

**JOINT AUTHORSHIP
IN COMPARATIVE PERSPECTIVE:
LEVY V. RUTLEY AND DIVERGENCE BETWEEN
THE UK AND USA**

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Recent scholarship has pointed to the diversity of copyright, and intellectual property laws more generally, in the common law world. In the place of a picture of convergence and uniformity, in *The Common Law of Intellectual Property*, Catherine Ng, Lionel Bently and Giuseppina D'Agostino argue that the "commonality" of intellectual property laws in common law jurisdictions has "latterly . . . become increasingly fractured." As they observe, drawing together a series of essays, the cumulative effect of diversity in many aspects of intellectual property law supports the "thesis of growing divergence in the approaches taken by the courts and legislatures of various common law countries"; the result is "a strong case that the approaches taken in the common law countries are anything but common."¹

A copyright doctrine left unconsidered by *The Common Law of Intellectual Property* is joint authorship. A number of developments in this area point to legal variation across common law jurisdictions in recent times.² Amongst these are judicial decisions in the UK and the U.S.,

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¹ CATHERINE W. NG, LIONEL BENTLY & GIUSEPPINA D'AGOSTINO, *THE COMMON LAW OF INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF PROFESSOR DAVID VAVER* 4, 5, (2010).

² Differences between the UK and U.S. approaches, both in terms of legislative tests and decided case law, are outlined in the passage that follows. Variation is also evident in the approaches adopted by common law countries, such as the UK, Australia, Canada and New Zealand, that have the same or closely similar statutory definitions of joint authorship: all adopt the statu-

tory definition set out at the text to note 3 *infra*, save for Australia that substitutes “not separate” for “not distinct” (as was the case under UK Copyright Act 1956 s. 11(1), the predecessor to the current UK 1988 Act). See UK Copyright Designs and Patents Act 1988 s. 10(1); New Zealand Copyright Act 1994 s. 6(1); Canadian Copyright Act 1985 s. 2; Australian Copyright Act 1968 s. 10(1)). For example, in the late 1990s the UK courts developed tests relating to the nature of the joint author’s contribution, into a requirement for the “right kind of skill and labor.” See *Fylde Microsystems, Ltd. v. Key Radio Sys., Ltd.*, [1998] FSR 449, 456, 457 (denying joint author status to those who contributed to error correction tasks to computer software); *Hadley v. Kemp*, [1999] EMLR 589, 643, 646 (interpretation and performance of musical works); *Brighton v. Jones*, [2005] FSR 16, ¶¶ 34(ii), 56(iii) (theatrical presentation of dramatic works). While an approach such as this might have been drawn on by the New Zealand Court of Appeal, in the leading New Zealand case of *Land Transport Safety Authority of New Zealand v. Glogau*, [1999] 1 NZLR 261, the Court instead decided the case (which concerned whether employees of the Land Transport Safety Authority were joint authors of safety logbooks for taxi drivers as a result of their employees’ contributions in discussing drafts during the course of statutory approval) on the basis of a lack of “collaboration,” not the nature of the contribution: collaboration required “two, or a team, setting out to write a joint production,” which did not occur in “a statutory approval situation.” *Id.* at 271. Cf. *Hadley*, [1999] EMLR at 644 (Park, J.) (UK case that proceeded on the basis that “collaboration” was not in issue — that case could have been decided on the basis that all the members of Spandau Ballet were not joint authors of the musical works because the rehearsals did not involve, to use the New Zealand test, “two, or a team, setting out to write a joint production”). While this may just reflect a different emphasis, other variations are more striking. For example, in the UK, tests of “intention” have been unanimously rejected (see *Beckingham v. Hodgens*, [2003] EWCA Civ 143, ¶ 11-12 (approving of the approach of Queen’s Counsel Floyd at first instance, [2002] EWHC 2143, ¶ 43)). In contrast, the New Zealand Court of Appeal considered intention to inform the requirement of “collaboration.” See *Glogau*, [1999] 1 NZLR at 272. A test of intention has also received some support in Canada (see *Neudorf v. Network Expressions*, [2000] RPC 935 (S. Ct. N.B.)), and while a subsequent ruling upheld by the Federal Court of Appeal did not follow this approach (see *Neugebauer v. Labieniec*, (2009) FC 666, *allowed in part and dismissed in part*, (2010) FCA 229)) some subsequent cases and commentary have referred to both approaches, suggesting that the test of “intention” may be applied in some Canadian cases. See, e.g., *Waldman v. Thomson Reuters Corp.*, (2012) ONSC 1138, ¶ 72; *HALSBURY’S LAWS OF CANADA* 106 (R.T. Hughes & S.J. Peacock eds., 2011)). As regards Australia, an example of a contrast to the UK is that the courts frequently tie a finding that there was no “collaboration” to the conclusion that contributions were “separate” on the basis that contributors exercised “individual intellectual effort.” See, e.g., *Primary Healthcare, Ltd. v. Federal Comm’r of Taxation*, [2010] FCA 419, ¶ 121-122 (concerning patient records completed by doctors); *Acohs Pty., Ltd. v. Ucorp, Pty., Ltd.*, [2010] FCA 577, ¶¶ 57-59, *approved*, [2012] FCAFC 16, ¶ 86 (concerning the role of computer programmers and trans-

which have served further to entrench differences in approaches to joint authorship contained in the statutory tests. The statutory definition of joint authorship in the UK is “a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.”³ In the U.S. it is: “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”⁴ Whereas certain statements made in the U.S. legislative process suggested that “collaboration” (a component of the UK test⁵ which does not appear in the US statute) might be an alternative to intention to merge into a unitary whole, in a number of decisions the Second Circuit District Court has made clear that this is not the case, with “intention to merge” being a requirement in all cases.⁶

scribers of data in compiling the source code for electronic information sheets). By contrast in *Beckingham*, [2003] EWCA Civ 143, ¶ 46 (Floyd, Q.C.), the criterion that contributions are “not separate” concerned the question of how the contribution related to the rest of the finished work, rather than whether it stemmed from effort that was individual not collaborative; *see also Hadley*, [1999] EMLR at 650. The differences in interpretation of the criterion of “not separate” may result, in particular, in differences in the application of joint authorship to large-scale collaborations: in Australia, the interpretation of “not separate” by reference to the process of creating the work, rather than the significance of the contributions to the final work (as in the UK case of *Beckingham*), has been used as a judicial technique to *limit* the application of joint authorship to large scale collaborations, in which different groups of contributors may be oblivious to the function performed by other contributors. *See Telstra Corp. v. Phone Directories, Pty., Ltd.*, [2010] FCA 44, ¶ 337; [2010] FCAFC 149, ¶ 92, where the Federal Court of Australia, Full Court, upheld the first instance the judgment of Judge Gordon that the white and yellow pages telephone directories were not works of joint authorship, in part because the various groups of individuals involved in the process did not collaborate, being unaware of the functions which each performed separately.

³ UK Copyright Designs and Patents Act 1988 s. 10(1).

⁴ 17 U.S.C. § 101 (2012). This is framed as a definition of a “joint work.” However, as acknowledged by judicial statement, “this definition is really the definition of a work of joint authorship.” *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991).

⁵ The UK Court of Appeal has approved an approach to joint authorship that involves an enquiry into three elements: collaboration, the nature of the contribution and the requirement that each contribution is not distinct. *Beckingham*, [2003] EWCA Civ 143, ¶¶ 11-12 (approving of the approach of Queen’s Counsel Floyd at first instance in *Beckingham*, [2003] EWCA Civ 143, ¶ 43).

⁶ *Childress*, 945 F.2d 500. On this point, the court was following *Weissmann v. Freeman*, 868 F.2d 1313, 1317-19 (2d Cir.1989). Legislative discussion of this provision appeared to envisage two alternative criteria: collaboration or intention to merge into a whole. In *Weissmann*, 868 F.2d at 1317-19, and

Further, the decision that reflects the current U.S. majority view, the U.S. Second Circuit District Court in *Childress v. Taylor*,⁷ sets down two further requirements that again distance the U.S. approach from that in the UK. First, each joint author's contribution must be "independently copyrightable" such that if someone contributes a "non-copyrightable idea" and another the "copyrightable form of expression," the contributor of the idea will not be a joint author.⁸ This contrasts to certain case law in the UK: in looking for a contribution to the skill and labor protected by copyright,⁹ rather than the higher hurdle that the contribution is independently copyrightable, certain UK decisions have been more flexible in accepting co-authorship status for the contributors of ideas.¹⁰ Secondly, the ruling in *Childress* requires "intention as to co-authorship,"¹¹ and in *Beckingham v. Hodgens* the UK Court of Appeal unanimously ruled that there

Childress, 945 F.2d at 505-06, the Second Circuit made clear that the statutory test was to be interpreted literally.

- ⁷ *Childress*, 945 F.2d 500; Eric J. Schwartz & David Nimmer, *United States of America*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 4[1][a][i] (Paul E. Geller ed., 2011).
- ⁸ *Childress*, 945 F.2d at 506. Subsequent decisions have explained this to mean that the contribution must amount to an "original expression that could stand on its own as subject matter of copyright." See *Erickson v. Trinity Theatre*, 13 F.3d 1016 (7th Cir. 1994), ¶ 46 (quoting PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 4.2.1.2, at 379 (1989)). But see *Weissman*, 868 F.2d 1313 (focusing on collaboration).
- ⁹ The impact of the dicta of the European Court of Justice in defining "originality" as "own intellectual creation" is yet to be seen in joint authorship case law. See *Infopaq Int'l, A/S v. Danske Dagblades Forening*, Case C-5/08, [2009] ECR I-6569; see also *infra*, note 129.
- ¹⁰ See, e.g., *Cala Homes (South), Ltd. v. Alfred McAlpine Homes, Ltd.*, [1995] FSR 818, 835 (Laddie, J.) ("In my view, to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium. It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected."). Note however, that in *Robin Ray v. Classic FM, Plc.*, [1998] FSR 622, 636, Justice Lightman said he considered *Cala* to be an "exceptional" case, involving "very detailed input given by the joint author that did not exercise penmanship" and concluding that "what is required is something which approximates to penmanship." See also *Donaghue v. Allied Newspapers, Ltd.*, [1938] Ch. 106, 109 (though a claim for joint authorship was not advanced in that case).
- ¹¹ *Childress*, 945 F.2d at 507. This takes the requirement of intention beyond that indicated by the statutory language (confined to the merger of the contributions into a unitary whole). See the wording of 17 U.S.C. § 101 n.4 (2012).

was “no basis” for “importing” such a requirement from inter alia U.S. jurisprudence, expressly refusing to follow *Childress*.¹²

Despite these differences, the courts in both the UK and the U.S. claim joint authorship to have a common historical lineage: the late nineteenth century English case of *Levy v. Rutley*.¹³ In *Childress*, the Second Circuit District Court acknowledged *Levy* to be “the first definition of “joint authorship””¹⁴ and in the UK, *Levy* is still cited in some legal judgments as regards the substance of the joint authorship test.¹⁵ This common origin might suggest that the “fracture” of UK and U.S. approaches to joint authorship occurred only in recent times. The central contention of this article is that it is not: despite *Levy* being the common root of joint authorship in both jurisdictions, the story of difference has a longer history.

In this way, the comparative historical research contained in this paper presents a nuanced picture about the influence of common law jurisdictions on the national laws of one another. On the one hand, it further supports the “provocative thought” entertained in the postscript to *The Common Law of Intellectual Property*: that intellectual property in common law countries has long been characterized by divergence.¹⁶ On the other, the very fact that the U.S. sought to draw on English nineteenth-century authorities as late as the early twentieth century, suggests that this is an area that defies one of the most obvious explanations that existing literature has put forward to account for difference in common law approaches: the throwing off of “old legal chains” by former colonies that had become independent.¹⁷ Indeed, as we will see, the roots for the emergence of divergence lie with a U.S. decision that read *Levy* in conjunction with another English authority (*Hatton v. Kean*), at variance to its interpretation by English courts. In explaining these differences and others in UK and U.S. approaches, which stem from the development of dicta from

¹² *Beckingham v. Hodgins*, [2003] EWCA Civ 143, ¶ 52-53 (Parker, L.J.), affirming [2002] EWHC 2143, ¶ 48 (Floyd, Q.C.).

¹³ (1870–71) L.R. 6 C.P. 523.

¹⁴ *Childress*, 945 F.2d at 504.

¹⁵ See, e.g., *Beckingham*, [2003] EWCA Civ 143, ¶ 44 (Floyd, Q.C.) (drawing on *Levy* to inform the requirement of “collaboration”). See also the language of “common design” in *Godfrey v. Lees*, [1995] EMLR 307, 325. In addition, certain dicta on the nature of the contribution may be informed by *Levy*. For example, in *Godfrey*, Judge Blackburne accepted that there was no need for each joint author to contribute equally to the work, which was also a point decided in *Levy*.

¹⁶ See NG, BENTLY & D’AGOSTINO, *supra* note 1, 401-21.

¹⁷ See *id.* at 6 (quoting the contribution of Lior Zemer in the same volume: Lior Zemer, *The Emancipation of Fair Use in Israel in THE COMMON LAW OF INTELLECTUAL PROPERTY*, *supra* note 1, 281-304, 284).

common authorities, this article looks to broader differences in social and cultural contexts (e.g., the theatre and literature in the UK and popular music in the U.S.) and other variations in national copyright rules, which provided distinct parameters within which the implications of joint authorship were debated and considered in the two jurisdictions.

With these comments in mind, this article proceeds as follows: starting with the ruling in *Levy* and other nineteenth-century disputes about authorship and ownership (Section I), it explains how and why differences emerged between UK and US approaches to joint authorship during the course of the twentieth century (Sections II and III). The article concludes (in Section IV) with comments about how the comparative history of joint authorship contributes to a broader picture of historical diversity in copyright in the common law world, an observation of relevance both to copyright scholarship and policy-making in recent times.

I. COMMON ORIGINS: LEVY V. RUTLEY AND EARLY DISPUTES OVER AUTHORSHIP

Levy v. Rutley, decided in 1871 by the Court of Common Pleas, was one of a number of cases brought under the Dramatic Literary Property Act 1833¹⁸ by theatre managers seeking to prevent rival theatres from putting on plays written by dramatists they had “employed.” In these cases, the courts were presented with competing claims as regards authorship and/or first ownership between “employer” theatre managers on the one hand and “employee” dramatists on the other.¹⁹ As this section shows,

¹⁸ The Dramatic Literary Property Act 1833 (3 & 4 Will. 4, c.15) provided protection for the performance of “any Tragedy, Comedy, Play, Opera, Farce, or any other Dramatic Piece or Entertainment” at “any place or places of Dramatic Entertainment whatsoever” (at § 1). For more on the 1833 Act see Ronan Deazley, *Commentary on Dramatic Literary Property Act 1833*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (Lionel Bently & Martin Kretschmer eds.), <http://www.copyrighthistory.org> (last visited Jan. 1, 2015); Isabella Alexander, “Neither Bolt nor Chain, Iron Safe nor Private Watchman, Can Prevent the Theft of Words”: *The Birth of the Performing Right in Britain*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT (Ronan Deazley, Martin Kretschmer & Lionel Bently eds., 2010).

¹⁹ The cases describe the theatre managers as “employers” and their relation with the dramatists as one of “employment.” Yet, it should be noted that the nineteenth-century meaning of these terms was different from their meaning today. As Simon Deakin and Frank Wilkinson have shown, the modern concept of the contract of employment did not emerge until the twentieth century. In the mid-nineteenth century, the term “employee” denoted wage-dependent labour of clerical, managerial or professional status. The category “employee” was distinct from that of “servant,” the latter falling under the disciplinary regime of “master” and “servant” legislation which was supported by the criminal jurisdiction of the magistrates’ courts.

the decision in *Levy*, which favored the position of the latter, can be explained both by the wish not to undermine other case law prescribing the circumstances in which the interests of “employer” theatre managers would prevail, as well as policy implications relating to operation of copyright in the particular context of the theatre.

By the time *Levy* came to be heard, a number of disputes between theatre managers and dramatists had been decided. These established a number of propositions. First, it was clear that the “author” was the first owner of copyright in a play: in *Shepherd v. Conquest*, the Court of Common Pleas rejected an argument that presented the relationship between a theatre proprietor and a dramatist he had “employed” as one of “master” and “servant” such that the labor of a “servant” became “the property of his masters at the moment of production.”²⁰ As Chief Justice Jervis concluded: “it is upon the author in the first instance that the right is conferred by the statute which creates it.”²¹

While copyright vested ab initio with the “author,” there were cases in which an “employer” might be “the author.” Support for this was provided by the dicta of the Vice Chancellor Sir John Leach in *Barfield v. Nicholson*, decided by the Court of Chancery in 1824, in discussing who was the author and proprietor of a book, *The Practical Builder*, to which the defendant and others had contributed:

[T]he person who forms the plan, and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements — that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection who upon certain conditions contribute to it, is *the author and proprietor* of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally.²²

A contractual model of the work relationship only emerged in the nineteenth century in relation to the former category: “employees.” See SIMON DEAKIN & FRANK WILKINSON, *THE LAW OF THE LABOUR MARKET: INDUSTRIALISATION, EMPLOYMENT AND LEGAL EVOLUTION* 36, 74, 78-79, 106 (2005).

²⁰ *Shepherd v. Conquest*, (1956) 17 CB 427; 139 E.R. 1140, 1147.

²¹ *Id.* at 1147. Another reason why this argument was rejected may be that, as noted at note 19 above, the “master” and “servant” relationship was distinct from that denoted by the terms “employer” and “employed” which were used to refer to the plaintiff, the proprietor of the Surrey Theatre, and the dramatist (called Courtney). The facts of *Shepherd* were that the Courtney was “employed” by the plaintiff as a “stock author” to attend plays in France with a view to adapting them for the English stage, and for which purpose he was paid a weekly stipend and expenses.

²² 2 L.J. Ch. (O.S.) 90, 102 (emphasis added). This notion of authorship was put forward in the context of considering an argument as to whether a Mr. Kelly, who had formed the plan and scheme of the work and paid the con-

This suggested that an employer who was also a senior contributor, i.e., a contributor to the overall “plan and scheme” of the work, would be its sole author. Later case law left open this basis for authorship. In *Shepherd v. Conquest*, the Court of Common Pleas confined its conclusions to the facts before it: that it was an “abuse of terms” to say that an employer who “merely suggests the subject and has no share in the design or execution of the work” was an “author.” However, Chief Justice Jervis expressly left it open that there might be other circumstances in which an employer might be the first owner of copyright, and by implications the author.²³

Such circumstances arose in *Hatton v. Kean*, which Justice Byles presented as an example of the class of case upon which the court in *Shepherd* had “expressly abstained from pronouncing an opinion.”²⁴ In *Hatton*, the manager of a theatre was held to be “the author and designer of an entire dramatic composition” (an adaptation of a number of Shakespeare’s plays) and the music composed by a musician, who the manager

tributors, was a purchaser for value without notice of Nicholson’s contribution, such that he would not be bound by a restrictive covenant by which Nicholson promised the plaintiff not to publish any work which would interfere with a rival work to which Nicholson had previously contributed: *The Architectural Dictionary*. Counsel for the plaintiff argued that Kelly would only be a purchaser for value without notice if he had complied with the formalities proscribed by the applicable copyright Act (the Statute of Anne 1709) that required assignments of copyright to be in writing. Sir John Leach dismissed this argument by finding Kelly to be the author and proprietor of the work. Interestingly, this passage is not contained in the report of the case in the *English Reports*, ((1824) 2 Sim. & Stu. 1; 57 E.R. 245), yet the dicta came to be cited widely in subsequent cases and early treatises on copyright. See, e.g., WALTER COPINGER, COPYRIGHT IN WORKS OF LITERATURE AND ART 45 (1870) (after citing the rule in *Shepherd*, this dicta from *Barfield* is quoted to support the statement that: “Where however the employers do more than suggest the subject, and have a share in or solely design the execution of the work, the case is different.”). It is interesting to note that Copinger was clearly aware of nineteenth-century U.S. rulings that were early forerunners to the work for hire doctrine which would emerge in the U.S. in the early twentieth century. See, e.g., *id.* at 44 (citing *Atwill v. Ferrett*, 2 F. Cas. 195 (C.C.S.D.N.Y. 1846) (No. 640)). Professor Fisk in her history of the work for hire doctrine presents *Atwill* as an early example of employer ownership, though on the basis that “employers acquired a claim to the copyright based only on their intellectual contributions, not by virtue of having paid the employee to create.” See Catherine Fisk, *Authors at Work: The Origins of the Work-For-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 25 (2003). Also on the early history of the work for hire doctrine in the U.S., see Oren Bracha *The Ideology of Authorship Revisited: Authors, Markets and Liberal Values in Early American Copyright*, 118 YALE L.J. 118, 186 (2008).

²³ *Shepherd*, (1956) 139 E.R. at 1147.

²⁴ (1860) 29 L.J.C.P. 20, 25.

“employed” for that purpose, was merely “a part of, a mere accessory to the main piece.”²⁵ In these circumstances, the Court of Common Pleas held that the “employer” was first owner of copyright in the “entire dramatic composition, including the musical portion” contributed by the musician,²⁶ there being no need for written consent or assignment.²⁷ The court’s reasoning drew attention to the fact that the oral terms on which the musician was “employed” were such that the music should “form part of the entire dramatic composition”²⁸ and that the music was composed in accordance with “the plan designed and carried out” by the “employer.”²⁹ Walter Copinger, in the first edition of his copyright treatise published in 1870, considered *Hatton* to be an application of the principle put forward by Vice Chancellor John Leach in *Barfield*, that is, an “employer” who “did more than suggest the subject” and contributed to the plan or scheme of the work was both the author and first owner of copyright in the work.³⁰

²⁵ *Id.* at 24 (Erle, C.J.).

²⁶ *Id.* at 25.

²⁷ The facts of this case were that there was no written contact of any nature between “employer” and “employee,” the manager having “verbally employed the plaintiff.” *Id.* at 20.

²⁸ *Id.* In a later case it was made clear that *Hatton* would not apply where the musical contribution to a larger dramatic production (a Christmas ballet) was a “substantial, independent musical composition.” *Eaton v. Lake*, (1888) 20 Q.B.D. 378, 385.

²⁹ *Hatton*, 29 L.J.C.P. at 24. As Justice Crowder expressed it (29 L.J.C.P. at 25), the musician’s contribution was “accessory to the one general design” of the employer.

³⁰ COPINGER, *supra* note 22, at 45. The judgments in *Hatton* made clear that the employee contributor had “no separate rights to the music” but this was expressed to be “as between the plaintiff and the defendant” (*Hatton*, (1860) 29 L.J.C.P. at 25 (Crowder, J.)) the case merely deciding that the plaintiff had no right to prevent the representation of the dramatic piece as a whole by the employer. This did not rule out the possibility that the employee contributor might retain a copyright in the individual contribution for other purposes, though in a subsequent case in which *Hatton* was applied, the Court of Queen’s Bench held that the contribution of an “employee” musician, in composing the music “as a mere adjunct and accessory to the dramatic piece *Lady Audley’s Secret*, ‘became part and parcel of the drama, and no longer has an independent existence as a musical composition.’” *Wallerstein v. Herbert*, (1867) 15 WR 838, 839 (Cockburn, C.J.). This conclusion appears also to have been supported by the early editions of Copinger’s work, in which *Hatton* was cited as a case in which the individual contributions “lose their separate identity.” COPINGER, *supra* note 22, at 44. Interestingly, after the passage of the 1911 Act, the commentary in *Copinger* would be revised such as to present these cases as relevant to a new category of works defined by the 1911 Act: “collective works.” The provisions on collective works, that is works comprising “distinct parts by

Viewed in the context of this contemporaneous case law, *Levy* concerned an alternative means by which “employer” theatre managers might argue that they were authors and thereby first owners of copyright: as joint authors with the dramatists they “employed.”³¹ Indeed, the report of the decision records that the claim of joint authorship was how the case was “ultimately presented” following an unsuccessful attempt to argue that Levy was the author and proprietor by virtue of his status as “employer” (a matter “answered by *Shepherd v Conquest*”).³² While the Dramatic Literary Copyright Act (and perhaps the Literary Copyright Act 1842) contemplated that there might be cases of co-authorship, there was no statutory guidance on when this would arise.³³ This was a matter left to

different authors,” envisaged that the various parts might be works in their own right (1911 Act §§ 35, 16(2)). Consequently, in the edition of his work which was published after the 1911 Act, the discussion in *Copinger* would present a collective work as involving “two distinct copyrights, namely: (1) in the collective work considered as a whole and (2) in the distinct works of the various contributors to the collective work.” JAMES M. EASTON & WALTER COPINGER, *COPYRIGHT IN WORKS OF LITERATURE AND ART* 224 (5th ed. 1915). In this new legislative context, *Copinger* presented cases such as *Hatton* and *Barfield* as examples of authorship of the collective work as a whole (*id.* at 225, 110-11) that did not preclude authorship and ownership by the individual contributor of a separate copyright in their individual contributions.

³¹ Another unsuccessful line of argument pursued by Levy in both *Levy v. Rutley* and a number of other legal proceedings that he brought against owners of theatres (located in Weymouth, Exeter, and Liverpool), was that he was the dramatist’s assignee. See *infra*, note 46 and accompanying text, regarding the failure of this argument in *Levy v. Rutley*. In the other cases, which all concerned the unauthorized performances of plays by dramatist John Courtney (*The Solder’s Progress*, *The Two Colts* and *Time and It’s All*), the proceedings either failed or were abandoned by Levy following hearing of defense arguments as to defects in the assignment (either failure to comply with formalities or on the basis that the assignment documents were forged) or because Courtney had granted a license to the defendant prior to the alleged assignment. See *Levy v. Neeve* (Ct. C.P.), *THE TIMES* May 3, 1871, at 11, and May 4, 1871, at 11; *Levy v. Lacy* (writ dated Dec. 23, 1870, which proceedings collapsed when Levy did not appear to prosecute before the Surrey Assizes court in 1871. See UK National Archives CP40/4118; *Summer Assizes*, *THE TIMES*, Aug. 16, 1871, at 9; *Northern Circuit*, *THE TIMES*, Aug. 17, 1871, at 11); *Levy v. Heath* (writ dated Dec. 21, 1870, heard before Justice Willes in Spring Assizes 1871 and the Court of Exchequer in June 1873; see UK National Archives CP40/4116; *Court of Common Pleas*, *THE TIMES*, May 24, 1871, at 11).

³² *Levy v. Rutley*, (1870–71) L.R. 6 C.P. 523, 530.

³³ Section I of the Dramatic Literary Property Act 1833 stated that the term of protection would be for twenty-eight years from first publication, or the life of “the Author or Authors or Survivor of the Authors,” whichever period was longer, as well as containing an interpretation clause which specified

the judiciary and the question of what this might mean came to be addressed at length for the first time in *Levy*.³⁴

The particular facts of *Levy* concerned a dispute between rival theatre proprietors about the right to perform *The King's Wager*, a play about the adventures of Charles II after his escape from the battle of Worcester. Lawrence Levy, the proprietor of the Victoria Theatre, had employed a dramatist named Wilks to write the play in 1836. Wilks presented the finished play to Levy, following which Levy made changes to it with the assistance of two actors from his theatre company: he introduced a new scene and made “alterations and additions to the dialogue” so as “to make it more attractive to an audience.”³⁵ The report of the litigation in *The Times* characterized these as “sensation scenes” (in submissions by Coun-

that “whenever Authors . . . are spoken on in this Act in the Singular Number. . . the same shall extend to any Number of Persons . . .” (§ IV). In his commentary on this Act in *Primary Sources on Copyright*, Ronan Deazley notes these to be the first UK statutory provisions on joint authorship. See Deazley *supra* note 18, ¶ 10. Section 2 of the Literary Copyright Act 1842, dealing with copyright in “books,” contained a more general interpretation provision that references to the singular in respect of inter alia “any Person . . . shall be understood to include and to be applied to several Persons as well as one Person,” though this was subject to the proviso that this would not apply where “there shall be something in the subject or context repugnant to such construction.” A number of cases, however, indicated that the courts considered the 1842 Act to accommodate co-authorship. In *Maclean v. Moody*, (1858) 20 Sc. Sess. Cas. 2d Ser. 1154, a case about copyright in shipping lists, the Court of Session clearly understood the 1842 Act to contemplate joint authorship, Lord Deas noting in passing that a work “may be the joint production of two or more authors, whose contributions to it are undistinguishable” *Id.* at 1163. Further, in *Marzials v. Gibbons*, (1873–74) L.R. 9 Ch. App. 518, which concerned the right of an executor to rely on the transitional provisions of section 4 of the 1842 Act, the Court of Appeal did not raise any objection to the fact that the work in question, a Methodist hymn book, was compiled by seven authors. For the position under the Fine Arts Copyright Act 1862, see *infra*, notes 82–86 and accompanying text.

³⁴ As explained in note 33 *supra*, the judiciary had previously noted the possibility of joint authorship in cases such as *Maclean* decided under the Literary Property Act 1842. Joint authorship under the Dramatic Copyright Act 1833 was pleaded by Levy in earlier proceedings concerning the play *Breakers Ahead*: Levy argued that he was joint author of the play with a J.T. Haines on the basis that Levy had “suggested some alterations in the last scene, which gave a more sensational turn to the stage directions.” Justice Montague Smith referred the question of whether this had been proven to the jury, who returned verdict for the defendant. Counsel for Levy sought to request a fresh trial, on the basis of improper rejection of the evidence, but this was refused. See *Levy v. Cave* (Ct. C.P.), *THE TIMES*, Dec. 14, 1870, at 11, Jan. 16, 1871, at 11.

³⁵ *Levy*, (1870–71) L.R. 6 C.P. at 529.

sel for the plaintiff) and “additions . . . for the attention of the gallery” (in argument put by Counsel for the defendant): one scene involved the Duke of Buckingham striking the legs of a police constable who was hiding by posing as a statue, to which the constable cried “Mercy, Mercy,” and in another “the King was made to kiss a pretty barmaid.”³⁶ The play was published in 1840 and Wilks died in 1854. Accordingly, if Wilks was the sole author, copyright would have expired by the time of the allegedly infringing performance put on by the defendant’s theatre.³⁷ Levy brought a claim for penalties under the Dramatic Literary Property Act 1833 alleging that he was Wilks’s co-author, with the consequence that copyright continued to subsist in the play and that he was joint owner.

The case was heard by Winchester Assizes before Justice Byles and Baron Pigott, with a verdict returned by the jury for Levy.³⁸ This decision was subsequently appealed to the Court of Common Pleas, where Levy’s claim was unanimously rejected. While the judges accepted that joint authorship might arise in cases where one author had contributed more than another, Levy had merely made subsequent additions and alterations, there being no common design with Wilks. As Justice Byles explained, joint authorship required a piece to be “written . . . jointly, in prosecution of a pre-concerted joint design.”³⁹ Agreeing with Justice Byles, Justice Keating expressed this as “a joint labouring in furtherance of a common design.”⁴⁰ Finally, Justice Montague Smith delivered a judgment agreeing with both the other judges. As he explained, joint authorship demanded an agreement “to write a piece, there being an original joint design, and the co-operation of the two in carrying out that joint design . . .”⁴¹

It is worth noting that Justice Montague Smith’s judgment was reported differently in *The Law Times Reports*: he was reported as objecting to the fact that there was “no agreement between the two, or intention on Wilks’s part that they should have been joint authors originally.”⁴² Further, rejecting Levy’s alternative claim that copyright had been assigned by virtue of a receipt which stated that Wilks received payment for his “share

³⁶ *Court of Common Pleas*, THE TIMES, Jan. 6, 1871, at 11.

³⁷ As per § I of the Dramatic Literary Property Act 1833. See *supra*, note 33. The term provided by the Dramatic Copyright Act 1833 was amended by the Literary Copyright Act 1842, so as to bring it into line with the term applicable to books (see *infra*, note 70). However this only applied to works published after the passage of the 1842 Act. See Copyright Act 1842 ss. 3, 20.

³⁸ See Plea Roll at UK National Archives CP40/116; Cause List at UK National Archives ASSI 22/32.

³⁹ *Levy*, (1870–71) L.R. 6 C.P. at 528.

⁴⁰ *Id.* at 529.

⁴¹ *Id.* at 530.

⁴² (1871) 24 L.T.R. (N.S.) C.P. 621, 623 (emphasis added).

title and interest as a co-author” with Levy, Justice Montague Smith is recorded as saying that the only relevance of the receipt might be in the context of the issue of joint authorship: as “evidence that they considered themselves to be co-authors at that time,” though this finding was “not warranted by the facts.”⁴³ It was this report, with its inclusion of a test of intention as to joint authorship, which was to be quoted at length in subsequent editions of Walter Copinger’s treatise on copyright, published during the course of the late nineteenth and early twentieth century.⁴⁴

The court’s test of common design (and, as in *The Law Times Report* or Copinger’s treatise, intention as to joint authorship on the part of Wilks) supported a finding of sole authorship by a dramatist, as against an “employer” manager, a result that appears, at least in part, to have been influenced by the norms of play-writing in the particular context of the theatre. As Justice Montague Smith noted it would be “strange if not unjust” to find co-authorship in the circumstances of the case as there are probably very few instances — at least in modern times — of a play being put upon the stage without some alteration by the manager.⁴⁵ The approach in *Levy* therefore ensured that the usual activities of theatre managers, in making subsequent alterations to play scripts, would not be sufficient to find a claim to joint authorship, a result that would mean that managers could control the performance of plays at rival theatres. Indeed, giving judgment rejecting the alternative claim (that a manager’s receipt could amount to an assignment of the playwright’s copyright), the court expressed concern at the “inconvenient multiplication of rights and remedies which never could have been contemplated.”⁴⁶

This was also the implication of *Shelley v. Ross*, a joint authorship case tried a few weeks after *Levy*, in which Justice Hannen appeared to focus on the nature of the contribution of the purported joint author, rather than common design.⁴⁷ The sole issue in *Shelley* was whether the plaintiff became a joint author of a play entitled *Clam* through making “alterations in a dramatic piece, for the purpose of rendering it more at-

⁴³ *Id.* All three judges rejected this claim. As Justice Keating explained, the receipt did not amount to an assignment, it being a mere acknowledgement of the payment of money or at most an undertaking to assign which was never fulfilled. See *Levy*, (1870–71) L.R. 6 C.P. at 528.

⁴⁴ WALTER COPINGER, *COPYRIGHT IN WORKS OF LITERATURE AND ART* 132-33 (2d ed. 1881); WALTER COPINGER, *COPYRIGHT IN WORKS OF LITERATURE AND ART* 140 (London, Stevens & Haynes 3d ed. 1893); WALTER COPINGER, *COPYRIGHT IN WORKS OF LITERATURE AND ART* 111-12 (4th ed. 1904).

⁴⁵ *Levy*, (1870–71) L.R. 6 C.P. 530.

⁴⁶ *Id.* at 531 (Montague Smith, J.).

⁴⁷ (1870–71) L.R. 6 C.P. 531; *Bail Court, June 7*, THE TIMES, June 8, 1871, at 10.

tractive or better adapted for stage representation.”⁴⁸ Justice Hannen rejected the claim: “alterations and additions . . . such as made it an acting drama” could not found a claim to joint authorship, commenting that “the stage carpenter might claim as joint author if the plaintiff’s claim was admitted.”⁴⁹

As well as being explained by the particular context of the theatre, the adoption of a test that supported the position of the dramatist, reflected that there were other cases concerning authorship that were less favorable to those that composed the work: as we have seen, *Barfield v. Nicholson* and *Hatton v. Kean* instead protected the position of an “employer” who was also a senior contributor, i.e., the designer of the overall plan and scheme of a work. In the nineteenth century, these decisions co-existed with cases decided under contrasting provisions of separate legislation on artistic copyright. For instance, the Fine Arts Copyright Act 1862 contained an express provision vesting first ownership of copyright in an “employer” (as the person providing good or valuable consideration)⁵⁰ and in *Nottage v. Jackson*⁵¹ the Court of Appeal refused to interpret “authorship” to denote “the common employer of all the artists and assistants” involved in producing a portrait photograph, “the person who conceives the idea and sends his materials and men to take it.”⁵² In *Nottage*, the Court of Appeal instead tied the definition of “authorship” to the process of making the work, characterizing the tasks of the employee who “superintended the arrangement, who . . . actually formed the picture by putting the people into position”⁵³ as activities of “originating, making, producing, as the inventive or master mind.”⁵⁴

Copyright law in the nineteenth century, therefore, spanned a number of concepts of authorship: not just those under literary and dramatic copyright legislation favorable to “employers” that planned the overall scheme of the work (e.g., *Barfield* and *Hatton*), but also concepts of authorship that privileged those who were involved in the process of making or composing the work (e.g., *Nottage* and *Levy*). These cases formed the backdrop for contrasting developments in joint authorship that began in the late nineteenth and early twentieth centuries. As we will now see, the

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 25 & 26 Vict. c. 68, § 1.

⁵¹ *Nottage v. Jackson*, (1882–83) L.R. 11 Q.B.D. 627 (concerning the question of who was the “author” of a *carte de visite* photograph of the Australian Cricket Team, for the purposes of the registration requirements of section 4 of the 1862 Act).

⁵² *Id.* at 628 (per the argument of Counsel for the claimants: Mr. Pretheram, Q.C. and Mr. Shortt).

⁵³ *Id.* at 632 (Brett, M.R.).

⁵⁴ *Id.* at 634 (Cotton, L.J.).

result was that by the early twentieth-century differences of approach had emerged between the UK and her self-governing dominions on the one hand, and the U.S. on the other hand, despite both claiming lineage from *Levy*. These are now explored in turn.

II. THE EMERGENCE OF A STATUTORY TEST: THE UK IMPERIAL COPYRIGHT ACT 1911

In the decades that followed *Levy* there were numerous attempts at legislative reform of copyright in the UK. Copyright law at that time was contained in fourteen different statutes, passed during the course of the eighteenth and nineteenth centuries, each concerning different subject matter, such as engraving, sculpture and books.⁵⁵ Reporting in 1878, the Royal Commission on Copyright concluded that copyright law was “wholly destitute of any sort of arrangement, incomplete, often obscure” and in need of reform.⁵⁶ In this more general reforming context, the question of joint authorship was raised by the Society of Authors in a number of legislative proposals put forward in the 1890s. As we will see, like *Levy*, these legislative proposals, and those that followed to the early twentieth century, again placed emphasis on the composition of the work, a stance that can be explained both by reference to the writing practices adopted by those at the head of the Society of Authors, as well as the intersection between joint authorship with more general copyright rules on the term of protection.

The Society of Authors, established in 1884 for the “furtherance of the Interests of Authors” under the presidency of poet laureate Alfred Tennyson, was then under the chairmanship of the author Walter Besant. As well as being a critic and an historian, Besant was well known for his novels written with co-author James Rice, such as *Ready Money Mortiboy*, *The Golden Butterfly* and *The Chaplain of the Fleet*. Besant and Rice began to collaborate in the early 1870s, and as Besant’s obituary in the Society’s magazine *The Author* explained, in the following decade: “the joint authors produced a series of novels which won them immediate popular-

⁵⁵ For example, in addition to the Dramatic Literary Property Act 1833, five Acts dealt with copyright in engravings (8 Geo. 2, c. 13 (1735); 7 Geo. 2, c. 38 (1767); 17 Geo. 3, c. 57 (1777); 6 & 7 Will. 4, c. 59 (1836); 15 & 16 Vic., c. 12, § 14 (1852), and two further Acts dealing with copyright in sculpture (38 Geo. 3, c. 71 (1798) and 54 Geo. 3, c. 56 (1814)), as well as the Fine Arts Copyright Act 1862 concerning painting, drawing and photography (25 & 26 Vic., c. 68), and the Literary Copyright Act 1842 dealing with copyright in “books” (5 & 6 Vic., c. 45).

⁵⁶ UNITED KINGDOM ROYAL COMMISSION ON COPYRIGHT, THE ROYAL COMMISSION AND THE REPORT OF THE COMMISSIONERS, at C-2036, C-2036-1 XXIV.163, 253, ¶ 17 (1878).

ity, and a permanent place in English letters.”⁵⁷ It is of no surprise, then, that the Bills presented to Parliament by the Society of Authors all contained provisions on joint authorship. Indeed, “the novels of Besant and Rice” were often referred to as a paradigm example of joint authorship in the debates over the Society’s proposals by the Select Committees on Copyright in the late 1890s,⁵⁸ as well as informing the understanding of authorship articulated in the first instance judgment in *Nottage v. Jackson* (which as we saw, was a case which supported a concept of authorship defined by reference to the process of composing the work).⁵⁹

As we noted above, the existing UK statutes on dramatic and literary copyright appeared to contemplate that there might be more than one author, but did not provide any statutory guidance as to when this might arise.⁶⁰ Joint authorship provisions were also largely absent from existing local copyright legislation in the colonies,⁶¹ the Victoria Copyright Act 1869 being a rare example that contained an interpretation clause — “the

⁵⁷ *Sir Walter Besant*, 12 *THE AUTHOR* 20, 22-23 (Jan. 7, 1901); see also 1 VICTOR BONHAM CARTER, *AUTHORS BY PROFESSION* 127-28 (1978).

⁵⁸ See, e.g., *REPORT OF THE SELECT COMMITTEE ON THE COPYRIGHT BILL (H.L.) AND THE COPYRIGHT (AMENDMENT) BILL (H.L.)* 5 (1898) [hereinafter *SELECT COMMITTEE ON COPYRIGHT 1898*] (evidence of John Murray (Q. 31) (“a novel such as that by Besant and Rice, where nobody can tell which part is attributable to which author.”); *id.* at 31 (evidence of Frederic Daldy (Q. 449) (“I speak of Besant and Rice as an instance [of joint authorship] that is very well known.”); *id.* at 89 (Q. 1375) (Lord Knutsford in questioning Queen’s Counsel Edward Cutler, asking whether a particular provision encompassed “joint authors, like Besant and Rice.”). Later in the twentieth century, “Besant and Rice” would also be referred to as an example of what was denoted by “joint authorship” by the Gregory Committee on Copyright. See *BOARD OF TRADE: REPORT OF THE COPYRIGHT COMMITTEE* (1952) [Cmd.] 8662, ¶ 25.

⁵⁹ *Nottage v. Jackson*, (1883) L.T.R. 339, 341 (Field, J.) (“When I say ‘one person’ I do not mean to deny that it may be joint. Several persons may combine together as Mr Besant and Mr Rice . . . *The Chaplain of the Fleet* or any book of that kind.”). The Court of Appeal upheld the first instance judgment.

⁶⁰ See *supra*, note 33. As we note later, joint authorship was neither referred to expressly nor indirectly (e.g., through an interpretation clause) in the statutes on artistic copyright.

⁶¹ In particular, local copyright legislation was passed in each of the following colonies: Victoria, New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia (all of the preceding states which were to form the Commonwealth of Australia in 1901), New Zealand, India, Canada, Newfoundland, Cape Colony, Natal and the Transvaal (the latter three states forming the Union of South Africa in 1910 with the Orange River Colony). As we see below, these states (or their successors) were represented at an Imperial Conference on Copyright in 1910 that preceded the passage of the UK Copyright Act 1911.

single number shall include the plural” — that might cover joint authorship.⁶² There were, however, two exceptions: the local Copyright Acts of Canada of 1875 (and later the Acts of 1886 and 1906) and Newfoundland of 1890 provided for the subsistence of copyright in literary and artistic works for a period of twenty-eight years from publication, subject to the possibility of renewal for a further fourteen years if the “author, or any of the authors when the work has been originally composed and made by more than one person” was still alive at expiry of the original term.⁶³ Therefore, the Society of Authors’ reform attempts appear to be the first concerted attempt in the UK, after the ruling in *Levy*, to formulate a statutory test for joint authorship, though preceded by local legislation passed in Canada and Newfoundland.⁶⁴

The Society of Authors’ proposals on joint authorship all stressed a contribution to the process of writing or composition.⁶⁵ For example, the

⁶² 33 Vict., No. 350, s. 2. Interestingly, this interpretation provision was omitted from the Victorian legislation that repealed and replaced the 1869 Act, the Copyright Act 1890 (54 Vict., No. 1076). It was also absent from legislation passed in New South Wales in 1879 (42 Vict., No. 20) and South Australia in 1878 (41 & 42 Vict., No. 95) that was closely modelled on the 1869 Act.

⁶³ Canadian Copyright Acts 1875 (38 Vict., c. 88, § 5); 1886 (49 Vict., c. 4, § 17) (emphasis added); 1906 (R.S.C., c.70, § 19); Newfoundland Copyright Act 1890, c. 110, § 16. As we see later, by 1911, the only other colony of those listed in note 61 *supra* to have passed local legislation including a provision on joint authorship was Australia.

⁶⁴ A statutory test of joint authorship was included in an early draft of a copyright Bill presented to the House of Commons as part of a reform attempt that took place in the 1880s. However, this provision was soon abandoned due to the controversies relating to its application in relation to artistic copyright (discussed below) that became the focus of this initiative (the Bill being drafted by solicitor Basil Field advising the Royal Academy of Arts). See Copyright Bill, Bill 121, cl. 9, 1881 Parliamentary Papers [P.P.]. Like the Society of Authors’ proposals of the 1890s, the test contained in the 1881 Bill stressed a contribution to the writing or composition of the work. This proved controversial in an art institutional context in which artists routinely involved pupils or assistants in the execution of their work, but neither attributed such pupils/assistants as authors nor considered them to be copyright owners. Clause 9 dealt with the latter point, providing that where one joint author was the pupil of the other, instead of joint ownership by pupil and “artist” copyright would be solely owned by the “artist.”

⁶⁵ Emphasis on a contribution to writing was also made by the judiciary in a number of early twentieth century cases, in which the contributors of ideas claimed to be authors of literary works, though in a number of these cases joint authorship with the person that composed the work was not claimed. In *Springfield v. Thame*, (1903) 89 L.T. 242; 19 T.L.R. 650 (Ch.), Judge Joyce accepted the argument of Thomas Scrutton, that copyright was in the “particular form of language” meaning that the newspaper article in question was authored by the sub-editor who wrote it, perhaps jointly with a second sub-editor who touched it up, and not by the journalist that provided

Bill introduced into the House of Lords by Lord Monkswell in 1890, defined “joint work” as a “book, article, essay, poem, dramatic piece or musical composition . . . *written, composed, or produced* by two or more persons and published as such.”⁶⁶ A later clause provided that copyright in a joint work, in absence of agreement to the contrary shall belong “to persons by whom the same is *written or composed jointly*.”⁶⁷ A later proposal supported by the Society jointly with the publisher dominated Copyright Association, introduced into the House of Lords by Lord Monkswell in 1899 and 1900, defined “joint authorship” as “a book *written* by joint authors.”⁶⁸

In addition to reflecting the paradigm of Besant and Rice, the emphasis on a contribution to writing or composition can be explained by reference to the debates on the term of protection of jointly authored works. Each of the Bills of 1890, 1899 and 1900 proposed a term of life plus thirty years linked to the life of the last surviving author.⁶⁹ The term of life plus

the underlying story. The reasoning in *Springfield* was followed in a number of other decisions delivered in the first half of the twentieth century. See *Bagge v. Millar*, [1917–23] MacG. C.C. 179, 182 (Russell, J.) (relying on *Shepherd v. Conquest* to establish that: “mere suggestion of an idea which is then embodied by another in a dramatic work written by him does not . . . constitute the originator of the idea as an author or joint author of the dramatic work.”); *Evans v. E. Hulton & Co.*, [1923–28] MacG. C.C. 51, 56 (Tomlin, J.) (denying authorship or joint authorship status to a plaintiff who “did not take any part in producing the express matter which is the original literary work.”); *Donaghue v. Allied Newspapers, Ltd.*, [1938] Ch. 106, 109 (Farwell, J.) (finding that the author is “the person who has clothed the ideas in form.”) Of these cases, only *Bagge* and *Evans* included a claim that the contributor of ideas was a joint author with the contributor of expression, the plaintiff contributors of ideas in the other cases claiming to be sole author.

⁶⁶ Copyright Bill, H.L. Bill 7, cl. 5, 1890–91 Parliamentary Papers [P.P.] [hereinafter 1890 Bill] (emphasis added).

⁶⁷ *Id.* cl. 18(1) (emphasis added).

⁶⁸ Literary Copyright Bill, H.L. Bill 44, cl. 8, 1899 Parliamentary Papers [P.P.] [hereinafter 1899 Bill]; Literary Copyright Bill, H.L. Bill 18, cl. 8 (1900) [hereinafter 1900 Bill]. On the Society of Authors’ support for this measure, see BONHAM CARTER, *supra* note 57, at 164.

⁶⁹ 1890 Bill, *supra* note 66, cl. 15(2); 1899 Bill, *supra* note 68, cl. 8.; 1900 Bill, *supra* note 68, cl. 8. This was also the case as regards the Bill introduced into the House of Lords in 1898 by Lord Herschell, supported by the Copyright Association. While this did not contain a definition of joint authorship, the clause on term of protection stated that in the case of a work published in the “true name” of a “plurality of authors” the term would expire thirty years after the end of the year in which the last survivor died. See Copyright Bill, H.L. Bill 21, cl. 2(iii), 1898 Parliamentary Papers [P.P.]. The phrase “plurality of authors” came under much criticism in the Lords’ Select Committee for its wide ambit. See, e.g., SELECT COMMITTEE ON

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thirty years itself was seen as a significant extension of copyright compared to that provided for under the existing Acts⁷⁰ and in the debates on the term of joint authorship it was questioned whether it was “just” for a joint author to get not only “the benefit of his interest” but also “the benefit of the interest of his co-writers also.”⁷¹ In particular, concerns were raised that the joint authorship provisions might be “used for dishonest purposes.”⁷² As Lord Thring explained to the House of Lords’ Select Committee in 1898:

Supposing you and I were writing a book, it is perfectly possible that practically one of us may have written the whole book, and yet the other may have been put in simply for the purpose of prolonging its life. . . . by a trick it may be used dishonestly⁷³

In this context, the emphasis on a contribution to writing or composition may be understood as an attempt to ensure that each co-author made a genuine contribution to the work, to guard against joint authorship being used as a “trick” for prolonging term.

The debates on term in the Select Committee of 1898 also influenced the development of another aspect of the proposed legislative scheme: the

COPYRIGHT 1898, *supra* note 58, at 67 (Q. 1115). As Queen’s Counsel Cutler, who drafted that Bill, explained in giving evidence, he considered “plurality of authors” to derive from *Levy* and in that Bill the phrase was meant to denote cases of joint authorship only. *Id.* at 89-90 (Q. 1375, Q. 1377, Q. 1382). In the Literary Copyright Bills of 1899 and 1900 “plurality of authors” was used to denote cases of multiple authorship *other* than joint authorship. This is discussed later *infra*.

⁷⁰ See, e.g., the comments of George Herbert Thring, the Secretary to the Society of Authors, in giving evidence to the Select Committee on Copyright in 1898. *Id.* at 155 (Q. 2424). The term of protection for both literary and dramatic copyright was governed by the 1842 Act: the longest of the life of the author plus seven years or forty-two years from first publication (sections 3 and 20 of the 1842 Act). As noted above, the 1842 Act contained no express provision on how this term applied to joint authorship, unlike the provisions on term contained in section 1 of the Dramatic Literary Property Act 1833 (see *supra*, notes 33, 37). Instead, the 1842 Act merely provided *inter alia* that any person in the singular, shall be understood “to include and be applied to several persons, as well as one person . . . unless there shall be something in the subject of context repugnant to such construction.” In *Maclean v. Moody*, 1858) 20 Sc. Sess. Cas. 2d Ser. 1154, 1163, Lord Deas considered that the 1842 Act did contemplate joint authorship, commenting that this meant that “the life of one of them cannot be the criterion for measuring the privilege.”

⁷¹ For example, this was raised by Lord Thring in questioning the publisher Frederic Daldy giving evidence to the House of Lords Select Committee on Copyright 1898. SELECT COMMITTEE ON COPYRIGHT 1898, *supra* note 58, 30-31 (Q. 432).

⁷² *Id.* Q. 434.

⁷³ *Id.* Q. 435, Q. 438.

requirement that each author's contribution is "not distinct." A term of protection tied to the life of the last surviving author was only seen as just in cases where it was "impossible . . . to decide which has written which part"; "to deal with the cases that you cannot distinguish" between contributions.⁷⁴ By contrast, such a term could not be justified in a case where every author's contribution is "perfectly separate and distinct."⁷⁵ Hence the Literary Copyright Bills of 1899 and 1900 contrasted "joint authorship" to cases of "plurality of authors" where "a book is written in distinct parts by different authors." Unlike joint authorship where the term was linked to the last surviving author in the case of "plurality of authors" the Bills of 1899 and 1900 provided that "each author shall be entitled to the portion written by him in the same manner as if it were a separate book."⁷⁶

The reform attempts of the turn of the century failed, and the next impetus for reform was not until after the revision of the Berne Convention on Copyright of 1908. The resulting Copyright Act 1911,⁷⁷ which repealed and replaced the then twenty-two subject specific statutes with a single copyright code applying to all copyright works, set out a test for joint authorship in the following terms: "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors."⁷⁸

This definition encompassed a number of the aspects of joint authorship which had been worked out in the debates of the previous decades: the requirement of "collaboration" may stem from the test of common design in *Levy*, and need for a contribution to be "not distinct" from the statutory debates of the late 1890s. The term of protection however was differently formulated: either a term of the life of the last surviving author, or a term of the life of the author who first dies plus fifty years, whichever was longer.⁷⁹ While this was different from previous proposals, the provi-

⁷⁴ *Id.* Q. 443 (Viscount Knutsford to Frederic Dalry).

⁷⁵ *Id.* Q. 441 (Lord Monkswell).

⁷⁶ 1899 Bill, *supra* note 68, cl. 9; 1900 Bill, *supra* note 68, cl. 9.

⁷⁷ 1 & 2 Geo. 5., c. 46.

⁷⁸ Copyright Act 1911 § 16(3). This test was included in each of the Copyright Bills of 1911. See Cl. 16(3) of each of the following Copyright Bills: Bill 149, 1911 Parliamentary Papers [P.P.]; Bill 296, 1911 Parliamentary Papers [P.P.]; H.L. Bill 191, 1911 Parliamentary Papers [P.P.]; H.L. Bill 227, 1911 Parliamentary Papers [P.P.]. There was no definition of joint authorship in the 1910 Copyright Bill (Bill 282, 1910 Parliamentary Papers [P.P.]), introduced to prepare the ground for the Bills that were to follow in 1911.

⁷⁹ The provision on the term of protection contained in the 1911 Act first appeared in the Bill of 1910, and was retained in each of the Bills of 1911. 1910 Bill, *supra* note 78, cl. 19(1); 1911 Bills *supra* note 78, cl. 16(1)). Article 7 of

sion on term stemmed from debates in the Imperial Copyright Conference of 1910, which reflected earlier concerns with neither over nor under-compensating each co-author. As Lord Tennyson, representing Australia,⁸⁰ explained to the Conference which comprised representatives of inter alia the self-governing dominions of New Zealand, South Africa and Canada, the objective of ensuring all joint authors were adequately protected (e.g., by ensuring that the term did not expire during their lifetime) had to be balanced against the need to “prevent fraud.” Mr. Temple Franks of the UK Board of Trade warned that were a different solution adopted a “very young author . . . might be fraudulently joined in many cases” for no other reason than to prolong the term.⁸¹

In another respect, however, the 1911 Act (like the Bills of 1910 and 1911 that preceded it) differed radically from the case law and legislative proposals of the previous decades. As we have seen, the history of joint authorship in the late nineteenth and turn of the twentieth century lay with cases and legislative proposals exclusively concerning literary and dramatic copyright. While obiter dicta in one case suggested that the judiciary would read joint authorship provisions into the Fine Arts Copyright Act 1862,⁸² the lack of reference to multiple authors in the Act’s provi-

the Berlin revision of the Berne Convention required countries of the Union to provide a term of protection of the life of the author plus fifty years, but remained silent on the question of joint authorship.

⁸⁰ Interestingly, some five years earlier the Commonwealth of Australia enacted local copyright legislation that provided for a term in the case of jointly authored works based on a period after the life of the *last* surviving author. Australian Copyright Act 1905 No. 25, s. 17(3). However, this was for a shorter term (forty-two years or the life of the last surviving author plus seven years) and therefore perhaps was not seen as giving rise to the concern about fraud voiced by Australia’s representative at the 1910 conference noted above. The Australian legislation of 1905, along with that passed by Canada and Newfoundland (see *supra* note 63), are the only examples of local copyright statutes that refer to joint authorship passed before 1911 by the colonies listed at note 61 above.

⁸¹ MINUTES OF PROCEEDINGS OF THE IMPERIAL COPYRIGHT CONFERENCE, 1910, UK National Archives CO 886/4/4, at 120-21. In the context of ensuring that the term of protection was not too long, Sir H. Llewelyn Smith, advising the Board of Trade, gave the example of scientific text books which are “kept up to date with new additions” where it was common for “a veteran” to bring in “a youngster fresh from university, who devils the thing up and it appears under joint names.” The proposal for a term of whichever was longer of the life of the last surviving author or fifty years after the life of the author who first dies, was agreed by the Imperial Conference (at 200) and contained in the Memorandum of the conference proceedings which was issued as a Parliamentary Paper. See IMPERIAL COPYRIGHT CONFERENCE 1910, MEMORANDUM OF PROCEEDINGS, 1910 Parliamentary Papers, Cd. 5272, at 7, ¶ 7(d).

⁸² Kenrick v. Lawrence, (1890) 25 Q.B.D. 99, 106.

sions⁸³ caused Master of the Rolls Brett to question this in the Court of Appeal case of *Nottage v. Jackson*.⁸⁴ Further, the absence of the issue of joint authorship in the legislative proposals and debates on artistic copyright is striking, particularly in the debates of 1899 and 1900, in which Artistic Copyright Bills were considered alongside the Literary Copyright Bills by the same parliamentary Select Committees.⁸⁵ An explanation for this may well lie with controversies surrounding the use of assistants by artists in the late nineteenth century to “aid in the execution of original works,” which sat uneasily with an art market that valued art “according to the hand that painted it.”⁸⁶ Therefore, while the Society of Authors was formulating a test of joint authorship in the 1890s which stressed contributions to writing or composition, the same test might have thrown up difficulties for the very different art institutional context in which painters operated, which dominated the debates on artistic copyright during the same period.⁸⁷

⁸³ Unlike the Dramatic Copyright Act 1833, the 1862 Act did not contain a reference to “the author or authors or survivor of the authors” in the provision on term, neither did it contain an interpretation clause, as in the case of the Literary Copyright Act 1842, which stated that a reference to a person in the singular would denote the plural. These provisions are discussed *supra*, note 33.

⁸⁴ (1882–83) L.R. 11 Q.B.D. 627, 631 (“Here you have . . . two gentlemen stated to be authors. Can two people be the authors of a photograph? It is difficult to say, but if they are, for whose life is it to last? For the life of one of them, or for the life of the longest liver or what?”). While Lord Justice Bowen did accept that the 1862 Act might be interpreted to allow for joint authorship, he considered this to be a matter which was not in the contemplation of the legislators who drafted the legislation: “the person who drew this section evidently thought that in ninety nine cases out of a hundred there would be only one author. The idea of there being two authors seems never to have presented itself to him Whoever drew this section did not . . . imagine, apparently, the case of an author being more than one person.” *Id.* at 637–38. These statements were cited in a contemporary treatise on copyright by John Shortt (who had appeared as Counsel for the plaintiffs in *Nottage*), which presented Master of the Rolls Brett as having “seemed to doubt whether the author must not be a single person.” JOHN SHORTT, *THE LAW RELATING TO WORKS OF LITERATURE AND ART* 127 (London, Reyes & Turner 2d ed. 1884).

⁸⁵ See Artistic Copyright Bill, H.L. Bill 45; and Artistic Copyright Bill, H.L. 19, 1900 Parliamentary Papers [P.P.]. It is also noted that the provisions on “joint authors” in the local Australian Act of 1902 ss. 17(3), 19, discussed at *supra*, note 80) applied only to literary, dramatic and musical copyright, and not to artistic copyright.

⁸⁶ See DELABERE ROBERTON BLAINE, *ON THE LAWS OF ARTISTIC COPYRIGHT AND THEIR DEFECTS* 28 (London, John Murray 1853).

⁸⁷ The joint authorship status of pupils or assistants arose in one example given by Queen’s Counsel Edward Cutler, in discussing the joint authorship pro-

As well as applying to all copyright subject matter, the 1911 Act's test of joint authorship also operated throughout the Empire, being adopted by the UK's self-governing dominions.⁸⁸ Whereas the mid-twentieth century would see change to the 1911 Act's approach to the term of jointly authored works (since the Brussels revision in 1948 the Berne Convention has required signatories to provide a term of fifty years from the death of the last surviving author),⁸⁹ as we have seen, the substantive test of joint authorship set out in the 1911 Act is contained in the current UK copyright legislation.⁹⁰

III. LEVY V. RUTLEY IN THE U.S.

While the UK and its self-governing dominions had a statutory test of joint authorship by the early twentieth century, the contemporaneous U.S. Copyright Act passed in 1909 contained no such provision. The story of joint authorship doctrine in the U.S. was instead one of judicial development. The key case in this regard was *Maurel v. Smith* decided in 1915 by Judge Learned Hand then sitting in the U.S. Southern District Court of New York.⁹¹ As we will now see, while Judge Hand drew on *Levy v. Rutley*, which was the sole authority on joint authorship cited in the existing U.S. copyright treatises,⁹² he did so in conjunction with an interpretation of another nineteenth century English case which was discussed above: *Hatton v. Kean*.⁹³ This set the foundations for a U.S. approach to joint authorship that differed from that taken by the UK and those countries that were part of her dominions in 1911.

visions on literary and musical copyright before the 1898 Select Committee: the Twelfth Mass by Mozart, "where he wrote the Credo, the rest being done by his pupils." Queen's Counsel Cutler was of the view that this would be a case of joint authorship on the part of Mozart and his pupils. See SELECT COMMITTEE ON COPYRIGHT 1898, *supra* note 58, at 23 (Q. 1380). See also 33 Vict. No. 350, s. 2.

⁸⁸ See, e.g., Canadian Copyright Act 1927§ 2(k); New Zealand Copyright Act 1913 s. 22(3); Australian Copyright Act 1912 s. 12.

⁸⁹ Art. 7bis. This standard had been set out in Article 7bis(1) of the previous revision of the Convention, at Rome in 1928, but Article 7bis(2)–(3) went on to provide for reciprocity where a Union country granted a lesser term of protection (the minimum permissible term being the life of the last surviving author).

⁹⁰ See *supra*, note 3.

⁹¹ 220 F. 195 (S.D.N.Y. 1915).

⁹² See EATON DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 237 (Boston, Little, Brown & Co. 1879); R.R. BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW: BEING A SUMMARY OF THE PRINCIPLES AND PRACTICE OF COPYRIGHT 101 (1912).

⁹³ See *supra* notes 24-30 and accompanying text.

Maurel v. Smith concerned a comic opera called *Sweethearts*, to which the plaintiff had contributed the scenario and the defendants the lyrics/libretto. Reviewing the law on joint authorship, Judge Learned Hand said he had “been able to find strangely little law regarding the rights of joint authors of books or dramatic compositions.”⁹⁴ Indeed, the “only case in the books in which the matter appears to have been discussed” was *Levy v. Rutley*, and Judge Hand cited dicta from the judgments of Justice Keating⁹⁵ and Justice Montague Smith,⁹⁶ which expressed joint authorship as requiring an agreement to write a work amounting to a common design. On the facts of *Maurel*, this was held to be satisfied because the parties’ contributions had been made on the basis of an agreement that they were joint authors of the opera.

Judge Hand then went on to consider whether joint authorship would apply where a contribution was separately composed, as in the case of the lyrics to *Sweethearts*. He concluded “whatever their origin, in their presentation, the whole was single” and the subsequent separate publication of contributions would also “not break this original unity, because it is impossible to say how much of their vogue was due to them alone, and how much to their presentation along with the opera as a whole.”⁹⁷ Interestingly, in support of this position, Judge Hand looked to the English case of *Hatton v. Kean*, citing it as authority for the proposition that “one who contributes to such a joint production does not retain any several ownership in his contribution, but that it merges into the whole.”⁹⁸ Of course, it will be recalled from the discussion above, that *Hatton* was not a case on joint authorship; rather the Court of Common Pleas had used the analysis of “merger into a whole” to support a finding of sole authorship by an “employer” who had determined the overall design and plan of the work.⁹⁹ Drawing these points together, Judge Hand concluded that “com-

⁹⁴ 220 F. at 199.

⁹⁵ “If two persons undertake jointly to write a play, agreeing on the general outline and design and sharing the labour of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it; but to constitute joint authorship there must be a common design.” (1870–71) L.R. 6 C.P. 523, 529 (Keating, J.).

⁹⁶ “But I take it that, if two persons agree to write a piece, there being an original joint design and the co-operation of the two in carrying out that joint design, there can be no difficulty in saying they are joint authors of the work, though one may do a larger share than the other.” *Id.* at 530 (Montague Smith, J.)

⁹⁷ *Maurel*, 220 F. at 200.

⁹⁸ *Id.* at 201.

⁹⁹ *See supra* notes 24–30 and accompanying text. It is interesting to note that by the second decade of the twentieth century, *Hatton* would be reinterpreted in *Copinger* (published 1915) as a case relevant to “authorship” of “collective works,” a new category of copyright work introduced by the 1911 Act.

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mon design, mentioned in *Levy v. Rutley*” arose where contributors “knowingly engage in the production of a piece which is to be presented originally as a whole only”¹⁰⁰

Judge Hand’s decision in *Maurel*, which is today seen as the U.S. origin on joint authorship, on the one hand, evidences similarity with contemporaneous UK developments: the emphasis on the common design test from *Levy*, gave joint authorship in the U.S. and UK a common root. This was, therefore, neither an instance of courts throwing off “old legal chains” nor deliberately “expressing their freedom” in adopting an equally reasonable divergent approach for its “own sake.”¹⁰¹ On the other hand, Judge Hand’s dicta in *Maurel* laid the foundations for a significant difference in U.S. and UK approaches. As we saw above, in the UK, the legislative debates about the justice of granting one co-author the “benefit” of a term based on the last surviving co-author’s life, had resulted in joint authorship being drawn in narrower terms, applying only in situations where the contributions could not be separated and resulted in the statutory requirement that the contributions be “not distinct.” By contrast, in *Maurel*, the concern about how to attribute the popularity of one contribution to that of another produced a test that focused on presentation to the public, thereby applying joint authorship to a wider set of circumstances.

In part this may reflect differences in the broader framework of U.S. copyright rules: the arguments relating to term that had influenced developments in the UK were irrelevant in the context of U.S. copyright where term was instead calculated exclusively by reference to a term of years from publication.¹⁰² Instead, Learned Hand’s emphasis on the “presentation” of the work to the public appears to be motivated by the rules governing the inter-relation of statutory copyright and rights in unpublished works: the effect of publication by the defendants, opined Judge Hand, was to destroy rights at common law in the whole opera, so it was equitable that the resulting statutory property should be jointly owned by the plaintiff.¹⁰³ Further, the ground for future differences may have been prepared by the Circuit Court decision affirming Judge Hand’s decision; this cited the general principle of joint authorship set out in Walter Copinger’s UK treatise.¹⁰⁴ It will be recalled that Copinger fleshed out this general

As explained in note 30 *supra* this envisaged that individual contributions might attract separate copyright, as works in their own right, alongside copyright in the collective work as a whole. This interpretation of *Hatton* is therefore in contrast to its contemporaneous interpretation by Judge Hand *Maurel* in shaping the different category of joint authorship.

¹⁰⁰ *Maurel*, 220 F. at 199.

¹⁰¹ NG, BENTLY & D’AGOSTINO, *supra* note 1, at 6-7; *see also supra*, note 17.

¹⁰² Copyright Act 1909, ch. 320, § 23, 35 Stat. 1075, 1080.

¹⁰³ *Maurel*, 220 F. at 201.

¹⁰⁴ 271 F. 211, 215 (2d Cir. 1921).

principle by reference to the report of *Levy* in *The Law Times Report*, as a test of intention to co-authorship, unlike the *Law Report* version of the case which was to be cited by courts in other common law jurisdictions.¹⁰⁵

In the decades that followed, *Maurel* came to be applied by the U.S. courts so as to develop the dicta deriving from Judge Hand's reading of *Hatton*, that is "merger into a whole," into a test of intention. While *Levy* continued to be cited, it was the test of "intention to merge into a whole" that came to delineate the ambit of "common design." For example, in *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, Judge Hand, now sitting as a circuit judge, after citing the test of "joint labouring in furtherance of a common design" from *Levy*, held that this was satisfied where joint authors "mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."¹⁰⁶ Consequently, where the plaintiff composed words that were intended to be the words of a song, he became a joint author with a composer who subsequently, without the plaintiff's knowledge, set the words to music.

This principle also came to be applied and extended in a later case, *Shapiro Bernstein & Co. v. Jerry Vogel Music Co.*,¹⁰⁷ to find co-authorship between composer and lyricist in a case where a lyricist set words to pre-existing music, the music having been originally written by a composer in collaboration with another lyricist. In those circumstances, it was held that the composer and second lyricist were joint authors of a new work. Judge Swan, with whom the other judges of the Second Circuit (including Judge Hand) agreed, held that it was immaterial to the finding of joint authorship between composer and second lyricist that the composer's original intention to have his music combined with the words by the first lyricist was realized, the relevant intent instead being the composer's more general intention for the music to be combined with words. The principle was extended yet further in a case concerning the same parties, decided a decade later. In that case, the Second Circuit held that the relevant intention, that is "intent . . . to merge the two contributions into a single work, to be performed as unit for the pleasure of hearers" was to be measured at the time the second contribution was made.¹⁰⁸ Further, the relevant intent was on the part of the author where s/he remained the copyright owner, but on the part of the copyright *owner* where copyright had been assigned.

¹⁰⁵ The passage in Copinger referring to dicta from *Levy* as including a test of intention to co-authorship (see *supra*, note 44 and accompanying text) immediately preceded the passage cited by the Circuit Court.

¹⁰⁶ 140 F.2d 266, 267 (2d Cir. 1944).

¹⁰⁷ 161 F.2d 406 (2d Cir. 1946).

¹⁰⁸ *Shapiro, Bernstein & Co., Inc. v. Jerry Vogel Music*, 221 F.2d 569, 570 (2d Cir. 1955).

In the U.S. therefore, the test of “common design” in *Levy* was interpreted by the judiciary as an intention on the part of the author or subsequent owner, for the contribution to be merged into a whole. As the U.S. Southern District Court of New York noted in *Picture Music, Inc. v. Bourne, Inc.*, the result of these cases was that: “No longer does there seem to be required a pre-concerted common design or active collaboration. It is now sufficient if there be any ‘fusion of effort’”¹⁰⁹ This contrasts to the statutory test contained in legislation in the UK and her self-governing dominions, in which “common design” had become a test of “collaboration.”

These early differences in approach can be explained by the U.S. courts considering the intersection between the consequences of a finding of joint authorship for the cultural context within which litigation most commonly arose: popular songs. By the early twentieth century, the U.S. and the UK conceived of the consequences of co-ownership differently. While in both the U.S. and UK, it was accepted that co-owners owned as tenants in common, in the UK this was understood to necessitate consent on the part of *all* co-owners to exploitation. As Master of the Rolls Jessel explained in *Powell v. Head*, another action for penalties under the Dramatic Copyright Act 1833 decided a few years after *Levy*, “where there are two proprietors, the one cannot represent without the consent of the other proprietor.”¹¹⁰ By contrast in the U.S. there was authority that a co-owner was free to exploit the work without the other co-owners’ consent.¹¹¹ In developing the test of intention to merge into a whole, the U.S.

¹⁰⁹ 314 F. Supp. 640, 646 (S.D.N.Y. 1970) (Pollack, J.) (quoting GEORGE D. CARY, *JOINT OWNERSHIPS OF COPYRIGHT* 689 (1963)).

¹¹⁰ *Powell v. Head*, (1879) 12 Ch.D. 686, 689-90 (Jessel, M.R.), *approved*, *Lauri v. Renad*, [1892] 3 Ch. 402, 412 (Kekewich, J). The approach in *Powell* and *Lauri* was followed by Judge Rowlatt under the 1911 Act in *Cescinsky v. Routledge*, [1916] 2 K.B. 325, 329.

¹¹¹ See *Carter v. Bailey*, 64 Me. 458, 463-54 (1874) (Virgin, J.) (stating that during the copyright term: “All others within that period, having no license from [the co-owners] or *some one of them* are excluded. Each can exercise his own right alone . . . if none be allowed to enjoy his legal interest without the consent of all, then one, by withholding his consent, might practically destroy the value of the whole use. And a use only upon condition of accounting for profits, would compel a disuse”) (emphasis added). See also ARTHUR W. WEIL, *AMERICAN COPYRIGHT LAW: WITH SPECIAL REFERENCE TO THE PRESENT UNITED STATES COPYRIGHT ACT 254* § 693, at 253, § 1523, at 547 (1917). Weil stated, relying on *Carter v. Bailey*, that it was not even necessary for a co-owner to account to the other co-owners’ for their share of the profits of exploitation. However, cases like *Maurel v. Smith* illustrate that the obligation to account to other co-owner(s) would arise in cases where the courts found an agreement to that effect. See also Note, *Accounting Between Co-owners of a Copyright*, 48 COLUM. L. REV. 421, 422 (1948). As regards the significance of the consequences of co-ownership in

courts favored a policy of facilitating the exploitation and dissemination of copyright works, more particularly popular songs where lyrics and music were generally exploited together. As Judge Smith reasoned in the second *Shapiro Bernstein* case, to deny joint authorship would be to leave the authors with “a barren right in the words of a worthless poem, never intended to be used alone” concluding that: “Such a result is not to be favored.”¹¹² This was a point also raised by Judge Hand in *Edward B. Marks*:

To allow the author to prevent the composer, or the composer to prevent the author, from exploiting that power to please, would be to allow him to deprive his fellow of the most valuable part of his contribution; to take away the kernel and leave him only the husk.¹¹³

The different consequences of co-ownership in the UK, which required the consent of all the co-owners to exploitation, meant that in the UK joint authorship could not be used to fulfil this objective.¹¹⁴

In subsequent cases, the broad interpretation of the test of intent came under criticism in particular because the original author would benefit from a new term of protection whenever there was a subsequent “fusion of effort.”¹¹⁵ The first statutory test of joint authorship in the U.S. was, in part, a response to these difficulties. This was contained in the Copyright Act 1976 that continues to apply in the US, and defined a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹¹⁶ Therefore, while the test of intention to merge into a whole remained the “touchstone” of joint authorship,¹¹⁷ the statute made clear that intent was on the part of the authors and to be measured at the time the work was prepared.

the U.S. for the comparative law of co-authorship today, see M. Perry & T. Margoni, *Ownership in Complex Authorship: A Comparative Study of Joint Works*, 34 EIPR 22 (2012) (comparing the U.S. approach to a civil law jurisdiction: Italy).

¹¹² *Shapiro*, 221 F.2d at 570.

¹¹³ *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 267 (2d Cir. 1944).

¹¹⁴ This difference aside, it is noteworthy that the U.S. cases developing common design into a test of intention to merge into a whole, all concerned the words and music of a song. In the UK, such facts did not give rise to the question of joint authorship, due to the UK’s different concept of the “work,” which separated the lyrics into a “literary work” and music into a “musical work.”

¹¹⁵ See *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 646 (S.D.N.Y. 1970).

¹¹⁶ 17 U.S.C. § 101 (2012).

¹¹⁷ H.R. REP. NO. 1476, at 120 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736; S. REP. NO. 473, at 103-04 (1975), cited in *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991).

IV. CONCLUSION

This article has explained the development of distinct tests for joint authorship in two common law jurisdictions from the common root of *Levy v. Rutley*. While *Levy* formed a shared starting point, the foundations for the emergence of divergence were set by the early twentieth century, as joint authorship came to be shaped by concerns informed by particular frameworks of national copyright rules (e.g., term, the circumstances leading to loss of protection of common law, and the consequences of co-ownership) as considered in relation to the norms of specific cultural sectors that dominated the fora in which the implications of joint authorship were debated and considered (literature in the UK and popular music in the U.S.). In this way, in situating the story of joint authorship within the context of wider differences in national rules and the cultural contexts in which they were considered, the research contained in this article contributes to a broader picture of historical diversity in UK and U.S. copyright law. This supports the thesis that the story of “fracture” noted in *The Common Law of Intellectual Property*, is not one restricted to recent times.

How might the comparative historical experience uncovered in this article enable us critically to reflect on joint authorship in the U.S. and UK today? As regards the U.S., at a first glance, history might seem of little relevance to the present: in *Childress*, a leading case on joint authorship, the U.S. Second District Court considered *Levy* to be nothing more than “useful in pointing an inquiry in the right direction.”¹¹⁸ However, this point aside, some more general observations can be made, using history as a standpoint for reflecting on aspects of the current U.S. law on joint authorship. On the one hand, there is some continuity between U.S. approaches today and early English case law of the nineteenth century in terms of the types of factors that shape differences in joint authorship. For example, both in the nineteenth century and today the ambit of joint authorship has been influenced by rules vesting authorship and ownership in employers. Just as the ruling in *Levy* defined joint authorship so as not to undermine the limits on the vesting of copyright ownership in employers in *Barfield* and *Hatton*, so in the U.S. in more recent times, case law restricting the ambit of joint authorship is frequently explained by a change in legislative policy with the passage of the Copyright Act 1976, narrowing the circumstances in which copyright vests in employers.¹¹⁹ Similarly, unlike other areas of law where the U.S. constitutional provision has resulted in different types of consideration shaping U.S. law, in joint authorship

¹¹⁸ *Childress*, 945 F.2d at 504.

¹¹⁹ See generally Mary LaFrance, *Authorship, Dominance and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193 (2001).

parallels can be noted between the concerns noted in *Levy* and current U.S. decisions, which define “co-authorship” in a manner that takes into account its implications for the cultural domain.¹²⁰ Therefore, while the story of fracture between U.S. and UK approaches may have a long history, there is continuity in the types of factors that impact on the courts’ interpretation of joint authorship in the past and present.

In other respects, the nineteenth century experience highlights ways in which the current U.S. approach differs from the past: history provides a basis for critical reflection on how the courts utilise nineteenth century authorities today. For example, a leading case decided by the U.S. Ninth Circuit District Court is *Aalmuhammed v. Lee*,¹²¹ and this has been criticised as favoring the position of senior collaborators.¹²² In that case, the plaintiff, a consultant on Islamic issues, who claimed to have inter alia written scenes relating to a Hajj pilgrimage, was not a joint author of the film *Malcolm X* with director Spike Lee, as “control” was an index of “authorship” and the plaintiff’s contribution was subject to Spike Lee’s approval. Interestingly, in reaching this conclusion, the court drew on dicta from the English nineteenth century case of *Nottage v. Jackson*, which was cited by the U.S. Supreme Court in *Burrow Giles Lithographic Co. v. Sarony*: that an “author” is the person who “superintended the arrangement” by “actually [forming] the picture” or the “originating, making, producing, as the inventive or master mind, the thing which is to be protected.”¹²³ Yet, it will be recalled that in *Nottage*, the Court of Appeal used this reasoning to tie “authorship” to the process of making the work, in contrast to the concept of authorship in *Barfield* and *Hatton* that

¹²⁰ See the discussion regarding *Levy*, see *supra*, notes 45-46; see also *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (regarding the constitutional provision which states that copyright has an important role to play in promoting artistic progress: “Progress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole authorship of the work. Too open a definition of author would compel authors to insulate themselves and maintain ignorance of the contributions others make . . . the arts would be the poorer for that.”).

¹²¹ *Aalmuhammed*, 202 F.3d at 1227. In the Ninth Circuit, the factors that inform the “intention to co-authorship” test applied in *Childress* are instead considered to inform a requirement that each contributor is an “author.” See *id.* at 1233-34 (“Although the Second and Seventh Circuits do not base their decisions on the word “authors” in the statute, the practical results they reach are consistent with ours.”).

¹²² *Id.* Peter Jaszi is thanked for drawing attention to this consequence of the U.S. approach in the discussions on joint authorship at *Creativity That Counts*, the final conference of the HERA funded project *Of Authorship and Originality* hosted by the University of Amsterdam in April 2013.

¹²³ See *supra*, notes 51-52 and accompanying text.

favoured senior contributors that determine the overall plan and scheme of the work.¹²⁴ Accordingly, in *Aalmuhammed*, the effect of the reasoning in *Nottage* is altered from how it was understood in the nineteenth century: the definition of an “author” as “the person to whom the work owes its origin and who superintended the whole work, the ‘master mind’” instead “would generally limit authorship to someone at the top of the screen credits . . . someone who has artistic control.”¹²⁵ In this way, the historical research in this paper might suggest ways in which dicta stemming from *Nottage* could be interpreted differently today, providing a basis to overcome the bias towards senior collaborators by instead requiring courts to focus on the process of making the work.

Turning to the implications of this paper for the law in the UK, unlike the position in the U.S., *Levy* continues to be drawn on by the courts to shape the substance of aspects of joint authorship doctrine.¹²⁶ Ironically, viewed from a purely doctrinal perspective, this article might support greater convergence between common law approaches: it provides some basis for revisiting the role for “intention” in the UK test of joint authorship which, as we saw at the outset, is today a key point of divergence between U.S. and UK approaches.¹²⁷ Whereas the UK courts today have interpreted *Levy* to be authority for the irrelevance of intention to the UK test of joint authorship, this overlooks that at least one law report of *Levy*, that *did* provide a role for “intention,” a position that was also reflected in the copyright treatises of that time.¹²⁸

However, when it comes to explaining the future of UK joint authorship law, historical precedents shared by common law countries seem increasingly irrelevant; the increasing influence of regional harmonization initiatives on copyright policy, such as those in Europe, instead promote convergence between jurisdictions on a regional basis, spanning countries of both the common and civil law tradition.¹²⁹ Indeed, points of conver-

¹²⁴ See *supra*, notes 53-54 and accompanying text.

¹²⁵ *Aalmuhammed*, 202 F.3d at 1233.

¹²⁶ See *supra*, note 15.

¹²⁷ See *supra*, notes 11-12 and accompanying text.

¹²⁸ See *supra*, notes 42-44 and accompanying text.

¹²⁹ Whereas European legislative harmonization regarding joint authorship is confined to aspects of the specific case of cinematographic and audio-visual works (Article 2(1) of the Term Directive 2006/116/EC and Article 2(2) of the Rental Directive 2006/115/EC require EU member states to recognise the “principal director of a cinematographic or audiovisual work” as its author or one of its co-authors), European jurisprudence has developed a common approach to the concept of “originality” (see above note 9) which may well influence, for example, how the UK joint authorship test is to be interpreted, e.g., the limb relating to the nature of the contribution, which includes a requirement that this is “significant and original.” *Godfrey v. Lees*, [1995] EMLR 307, 325 (Blackburne, J.).

gence between common law jurisdictions today often arise despite the regional influences at play, rather than because of shared precedents.¹³⁰ Accordingly, rather than promoting convergence, the comparative historical research in this article in fact may go some way to contribute to a way of thinking that results in further fracture in the common law world, by raising more fundamental questions about the utility of notions of “traditions” in structuring thinking about copyright, whether as an explanation for existing differences between national laws or in setting parameters for their future direction.¹³¹

¹³⁰ For example, in the late 1990s, while the judiciary in the UK was developing the criterion requiring a contributor to exercise the “right kind of skill and labor,” Australian and New Zealand courts were instead focusing on the need for collaboration, the joint authorship enquiry merely requiring contributors to show they had made a “joint effort” or “input.” See *Land Transp. Safety Auth. of New Zealand v. Glogau*, [1999] 1 NZLR 261; *Milwell Pty., Ltd. v. Olympic Amusement Pty., Ltd.*, (1999) 85 FCR 436, 446-47. As regards the latter decision, joint authorship was established merely by showing “joint effort” as part of a “collaborative exercise.” That case involved the compilation of words and numbers as prize scales of poker video games by mathematicians and employees of the respondent (a manufacturer of video games). Interestingly, the sole UK authority cited by the Court on the issue of joint authorship was *Cala Homes*, there being no reference to UK case law developing the “right kind of skill and labor” requirement, the decision of Justice Laddie in *Fylde* decided a year before *Milwell*. The greater affinity between the Australian and UK courts’ approach on this issue today stems from Australian courts responding to the Australian High Court ruling in *Ice TV Pty., Ltd. v. Nine Network Pty., Ltd.*, [2009] HCA 14.

¹³¹ For an example of a recent study that places notions of tradition at the heart of national differences in intellectual property law see TOSHIKO TAKENAKA, *INTELLECTUAL PROPERTY IN COMMON LAW AND CIVIL LAW* (2013). The thesis of this work is that the “two traditions” of common and civil law “still exert powerful and divergent influences” on national intellectual property laws. See Preface, at ix.