

1 Copyright Law and Collective Authorship

1.1 Introduction

Large-scale collaboration is becoming increasingly widespread and is now a prominent feature of the economic and cultural landscape.¹ This is due, in large part, to advances in digital and communications technology which have made it easier than ever before for people to work together. The most iconic symbol of modern collaboration, Wikipedia, averages 515 new articles per day.² Thousands of contributors collaborate in adding to, editing and contesting Wikipedia's content – in June 2018, for example, each article on Wikipedia had been edited, on average, 98 times.³ Contemporary examples of large-scale collaboration are numerous⁴ (consider: open source software, 'citizen science' projects, and the crowdsourcing of architectural designs,⁵ films,⁶ books,⁷

¹ D Tapscott and A Williams, *Wikinomics: How Mass Collaboration Changes Everything* (Atlantic Books 2008); K Sawyer, *Group Genius: The Creative Power of Collaboration* (Basic Books 2007) 15; K Sawyer, *Explaining Creativity: The Science of Human Innovation* (OUP 2nd ed 2012) 231–233; MM Biro, 'Smart Leaders and the Power of Collaboration', *Forbes* (3 March 2013) <www.forbes.com/sites/meghanbiro/2013/03/03/smart-leaders-and-the-power-of-collaboration>; 'The Collaborative Economy: Impact and Potential of Collaborative Internet and Additive Manufacturing' (Science and Technology Options Assessment Panel Study, European Parliament, PE 547.425, Dec 2015) <[www.europarl.europa.eu/thinktank/fr/document.html?reference=EPRS_STU\(2015\)547425](http://www.europarl.europa.eu/thinktank/fr/document.html?reference=EPRS_STU(2015)547425)>. All websites referred to in this book were last accessed on 17 August 2018 unless otherwise stated.

² <en.wikipedia.org/wiki/Wikipedia:Statistics> (considering only the English language version of Wikipedia).

³ <stats.wikimedia.org/EN/Tables/WikipediaEN.htm>. At the time of writing, 120,446 contributors had performed an edit within the previous 30 days: <en.wikipedia.org/wiki/Wikipedia:Wikipedians>.

⁴ There are countless tools that facilitate such collaboration, from the wiki software that Wikipedia uses to a more generic tool, such as Amazon's Mechanical Turk, which provides a platform for the distribution of small tasks to many workers at low prices: <www.mturk.com/mturk/welcome>.

⁵ For example: <www.arcbazar.com>. ⁶ For example: <www.userfarm.com/en>.

⁷ Such as the cookbook <www.gooseberrypatch.com> or the novel 'One Million Penguins' described at <fanfiction.wikia.com/wiki/A_Million_Penguins>.

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advertising,⁸ and 3D printer product designs, to name just a few). Indeed, some suggest that collaborative efforts may now have become the paradigmatic form of creativity.⁹ Although collaborative creativity is by no means new, large-scale collaboration, or collective authorship, creates unique challenges (as well as opportunities).¹⁰ This book is concerned with the challenges that collective authorship poses to copyright law.¹¹

In today's information economy, intellectual property law is of fundamental importance. It provides the main set of rules governing the allocation of property-style rights in a broad array of intellectual products. In this context, the question of how to determine the authorship, and hence the first ownership of copyright, in works created by groups of people requires urgent attention. Yet, copyright law does not provide a coherent or consistent answer to this question. In the UK there have been no cases explicitly considering the authorship of works created by large numbers of potential authors.¹² The copyright case law on joint authorship is confined to situations involving disputes between only a few contributors, and scholars have observed that the reasoning adopted in many such cases lacks the analytical clarity necessary to provide general guidance.¹³ This is the first book to engage with the problem of determining the authorship of works of collective authorship from a copyright law point of view.

⁸ For example: <www.victorsandspoils.com>.

⁹ A Bell and G Parchomovsky, 'Copyright Trust' (2015) 100 Cornell LRev 1015.

¹⁰ In their best-selling book, *Wikinomics*, Tapscott and Williams (n1) 31–33 make the bold claim that 'mass collaboration changes everything'. They identify a fundamental shift in the way that work and innovation are conducted, which they foresee will ultimately transform the current economic system – arguing that businesses must 'collaborate or perish'.

¹¹ Throughout the book, a work of 'collective authorship' refers to any work that is created by many contributors. It is not intended to be confined by the meaning of 'collective work' in s178 of the Copyright Designs and Patents Act 1988 ('CDPA'), although most works of collective authorship are likely to fall within this definition. 'Collective' is preferred to 'collaborative' to avoid confusion when considering which contributors might be joint authors of such a work for copyright law's purposes (given that collaboration is a requirement for joint authorship). The term 'group authorship' has been avoided, as it might seem to imply cohesion between contributors, which is unnecessarily under-inclusive.

¹² There have been a number of cases considering the joint authorship of film in the USA: 2.5.3, 6.2.5. The question has also arisen in Australia, for example, *Telstra v Phone Directories* [2010] FCA 44, [2010] FCAFC 149 (joint authorship of a telephone directory, largely compiled using computer software with some human input not established).

¹³ L Zemer, 'Contribution and Collaborations in Joint Authorship: Too Many Misconceptions' (2006) 1(4) JIPLP 283; A Stokes, 'Authorship, Collaboration and Copyright a View from the UK' (2002) Entertainment LRev 121.

The book offers a comprehensive analysis of copyright law's concept of authorship and, in particular, joint authorship. This analysis provides the doctrinal foundation upon which the book's general argument – that copyright law's joint authorship test needs to be recalibrated for the digital age – is constructed. In addressing the question of how copyright law ought to determine the authorship of collaborative work, the book primarily follows an inductive approach. Four cases studies, broadly representative of the phenomenon of collective authorship, are considered in detail. Each of these cases studies break new ground in exploring the significance for copyright law of the mismatch between creative norms in environments in which collaboration flourishes (Science, Film, Indigenous art, Wikipedia) and copyright law's rules on authorship. The book, thus, employs insights from the ways in which collaborators understand and regulate issues of authorship themselves to assess copyright law's approach to joint authorship critically.

This book is written during a period when copyright law appears to be suffering from a crisis of legitimacy.¹⁴ In recent decades, the successful lobbying of rights holders and the internationalisation of copyright law has led to the expansion of copyright protection.¹⁵ This has resulted in a copyright regime which has often been accused of being geared more towards protecting the corporations involved in producing and distributing creative works, than it is towards rewarding and incentivising authors.¹⁶ At the same time, non-compliance with copyright law is becoming increasingly widespread, and in some quarters, normalised (viz. the anti-copyright law platform of the Pirate Party, the 'Guerrilla

¹⁴ E.g. S Dusollier, 'Open Source and Copyleft: Authorship Reconsidered?' (2003) 26 Columbia J of L and Arts 281: 'The institution of copyright is in ill repute these days'; N Elkin-Koren, 'Tailoring Copyright to Social Production' (2011) 12(1) Theoretical Inquiries in L 309, 310: '... a regime in crisis'.

¹⁵ The entertainment, software and database industries have been particularly important drivers of copyright expansionism. Acknowledging the influence of 'lobbysmics' on UK copyright policy: I Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth for HMG' (2011) available at: <www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth> p 18.

¹⁶ Whilst the subject-matter and scope of exclusive rights has been broadened, there appears to have been relatively little corresponding effort to ensure that actual creators benefit. Creators, dependent on intermediaries to fund/disseminate their work, often make little money from their creations and any control which they might exercise over them is likely to be short-lived. Despite the enormous value that copyright industries add to the economy, most creators cannot earn a living from their creative work: J Litman, 'Real Copyright Reform' (2010) 96(1) Iowa LRev 1; J Ginsburg, 'How Copyright Got a Bad Name For Itself' (2002) 26(1) Columbia J of L and the Arts 61; R Giblin and K Weatherall, 'A Collection of Impossible Ideas' in R Giblin and K Weatherall (eds) *What if We could Reimagine Copyright?* (ANU Press, 2017), 316.

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open access movement',¹⁷ etc.). The Creative Commons and the Free Software movements, which cast themselves as an 'ethical alternative' to copyright, have also been gaining popularity. As copyright law is frequently accused of being out of touch with modern creative realities, non-compliance may appear unsurprising.¹⁸ Indeed, psychologists have demonstrated that people are more likely to obey laws they consider to be legitimate and fair.¹⁹ In light of this legitimacy crisis, a search for the best way to apply the joint authorship test ought to begin with the reality of creativity.²⁰ As Jane Ginsburg argued over a decade ago, refocusing on authors and the act of creating may help restore a proper perspective on copyright law.²¹ In this spirit, this book focuses on the dynamics of creativity in four instances of collective authorship.

The figure of the author is at the heart of copyright's sense of its own identity and purpose.²² Although 'authorship' bears significant doctrinal and normative weight, as a concept, it remains extremely vague and open-textured. Despite increasing interest in legal scholarly

¹⁷ B Bodó, 'Pirates in the Library – An Inquiry into the Guerrilla Open Access Movement' (8th Annual Workshop of the International Society for the History and Theory of Intellectual Property, CREATE, University of Glasgow, UK, 6–8 July 2016) available at <ssrn.com/abstract=2816925>.

¹⁸ T Tyler, 'Compliance with Intellectual Property Law: A Psychological Perspective' (1996) 29 *International L and Politics* 219, 227 arguing that people are more likely to obey a law that reflects public morality. On the link between the perceived lack of transparency with respect to the beneficiaries of intellectual property protection and this crisis of legitimacy: C Geiger, 'The Social Function of Intellectual Property Rights' in GB Dinwoodie (ed) *Intellectual Property Law: Methods and Perspectives* (Edward Elgar 2013) 153, 155.

¹⁹ For example, the important work of T Tyler, *Why People Obey the Law* (Princeton UP 2006) and *ibid.* Of course the allocation of copyright is only one part of this complex question. The scope of copyright protection and its limitations also affect perceptions of its fairness; and there is no doubt that the ease of infringement coupled with the challenges of enforcement greatly facilitate non-compliance.

²⁰ RR Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the US* (Stanford UP 2009) 5 draws upon Tyler's work to argue that laws governing authors' rights are likely to be ignored if they fail to embrace widely shared norms regarding authorship. Similarly, J Ginsburg, 'The Author's Place in the Future of Copyright' in R Okediji (ed) *Copyright in an Age of Exceptions and Limitations* (CUP, 2015) 60, 62: 'The disappearance of the author moreover justifies disrespect for copyright—after all, those downloading teenagers aren't ripping off the authors and performers, the major record companies have already done that'.

²¹ J Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52 *De Paul L Rev* 1063, 1071; also L Bently, 'R v Author: From Death Penalty to Community Service' (2008) 32(1) *Columbia J of L & the Arts* 1.

²² The protection, reward and incentivisation of creators has always been at the heart of copyright law, notwithstanding the fact that sometimes it has been used to protect against unfair competition (2.1, n 34) or has been seen to work to the benefit of distributors and publishers more than creators.

literature in recent times, authorship remains very under-theorised.²³ In the case law its meaning is often treated as self-evident. Such vagueness may have been thought a rhetorical asset, as strategic ambiguity permits copyright law to serve competing regulatory purposes simultaneously.²⁴ Since the birth of copyright law, authorship has been a hotly contested issue, as stake holders battle to define the beneficiaries and reach of copyright protection.²⁵ (The so-called ‘monkey selfie’ dispute is a recent example that has received media attention.²⁶) Legal scholarship’s relative historical neglect of the bounds of authorship might be attributed to a reluctance to open this ‘can of worms’.²⁷

Now is the right time to start prising the can of worms open for at least two reasons. First, part of the response to copyright’s crisis of legitimacy ought to be realignment with its *raison d’être*: the encouragement of authorship and the protection of authors. Second, changes to the creative landscape facilitated by digital technology mean that courts are increasingly likely to be faced with disputes that require definition of the outer

²³ Much theoretical scholarship has focused upon the philosophical underpinnings of copyright law, assigning authorship an instrumental role according to the scholars’ preferred view. Ginsburg (n 21) provides a notable exception. Recently, there has been more interest in authorship. In Europe, for example: M van Echoud (ed) *The Work of Authorship* (Amsterdam UP, 2014); Bently (n21). In the USA following *Aalmuhammed v Lee* 202 F3d 1227 (9th Cir, 2000) and *Garcia v Google* 743 F3d 1258 (9th Cir, 2014), 786 F3d 733 (9th Cir, 2015), for example: C Buccafusco, ‘A Theory of Copyright Authorship’ (2016) 102 Virginia LRev 1229; J Tehranian ‘Sex, Drones & Videotape: Rethinking Copyright’s Authorship-Fixation Conflation in the Age of Performance’ (2017) 68 Hastings LJ 1319; S Balganes, ‘Causing Copyright’ (2017) 117(1) Columbia LRev 1, 5 n17 referring to much of this scholarship. In Australia, following *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, (2009) 239 CLR 458 and *Telstra v Phone Directories* [2010] FCA 44, [2010] FCAFC 149, for example: E Adeney, ‘Authorship and Fixation in Copyright Law: A Comparative Comment’ (2011) 35 Melbourne University LRev 677; J McCutcheon, ‘The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law’ (2013) 36(3) Melbourne LRev 915.

²⁴ M Spence, *Intellectual Property* (OUP 2007), ch 2.

²⁵ The contours of the concepts of authorship, originality and the copyright work together outline the boundaries of copyright entitlement. Although the CJEU in Case C-5/08 *Infopaq v Danske Dagblades Forening* [2009] ECR I-6569 seems to suggest the primacy of originality in determining copyright subsistence, there are some restrictions on what might be considered a protectable ‘work’ at the EU level: C-310/17 *Levola Hengelo* EU: C:2018:899 [40]-[41] (it must be capable of being expressed in a precise and objective manner).

²⁶ The dispute concerned the subsistence and ownership of copyright in a ‘selfie’ photograph taken by a macaque monkey. See further: Tehranian (n23) 1352–1355.

²⁷ As authorship is necessarily bound up with the rationale for copyright protection, to the extent that a coherent normative underpinning for copyright law remains elusive, scholarly caution may be warranted. W Fisher ‘Theories of Intellectual Property’ in S Munzer (ed) *New Essays in the Legal and Political Theory of Property* (2001) <www.tfisher.org/publications.htm> demonstrates that each of the common justifications for copyright protection contain flaws concluding that the explanatory power of these theories is limited.

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limits of the concept of authorship.²⁸ Although a complete theory of authorship is beyond the scope of this book, its more modest aim is to take us a step further down the path to defining the copyright law's concept of authorship. It tests copyright law's ability to meet the two challenges of legitimacy in, and suitability for, the digital age by probing one particularly difficult scenario: collective authorship.

Although scholars broadly agree that current copyright law is ill-equipped to meet the challenges of determining the authorship of highly collaborative works, they proffer different explanations. Some suggest that the influence of the 'romantic author', a literary trope which presents the author as a solitary creative genius, has left copyright law ill-adapted to collaborative creativity.²⁹ Others offer a more fundamental critique of copyright law, suggesting that it simply lacks the conceptual tools to deal with the forms of creativity that flourish in the modern digital world (many of which are highly collaborative).³⁰ This book does not ask *why* copyright might be ill-suited to collaborative creativity. Instead, it tackles the underlying assumption that copyright law *is* unable to deal with collective authorship. I argue there are appropriate tools to determine the authorship of works of collective authorship, provided that when applying the joint authorship test, judges make better use of their conceptual tool box.

1.2 Methodological Approach

In his report for the UK government on the reform of copyright law, Ian Hargreaves stressed the importance of evidence-based policy making.³¹ Such policy-making is not possible unless scholarly work helps to join the dots between legal concepts and creative reality. In recent times there has been a significant growth in interest amongst intellectual property law scholars in empirical projects and economic analysis. Yet these methodologies are not always the best equipped to capture some of the less

²⁸ US courts have already confronted some of these challenges: Tehranian (n23); Buccafusco (n23) 1233–1234. Collective authorship is only one such challenge. New media and artificial intelligence provide new avenues for creativity and with the ready availability of smart phones and other technological tools anyone can be a creator.

²⁹ See M Woodmansee and P Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke UP, 1994); M Rose, *Authors and Owners: The Invention of Copyright* (Harvard UP 1993); D Saunders *Authorship and Copyright* (Routledge 1992); J Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard UP 1996). Others suggest that there are better explanations of the current state of copyright law, e.g. Bently (n21).

³⁰ JP Barlow, 'The Economy of Ideas: Selling Wine Without Bottles on the Global Net' <www.eff.org/pages/selling-wine-without-bottles-economy-mind-global-net>.

³¹ Hargreaves (n15).

quantifiable aspects of copyright law. This book takes a broad, interdisciplinary approach, drawing on the expertise of a wide range of scholars from the Humanities and Social Sciences who have thought deeply on issues relating to collaborative authorship from different perspectives and in a variety of contexts. The book seeks to embrace complexity in order to develop a richer, more nuanced understanding of the role of copyright law within creative communities, with the view that such an approach is more likely to generate realistic workable solutions.

Compelling arguments have been made that the relationship between copyright law and creativity needs to be rethought.³² This book takes up this challenge. In so doing it forms part of a growing body of work which reacts to the abstract approach of previous copyright scholarship.³³ Indeed, the book adopts a primarily practical, inductive approach by evaluating the dynamics of creativity and the regulation of the incidents of authorship in cases of collective authorship. This research is also situated within the ongoing debate on the distance between social norms and copyright law.³⁴ By taking creative practice as its starting point, the book proposes ways in which copyright law might use social practices to bridge this gap, and thereby reclaim some of its lost credibility.

The four case studies considered in this book have been chosen because they provide complementary pieces of the jigsaw of ‘real-world’ collective authorship. They concern the creation of different types of copyright works (literary, artistic, dramatic, film) in very different economic sectors. They are fairly representative of the range of collaborative practices, encompassing both a new form of creativity (Wikipedia) and one with an ancient origin (Australian Indigenous art). They embrace hi-tech (Science, Film) as well as amateur (Wikipedia) examples. In each case, authorship is driven by different impulses, from largely commercial motivations (Film), to religious and spiritual motivations (Indigenous art), to reputation and knowledge creation motivations (Science) and even as a recreational pursuit (Wikipedia). They also provide examples of a range of different ways in which issues of authorship might be self-regulated by creators.

³² J Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 University of California Davis LRev 1151.

³³ Ibid; RK Walker and B Depoorter, ‘Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard’ (2015) 109(2) Northwestern University LRev 343.

³⁴ For example: L Bently and L Biron, ‘Discontinuities between legal conceptions of authorship and social practices: What, if anything, is to be done?’ in van Eechoud (n23) 237; LJ Murray, S Tina Piper and K Robertson, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (OUP 2014); M Schultz, ‘Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law’ (2006) 21 Berkeley Technology LJ 651, 654; J Tehranian, ‘Infringement Nation: Copyright Reform and the Law/Norm Gap’ (2007) Utah LRev 537.

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Adopting the interdisciplinary, inductive method just discussed, this book asks how the joint authorship test ought to be applied to yield a suitable mechanism for determining the authorship of collective authorship works. For these purposes, *suitable* is taken to mean:

- a test that serves copyright law's purposes to incentivise and reward creativity;³⁵ and
- a test that is credible to creators and the creative community concerned (because of the importance of some congruency between law and social norms, both in enhancing the law's perceived legitimacy and in promoting compliance).³⁶

This book primarily focuses upon the interpretation of the joint authorship test in UK copyright law, as influenced by European law. The fruits of this analysis will, however, be of interest to scholars and practitioners in other jurisdictions which face similar issues. Indeed, the analysis in Chapter 4 considers Australian law, while Chapters 2, 6 and 8 refer to the law of the United States. These different national approaches to questions of authorship, joint authorship and joint ownership provide an interesting counterpoint to UK law.

1.3 A Roadmap

In order to provide a solid foundation for the argument, the book begins with a doctrinal and theoretical analysis of the concepts of authorship and joint authorship in UK copyright law (Chapter 2). I consider the impact of recent jurisprudence of the Court of Justice of the European Union ('CJEU'), since its strides towards harmonisation of the originality requirement feeds directly into copyright law's conception of authorship. Although the contours of the concept of authorship are uncertain, I identify its stable core: a more than de minimis contribution of creative choices or intellectual input to the protected expression.³⁷

³⁵ Although these are most commonly cited by commentators, there are a number of other possible purposes of copyright law. For example, encouraging the distribution of creative works, promoting individual flourishing or fostering the achievement of a just and attractive culture. See Fisher (n28) for an overview of the many different views on the theoretical underpinnings of copyright law. In Chapter 2 I argue that the concept of authorship might be affected by one's view of copyright law's purpose and offer a definition of the minimum core of authorship, similar to a 'mid-level principle' of the sort discussed by R Merges, *Justifying Intellectual Property* (Harvard UP, 2011), see further ch 2, n88.

³⁶ Tyler (n18); K Burleson, 'Learning from Copyright's Failure to Build its Future' (2014) 89(3) *Indiana LJ* 1299; also Q4, FAQs on Copyright <euipo.europa.eu/ohimportal/en/web/observatory/faqs-on-copyright-hr>; GN Mandel, 'The Public Perception of Intellectual Property' (2014) 66 *Florida LRev* 261. See further 8.1.

³⁷ 2.1.

Then, I turn to the joint authorship test found in the Copyright, Designs and Patents Act 1988 ('CDPA').³⁸ I argue that the definition of a work of joint authorship implies that it is the result of creators working together to create something that is *greater* than the sum of its parts.³⁹ I argue that this conception serves as useful guide in the application of the test. An analysis of the case law reveals that it is difficult to assess whether, or not, the current statutory test provides a suitable mechanism for determining the authorship of works of collective authorship because the case law is limited, and the test is rarely applied in an analytical manner. Three themes are discussed: (i) the factual specificity of the joint authorship test; (ii) the pragmatic instrumental approach to the implementation of the test; and (iii) the preoccupation with aesthetic neutrality.⁴⁰ Although factual specificity results in an uncertain jurisprudential picture, ultimately it is a strength of the test allowing it the flexibility to adapt to different creative contexts.⁴¹ The second and third themes are more problematic, as they lead to lack of analytical clarity in judicial reasoning, which hampers predictability and risks a chilling effect on collaborative creativity.

A trend, evident in copyright scholarship and the case law, is associated with the second theme that favours a restrictive approach to the application of the joint authorship test.⁴² I refer to this as the *pragmatic instrumental approach*. Its proponents have been persuaded, primarily for pragmatic reasons, that authorship should be concentrated in the hands of one or a few dominant creators. The worry is that a work's exploitation will be impeded if it has too many joint owners who are unable to agree.⁴³ The pragmatic instrumental approach is undesirable for a number of reasons. Most notably, it tends to conflate the (importantly separate) concepts of authorship and ownership, and it seems to impose a higher standard of authorship for joint works than is justified by the wording of the CDPA and the case law on authorship more generally.

³⁸ Unless otherwise indicated, throughout this book statutory provisions refer to sections of the CDPA.

³⁹ 2.2. ⁴⁰ 2.3. ⁴¹ 2.3.1.

⁴² 2.3.2. In the US context, the debate between restrictive and inclusive approaches to joint authorship has been explicitly played out between two eminent copyright scholars: Melville Nimmer and Paul Goldstein, see: M LaFrance, 'Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors' (2001) 50 Emory LJ 193, 196–197, 259–261; PS Fox, 'Preserving the Collaborative Spirit of American Theatre: The Need for a "Joint Authorship Default Rule" in Light of the Rent Decision's Unanswered Question' (2001) 19 Cardozo Arts & Entertainment LJ 497, 507–509. The restrictive view is currently favoured by most US courts, although not without criticism: J Dougherty, 'Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures under US Copyright Law' (2001) 49 UCLA LRev 225.

⁴³ On this view, the more owners there are the greater the possibility of hold-ups occurring. On joint ownership of copyright: 8.6.1.

The third theme is a preoccupation with aesthetic neutrality. I argue that judicial concern about passing judgement on the aesthetic merits of a work has led to a reticence to explicitly engage with aesthetic criteria in the application of the joint authorship test.⁴⁴ Yet, as the case law demonstrates, it is difficult, if not impossible to apply the joint authorship test without resort to aesthetic criteria.

I conclude the discussion of the case law on joint authorship by laying groundwork for a more analytical approach to the application of the test in distinguishing the questions of fact from the question of law at its heart (what constitutes protectable authorial input?).⁴⁵ The final sections of Chapter 2 seek insights from the scholarly literature on authorship to further enrich this doctrinal analysis.⁴⁶

Then, I look outward at the realities of collective authorship. I consider the regulation of the attribution of authorship and the social incidents of authorship (benefits, responsibilities, etc.) in four case studies of collective authorship:

- (i) Wikipedia (Chapter 3);
- (ii) Australian Indigenous art (Chapter 4);
- (iii) Scientific collaborations (Chapter 5); and
- (iv) Film (Chapter 6).

Each case study has been approached with similar questions in mind and the chapters follow a common structure. Each chapter includes four parts: an analysis of the dynamics of creativity and the social norms which operate to regulate the attribution and social incidents of authorship in that particular context; an attempt to apply copyright's subsistence rules to the case study subject matter, thereby identifying any gaps or uncertainties; an assessment of any private ordering measures adopted to address these gaps; and identification of the insights which the case study may provide for copyright law. The four parts are ordered in the sequence which best aids a clear presentation of the relevant issues.

Chapter 7 draws together the many disparate insights from the case studies to develop five broad themes which elucidate the role of copyright law in regulating collective authorship. These might be summarised, in broad-brush terms, as follows:

1. **The nature of collective authorship**⁴⁷ Collective authorship tends to involve: a division of labour; the sharing of responsibility for the creative or intellectual content of the work among many contributors; and social norms that regulate the creative process, often also

⁴⁴ 2.3.3.

⁴⁵ 2.4. I argue that the questions of fact relate to the existence of 'collaboration' and a 'significant' contribution which is 'not distinct'.

⁴⁶ 2.5. ⁴⁷ 7.1.