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2007

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Over recent years a number of musicians and song writers have been locking horns in court over claims of joint authorship in copyright works. The latest of those battles brought together Matthew Fisher, the former organist of 1960s pop group Procol Harum, and Gary Brooker and Keith Reid, the acknowledged writers of 'A Whiter Shade of Pale', arguably one of the great anthems.¹

Legal basis for joint authorship

The Copyright Designs and Patents Act 1988 establishes in s.10(1) that "a work produced by the collaboration of two or more authors in which the contribution of each is not distinct from the contribution of the other author or authors" is to be regarded a work of joint authorship. The Copyright Act 1956 provided almost the same definition apart from using the word "separate" instead of "distinct".² There are a number of hoops that allegedly joint authors have to jump through before they have a case. There needs to be collaboration and contribution by two or more individuals to create an original copyright work "in prosecution of a preconcerted joint design"³. The contribution must not be separate or distinct from each other, but there is no doubt that it has to be substantial.⁴ For example, where two authors write two chapters each for a book, they would be the author of those separate chapters respectively, rather than be joint authors in the whole text. With regard to musical works and songs, however, it was held in *Beckingham v. Hodgens*⁵ that an introduction written by one person was not to be regarded to be distinct:

"A work will not be a work of joint authorship if the contribution of the co-authors is separate. The example often given is of a literary work where separate authors contribute specific chapters, but there are other examples where the distinction made in the section may not be so easy to be apply. I do not believe that a contribution to the arrangement of a song of the kind I am concerned with in this case is "separate" in the sense in which that word is used in the section.

*The added part is heavily dependent on what is there already. Stripped of the voices and other instruments, the violin part would sound odd, and lose meaning. The final musical expression - what the audience will hear - is a joint one."*⁶

Finally, the contributions by the respective individuals do not have to be equal in order to give rise to a claim of joint authorship. In *Stuart v. Barrett*, the court held that each of the four band member was to be allocated 25%, as the songs at issue were created jointly during jamming sessions.⁷ However, a court may well calculate individual shares,⁸ or

enforce contractual arrangements.

In any event, the burden of proof lies on the party claiming to be a joint author.

The copyright claim by Mr Fisher

Matthew Fisher claimed to have written the eight-bar organ introduction to "A Whiter Shade of Pale" and, based on this claim, argued that he should be recognized a joint author of the song. Apart from being recognized as a joint creator, he also claimed £ 1 million in lost royalties. The defendants argued, *inter alia*, that Mr Fisher's objection, raised some 40 years after the song was composed, arrived too late and that Mr Fisher merely adapted what had already been written by two band members before the organist's arrival.

A version of the lyrics and the music existed before Mr Fisher was invited to join the band, and that had been written by Mr Brooker and Mr Reid. That early version consisted of four verses and was accompanied by Mr Brooker on his piano. This version was presented to the band during rehearsals, and Mr Fisher eventually produced the now world famous organ solo/ accompaniment. Mr Fisher argued that he was inspired by a particular piece written by JS Bach and, in composing the organ solo, he adapted and made changes to it, so that it would fit the descending baseline that was dictated by the song.

On the facts, Blackburne J held that the solo was a significant contribution to the overall song the creation of which required sufficient skill and labour in order to attract copyright protection. Crucially, there was no real dispute and, therefore "no contest", between the parties as to who wrote the organ part:⁹ Mr Brooker conceded that Mr Fisher wrote it, but he did not succeed with his argument that this was to be regarded as an adaptation of Brooker's earlier efforts. Without referring to any previous judgments, Blackburne J held on the facts for Mr Fisher regarding the joint authorship claim:

*"Reviewing the evidence as a whole, it is abundantly clear to me that Mr Fisher's instrumental introduction (...) is sufficiently different from what Mr Brooker had composed on the piano to qualify in law, and by a wide margin, as an original contribution to the Work. The result in law is that Mr Fisher qualifies to be regarded as a joint author of the Work and, subject to the points to which I shall next turn, to share in the ownership of the musical copyright in it."*¹⁰

While Blackburne J agreed that it was indeed surprising that Mr Fisher had not staked his claim earlier, he held that this fact should not be used to prevent Mr Fisher from being regarded a joint author, as the copyright in the work had still a considerable time to run.

This outcome, it is submitted, is not surprising if compared with earlier judgments. For example, the decision in *Godfrey v. Lees*,¹¹ a case which was also heard by Blackburne J, concerned the contributions by a classically-trained pianist who acted as orchestral arranger for the group Barclay James Harvest in the late 1960s. While that scenario can be distinguished by the Procol Harum dispute, since the pianist was not an actual band

member of BJH, it is illustrative of how "little" in terms of quantity can give rise to a claim of joint authorship: while he had contributed the underlying orchestral arrangements to BJH's songs, fairly major contributions, Blackburne J also allowed a six-bar orchestral link-passage as being an original and significant contribution to the overall work. In *Stuart v Barrett*¹² and *Others* the drummer of a band claimed to be a joint author in certain works. The court agreed that "each of the players was left to decide for himself his contribution. They fed off each others' creativity and became quite an efficient composing unit (...)." ¹³ It was agreed that Stuart did not write any of the lyrics for the songs, but Morison QC accepted his evidence in respect of his claim of joint authorship in the music, holding that all members of the group played a

*"significant and creative role in bringing the music of a song to its final form. The first defendant did not orchestrate his pieces; he did not write the notes down. Whilst he may have had the original idea, in the sense of an opening phrase or of a series of notes in his head which ultimately provided the theme, the other members of the group themselves made important original contributions to the work."*¹⁴

Finally, in *Beckingham v Hodgens*¹⁵ the Court of Appeal held that a hired musician who composed and played the violin introduction to the song "Young at Heart" by the band The Bluebells was entitled to be regarded as joint author of the song. Expert evidence by a musicologist and copyright consultant suggested that the violin part was more memorable than anything else in the song. The court, with Jonathan Parker LJ giving the leading judgment, had no problem in holding that the violin part made a significant and original contribution of the right kind of skill and labour to the final version of the song, and although the claimant was not a formal band member, he was a joint author of the song.

The other claims by Mr Fisher

The success in the joint authorship claim meant that Blackburne J was invited to allocate a percentage to Mr Fisher's share, with the organist pleading for a 50% share.

Blackburne J acknowledged that discussion of that very point had taken place between the parties' representatives, and that "I have to grapple with the point".¹⁶ Admitting that this was a highly subjective issue, Blackburne J accorded the musician a 40% share in the musical copyright, as in his view, Mr Brooker's contribution was more substantial. It is submitted that this is a very unsatisfactory way of determining individual shares in a collaborative, jointly authored copyright work. While it is understandable that in the present case the court could distil little guidance from the submissions of the parties, the shares eventually allocated translate into royalty payments. Therefore, this is a crucial issue which appears to deserve a more detailed analysis by the court.

As to Mr Fisher's claim to payment of his share of the monies paid out to the defenders by two collecting societies in the six years before the current case commenced, the court was less willing to entertain the organist.¹⁷ Although Mr Fisher had not been registered as an owner of the work, although he should have been, he argued that his former fellow band members received a far greater share of the royalties than they

should. Blackburne J was not impressed, arguing that Fisher's silence coupled with the long delay in raising the legal action was tantamount to an implied licence to exploit his copyright freely:

"The plain fact is that Mr Fisher has sat back and permitted the two societies to account to the defendants for royalties in respect of the musical copyright in the Work for nearly 40 years. The fact that he may have had no awareness of his right in law to share in the royalties or had felt unable to vindicate his claim in the meantime (whether because of poor advice or for other reasons) does not seem to me to matter. For so long as the societies had no knowledge of Mr Fisher's claims, they had no option but to account to the defendants in the way they did. For so long as Mr Fisher chose not to make and establish his claim the defendants had no reason to think that they were not entitled to the payments they received. Moreover, for so long as Mr Fisher allowed the societies to account to the defendants, notwithstanding his long held belief that as co-writer of the music he was entitled to share in the musical copyright or at the least to be recognised as having co-written the Work, he must be taken to have gratuitously licensed the exploitation of his copyright. That implied licence must have continued at least until 19 March 2004 when, through his then solicitors, his claim was first intimated to Mr Brooker. Even then it was scarcely clear from the letter that he was revoking the licence. In my view any revocation of the implied licence only came about, at the earliest, when his present solicitors sent their letter before action to Mr Brooker. That was in April 2005. It was only in May 2005 that his solicitors notified the second defendant of any claim."

Therefore, the court held that any right by Mr Fisher as to a share in the royalties only arose from 31 May 2005. Some commentators may regard this as a pretty heavy defeat, but it should be remembered that the song itself still enjoys cult status and high sales, while it also constitutes the basis for a highly popular mobile phone ringtone. Therefore, even a belated claim to royalties may still be regarded as worthwhile!

A Pyrrhic victory?

Much has been made of Mr Fisher's inability to lay claim to lost royalties. Given the fact that he won a declaration to be regarded as joint author of one of the most iconic pop songs which without doubt will lead to him taking his place in music history, coupled with the remuneration in the form of future royalties plus the liability of court fees by his former Procol Harum colleagues may hardly render this a Pyrrhic victory. While the Court of Appeal may yet get to hear the dispute, there are a number of valuable lessons that can be learnt from this scenario. Gary Brooker may well bemoan the judgment as the start of the open season to any songwriter, but it is clear that songwriter, band members and session musicians should spare a few thoughts on copyright law while embarking on a musical career. If the contribution made by an individual is made pursuant to a common design, is original and significant, *ie* involving sufficient skill and labour, that individual may well lay claim on both a share of the copyright in the overall work and the financial reward.

The legal principles underlying joint authorship apply to anyone jointly composing or writing music and lyrics, and are ignored at the protagonists' peril, be they musicians, songwriters or publishers.

- 1 *Fisher v. Brooker* (2006] EWHC 3239 (Ch D).
- 2 Copyright Act 1956, s. 11(3). Both sections mirror what was held by the Court of Common Pleas to constitute joint authorship in *Levy v Rutley* (1870- 71) L.R. 6 C.P. 523, the first case concerning this particular legal issue.
- 3 *Levy v Rutley* (1870-71) L.R. 6 C.P. 523 at 528.
- 4 See, for example, *Stuart v. Barrett* [1994] EMLR 448; *Hadley v. Kemp* [1999] EMLR589.
- 5 (2004] **ECDR** 6
- 6 (2003] FSR 238 at 248.
- 7 [1994] EMLR 448.
- 8 *Bangboye v Reed* (2004] EMLR 5; *Brown v McAsso Music Production Ltd* (2005] FSR 40
- 9 *Fisher v. Brooker* [2006] EWHC 3239, paras. 21 to 23.
- 10 *ibid* at para. 42.
- 11 [1995] EMLR 307.
- 12 (1994] E.M.L.R. 448, per Morison QC.
- 13 *ibid* at 455.
- 14 *ibid* at 458.
- 15 (2004] ECDR 6
- 16 *Fisher v. Brooker* [2006] EWHC 3239, at para. 98.
- 17 In fact, Mr Fisher's argument was based on 38 years of lost royalties, but his claim took into account the limitation period, which was six years before the start of his legal action.