

5 S Scafidi, 'Intellectual Property and Cultural Goods' (2001) 81 *Boston University Law Review* 793, 804.

6 I shall use the term 'property' interchangeably with 'traditional', 'tangible' or 'corporeal' property and the term 'intellectual property' interchangeably with 'intangible', 'incorporeal' or 'abstract' property.

Subjecting these elements to exclusive private property has a direct detrimental impact on the development of our society and its individual members.⁷

Third, the law has recognised that copyright and property, while fulfilling similar ambitions, are different doctrinal areas. The law has designed a different set of rules specifically applicable to copyrights to accommodate their social implications. In that special set of rules, the duration of the right is perhaps of the greatest difference. While perpetuity is not an alien concept in traditional property, in copyright it is.⁸ As Hughes observes: 'Perhaps the greatest difference between the bundles of intellectual property rights and the bundles of rights over other types of property is that intellectual property always has a self-defined expiration, a built-in sunset.'⁹ Despite the limited duration of the right, it is frequently argued that it creates the danger of conferring on authors a quasi-perpetual right. In fact, as Lessig remarks, this danger is already with us: copyrights have come to be thought of 'not as rights that get defined or balanced against other state interests, but as rights that are, like natural property rights, permanent and absolute.'¹⁰

7 As Vaidhyathan writes: '...there must be a formula that would acknowledge that all creativity relies on previous work, builds "on the shoulders of giants", yet would encourage – maximize – creative expression in multiple media and forms. But because twentieth-century copyright law has been a battle of strong interested parties seeking to control a market, not a concerted effort to maximize creativity and content for the benefit of the public, we have lost sight of such a formula along the way.' S Vaidhyathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York and London: New York University Press, 2001) 116.

8 An author enjoys copyright in his works for 70 years 'from the end of the calendar year in which the author dies.' Copyright, Designs and Patents Act 1988 (1988, c.48) s 12(2) (hereinafter – 'CDPA 1988').

9 J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287, 296. However, there exists one exception to this rule. The CDPA 1988 provides a unique exception to the standard usage of copyright term, designed especially for Sir James Matthew Barrie's play *Peter Pan*. The exception provides the trustees of The Hospital for Sick Children, Great Ormond Street, London, a perpetual 'right to a royalty in respect of the public performance, commercial exploitation, broadcasting or inclusion in cable programme service of the play "Peter Pan" by Sir James Matthew Barrie, or of any adaptation of that work, notwithstanding that copyright in the work expired on 31 December 1987.' CDPA s 301. The right will terminate if the Hospital ceases to have a separate identity or no longer has as its purpose the care of sick children.

Seville remarks in that respect that '[t]he policy questions are vexing...since authorship draw from the literary commons, it is arguably inappropriate to attribute "ownership" of a character to a single author, at least if it is to extend beyond the boundaries of the character's expression in the author's copyright works' and 'quite apart of the dangers of unwittingly restricting other's use of character types, room must be left for humour, parody, comment, and reference.' C Seville, 'Peter Pan's Rights: "To Die Will Be an Awfully Big Adventure"' (2003) 51(1) *Journal of the Copyright Society of the USA* 1, 7.

10 L Lessig, 'Copyright's First Amendment' (2001) 48 *UCLA Law Review* 1057, 1068.

Although it is not entirely wrong to argue that '[o]ur lives are in every respect dominated by an intuitive sense of property and belonging',¹¹ when intellectual properties are at stake, ownership and control should not be defined under exclusive terms. I shall argue that copyrighted entities are manifestations of the collective creativity; they are socially and culturally constructed. So we may ask, if works of art and authorship are collectively produced, ought they to be collectively owned? Admittedly, as Underkuffler remarks: property is a legal conclusion but '[t]he idea that property rights...are presumptively free from collective claims has been decisively abandoned, if ever it was true.'¹² I largely base my arguments on the claim that every copyrighted entity is socially constructed and historically contingent.¹³ This claim raises serious doubts regarding declarations such as 'I own the copyright' or 'this is my copyright.'

A starting point for the understanding of copyright from a constructionist perspective is the role of collaboration in copyright creation and its place as a key characteristic of the creative society. In fact, collaborative authorship is not an invention of modern times. Masten tells us that collaboration 'was a prevalent mode of textual production in the sixteenth and seventeenth centuries, only eventually displaced by the mode of singular authorship with which we are more familiar.'¹⁴ Vickers asserts that collaborative authorship was a 'standard practice in Elizabethan, Jacobean, and Caroline drama.'¹⁵ Jaszi tells us that in recent times works of art and

11 K Gray, 'Equitable Property' (1994) 47(2) *Current Legal Problems* 157, 158.

12 LS Underkuffler, *The Idea of Property: Its Making and Power* (Oxford: Oxford University Press, 2003) 2. See also by the same author, 'On Property: An Essay' (1990) 100 *Yale Law Journal* 127.

This can be supported by Gordon's remark that 'what strikes the backward-looking observer as curious is simply this: that in the midst of such a lush flowering of absolute dominion talk in theoretical and political discourse, English legal doctrines should contain so very few plausible instances of absolute dominion rights. Moreover, it is curious that English and colonial social practices contained so many property relations that actually seemed to traduce the ideal of absolute individual rights. The real building-blocks of basic eighteenth-century social and economic institutions were not absolute dominion rights but, instead property rights fragmented and split among many holders; property rights held and managed collectively...; property relations of dependence and subordination; property subject to arbitrary and discretionary direction or destruction...; property surrounded by restriction on use and alienation; property qualified and regulated for communal or state purposes...' RW Gordon, 'Paradoxical Property', in J Brewer and S Staves (eds.), *Early Modern Conceptions of Property* (London: Routledge, 1996) 96.

13 As Hacking, writing on social constructionism, tells us: 'none of the examples is my own. I deliberately take historical case studies made by other people', and that '[c]ollectively my audiences were participating in the making of this book.' I Hacking, *The Social Construction of What?* (Cambridge Mass.: Harvard University Press, 1999) ix, 172.

14 J Masten, *Textual Intercourse: Collaboration, Authorship, and Sexualities in Renaissance Drama* (Cambridge: Cambridge University Press, 1997) 4.

15 B Vickers, *Shakespeare, Co-Author: A Historical Study of Five Collaborative Plays* (Oxford: Oxford University Press, 2002) 137.