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Authorship, aesthetics and the artworld: reforming copyright's joint authorship doctrine.

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The challenge of identifying the 'author' of a work in cases where there are multiple contributions has long been an issue for copyright.¹ This problem is thought to have become yet more pressing in the age of digital technology, as new forms of creative practice emerge, dependent on the contributions of many.² The idea that philosophy of art might have a role to play in addressing this challenge may strike some as surprising. Indeed, copyright's all too comfortable relationship with certain aesthetic theories, particularly those linked to romanticism, is sometimes said to impede its accommodation of collective or collaborative forms of authorship.³ However, the romantic conception of authorship has long been criticised both in

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¹ See e.g. *Nottage v. Jackson*, L.R. 11 Q.B.D. 627, 632 (1882-83) concerning authorship of a portrait photograph.

² See European Commission, *Green Paper on Copyright and Related Rights in the Information Society*, COM (95) 382 final (1995), p. 25.

³ See M. Woodmansee, 'On the Author Effect: Recovering Collectivity', in M. Woodmansee and P. Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature* (North Carolina: Duke University Press, 1994), pp. 15-28. As Woodmansee states, 'Our laws of intellectual property are rooted in the century-long reconceptualization of the creative process which culminated in high Romantic pronouncements like Wordsworth's

philosophy of art and literary theory more broadly,⁴ with alternative approaches advanced. This indicates that, romanticism notwithstanding, philosophy of art has a broader range of resources for copyright law to draw on in its quest to identify the author or authors of works to which many have contributed. After all, philosophy of art shares with copyright the need to make sense of the aesthetic object and its related subject or subjects.

Representative scholarship on the relation between copyright law and art has explored the affinities between copyright and ideas of romanticism of the early nineteenth century (in the work of Peter Jaszi and Martha Woodmansee)⁵ as well as copyright and modernism of the mid-

to the effect that this process ought to be solitary, or individual, and introduce “a new element into the intellectual universe” (p. 27). Further, she suggests that ... ‘as creative production becomes more corporate, collective and collaborative, the law invokes the Romantic author all the more insistently’ (p. 28). See also P. Jaszi and M. Woodmansee, ‘The Ethical Reaches of Authorship’, *Southern Atlantic Quarterly* 95(4) (1996): pp. 947-977. Furthermore, Peter Jaszi argues that a Romantic approach to authorship gives copyright’s doctrine of joint authorship an ‘individualistic bias’ (P. Jaszi, ‘On The Author Effect: Contemporary Copyright and Collective Creativity’ in Woodmansee and Jaszi, *The Construction of Authorship*, pp. 29-56). This point is discussed further below (at text to note 99).

⁴ See Woodmansee, ‘The author effect’, pp. 27-28, noting the post-structuralist approach within ‘literary studies’ of the 1970s onwards.

⁵ In addition to the works cited in note 3, see M. Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of ‘Author’’, *Eighteenth Century Studies* 17 (1984): pp. 425-428; P. Jaszi, ‘Toward a Theory of Copyright: The Metamorphoses of “Authorship”’, *Duke Law Journal* 413 (1991): pp. 455-502; M. Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (New York: Columbia University Press, 1994); M. Woodmansee, ‘The Cultural Work of Copyright: Legislating authorship in Britain: 1837-1842’, in A. Sarat and T. R. Kearns (eds.) *Law in the Domains of Culture* (Ann Arbor: The University of Michigan Press, 2000).

twentieth century (in the work of Anne Barron).⁶ But when it comes to questions about multiple authorship, these theories are unhelpfully silent. Romanticism's focus is most certainly on authorship, but as 'solitary, or individual' and involving the introduction of 'a new element into the intellectual universe.'⁷ This is a conception of authorship that many have found to be outdated and so focused on the idea of the 'solitary genius' that it is unable to accommodate the many collaborative forms of artistic endeavour characteristic of contemporary creative practices. Modernism, on the other hand, with its implicit formalist aesthetic,⁸ has little to say about the author, and focuses more on the work itself; in Anne Barron's phrase, its focus is on the genus, not the genius.⁹ The extent to which either romanticism or modernism can be drawn upon to assist copyright in its quest to define 'joint authorship' is therefore limited.

By contrast, this article considers whether theories of art of the latter twentieth century might be suited to this task, and focuses in particular on institutional theories of art associated with the work of analytic philosophers Arthur Danto and especially George Dickie. These theorists, who develop the notion of the 'artworld', consider the relation of the art object to a wider context, such as art institutions and art theory. The persuasive force of institutional theories, therefore, lies with their provision of a theoretical framework that captures the broader network of relations within which artists work. As Dickie explains in an exposition of his theory:

⁶ A. Barron, 'Copyright Law and the Claims of Art', *Intellectual Property Quarterly*, 4 (2002): pp. 368-401; A. Barron, 'Copyright, Art and Objecthood' in D. McClean and K. Schubert (eds.), *Dear Images: Art, Copyright and Culture* (London: Ridinghouse and ICA, 2002) pp. 277-311.

⁷ Woodmansee, 'The Author Effect', p. 27, citing William Wordsworth.

⁸ See e.g. the work of Clement Greenberg, 'Modernist Painting', discussed in Barron, 'Copyright and the Claims of Art', p. 372, note 91.

⁹ *Ibid.*

Traditional theories of art place works of art within simple and narrowly-focused networks of relations ... for example ... a two-place network of artist and work. The institutional theory attempts to place the work of art within a multi-placed network of greater complexity than anything envisaged by the various traditional theories. The networks of contexts of the traditional theories are too 'thin' to be sufficient. The institutional theory attempts to provide a context which is 'thick' enough to do the job ...¹⁰

Institutional theories of the late twentieth century—of which Dickie's theory is often seen as a paradigm—therefore provide scope for a perspective on authorship that steers a middle ground between the romantic focus on the solitary author on the one hand and, on the other hand, the modernist focus on features of the work at the expense of the author.

This paper explores how insights from these theories may be of value to lawyers in rethinking a set of copyright rules concerning joint authorship. In the UK, joint authorship is defined as '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'¹¹ and in the USA '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.'¹² By situating authorship in the 'artworld', relational theories provide copyright with concepts for forging correspondence

¹⁰ G. Dickie, 'The New Institutional Theory of Art' repr. in P. Lamarque and S. Olsen (eds.), *Aesthetics and the Philosophy of Art: The Analytic Tradition: An Anthology*, (Oxford: Blackwell, 2004), pp. 47-54.

¹¹ UK Copyright Designs and Patents Act s.10(1) (1988)

¹² 17 USC s.101 (1976)

between notions of joint authorship in law and art. As has been shown elsewhere, copyright's tests of joint authorship often bear little relation to social understandings of who 'counts' as an author¹³ and, in the realm of art, such connections are important to ensure the law's legitimacy: as Anne Barron has argued, copyright is often justified by the goal of encouraging the promotion of the arts and its legitimacy therefore rests with the efficacy of its response to the 'claims of art.'¹⁴

In pursuing this approach, this paper breaks new ground in the disciplines of both philosophy and law. Existing literature on institutional theories in the philosophy of art has been directed at the question of defining the 'work', whereas this paper instead teases out and explores what these theories have to say about 'authorship', thereby drawing attention to little considered aspects of their philosophical underpinnings. In regard to legal scholarship on copyright, institutional theories of art have received relatively little attention, and within the literature that does exist¹⁵ there is no attempt to discuss their implications for copyright's joint authorship

¹³ See L. Bently and L. Biron, 'Discontinuities Between Legal Conceptions of Authorship and Social Practices', in M. Van Eechoud (ed.), *The Work of Authorship*, (Amsterdam: Amsterdam University Press, 2014): pp. 237-276, pp. 243-248; E. Cooper, 'Reassessing the challenge of the digital: An empirical perspective on authorship and copyright', in Van Eechoud (ed.) *The Work of Authorship*, pp. 175-214, p. 205.

¹⁴ Barron, 'Copyright and the Claims of Art', p. 399.

¹⁵ See, e.g., A.C. Yen, 'Copyright Opinions and Aesthetic Theory', *Southern Californian Law Review* 71 (1998): pp. 247-302, who discusses Dickie's institutional theory in the context of the more general relationship between copyright and aesthetic theory, and D. Booton, 'Framing Pictures: Defining Art in UK Copyright Law', *Intellectual Property Quarterly* 38 (2003), who considers Dickie's theory in the context of UK case law on the 'work'. Justine Pila's scholarship, which uses the work of analytic philosopher of art Kendall Walton to illuminate copyright law's categories of authorial works, explicitly distances itself from Dickie's institutional theory (J Pila, 'Copyright and its Categories of Original Works', *Oxford Journal of Legal Studies* 30 (2) (2010): pp. 229-254, p. 241, note 90). See

doctrine. Bearing in mind these points, the paper proceeds first by giving a brief overview of some institutional approaches to defining art, and then by drawing out the central components of authorship implicit in these theories (sections 1 and 2). Following this, the paper considers how these theories might provide copyright law with alternative concepts and frameworks for approaching questions about co-authorship (sections 3, 4 and 5). In doing so, it explores the selective way in which UK and US law currently draws on artworld concepts. After discussing copyright's own institutional status, and broad reach beyond the artworld, the piece concludes by proposing ways in which legal tests of joint authorship might be reformed, so as to allow copyright to retain its own benchmarks while also facilitating a closer alignment of law and art.

1 Institutional Theories of Art: the Quest for Definition

Defining art is often thought to be one of art theory's most fundamental projects, yet this has been complicated in recent years, as avant-garde art 'has consistently and intentionally produced objects and performances that challenge settled conceptions about what one is likely to encounter on a visit to a gallery, a theater [sic] or a concert hall.'¹⁶ This is particularly acute in a post-Duchampian age. It will be recalled that Marcel Duchamp famously submitted in 1917 a urinal, entitled *Fountain*, for exhibition by the Society of Independent Artists, New York, under the pseudonym R. Mutt. This, and other examples of art comprising found objects, such as Robert Rauschenberg's *Bed* and Andy Warhol's *Brillo Boxes*, challenged existing theories—for

also J. Pila, 'Works of Artistic Craftsmanship in the High Court of Australia: The Exception as Paradigm Copyright Work', *Federal Law Review* 36 (2009): pp. 365-381.

¹⁶ N. Carroll, 'Identifying Art', in R. Yanal (ed.), *Institutions of Art: Reconsiderations of George Dickie's Philosophy* (University Park: Pennsylvania State University Press, 1994), pp. 3-38, p. 5.

example, the romantic assumption of art as a product of ‘individual acts of origination,’¹⁷ in addition to the modernist notion that a ‘work’ had intrinsic, discernable properties. How have philosophers of art responded to these problems of definition?

One response, found in Morris Weitz’s seminal paper ‘The Role of Theory in Aesthetics’, is to argue that the project of defining art by attempting to find some ‘essential’ property of arthood is simply misconceived.¹⁸ Weitz argues, in Wittgensteinian spirit, that art is an ‘open concept’, of which certain ‘paradigm cases’ can be given, but no ‘exhaustive set of cases’.¹⁹ Weitz’s paper is important not only for the challenge it presents to theorists attempting to define art, but also for pointing towards a fundamental shift of focus in the philosophy of art, away from the search for *intrinsic* aesthetic properties of art works (characteristic of earlier twentieth century theorizing about art)²⁰ and towards so-called *relational* properties—as we noted above, properties such as the social, historical or institutional context in which works are produced and appreciated. This point is implied by Weitz in his claim that, ultimately, the question of whether to include certain works within a definition of art is to be left to ‘decisions on the part of those interested, usually professional critics, as to whether the concept should be extended or not’.²¹ The emphasis he suggests, then, is on the decisions of art professionals, rather than the search for

¹⁷ Woodmansee, ‘The Author Effect’, p. 21

¹⁸ M. Weitz, ‘The Role of Theory in Aesthetics’, *Journal of Aesthetics and Art Criticism* 15(1) (1956): pp. 27-35.

¹⁹ *Ibid.* p. 31

²⁰ In the early twentieth century, a variety of theories of art were put forward, united in their aim to elucidate the meaning of art in terms of the intrinsic or formal properties of artworks, such as: significant form, emotional expression or the complex interplay of interrelated parts (Lamarque and Olsen, *Aesthetics and the Philosophy of Art*, p. 9).

²¹ Weitz, ‘The Role of Theory’, p. 32

any intrinsic or formal property that art works might be seen to possess. This claim has been developed by subsequent theories of art, often described as ‘institutional’ theories.

Arthur Danto’s 1964 essay ‘The Artworld’ is thought to be the first articulation of the institutional theory of art (although Danto himself did not embrace this label). Danto considers the paradox that Andy Warhol’s *Brillo Boxes* is a work of art even though perceptually indistinguishable objects (a stack of brillo boxes in a shop, for example) are not art.²² To explain why, Danto argues that: ‘to see something as art requires something that the eye cannot descry—an atmosphere of artistic theory, a knowledge of the art history: an artworld’.²³ Something counts as art, then, not because of any intrinsic properties it has but by virtue of the relation it bears to a larger social context, which Danto dubs, ‘the artworld’. Elaborating on his theory in later work, Danto goes on to discuss the importance of both historical and intentional factors as relational determinants of an artefact’s status as a work of art.²⁴

Building on Danto’s insight that the context of the artworld is essential to a definition of art, George Dickie has developed, in a number of works, an explicitly institutional theory of art.²⁵ According to the most recent version of Dickie’s theory, ‘a work of art is an artefact of some kind created to be presented to an artworld public’.²⁶ In addition to this core definition of a work of art, Dickie puts forward four further definitions, which in turn help to clarify his

²² This is often referred to as the ‘paradox of the indiscernibles’.

²³ A. Danto, ‘The Artworld’, *The Journal of Philosophy* 61(19) (1964): pp. 571-584, p. 580.

²⁴ A. Danto, ‘The Transfiguration of the Commonplace’, *The Journal of Aesthetics and Art Criticism* 33(2) (1973): pp. 139-148.

²⁵ G. Dickie, *Art and the Aesthetic: an Institutional Analysis* (Ithaca: Cornell University Press, 1971); G. Dickie, *The Art Circle: A Theory of Art* (Ann Arbor: University of Michigan Press, 1984).

²⁶ Dickie, *The Art Circle*, p. 82

account: [1] an *artist* is a person who participates with understanding in the making of an artwork; [2] a *public* is a set of persons who are prepared in some degree to understand an object that is presented to them; [3] an artworld system is a framework for the presentation of a work of art by an artist to an artworld public; [4] the artworld is the totality of all artworld systems. Implicit in these definitions is the claim that artists' intentions are in some sense relevant to the classification of their works as art,²⁷ in addition to the idea that the conventions of different 'artworld systems' are dynamic and prone to change over time.²⁸ These core definitions provide a theoretical framework for explaining how an object's status as art derives at least in part from its institutional status, which is a relational and not a material property of the object.

A fuller exposition and critique of Dickie's institutional theory is beyond the scope of this paper. The aim of the paper is not to offer a full analysis of Dickie's theory, but rather to develop its core components into a framework for joint authorship that is then applied to copyright law. What is important to note at this stage is that institutional theories are committed to the claim that material or intrinsic qualities of works are not the defining features of artworks; moreover, that artists' intentions are relevant to classifying their works as art and that there is a broader framework to which such intentions relate. As we have already noted, this opens up the possibility of defining art not by invoking simple bilateral categories such as 'author and work', but rather through thicker, multilateral categories such as the artworld. With these points in mind, we can go on to ask what institutional theories might be able to tell us about the concept of

²⁷ The notion of intentionality enters into Dickie's account through his definition of an 'artifact' as an object in which human intentionality is present, even in the case of choosing a 'found' object (discussed further at text to note 35). In this sense, we disagree with Yen's assessment that '...Dickie considers formal properties and the creator's intent unimportant when deciding if an object is art' (Yen, 'Copyright Opinions and Aesthetic Theory', p. 258).

²⁸ Dickie, 'The New Institutional Theory of Art', p. 52.

authorship in general, and joint authorship in particular, before considering their application to copyright law.

2 Institutional Theories of Authorship

A Authorial Role

The shift to an institutional perspective on authorship means that the focus is on the particular role that an author occupies within a broader framework—whether within the artworld, art history, or an atmosphere of art theory more broadly. As Dickie’s theory contains the fullest discussion of how the author’s role functions within the artworld, our focus here will be on his account.

Dickie argues that the relationship between the artist and the artworld public is crucial to understanding the concept of art. As he states: ‘in creating art an artist is always involved with a public, since the object he creates is of a kind to be presented to a public’.²⁹ In all versions of Dickie’s theory, the roles of artist and artworld public are both separate and interrelated. We can begin with that of the artist. Dickie states that the role of the artist has a general aspect which is ‘the awareness that what is created for presentation is art’ and also the employment of a wide variety of art techniques. What is essential to the definition of the role of the artist, then, is an awareness that one is creating art, and that one’s work is of a kind that is made for presentation (regardless of whether it is actually presented). But there is nothing to suggest this role needs to be realised by a single individual:

²⁹ Dickie, *The Art Circle*, p. 71.

The role of the artist may be realized in various ways. The role may be filled by a single person as is typically the case with painters. Even with painters the role of the artist may be internally complex in the sense that a number of persons may be involved, as when an assistant (or assistants) aids a master. In cases of this kind there is still a single role, but it is being fulfilled by several persons. By contrast, in the performing arts it is the rule that the artist role is in fact a multiplicity of cooperative roles. For example, in the theater [sic], the artist role encompasses the roles of playwright, director and actors.³⁰

The first interesting point to note from Dickie's analysis of the artist's role, then, is that he accepts it may be occupied by a number of individuals—both internally, when a 'master' is 'assisted' by other artists, but also in cases of 'co-operation' between various artistic contributors, such as the relationship between a playwright, director and actors in theatrical works. By defining the artist's role in this way, Dickie casts the definition of 'artist' in very wide terms, to include all contributions to a work.

The next point to note is that Dickie's account of the artist's role provides an interesting contrast to a romantic conception of authorship: first, as we have seen above, it rejects the idea that authorship is a solitary activity; second, it challenges the idea that an author can produce works simply 'by his own free originaive power',³¹ independently of broader social and historical influences. As regards this second aspect, Dickie finds the idea of the romantic artist to

³⁰ Ibid. p. 72.

³¹ M. Beardsley, 'Is Art Essentially Institutional', in L. Aagaard-Mogensen (ed.) *Culture and Art: An Anthology* (Atlantic Highlands: N. J. Humanities Press, 1976), pp. 194-209, p. 196.

be simply ‘inconceivable’ since, as he puts it, ‘Art...must exist in a cultural matrix, as a product of someone fulfilling a cultural role’.³² This is an insight that often provides much of the backlash against romantic conceptions of authorship.³³ Dickie’s account of the artworld provides a theoretical framework for its articulation. Although we might still speak of the ‘single author’ in the sense of there being a single role that an author realizes, then, Dickie’s theory makes no particular judgement about the number of individuals that might fulfil that role, and seems to imply that any number of individuals occupying an artistic role would thereby count as authors.

Dickie also describes an additional ‘presenter’ role that functions to enhance and facilitate the core relationship between artist and public. Such a role includes individuals who assist artists in the presentation of their works (such as stage managers and museum directors) and individuals who assist the public in their understanding and interpretation of a work (such as art critics and art historians). The artworld consists of the totality of these roles, with ‘the roles of artist and public at its core’.³⁴ At first sight, we might assume that individuals who perform, direct or otherwise help ‘present’ or realize a work would fall within the presenter’s role—however, as we have seen, Dickie includes such individuals within the artist’s role, which suggests that there is room in his account to accord such contributors fuller recognition than would be the case if they occupied the role of presenter.

Finally, it is important to clarify a common misconception of Dickie’s theory—namely, that it makes the role of the artist ‘superfluous’ by suggesting that the artworld ‘makes’ art. If this were true, Dickie’s account would have little, if any, relevance for theories of authorship.

³² Dickie, *The Art Circle*, p. 55.

³³ E. C. Hettinger, ‘Justifying Intellectual Property’, *Philosophy and Public Affairs* 18(1) (1989): pp. 31-52, p. 38.

³⁴ Dickie, *The Art Circle*, p. 75

Part of the confusion surrounding this point arises in consideration of examples such as Duchamp's *Fountain* and other works of art that consist of 'found' objects. Cases like these do seem to suggest that the art status of an object is 'conferred' upon it by others, since artists themselves do not literally make such objects. However, Dickie argues in response that the difference between 'readymade' contemporary art and more traditional forms of artistic authorship is one of degree and not kind, and that Duchamp's *Fountain* and its like must be construed as the artifacts of artists as the result of a kind of minimal work on the part of those artists'.³⁵ On his analysis, it is the contribution of the artist that effects this transformation from 'simple' to 'complex' object—even through acts of selection and designation—and the artworld provides the background for this transformative process. But this still raises a further question: what is it about the artist's role that marks it out as distinctly 'art-conferring'? Moreover, could we single out particular individuals as the 'author' or 'authors' of a work within the multiple contributions characteristic of the artist's role? To answer these questions, we suggest two further criteria for narrowing down the role of 'author' within the multiplicity of artistic roles implied by Dickie's account.

B Authorship and Authority

Dickie's institutional theory points towards an interesting distinction between artistic authority and artistic skill, which sheds further light on its conception of authorship. This distinction arises in consideration of Dickie's view of the role of artist, with the implication that almost anybody might become an artist in the context of the artworld—an implication which philosopher Stephen

³⁵ Ibid. p. 11

Davies finds implausible.³⁶ Davies argues that it is important to offer a more complex account of how an artist acquires the authority to confer art status, and he brings out a crucial aspect of contemporary art-making which institutional theories seem to support: the fact that artists are often able to produce art without exercising any skill in the traditional sense of technical ability, but rather through authoritative statements of delegation and instruction to their assistants.

By authority in this sense, Davies means ‘an entitlement successfully to employ the conventions by which art status is conferred on objects/events’.³⁷ In the case of *Fountain*, for example, Duchamp’s authority to alter the conventions by which art status might successfully be conferred resulted from his having achieved recognition as an avant-garde artist. When this distinction is made clear, it cannot be the case that ‘just anyone’ might count as an artist, in the sense of having the authority to employ all of the conventions by which art status might be conferred. Although ‘the display of artistic skills might be one of the informal ways in which a person qualifies for the special authority that goes with his being a recognized artist’ Davies argues that ‘what matters is the authority and not the way it is acquired’.³⁸ This distinction between skill and authority has become all the more pronounced in the current artworld, where ‘technical skill in production has become less important than it once was’.³⁹

How does this distinction between authority and skill help us to identify the author of a work to which many have contributed? The first point to note is that an artist’s authority includes the authority to instruct others to perform aspects of its execution, many of which may involve significant skill: ‘as artists have the authority to delegate aspects of production or realization, the

³⁶ S. Davies, *Definitions of Art* (Oxford: Oxford University Press, 1991), p. 85.

³⁷ *Ibid.* p. 87

³⁸ *Ibid.* p. 219

³⁹ M. Buskirk, *The Contingent Object of Conceptual Art* (Cambridge: MIT Press, 2005), p. 88.

very possibility of such fragmentation necessitates constant reinterpretation of the nature of artistic authorship.⁴⁰ On the one hand, this is not a new insight—artists have often relied on teams of assistants, and contemporary artists in this sense are not unique. But forms of conceptual art do raise the problem particularly acutely. As artist Sol LeWitt puts it: ‘when an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. The idea becomes the machine that makes the art’.⁴¹ Nobody doubts LeWitt’s authority in this sense to delegate the ‘perfunctory’ production of his work. The question we must consider, though, is why authorship can be characterized in terms of intellectual acts such as ‘planning’, whereas other contributions can be defined in terms of technical skill, without themselves being contributions of authorship. In answering this question, we now suggest a further criterion of authorship implicit in Dickie’s institutional theory.

C Authorship and Intent

As we have noted, artistic intent is an important component of institutional theories of art. What do institutional theorists mean by intention, and how does this relate to authorship? The idea that authorship and intention are importantly connected is distinct from the proposition that artists’ intentions determine single and correct interpretations of their works (a position known as the

⁴⁰ Buskirk, *Contingent Object*, p. 55.

⁴¹ S. LeWitt, ‘Paragraphs on Conceptual Art’, in A. Legg (ed) *Sol LeWitt* (New York: Museum of Modern Art, 1967), p. 166.

‘intentional fallacy’). Rather, it is simply to state that an artist’s activity is done purposively, with awareness that one is producing an artwork. Dickie puts the point well:

art-making is an intentional activity; although elements of a work of art may have their origin in accidental occurrences that happen during the making of a work, a work as a whole is not accidental. Participating with understanding implies that an artist is aware of what he is doing.⁴²

But the broad appeal to intention leaves open questions about the correct interpretation of the work . As Levinson states, ‘to appeal to intentions—or intentionality—in explicating the concept of artmaking is not to commit oneself to any particular view of how an individual’s intentions are embodied in the world ...’.⁴³ However, it should be noted that, with contemporary forms of art, which often consist largely in plans or instructions, artists’ intentions are crucial to the overall realisation of the work, and are often a powerful (and sometimes the only) indicator of authorship. Even if we no longer place a high value on artistic intent when thinking about the

⁴² Dickie, *The Art Circle*, p. 80. The notion of intention explored in this piece has a different basis to that employed by Justine Pila (Pila, ‘An intentional view of the copyright work’, *The Modern Law Review* 71(4) (2008): pp. 535-558), who explores intentionality as a non-tangible component of a work, distinct from its fixation. It is also different from Kendall Walton’s use of intention as a factor in determining the category under which a work of art should be correctly perceived (e.g. sculpture or painting), explored by Pila (Pila ‘Copyright and its categories of original works’, pp. 248-249).

⁴³ J. Levinson, ‘Refining Art Historically’, *Journal of Aesthetics and Art Criticism* 47 (1989): pp. 21-33, p. 23.

correct interpretation of a work, then, it arguably has become ‘a determinant of a work’s very form’⁴⁴ in the context of contemporary art-making.

Given that intention, understood as the awareness that one is producing art, does seem to be a crucial component of contemporary art-making, how does this further criterion help to clarify the author’s distinctive role? Appealing to intention in this way appears to solve the problem of explaining why those who occupy other roles in the artworld—such as those who present or even ‘use’ art works (with the case of interactive digital works) are not themselves authors. The same can be said of those who assist artists in the execution of their work. The person who holds ultimate responsibility is the artist, and assistants may contribute their own labour and skill, but they do not do so with the intention of making the work; they do so with the intention of following the artist’s instructions.

Thus, drawing together the insights we have developed from Dickie’s institutional theory of art, we offer the following, threefold answer to the question of how to identify the author or authors of a work whose provenance can be traced to multiple contributors. First, the notion of role-differentiation helps to mark out a distinctive role for the artist that encompasses many contributions to a work, including performance, direction and technical assistance. On Dickie’s account, these are seen as contributions of an artistic nature, rather than contributions merely to aid the ‘presentation’ of a work. Second, when we press the question of how to identify authors amongst the multiplicity of contributions characteristic of the role of the artist, Dickie’s theory supports the view that authors have a certain kind of authority, acquired through participation in the activities of the ‘artworld’, rather than through displaying skill in making the work (which might instead be displayed by other contributors). Third, as Dickie suggests, an author, unlike

⁴⁴ Buskirk, *Contingent Object*, p. 15

other artistic contributors, explicitly intends to produce a work of art. With this three-pronged approach to joint authorship developed through exposition of Dickie's theory—based on *role*, *authority* and *intention*—we now examine its application to copyright.

3 Institutional Theories and Copyright

Authorship is a central theoretical component of copyright and has been the subject of philosophical discussion in copyright theory. At the justificatory level, various theories of authors' rights and authorial entitlement have been put forward, often to strengthen authorial claims to ownership of their works. But it must be noted that these are not theories of authorship *per se*; rather, they are theories of property or speech translated into theories of authorship. There is certainly a question to be asked, then, about the extent to which philosophy of art might provide a more direct route to a theory of authorship that might be used to illuminate, challenge and even redefine copyright's own account of the concept.

A number of aspects of the theoretical underpinnings of institutional theories of authorship, outlined in the previous section, seem appealing from the perspective of copyright. Unlike the solitary romantic author, institutional theories provide a framework which accommodates a more complex set of relationships surrounding authorship, providing a conceptual apparatus for distinguishing between authors and non-authors, which is the issue faced by the courts in co-authorship cases.⁴⁵ Moreover, the concepts of role, authority and

⁴⁵ See Judge Newman's comment in *Childress v. Taylor*, 945 F.2d 500, 25 (2nd Cir. 1991): 'the determination of whether to recognize joint authorship in a particular case requires a sensitive accommodation of competing demands advanced by at least two persons, both of whom have normally contributed in some way to the creation of a work of value. Care must be taken to ensure that true collaborators in the creative process are accorded the perquisites of co-

intention, which institutional theories offer to carry out this task, are all framed so as to be free from aesthetic evaluation or judgements as regards quality. In the philosophical literature on institutional theories, and particularly in discussion of Dickie's institutional theory, such value neutrality is sometimes seen as problematic. Some theorists are uncomfortable with the fact that Dickie's theory says nothing about the reasons for appreciating artworks that is distinctively 'aesthetic' or art-conferring.⁴⁶ Yet for lawyers, this makes institutional theories appealing, as it is an approach which accords with formal legal principles of non-discrimination and 'the supposed terrors for judicial assessment of matters involving aesthetics'.⁴⁷ Therefore, what is often seen as a weakness from a philosophical perspective appears to be a strength from the standpoint of copyright.

Furthermore, because institutional theories are closely connected to art conventions, the notions of role, authority and intention possess an inherent flexibility, such that their meaning can be adapted over time, as conventions change. This might be seen as one of the key defining features of institutional theories, which are united in the claim that 'an object is a work of art if it conforms to some reason for being a work of art operative in the artworld at the time'.⁴⁸ In this

authorship and to guard against the risk that a sole author is denied exclusive authorship status simply because another person rendered some form of assistance'.

⁴⁶ See T. Cohen, 'The Possibility of Art: Remarks on a Proposal by Dickie', *Philosophical Review* 82(1) (1973): pp. 69-82. Cohen challenges Dickie to say more about what constitutes aesthetic appreciation, inviting him to specify what sort of appreciation (or, in his later theory, 'understanding') is required that is distinctively 'aesthetic' or art-conferring.

⁴⁷ *Burge v. Swarbrick*, HCA 17, 63 (2007)

⁴⁸ D. Matravers, 'The Institutional Theory of Art: A Protean Creature', *British Journal of Aesthetics* 40(2) (2002): pp. 242-250, p. 244. This is a position Matravers describes as 'weak proceduralism'.

sense, as Derek Matravers notes, institutional theories are ‘transhistorical’—they accept that definitions of art that are operative in the artworld may change. Again, this is attractive from a copyright lawyer’s perspective, because it provides a means by which ‘authorship’ in law can keep pace with and be aligned with changes in artistic practices, allowing the law to apply the conventions operative at the time the work was made. As Anne Barron has argued, since copyright is an institution that claims to promote the arts, maintaining a connection between law and art is important for copyright’s legitimacy.⁴⁹

Indeed, considering copyright’s own institutional status and relationship to the artworld, the purpose of ‘authorship’ for copyright is, amongst other things, to determine the first instance ownership of property rights—that is, the right to authorize and prohibit a number of restricted acts in relation to that work. Given this purpose, at least one of the concerns is to avoid defining ‘authorship’ in a manner which would give rise to a multiplicity of unexpected claims, as this may unnecessarily impede exploitation of the work⁵⁰ and inhibit the freedom which an author might feel to consult others.⁵¹ In this way, the conception of authorship offered by institutional

⁴⁹ Barron, ‘Copyright and the claims of Art’, p. 399

⁵⁰ That the test of co-authorship has implications for control over the use and dissemination of cultural works is a matter which has been evident since at least *Levy v. Rutley* L.R., 6 C.P. 523 (1871), today seen as a common root of US and UK co-authorship doctrine. See further E. Cooper, ‘Joint Authorship in Comparative Perspective: Levy v. Rutley and Divergence between the UK and USA’, *Journal of the Copyright Society of the USA*, 62 (2) (Winter 2015): pp. 245-276.

⁵¹ This concern was expressed in the US decision in *Aalmuhammed v. Lee*, 202 F.3d 1227, 27, (9th Cir. 2000) in the context of the constitutional recognition 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

theories, which flexibly adapts itself to changes in expectations in the artworld current when the work is made, also meets a concern articulated in the copyright domain: to prevent the ‘inconvenient multiplication of rights and remedies which never could have been contemplated’.⁵²

These considerations suggest that institutional theories of art have the potential to point copyright in a promising direction. On the one hand, as we saw, Dickie’s notion of ‘role’ is a broad one, which can capture a large number of persons (for example, in the case of drama, Dickie considers that the ‘artist role’ may be performed by the playwright, director *and* the actors, and in the case of visual art, the ‘artist role’ will also encompass the contribution of assistants). The expansive concept of ‘role’ provides a starting point in contrast to the narrower ‘individualistic bias’ that, as we will see below, is sometimes said to underpin the legal approach to co-authorship.⁵³ While the starting point is broad, institutional theories offer further tests of ‘authority’ and ‘intention’, which may narrow the number of authors. As we saw above, guarding against the multiplicity of unexpected claims has long been the policy of the courts in co-authorship cases, and the tests of ‘authority’ and ‘intention’ offer a means for achieving this which brings co-authorship in line with ‘artworld’ expectations.

Bearing in mind these appealing features of institutional theories, this article now turns to case law on co-authorship, looking in particular at how courts in the UK and US deal with notions of ‘role’, ‘authority’ and ‘intention’ in interpreting the statutory definitions set out in this

to insulate themselves and maintain ignorance of the contributions others make ... the arts would be the poorer for that.’

⁵² *Levy* at 531 per Montague-Smith J.

⁵³ See text to note 99

article's opening.⁵⁴ After outlining the key concepts at play, we go on in section five to discuss the relationship between copyright's definition of these categories as compared to those offered by institutional theories. Here we note that, despite the possible affinities between the two, there are still some fundamental differences, some of which may be problematic for copyright. This final section also argues that institutional theories could be drawn upon to implement some normative changes to copyright's definition of co-authorship—in particular, relaxing copyright's requirement of expression to accommodate aspects of co-authorship associated with 'intention' and 'authority'.

4 Case Law on Co-Authorship

A 'Role' and 'Authority' in UK Case Law on Co-authorship

⁵⁴ See text to notes 11 and 12. Joint authorship is of course not the only means by which the law makes sense of situations of multiple authorship and we acknowledge that a correspondence between 'authorship' in law and art may well be achieved in the case of many artists working in the post-Duchamp era, through the US work for hire doctrine (vesting 'authorship' of employee works in their employer). However, outside this model of working, the work for hire doctrine may well not produce an affinity between law and art. By contrast, rules concerning co-authorship, given their more general application, provide flexibility in making sense of the complexity of relations surrounding the making of the work and therefore facilitate connection between law and art in respect of a greater variety of modes of artistic work. Indeed, as we see later, one of the attractions of institutional theory for copyright lawyers is its flexibility in capturing changing artworld relations (text to n.48-49).

Case law has broken down the statutory definition of joint authorship into three requirements.⁵⁵ First, the co-author must have made a relevant contribution to the work: it must be ‘significant’ (i.e. ‘substantial’ and ‘non-trivial’), ‘original’ (i.e. resulting from the co-author’s own skill and labour) and of the ‘right kind of skill and labour’ (i.e. in the nature of authorship).⁵⁶ Second, there must be ‘collaboration’, in the sense of a ‘joint labouring in the furtherance of a common design’ rather than the ‘subsequent independent alteration of a finished work’.⁵⁷ Finally, as indicated by the statutory language, the contribution must be ‘not distinct’ (or, under the language of the 1956 Act,⁵⁸ it must be ‘not separate’) from the contributions of other authors.

In UK case law on co-authorship, an author’s ‘role’ is referred to in judicial reasoning insofar as it assists the court in determining whether a contribution is ‘of the right kind of skill or labour’ to be a contribution of authorship. For example, in *Brighton v. Jones*, the High Court was presented with evidence about whether the contribution of the claimant, the director of the play *Stones in His Pockets*, exceeded ‘the normal role of a director’ such as to make her a co-author of the play with the defendant, the script writer. The claimant gave evidence that her activities ‘went way beyond the normal role of a director’,⁵⁹ whereas other witnesses, such as the stage

⁵⁵ See above, text to note 11 and Floyd QC’s judgment in *Beckingham v. Hodgens*, EWHC 2143 (Ch, 2002), FSR 14, 44 (2003), approved by the Court of Appeal at EWCA Civ 143 (2003), EMLR 18, 11-12 (2003).

⁵⁶ We are yet to see the influence in this area of the criterion of ‘own intellectual creation’ set out by the European Court of Justice in defining ‘originality’ in Case C-5/08 *Infopaq v. Danske Dagblades Forening* (2009) ECR I-6569.

⁵⁷ *Beckingham*, *Ibid.*, per Floyd QC, 45, citing *Levy*.

⁵⁸ The Copyright Act 1956 defined a “work of joint authorship” as a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors’ (1956 Copyright Act: 4&5 Eliz. 2 c.74 s.11(3)).

⁵⁹ *Brighton v. Jones* EWHC 1157 (Ch, 2004), FSR 16, 48 (2005).

manager⁶⁰ and one of the actors, gave evidence that the claimant ‘did nothing out of the ordinary or any more than would be expected of a director in preparing a new play for the stage.’⁶¹ Accepting the evidence of the actor and stage manager, the judge concluded that the claimant’s contribution was not of the ‘right kind of skill and labour’ to make her a co-author of the play. As Park J. explained:

[The defendant] presented [the claimant] with a play upon which, during the rehearsals, she was expected to exercise her director's skills, together with Mr Murphy and Mr Hill exercising their actors' skills, in order to get it ready to be performed before live audiences. The actors did not become joint authors by reason of what they did, and I do not think that [the claimant] became a joint author by reason of what she did either.⁶²

In this way, as the skill exercised by the claimant was confined to her role as a ‘director’, this did not amount to authorship.

Turning now to case law exploring ‘authority’, this is relevant insofar as ideas of ‘control’ assist courts in assessing whether a participant’s contribution meets the necessary requirements of ‘collaboration’ and/or ‘right kind of skill and labour’. For example, in *Hadley v. Kemp*, one of the most important findings of fact by Park J. concerned the tight control that Gary Kemp exercised over the process of composing the music of the songs performed by *Spandau*

⁶⁰ ‘There was... nothing out of the ordinary in [the claimant’s] contribution during rehearsals for *Stones*, or anything which was more than one would ordinarily expect from the director.’ *Ibid.*, 51.

⁶¹ *Ibid.*, 51

⁶² *Ibid.*, 56(v)

Ballet, which precluded any contribution to the composition of the music by the other members of the band:

...both at rehearsals and in the recording studio Gary Kemp was in charge. His own evidence was that they were not a democratic band; they were a hierarchy and people would listen to him where music was concerned.⁶³

Analogising Kemp's position as master-mind of the music to the classical composer Beethoven, who could hear the sound of his music in his head even after he was deaf, Park J. distinguished the facts to those of *Stuart v. Barrett*, where a band composed music together through a process of 'collective *jamm*ing'. As the judge described in that case:

Someone started to play and the rest joined in and improvised and improved the original idea. The final piece was indeed the product of the joint compositional skills of the members of the group present at the time.⁶⁴

By contrast, the strict control exercised by Kemp indicated that the compositional process was not a communal one: not only did Kemp have 'definite ideas about how his songs should sound, and was clearly the person in charge', but once he had presented his compositions to the band, changes were generally unheard of.⁶⁵ In this way, unlike the band in *Stuart* that composed the

⁶³ *Hadley v. Kemp*, EMLR 589, 646 (Ch, 1999)

⁶⁴ *Stuart v. Barrett*, EMLR 449, 458, (Ch, 1994) per Morison QC.

⁶⁵ *Hadley*, 641.

music by labouring in furtherance of a common design, the other members of *Spandau Ballet* did not exercise the ‘right kind of skill and labour’, and accordingly were not joint authors.

Likewise, in *Brighton v. Jones*, Park J. held that an important finding of fact that supported the conclusion that the claimant was not a co- author of the play with the defendant was that:

[The claimant] was not entitled to give instructions to [the defendant] about what [the defendant] should write, and either she did not do so, or, if she attempted to do so, [the defendant] made up her own mind about what she was prepared and what she was not prepared to write by way of changes to her original script.⁶⁶

Again, the fact that the defendant exercised control over the text of the script—and that this authority was reflected in the claimant’s contractual terms —proved to be an important factor in determining her claim to single authorship of the play. We say more about the similarities between these notions of ‘role’ and ‘authority’ and those offered by institutional theories in section five.

B ‘Role’, ‘Authority’ and ‘Intention’ in US Case Law on Co-authorship

⁶⁶ *Brighton*, 43.

The current majority view favours the interpretation of the statutory definition of ‘joint works’ set out in the Second Federal Circuit decision of *Childress v. Taylor*.⁶⁷ First, the contributions must either be ‘inseparable’ or ‘interdependent’ parts of the whole work. Secondly, the contributions must each be ‘independently copyrightable’, such that it amounts to an ‘original expression that could stand on its own as subject matter of copyright’.⁶⁸ Finally, the contributors must have intended to regard themselves as joint authors.⁶⁹

In US law, the notions of ‘intention’, ‘authority’ and ‘role’ are closely bound together. ‘Intention’ is relevant to the third requirement noted above, which concerns ‘intention’ as to being a joint author, rather than merely an awareness that one is creating art. ‘Intention’ in turn is determined by reference to ‘factual indicia’ of authorship,⁷⁰ which include ideas relating to ‘authority’ and ‘role’. In this context, reference to ‘authority’ is often made in the form of the ‘decision making authority over what changes are made and what is included in a work’.⁷¹ In many cases this will be ‘the most important factor’,⁷² a matter that may be supported by

⁶⁷ See text to note 12 above and *Childress*, discussed at note 45. See also E.J. Schwartz and D. Nimmer, ‘United States of America’ in P.E. Geller (ed.) *International Copyright Law and Practice* (Lexis Nexis, 2011), 4[1][a][i].

⁶⁸ *Erickson v. Trinity Theatre*, 13 F. 3d. 1016, 46 (7th Cir. 1994), quoting P. Goldstein, *Copyright: Principles, Law and Practice* (1989) Sec. 4.2.1.2, p. 379.

⁶⁹ This goes further than the statutory language that suggests intent merely regards the merger of the contributions into a unitary whole.

⁷⁰ *Thomson v. Larson*, 147 F.3d. 195, 32 (2nd Cir. 1998)

⁷¹ *Ibid.*, 37

⁷² *Aalmuhammed*, 22. In the Ninth Circuit these factors inform a requirement that each contributor is an ‘author’ (not ‘intention to co-authorship’), but these tests were seen by the Court in *Aalmuhammed* as reaching the same ‘practical result’. *Ibid.*, 20.

contractual provisions determining who has final approval over changes.⁷³ Evidence of authorial ‘role’ is also relevant for determining intention—for example, the manner in which contributors are billed ‘helpfully serves to focus the fact-finder’s attention on how the parties implicitly regarded their undertaking’.⁷⁴ For example, in *Thomson v Larson*, billing of the claimant as a ‘dramaturg’ rather than an author of the musical *Rent* suggested that the claimant was not an author.⁷⁵ Therefore, unlike the position in the UK, ideas of ‘authority’ and ‘role’ do not appear bound up with questions of skill and labour and, most notably, there is an explicit recognition that intention to be a co-author plays an important role in determining co-authorship, which has been rejected by UK courts.⁷⁶

5 Implications for Copyright

To what extent do the concepts of ‘role’, ‘authority’ and ‘intention’ operate in similar ways, in copyright and institutional theories? At first sight, there would appear to be some clear similarities. First, both are engaged in role-differentiation, particularly when distinguishing between authors and other contributors. Second, in the way these roles are defined, there is some acceptance of the distinction between authorship and skill insofar as a contributor can exercise considerable skill, but yet not count as an author because that skill or labour is not characteristic

⁷³ *Erickson*, 38.

⁷⁴ *Childress*, 40.

⁷⁵ *Thomson*, 41-42.

⁷⁶ The requirement of ‘intention’ to co-authorship was expressly rejected by the Court of Appeals in *Beckingham*, where it was described as an ‘uncertain realm of policy’ (53).

of an authorial role.⁷⁷ Third, in US law, there is an explicit recognition of the connection between intention and authorship, and some have argued that the UK statutory definition of ‘common design’ implicitly recognizes some form of intention, since ‘a joint enterprise, by its very nature, is based on some intention by parties to collaborate’.⁷⁸

However, when we probe these categories further, the parallels are not as close as they may at first sight appear to be. One important point to note, in consideration of the definitions of role and authority offered by UK case law, is that these concepts are defined in terms of what might be seen as an essentially bilateral relationship between author and work. A key question for UK courts appears to be whether the skill and labour exercised by the contributor is of the right kind to indicate authorship, and ‘authority’ and ‘role’ are only relevant insofar as they assist the courts with that enquiry. Through this narrow focus on skill or labour, which is a bilateral relation between author and work, it would appear that UK courts are not interested in drawing upon broader, relational determinants of a work, such as artworld practices.

In response to this point, it might be noted that, for example, the project of role-differentiation in *Hadley v. Kemp* was informed by the evidence of artworld representatives—in that case, trained musicologists. This suggests some willingness on behalf of courts to consider the extent to which legal notions of role-differentiation are informed by broader artworld

⁷⁷ See *Fylde Microsystems Ltd v. Key Radio Systems Ltd*, F.S.R. 449, 457 (Ch. 1998): ‘Although the beta tester may expend skill, time and effort on testing the software, it is not authorship skill...it can be likened to the skill of a proof-reader’.

⁷⁸ L. Zemer, ‘Is Intention to Co-author an Uncertain Realm of Policy?’, *Columbia Journal of Law and the Arts* 30(4) (2007): pp. 611-624, p. 617.

conventions—indeed, existing scholarship has shown such evidence to be highly influential.⁷⁹ However, closer analysis shows that such evidence was considered relevant to the case only insofar as it assisted the court in distinguishing between skill and labour in the nature of authorship, as opposed to other types of skill and labour. Where evidence about ‘role’ does not have any bearing on the question of skill and labour, the courts disregard broader artworld practices. For example, in *Bamgboye v. Reed*, the High Court dismissed evidence that the claimant was not co-author of the musical work *Bouncing Flow* on the basis that ‘he would not have been thought of as a ‘collaborator’, in the way that the word might normally be used in the industry’, as this was irrelevant to the legal question of whether he had ‘creative input into the music ...’.⁸⁰

US case law, on the other hand, appears at first sight to offer a different perspective on this issue. Unlike the position in the UK, ideas about ‘authority’ and ‘role’ are not bound up with questions of identifying authorial skill and labour. Moreover, there is an explicit recognition that ‘intention’ plays an important role in determining co-authorship, which has been rejected by UK courts.⁸¹ Indeed, it is the US test of intention which opens up enquiries about authorship to broader artworld practices, as these influence understandings of the conventions surrounding

⁷⁹ On the role of expert witnesses in musical copyright cases, see L. Bently, ‘Authorship of Popular Music in UK Copyright Law’, *Information, Communication and Society* 12 (2009): pp. 179-204. Bently considers the emphasis placed on the testimony of expert witness Guy Protheroe in *Hadley* to be ‘one of the most remarkable features of the case’ (p. 192). See also Jose Bellido’s work, which explores the influence of expert witness Victor Herbert in numerous artistic copyright cases: J. Bellido, ‘Looking Right: the Art of Visual Literacy in British Copyright Litigation’, *Law, Culture and the Humanities* (2011): pp. 1-22.

⁸⁰ *Bamgboye v. Reed*, EWHC 2922 (QB, 2002), EMLR 5, 61 (2004).

⁸¹ See note 76 above.

parties' intentions. This is well illustrated by Judge Newman's reasoning in *Childress* about the distinction between the intentions of writer and editor, which were clearly informed by the usual conventions of those occupying these roles:

[...] a writer frequently works with an editor, who makes numerous useful revisions [...]. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet *very few editors and even fewer writers would expect* the editor to be accorded the status of joint author [...]. What distinguishes the writer-editor relationship ... from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.⁸²

Perhaps this shows that US perspectives on joint authorship are more closely tied to the artworld, through the greater weight that is attached to practices such as billing and other conventional understandings of the parties' expectations. Thus, we might conclude that institutional theories have closer affinities to US law than UK law.⁸³

However, before drawing such a sharp contrast between these judicial approaches, it must be noted that the second limb of the US test requires each contribution to be 'separately copyrightable' such that it amounts to 'an original expression that could stand on its own as subject matter of copyright'.⁸⁴ This means, as Judge Newman explained in *Childress*, that if

⁸² *Childress*, 38, (emphasis added).

⁸³ One explanation for this difference might be the constitutional recognition in the US that copyright is intended to promote artistic progress, which may mean that US Courts are more explicitly aware of the impact their decisions about joint authorship might have on artworld practices. See note 51 above.

⁸⁴ *Erickson*, 46, quoting P. Goldstein, *Copyright: Principles, Law and Practice* (1989) Sec. 4.2.1.2, p. 379.

someone contributes a ‘non-copyrightable idea’ and another contributes the ‘copyrightable form of expression’, while the resulting work is copyrightable, the contributor of the idea has not provided a relevant contribution for joint authorship.⁸⁵ Therefore, in the US also, joint authorship will always concern the bilateral relation between author and work. Further, the requirement that an author contributes a separately copyrightable expression is at odds with the notion of authorship offered by institutional theories that, as we have seen, can be satisfied by activities such as planning or delegation.

Drawing together these observations, then, we can note that copyright tests of co-authorship in both the UK and US place notions of ‘role’, ‘authority’ and ‘intention’ in the context of the bilateral relation between contributor and work. In the UK, ideas of ‘role’ and ‘authority’ are relevant insofar as they assist a court in identifying the ‘right kind of skill and labour’, running counter to the clear demarcation between ‘authorship’ and ‘skill’ offered by institutional theories. When evidence about artworld practices can inform questions about authorial skill and labour, such evidence will be counted; but the overriding concern is not to reflect artworld conventions about role-differentiation, but to develop the legal criterion of authorial skill and labour. In the US, notions of ‘role’ and ‘authority’ are used to determine ‘intention’ as to co-authorship, but the requirement of ‘independent copyrightability’ ultimately means that authorship in law will always require the contribution of expression, contrary to the suggestion made by institutional theories that authorship need not involve any physical skill or expression on behalf of an artist. Copyright, therefore, is selective in its reference to artworld concepts.

⁸⁵ *Childress*, 36.

With these differences in mind, what are the normative implications for copyright's test of co-authorship? Institutional theories, by situating authorship within the artworld, offer copyright a set of concepts that facilitate convergence between the law of co-authorship and changing ideas about authorship in art. The attraction of this approach is that it contributes to copyright's legitimacy as a body of law frequently justified by the promotion of the arts. Of course, as has been argued elsewhere, given the breadth of copyright's domain, it is impossible for the legal determinations of authorship to be aligned in respect of every artistic practice.⁸⁶ Accordingly, while ensuring some degree of alignment between law and art is important, copyright must ultimately maintain its own set of benchmarks applicable to the broad range of activities that it regulates. The approach suggested therefore is for copyright's existing concepts to be adapted, rather than superseded.

The key disjunction between copyright and artworld practices is law's blindness to co-authorship in the absence of 'the right kind of skill and labour' (in the UK) or 'independently copyrightable *expression*' (in the US). Institutional theories, through the distinction between authority and skill, provide a clear justification for relaxing these requirements to recognise the point that, from the perspective of the artworld, an individual can count as an author without expending any skill or labour in the process of physically creating the work. Is there any basis for the development of such an approach in the US and UK?

In the US, the proposition that a contributor of ideas might be co-author (with a contributor of expression) was supported by the copyright scholar Melville Nimmer,⁸⁷ and this

⁸⁶ Bently and Biron, 'Discontinuities', p. 260.

⁸⁷ The Court in *Erickson* summarised this position as follows: 'Professor Nimmer asserts that if two authors collaborate, with one contributing only uncopyrightable plot ideas and another incorporating those ideas into a

was accepted as a possible interpretation of the statute by the Second Circuit Court in *Childress*, in particular as compatible with the US Constitutional clause (mandating the protection of ‘authors’).⁸⁸ Indeed, the Court in *Childress* also noted the advantage of this approach:

If the focus is solely on the objective of copyright law to encourage the production of creative works, it is difficult to see why the contributions of all joint authors need be copyrightable. An individual creates a copyrightable work by combining a non-copyrightable idea with a copyrightable form of expression; the resulting work is no less a valuable result of the creative process simply because the idea and the expression came from two different individuals. Indeed, it is not unimaginable that there exists a skilled writer who might never have produced a significant work until some other person supplied the idea.⁸⁹

completed literary expression, the two authors should be regarded as joint authors of the resulting work’ (Erickson, 42, citing *Nimmer on Copyright* (1998): pp. 6-21.

⁸⁸ *Childress*, 36.

⁸⁹ *Ibid.* Nimmer’s approach finds favour with Lior Zemer, provided the test of intent to co-authorship is satisfied: ‘After all, the court itself remarks that the Goldstein rule contravenes the interest in maintaining a high level of creative productivity’ (Zemer, ‘Is intention to co-author an uncertain realm of policy?’, p. 622). Rochelle Cooper Dreyfuss also notes the ‘important advantage’ of Nimmer’s test: ‘it promotes creative output by providing incentives not only to express, but also to have thoughts worth expressing, and to transfer those thoughts to someone who can express them’ (R. C. Dreyfuss, ‘Collaborative Research: Conflicts on Authorship Ownership and Accountability’, *Vanderbilt Law Review* 53 (2000): pp.1159-1232, p.1208). Dreyfuss includes the contributors of ideas, alongside a broad range of other contributors, as ‘authors’ of a new category of ‘collaborative work’, applicable to works that are not ‘joint works’ on account of their lack of unitariness (pp.1220, 1222-3).

The reason for the Court in *Childress* ultimately favouring the alternative approach, proposed by copyright Professor Paul Goldstein, that each co-author's contribution is independently copyrightable, was to guard against spurious claims:

The insistence on copyrightable contributions by all putative joint authors might serve to prevent some spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author of a copyrightable work, even though a claim of having contributed copyrightable material could be asserted by those so inclined.⁹⁰

Yet this concern seems out of touch with much contemporary art practice in which, as already noted above, a claim to co-authorship based on the contribution of ideas may not be spurious but instead the most important contribution.⁹¹ Institutional theories provide a basis for re-opening the argument on this point.

In the UK, some cases have adopted a more generous approach to affording co-authorship status to contributors of ideas. For example, in *Cala Homes v. Alfred McAlpine*⁹² Laddie J. held that the design director of Cala Homes was a co-author of certain house designs,

⁹⁰ *Childress*, 37. In *Thomson* this was referred to as a concern regarding 'overreaching' contributors (23). For more detail regarding the case law preceding *Childress* on this issue, see R. Versteeg, 'Defining 'Author' for Purposes of Copyright', *American University Law Review*, 45 (1996): pp. 1323-1366. See also M. Landau, 'Joint Works under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation', *IDEA: The Intellectual Property Law Review* 54 (2014): pp. 157-224, criticising the 'independently copyrightable' requirement as unsupported by the statutory definition of 'joint works' (p. 222).

⁹¹ See text to note 39.

⁹² *Cala Homes v. Alfred McAlpine*, FSR 818 (Ch, 1995).

together with draughtsmen employees of a firm that had produced the drawings, on the basis of his instructions to the employees. In Laddie J.'s view, having regard to 'who pushed the pen' was 'too narrow a view of authorship' and he went on to consider the skill and labour protected by copyright beyond the physical act of drawing:

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.⁹³

On this basis, 'skill and effort' would seem to encompass activities like planning a work, where the planning closely relates to what is fixed on the page.

That activities not amounting to penmanship might be relevant 'skill and labour' for co-authorship was a point also contemplated in *Brighton v. Jones*. In that case, Park J. accepted that both contributors to the expression/words of the play, or to the story or plot, could be co-authors:

Copyright can subsist in a story or a plot, so that if what happened in rehearsals was that [the claimant] determined what the plot of the play was to be (or [the claimant] and [the defendant] determined in collaboration what it was to be), and then [the defendant]

⁹³ Ibid. 835. Emphasis added.

actually wrote the words to give effect to the plot, I can see that [the claimant] might have been a joint author.⁹⁴

That said, other case law stresses that a person who does not put pen to paper will only be a co-author in exceptional circumstances, stressing the need for direct connection between the activities of planning/giving instructions and the physical acts that are involved in making the work. As Lightman J. said in *Robin Ray v. Classic FM*, in considering the approach of Laddie J. in *Cala Homes*:

...in my judgment what is required is something which approximates to penmanship. What is essential is a direct responsibility for what actually appears on the paper. ... As it appears to me the architects in... [*Cala Homes*] were in large part acting as ‘scribes’ for the director. In practice such a situation is likely to be exceptional.⁹⁵

Institutional theorists’ response to contemporary art practices is to disassociate authorship from skill in making a work and contributions to expression. In light of this, we submit that the copyright principles set out in UK case law (such as *Cala Homes* and *Brighton*), which recognize that contributors of ideas can be co-authors, should be of renewed importance in reforming copyright’s joint authorship doctrine, thereby facilitating copyright’s closer connection to art.

⁹⁴ *Brighton*, 34, (iii).

⁹⁵ *Robin Ray v. Classic FM*, FSR 622, 636 (Ch, 1998). See also *Donoghue v. Allied Newspapers*, 106, 109 (Ch. 1938), though a claim for joint authorship was not advanced in that case.

Such an approach facilitates greater alignment between law and art while also maintaining the integrity of existing copyright principles.

The above analysis raises some challenging questions: does our suggestion that contributors of ‘ideas’ may count as co-authors undermine an important principle of copyright jurisprudence: the idea/expression dichotomy? Does our analysis ‘open the floodgates’ for a complete reform of this doctrine so as to restrict its operation, thereby undermining the crucial policy goal it serves of limiting authorial ownership to safeguard the raw materials of the public domain?⁹⁶ In particular, our suggestion that ‘ideas’ can count as contributions of co-authorship appears potentially to increase the scope of copyright infringement, thereby leading to an increase in copyright protection at precisely the time at which scholars are worrying about its over-increase.⁹⁷ In response, we would resist the suggestion that our analysis has such wide-reaching implications. First, as stressed above, our goal is to reopen an existing debate about the contribution of ‘non-copyrightable’ ideas to joint authorship, and to bring our philosophical framework to bear on this question. We are not attempting to supersede copyright principles in suggesting this reform, but rather to adapt these existing principles. Second, we agree with scholars who suggest that copyright law might benefit from separating out its ownership and attribution functions,⁹⁸ such that our proposal could apply to questions of attribution whilst

⁹⁶ See, for example, L. Bently and B. Sherman (3rd ed), *Intellectual Property Law* (Oxford: Oxford University Press, 2008), pp. 183-184; A. Drassinower, *What’s Wrong with Copying?* (Cambridge: Harvard University Press, 2015): pp. 54-84; J. Litman, ‘The public domain’, *Emory Law Journal* 39 (1990): pp. 965-1023.

⁹⁷ See Bently and Biron, ‘Discontinuities’, pp. 264-265, for a similar criticism applied to Dreyfuss’ ‘collaborative work’ proposal.

⁹⁸ Bently and Biron, *Ibid.* pp. 267-270; C. Fisk, ‘Credit where it’s due: The law and norms of attribution’, *Georgetown Law Journal* 95 (2007): pp. 49-118; G. Lastowka, ‘Digital Attribution: Copyright and the Right to

leaving untouched questions of ownership and infringement, thereby retaining the rationale of the idea/expression dichotomy to safeguard the public domain.

In addition to our suggestion that the contribution requirement be relaxed to enable contributions of ‘ideas’ to count for co-authorship in certain cases, we also argue that copyright could bring to the fore its *own* conception of the tests which institutional theories offer to narrow the number of authors—based on authority and intention—in the formulation of ‘co-authorship’. Again, this would be a means of allowing copyright to retain its own rationale for regulating authorship, whilst utilising tests that are conducive to the accommodation of artworld practices. What might this mean for the existing tests of co-authorship in the UK and US? First, emphasis on ‘authority’ and ‘intention’ as narrowing concepts might justify a move away from tests which, as Peter Jaszi argues, reveal an ‘individualistic bias’: for example tests which disaggregate contributions into works of individual authorship (for example, in the UK, the requirement that the contribution must be ‘not distinct’ and in the US that the contribution is ‘inseparable’ or ‘interdependent’), as well as the US requirement that each contribution be independently copyrightable.⁹⁹ Secondly, in the UK, this would support a shift away from interpreting the ‘collaboration’ limb as a test of ‘common design’ in terms of an agreed course of action,¹⁰⁰ and towards an emphasis on factors which were highlighted in *Hadley v. Kemp*: that is, ‘control’ as

Credit’, *Boston University Law Journal* 87 (2007): pp. 41-90; R. Tushnet, ‘Naming rights: attribution and law’, *Utah Law Review* 3 (2007): pp. 781-814.

⁹⁹ P. Jaszi, ‘On the Author effect’, pp. 51-56.

¹⁰⁰ See for example the dicta of Montague-Smith J in *Levy*: ‘I take it that, if two persons *agree to write a piece*, there being an original joint design and the cooperation of the two in carrying out that joint design, there can be no difficulty in saying that they are joint authors of the work’ (emphasis added, 530). Keating, J. also considered that ‘common design’ would be evidenced by the fact that authors had ‘agreed together to rearrange the plot’ (529).

an enquiry into the substance of the collaborative relations. In the UK, this would also validate the introduction of an intention requirement, which the Court of Appeal rejected in *Beckingham v. Hodgins*, providing the courts with a means of aligning co-authorship status with wider social expectations.

Rather than defining ‘authority’ and ‘intention’ by reference to ultimate decision-making control, as in the US, which might endorse existing social power-relations,¹⁰¹ our approach enables copyright to retain its own benchmarks by focusing on the substance of contributions. This is illustrated by *Hadley v. Kemp* where the ‘control’ exercised by Kemp meant the other band members did not make any contribution to the musical compositions. This does not prevent a finding of co-authorship where junior collaborators make substantive contributions to the work: in *Bamgboye v. Reed*, concerning a work to which both claimant and defendant contributed, the fact that the defendant had the ultimate say as to which of the claimant’s contributions were included or not in the musical work, was held to entitle him to a greater interest in the copyright (two-thirds). This did not preclude the claimant’s claim to co-authorship, albeit of a smaller share (one-third).¹⁰² Adopting such an approach, combined with a relaxation of the requirement of skill (or in the US expression) so as to encompass the contributors of ideas, provides a way for

¹⁰¹ For examples of critiques of the US intention test on this basis see Dreyfuss, ‘Collaborative Research’, p. 2000 and Mary LaFrance, ‘Authorship, Dominance and the Captive Collaborator: Preserving the Rights of Joint Authors’, *Emory Law Journal* 50 (2001): pp.193-263, 202. See also Roberta Rosenthal Kwall, ‘Author Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine’, *Southern California Law Review* 75 (2001): pp.1-64, p.52, 59, framing the criticism in terms of ‘narrative theory’, arguing that ‘intention’ marginalises the non-dominant author’s ‘narrative of creation’. She instead proposes an approach of ‘meaningful collaboration’ (p.64).

¹⁰² *Bamgboye*, 77, per H. Williamson QC.

copyright law to interpret its own notions of ‘authority’ and ‘intention’ in terms of the process of making the work, not social power, and thereby retain its own standards.

6 Conclusions

Institutional theories of art provide a powerful alternative to the idea of the solitary romantic author, which is so often presented as impeding copyright’s accommodation of the contributions of many. Indeed, by drawing on Dickie’s institutional theory, we have shown that it is possible to seek a definition of authorship that can be flexible enough to take into account the various ways in which art conventions about authorship might change over time. In this way, these theories have the potential to point copyright in a promising direction, as it faces the challenge of recognising multiple contributions. At the same time, too close a correlation between the two may cause difficulties, as institutional theories are too closely rooted in the artworld, which is narrower than the broader domain protected by copyright.

In this context, this paper has explored some ways copyright’s own concepts might be modified, so as to retain copyright’s own rationale in regulating authorship, while adopting an approach which draws on the strength of institutional theories: their flexibility in capturing changing artworld practices. The most significant disjuncture between institutional theories and copyright is the latter’s emphasis on the exercise of skill (UK) or expression (US) in producing a work. In this regard, we have argued that copyright should draw upon institutional theories when working through the difficult question of how, in certain cases, it might relax its notion of skill/expression to recognise contributions of ideas as contributions of authorship. This reform, combined with an approach which places copyright’s own concepts of ‘authority’ and ‘intention’

at the fore of the co-authorship test, provides a means for bringing conceptions of authorship in law and art closer together.

Finally, by placing institutional theories in the context of legal tests of joint authorship, we have uncovered and applied the various elements of authorship that they contain, and which have thus far received little theoretical attention in the philosophical literature. On the one hand, the three-pronged approach to authorship that we have uncovered within Dickie's account could interest philosophers of art regardless of its application of copyright law—indeed, as we have noted, the focus on authorship in this paper's discussion, as opposed to 'art' or the 'work', may take the philosophy of art in new directions. On the other hand, by bringing institutional theories into the context of copyright theory, we have illustrated some new and fruitful ways in which this approach to authorship has both practical and theoretical import. Indeed, bringing art-philosophical concepts into contact with specific facts of legal cases highlights the nuanced and flexible approach to authorship that might be needed if institutional theories are truly to represent artworld concepts and expectations.