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Copyright and Collective Authorship: Locating the Authors of Collaborative Work (book review)

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Aestheticians frequently disagree about whether their discipline has any real-world applications. Though some debates are so abstract that it is difficult to see any practical utility in them, I have long believed that there are areas within the disciplinary domain of aesthetics that can have a clear impact outside of academia. It is from this perspective, I believe, that aestheticians should approach law scholar Daniela Simone's latest book, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge University Press).

Some of the most interesting and innovative works in aesthetics have already dealt with intellectual property rights (IP). And I believe that this field of study would benefit greatly from more interdisciplinary collaboration. Though often a meaningless buzzword, an interdisciplinary research agenda with a well-defined focus on IP foundations in which – among others – aestheticians, law scholars, sociologists, economists, and political scientists can collaborate could very well serve the needs of society as a whole. The overall goal of this review is to encourage that specific type of collaboration.

As the book title suggests, Simone is dealing with copyright concerns in cases where works are created by a group of collaborating authors. These issues have become especially pressing as technological advances have opened up new avenues of collaboration, challenging traditional forms of joint authorship. Digital and communication technologies have, for instance, enabled projects such as Wikipedia, which publishes hundreds of articles per day written by an ever-expanding and loosely connected group of contributors who have most likely never met – and likely never will. Their roles vary, ranging from writing complete entries to performing more basic tasks like proofreading and enforcing Wikipedia's own guidelines. Should we call all of them

authors or should we impose some restrictions on authorship even in these cases? Call this the *collective authorship question*.

Simone claims that addressing this long-overlooked question in the context of governing the allocation of property-style rights, which is one of the primary goals of copyright, is critical at this time for two reasons. The first is normative and concerns the legitimacy of copyright itself. While expanding its reach, Simone highlights how, in recent decades, copyright legislation has been accused of favouring the interests of large corporations over creative subjects. A principled response to the question of collective authorship may help to realign copyright with creative practises while also promoting creators' interests. This would effectively re-ground intellectual property legislation on its ethical foundation.

The second reason for embarking on a project to address the collective authorship question is practical. The growing number of collaborative deeds enabled by digital technologies is likely to result in an increase in disputes over proprietary rights to a work created by multiple authors. Joint authors are likely to sue each other over control of the economic exploitation of their collective creation, particularly when monetary gain is at stake.

These two reasons limit the book's scope. Simone's goal here is not to develop a full-fledged theory of authorship, but rather to make some observations that can help modernise the concept of authorship in copyright law, particularly collective authorship, so that it can overcome doubts about the legitimacy of intellectual property while remaining effective in the courtroom. In this regard, Simone is what I call a copyright optimist. She believes that copyright has the tools, namely the joint authorship test, introduced by Section 10(1) of the Copyright Designs and Patents Act 1988 (CDPA), to

effectively manage cases of collective authorship. Once calibrated, this test can help us answer the collective authorship question on a case-by-case basis.

The joint authorship test states that contributors to the creation of a work are joint authors if their contribution is (i) not distinct; (ii) part of a common design; and, (iii) a significant contribution of the right kind. The book focuses on developing a suitable interpretation of these clauses. The *pars destruens* of Simone's argument attacks the dominant interpretation of the test, which she refers to as the pragmatic instrumental approach to joint authorship. She claims that it is misleading and should be discarded. This approach sets a high standard, particularly when determining whether a contribution is significant and of the appropriate kind. In this way, it restricts authorship of collaborative works to a small number of creators. The rationale for this decision is straightforward: limiting the number of authors allows for more efficient economic exploitation of a work. This approach sets a high bar, particularly for determining whether a contribution is significant and of the right kind. In this sense, it is restrictive and tends to concentrate authorship of collaborative works among a small number of creators. The motivation for this choice is clear: limiting the number of authors allows for more efficient economic exploitation of a work.

However, Simone points out that this approach has at least two flaws. The first is that it conflates ownership and authorship, which are conceptually distinct. Second, it ignores how creative practices regulate authorship through specific social norms. And, in paradigmatic cases of collectively created works, denying authorship to many collaborators may very well fly in the face of such norms, thus threatening copyright's legitimacy.

The book's *pars construens* argues for a more liberal interpretation of the joint authorship test, which Simone describes as a contextual and inclusive approach (pp. 250-256). It is contextual in the sense that it generally determines a contribution to a work as significant and of the right kind by applying criteria specific to the category to which the work belongs. It is inclusive in the sense that there is a low standard for being considered a joint author, where a *de minimis* contribution may well suffice in many cases – though inclusivity appears to be a result of contextuality, a point which Simone never addresses. Her approach, she believes, has the potential to restore the legitimacy of copyright by respecting how collective authorship works in specific practises.

A general upshot from this argument is that we frequently assume that economic incentives, and thus ownership, are the most important, if not the only, motivators for creators. However, given Simone's discussion, this appears to be an overstatement that does not apply across the spectrum of heterogeneous creative practises: particularly in highly collaborative projects, authors are more interested in the moral rights of attribution, that is, 'authorial credit' (p. 49). Being referred to as an author carries intrinsic value, which for many is sufficient compensation for collaborative effort.

Simone's argument is inductive. It finds evidence through the discussion of a series of case studies of collaborative authorship that both highlight the flaws of the pragmatic instrumental approach and demonstrate the benefits of her contextual and inclusive approach. These examples include Wikipedia (Chapter 3), Australian indigenous art (Chapter 4), scientific collaborations (Chapter 5), and film (chapter 6). The discussion of the cases is preceded by a legal and theoretical analysis of authorship in UK law (Chapter 2) and a general introduction discussing the book's main themes, methodology, and achievements (Chapter 1). The book concludes with a discussion of

the main points emerging from the analysis of the case studies (Chapter 7) and an application of these lessons to copyright doctrine (Chapter 8).

Simone's book is a rich and ambitious study that offers much to learn. However, there are a few issues that I would like to address. The first is very broad and deals with the definition of collaborative authorship, which should limit the scope of the book and inform its analysis. Simone claims that collective authorship is 'large-scale collaboration' (p. 2). A work produced by that activity is 'one which is greater than the sum of its parts' (p. 11). But this viewpoint is unconvincing.

For starters, it's not clear how the two claims are related. The latter is never fully clarified or systematically argued. For example, it appears to me that every work of art, even one created by a single person, is greater than the sum of its parts, in the sense that (at least some) aesthetic features can be derived from the combination of a work's components. Consider the balance of composition in a painting. It is, of course, something that only the entire painting possesses, not its individual parts. The claim appears to be a broad statement about the ontology of creative works rather than a definition of collaborative authorship.

Furthermore, even with this issue aside, the specific nature of large-scale collaboration is never fully explained. The book appears to be about joint authorship in general as a collaborative effort involving two or more people. Simone acknowledges this, claiming that the book 'is relevant to collaborations of all sizes' (p. 232, n4). This is somewhat baffling for a reader who is told to expect something more specific (p 2). Though Simone puts a significant effort in connecting with contributions outside her discipline, works in aesthetics offer very nuanced discussions of large-scale collaborative authorship that could have been of help.

The second issue concerns the role of social norms in the joint authorship test. As previously stated, social norms are important in determining the significance and (right) kind of contribution. I believe Simone's general point is correct: copyright law usually minimises efforts that are highly respected and valued within a collaborative practise. But there are some caveats to adopting those norms. Judges should not defer to unreasonable social norms that lack substantive fairness and concern for the public interest (p. 246). Copyright can help us filter out these undesirable social norms because its normative goal is to incentivize and reward authors. Simone gives us some examples of undesirable social norms: Senior scientists have significant control over authorship attribution in scientific publications. However, that appears unfair, so social norms tolerating such behaviours should be ideally excluded through the use of copyright principles.

However, there appear to be instances where a creative practice's social norms regarding authorship are so dissimilar to copyright law that it is difficult to see how they could not appear unreasonable. One of Simone's case studies, that is, Australian indigenous art, appears to provide a clear example. She acknowledges that the notion of collective authorship in this practise, which includes even ancestors as authors through ritual knowledge, 'stretches copyright law beyond its conceptual limits' (p. 122). In effect, as she admits, the best approach to handle this case—and arguably similar ones—is *sui generis* legislation (p. 101). Simone never describes in detail how this legislation should look, but I don't see how it could be consistent with the foundations of copyright. In this sense, there appears to be an unavoidable tension, if not a contradiction, between her general model, which includes copyright law as an arbiter of social norms, and what she proposes when discussing cases of traditional art. It seems to me that she cannot save both.

This last point, if correct, suggests an even deeper concern for Simone's theory, especially one of its core claims: copyright law has the tools to deal with collective authorship (p. 6). I don't see how this is true if dealing with a traditional artistic practise necessitates *sui generis* legislation. To be sure, I support the idea of creating specific bodies of law for some non-mainstream artistic practises. But I am convinced of this because I see copyright as a direct threat to their survival as artistic traditions. We have seen that in the similar case of Chinese calligraphy. Copyright laws transformed what was, just like Australian indigenous art, an appropriating and sharing culture 'into a very different contemporary form of artistic expression... marked by individual expression and ownership' (Greenberg, 2010, p. 163).

Despite my reservations, this book is an intriguing addition to the discussion of collective authorship, and a must-read for anyone interested in authorship theories and their practical applications. When considering recent legal controversy such as *Druet v. Cattelan*, in which the French sculptor unsuccessfully sought co-authorship of some of the Italian conceptual artist's works that Druet materially created, it appears that the debate will continue to pique the interest of scholars from various backgrounds as well as the general public.

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