Disaggregating the Authorship Function in Copyright

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Centrality of Authorship

- "Authorship is the cornerstone of the whole copyright protection regime" (Xalabarder (2002), 8)
- "Authors are at the heart of copyright" (Ginsburg (2003) 1064)
- "where there is no author, there is no copyright" (AG Szpunar in *Funke Medien*)

The Roles of Authorship in Copyright Law

- Originality as “author’s own intellectual creation”
- Qualification by status of “author”
- Ownership of rights vesting in “author”
- Duration calculated from death of “author”
- Moral right of attribution of authorship
- Acknowledgment as a condition for exception
- Defences granted to “authors”
- Contractual protections for authors

A Presumption that Unitary

- *McHale v Earl of Cadogan* [2010] EWCA Civ 1471, [29] (Arden LJ) ("in the absence of contrary indication, where Parliament enacts a single statute, it must be taken to intend to enact **a single consistently-expressed** code of provisions.")
- Case T-378/11, *Lannguth v OHIM*, [41] (on "identity" in EUTMR), "A concept which is used in different provisions of a legal measure, must, for reasons of coherence and legal certainty, and particularly if it is to be interpreted strictly, be **presumed to mean the same thing**, irrespective of the provision in which it appears) (affirmed as Case C-412/13P).

A Single Conception?

- Commentators and courts tend to assume authorship has one meaning
- Copinger: “the term author [in moral rights] has the same meaning as in the context of copyright, namely the person who creates the work”: Copinger, [11.05].
- UK courts have certainly applied same test for joint authorship, qualification, moral rights
- Example of *Martin v Kogan* [2018] (originality, authorship and part)

So what about possible disaggregation?

- E.g. a different conception of authorship for moral rights (and even for integrity and attribution rights) compared to ownership
- A different conception eg for contractual protection (to protect vulnerable or “artistic workers” (Benbou)) than for term calculation (to avoid opportunism)

Disaggregation: some conceptions of "authorship"

- Conceivers/Initiators/Planners
- Dominant "authors" (by amount, by control?): ownership, integrity, contractual protection
- "Ancillary" contributors (less substantial, less control): attribution, remuneration claims?
- Editors/arrangers/Improvers
- Natural/legal entities (Benabou); "scientific authors" (Janssens)

Reasons for disaggregation: 1

- Multiple purposes implicate different policies
- In some situations a flexible/liberal notion of authorship might **affect alienability** (joint authorship for ownership); in others the **public domain** (authorship for term calculation); whereas in others a flexible concept might do better **justice** (attribution)

Reasons for disaggregation: 2

- Requiring a single conception leads courts to gravitate towards a “proprietary” model, characterized by a tendency to agglomerated authorship – to limit joint authorship, marginalize informal contributions and privilege the “ultimate arbiter”

Reasons for disaggregation: 3

- "Authorship" norms derived from divergent sources

- Berne (leaves flexible)

- EU law

- National law

- 'Global Legal Pluralism': tells against presumption of coherence

Mechanisms to Disaggregate

- Proxies for authorship (eg for duration,) or alternatives
- Adapted concepts of “authorship” (“principal director” v “director”)
- Limiting authorship by reference to “significance” of contribution

Existing examples of disaggregation

- Film authorship (for first ownership) distinct from film term calculation (70 years from death of last to die of principal director, author of screenplay, author of dialogue, composer of music)
- Film authorship (for first ownership, “principal director”) in UK distinct from moral rights (“director”)
- Song authorship (for first ownership, moral rights) dealt with distinctly from term of copyright (last of author of music/lyrics to die)

Existing Examples (2)

- Private international Law
- Some countries (US, Portugal) apply "*lex originis*" to determine ownership
- ALI Restatement (Gisnburg, Dreyfus) adopts this approach

Problems with Disaggregation

- Complexity
- Line-drawing (e.g. trouble with “ancillary” performers)
- Compatibility with International and EU Law

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Berne and Authorship

- "**Berne...does not tell us how to identify an individual author**, or for that matter, the authors of a work with multiple creative participants….." (Ricketson & Ginsburg, 359, [7.03])
- "The international treaties do not offer much guidance on the question of authorship. **The Berne Convention does not define the 'author' of a work**, leaving this to the contracting parties..." (Goldstein and Hugenholtz, 2d ed, 244-5)
- Even if BC requires a single conception, MS could interpret "Berne authorship" in a restrictive fashion, but adopt more generous conceptions of authorship in other contexts (eg attribution)

EU and Authorship

- Explicitly unharmonized (CPD, art 2(3); DBD, Art 4(1): as Benabou explained). But “autonomous concept” in ISD Arts 2-4?
- No moral rights (until AG Szpunar legislates)
- But in places *explicitly* linked: Arts 18-22 DSM relates to licensing/transfer of *harmonized rights* (adaptation right?); recital 74 (“that are harmonised under Union law”); recital 75 “only where copyright relevant rights are concerned” (but references of “merchandising” income!)

Conclusion

- Copyright laws can and do recognize multiple conceptions of authorship
- In some cases this may reflect plurality of sources of law and “transitional” stage of harmonization
- Whatever the reason, my suggestion is that further thought can usefully be given to express recognition of further differentiations