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## ***Whistler's Symphony in White No 1 through the Lens of Copyright History***

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In February 2022, a new exhibition of the work of the painter and printmaker James MacNeill Whistler (1834-1903) opened at the Royal Academy of Arts, London: *Whistler's Woman in White: Joanna Hiffernan*. Curated by Ann Dumas of the Royal Academy and the renowned Whistler scholar Margaret MacDonald,<sup>1</sup> the exhibition brings together, for the first time, nearly all known images of a relatively unknown sitter - Joanna Hiffernan (1839-1886) - who was Whistler's principal model, muse and romantic partner in the 1860s.

The centre-piece of the exhibition is a full-length portrait of Hiffernan: Whistler's *Symphony in White No.1: The White Girl* (1861-3, National Gallery of Art, Washington, fig. 1). *Symphony in White No.1*, originally titled *The White Girl*,<sup>2</sup> was first exhibited in summer 1862 at the Berners Street Gallery, London, having been rejected by the Royal Academy of Arts' selection jury for the summer exhibition. The painting was controversial because it defied artistic conventions. While the full-length size invoked the grand-manner tradition of portraiture, suggesting a sitter of dignified status, Hiffernan was an unknown subject and Whistler's depiction of her – simply dressed in a white gown, barefoot, with loose flowing hair - was informal. The portrait's lack of pictorial narrative also unsettled a Victorian audience: Hiffernan gazes out at the viewer without expression. Without consulting Whistler, the Berners Street Gallery managers suggested a narrative for the painting: they advertised it as 'Whistler's extraordinary Picture: 'The Woman in White'', implying that the painting depicted the mysterious character Anne Catherick in Wilkie Collins' then popular sensation novel *The Woman in White*. This was a connection that Whistler publicly denied in July 1862 favouring a more abstract interpretation: 'my painting simply represents a girl dressed in white standing in front of a white curtain.'<sup>2</sup>

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<sup>1</sup> Amongst many other works, Margaret MacDonald is one of the authors of the catalogue raisonné for Whistler: A. McLaren Young, M. MacDonald, R. Spencer and H. Miles *The Paintings of James McNeill Whistler*, New Haven and London, 1980.

<sup>2</sup> Letter from Whistler to the editor, *The Athenaeum*, 5 July 1862 p.23. On the Royal Academy exhibition generally, see M. MacDonald, *The Woman in White: Joanna Hiffernan and James MacNeill Whistler*, New Haven and London, 2022. On the rejection by the Royal Academy and display at the Berners Gallery see further the following essays in the same volume: P. de Montfort, "'A Great Sensation": Women in White in Late Victorian Literature and Popular Culture' in MacDonald, *Ibid.*, pp.147-156, p.147; C. Brock, 'A Short History of

In this way, summer 1862 was, in the words of one five-star review of the current exhibition, a ‘revolutionary moment in art’<sup>3</sup> in the display of a painting that signified Whistler’s challenge to Victorian art conventions. Summer 1862 also saw the passage by Parliament of the Fine Arts Copyright Act 1862 which was, amongst other things, the first copyright Act to protect paintings (section 1) and also enabled penalties to be recovered for certain types of fraudulent acts relating to paintings (section 7).<sup>4</sup> As viewers came to see *The White Girl* at the Berners Street Gallery – which *The Athenaeum* described as ‘the most prominent’, ‘striking’ and ‘bizarre’ picture of some 200 exhibits in the exhibition<sup>5</sup> - important legal debates about art and copyright were taking place in Parliament.<sup>6</sup> In this article, I connect two strands of these legal debates, as developed further in the later nineteenth century, with aspects of the current Royal Academy exhibition *Whistler’s Woman in White*. First, I bring the exhibition’s focus on Hiffernan, in capturing her agency and in opening up the relation between Hiffernan and Whistler for re-interpretation, into conversation with the position of the sitter in copyright law, both as the subject of a portrait and as joint author of a painting with the painter. Secondly, I relate the exhibition’s account of the significance of titles to Whistler’s work to nineteenth century debates about art fraud: whether a change of a title of a painting, without the consent of the artist, was or should be an unauthorised alteration of a work prohibited by section 7 of the 1862 Act. Copyright history, I argue, is another lens through which the ambiguities and radicalism of Whistler’s art are revealed.

Before I turn to copyright history, what can be seen at the Royal Academy exhibition *Whistler’s Woman in White: Joanna Hiffernan?* Joanna Hiffernan, we learn from the exhibition, was a red-headed Irish girl, from a ‘desperately poor’ background, who met Whistler in London in

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the *Woman in White*’ in MacDonald, *Ibid*, pp.177-190, p.177; and G. Petri, ‘The “Symphonies in White”: Display, Sale and Reproduction’ in MacDonald, *Ibid*, pp.167-176, p.168

<sup>3</sup> J. Jones, ‘Whistler’s *Woman in White: Joanna Hiffernan*’ reviewed in *The Guardian*, 23 February 2022.

<sup>4</sup> 25 & 26 Vic. c.68. The full text of the Fine Arts Copyright Act 1862, and other primary sources on copyright history, can be found in the open access digital resource: L. Bently and M. Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>5</sup> *The Athenaeum*, 28 June 1862, p.859, discussed in de Montfort, “‘A very Great Sensation’”, *Ibid.*, p.148. The comments in *The Athenaeum* are understood to be those of the pre-Raphaelite critic Frederic George Stephens.

<sup>6</sup> On nineteenth century debates on artistic copyright see E. Cooper, *Art and Modern Copyright: The Contested Image*, Cambridge, 2018 and E. Cooper, ‘The Visual Turn in Copyright History and its Relevance to Art History’, *The Burlington Magazine*, 2021, Vol. 163, p.p.1148-1157.

1860 when she was 17 years old.<sup>7</sup> Hiffernan and Whistler ‘remained an integral part of each other’s lives up until her death in 1886.’<sup>8</sup> The exhibition opens with a room exploring London in the 1860s, including Whistler’s *Wapping* (1860-4, National Gallery of Art, Washington) with Hiffernan in the foreground, but the viewer is at all times aware of *Symphony in White No.1* (originally titled *The White Girl*) in the next room that is displayed alongside Whistler’s two further *Symphonies in White* that also depict Hiffernan: *Symphony in White No.2* (1864, Tate, London, fig. 2) originally entitled *The Little White Girl*, exhibited at the Royal Academy in 1865, and *Symphony in White No.3* (1865-7, The Barber Institute of Fine Arts, The University of Birmingham, fig. 3) exhibited at the Royal Academy in 1867 (after which the earlier two paintings - *The White Girl* and *The Little White Girl* – were renamed by Whistler as *Symphonies No.1 and No.2*). Also on display in the exhibition are Whistler’s prints of Hiffernan, both dry-points and etchings, including six impressions of *Weary* (1863, including fig. 4, drypoint, state iv/vi, The Hunterian, Glasgow) that capture with great subtlety in monochrome the texture of Hiffernan’s unruly hair.

The influence of Asian art, evident in *Purple and Rose: The Lange Leizen of the Six Marks* (1864, Philadelphia Museum of Art), is also explored in the exhibition, in a room which also includes a number of landscapes by the Japanese artist Utagawa Hiroshige (1787-1858). A further room is dedicated to works painted when Whistler and Hiffernan met Gustave Courbet (1819-1877) at the sea-side town of Trouville, Normandy in summer 1866 including three of the four versions of Hiffernan painted by Courbet, exhibited on a single wall (*Jo, the Beautiful Irish Girl*, 1886/1868, Nationalmuseum, Stockholm; *Jo, the Irish Woman*, c.1866/1868, The Nelson-Atkins Museum of Art, Kansas City; *Jo, la belle Irlandaise*, 1865-1866, The Metropolitan Museum of Art). The exhibition closes reflecting on the legacy of *Symphony No. 1*: the closing room provides a rare occasion to view together examples of later works depicting women using a white-on-white palette, which are on loan from galleries all over the world including *A Somnambulist* by John Everett Millais (1871, Delaware Art Museum, Wilmington), *The Bride* by Anders Zorn (1886, Nationalmuseum, Stockholm), *Portrait of Madeleine Mabile* by Fernand Khnopff (1888, Carnegie Museum of Art, Pittsburgh), *Portrait of Bessie (Miss Elizabeth Newton)* by Albert Herter (1892, High Museum of Art, Atlanta),

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<sup>7</sup> See further, M. MacDonald, ‘Joanna Hiffernan and James Whistler: An Artistic Partnership’ in *The Woman in White*, *ibid*, pp.15-31, p.15.

<sup>8</sup> M. MacDonald, ‘Whistler and the Woman in White’ in *The Woman in White*, *ibid*, p.p.11-13, p.12.

*Portrait of Hermine Gallia* by Gustav Klimt (1904, The National Gallery London) and *Symphonie en blanc* by Andrée Karpelès (1908, Musée d'Arts de Nantes).

In *Whistler's Woman in White*, the curators open up art to interdisciplinary engagement by asking open and contextual questions, rather than a narrower focus on the relation between artist and work. One aspect of this, is the curators' innovative decision to foreground and reveal the agency of an artist's model, adopting a 'more humanistic understanding of how these exquisite paintings, drawing and prints were made.'<sup>9</sup> Rather than anonymous and passive, Hiffernan is described as having been in a 'complex personal and artistic partnership' with Whistler.<sup>10</sup> As the exhibition catalogue explains: 'A portrait does not just happen. It results from a collaboration between artist and model or sitter'.<sup>11</sup> By way of example: 'The artist, sometimes in discussion with the model must decide on a composition including the dress... as well as pose and practicalities, such as the model's ability to strike and maintain a particular attitude.'<sup>12</sup> The exhibition, then, is 'the first to fully acknowledge the role Hiffernan played in Whistler's career and the first to consider their creations as collaborations.'<sup>13</sup> The exhibition also captures something of Hiffernan's personality in a letter from Courbet reminiscing about the Trouville meeting:

Do you remember Trouville and Jo who played the clown to amuse us. In the evening she sang Irish songs so well because she had the spirit and distinction of art.<sup>14</sup>

Further, Hiffernan is revealed to have been active in running Whistler's studio and two legal documents signed by Whistler in 1866 – a will in Hiffernan's favour and a power of attorney empowering her to manage Whistler's affairs in his absence - are also included in the exhibition.<sup>15</sup>

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<sup>9</sup> K. Feldman and R. Salter, 'Foreward' in MacDonald, *Whistler's Woman in White*, Ibid. p.7.

<sup>10</sup> M. MacDonald, A. Dumas and C. Brock, 'Preface' in MacDonald, *Whistler's Woman in White*, Ibid. p.p.8-9, p. 8 and M. MacDonald, J. Dunn and J. Townsend, 'Painting Joanna Hiffernan' in MacDonald, *The Woman in White*, Ibid. pp.33-45, p.33.

<sup>11</sup> MacDonald, Dunn and Townsend, 'Painting Joanna Hiffernan', Ibid., p.33

<sup>12</sup> Ibid.

<sup>13</sup> Feldman and Salter, 'Foreward', Ibid. p.7.

<sup>14</sup> Letter Courbet to Whistler, 14 February 1877, further discussed in MacDonald, 'Joanna Hiffernan and James Whistler' in MacDonald, *The Woman in White*, p.p. 15-31, p.25.

<sup>15</sup> These documents, from the Pennell-Whistler Collection, Library of Congress, Washington, are reproduced in an Appendix of Archival Materials in the exhibition catalogue: MacDonald, *The Woman in White*, pp.198-9.

As the Preface to the exhibition catalogue acknowledges, recovering the agency of female models in this way is significant for art history: this exhibition, taken together with two other recent exhibitions exploring ‘the contributions of models to late nineteenth century art’,<sup>16</sup> challenges the traditional centrality to art history of ‘male artists’ reputations, created by male patrons and critics’<sup>17</sup> and instead invites more ‘balanced interpretations of the varied relationships that existed between these women and their more celebrated male associates.’<sup>18</sup> What perspectives on the relationship between sitter and painter can copyright history provide?

Sitters complicated nineteenth century debates about copyright in portrait paintings as subjects depicted in a painting.<sup>19</sup> Counter to the usual legal narrative today, that the UK (in contrast to the law in France, Germany and USA) has protected a person’s image or identity only in recent times,<sup>20</sup> there were statements in late nineteenth and early twentieth century copyright debates that ‘a man has a right to his own identity either in a picture or otherwise’<sup>21</sup> or that ‘a man consenting to sit for his portrait is at least proprietor of his own visage or ought to be’.<sup>22</sup> The second proviso to section 1 of the 1862 Act, stated that the commissioner of a painting would own copyright, and this proviso was introduced after Lord Overstone in the House of Lords debates in 1862 drew attention to the position where ‘a man engaged an artist to paint for him a portrait of himself or a member of his family’.<sup>23</sup> In the copyright debates about portrait paintings later in the nineteenth century, the commissioner was assumed to be ‘a member of the family’ of the person depicted, ‘or... someone interested to maintain the privacy’ or ‘sentimental value’ of the picture.<sup>24</sup>

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<sup>16</sup> MacDonald, Dumas and Brock, ‘Preface’, p.p.8-9, p.8 referring to *Posing Modernity: The Black Model from Manet and Matisse to Today* (2018, Wallach Art Gallery, New York and Musée D’Orsay, Paris) and *Pre-Raphaelite Sisters* (2019, National Portrait Gallery, London).

<sup>17</sup> J. Marsh, ‘Introduction: The Sisters and the Movement’ in J. Marsh, *Pre-Raphaelite Sisters*, London, 2019, pp.7-8, p.8.

<sup>18</sup> MacDonald, Dumas and Brock, ‘Preface’, *Ibid.* p.8.

<sup>19</sup> See further Cooper *Art and Modern Copyright*, Chapter 5, pp.163-167.

<sup>20</sup> *Ibid.* pp.171-5.

<sup>21</sup> Sir Coutts Lindsay, speaking to a meeting of artists at the Grosvenor Gallery in 1879: ‘Copyright in Pictures’, *Photographic News*, 7 February 1879, p.66.

<sup>22</sup> Evidence of Arthur Lucas, Report on the Select Committee on the Copyright Bill [H.L.] together with the Proceedings of the Committee, Minutes of Evidence and Appendix; P.P. 1900 (193) (hereafter ‘1900 Report’), Q.543-5.

<sup>23</sup> Par. Deb., vol. 166, ser. 3 col. 2014, 22 May 1862, Lord Overstone. The second proviso to section 1 applied, in the case of paintings, to paintings ‘made or executed for or on behalf of any other person for good or a valuable consideration’.

<sup>24</sup> Evidence of Arthur Lucas, 1900 Report, Q. 545 and 559.

In the intense debate of how copyright should be reformed in the late nineteenth century, portrait painters sought to narrow the circumstances in which their claim to copyright would be fettered to protect the sitter's interests: portrait painters proposed that they should own copyright in all cases, entitling the commissioner only to a veto on the reproduction of commissioned portraits on the basis that there were 'family and personal considerations' to paintings that were 'a matter of private or domestic interest'.<sup>25</sup> To support their position – that protection for sitters should be limited to private portraits - portrait painters drew on the public importance of the grand manner tradition of portrait painting; to treat *all* portraits differently to other paintings under copyright law would amount to an unwarranted 'stigma' on the portrait painter and it was, argued Henry Tanworth Wells RA on behalf of the Royal Academy of Arts, giving evidence to a House of Lords' Select Committee on copyright:

an odd thing in an English Bill to put this stigma and injurious treatment upon portraitists when we cannot but know the place that English portraiture has taken in the world... apart from the great landscapes, if we were asked what works we would send to keep company with the artistic works of all time, we should send our great portraits. If I may give a modern instance, let me take Sir John Millais'... *Mr Gladstone*... Or take the great Reynolds pictures like that of *Mrs Siddons* or that of *Lord Heathfield*, which is one of the finest portraits ever painted showing evidence of the greatest artistic power that you can find in English work.<sup>26</sup>

Accordingly, the copyright debates are another lens through which we can see the ambiguities of Whistler's art. The copyright debates about portraits of the late nineteenth century were premised on there being a distinction between private portraits where reproduction would be controlled by the commissioner (as a relative or personal friend of the sitter) and public portraits where the painter would own copyright outright at first instance, with no fetter on reproduction to protect the sitter.<sup>27</sup> Whistler's *Symphony in White No.1* sits uneasily with both of these categories: the portrait is both private – in terms of Hiffernan's lack of public status, the informality of the depiction (barefoot, simple attire and un-styled flowing hair) and her personal relationship to Whistler – *and* public – as regards the scale on which it was painted

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<sup>25</sup> Evidence of the barrister Thomas E. Scrutton, on behalf of the Royal Academy of Arts, to House of Lords' Select Committee in 1900, 1900 Report, Q.823-4 and Q.1153.

<sup>26</sup> Report of the Select Committee on the Copyright Bill (H.L.) and the Copyright (Amendment) Bill (H.L.); P.P. 1898 (189), hereafter '1898 Report', at Q.2893 and Q.2982.

<sup>27</sup> Cooper, *Art and Modern Copyright*, p.164-5.

and the intention of public exhibition. Whistler is both entitled to copyright at first instance (as there was no commission), yet the legal documents concluded in 1866 (the will and power of attorney in Hiffernan's favour) indicated Whistler's intention that Hiffernan was, after his death and in his absence, to exercise control over his affairs, which would include control over the reproduction of her own image (to the extent that copyright had not been transferred by Whistler to a third party, and had not lapsed due to lack of written reservation on first sale).<sup>28</sup>

Interestingly, one aspect of the relation between sitter and painter that was not considered in late nineteenth century copyright debates, was whether a sitter might be a joint author of a painting with the painter. Indeed, unlike nineteenth century debates about literary and dramatic copyright, there was an absence of a discussion more generally about joint authorship of a painting, and this is particularly notable in debates of 1899 and 1900, in which artistic copyright was considered alongside literary copyright by the same parliamentary Select Committees.<sup>29</sup> Further unlike the nineteenth century statutes protecting literary and dramatic works, there was no language in the 1862 Act that might support a finding of joint authorship, a matter which was noted by two Court of Appeal judges in *Nottage v Jackson* (1882-83) (a case about authorship of a *carte de visite* photograph, photographs also being protected by the 1862 Act).<sup>30</sup>

The most likely explanation for the absence of any nineteenth century discussion of co-authorship of a painting was the difficult issues this might raise about the contributions of painters' studio assistants at a time when a painting was valued 'according to the hand that

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<sup>28</sup> In fact, Hiffernan died young in 1886, and before Whistler. On the importance of reserving copyright on first sale see Cooper, 'The Visual Turn in Copyright History', p.1150 and Cooper, *Art and Modern Copyright*, Chapter 4, p.130.

<sup>29</sup> E. Cooper, 'Joint Authorship in Comparative Perspective: *Levy v Rutley* and Divergence between the UK and USA', 2015, 62(2) *Journal of the Copyright Society of the USA*, 245-276, 266.

<sup>30</sup> *Ibid*, 254, fn.33 and fn. 84, discussing the Dramatic Literary Property Act 1833 (s.1) which referred to the life of 'the author or authors or survivor of the authors' in calculating the term of copyright, and the Literary Copyright Act 1842 (s.2) which contained an interpretation clause, that a reference to a person in the singular would denote the plural. See, for example, the dicta of Brett MR in *Nottage v Jackson* (1882-83) LR 11 QBD 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 the one of them, or for the life of the longest liver or what?'. As the term of protection for a painting was the same as a photograph (the life of the author plus 7 years) the same reasoning would apply to copyright protection for paintings. See also the comments of Bowen LJ also in *Nottage* at 637-8: 'the person who drew this section evidently thought that in ninety nine cases out of 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.' Bowen LJ was here referring to section 4 of the 1862 Act, which required the name of 'the author of the work' to be recorded on the copyright register and applied also to paintings and drawings as well as photographs.



painted it.’<sup>31</sup> The nineteenth century position contrasts to today, where joint authorship clearly does apply to all copyright works, including paintings,<sup>32</sup> and following the UK Court of Appeal ruling in *Kogan v. Martin* (2019), concerning joint authorship of the screenplay for the film *Florence Foster Jenkins* (starring Meryl Streep and Hugh Grant), the law now adopts a far more inclusive and pro-collaboration approach to joint authorship that is, amongst other things, far more generous to minor contributors where there is an informal relation between the parties.<sup>33</sup> In *Kogan*, the successful joint authorship claim was brought by an opera singer, who was in a romantic relationship with the screen-writer credited as the sole author of the screenplay and, after a re-trial following the Court of Appeal ruling, the Intellectual Property Enterprise Court awarded her a 20% share of the copyright in the screenplay.<sup>34</sup> There is, of course, no detailed account of the interaction between Whistler and Hiffernan as regards the creative process, unlike, for example, the actress Sarah Siddons (1755-1833), who in her autobiography claimed to have both determined her dramatic pose in Joshua Reynolds’ portrait *Sarah (Kemble) Siddons Tragic Muse* (1783-4, The Huntington Library) and to have ‘intervened’ to stop Reynolds from ‘applying a wash of colour to her face and neck’.<sup>35</sup>

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<sup>31</sup> E. Cooper, ‘Joint Authorship in Comparative Perspective’, 2015, 266. The phrase ‘according to the hand that painted it’, is from D.R. Blaine, *On the Laws of Artistic Copyright and their Defects*, London, 1853, p.28. The joint authorship status of pupils or assistants arose in one example given by the barrister Edward Cutler QC, in discussing co-authorship provisions in literary and musical copyright before the 1898 House of Lords Select Committee on Copyright: in the case of the Twelfth Mass by Mozart, ‘where he wrote the Credo, and the rest being done by his pupils’, Cutler QC was of the view that it would be a case of joint authorship on the part of Mozart and his pupils. See 1898 Report, Q.1380.

<sup>32</sup> Section 10(1) of the Copyright Designs and Patents Act 1988 defines 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 distinct from that of the other author or authors.’ See also D. Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work*, Cambridge, 2019.

<sup>33</sup> *Kogan v Martin* [2019] EWCA Civ 1645 discussed in D. Simone, ‘*Kogan v Martin*: A New Framework for Joint Authorship in Copyright Law’ (2020) 83(4) *Modern Law Review* 877-892. In particular, the Court of Appeal ruling makes clear that the status accorded to contributors in the relevant creative field is irrelevant, and the Court of Appeal warns against too much focus on who puts the pen to paper. Also, the fact that one contributor had the ‘final say’ does not ‘eclipse’ the contributions of the other minor contributors. It is open to a court to grant a minor joint author, a smaller share of the copyright, so the relative significance of the parties’ contributions is relevant to apportioning each co-author’s entitlement. See further Simone, *Kogan v Martin*, p.p. 884, 887, 891, and 890.

<sup>34</sup> *Martin v Kogan* [2021] EWHC 24(Ch).

<sup>35</sup> See R. Asleson, *A Passion for Performance: Sarah Siddons and Her Portraits*, 1999, Los Angeles, pp. 46-7 and p.109. In more recent times, in a case about photography, creative choices in posing were relevant to the originality of a portrait photograph under the intellectual creation test set down in *Infopaq: Infopaq v. Danske Dagblades C5-08* [2009] ECR I-6569 (ECJ 4<sup>th</sup> Chamber) and *Eva Maria Painer v. Standard Verlags*, C-145/10 [2012] ECDR (6) 89 (ECJ) at para. 87-89. In *Cala Homes v. Alfred McAlpine* [1995] FSR 818, concerning architectural drawings, Laddie J considered that general instructions such as ‘‘paint me a yellow flower’ would not make the person who gives those instructions a joint author of the resultant painting’, but more detailed instructions could found a claim to joint authorship (at 834). As Laddie J explained, in a passage quoted with approval by the Court of Appeal in *Kogan*: ‘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

However, in opening up the relation between Hiffernan and Whistler for re-interpretation, and referring to Hiffernan as a creative collaborator, *Whistler's Woman in White: Joanna Hiffernan* well illustrates the potential for copyright's joint authorship doctrine, as interpreted in *Kogan*, to counter traditional power relations in the visual arts: today, while a court may grant a minor joint author a smaller share of the copyright, *all* copyright owners must consent to the exercise of the exclusive rights comprising copyright (e.g. reproduction) or to an assignment (i.e. the transfer) of copyright to a third party.<sup>36</sup>

*Whistler's Woman in White* also reveals the significance of the titles of paintings in the nineteenth century and this may cast new light on how we understand another aspect of the 1862 Act: section 7, that empowered any person aggrieved, such as a painter, to bring an action to recover penalties for certain statutory art frauds, and this included acts relating to a painting that had been 'altered' without the authorisation of the author.<sup>37</sup> In Parliament, this section was understood to concern protection for the author's reputation<sup>38</sup> and in debates later in the nineteenth century, it was contemplated that changing a title, without an author's consent, might amount, in certain cases, to changing a work. As the painter Briton Rivière expressed to the House of Lords Select Committee on copyright in 1898:

an artist, as a general rule, uses very great care in the titles he gives to his works; he tries to express exactly as much as is necessary to lead the spectator to see the particular part of the story which the work itself tells... If a work falls into the hands of someone who is trying to popularise it or is not very sensitive in his appreciation of the story, he

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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.' *Cala Homes* at 835, approved by the Court of Appeal in *Kogan* at para. 38

<sup>36</sup> Copyright Designs and Patents Act 1988 s.16(2) and s.173(2).

<sup>37</sup> Fine Arts Copyright Act 1862, section 7 para 4, which applied to paintings, drawings or photographs made either before or after the passage of the 1862 Act. It prevented any person from, 'during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker.' Any 'person aggrieved' could recover a statutory penalty per fraudulent act (of ten pounds or not more than double the price of the altered works or their copies) and obtain forfeiture of the altered works and the copies. Penalties could only be recovered where the 'author or maker' had 'sold or otherwise parted with the possession of such work' and an 'alteration shall afterwards be made... by any other person, by addition or otherwise'. Here, Whistler had parted with the possession of the work for the purposes of exhibition.

<sup>38</sup> See the comments of the Lord Chancellor Lord Westbury in debating the Fine Arts Copyright Bill: Hansard, 3<sup>rd</sup> Ser. Vol. 166, col. 2019, 22 May 1862.

will often, give a bent to the work, by a change of name, which the artist never intended. I submit that changes his work...<sup>39</sup>

Of course, Rivière was here referring to the implications of changing a title to changing the work's 'story' or narrative and an example of such a change might be the reproduction by Lever Bros in 1889, of William Powell Frith's *The New Frock* (1889, Lady Lever Art Gallery) depicting a girl holding her dress, under the slogan *So Clean* (as an advertisement for soap).<sup>40</sup> In Whistler's art however, a title – such as *Symphony in White* – signified a more fundamental rejection of the Victorian art establishment's interest in pictorial narrative and this would be undermined if his work was re-titled after a character from a popular novel such as *The Woman in White* after Wilkie Collins' novel. Indeed, the painting would have been understood differently, and as Margaret MacDonald notes in the exhibition catalogue, might have 'produced a totally different set of reactions' had it been entitled *Chastity* or *The Bride*, which suggested narrative.<sup>41</sup>

Whistler further elaborated these ideas in 1878, referring to his *Nocturne: Grey and Gold – Chelsea Snow* (1878, Fogg Art Museum, Harvard, fig. 5 – not on display in the current exhibition): some had suggested that *Nocturne: Grey and Gold* should be titled 'Trotty Veck', after the protagonist in Charles Dickens' novel *The Chimes*, so it could be sold 'for a round harmony of golden guineas' as 'without baptism, there is no... market!' Instead, Whistler asserted that 'I care nothing for the past, present, or future of the black figure'; a picture 'should have its own merit' independent of 'dramatic, or legendary or local interest':

As music is the poetry of sound, so is painting the poetry of sight, and the subject-matter has nothing to do with harmony of sound or of colour.<sup>42</sup>

For Whistler, then, art was a purely aesthetic experience. In the current exhibition, these conflicting ideas about art are visually communicated to the viewer by the juxtaposition of the abstract qualities of the full-length *Symphony in White No.1*, to a life-sized theatre poster (in the adjacent room) for a dramatic production of Wilkie Collins' novel at the Olympic Theatre:

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<sup>39</sup> 1898 Report, Q.3238.

<sup>40</sup> For more details, see Cooper, *Art and Modern Copyright*, pp.245-246.

<sup>41</sup> MacDonald, 'Whistler and the Woman in White', *Ibid.* p.13.

<sup>42</sup> McLaren Young et al, *The Paintings of James McNeill Whistler*, p.101 quoting from Whistler, 'The Red Rag', *World*, 22 May 1878.

*The Woman in White* by Frederick Walker (Tate, London, 1871, fig. 6). In bringing the current exhibition into conversation with copyright history, we realise the significance of this ‘revolutionary moment’ in art, not just to art history, but also to legal history, in raising the question of whether a change in title might also alter a work as a matter of law, in changing the very meaning of art that a work signified.

*Whistler’s Woman in White: Joanna Hiffernan* is at the Royal Academy of Arts, London until 22 May 2022 and at the National Gallery of Art, Washington from 3 July to 10 October 2022.