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AUTHORSHIP AND JOINT-AUTHORSHIP OF  
MUSICAL WORKS:  
A QUEST FOR COMMON STANDARDS IN EU COPYRIGHT LAW

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## **Abstract**

Authorship in musical works is a key concept of copyright law, applied in both, common law and civilian law jurisdictions. Authorship has also been the legitimating factor since over a decade to gradually expand exclusive rights and their term. Yet authorship as a concept is today challenged by the argument that *the author* is an artificial construct based on a how classical music was created at the end of the 19<sup>th</sup> century. The critic submits that the concept of authorship fails to understand how music is created today, especially in music genres such as jazz, pop and rock music and that a review of establishing authorship title—sole and joint—is needed.

This view is contrasted with the main argument developed in this research project, which purports that every performance is based on—or at least contains—an underlying musical work, which is created through an *authorial process* necessitating time, research, brainstorming and inspiration. But most importantly it is argued that the creation of the musical work is the result of labour of the mind and the expression of that labour is what copyright in the sense of author's right aims to protect.

Moreover this research project affirms that EU harmonisation in the area of authorship in musical works is far from being complete and concludes that in order to provide a fair level playing field for all authors of music active in the EU Single Market, as well as in order to restore the foundational ground of EU copyright law, harmonization of sole and joint authorship title in musical works shall be pursued along a narrow approach of authorship.

## Table of Contents

### - **Introduction**

- Introduction
- Terminology and Methodology

### - **Chapter 1:**

- Main governing Principles of UK Copyright Law and German Author's Rights

### - **Chapter 2:**

- Joint Authorship of Musical Works in the UK
- Joint Authorship of Musical Works in Germany

### - **Chapter 3**

- Joint Authorship Rules of Musical Works in the UK and Germany: Main Differences
- The EU Dimension

### - **Chapter 4:**

- A Quest for Common Standards
- The Necessity to maintain a Narrow Approach

### - **Conclusion**

### - **Bibliography**

## Introduction

Authorship holds a central conceptual place in copyright law. In civil law countries such as Germany, the term *Urheberrecht*, or authors' rights, highlights the inherent link between the author and his or her work and references the philosophical background of natural rights theory. While the role of the author is also central in UK copyright law, it is approached from a different philosophical conviction: UK law understands that in granting authors a set of exclusive rights, incentives for the creation of new works of art are provided, which in turn is beneficial to society as a whole.

Commentators in academics and politics argue that the *author* as conceptualized in copyright law is outdated and fails to account for how music is created in the twenty-first century. Too frequently copyright denies the creative contribution of performers, they argue. In addition requests for a review of authorship, or at least for a more flexible concept, have become more and more frequent.

The aim of this dissertation is to analyse key aspects of the authorship of musical works and to provide guidance for further harmonization of authorship—sole and joint—at the European level. It is argued that in order to advance the EU Single Market and to provide a fair level playing field for all authors of music active throughout the EU, harmonization of authorship is pivotal.

In line with this argument, this dissertation outlines several key principles upon which further EU harmonization should be based. It concludes that authorship remains a fundamental aspect of EU copyright law not least because it is the main legitimacy for granting a set of exclusive

rights for 70 years post mortem auctoris and that a too flexible approach of authorship would endanger copyright law as a legal institution.

## **Terminology and Methodology**

At the outset it is important to define precisely what “copyright” and “authors’ rights” refer to for the purposes of this dissertation.

The term “copyright” in the outline of the main governing principles of UK copyright law in chapter one is used as in the law, i.e., to describe the rights arising under Chapter 1 of the Copyright, Designs and Patents Act for original literary, dramatic, musical and artistic works, as well as for sound recordings, films, broadcasts and the typographical arrangement of published editions.

The term “authors’ right” and “neighbouring rights” in the description of the main governing principles of *German authors’ rights* law is used to mark the distinction between the civil law and common law traditions and more precisely translate the meaning of the German term *Urheberrecht*. “Authors’ rights” describe the rights arising in original works that are the result of the author’s own intellectual creation. “Neighbouring rights” refer to rights in entrepreneurial works such as sound recordings or broadcasts.

The reference to “copyright” in the EU dimension is used in the restricted sense of rights for original works of authors. Rights for performances, sound recordings, film and broadcasts are described in the EU directives as “related rights.”

The dissertation is based on primary sources such as statutory and case law as well as secondary sources such as journal articles, textbooks, government papers and studies. The dissertation also includes insights derived from interviews with the composers Bernard Grimaldi and Stephan Kondert.

## CHAPTER I

### **Main governing Principles of UK Copyright Law and of German Author's Rights**

The main purpose of this chapter is to outline the foundational grounds of UK copyright law and German author's rights and to elaborate in brief the general and historical backgrounds, the structure of protection, the appearance of the author as beneficiary and the concept of originality.

#### **United Kingdom**

##### *General and Historical Overview*

The UK's philosophical premise of copyright is based on a strong utilitarian calculation: the aim of copyright is to stimulate creation in order to enrich society and culture.<sup>1</sup>

Historically, copyright in England developed within the common law tradition over a period of time from old customs and court decisions, giving protection against unauthorized publication of an author's manuscript or unauthorized public performance of plays. It was common practice for the guild of book printers, the Stationers' Company, being trade partners of the state and the church, to operate a licensing system for printing that gave members unlimited monopolies over titles or even classes of work.<sup>2</sup>

With constitutional changes at the end of the seventeenth century—the Restoration and the Glorious Revolution—stationers were challenged for the first time by provincial copiers and

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<sup>1</sup> Cornish, W.R.. "Authors in Law". The Modern Law Review 1995, Volume 58: page 4

<sup>2</sup> Ibid page 3

needed stronger protection and reference under law. The first ever copyright act, commonly known as the Act of Anne, was enacted in 1710 and constitutes the first statutory reference to authorship. Entitled “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned,” the Act gave authors or their assignees (in most cases publishers and booksellers) the exclusive right to print their works for a period of 14 years; if authors were living at the end of that period, the sole right of printing and disposing of copies returned to them for a second term of the same period (in practice the authors’ rights were assigned to the publisher, who then controlled the printing rights).<sup>3</sup>

### *Structure of Protection*

While copyright gained statutory reference with the Act of Anne, the question arose whether disputes over rights should be enforced by common or statutory law, which impacted the term of protection (the Act of Anne provided limited term protection while common law rightly assumed that copyright is perpetual). In *Millar v. Taylor*<sup>4</sup> the common law right was held to continue; however, the case *Donaldson v. Beckett*<sup>5</sup> ruled that once a work was published, the perpetual common law right was replaced by statutory right with a limitation in term.<sup>6</sup> Indeed, the perpetuity of copyright granted to published works under common law was restrained and taken away by the Act of Anne.<sup>7</sup>

The *Donaldson* case is important as it highlighted the necessity of finding the right balance between a utilitarian calculation for stimulating the creation of new works through granting

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<sup>3</sup> Ibid.

<sup>4</sup> *Millar v Taylor* (1769) 4 Burr 2303, 98 ER 201

<sup>5</sup> *Donaldson v Beckett* (1774) II Bro PC 129, 1 ER 837; 4 Burr 2408, 17 Parl Hist 953.

<sup>6</sup> Cornish, W.R.. “Authors in Law”. *The Modern Law Review* 1995, Volume 58: page 3

<sup>7</sup> Ibid.

exclusive rights and the public interest in competitive access to a work.<sup>8</sup> *Donaldson* clearly limited the term of copyright for published works and established the Act of Anne as the statutory reference for published works. The *Donaldson* ruling and the subsequent interpretation of the Act of Anne are also interesting case studies for analysing the role of the ‘author’ in early British copyright law and illustrated the need for publishers and producers of works to refer to the moral claim of the author to justify rights for printing or performances.

UK statutory copyright law was further elaborated in the course of the nineteenth and twentieth centuries, taking into account technological developments and gradually lengthening the list of subject matter. While the 1911 Copyright Act granted exclusive rights to original literary, dramatic, musical and artistic works, entrepreneurial works such as sound recordings or broadcasts were not yet included under statutory copyright law. Only the 1956 Copyright Act and later the 1988 Copyright, Designs and Patent Act (CDPA) complemented the list of “original” works with entrepreneurial works and set out a term protection of 70 years *post mortem auctoris* for original literary, dramatic, musical and artistic works<sup>9</sup> and films,<sup>10</sup> and 50 years for entrepreneurial works such as sound recordings<sup>11</sup> or broadcasts.<sup>12</sup>

Copyright in the UK under the CDPA is granted to original literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and the typographical arrangement of published editions.<sup>13</sup> Thus there is one copyright for both original works and entrepreneurial works. It should also be noted that an original work must fall within the closed list of literary, dramatic, musical and artistic subject matter in order to be granted copyright protection.

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<sup>8</sup> Ibid

<sup>9</sup> 1988 CDPA s. 12(2)

<sup>10</sup> Ibid. s.13B (2)

<sup>11</sup> Ibid. s. 13A (2)(a)

<sup>12</sup> Ibid. s. 14 (2)

<sup>13</sup> Ibid. s.1

Finally, as the United Kingdom is member of the European Union its directives and regulations apply. Chapter three of this study will discuss the European dimension more thoroughly.

### *The Author as Beneficiary of Copyright Protection*

The legal and statutory origin of the author as the first owner of copyright law is frequently sourced to the Act of Anne, which also provided an opportunity to rethink the notion of ‘property’. While in practice nearly all early litigation that arose under the statute involved booksellers claiming rights against other booksellers,<sup>14</sup> one case, litigated in 1741, documents the first appearance of the author in court claiming rights under the Act of Anne. In *Pope v. Curl*,<sup>15</sup> which is referred to as the origin of the notion of the essentially immaterial nature of the object of copyright,<sup>16</sup> Lord Chancellor Hardwicke had to examine two important questions: first, whether a private letter falls under the scope of the Statute of Anne, i.e., “Encouragement and Learning,” and second, whether the property in the letter vests to the receiver of the letter or to the person who wrote it. As for the first question Lord Hardwicke refrained from examining the literary quality and simply held:

I think it would be extremely mischievous, to make a distinction between a book of letters, which comes out into the world, either by the permission of the writer, or the receiver of them, and any other learned work.<sup>17</sup>

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<sup>14</sup> Rose, Mark. “The Author in Court: Pope v. Curl (1741)”. *Cultural Critique* 1992. P. 202

<sup>15</sup> *Pope v. Curl*, (1741) 26 ER 608

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

Lord Hardwicke clearly refrained from making an assessment of artistic quality—a decision that was seconded by many judges.

As for the second question, Lord Chancellor Hardwicke's conclusion is remarkable as it illustrates an important abstraction of the traditional common law approach to property: Hardwicke does not confirm that the receiver of a letter holds the property in it, as purported by the defendant. Rather it is held that while the property in the paper may belong to the receiver, it does not give the receiver the right to publish it to the world.<sup>18</sup> Thus, the Statute protects the words recorded on paper as the writer's property.

The distinction between physical and immaterial property, with the latter belonging to the author, is raised in Lord Chancellor Hardwicke's assessment in *Pope v. Curl*. Of fundamental importance for today's copyright law in the UK and abroad, this distinction strongly impacted the concept of authorship, which further developed in the eighteenth and nineteenth centuries into a key point of attachment for determining ownership and copyright protection.

#### *Protection Criteria: Originality*

The Copyright Act of 1911 is of great significance for UK copyright law because it defines the closed list of copyright subject matter under the condition that the respective work is *original*. Thus literary, dramatic, musical and artistic works are protected by copyright only if they are original, which becomes a key criterion for the establishment of copyright protection. Interestingly, while the 1956 and 1988 Acts gradually supplemented the subject matter list with entrepreneurial works such as broadcasts, films and sound recordings, they refrained

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<sup>18</sup> Ibid.

from exporting the concept of originality to those kinds of works and reserved originality as an approach for the category of ‘authorial works’.

Section 9 of the 1988 Copyright, Designs and Patent Act defines the ‘author’ as the person who creates the work.<sup>19</sup> The act does not provide much more guidance in defining authorship (except for joint authorship as discussed later). It is therefore useful to examine what qualifies as authorship and how the notion of authorship is linked with the concept of originality. Qualifying as an author (and thus determining first ownership<sup>20</sup>) depends largely on whether the work in question can be qualified as an *original* work. Case law provides some guidance, and the common approach tests whether the right kind of labour, skill and judgment had been employed in creating the work. In line with this approach, originality has been found in a verbatim report<sup>21</sup> and in the automatic writings of a spiritual medium.<sup>22</sup> However, not all categories of works—literary, dramatic, musical and artistic—can be tested for originality using the same kind of labour, skill and judgment. In *Interlego AG v. Tyco Industries*,<sup>23</sup> for example, Lord Oliver noted that it would be erroneous to apply the same test of originality developed in *Landbroke v. William Hill*<sup>24</sup>—the right kind and degree of labour, skill and judgment—to artistic works. Thus, while UK courts carefully avoided assessing the artistic quality of the work in question, in *Interlego* Lord Oliver proposed that changes must be visibly significant in order to acquire authorship of artistic works.

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<sup>19</sup> 1988 UK CDPA; S.9

<sup>20</sup> *Ibid.* S.(11)(1)

<sup>21</sup> *Walter v Lane* (1900) AC 539

<sup>22</sup> *Cummins v Bond* (1927) 1 CH 167

<sup>23</sup> *Interlego AG. v. Tyco International Inc* [1988] RPC 343; [1989] 1 AC 217 (PC)

<sup>24</sup> *Ladbroke Football Ltd v. William Hill Football Ltd* [1964]

This assessment argues that while different approaches must be applied for different categories of works when assessing their originality, the threshold of originality in artistic quality is generally at a minimum level.<sup>25</sup>

In addition to the traditional UK test of labour, skill and judgment, a ruling of the European Court of Justice concluded that to be original, the work in question must express “the authors own intellectual creation.”<sup>26</sup>

Finally, UK copyright law entails a fixation requirement for original works, which need to be recorded in writing in order to acquire copyright protection.<sup>27</sup> The research project shall elaborate thereon later.

## **Main Governing Principles of German Authors’ Rights Law**

### *General and Historical Overview*

As in England, sovereign printing privileges preceded the emergence of an authors’ rights law in Germany. The first German copyright legislation was an 1837 Prussian act, which was replaced with the establishment of the Second German Reich by an 1871 act granting protection to literary works, illustrations, musical compositions and dramatic works.<sup>28</sup> The

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<sup>25</sup> Sawkins v. Hyperion (2005) 3 All ER 636

<sup>26</sup> Infopaq International A/S v Danske Dagblades Forening (Case C-5/08) (16 July 2009) at 37

<sup>27</sup> 1988 CDPA s.3(2)

<sup>28</sup> Goldstein, Paul. “International Copyright: Principles, Law and Practice.” 2001 Oxford University Press. P. 9

current statutory legislation is based on the 1965 Act on Copyright and Related Rights (*Gesetz über Urheberrecht und verwandte Schutzrechte*).<sup>29</sup>

In contrast to the UK's philosophical framework of utilitarian principles, the German authors' rights law is rooted in the science of natural rights and mainly in the findings of the philosophers Johann Gottlieb Fichte and Immanuel Kant. Both are probably the most important thinkers of the German Enlightenment and submitted in the late nineteenth century that, in essence, literary creations contain immaterial property that reflects the personality of the author.

German lawyer and law historian Otto von Gierke linked this concept with law and argued for a legal regime of authors' rights that would enable the author to control every aspect of the work, whether personal or material. Shifting from the property approach to a theory of the personality right, German author's rights are characterised by monism, tracing back to the view that every creative work reflects the personality of the author. Accordingly, the author of a work exercises a personality right according to which the moral and economic rights of the author are inseparable.<sup>30</sup>

### *Structure of Protection*

The 1965 law is the main statutory reference for authors' rights in Germany. Known as the *Urheberrechtsgesetz*, the act is divided into five parts dealing with author's rights, related

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<sup>29</sup> Urheberrechtsgesetz 1965, Deutschland

<sup>30</sup> In contrast to the French "droit d'auteur," which views moral rights as separate from exploitation rights (dualism) .

rights, special provisions on film, common provisions on authors' rights and related rights and transitional and final provisions.<sup>31</sup>

The German law provides a terminological distinction between original works, which are the result of the intellectual creation of authors, and entrepreneurial works or performances. While the former type falls under 'author's rights' and is covered by part one of the act, the latter is distinguished in part two of the act with the term "related rights" (*verwandte Schutzrechte*). As in the UK, the rights granted to entrepreneurial works and performances are more limited, such as a shorter term protection of 50 years after the calendar year of the recording<sup>32</sup> and less elaborated moral rights.<sup>33</sup>

The term "related rights" is an Austrian invention from 1936, which provided a practical solution to the theoretical problems author's rights were subject to in the area of performances and new technologies.<sup>34</sup>

Also, original works outlined under part one are illustrative, and the German act does not provide a "closed list" as does the UK CDPA.

A further interesting detail on the 1965 Act is the location of moral rights (*Urheberpersönlichkeitsrecht*) just before the exploitation/use rights (*Nutzungsrechte*), probably in order to maintain an approach consistent with the theory of personality rights.<sup>35</sup>

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<sup>31</sup> 1965 UhrG., Germany

<sup>32</sup> 1965 UrhG, Part II, Art. 82

<sup>33</sup> Ibid. Part II, Art. 76

<sup>34</sup> Sterling, J.A.L., "World Copyright Law". London: Sweet & Maxwell 2008. P 80

<sup>35</sup> 1965 UrhG. Part I, Arts 12-14

The 1965 Act was amended in 2002 with the introduction of a Law to Strengthen the Contractual Position of Authors and Performers, which includes an inalienable right of the author to claim “equitable remuneration” (*angemessene Vergütung*).<sup>36</sup>

### *The Author as Beneficiary of Protection*

Similar to the UK, printing privileges preceded the emergence of authors’ rights in Germany. However, the Enlightenment movement and the natural rights studies of Johann Gottfried Fichte developed the reference to the author in German literature and law, which now holds a central conceptual place in the German authors’ rights law.

Article 7 of the 1965 Act describes “the author [as] the creator [*Schöpfer*] of the work” and, following the philosophical foundation of monism, the act incorporates the view that every work reflects the personality of the author. Consequently, authors’ rights, whether moral rights or exploitation rights, are not assignable under German law.<sup>37</sup> Instead, authors grant “use rights”<sup>38</sup> and, at least in theory, the right itself remains with the author.

### *Protection Criteria*

Under German law a “work” in the sense described in Article 1 of the Act is a “personal intellectual creation.”<sup>39</sup> Thus, the critical question is whether a work achieves the so-called ‘level of creativity’ (*Schöpfungshöhe*).<sup>40</sup> In essence, German courts have interpreted this

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<sup>36</sup> Ibid. Part I, Art. 32

<sup>37</sup> Ibid. Part I, Art. 29

<sup>38</sup> Ibid. Part I, Art. 31

<sup>39</sup> Ibid. Part I, Art. 2

<sup>40</sup> Schricker, Gerhard. “Farewell to the ‘Level of Creativity’ (*Schöpfungshöhe*) in German Copyright Law”. *International Review of Intellectual Property and Competition Law* ((1995) 26(1) IIC 41). P. 1

concept broadly,<sup>41</sup> particularly for works that are literary, artistic, musical or dramatic in nature. However, for applied arts a concept evolved that a work should attain a certain ‘level of creativity’ in order to be protected under author’s rights.<sup>42</sup> Without much discussion this concept was also applied to other kind of works, such as computer programs, to answer the question whether the degree of individuality in the work is sufficient to qualify for protection.<sup>43</sup> The German Federal Court of Justice applied these criteria and decided that a computer program can only be protected under the German authors’ rights law if it demonstrates a level of creativity that surpasses the average in works of that kind.<sup>44</sup>

However, European harmonization has obliged the German courts to reconsider this approach, and the German concept of ‘small change’ (*kleine Münze*) has been applied to protect works containing a low level of creativity in the traditional meaning, such as databases or computer programs, in order to provide protection under the authors’ rights law.

Music and other works of art have maintained a low level of creativity as a general methodology.<sup>45</sup>

Finally, while there is merit in stressing that continental authors’ rights laws such as Germany’s and copyright law in the sense of the UK common law tradition differ more in emphasis than in outcome,<sup>46</sup> both concepts remain rooted in distinct foundational principles

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<sup>41</sup> Sterling, J.A.L. “World Copyright Law”. London: Sweet&Maxwell 2008..P. 344

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> “Inkasso Programm” BGH, 9 May 1985; GRUR 1041; (1989) 17 IIC 681; (1986) EIPR 185

<sup>45</sup> Schricker, Gerhard. “Farewell to the ‘Level of Creativity’ (Schöpfungshöhe) in German Copyright Law”. International Review of Intellectual Property and Competition Law ((1995) 26(1) IIC 41). P. 2

<sup>46</sup> Goldstein, Paul. “International Copyright: Principles, Law and Practice”. Oxford University Press 2001. P. 10

ranging from pragmatism and utilitarianism to philosophical conviction and the natural sciences.

The following table illustrates the main differences between UK copyright law and German authors' rights and provides a general reference for the second chapter that addresses specifically joint authorship of musical works.

Table I: *Main characteristics of UK copyright and German author's right law in comparison*

	<b>UK</b>	<b>Germany</b>
<b>Basis of Protection</b>	Copyright is a property right	Monist system: the author has natural rights composed of moral and economic rights
<b>Subject Matter of Protection</b>	Specifically defined "closed list"	Personal intellectual creation, non-exclusive list
<b>Beneficiaries</b>	Authors of works in s.1 CDPA, separate copyright for original and entrepreneurial works	Authors of works of personal intellectual creations. Related rights for entrepreneurs and performers
<b>Protection Criteria</b>	Fixation and originality (labour, skill and judgment)	Evidence of personal intellectual creation and individuality ( <i>Persönlichkeit</i> )
<b>Moral Rights</b>	Waivable	Non-waivable
<b>Exercise of Rights</b>	Authors can assign rights	Authors grant usage rights ( <i>Nutzungsrechte</i> ). Also: extensive rules on contracts
<b>Exceptions</b>	Extensive list including "fair dealing" exceptions	Extensive list, but less elaborated than in the UK

## CHAPTER II

### Joint Authorship of Musical Works in the United Kingdom and in Germany

This chapter discusses authorship and joint authorship rules of musical works in the UK and in Germany with reference to relevant cases and methodological concepts. At the outset, however, it should be noted that while the licenses collected for copyrights and author's rights of musical works have become significant sums over the years—for instance the UK-based Performing Rights Society (PRS for Music) paid out £557.2 million to its members (composers, songwriters and publishers)<sup>47</sup> in 2011—there is no European or internationally recognized definition of musical works<sup>48</sup> nor of authorship. Considering the important financial consequences of whether a person is held to be a joint-author of a (commercially) successful musical work, it would be advisable to have a European, if not international, standard.

#### *Subject Matter: Musical Works in the UK and in Germany*

What is a “musical work”? While there is no internationally recognized definition of musical works, combinations of sounds in selected rhythms and melody as composed over the centuries are generally acknowledged as musical works.<sup>49</sup> The Berne Convention for the Protection of Literary and Artistic Works—the world's leading international convention on copyright and related rights, with the UK and Germany as signatories—sets out in Article 2 that “the expression of ‘literary and artistic works’ shall include every production in the

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<sup>47</sup> 2011 PRS for Music Financial Review, <http://www.prsformusic.com/aboutus/ourtrackrecord/2011/Pages/default.aspx> > accessed 1 September 2013

<sup>48</sup> Sterling, J.A.L. “World Copyright Law”. London: Sweet&Maxwell 2008.P. 258

<sup>49</sup> Ibid.

literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as [...] musical compositions with or without words.” Thus, the Berne Convention cedes to contracting parties the answer to the question of whether a musical work shall include words.

UK copyright law strictly excludes “words or any action intended to be sung, spoken or performed with the music” from musical works,<sup>50</sup> with the result that a UK song contains two copyright protected works—the musical work and the lyrics therein. Case law also provides some guidance as to what characterizes a musical work, e.g., Lord Justice Mummery’s ruling in *Sawkins v. Hyperion Records*<sup>51</sup> where it was held that the

essence of music is combining sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener’s emotions and intellect.<sup>52</sup>

Mummery’s assessment erroneously narrows the scope of musical works by excluding the practice of art and contemporary music composers who strive to create aspects other than harmony and instead focus, for instance, on the art of noise and disorganized harmony. Also the judgment raises the question whether John Cage’s masterpiece *4’33”*—four minutes and thirty three seconds—would be protected as a musical work under UK copyright law. What some commentators might view as mere silence, others understand as the act of listening, as opposed to merely hearing.<sup>53</sup> David Tudor, who performed the premiere of *4’33”* in 1952, characterized the work as “one of the most intense listening experiences you can have. You

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<sup>50</sup> 1988 CDPA, s. 3 (1)

<sup>51</sup> *Hyperion Records Ltd v Sawkins* [2005] EWCA Civ 565,

<sup>52</sup> *Ibid.* para 53

<sup>53</sup> Silverman, Kenneth. “John Cage – Begin Again”. New York 2010, Alfred A. Knopf. P. 117-118

really listen. You're hearing everything there is."<sup>54</sup> According to Cage, what perhaps most members of the audience experience as silence is in fact ambient sounds they had ignored: the wind stirring outside, raindrops pattering on the tin roof and, toward the end, themselves making "all kinds of interesting sounds as they walked out."<sup>55</sup>

In contrast, the German authors' rights law has a more flexible concept of musical works and a broader understanding of the subject matter "works of music" (*Werke der Musik*).<sup>56</sup> Those works can be expressed through sounds as well as scores and may also entail a human voice.<sup>57</sup>

While the German concept may be broader in scope, the main difference between the UK and German approaches concerns the fixation requirement of the musical work. Under UK law, the musical work must be recorded in writing or otherwise,<sup>58</sup> under German law it suffices if the musical work is perceivable, for instance, during a public performance.<sup>59</sup> As discussed below, this particular characteristic of German law was helpful for the appellant's joint authorship claim in the "Schatten an der Wand" case.<sup>60</sup>

However, commentators differ in their opinions as to what a musical work in the sense of the law should entail, with some stating that it is not desirable to have a legal definition of music in the UK statute<sup>61</sup> and others pointing out that the concept of music and the UK copyright

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> 1965 UrhG., § 2 (I) (2)

<sup>57</sup> Prof. Dr. Wandtke. „Urheberrecht. Grundbegriffe und Schemata zum Urheberrecht“. (Neubearbeitung 2008 von Dr. Michael Kauert). 2008 Humboldt Universität Berlin. P.3

<sup>58</sup> UK CDPA 1988 s.3 (2)

<sup>59</sup> Böhmanwaltskanzlei. <http://www.boehmanwaltskanzlei.de/urheberrecht-medienrecht/200-das-werk/636-werke-der-musik.html> > accessed 10 July 2013

<sup>60</sup> Federal Court Mannheim, 7 O 514/04 (12 August 2004)

<sup>61</sup> Rahmatian, Andreas. "The Concepts of 'Musical Work' and 'Originality' in UK Copyright Law – Sawkins v Hyperian as a Test Case." 2009. International Review of Intellectual Property and Competition Law. Volume 40/Issue 5. At 566

law of musical works “harbour a bias in favour of Western art music,” completely underestimating and under-privileging popular music as a field of creative practice.<sup>62</sup> The latter argument is of particular relevance in cases of joint authorship and will be further discussed below.

Table II: *Main Conceptual Differences of Musical Works in the UK and in Germany*

Musical Work in the UK	Musical Work in Germany
<ul style="list-style-type: none"> <li>- Fixation requirement</li> <li>- No statutory definition but narrow interpretation in case law (Mummery L.J. in <i>Sawkins</i>): A musical work must contain a combination of sounds, it is more than mere noise</li> <li>- Excludes any words</li> </ul>	<ul style="list-style-type: none"> <li>- No fixation requirement</li> <li>- No statutory definition</li> <li>- Broad interpretation: sounds can include animal noises, human voice, instruments etc.</li> <li>- Music structure or melody irrelevant</li> <li>- Words can be included</li> </ul>

Finally, this paper argues that instead of concentrating on traditional concepts of classical music and popular music, the concept of musical works should be broad enough to accommodate works with similar *artistic* characteristics as 4’33”.

### **Joint Authorship of Musical works in the UK**

There is a lot of debate in the literature and the law about *what* constitutes joint authorship of musical works and whether UK copyright law applies a consistent approach in its attribution. Furthermore, it is frequently criticized that the attribution of authorship is based on a concept developed in the nineteenth century for classical music and falls short of accommodating the characteristics of popular music, which in many cases is the result of collective creativity and

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<sup>62</sup> Barron, Anne “Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice”, 2006 Social and Legal Studies (15.1). SAGE Publications. P.25

jamming. This segment elaborates both issues and aims to outline the state of the art of joint authorship of musical works in the UK.

The CDPA sets out that a “work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of each author *is not distinct* from that of the other author or authors.<sup>63</sup> Copyright protects the common work and shares are normally divided equally.<sup>64</sup> The aspect of qualification requirements is similar to the concept of sole authorship discussed above and it is submitted that a contribution must be substantial in the sense of originality. Therefore, courts tend to analyse whether the part contributed is *original* in the sense that labour, skill and judgment were applied to create something novel—an analysis that is particularly challenging when assessing joint authorship of performances of popular music. While the contribution must be substantial in the sense of originality, UK law also requires that the contribution be merged into an inseparable unitary whole.<sup>65</sup> Finally, courts will analyse whether the work in question has been created in a process of collaboration.<sup>66</sup>

The question of original contribution is of prime importance as it goes back to the fundamental question of what constitutes authorship. *Hadley v. Kemp*<sup>67</sup> addresses this aspect in an almost textbook fashion. Three members of the group Spandau Ballet claimed to be joint authors of the band’s songs created under the lead of songwriter Gary Kemp. Their argument stressed that all songs had been jointly authored as they were the result of collective creativity and also because the songs were fixed for the first time while being recorded in the studio.

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<sup>63</sup> 1988 UK CDPA; s.10 (1)

<sup>64</sup> The CDPA does not provide guidance as to how to divide shares, but in most cases shares are equal if not otherwise decided by the parties.

<sup>65</sup> *Beckingham v. Hodgens*, (2003) FSR 238 (EWHC); (2003) EMLR 376 (CA)

<sup>66</sup> *Ibid.*

<sup>67</sup> *Hadley v. Kemp* (1999) EMLR 589.

The case went to the High Court of Justice where Justice Park held that while Kemp did not fix the songs in the classical manner on a score he was the sole author of the songs:

To describe Gary Kemp as the “writer” of the music could be misleading without adding a little explanation. As I have said once or twice already he did not write the music down on paper. [...] Popular music is not usually created that way, and Gary Kemp did not create his music that way. He composed at home, with a guitar and sometimes a piano. In this way for each song he developed, and fixed in his musical consciousness, the melody, the chords, the rhythm or groove, and the general structure of the song from beginning to end. Usually at the same stage he wrote the entire lyrics for the song.<sup>68</sup>

While Mr. Kemp lacks scores or scripts fixing and expressing his musical work on paper, the Court accepted testimonials describing him as the person giving the instruction as evidence:

There was a substantial body of evidence from witnesses who were not members of the band but who were present during rehearsals or recording sessions or both. All of them (including the witness called on behalf of the plaintiffs) gave evidence to the effect that Mr Kemp had definite ideas about how his songs should sound, and was clearly the person in charge. [...] Mr Gary [...] said that Mr Kemp was a “control freak”, and that the other members of the band went along with what he said.<sup>69</sup>

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<sup>68</sup> Ibid. N3 The copyright claim: the facts and the evidence

<sup>69</sup> Ibid.

Ultimately the High Court held that the contributions needed to be to the creation of the musical work, “not the performance or the interpretation of them.” This analysis is in line with the traditional and orthodox UK approach on authorship, which maintains that the contributions need to be *original and novel* in an aesthetic sense. Commentators tend to criticize this approach as a somewhat bizarre view that authorship and joint authorship need be assessed according to how classic music was created in the nineteenth century and fails to understand how popular music is created today.<sup>70</sup> It is also criticized that Park J. ignores the effect the contributions in question had on their audience and excludes it from his evaluation, in particular with regard to Norman’s saxophone solo in the song “True,” which is probably the reason why this song is the band’s best known and most frequently played.<sup>71</sup> Indeed, Park J. clearly distinguishes between the *sound* of a musical composition as a recording and the musical work as protected by law. While the latter might appear different in recorded form, it is still the same as at the beginning of the recording process.

Park J.’s orthodox interpretation of authorship and concept of musical works in *Hadley v. Kemp* gave the impression that UK copyright law privileges a type of authorship that is “invented ex post facto out of the sound sculpture produced by the artist in the recording studio.”<sup>72</sup>

While maintaining an orthodox view of joint authorship—and therefore consistent with the traditional UK concept of authorship and “originality”— Park J.’s ruling also reflects how popular music groups work in practice. It would be naive to assume that bands such as Spandau Ballet do not have hierarchical structures and power struggles. In most cases

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<sup>70</sup> Barron, Anne “Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice”, 2006 *Social and Legal Studies* (15.1). SAGE Publications. P. 25-28

<sup>71</sup> *Ibid.*

<sup>72</sup> Bently, Lionel “Authorship of Popular Music in UK copyright law“. 2009 *Information, Communication & Society* Vol.12, No.2. P.179

songwriters are also band leaders, giving advice and instructions on how the songs shall be interpreted. This was very well highlighted in *Kemp*. But the ex post facto claim of the other group members in *Kemp* demonstrates that it was motivated by economic reasons and not by moral ones, with the claimants aiming to receive a share of the publishing income of Mr. Kemp. Without any doubt, *Hadley v. Kemp* illustrates that performers remain at the “bottom of the music industry food chain.”<sup>73</sup> But this does not legitimate attribution of ‘originality’ and authorship while only interpretation and performance of Mr. Kemp’s songs occurred. Also, this should not provide enough evidence to call the notion of authorship and musical works in UK copyright law obsolete. It misses the point as the question should be why the other band members did not receive *fair remuneration* from their copyright on their performances, which had been assigned to the record producer.

However, Park J.’s ruling is confusing with regard to the interpretation of the fixation requirement for copyright protection under s. 3(2) CDPA: The judge refers to the musical consciousness and distinguishes between an already existing, but unrecorded, musical work and the musical work recorded later that falls under copyright protection.<sup>74</sup> How can a musical work exist if it is not recorded in the sense of copyright law? Shouldn’t it rather remain an idea when Kemp instructs the band on how to perform it? The judge himself notes that “Kemp had very clear ideas how his songs should sound,”<sup>75</sup> and it would be more consistent to argue that the musical work is *expressed* during the process of recording the performance. And the performance serves as an instrument for *establishing* the musical work, such as pen

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<sup>73</sup> Arnold, Richard “Case Comment: Are Performers Authors?”, 1999 European Intellectual Property Review. P.7

<sup>74</sup> Rahmatian, Andreas. “The Concepts of ‘Musical Work’ and ‘Originality’ in UK Copyright Law – Sawkins v Hyperian as a Test Case.” 2009. International Review of Intellectual Property and Competition Law. Volume 40/Issue 5. At 570

<sup>75</sup> *Hadley v. Kemp* (1999) EMLR 589

and paper do for a literary work. The musical work, being entirely intangible, is the subject matter as an original work protected under copyright and fixed in the recording.

The UK's "sweat of the brow" and orthodox doctrine of originality was impressively re-affirmed in *Sawkins v. Hyperion*.<sup>76</sup> While not a joint authorship case, *Sawkins* provides good guidance on how to interpret authorship and originality. Here the court had to determine whether Sawkins' performing editions of the compositions of the seventeenth-century composer Lalande were original and therefore to grant copyright. The performing editions were created by gathering Lalande's original manuscripts, sorting out the irrelevant ones and editing missing material and transcriptions. In sum, Sawkins made 3000 editorial interventions, and the copyright claim was confined to the parts *originating* from Sawkins.<sup>77</sup> But did Sawkins employ the right kind of labour, skill and judgment in creating the performing editions, which were needed in order to allow orchestras to perform the works of the composer Lalande? While holding that the editorial skill and effort did not create "new music" as such, the Court of Appeal held that the editorial interventions were original within the meaning of copyright. Relying on *Walter v. Lane*<sup>78</sup>, the Court held that the effort, skill and time Sawkins had spent in making the performing editions were sufficient to satisfy the requirement to be original in the sense of novel.<sup>79</sup>

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<sup>76</sup> *Sawkins v. Hyperion Records Ltd* (2004) EWHC 1530 (CH), (2005) RPC 4.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Walter v. Lane* (1900) AC 539

<sup>79</sup> Rahmatian, Andreas. "The Concepts of 'Musical Work' and 'Originality' in UK Copyright Law – *Sawkins v Hyperion* as a Test Case." 2009. *International Review of Intellectual Property and Competition Law*. Volume 40/Issue 5. At 564

To sum up, joint authorship requires that creative input is made with respect to the creation of the work, not to the interpretation of it.<sup>80</sup> And, as held in *Robin Ray v. Classic FM*, a joint author is a person who provides a significant creative input that *finds its way* into the finished work.<sup>81</sup> Therefore, looking at the examples outlined in this segment, it is fair to say that UK copyright law has a good degree of consistency when attributing joint authorship of musical works with regard to the concept and standard applied. What can be observed is that a performer's claim for attribution of joint authorship will need to provide strong evidence showing that the contribution was with regard to the 'song-writing' of the musical work and not to the creation of the *sound* in a broader sense.

## **Joint Authorship of Musical Works in Germany**

### *The Creation Principle*

The joint author appears in Section 3, Article 8 of Germany's author's rights law. It follows Article 7, which defines the author as the creator (*Schöpfer*) of the work. This creation principle (*Schöpfungsprinzip*) is maintained and the reference is always the common work, which must be created by more than one author; according to Article 8, the contribution of each author cannot be exploited separately and must constitute the work as a unitary whole.<sup>82</sup>

### *Idea vs. Expression*

Each contribution must be of a creative nature, reflecting the personal intellectual accomplishments of all authors. Ideas, inspiration or help in creating the work do not suffice.

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<sup>80</sup> Brighton v. Jones, [2005] FSR 288, 311, para. 56. In: Rahmatian, Andreas. "The Concepts of 'Musical Work' and 'Originality' in UK Copyright Law – Sawkins v Hyperian as a Test Case." 2009. International Review of Intellectual Property and Competition Law. Volume 40/Issue 5. At 573

<sup>81</sup> Robin Ray v Classic FM [1998] FSR, 622, 636

<sup>82</sup> Ringo Krause, „Comment on § 8 UrhG”.

<http://www.jusline.de/?cpid=f92f99b766343e040d46fcd6b03d3ee8&lawid=2&paid=8#> > accessed 2 September 2013

In order to be held joint author, the process of creation must be accomplished by the individual mind of the joint creator—a concept that clearly derives from the principle that a work must reflect the personality of the author, irrespective of whether it was created by one author or several.<sup>83</sup>

An important condition in determining joint authorship is that it can result in only *one* work. Each author must consent to the exploitation or alteration of that work,<sup>84</sup> and the work is considered as an inseparable unity of which the authors are joint owners. Therefore, publication, exploitation or alteration of the work needs to be approved by all co-owners.<sup>85</sup> Finally, each author maintains his or her moral rights to the work under Section 2 of the act.<sup>86</sup>

### *Creative Collaboration*

In order to be held joint authors in Germany, authors must have engaged in a process of creative collaboration. Interestingly, courts tend to interpret this concept rather broadly, as illustrated in the 2005 decision of Mannheim’s district court. The main elements of this case revolve around the claim by the singer and author of the lyrics to have contributed to the composition of the song “Schatten an der Wand”.<sup>87</sup> The claimant was registered as author of the lyrics and the defendant as composer of the work of music at the German Performing and Mechanical Rights Society (GEMA).

The court ruled for joint authorship and held that while it is difficult to determine along objective criteria whether the success of a song is due to its melody or arrangement of sounds,

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<sup>83</sup> Ibid.

<sup>84</sup> 1965 UrhG., § 8 II

<sup>85</sup> Ringo Krause, „Comment on § 8 UrhG”.

<http://www.jusline.de/?cpid=f92f99b766343e040d46fcd6b03d3ee8&lawid=2&paid=8#> > accessed 2 September 2013

<sup>86</sup> UrhG. § 13

<sup>87</sup> “Schatten an der Wand”. Federal Court of Mannheim, 7 O 514/04 (12 August 2004)

in cases of doubt, it is to be held joint authorship, notably because it was evident that the claimant contributed in a considerable creative manner with her singing and melody to the character of the song.

From the evidence it was apparent to the court that both the claimant and the defendant were *engaged collaboratively in a common process of creation*: the keyboard rhythm of the defendant provided the basis for the creation of the singing melody of the claimant and vice-versa—the singing melody of the claimant was included by the defendant in his arrangements of the musical work. For the court it was clear that the reciprocal contributions of both led to the successive collaborative creation of the song.<sup>88</sup> It suffices that the claimant with her singing melody provided a considerably creative contribution to the entire work, especially since the singing melody is not exploitable on its own.<sup>89</sup>

It should be noted that the non-fixation requirement in German law provides more flexibility and facilitates the implementation of the concept of “creative collaboration” in music. Certainly, the appellant’s claim for joint authorship would have potentially been impeded had the German act contained a similar fixation requirement as the CDPA.

### *Separate Exploitation*

The “Schatten an der Wand” case illustrates that while German law provides flexibility and a broad view with regard to joint authorship, it remains vague as to whether the jointly authored musical work contains the lyrics. When applying the test of separate exploitation to the musical work *including* the words, the ruling determining joint authorship would be clearly

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

contradiction as the lyrics and the musical work can be exploited separately.<sup>90</sup> Accordingly, it seems likely that the song “Schatten an der Wand” is a combined work, containing a jointly authored musical work and a solely authored literary work for the lyrics.

Finally, a musician can be held joint author in an almost finished song if he or she provides the song with a new twist by changing, for instance, the chord progression of the refrain. Thus even relatively insignificant contributions can lead to joint authorship in Germany. However, simply giving an existing work a musical notion or attributing a special sound to the rhythm does not suffice, as the contribution does not provide any new *creation* to the work.

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<sup>90</sup> The claimant is member of GEMA as a lyricist.

## CHAPTER III

### **Joint Authorship Rules of Musical Works in the UK and in Germany: Main Differences**

Comparing the cases discussed above it is tempting to argue that both jurisdictions have different approaches in determining joint authorship of musical works. While UK law maintains a certain degree of rigidity and conservatism with regard to authorship (though with some inconsistency in practice<sup>91</sup>), the German authors' rights law is more flexible and broader.

UK courts tend to analyse three aspects, with a particular focus on the second:

- 1) collaboration in the creation of the work;
- 2) contribution from each joint author;
- 3) the contribution must not be distinct from each other.

While the first aspect is fairly easy to determine, a judge will concentrate on analyzing points two and three and, particularly, whether the contribution is original in the sense that labour, skill and judgment contribute to the creation of the musical work. The musical work can be fixed in writing or during the recording process of a performance. Without doubt, the originality threshold is high and attribution of authorship is difficult to obtain. Performers of popular music claiming joint authorship must demonstrate that their performance is original and not spontaneous (interpretation or improvisation). Thus, the contributing performer must

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<sup>91</sup> See the cases *Hadley v. Kemp* and *Godfrey v. Lees* (1995) EMLR 307 (HC)

prove that he or she contributed to the “writing” of the underlying musical work—ideally, but not necessarily, manifested in notes, scores and computer or studio programs.

In contrast, German law provides more flexibility and sets a lower threshold requirement for determining joint authorship, particularly with regard to originality. With no fixation requirement—in fact a musical work can be created during a live performance—the joint musical work under German law is frequently created in the process of creative collaboration among several ‘creative’ performers. As highlighted by the *Schatten an der Wand* case, even a singing melody can suffice as a creative contribution to the musical work. In general, German courts tend to apply the principle of ‘small change’ (*kleine Münze*), a concept that establishes a low originality threshold and accepts that *creative artistic contributions* by performers can result in joint authorship if they participate in an exercise of creative collaboration, reciprocally inspiring each other.

However, in both the UK and in Germany, a jointly authored work must fulfil the requirement that the contributions are not distinct from each other, which can be determined in Germany using the test of separate exploitation.

It is important to note that in both jurisdictions—unless otherwise agreed contractually—all joint authors enjoy their moral and economic rights and all exploitation must be with the agreement of all authors. Also, both laws provide equal shares of ownership by default, except otherwise agreed contractually.

As illustrated in Table III below, both the UK and Germany apply different concepts when assessing whether the contribution is original. The UK orthodox approach to authorship and

originality, as applied by the courts, has been subject to criticism. On several occasions, Justice Richard Arnold has argued that the concept of joint authorship and musical works does not reflect musical reality not it is legally correct.<sup>92</sup> Jazz is put forward as an example because of the key role of the performer, a view which is seconded, in essence, by Anna Barron.<sup>93</sup> In general, it is claimed that the *creation* process happens during the performance, which is the process of a non-hierarchical, creative collaboration of co-inspiration and musical exchange.

Table III: *Main Characteristics in Determining Joint Authorship in the UK and in Germany*

	UK	Germany
Statutory Reference	1988 CDPA s.10 (1), s.1(1)(a), s.3(2)	1965 UrhG §8, Abs 1; §2, Abs 2, §7
Collaboration	The work must be the result of the collaboration of two or more authors; each contribution must not be distinct from each other	A common created work by several authors whose contributions cannot be exploited separately
Fixation	The work must be fixed (CDPA s.3 (2))	No fixation requirement; a musical work can be created during a live performance (without recording)
Originality	Threshold is high (see <i>Hadley v Kemp</i> ); the contribution must be original in the sense that labour, skill and judgment had been employed in the creation of the underlying musical work	The contribution must be of a “creative” nature (in the sense of creation, i.e., <i>schöpferisch</i> ). The creation principle ( <i>Schöpfungsprinzip</i> ) refers to the personality of the author and the threshold is rather low. Courts tend to apply the principle of “ <i>kleine Münze</i> ”

<sup>92</sup> Arnold, Richard. “Reflections on *The Triumph of Music: Copyrights and Performers’ Rights in Music*.” Oxford Intellectual Property Invited Speaker Seminar. 2009. P. 5

<sup>93</sup> See: Barron, Anne “Introduction: Harmony or Dissonance? Copyright Concepts and Musical Practice”, 2006 Social and Legal Studies (15.1). SAGE Publications.

While this paper agrees with the view that UK copyright law manifests some inconsistency in attributing joint authorship to musical works—the cases of *Beckingham v. Hodgens*<sup>94</sup> and *Hadley v. Kemp*<sup>95</sup> are worth comparing<sup>96</sup>—the concept of authorship and musical works is still relevant, whether for art music or popular music. In jazz too the practice of ‘writing’ prevails—defining the instruments and the number of musicians and giving general indications of the underlying musical work provide the basis for interpretation and improvisation of jazz musicians. As will be outlined below, an overly flexible concept of authorship, which grants performers joint authorship status too easily, not only ignores how music is created in the vast majority of cases but also potentially weakens the concept of copyright and authors’ rights in general.

### **The EU Dimension**

Intellectual property rights and copyright law in particular fall within the competences of the EU internal market and are harmonized to an important extent at the European level. However, while the question of authorship has been explicitly left to the member states,<sup>97</sup> and joint authorship rules have only been addressed with regard to the term protection of jointly authored works, EU law does provide some vague indications as to what authorship (and also joint authorship) entails at the European level.

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<sup>94</sup> *Beckingham v. Hodgens* (2004) 6 ECDR 46 (CA)

<sup>95</sup> *Hadley v. Kemp* (1999) EMLR 589

<sup>96</sup> Whereas in *Beckingham* the Court of Appeal concluded that a violin part does make a significant and original contribution (having consulted the views of musicologists), the judge concluded in *Hadley* that a saxophone solo, which lasted under 9% of time of the entire recording, is not enough to qualify as joint authorship (without seeking the views of musicologists); interestingly, not the kind of contribution but the degree of contribution is applied in determining whether joint authorship exists.

<sup>97</sup> Directive 2006/116/EC, Recital 14

Of particular relevance to the discussion are two directives—Directive 2006/116/EC and Directive 2011/77/EU—and the *Infopaq* case<sup>98</sup> decided by the European Union Court of Justice (EUCJ).

The aim of Directive 2006/116/EC is to harmonize the term of copyright throughout the EU as the differences between national laws governing the term impede the free movement of goods and the freedom to provide services and distort competition in the EU.<sup>99</sup> The directive also tackles the question of term protection in the case of works of joint authorship and states that

“in the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author.”<sup>100</sup>

Thus a jointly authored work is protected under copyright law until 70 years after the death of the last surviving author.<sup>101</sup>

While Recital 14 notes that “the question of authorship of the whole or a part of a work is a question of fact which the national courts may have to decide,”<sup>102</sup> Article 6 sets out that “photographs (...) are original in the sense that they are the author’s own intellectual creation.”<sup>103</sup>

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<sup>98</sup> *Infopaq International A/S v. Danske Dagblades Forening* (Case C-5/08) (16 July 2009)

<sup>99</sup> Directive 2006/116/EC, Recital 3

<sup>100</sup> Directive 2006/116/EC, Article 2

<sup>101</sup> Directive 2006/116/EC, Article 1

<sup>102</sup> Directive 2006/116/EC, Recital 14

<sup>103</sup> Directive 2006/116/EC, Article 6

Comparing Recital 14 and Article 6 creates some confusion. Photographs fall under the category of literary and artistic works of the Berne Convention as referred to in Article 1 of the directive, and it is therefore only logical to assume that the “author’s own intellectual creation” standard is not limited to photographs as set out in Article 6 but relevant to *all* literary and artistic works within the meaning of Article 2 of the Berne Convention.

This argument is strengthened by the 2009 EUCJ ruling in the *Infopaq* case, in which the court had to determine whether a data capture process of 11 words falls under the exception of the reproduction right in Directive 2001/29/EC. The ruling is crucial as it confirms that the new EU originality standard is applicable to all subject matter. Concretely, it states that

copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation.<sup>104</sup>

Further, the court held that an extract of a literary work of 11 words can be protected by copyright “if that extract contains an element of the work which, as such, expresses the author’s own intellectual creation; it is for the national court to make this determination.”<sup>105</sup>

What does this new originality standard entail? How is it applicable and, most importantly, was it developed on purpose?

Directive 2011/77/EC, which harmonises the term protection of works of performers, sets out an interesting reference to the creative contribution of performers and could provide some

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<sup>104</sup> EUCJ, Judgment of the fourth chamber, *Infopaq International A/S v. Danske Dagblades Forening* 16 July 2009, s.37

<sup>105</sup> *Ibid.* s.48

guidance to understanding what the new European standard of authorship and joint authorship entails. Two recitals are of particular importance.

Recital 4 sets out that “the socially recognized importance of the *creative contribution* of performers should be reflected in a level of protection that acknowledges their *creative and artistic contribution*.”<sup>106</sup> Recital 18 states that “in musical genres such as jazz, rock and pop music, *the creative process is often collaborative in nature*.”<sup>107</sup>

These two recitals not only pay tribute to the role of performers but also stand in contrast to the traditional and narrow concept of authorship and musical works in the UK. While the new wording is set out *only* in recitals, and no EU directive explicitly addresses the question of authorship and musical works, it illustrates a departure from the UK approach towards the German concept of authorship and musical works, broader and more flexible in application. The UK copyright triangle—maintaining the interrelation and crucial link between the concept of authorship, originality and the (musical) work, which sets a fairly high standard for joint authorship entitlement—is seriously challenged by the new EU approach.

Finally, the directive also addresses the question of term protection of musical compositions with words and outlines that due to the different approaches in EU member states as to whether musical works include words—for instance, in the UK a musical work excludes words while in Germany or Italy it can include words—“the harmonisation of the term of protection in respect of musical composition with words the lyrics and music of which were created in order to be used together is incomplete, giving rise to obstacles to the free

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<sup>106</sup> Directive 2011/77/EU, Recital 4

<sup>107</sup> Directive 2011/77/EU, Recital 18

movement of goods and services, such as cross-border collective management”.<sup>108</sup> Therefore, the directive sets out in Article 1 that Directive 2006/116/EC shall be amended and that the term of “protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words.”<sup>109</sup>

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<sup>108</sup> Directive 2011/77/EU, Recital 19

<sup>109</sup> Directive 2011/77/EU, Article 1

## CHAPTER IV

### A Quest for Common Standards

To recapitulate, while the term *musical work* lacks a statutory definition in national, EU or international copyright law, copyright law traditionally maintains a distinction between the authored work and the performance of the work. Without doubt, defining or conceptualizing the term *musical work* is probably the most difficult exercise, and there is good reason why the term lacks a statutory definition. Nonetheless, copyright law provides a flexible interpretation as to what a musical work may entail, broad enough to protect works similar to Cage's *4'33"* or works of new electronic popular music, which are *arranged* in an original manner rather than written on scores. However, one key aspect of a musical work is that it is the result of an authorial process of a human being, producing something original and containing an underlying *structure*.

The traditional UK concept of authorship and originality—assessing whether a work or a contribution to a work is the result of labour, skill and judgment—is now challenged by the new EU approach that looks at whether a work or a contribution to a work is the result of the “author’s own intellectual creation,” but leaves it up to member states to determine what the new EU standard shall entail. Bearing in mind how the new standard was developed—providing first a concept for original photographs<sup>110</sup> and then, to the surprise of observers, applied by the EUCJ to all subject matters—it raises the question whether the respective EU authorities carried out a thorough impact assessment prior to introducing the new standard,

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<sup>110</sup> Directive 2006/116/EC, Article 6

analyzing how it would affect authors, publishers, cross-border licensing of musical works and, last but not least, copyright law in general.

While the new standard leaves it up to national courts to determine what constitutes the “author’s own intellectual creation,” the new wording should be read along with Recitals 4 and 11 of Directive 2011/77/EU as outlined above. The two Recitals provide good evidence that EU copyright law tends to follow the German approach in maintaining a broad and flexible interpretation of authorship and joint authorship rules, departing from the traditional UK concept of authorship. However, it goes without saying that national jurisdictions will continue to apply their own concepts, and the EU Single Market will lack a common authorship approach (sole and joint). Fragmentation, to the detriment of authors and copyright in the single market, will inevitably persist.

It is worth asking whether the current situation in the EU is satisfactory in terms of having a consistent EU copyright regime in the Single Market. Does the partial harmonization of authorship and joint authorship provide a good legal background for composers, songwriters, performers and publishers working together in the EU? Without doubt, differences between national jurisdictions governing and establishing joint title not only create an uneven playing field for composers, songwriters and performers active throughout the Union, but they also distort copyright in the common market. Although the European Union constantly re-emphasizes that copyright law falls under the legislative competences of the European Commission, because IP and copyright are part of the Single Market Act, it appears that probably the most important concepts establishing the *raison d’être* of copyright—namely stimulating intellectual creation by rewarding authors with exclusive rights—remain fragmented and only loosely harmonized at the EU level.

While in the UK, for instance, an author of a musical work enjoys strong protection against potential joint authorship claims by performers, the same author operating in Germany might easily lose 50% of his rights to a performer claiming to have creatively contributed to the musical work. But authors of music operate to a large extent on a European level, and cross-border mobility of composers and songwriters is a reality. EU copyright law—which claims that it “provide[s] an incentive for the creation of [...] new works and other protected matter (music, films, print media, software, performances, broadcasts, etc.) and their exploitation, thereby contributing to improved competitiveness, employment and innovation”<sup>111</sup>—clearly fails to comply with the EU’s own policy aims as it does not provide a common European standard establishing title and joint title of authorship. How will intellectual creation be stimulated in the EU single market without having a European standard of authorship?

Consequently, this article argues that in order to stimulate creativity and intellectual creation in Europe, and to legitimate EU copyright law and make it suited for the future, further harmonization of copyright law should finally concentrate on establishing a common European standard of authorship and joint authorship of musical works. This will not only provide a fair level playing field for all authors of music active in the Union—many of them collaborating and working with performers or musicians in other countries—but it will also ease the registration of metadata of musical works in collective management societies of authors’ rights, reduce conflicting data and facilitate cross-border licensing of musical works. Lastly, introducing an EU concept of authorship and placing authorship at the heart of EU copyright will also help copyright to regain legitimacy as an institution and provide the right perspective for potential copyright reform in light of the Internet. As will be elaborated below,

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<sup>111</sup> The EU single market – copyright and neighboring rights.  
[http://ec.europa.eu/internal\\_market/copyright/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/index_en.htm) > accessed 12 August 2013

a central argument in this respect is that EU copyright law necessitates a diligent reflection on what authorship consists of and why authorship is the only concept legitimating a set of exclusive rights for a period of 70 years post mortem auctoris.

### **The Necessity to maintain a Narrow Approach**

The *raison d'être* of copyright law remains human creativity, which melds the work to the vision of the creator.<sup>112</sup> Therefore, a work is the result of labour, which is creative in the sense that it is a work of the mind. A musical work is created during an authorial process, which resembles the elaboration of an academic article or a literary essay, especially in contemporary (art and classical) and audiovisual music. In contemporary music a work is created in the traditional sense—the composer uses scores and a musical instrument (in many cases the piano) to test the tact. Also in audiovisual music (music created for motion pictures) a work is created by a composer using scores, piano or computer programs. The composer spends days and hours and sometimes frustrating moments searching for inspiration and ideas. French composer Bernard Grimaldi describes the composing process for film music as follows:

A film project usually involves a research phase, it is a bit like writing a book. You research material that is in relation with the subject. [...] When I compose, I wake up and start working. I am usually my best in the morning, so I try to divide my day into two parts, composition first and then doing a bit of architecture: planning the composition, based on where I left off the previous

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<sup>112</sup> Ginsburg, Jane C. “The Concept of Authorship in Comparative Copyright Law”. 2003. Submitted for DePaul L. Rev. symposium: “The Many Faces of Authorship” Columbia Law School. P. 29

day.... But I can find myself at 2 a.m., not having reached the second part yet.<sup>113</sup>

Thus the process of composing contrasts with the exercise of performing. Performers are trained to skilfully play the scores and to interpret the work according to the instructions of the conductor and the composer. While performers are certainly creatively engaged in the artistic sense, they are not creating or contributing to the creation of the musical work in the traditional sense. This is done by the composer and it is the result of the authorial exercise of “writing” the musical work, expressed on scores or in computer programs, which copyright law aims to protect and to promote through granting exclusive economic and moral rights.

While in popular music songwriters are in many cases also performers, and a musical work is more frequently the result of co-inspiration and joint authorship, the authorial process is similar to the composition of art and audiovisual music. Without doubt, performers of popular music have more liberty in the interpretation of the work than in, say, classical music and contribute with their improvisations to the interpretation of the musical work. This is particularly the case in jazz. But even here and in genres such as rock, hip-hop, indie etc., each performance is based on an *underlying musical work*, which is distinct from the performance and which had been created through an authorial process taking place before the performance. In rock and indie music, the songwriter usually plays his or her instrument, drafting scores and notes, revising them repeatedly until the future song has an original structure and the desired drift. In electronic music, the authorial process includes arranging samples with beats in an original manner, cutting and pasting them together and laying out the

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<sup>113</sup> Grimaldi, Bernard. Interview Spotlight on Composers: “Pure Magic”. [http://www.composeralliance.org/Files/files/bernard\\_grimaldi\\_interview\\_ecsa.pdf](http://www.composeralliance.org/Files/files/bernard_grimaldi_interview_ecsa.pdf) > accessed 14 August 2013

musical work using a computer program. There is always labour of the mind involved, judgment and selection and, obviously, skilful creativity.

Austrian composer Stephan Kondert, a member of the jazz-hip-hop trio The Ruff Pack<sup>114</sup>, describes the following song development process:

One of us writes a song, all give their opinion and mood to it and we arrange the piece together in the studio, always with great confidence in the composer since he had the first vision of the song and sets the direction for it. [...] I do prefer to use a real music sheet and my bass, piano or guitar to compose a new song; a small pre-production and then straight into the studio. At the moment I'm doing some pre-production only to save time, I record everything at home, make a layout and then bring it to the musicians that will record it in the studio.<sup>115</sup>

Every music performance, including popular music, is based on a pre-existing, underlying musical work. While it is true that in popular music, especially in jazz and hip-hop, great liberty is given to the performer on how to interpret the musical work, in no case can the authorial process creating the work be denied. This, however, does not exclude the possibility that band members make arrangements and agree on joint authorship.

In line with this reasoning, a spontaneous improvisation of a performer does not suffice as creative authorial labour, and EU copyright law would do wrong in granting authorship title to such an exercise that includes little labour of the mind.

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<sup>114</sup> <http://www.skinvitational.com/theruffpack/> > accessed 19 August 2013

<sup>115</sup> Interview with Stephan Kondert, 19 August 2013

Therefore, this article suggests that EU copyright law—instead of opting for the German model—should depart from its wording in the term Directives 2006 and 2011 and follow the UK originality approach, assessing title and joint title according to the labour, skill and judgment test. The UK concept, which has been certified in many cases and, most importantly, in the key case *Hardley v. Kemp*, describes well the authorial process for establishing authorship and provides good guidance for assessing whether a work has been authored jointly.

It is also tenable that the grant of a set a exclusive economic rights, which last 70 years after the death of the author, together with moral rights, which in some jurisdictions are unwaivable and even perpetual<sup>116</sup>, necessitates strong legitimacy and conceptual grounds. It appears that only authorship, which is the result of labour of the mind creating something new, provides the basis for such a strong copyright protection. Granting full copyright protection, including moral rights, to the recording of a spontaneous improvisation of a performer and classifying it ex post as a musical work seems excessive and misses the point of what copyright as a legal institution aims to protect. A musical work must be the *result of intellectual reflection, brainstorming, inspiration*; it is the *result of a process necessitating time* and which cannot be spontaneous. On the other hand, performers are expected to improvise and skilfully play an instrument, and their contributions also deserve legal protection, as conceptualized in ‘related rights’ or ‘neighbouring rights’.

It is therefore anticipated that if EU copyright law departs from the authorship model and continues to blur the line between authors and performers, copyright as a legal institution will suffer, and commentators calling for a reduced set of rights and shorter term protection will

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<sup>116</sup> See French author’s right act, which does not provide a limitation in term for moral rights

find additional and strong arguments to review the EU copyright acquis. Authorship today, as it was in the past and will be in the future, is the cornerstone of the musical work and therefore of copyright law as a legal institution. Authorship is the basis of copyright's legitimacy and the EU would do wrong in setting out too broad a definition of what authorship entails.

In line with this reasoning, the following points outline what the new EU authorship standard—sole and joint—should concretely entail.

### ***Musical Work***

Firstly, EU law should follow national examples and avoid any attempts to provide a statutory definition of a musical work. As discussed earlier, a musical work can contain 4'33" of silence, a collection of samples reinforced with beats, arranged originally, or any other work, irrespectively of its artistic quality. When 4'33" was first released, John Cage was heavily criticised by his supporters and friends for not composing a musical work. Today, 4'33" is probably the most frequently performed work of art music, generating significant sums of publishing income, and is generally acknowledged as a work of genius.

### ***Fixation***

Secondly, a musical work is only *created when it is fixed*. The fixation requirement is helpful as it provides evidence of authorship, which is important when works are registered with collective management societies and licensed on a national and international basis. EU law should provide a broad interpretation of the fixation requirement to allow for a musical work to be fixed during a recording of the performance.<sup>117</sup>

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<sup>117</sup> See *Hadley v. Kemp* (1999) EMLR 589 N3 The copyright claim: the facts and the evidence

### ***Authorship***

Thirdly, double standards must be avoided and Recitals 4 and 11 of term Directive 2011 should be replaced; not only it is unclear what is meant by the “creative process” but it also creates confusion as to whether the EU tends to privilege certain types of performers, namely of jazz, pop and rock music. Instead, EU copyright law urgently requires a common standard of authorship, which shall be a concept of both the “author’s own intellectual creation” approach along with the UK originality concept and its labour, skill and judgment test. *Labour of the mind* is probably the most fitting way to describe the authorial process, and EU copyright law would do well to complement the EU standard with the UK labour, skill and judgment test.

### ***Joint Title***

Finally, joint authorship should be assessed along the same principles as in the UK as outlined in the previous chapter. Accordingly, a jointly authored work must contain the following characteristics:

- 1.) there is collaboration of two or more persons in the creation of the work;
- 2.) there is a contribution from each joint author;
- 3.) the contributions must not be distinct from each other.

Point one should be interpreted broadly; a simple email exchange, notes or some kind of evidence should suffice to demonstrate that there is collaboration. Point two is of prime importance as it must be decided whether the contribution was original and of an authorial nature. Accordingly, the new EU approach should be complemented with the UK labour, skill

and judgment concept, testing whether the contribution is original. Point three is important as it demonstrates that joint authorship results in a merging of two or more inseparable contributions. The jointly authored work cannot be exploited without the contribution of the other author and vice versa.

## CONCLUSION

What would copyright law be without authorship? Jane Ginsburg, in analyzing the concept of authorship, considers that the author is the “moral center” and “*raison d’être*” of copyright law and points out that “if we no longer value creativity, then we shall require another basis for recognizing exclusive rights in works, be they works of authorship or other productions. More importantly, the scope of the rights we then install would have to be rethought and probably drastically reduced.”<sup>118</sup>

In line with this reasoning, the research project compared concepts of sole and joint authorship of musical works in the UK and in Germany and analysed current EU harmonization in this area, which appears far from complete. Indeed, while EU copyright law claims to contribute to the stimulation of new works, concepts of attributing authorship remain fragmented in the EU Single Market. But it is important to note that the analysis of relevant directives and the *Infopaq* case highlight a trend in the EU toward a flexible and broad interpretation of authorship similar to the German approach, which easily attributes joint title. This stands in contrast to the UK concept, which maintains an orthodox view of what authorship entails and provides a high threshold for joint authorship title.

The main argument developed in this dissertation is that every performance in all genres of music is based on an underlying musical work. The *work*, irrespective of its length, maturity and completeness, is the result of intellectual reflection, brainstorming and inspiration; it is

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<sup>118</sup> Ginsburg, Jane C. “The Concept of Authorship in Comparative Copyright Law”. 2003. Submitted for DePaul L. Rev. symposium: “The Many Faces of Authorship” Columbia Law School. P. 29

the result of a process necessitating time and, in particular, labour of the mind, which is described in this dissertation as the *authorial process*.

This process resulting in the creation of a *work* is what copyright law, in the sense of authors' rights, protects, and a departure on European level from this concept has dramatic consequences: Firstly, for authors of music, who would face a further increase of performers claiming to be held joint author while not having participated to the creation of the work. Secondly, it would weaken moral centre of copyright law as a legal institution—the author.

Consequently, any adaptation or enforcement of copyright law with regard to challenges brought through the digitalization and dematerialization of copyright protected works will be more difficult to pursue as its legitimacy—authorship—is weakened. A spontaneous improvisation of a performer, for instance, does not provide enough sweat of the brow and authorial labour to legitimate the exercise of exclusive rights in the sense of author's rights.

Thus, in order to make copyright better suited for challenges such as enforcing copyright in a digital world and to provide a fair level playing field for all authors of music active in the EU single market, harmonization of sole and joint authorship should be pursued according to the principles outlined in Chapter 4: testing the new EU 'author's own intellectual creation' standard along with the UK originality concept and examining whether a musical work is the result of labour, skill and judgment.

To conclude, harmonization along these lines will help EU copyright law to comply with its aim—namely to stimulate the creation of new works of art for the benefit of society and culture.

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