

From throwing cartwheels to feeling kinda seasick.

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From Throwing Cartwheels to Feeling Kinda Seasick

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Not so long ago, Gazette readers were alerted to the victory by the organist, Matthew Fisher of 1960s cult band Procol Harum, as High Court judge Blackburne J agreed that his contributions to the classic "*A Whiter Shade of Pale*" not only rendered Fisher a joint author of the musical work, but also entitled him to a share of 40% of ownership in the work.¹ Also, while Fisher had granted a licence to exploit the work by his actions – or inaction not to assert his claims for 38 years – until 2005, this licence was to be regarded as revoked by him commencing his case in May 2005. This would entitle him to a share of future royalties which could be lucrative in particular in respect of the tune's popularity as a mobile ring tone, and it would enable him to at least part-control the exploitation of the work courtesy of his being a joint owner. However, the joy of Mr Fisher proved to be short-lived: recently, Gary Brooker, the band leader, and Onward Music Ltd, the right holders, won their appeal in part, the majority of the Court of Appeal siding with them to a significant extent.²

Brooker and Onward Music Ltd had asked the Court of Appeal, *inter alia*, to overturn the High Court's declaration and to find that Fisher was not to be regarded as joint author of the musical work, and to find that the declarations of Fisher being a joint owner and of having revoked the implied licence should be struck down by the "delay defences" of acquiescence and laches: raising the legal action 38 years after the event constituted inexcusable delay in asserting his claims, and this should disentitle Fisher to gain title to a joint interest in the work.

Mummery LJ delivered the main judgment with which Sir Paul Kennedy concurred. In his Lordship's opinion, Blackburne J's declaration that Fisher was a joint author of the musical work should stand. The High Court was entitled to reach this conclusion based on the evidence, and Brooker's legal team failed to show that the delay defences made it unconscionable or inequitable for the organist to be regarded as joint author in the future. Mummery LJ revealed early concern that to uphold this declaration at the expense of the other on the economic aspects that would come with joint ownership may well be meaningless for Fisher. However, His Lordship pointed out that being regarded as joint author may "bring some practical benefit to Matthew Fisher [...]. [T]he declaration is potentially valuable in relation to his [...] moral rights under the 1988 [Copyright Designs and Patents] Act, in particular the right to the attribution of authorship of a work."³ Readers are of course aware that moral rights had only been introduced to the UK arena by the 1988 Act, and that they have led a comparatively peripheral existence. The standing of moral rights in the Anglo-American neck of the woods comes a distant second to economic rights which regulate the commercial exploitation of a copyright work; indeed, they are anything but sacrosanct and may be waived by authors. It is a far cry from the Continental/Civil Law scene where the status of moral rights – or authors' rights – derives from and is inalienably linked to the creator of a copyright work: there, the creation is regarded as part of the creator's personality. In that sense, Mummery LJ appears to give a timely boost to the status of moral rights under UK law. In practice, it also allows Matthew Fisher to claim his rightful place in the colourful history of popular music. This, however, is the point where the Court of Appeal departed from the High Court's view. In Mummery LJ's opinion, the notion of joint authorship does not necessarily require a finding of joint ownership. While this may be the case in normal circumstances, the factual situation in this case demanded a different outcome. "There is a substantial distinction to be drawn between the right to attribution of authorship and the right to title and to the control of exploitation of the future," declared His Lordship.

English law treats joint owners of copyright as tenants in common; Scots law as proprietors in common. When there are two or more individuals involved in the creation of a copyright work, questions as to who owns the work naturally arise. Property law offers two specific alternatives, namely joint tenancy and tenancy in common. Zemer explains that the former is regarded as "the more perfect form of joint ownership, the joint owners being treated as an inseparable unit without possessing individual shares or different parts in the property. They together own the entire item".⁴ In Scotland the default position is common ownership and the status of joint ownership is only applicable to trusts and other quasi fiduciary relationships. However, in order for either principle to be applicable, copyright must be treated as a chose in possession, i.e. tangible, personal property, rather than a chose in possession, i.e. an intangible right to be enforced by court action. The Copyright, Designs and Patents Act 1988 stipulates as early as s. 1(1) that "(c)opyright is a property right ..." which is given further emphasis by s. 90(1) stating that "(c)opyright is transmissible by assignment, by testamentary disposition or by

operation of law, as a personal or moveable property". Scots law has none of these complications with each proprietor being entitled to a pro indiviso share of the property but, it is submitted with the restrictions noted below.

The courts have long supported the opinion that joint owners of a copyright work are tenants in common. In *Powell v Head*,⁵ the earliest case on the matter, it was held that assignees, each of an undivided moiety, of the copyright were to be regarded as tenants in common, so that a co-owner of a dramatic work could not license the work to a third party without the consent of his fellow co-owners. That joint authors were to be treated as tenants in common was confirmed by *Kekewich J in Lauri v. Renad*.⁶

"The title might, nevertheless, be good if there was a joint tenancy, in which case the right would survive to the others. But it is not a joint tenancy: that has been finally decided, I think, once for all in the case of *Powell v. Head*, before Sir George Jessel and it must be considered as now settled law. Registered owners of a copyright are tenants in common, and they are tenants in common of a peculiar kind. It is impossible for us English lawyers, dealing with the English language, to express our views except in the technical language of our law; but it is not, perhaps, accurate even to call such owners tenants in common, and the Master of the Rolls took care not to call them simply tenants in common: he calls them "tenants in common or part owners," and there are, of may be, many differences and distinctions between tenants in common and part owners, as regards their rights *inter se*, and in respect of strangers. He not only decided that, but he also expressed a strong opinion, "that one part-owner could not either lend or deal with the entirety of the property without the authority of the other part owner." And, again" on the same page of the report, he says: "Therefore, they" (the two assignees) "were strictly tenants in common or part-owners of the right of representation, or liberty of representing, as it is called. That right, I take it, could not be exercised by one of them, that is, could not be exercised by one of them in the sense, that one could give the right of representation to a third party." That means to confer the sole right of representation, to pass it on as the property of the third party, which he might maintain against all the world, including the part-owner who had not concurred in the assignment or donation."⁷

This remained the case once the Copyright Act 1911 replaced the litany of statutes that had hitherto dealt with specific copyright works. In *Ceskiny v. George Routledge & Sons, Limited* it was argued as follows:

"I have next to consider whether the plaintiff is entitled to an injunction against the defendants. It is clear, from the cases of *Powell V. Head*, decided by Jessel M.R., and *Lauri v. Renad*, decided by Kekewich J., that the plaintiff is in no difficulty as plaintiff because he is only part owner of the copyright. But it is contended that the defendants as co-owners are entitled to use the property subject to accounting to the plaintiff in some way not easy to apply in respect of part of the profits. I think this contention is negatived by the words of the Copyright Act, 1911. By s. 2, sub-s. 1 "copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." By virtue of the Interpretation Act the singular includes the plural. Therefore a reproduction without the consent of all the owners is an infringement, and I do not see why one co-owner is not as much within the statute as a stranger. I think that this was really laid down by Sir George Jessel in *Powell v. Head* upon practically identical words in 3 & 4 Will. 4, c.15. Apart however, from the statute, if this were not so, a part owner would be at the mercy of his co-owners, each of whom, and they might be any number, might issue as many, as large, and as cheap editions as he chose, thus completely ruining the value of the copyright. In my opinion, the old common law rule as to the right of a co-owner to use the common property has no application to such a property as a copyright. It seems to me that a sole right of reproducing, though divisible as to title, must be indivisible as to exercise."⁸

This means that one co-owner may not issue a licence to the joint work without the consent of the other co-owner or co-owners. It also follows that one co-owner may take legal action against other co-owners for copyright infringement. While the courts clearly favour tenancy in common it is open to the parties involved to agree otherwise. In *Bamgboye v. Reed Williamson QC* reiterated that "if there are two or more persons who are joint authors they own the copyright in equal shares, but it is suggested that is not an invariable rule because sometimes the authors may be joint tenants rather than tenants in common and in that case until severance there are no shares".⁹

So, if Fisher was to be awarded joint ownership, this would enable him to effectively control the economic exploitation of the work 38 years after the event. Joint owners of copyright works are seen as tenants in common under English law. This means that if a work is owned by two or more individuals jointly, none of them may exploit the work without the consent of their respective fellow co-owners. Brooker and Onward Music Ltd had exercised their ownership rights without

'interference' by Fisher for almost four decades. To require them to adjust to a new situation regarding the ownership of the work would, in the eyes of the majority of the Court of Appeal, be unfair.

The appellants relied on the 'delay defences' of acquiescence and laches to defeat Fisher's claims to economic rights in the work. The court went some lengths to explain the preconditions for the defences to be applicable, and why Blackburne J should have taken a broader approach to the application of these defences. Acquiescence describes the action or inaction by a party who knowingly stands by without raising any objection to the infringement of his rights, when someone else unknowingly and honestly put in their resources under the impression that those right do in fact belong to them. The party who stood by is then prevented from making a claim against the infringing party or apply successfully for an injunction. In the present case, the defence was coupled with the equitable doctrine of laches which prevents or severely limits the relief to a party who delays in taking legal action or raising a claim.

Mummery LJ held that Fisher's excessive and inexcusable delay in asserting his claim should prevent him from being rewarded with a share of joint ownership in the work and the revocation of the implied licence under which the appellants had exploited the work for the past four decades. By not raising his claim earlier and acquiescing in the commercial exploitation of the work without starting proceedings, Fisher allowed the appellants to act as if the entire copyright was theirs, for a very long time. Mummery LJ agreed that:

"delay on its own is insufficient to raise a defence and to prevent a person from enforcing his legal claim to property. Whether the delay in notifying and pursuing a claim to a property interest is unconscionable and inhibits the granting of equitable remedies for the enforcement of a legal right depends on the conduct of the parties, judged objectively as regards the length of the delay, the reasons for it, the knowledge of the parties, the consequences of the conduct, the difficulty of going back and restoring parties to their original positions and all other circumstances relevant to acquiescence and laches."¹⁰

In applying these principles to Mr Fisher's claim to joint ownership, His Lordship concluded that :

"the issue is whether, faced with the facts of Matthew Fisher's excessive and inexcusable delay with knowledge of the defendants' continuing exploitation of the Work on the basis that they owned all the copyright in it, he has acquiesced in the indefinite continuation of this state of affairs. If, as I think, that is so, then it is unconscionable for him, with a view to enforcing his property right by final injunction, to assert a joint share in the copyright and to terminate the implied licence, under which he accepts the defendants have acted for very many years. The fact that he has limited his formal claim for relief to declarations of right does not avoid the effects of his acquiescence and laches, because the declarations (2) and (3) are plainly sought with a view to enforcing, by equitable remedies if necessary, his declared interest in the copyright against them, if they continue to exploit it without his express consent. If they are not sought in order to control the exploitation of the copyright by injunction or the threat of injunction, then no useful purpose would be served in granting them."¹¹

It must be pointed out that David Richards J dissented with the majority view on this point arguing that acquiescence without detriment could not extinguish Fisher's claim to joint ownership in the work.

Some may argue that Matthew Fisher's ability to assert his moral rights is very little to shout about. In short, he can claim entitlement to a right of attribution as a joint author of the work, thereby cementing his place in the history of popular music. The right of integrity to action against alleged derogatory treatment of the work may also be worthwhile. In taking this positive viewpoint the decision of the Court of Appeal represents a much-needed shot in the arm for the standing and viability of moral rights in the UK arena generally.

The Court provided little guidance as to what may constitute inexcusable and excessive delay. 38 years may appear excessive to many, but such a time frame is certainly exceptional. Most joint authorship claims are brought a lot earlier, and it would be beneficial to be able to gauge when delay in staking a joint authorship/ownership claim becomes excessive. An unsatisfactory but often exclaimed response may be that this probably depends on the specific facts of each case.

While we await news of a possible appeal to the House of Lords with interest, it remains to be seen whether this decision is likely to have an impact beyond the music industry, involving joint authorship claims which concern copyright works other than musical and sound recordings.

Footnotes:

1. Fisher a Brooker [2006] EWHC 3239 (Ch); [2007] F.S.R. 12; T. Lauterbach, “Not quite turning cartwheels, but a place in rock ‘n’ roll history beckons!” S.L.G. 2007, 75(2), 50.
2. [2008] EWCA Civ 287.
3. *Ibid.*, at para 77.
4. L. Zemer, “Contribution and collaboration in joint authorship: too many misconceptions” (2006) J.I.P.L. & P. 283 at 284.
5. (1879) 12 Ch.D. 686.
6. [1892] 3 Ch. 402.
7. *Ibid.*, at 412-413, footnotes omitted.
8. [1916] 2 K.B. 325 at 329-330, footnotes omitted, emphasis added.
9. [2004] 5 E.M.L.R. 61 at 74. See also *Mail Newspapers Plc v Express Newspapers Plc* [1987] F.S.R. 90, where Millett J concluded that a husband and wife who commissioned wedding photographs owned the copyright in those as joint tenants.
10. *Ibid.*, at para 83.
11. *Ibid.*, at para 87.