
APPORTIONING OF JOINT AUTHORSHIP IN COPYRIGHT

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ABSTRACT

Intellectual Property rights are exclusive in nature. So, all the authors have right to exclude others, enjoy monopoly and claim copyright in their work. Similarly, each co-author can claim copyright over the joint work. Based upon the contributions and other factors co-authors can claim copyright over the joint works. This paper deals how to apportion or identify the shares of claim of each co-authors. The analysis of Equal Division rule and apportionment criteria in different joint works done in this paper. A overview of joint authorship doctrine in India, US and UK with case laws and applicable statutes. Evolution of joint authorship through case laws and tests also discussed in this paper. This paper is based on doctrinal research.

Keywords: Joint Authorship, creativity, collaboration, contribution, Copyright Act, joint work.

LITERATURE REVIEW:

The term joint authorship is easy to describe but often becomes ambiguous to understand.¹ The Copyright Act, 1957 provides a definition of 'Joint Authorship'. It is defined as “ a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors”.²

According to UK law, “A joint author must collaborate with the other authors in the production of the work. Subsequent authors will not result in a work of joint authorship. However, the existence of collaboration must be a question of fact and degree. The author must provide a significant creative output.”³

In US, “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or independent parts of a unitary as a whole” considered as joint authorship.⁴ The act doesn't expressly state about the incidental aspects of the joint authorship. In case of joint authorship the work is indivisible, so during grant of limited rights to third parties one must get the consent of the other authors. The concept of joint authorship isn't concrete in nature. It is evolving through case laws, juristic opinions, commentaries, statutes and other international agreements.

Article 7bis of the Berne Convention states about joint authorship. The Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886 deals with the protection of works and the rights of their authors. Actually, it is based upon three basic principles. Minimum protection must be adopted by the member countries for the copyrighted works.⁵ Exclusive rights are granted through copyrighted works ,i.e., right to translate, right to make adaptations and arrangements of the work, right to communicate to the public, right to perform in public, right to broadcast and right to make reproductions of the existing works.⁶

The doctrine of joint authorship defines collaboration of works which can't be independently distinguished. It means that the works of different authors are interlinked or collaborated in

¹ <https://www.lawctopus.com/academike/joint-authorship-in-india/>

² Section 2(z) of The Copyright Act, 1957

³ Section 10(1) of Copyright, Design and Patents Act, 1988

⁴ Laura Biron & Elena Cooper, *Authorship, Aesthetics and the Artworld: Reforming Copyright's Joint Authorship Doctrine*, 35 LAW AND PHILOSOPHY 55 (2016).

⁵ https://www.wipo.int/treaties/en/ip/berne/summary_berne.html

⁶ *ibid.*

such a manner that the contribution of each author difficult to identify by others.⁷ The whole copyright is over the joint work, not on the individual contributions made by the authors.⁸ This is the main concern in joint authorships. In any work involving collaborative authorship, the general issue of assignment, licensing testamentary disposition and relinquishment arises most apparently.⁹ In certain cases it is impossible or very to establish the extent of right in a collaborative work. But, in the Copyright Act, 1957 there is no provision for joint authorship in order to establish the extent of rights of the authors.¹⁰ The joint works are different from the collective works. As we know that collective works includes anthologies, periodicals and encyclopedias, in which the authors' contributions identified as distinct copyrightable works. There is no intent of authors' to merge their works into a unitary whole in case of collective authorship. However, the nature of the contributions and the authors' intention matters in case of joint authorship.

RESEARCH GAP:

- There is specific Apportion criteria in joint works.
- Difficulty in differentiating of contributions of each co-author in a merged work.

RESEARCH QUESTIONS:

- Is Equal Division Rule appropriate in all cases of apportioning joint works?
- Should there be standard units for allocation of contributions of co-authors in joint works?

INTRODUCTION:

In recent decades, the co-authors have found it increasingly difficult to be recognized as joint authors.¹¹ The concept of joint authorship is essential for understanding the laws of copyright,

⁷ Biron and Cooper, *supra* note 4.

⁸ *Id.*

⁹ Upendra Baxi, *Copyright Law and Justice in India*, 28 JOURNAL OF THE INDIAN LAW INSTITUTE 497 (1986).

¹⁰ *Id.*

¹¹ LaFrance, Mary. (2022). Apportioning authorship. *University of Kansas Law Review*, 71(2), 209-250. *Law Journal Library - HeinOnline.Org*, https://heinonline.org/HOL/Page?handle=hein.journals/ukalr71&div=12&g_sent=1&casa_token=&collection=journals (last visited Sept. 27, 2024).

specifically when works produced by multiple authors.¹² By examining various judicial decisions and opinions of jurists within the United States, United Kingdom and India, it is possible to understand when multiple authors of a work may legally be considered as joint authors.¹³ The concept of joint authorship is based on copyright principles and theories established under Intellectual Property Rights (IPR), which is highlighted in the Indian Copyright Act and other international conventions.¹⁴ In US under Section 101 of the 1976 Act joint authorship defined. There is not much said about the definition in the legislative literature. Hence, the courts are left with much flexibility to clarify the nature of co-authorship in different circumstances. The apportionment rules also described through case laws. A solution is to carry out consumer surveys in market to evaluate the commercial values at the output level with consumers who have not viewed the publication or performance of the joint work but who are sufficiently representative of the pool of consumers i.e., generally potential consumers. Commercial values of different contributions need to be assessed.¹⁵ But, it is difficult to apportion authorship when contributions are unequal in joint works.¹⁶ Modernism, on the other hand, with its implicit formalist aesthetic, focuses more on the work instead of author.¹⁷ The theories of art of the latter twentieth century might be suited to this task, and focuses in particular on institutional theories of art associated with the work of great philosophers Arthur Danto and George Dickie.¹⁸ These theorists developed the notion of the artworld, in relation of the art object to a wider context, such as art institutions and art theory. Also, it discussed about the joint works and their contributions to the claimed art.¹⁹ There are legal tests of joint authorship which need to be reformed, so as to allow copyright to retain its own standards while facilitating a closer alignment of law and art.²⁰

EVOLUTION OF JOINT AUTHORSHIP:

Before the 1976 Act, the concept of co-authorship had not been referred to anywhere in the

¹² Aayushi Soni, *Joint Authorship in Copyright Law: A Comparative Study*, 3 JUS CORPUS L.J. 1093 (2022).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Adela M. Mao, *How to Apportion a Copyright in Joint Work by Co-Authors*, 23 INFORMATION & COMMUNICATIONS TECHNOLOGY LAW 136 (2014).

¹⁶ *Kogan v Martin: A New Framework for Joint Authorship in Copyright Law - Simone - 2020 - The Modern Law Review - Wiley Online Library*, <https://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12538> (last visited Nov. 1, 2024).

¹⁷ Biron and Cooper, *supra* note 4.

¹⁸ AESTHETICS AND THE PHILOSOPHY OF ART: THE ANALYTIC TRADITION: AN ANTHOLOGY (Peter Lamarque & Stein Haugom Olsen eds., 2003).

¹⁹ *Id.*

²⁰ Biron and Cooper, *supra* note 4.

statute.²¹ The concept developed through judicial creation by Judge Learned Hand in *Maurel vs Smith*²² where he cited an early English case *Levy vs Rutey*²³. Since then, courts have developed the doctrine at common law and found co-authorship under varying circumstances.²⁴

In *Super Cassettes Industries Ltd. Vs Sanjay Dalia*²⁵, the court held that for a work to be considered a joint work, it must be shown that the contributions of the authors are inseparable and cannot be distinguished from each other.²⁶ In *Indian Performing Right Society Ltd. Vs Sanjay Dalia and Ors.*²⁷, the court held that to prove joint authorship, it must be established that the work was produced by the collaboration of two or more authors and the contribution of one author is not distinct from the contribution of the other author or authors.²⁸

“Courts have recognized that the relationship of co-ownership of the work by co-authors is analogous to a tenancy in common, but the reference is by analogy only and does not by itself import the features of the latter common law concept to the copyright co-authorship”.²⁹ However, the relationship of co-owners of copyright is considered by many courts as a new or distinct relationship, with the result that reference to common-law concepts has been made by them for purposes of analogy only, the labelling of the relationship serving little useful purpose, particularly since words of art such as tenants in common or joint tenants have acquired secondary meanings in the law which are inapplicable to the field of copyright. Moreover, courts have frequently found a relationship of constructive trust between co-authors who hold the legal title and those who do not, so that the legal title is shared directly or on trust by all co-authors.³⁰ However, there is no suggestion that a constructive trust is either sufficient or necessary for the co-authorship. Thus, courts need to clarify the nature of co-authorship.

Various Commentators have attempted to fill in the gap by proposing theoretical bases for the nature of co-authorship. Professor Nimmer suggests two alternative bases to justify co-

²¹ Mao, *supra* note 15.

²² 220 F. 195 (SYDNY 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

²³ LR 6 CP 523 (1871).

²⁴ Mao, *supra* note 15.

²⁵ 2009

²⁶ Soni, *supra* note 12.

²⁷ 2015 SC 8253

²⁸ Soni, *supra* note 12.

²⁹ A. E. Korpela, Rights and remedies of co-owners of copyright, 3 ALR 3d 1301, 2[b] Summary (2013).

³⁰ See *Maurel vs Smith*, 220 F. 195 (SYDNY 1915), *aff'd*, 271 F. 211 (2d Cir. 1921); *Edward B. Marks Music Corp. Vs Jerry Vogel Music Co.*, 47 F. Supp 490 (DC NY, 1942), *aff'd*, 140 F.2d 266 (2d Cir. 1944). These cases were regulated by the 1909 Act when registration of the title of the works was required, but registration of title is no longer required under the 1976 Act. Hence, it is probably unnecessary for courts in the future to refer to the relationship of trust when the legal ownership does not coincide with the beneficial ownership.

authorship³¹:

- First, where the respective contributions of each author are inseparable, in the sense that they are not separately identifiable, the only workable solution is to regard each author as the joint owner of an individual interest in the entire work.
- A second basis for the principle of joint authorship occurs where the respective contributions are interdependent. Here, although the contributions are separately identifiable, each may be said to be written pursuant to an implied (if not express) agreement that the product of the several contributions will be jointly regarded as an indivisible whole.

According to Nimmer's view, the copyright of a work by co-authors comprising of inseparable contributions arises from the impossibility of separating contributions, and the copyright of a work comprising of interdependent contributions arises from an implied consent.³² The nature of authorship is a judicial choice and courts should pay more attention to the general principles of justice and fairness.³³ Courts may adopt totally different approaches to the question of apportioning the shares of the copyright, when facing different types of contribution, i.e. inseparable or interdependent.

Maurel vs Smith was among the first and the few to discuss the doctrine of co-authorship and its apportionment rule in the USA. Judge Learned Hand put forward the Equal Division Rule that "when several collaborators knowingly engage in the production of a piece which is to be presented originally as a whole only, they adopt that common design, mentioned in *Levy vs Rutly*, and unless they undertake expressly to apportion their contributions, they must share alike."³⁴ The judge explained the rule when he next relied on early English cases for the proposition that 'one who contributes to such a joint production does not retain any several ownership in his contribution, but that it merges into the whole. The judge's reasoning is that as individual co-authors' contributions merge into a joint work, their respective ownerships of the respective contributions merge into the whole accordingly, and the rights should be equally shared.³⁵ The rationale behind the equal division is the impossibility to assess the commercial

³¹ 1-6 Melville B. Nimmer and David Nimmer, Nimmer on Copyright s 6.02 (2013).

³² Mao, *supra* note 15.

³³ *Id.*

³⁴ 220 F. 195 (SYDNY 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

³⁵ Mao, *supra* note 15.

value of respective contributions.³⁶ The reasoning is somewhat vague about whether the commercial value should be assessed from the consumer end.³⁷

The Court of Appeal's approach to the application of the joint authorship test in *kogan vs Martin*³⁸ is a refined approach. The court made a principled framework, which takes into consideration of creative realities and contributions from determining authorship. This includes collaboration, authorship, contribution and non-distinctiveness of contribution.³⁹ If all the things present, then it constitutes as a unitary concept termed as joint authorship. In the Judgement, Lord Justice Floyd explains the role of each part and detailed guidance to the application of the test.⁴⁰ The relevant contribution must reach the legal standard of copyright 'authorship' and it must be assessed with an acute sensitivity as to the subject matter in question. Although, Kogan vs Martin brought significant clarity to the Joint Authorship test but certain questions were still unresolved, i.e. boundaries of a collaborative copyright work, how does one apportion authorship share where contributions are unequal and what is distinct contribution.⁴¹

TWO RATIONALES OF EQUAL DIVISION RULE:

The first rationale: from merged contributions to equal division

The merged individual contributions about the indivisibility of a co-author's rights in the joint work based on the theory of Professor Nimmer's. When the individual contributors are merged into an indivisible whole, the individual contributors relinquish their respective contributions in the joint work. Eventually, each co-author shared equal rights and claim equal copyright over the joint work.⁴² The relinquishment may be affecting one's property right, which should be carried out with the owner's intent. Therefore, there must be at least some conduct from which an implied intent to abandon the property in the individual contributions can be identified.

³⁶ *Id.*

³⁷ *Id.*

³⁸ [2019] EWCA Civ 1645.

³⁹ Kogan v Martin: A New Framework for Joint Authorship in Copyright Law - Simone - 2020 - The Modern Law Review - Wiley Online Library, *supra* note 16.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Mao, *supra* note 15.

The second rationale: intertwined commercial values to equal division

There are two levels at which the commercial values can be assessed. One is the output level, i.e. what consumers would pay for the work and the other is the input level, i.e. what co-authors would charge for their individual contributions.⁴³ If the commercial value is assessed at the output level, the intertwined nature of the consumer values of the individual contributions derives from the prior publication of the joint work. In other words, if the joint work has not yet been published, no mutual influences among different contributions are built in the mind of the consumers, and therefore it is plausible that co-authors of individual contributions in subsequent publication.⁴⁴ If the commercial value is assessed at the input level, the producer values of the individual contributions are hardly intertwined. The only possible instance where one cannot assess what the co-author would charge for their contributions is where there is no established market for that author. In other instances, there is always a past reference for an objective assessment of the commercial value of the individual contributions from the producer end.⁴⁵ Once the shares to the copyright are determined according to the producer value, it becomes easier to find out the realized commercial value.

CONTRIBUTIONS AS THE APPORTIONMENT CRITERION:

There must be apportionment rules in case Equal division rule is not followed. So, the alternative to Equal Division rule is Proportionate rule which means share of copyright corresponding to some quantitative apportionment criterion. The quantitative apportionment criterion must be quantifiable and it must be adequately related to the individual contributions that are in turn owned by or connected with the individuals who are claiming rights in the joint work.⁴⁶ There is a distinction between 'inseparable' and 'interdependent' inseparable contributions are not separately identifiable while interdependent contributions are. Many joint works have contributions that are physically separately identifiable, but some of the works are classic example of works of inseparable contributions. For example, an encyclopedia is a classic example of a composite work. Suppose different persons contribute its entries. These entries, whether all words or words combined with illustrations or otherwise, are not inseparable or interdependent in the sense of a joint work. They do not convert an encyclopedia

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

into a joint work.

For instance, a person writes 5 lines of a 100-line poem, contributes 5% of the poem, when the apportionment criteria chosen to be lines. But, the result may vary in case the criteria changed to number of words. So. The unit of appropriate for each case may be different. The criteria can be set according to what the majority of authors would have wanted, what the parties in the suit would have wanted, or even what the parties would have not have wanted.⁴⁷

Also, creativity can be a ground for determining the contributions of the co-authors. The esthetic works can be rewarded or appreciated more by the consumers as compared to less esthetic works.⁴⁸ Although, judges are not proficient in assessment of the esthetic quality of the works in deciding whether authors have copyright in the work.

For instance, a lyricist writes the lyrics and a musician composes the music for a song as a joint work. The first question arises that whether the contributions are quantifiable with a common and reasonable unit so as to be comparable. Basically, there is no particular unit to quantify the contributions. One can arbitrarily choose any criteria for quantification based upon the policies, in case there is no generalized classification criteria for a particular joint work.⁴⁹

In the landmark case of *Childress vs Taylor*⁵⁰, the defendant communicated an idea of a play to the plaintiff playwright and handed over the defendant's own research materials. The defendant later used the play without authorization from the plaintiff and the plaintiff sued for copyright infringement. The defendant sought to be recognized as a co-author of the play to be entitled to its use. The Second Circuit dismissed the defendant's appeal and affirmed the lower court's summary judgment of copyright infringement against the defendant. The Second Circuit court introduced the concept of dominant authorship. Herein, Childress is indisputably the dominant author of the work and the only issue is whether one person is the sole author or she and another (Taylor) are joint authors. Also, the court laid down a rule that there is a joint work only if the dominant author intended so.⁵¹

⁴⁷ Julie Katzman, *Joint Authorship of Commissioned Works*, 89 COLUMBIA LAW REVIEW 867 (1989).

⁴⁸ Mao, *supra* note 15.

⁴⁹ *Id.*

⁵⁰ 945 F.2d 500 (2d Cir. 1991).

⁵¹ Mao, *supra* note 15.

The Second Circuit court in *Thomson vs Larson*⁵² followed *Childress vs Taylor*⁵³ to require a dramaturg to establish that the principal playwright intended a co-authorship relationship to qualify the dramaturg as co-author of a musical. The Second Circuit stated that authorship can be determined through contributor's decision-making authority over what changes are made and what is included in a work.⁵⁴

CONCLUSION:

The criteria for joint authorship changes across nations and is dependent on factors such as the degree of collaboration and the interdependence of the authors' contributions. In general, courts will assess the authors' purpose, the nature of contributions, and if the contributions form an inseparable or interdependent unit. They also have equal rights over the shares of copyright and right to employ or license to others. Although, the concept of joint authorship evolved a great deal in recent years. Joint authorship is still evolving in India, with the applicable statutes, amendments, precedents, juristic opinions and international conventions providing guidance. Statutory backing of joint authors' rights and duties is an essential step towards ensuring mutual benefit for all parties involved. Adequate guidelines need to be brought for quantification of contributions of co-authors in a joint work. The rule may vary in different cases based upon the unit.

⁵² 147 F.3d 195 (2d Cir. 1998).

⁵³ 945 F.2d 500 (2d Cir. 1991).

⁵⁴ Mao, *supra* note 15.