

# Wiki (POCC) authorship: The case for an inclusive copyright

by Sunimal Mendis\*

**Abstract:** Public open collaborative creation (POCC) constitutes an innovative form of collaborative authorship that is emerging within the digital humanities. At present, the use of the POCC model (or Wiki authorship model) can be observed in many online creation projects the best known examples being Wikipedia and free-open source software (FOSS). This paper presents the POCC model as a new archetype of authorship that is founded on a creation ideology that is inclusive and as such, challenges the existing individualistic conception of authorship in exclusivity-based copyright law.

Based on a comparative survey of the copyright law frameworks on collaborative authorship in France, the UK and the USA, the paper demonstrates the inability of the existing framework of exclusivity-based copyright law to give adequate legal expression to the relationships between co-authors engaged in collaborative creation within the POCC model. It proposes the introduction of an 'inclusive' copyright to the copyright law toolbox which would be more suited for giving legal expression to the qualities of inclusivity and dynamism that are inherent in these relationships.

Keywords: authorship; POCC; Wiki authorship model; FOSS

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Recommended citation: Sunimal Mendis, Wiki (POCC) authorship: The case for an inclusive copyright, 13 (2022) JIPITEC 267 para 1.

## A. Introduction

1 Since its inception, the evolution of modern copyright law has been characterized by a dominant narrative of exclusive property rights.<sup>1</sup> Exclusivity can be

defined as the quality of a legal right in a tangible or intangible good that precludes any person other than the rightholder from benefitting from the utilities of that good.<sup>2</sup> The essence of copyright law is the exclusive copyright that is granted to an author over the work created by them. The exclusive copyright enables the author to reserve the utilities of that work (e.g. reproduction, adaptation, communication to the public etc.) to their own individual enjoyment

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narrative of property (and not just in the narrative of intellectual property rights). Hanoch Dagan, 'Exclusion and Inclusion in Property' in Hanoch Dagan (ed.) *Property: Values and Institutions* (Oxford Scholarship Online 2011) 37, at p 37.

1 As noted by Dagan, the right to exclude is the defining feature of property rights and is ingrained in the conventional

2 Gérard Cornu exclusive as « De ce qui écarte de la jouissance d'un droit toute autre personne que la titulaire » [That which precludes any person other than the owner of the right of enjoyment thereof]. Gérard Cornu, 'Exclusif,ive'. *Vocabulaire juridique* (11th edn. PUF 2016) 430 (author's translation).

(i.e. ‘mine not yours’). It further grants the author an affirmative claim to prevent any other person from benefitting from the utilities of the copyright protected work without their authorization.<sup>3</sup>

- 2 The exclusivity-based narrative is reinforced by copyright’s individualistic conception of authorship that frames authorship as an individual relationship subsisting between a specific person (i.e. author) and the expression (i.e. work) that is created by that person (or originates from them). This individualistic conception of authorship is at the core of copyright law’s perception of an author as a solitary romantic genius who is the sole creator of unique works that originate from their own individual intellect.<sup>4</sup>
- 3 This paper posits that *Wiki* authorship—an emerging model of collaborative creation in the digital humanities—challenges this individualistic conception of authorship and consequently the dominant exclusivity-based narrative of copyright law. It further argues that, in order to give legal expression to the relationships that exist among authors engaged in the creation of a work under the *Wiki* authorship model, it is necessary to introduce a parallel notion of an ‘inclusive’ copyright to the copyright law toolbox. In doing so, it proposes a paradigm shift in the conception of copyright as a tool for individual ownership (‘mine not yours’) to a property right that is capable of collective ownership by an open community of rightsholders (‘mine and yours’).
- 4 The notion of an ‘inclusive’ copyright that is advanced in this paper, is based on the concept of

an ‘inclusive’ property right proposed by Dusollier.<sup>5</sup> Dusollier envisages an inclusive property right as a legal relationship between a person and a tangible or intangible good that is characterized by the absence of a power of exclusion and a plurality of persons being included in the collective use of that good.<sup>6</sup> Accordingly, Dusollier’s concept of an ‘inclusive’ property right is based on two key characteristics: (a) a legal right to a good that is held by a plurality of persons which is characterised by the collective enjoyment of the utilities of that good; (b) an absence of a power or privilege on the part of any person to exclude an owner of the inclusive property right from benefitting from the utilities of the good. ‘Inclusivity’ can thus, be described as the quality of a legal right to benefit from all or some utilities of a tangible or intangible good that is held by a plurality of legal subjects in a collective way without any person having the power to exclude the rightholder from such benefit. Dusollier, acknowledges that inclusivity is a spectrum and identifies different types of property regimes that display varying degrees of inclusivity. For instance, the public domain—where inclusivity arises through an absence of exclusive property rights—would be located at one end of the inclusivity spectrum while copyleft licenses such as GPL and *Creative Commons* (CC)—that use contract as a tool to include others in the collective enjoyment of a good subject to exclusive copyright—would be located towards the other end.<sup>7</sup> The inclusive copyright that is proposed in this paper is situated at a mid-point on this spectrum. As elaborated in greater detail in section D.I below, it refers to a copyright that is shared among an open and indeterminate community of contributing authors which grants to each of them an equal and symmetrical right to collectively benefit from the utilities of a work (good), without one single author having a power or privilege to exclude another author from such benefit. Unlike

3 This is in accordance with Hohfeld’s conception of jural relations, wherein a legal right is defined as an affirmative claim held by one person over another. Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ 23 *Yale Law Journal* (1913) 55. This also reflects the Kantian notion of property as an individual right that “is rightfully mine (*meum iuris*) with which I am so connected that another’s use of it without my consent would wrong me”. Immanuel Kant, *Gesammelte Schriften*. Edited by the Königliche Preußische Akademie der Wissenschaften (Reimer/de Gruyter 1900) at p 245 (as cited in David James, ‘Independence and Property in Kant’s Rechtslehre’ 24 *British Journal for the History of Philosophy* (2016) 302, at p 312).

4 Martha Woodmansee, ‘On the Author Effect: Recovering Collectivity’ 10 *Cardozo Arts & Entertainment Law Journal* (1992) 279, at p 279. See also Martha Woodmansee and Peter Jaszi, ‘Introduction’ in M. Woodmansee and P. Jaszi (Eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press 1994) pp 2-3.

5 S. Dusollier and J. Rochfeld, ‘Propriété Inclusive ou Inclusivité’, in M. Cornu, F. Orsi et J. Rochfeld (eds.), *Le Dictionnaire des Biens Communs* (PUF, 2017) 983. See also, S. Dusollier, ‘Intellectual property and the bundle-of-rights metaphor’ in P. Drahos, G. Ghidini & H. Ullrich (eds.) *Kritika: Essays in Intellectual Property* (Edward Elgar 2020) 146; S. Dusollier, *Inclusive properties* (Cambridge University Press, forthcoming). It is noted that similar the notions of inclusive property rights have been advanced by several scholars such as Hanoch Dagan in relation to property rights, *ibid* (n 1) and by Geertrui Van Overwalle in relation to patent rights, see Geertrui Van Overwalle ‘Inventing Inclusive Patents. From Old to New Open Innovation’ in P. Drahos, G. Ghidini & H. Ullrich (eds.) *Kritika: Essays on Intellectual Property* (Edward Elgar 2015) 206.

6 *Ibid*, Dusollier and Rochfeld at p 985 (author’s translation).

7 *Ibid*.

in the case of copyleft licenses, here the quality of inclusivity materializes through a positive legal right that is held *in rem* by each inclusive copyright holder (as opposed to a right *in personam* that is granted by the holder of an exclusive copyright by contract). Yet, unlike goods in the public domain, inclusive copyright does not denote an absence of exclusive rights. Rather, inclusive copyright grants each rightholder a positive right of ownership in the common work (good) that can be ‘defensively’ enforced to prevent the exclusive appropriation of the work by any person (including any other inclusive copyright holder) and to prevent its use in violation of generally applicable terms and conditions. Thus, the inclusive copyright will comprise a dimension of exclusivity that, unlike the classical notion of exclusive property rights, is not directed towards preserving the individual enjoyment of the work (good) but rather aims to sustain and perpetuate the inclusive and collective enjoyment of the common work (good) over time by preventing its exclusive appropriation.<sup>8</sup>

- 5 This paper proceeds in four parts. Part B describes the *Wiki* authorship model—which I refer to as authorship carried out under Public Open Collaborative Creation (POCC) model—as a new archetype of collaborative creation that is based on a creation ideology that is collective and inclusive. Part C analyses the inability of the existing notion of exclusive copyright to give adequate legal expression to the relationships between persons engaged in the creation process under the POCC model. Part D proposes the development of an ‘inclusive’ copyright that would be more suited for giving legal expression to the relationships among the authors of a POCC work. The concept of an inclusive copyright is still at a very early stage of development and many issues relating to its scope, area of application and modalities of enforcement remain unresolved; part E provides a glimpse into some of these issues and discusses possible strategies for their resolution.

## B. POCC as a new archetype of collaborative creation

- 6 POCC is a term I coined to describe a collaborative creation model that is steadily gaining in popularity within the digital humanities. I define it as creation taking place through the contributions of a multiplicity of persons under a model of sequential creation, resulting in the production of a literary, artistic or scientific work, which remains in a continuous state of change and development over

an undefined period of time.<sup>9</sup> As per the structure of the POCC model, a plurality of authors collaborate in the creation of a single work by modifying and building upon expression contributed by each other within a process of incremental creation. This process of creation takes places within an open-ended time span which allows it to continue over an indefinite period of time. The term ‘work’ is used here to denote that the intellectual content created under a POCC model of authorship would typically display sufficient originality to qualify for copyright protection.

- 7 At present, the use of the POCC model can be observed in many collaborative creation projects that result in the production of a diverse array of literary, artistic and scientific content. The best-known examples of such creation projects are the online encyclopaedia *Wikipedia*<sup>10</sup> (hence the term *Wiki* authorship) and free open-source software (FOSS) creation projects such as *VLC*<sup>11</sup> and *Debian*<sup>12</sup>. In addition, it is used for the creation of collaborative fictional stories by the *Folding Story*<sup>13</sup> platform and *This Exquisite Forest*<sup>14</sup> project used it in the creation of collaborative graphic art.

9 Sunimal Mendis, ‘POCC: A new archetype of authorship’ 22 *Journal of World Intellectual Property Law* (2019) 59, at p 60.

10 Wikipedia: the free encyclopedia <<https://en.wikipedia.org/wiki/Wikipedia>> accessed 5 May 2022.

11 VLC media player <<http://www.videolan.org/vlc/>> accessed 5 May 2022.

12 Debian operating system <<https://www.debian.org/intro/about.en.html>> accessed 5 May 2022.

13 Folding Story < <http://foldingstory.com/>> accessed 5 May 2022. The Folding Story project uses the POCC model to allow members of the public to collaborate in the creation of fictional stories over an Internet platform. Each contributor writes a line or a paragraph of a story that is added to by other contributors, resulting in the creation of a short story or fictional narrative that is in a constant state of development.

14 This Exquisite Forest <[www.exquisiteforest.com/concept](http://www.exquisiteforest.com/concept)> accessed 5 May 2022. *This Exquisite Forest* is a collaborative graphic art project conceived by artists Chris Milk and Aaron Koblin and produced by the Tate Modern in London and the Google Data Arts team. It used the POCC model to create graphic animations exploring specific themes that built upon each other, along a chain of sequential creation. Members of the public were able to participate in the creation process over an Internet platform as well as by using digital drawing tablets that were made available to visitors at the Tate Modern. The project was operative from July, 2012 to August, 2014.

8 Ibid.

8 To illustrate the POCC model better, let us consider the creation process of a *Wikipedia* article (or ‘page’ as they are commonly referred to). Every *Wikipedia* article on a given topic is created by a multiplicity of contributors each building upon the expression contributed by previous contributors by means of adding to, modifying and in some instances even overwriting that expression. Even though the individual contributions may differ both in quantitative and qualitative terms, each contribution constitutes an integral step in the creation process. While this sequential creation process results in a literary work that remains in a constant state of evolution it nevertheless succeeds in preserving the work’s character as a single coherent work that, taken as a whole, will qualify for copyright protection at each stage of its evolution.<sup>15</sup>

9 In many cases, the contributions will take the form of ‘tweaks’ or very incremental changes or additions to existing content. This process of ‘tweaking’ is a hallmark of the POCC process and the following example that is based on the creation process of the headnote of the *Wikipedia* article on ‘Alexander the Great’ serves to elucidate this process.<sup>16</sup>

10 In November 2004, **Participant ‘T’** makes the following contribution to the headnote.

*...Alexander the Great, was one of the most successful military commanders of the Ancient world*

In May 2007, **Participant ‘U’** revises it as follows,

*...Alexander the Great, was one of the most successful Ancient Greek military commanders of the Ancient world in history*

In June 2007, **Participant ‘V’** deletes the words ‘Ancient Greek’ as he feels it confuses the sense of what the sentence seeks to convey,

*...Alexander the Great, was one of the most successful Ancient Greek military commanders in history*

In January 2011, **Participant ‘X’** partially re-writes the sentence,

*Alexander was known to be undefeated in battle and is considered one of the most successful commanders of all time*

11 For the moment, the POCC model is employed in the digital sphere and is primarily used in the creation of digital content over Internet platforms.<sup>17</sup> The genesis of the POCC model within the digital sphere is understandable as the potential for connectivity and networking offered by the Internet and the tools and infrastructure offered by digital technology for collaborative and incremental creation<sup>18</sup> provide the perfect conditions for the model to flourish. Nonetheless, it is important to note that the POCC model has the potential to be used in non-digital offline settings as well, for example in the creation of street art and graffiti and in the creation of music through jamming sessions. Indeed, it is possible to draw comparisons between the POCC model and folkloric traditions of storytelling, indigenous art and traditions of religious discourse. This gives rise to the interesting question whether the POCC model is in fact a completely ‘new’ archetype of authorship or whether it in fact signals the re-emergence of an ancient form of collaborative creation within the digital sphere.<sup>19</sup>

12 The value of the POCC model lies in its ability to harness the skills, talents, knowledge and experience of a large and diverse group of otherwise unconnected individuals from all corners of

15 Although it may be possible to separately identify the different stages of an article’s evolution (in the form of different ‘versions’ of the same article), it would nevertheless be artificial to compartmentalize each point in the incremental creation process into a series of separate static works. Such compartmentalization would also go against the objective of the creative endeavour which is to create a single yet evolving work, as opposed to the modification of an existing work so as to create a series of new versions that are separate from each other.

16 Please note that, although the example is based on the actual editing history of the headnote of the *Wikipedia* article (page) on Alexander the Great, it has been heavily edited and the names and identification information of the contributors have been changed.

17 One exception was *This Exquisite Forest* project that enabled members of the public to engage in creation under the POCC model through digital drawing tablets that were made available onsite at the Tate Modern, London.

18 For example, editing tools, the possibility of maintaining logs on creation history.

19 This discussion is not within the scope of this paper. However, it suffices to say that anthropological and ethnographic studies carried out on the folkloric tradition of authorship and the creation of the Jewish Talmud point to substantial similarities with the POCC model of creation. See for example David Atkinson, *The English Traditional Ballad* (Routledge 2002); Eva Axer, ‘Choir of the Minds’, in Mathias Denecke, Anne Ganzert, Isabell Otto, Robert Stock (eds), *Reclaiming Participation* (Transcript 2016); David Buchan, *The Ballad and the Folk* (Routledge 1972); TF Henderson, *The Ballad in Literature* (Cambridge University Press 1912); Hermann L Strack and Gunter Stemberger *Introduction to the Talmud and Midrash* (Markus Bockmuehl tr, Fortress Press 1992); Jacob Neusner *Invitation to the Talmud* (Wipf & Stock 2003).

the globe within a common collaborative value creation endeavour. These individuals are motivated to participate in the POCC process through non-pecuniary considerations<sup>20</sup> such as peer-recognition<sup>21</sup>, the enjoyment derived from engaging in a creative pursuit within a community of like-minded individuals and the satisfaction derived from collaborating in the creation of content that generates social, cultural and scientific value.<sup>22</sup>

- 13 The capacity of the POCC model to direct and sustain a large-scale collaborative authorship effort resulting in high-quality creative output is testified by the *Wikipedia* project that has matched (and in some respects overtaken) other conventional encyclopaedias published by corporate entities both in terms of comprehensiveness (number of articles and range of disciplines)<sup>23</sup> and reliability.<sup>24</sup> Similarly, VLC soft-

ware has overtaken *Windows Media Player* in relation to robustness, sophistication and simplicity of use.<sup>25</sup> Thus, the POCC model of authorship holds significant implications for the democratization of creative production by reflecting a commons-based approach<sup>26</sup> to creation that challenges the traditional market-based creative economy.

## I. The POCC model

- 14 The POCC model can be described in relation to four main characteristics: openness, chain of sequential creation<sup>27</sup>, creative autonomy and ideology. As will be discussed below, these characteristics imbue POCC authorship with an inclusivity and dynamism that differentiates it from conventional models of collaborative authorship that are recognized by copyright law.

### 1. Openness

- 15 The quality of openness can be described in relation to two aspects of the POCC process.

20 Volker Wittke and Heidemarie Hanekop, 'New Forms of Collaborative Innovation and Production on the Internet' in Volker Wittke and Heidemarie Hanekop (eds.) *New Forms of Collaborative Innovation and Production on the Internet: An Interdisciplinary Perspective* (Göttingen University Press 2011) 12.

21 See Andrea Forte and Amy Bruckman, *Why do people write for Wikipedia?* See Andrea Forte and Amy Bruckman, *Why do People Write for Wikipedia?* Georgia Institute of Technology (2005) <<http://www.andreaforte.net/ForteBruckmanWhyPeopleWrite.pdf>> accessed 5 May 2022. See also Ruediger Glott, Philipp Schmidt and Rishab Gosh, *Wikipedia Survey-Overview of Results* (UNUMERIT 2010) 9-10. <[http://www.ris.org/upload/editor/1305050082Wikipedia\\_Overview\\_15March2010-FINAL.pdf](http://www.ris.org/upload/editor/1305050082Wikipedia_Overview_15March2010-FINAL.pdf)> accessed 5 May 2022.

22 See Why do people write articles for Wikipedia, despite not getting any recognition or incentives? (Quora February 22, 2016) <<https://www.quora.com/Why-do-people-write-articles-for-Wikipedia-despite-they-dont-get-any-recognition-or-incentives>> accessed 5 May 2022. See also Alexander Hars and Shaosong Ou, 'Working for Free? Motivations of Participating in Open Source Projects', *Proceedings of 34th Annual Hawaii International Conference on System Sciences (HICSS-34)* 25; Georg Von Krogh, Stefan Haefliger, Sebastian Spaeth, and Martin W Wallin, 'Carrots and rainbows: Motivation and social practice in open source software development (2012) *MIS quarterly* 649.

23 *Wikipedia* has overtaken other conventional encyclopaedias in terms of the number of articles, range of disciplines and number of languages in which it is available. See 'Wikipedia: Size Comparisons' <[https://en.wikipedia.org/wiki/Wikipedia:Size\\_comparisons](https://en.wikipedia.org/wiki/Wikipedia:Size_comparisons)> accessed 5 May 2022.

24 See I. Casebourne, C. Davies, M. Fernandes, N. Norman, *Assessing the accuracy and quality of Wikipedia entries compared to popular online encyclopaedias: A comparative preliminary study across disciplines in English, Spanish and Arabic* (Epic

2012). Available at, <[https://en.wikisource.org/wiki/Assessing\\_the\\_accuracy\\_and\\_quality\\_of\\_Wikipedia\\_entries\\_compared\\_to\\_popular\\_online\\_encyclopaedias](https://en.wikisource.org/wiki/Assessing_the_accuracy_and_quality_of_Wikipedia_entries_compared_to_popular_online_encyclopaedias)> accessed 5 May 2022.

25 *Slant* (a product recommendation community) ranks VLC 4th and Windows Media Player 26<sup>th</sup> in the 'Best audio player applications for Windows' category. See 'What are the best audio player applications for Windows?' *Slant* <[https://www.slant.co/versus/1430/1608/~windows-media-player\\_vs\\_vlc](https://www.slant.co/versus/1430/1608/~windows-media-player_vs_vlc)> accessed 5 May 2022.

26 'Commons' refers to an institutional form of structuring the rights to access, use, and control resources that is not based on asymmetric exclusion typical of property but where the inputs and outputs of the process are shared, freely or conditionally, in an institutional form that leaves them equally available for all to use as they choose at their individual discretion. Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006) 61-62.

27 The term 'sequential creation' is used here in the place of the better-known term 'sequential innovation' to denote that the POCC model is defined (for the purposes of this study) in relation to the production of intellectual expression that qualify for copyright protection as opposed to scientific inventions. However, this is not to discount the potential held by the POCC model for the production of a diverse array of intellectual goods including inventions that could potentially qualify for patent protection.

## a) Open creation process.

16 Firstly, the POCC process is ‘open’ to any member of the public, subject to generally applicable terms and conditions of participation. These terms and conditions are twofold. The most important category are terms and conditions that regulate the way in which any member of the public can benefit from the utilities of the POCC work (or any portion thereof) by engaging in the sequential creation process. These terms and conditions are applicable without distinction to persons who seek to use the POCC work both within and (where such use is permitted by the terms and conditions) outside the dedicated platform. They are usually imposed through standard-form open-public licenses (e.g. CC and GPL) but can also take the form of specific terms and conditions that are formulated to fulfil requirements of a particular creation project. For example, *Wikipedia* articles are subject to a CC-BY-SA 3.0 license that determine the ways in which they can be reproduced, adapted or made available to the public. Any person who wishes to use a *Wikipedia* article (or any portion thereof) must agree to be bound by the terms of the CC-BY-SA 3.0 license, regardless as to whether the intended use is to be carried out within the *Wikipedia* platform or outside it.<sup>28</sup> Similarly, in the case of FOSS programs contributors agree to abide by the terms of the GPL license. The choice of applicable license or the formulation of the specific terms and conditions are typically determined by the project initiator<sup>29</sup> although members of the creator community can sometimes be invited to

participate in modifying these to suit the changing needs of the project.<sup>30</sup> The second category of terms and conditions is community governance rules that are designed to regulate the behaviour of creators (contributors) who engage in the POCC process. These community governance rules reflect an institutionalized framework of shared norms, goals and standards of conduct.<sup>31</sup> For instance, they could prescribe standards of conduct to be observed by creators in interacting with each other and delineate the nature and scope of the powers and authority vested in individuals empowered to carry out editorial and administrative functions. Such community governance rules are typically associated with creator communities engaging in the POCC authorship process within a dedicated online platform.<sup>32</sup> However, it is possible that they may also apply to diffused creator communities that do not engage in creation within a specific dedicated space but are dispersed both temporally and spatially. By setting out a common framework and/or set of values and ideals, they bind creators together within a common governance framework (and often within a common value system) that serves to create a sense of community among contributors and enables them to develop a common identity (e.g. a common identity as *Wikipedians*).<sup>33</sup> While the POCC model is not reliant on the existence of a community governance framework or a common value system, these contribute in no small measure towards the sustenance of the POCC process and

28 For a contrary view see the opinion expressed by Emmanuel Pierrat, that the CC-BY-SA license would not impose any obligation on third parties who seek to use that content outside of the platform. Cited in Marie Kostrz, ‘Houellebecq, gratuit sur le net: Flammarion va attaquer.’ Rue89 (2010). <<http://rue89.nouvelobs.com/rue89-culture/2010/11/25/houellebecq-gratuit-sur-le-net-flammarion-va-attaquer-177707>> accessed 5 May 2022. It is argued that this view is untenable as it would mean that the CC-BY-SA license is limited to use within the borders of a specific digital space. This would seriously affect the utility of a CC-BY-SA license and also be contrary to accepted legal principles regarding the scope of application of a contractual agreement.

29 The project initiator is the person or entity who designs the project and/or is in charge of operating the online platform (digital space) on which the POCC process takes place. For instance, as regards *Wikipedia*, the project initiator Jimmy Wales determined that content contributed to a *Wikipedia* article would be subject to a GNU Free Documentation License (GFDL) 1.2 (this was later changed to a CC-BY-SA license). Similarly, the terms and conditions under which content contributed to the *Folding Story* platform and *This Exquisite Forest* project is made available to downstream contributors was determined by the initiators of those projects.

30 In 2009, when the *Wikimedia Foundation* which owns and manages the *Wikipedia* platform decided to migrate from the GFDL license to the CC-BY-SA license, the relicensing proposal was put to a vote by individuals who had a registered account on a *Wikimedia Foundation* project with at least 25 edits prior to March

15, 2009. See ‘Licensing update/Result’ <[https://meta.wikimedia.org/wiki/Licensing\\_update/Result](https://meta.wikimedia.org/wiki/Licensing_update/Result)> accessed 5 May 2022.

31 For a detailed exposition of the importance of social norms in the *Wikipedia* creation process see Christian Pentzold, ‘Imagining the *Wikipedia* community: What do *Wikipedia* authors mean when they write about their “community”?’ 13 *New Media & Society* (2011) 704

32 For example, as per the community guidelines of the *Wikipedia* platform persons engaging in creation on that platform agree to submit to editorial interventions made by ‘editors’ appointed by the community. ‘*Wikipedia*: Administration’ <<https://en.wikipedia.org/wiki/Wikipedia:Administration>> accessed 5 May 2022.

33 According to Pentzold, *Wikipedia* can be perceived as *ethos-action community*. Membership and thus the boundaries are defined by adherence to a set of standards regarding the project’s purpose, norms, values, and valid actions. Pentzold (n 31) at p 714.

could be a critical ingredient in ensuring the success of the creation endeavour. Both categories of terms and conditions are capable of enforcement: the first category through legal action (e.g. enforcement of CC licenses in a court of law); and the second through community action (e.g. by ‘blocking’ and thereby excluding any person from continuing to engage in the common creation endeavour). However, as long as an individual abides by the terms of the license and community governance rules, no person has the power or privilege to exclude them from participating in the common creation endeavour. Thus, the borders of the POCC creator community are porous and any individual is able to gain membership of the creator community by agreeing to abide by generally applicable terms and conditions.

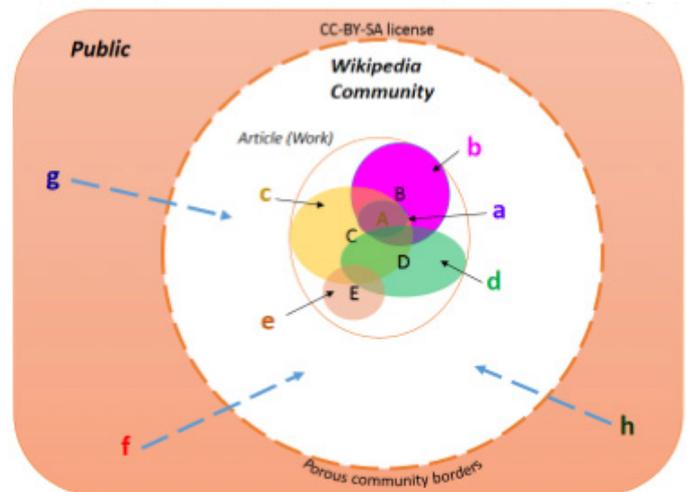
**b) Open resource**

17 Secondly, openness refers to the fact that the work created within the POCC process constitutes an ‘open-resource’ that can be added to, modified and built upon by members of the public both within the POCC process and in some instances even outside it (e.g. in creating stand-alone derivative works that are based on the POCC work but do not become part of the common work). Members of the public who engage in the creation process by adding to, modifying the POCC work or re-using the POCC work or portions thereof in the creation of independent derivative works can be referred to as ‘active users’. In addition, under the POCC model, the work is typically made available to ‘passive’ users who seek to use the content without making further additions or modifications to that work (e.g. a student who wishes to cite a portion of a Wikipedia page in a term paper). Of course, the degree of ‘openness’ of different POCC works can differ depending on the terms on which they are made available for use and re-use. For instance, the Folding Story project allows members of the public to develop and build upon content using the POCC model within the dedicated platform in accordance with specified terms and conditions of use. However, as regards use outside the online platform, the content is made available subject to the exclusive copyright of the respective authors. Therefore, while the POCC work created through the Folding Story project constitutes an ‘open-resource’ as regards the members of the creator community who engage in the POCC process within the dedicated online platform, it comprises a ‘closed-resource’ as regards third parties.

18 The POCC authorship process reflects a collective endeavour within which the contributions of a

multitude of otherwise unconnected persons<sup>34</sup> serve to create a single identifiable work that is available for the use and enjoyment of members of the public who agree to abide by generally applicable terms of use. In this sense, it corresponds closely to von Hippel’s model of ‘open collaborative innovation’ (OCI) that has been defined as development projects in which multiple users collaborate and contribute for free and openly share what they develop.<sup>35</sup> However, the fact that this concept has been formulated with reference to innovation economics and the vague terms in which it has been defined makes it unsuitable for founding a legal analysis of POCC authorship.

19 Figure I illustrates the POCC creation process; a, b, c and d being contributors to the creation process (i.e. members of the creator community) and g, f and h being members of the public who are hoping to contribute to the creation process at a future date (i.e. intending to obtain membership of the creator community).



**Fig. I:** Illustration of POCC process

34 The term ‘unconnected’ denotes that interactions between contributors are usually limited to the creation process itself although they may sometimes develop through interactions taking place on community forums (e.g. the ‘village pump’ forum of *Wikipedia*). But the contributors are typically strangers who come together via the creation process and have no personal relationships outside it.

35 Eric von Hippel, ‘Definition of open collaborative innovation’ (*Financial Times*) <<http://lexicon.ft.com/Term?term=open-collaborative-innovation>> accessed 5 May 2022; See also Carliss Y Baldwin and Eric A von Hippel, ‘Modeling a Paradigm Shift: From Producer Innovation to User and Open Collaborative Innovation’. Available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1502864](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1502864)> accessed 5 May 2022.

## 2. Chain of sequential creation

- 20 The POCC process involves a multiplicity of persons building upon and adding to content contributed by each other within a chain of sequential creation. Each contributor dedicates their contribution to the common creation effort to be added to, modified and built upon by downstream contributors. As a result, the contributions made by individual contributors become inseparably linked and intertwined with each other contextually and/or physically. Each contribution depends on preceding contributions for their context and meaning and this results in each contribution (no matter how small) being imbibed with an inherent dynamism, in that, it has the potential to inspire and direct the nature and substance of future contributions along the chain of sequential innovation. The open time-frame that enables the creation process to continue for an indefinite period of time enhances this dynamism by enabling the work to constantly adapt and update itself as an evolving 'living' work that can cater to contemporary requirements. Therefore, the POCC model is particularly suited for the creation of content that is in constant need of revision and updating such as FOSS and encyclopedia articles such as *Wikipedia*.

## 3. Creative autonomy

- 21 The POCC process proceeds in a random and sporadic manner, without a pre-determined creation design (agenda) or consensus among the authors as to the exact nature of the ultimate work. In addition, the POCC model is heterarchical<sup>36</sup> meaning that each contributor enjoys an equal degree of power and authority in determining the direction and outcome of the creation endeavour. Therefore, no person has the power to exercise control over the creative decision-making process or to set a creative agenda for another person. Thus, contributors are able to self-select the nature and scope of their individual contributions by exercising their personal creative judgment. In rare instances, contributions made to the common work may be subject to a process of curation such as in the case of *This Exquisite Forest*.<sup>37</sup>

36 Axel Bruns, 'Towards Producersage' in Fay Sudweeks, Herbert Hrachovec and Charles Ess (eds) *Cultural Attitudes towards Communication and Technology* (Murdoch University, 2006) 275, at p 279. A 'heterarchy' has been defined as "(...) the relation of elements to one another when they are unranked or when they possess the potential for being ranked in a number of ways." Carole L Crumley, 'Heterarchy and the Analysis of Complex Societies' (1995) *Archeological Papers of the American Anthropological Association* 1, p 3.

37 While contributors to *This Exquisite Forest* project enjoyed a

However, this curation is limited to the purpose of ensuring that only contributions that meet a certain level of quality are absorbed into the common work and do not set a creative agenda or dictate the actual nature and scope of individual contributions. Thus, each contributor exercises a substantial degree of creative freedom and autonomy in determining the nature and scope of the contribution they make. This also means that each contributor has the ability to modify and develop the POCC work in a way that could not have been intended or foreseen by preceding authors. For instance, in the creation of short fiction under a POCC creation model, a character created by an upstream contributor can be developed and modified by a downstream contributor in a way that was neither intended nor foreseen by its initial creator. This absence of a common creative agenda invests the creation process with considerable dynamism as the work is constantly developing in a manner that is serendipitous and unpredictable.

## 4. Ideology

- 22 The POCC model is founded upon an ideology of equality, collectiveness and sharing that is shared and accepted by contributors to the POCC process. This shared ideology and communitarian norms form a powerful incentive for individuals to contribute to the POCC process.<sup>38</sup> Therefore, the preservation and perpetuation of these norms along the chain of sequential creation is a key consideration in ensuring the sustainability of the POCC process.
- 23 The ideology of equality places each contributor on an equal footing with others and grants equal value to each contribution. Therefore, each contributor obtains an equal claim to the authorship of the work regardless of the value of their individual contribution to the overall work, either in quantitative or qualitative terms. The ideology of collectiveness is reflected through each individual contributor dedicating their expression to the common work that results in that expression becoming intertwined with the expression contributed by others to form a single cohesive work. Thus, the resulting POCC work is the result of a collective creative effort on the part of all contributors. Furthermore, the sequential innovation process proceeds upon a

high degree of creative autonomy and freedom in determining the way in which they developed upon the existing content, their contributions were curated by the producers of the project for appropriateness and quality. The producers reserved the right to not include certain submissions in the common work or to remove certain submissions from the platform.

38 Hars and Ou (n 22).

presumption held by each contributor that the value of their individual contribution would be augmented through its combination with other contributions and through modifications and additions effected by downstream contributors in the future. This further enhances the collective nature of the POCC process and gives expression to the ideology of sharing whereby each contributor entertains the expectation of sharing in the benefits of the value created through the contributions made to the work by others. Accordingly, the POCC process not only represents a collaborative endeavour that is designed for the *creation* of value but also for the collective *sharing of that value* with other contributors and (usually) with the public at large.<sup>39</sup>

### C. Why is exclusive copyright inadequate?

- 24 Copyright is granted to the author(s) of a work.<sup>40</sup> Thus, the establishment of authorship is the central criterion for the enjoyment of the ownership of copyright over a work.
- 25 Copyright law conceptualizes authorship as an individual relationship that exists between a person (i.e. an author) and the expression (i.e. work) that is created by that person (or ‘originates’<sup>41</sup> from them).
- 
- 39 As noted above, typically, content created under a POCC model is made available for use and re-use by members of the public subject to terms and conditions (usually imposed by open-licenses such as CC and GPL).
- 40 Exceptions do apply to this rule, for example, the ‘work-made-for-hire’ doctrine in US copyright law that grants ownership of copyright in a work created by an author within the course of employment to the employer, rather than to the author. See 17 U.S. Code [US Copyright Act of 1976] s. 201(b) read with s. 101.
- 41 The notion of ‘origination’ from the author is interpreted in two different ways as per the objective and subjective notions of ‘originality’. As per the objective notion of originality a work originates from its author if it is the independent creation of its author in the sense that it is not copied (this notion of originality is typically associated with the English common law tradition of copyright, see for example, *University of London Press v University Tutorial Press* [1916] 2 Ch 601). As per the subjective notion of originality a work is considered to originate from its author in the sense that it reflects its author’s personality (this notion of originality is prevalent in the civil law tradition of author’s rights). For a discussion on these two viewpoints of the notion of originality see Estelle Derclaye, ‘Wonderful or Worrysome? The Impact of the ECJ Ruling in Infopaq on UK Copyright Law’ EIPR (2010) 247 and Benoît Michaux, ‘L’originalité en droit d’auteur, une notion davantage communautaire après l’arrêt Infopaq’ 5 *Auteurs & Media* (2009) 473.
- 26 This individualistic conception of authorship is underpinned by two dominant theories of copyright law. The labour theory of copyright law (based on the writings of Locke<sup>42</sup>) that justifies copyright protection on the basis of an author’s entitlement to enjoy the fruits of their labour. This is founded on “...the concept of a unique individual who creates something original and is entitled to reap a profit from those labours”.<sup>43</sup> Similarly, the personhood theory of copyright law (derived from the writings of Kant<sup>44</sup> and Hegel<sup>45</sup>) is based on the premise that a work constitutes an artefactual embodiment of the author’s individual personality<sup>46</sup> and that, therefore, its protection under copyright law can be justified as a means of protecting the author’s personality.<sup>47</sup>
- 27 By attributing the work to the personal intellect of an identifiable author, copyright’s individualistic conception of authorship reinforces the exclusive nature of the right held by that author over the work. As the work is the product of the author’s own individual intellect it is both just and ethical that the author be allowed to reserve the benefits of the utilities of that work (e.g. reproduction, distribution,
- 
- 42 See John Locke, ‘Second Treatise of Government’, *The Works of John Locke* (Rev ed, Thomas Tegg 1823) <<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/locke/government.pdf>> accessed 5 May 2022. For an explanation as to how Locke’s theory of property applies to intellectual property in general see Lawrence C Becker, ‘Deserving to Own Intellectual Property’ 68 *Chicago-Kent Law Review* (1993) 609.
- 43 Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1993) p 2.
- 44 Immanuel Kant, *The Philosophy of Law* (W Hastie tr, Clarke 1887).
- 45 GWF Hegel, *The Philosophy of Right* (SW Dyde tr, G Bell 1896).
- 46 C.S. Yoo, ‘Copyright and Personhood Revisited’, 3 *University of Illinois Law Review* (2012) 1039, at p 1055.
- 47 William Fisher, ‘Theories of Intellectual Property’, in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property*, (Cambridge, 2001) 168, at p 171 and Justin Hughes, ‘The Philosophy of Intellectual Property’ (1988) 77 *The Georgetown Law Journal* 287, at p 330.

adaptation) to their own individual enjoyment (i.e. 'mine not yours') and be granted an affirmative claim to prevent any other person from benefitting from those utilities without their authorization.

- 28 Copyright law's notion of authorship gives expression to this individualistic bias through three main elements which I refer to as the 'tripod' of copyright's notion of authorship. These are originality, creative control and the existence of a static work. Originality is the primary element that establishes the individual relationship between the author and the work. It pre-supposes the existence of "...a relation of creation between the work and the author."<sup>48</sup> The second element of creative control refers to the 'agenda-setting' ability of the author in determining the final nature and form of the work by exercising control over the creative decision-making process. It thereby foresees the establishment of a direct link between the original expression incorporated in the work and the author's own intellect and personality. Woodmansee gives expression to this element by noting that copyright conceptualizes an author as "an individual who is solely responsible — and therefore exclusively deserving of credit for the production of a unique work."<sup>49</sup> The final element of a static work links authorship to a closed, static product which ensures that the individual relationship between the author and their original expression (incorporated in the work) remains unchanged once it has been established. Any further changes or modifications made to that original expression, either by the author themselves or by a third person, will give rise to a new static (derivative) work as opposed to being recognized as a step in the work's evolution (see Figure II).

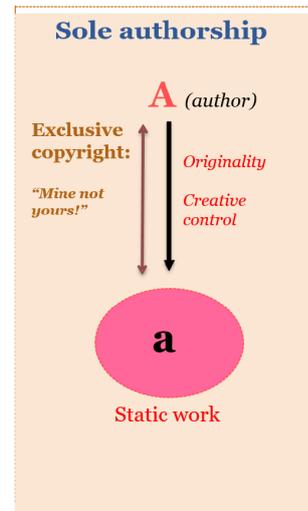


Fig. II: Illustration of individual relationship between author and work of sole authorship

- 29 As will be discussed in section C.II. this individualistic notion of authorship also permeates copyright's conception of collaborative authorship that is conceptualized as an individual or distinct relationship that exists between an identifiable group of persons (authors) and the original expression (work) originating from them (see Figure III).

### I. Inability of a POCC work to fit within the existing categories of collaborative authorship

- 30 At present, copyright law recognizes three models of collaborative creation: joint, derivative and collective creation. This classification applies consistently across different copyright law systems, albeit with nuances in the ways in which they are defined and interpreted. Authorship and the distribution of exclusive rights over a work involving a plurality of authors is determined according to the model of collaborative creation under which that work has been produced. Therefore, identifying the applicable model of collaborative creation is an important step in determining the persons who obtain copyright over the work and how that copyright can be exercised and enforced. At the moment, copyright law does not offer a catch-all-category (or a category *de droit commun*) that is equipped to deal with a work that fails to fall within any one of these categories. It is noted that a POCC work would not fit comfortably within any of these existing categories of collaborative authorship as they are currently defined in the copyright law systems of France, the UK and the US.
- 31 The joint creation model envisions a group of persons collaborating together in the creation of a specific

48 A. Dietz, 'The Artist's Right of Integrity Under Copyright Law – A Comparative Approach' IIC (1994) 177, at p 182

49 Martha Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'' 17 Eighteenth-Century Studies (1984) 425, at p 426.

and as yet unfinished work<sup>50</sup> with the creation process automatically coming to an end once the joint work has been realized. Thus, the joint creation model fails to capture the open-ended nature of the POCC process that is not directed towards the production of a static work but rather a dynamic work that can evolve over an indefinite period of time.

- 32 Similarly, a POCC work cannot be categorized as a derivative work. The derivative creation model envisions the creation of a new work through the modification, alteration or adaptation of a pre-existing work. Thus, the new work ‘derives from’ an existing work and constitutes a work of multiple authorship in the sense that it represents a fusion of expression belonging to the author of the pre-existing work and the author of the derivative work. However, the derivative work constitutes an independent work that exists separately from the pre-existing work and *vice versa*. Accordingly, the derivative creation model fails to capture the dynamism that is inherent in the POCC model whereby, any contribution that modifies, adapts or builds upon an existing contribution is absorbed into the common work without enjoying a separate existence from it.
- 33 The collective creation model envisages the creation of a collective work through the compilation or arrangement of the creative contributions made by a multiplicity of authors, within a logical sequence. The characteristic feature of the collective creation model is that the different authors do not collaborate with each other within a common creative endeavor but instead work independently on their individual contributions. These contributions are later collated together to form a single collective work by a specific person who is usually attributed the authorship of the collective work (provided that the compilation and/or arrangement of the different contributions display sufficient originality in order to qualify them as an author). As such, the absence of collaboration among the different authors within the creation process and the fact that these different contributions usually remain separate and distinct from each other, clearly prevents the POCC process from being located within the collective creation model.

50 The decision delivered by the United States Court of Appeals (9<sup>th</sup> Circuit), in the case of *Ashton-Tate Corp. v. Ross* [1990] 916 F. 2d. 516, affirmed that, where a contribution is made to a pre-existing work it would not result in a joint work but in a derivative work (at p 522). Similarly, Bently and Sherman observe that a poem written by one person and translated by another will not constitute a joint work but a derivative work. Lionel Bently and Brad Sherman *Intellectual Property Law* (5th edn OUP, Oxford 2018) at p 132.

## II. Notion of collaborative authorship in copyright law

- 34 Of the three models of collaborative creation currently recognized under copyright law, the joint and derivative models of creation give rise to works of plural authorship whereby the authorship over the work is attributed to more than one person. The collective creation model on the other hand, results in the creation of a work of single authorship as the authorship of the work is attributed to the person or entity who is deemed responsible<sup>51</sup> for compiling the individual contributions made by a multitude of authors in order to create the collective work. Thus, at the outset, it is possible to exclude the collective creation model from our analysis of the notion of collaborative authorship in copyright law. I will proceed to analyse the joint and derivative creation models as they are defined and interpreted in the copyright law frameworks of France, the UK and the US to demonstrate how the tripod of copyright’s individualistic notion of authorship permeates the concept of plural authorship in works created under these models of collaborative creation.

### 1. The joint creation model

#### a) Originality

- 35 The joint creation model refers to the creation of a single static work by merging together the creative efforts of a multiplicity of persons. The copyright over the ensuing work is collectively owned<sup>52</sup> by all persons (co-authors) who have contributed original expression to the work. The attribution of authorship over a work created under a joint model

51 In French copyright law this is the ‘*maître d’oeuvre*’ who takes the initiative for creation, gives directions as to how the work should be created and takes the initiative to exploit the work. Michel Vivant and Jean-Michel Bruguière, *Droit d’Auteur* (Daloz, Paris 2009) at pp 245-247. In the UK and the US the copyright in the compilation is granted to the ‘editor’ or ‘compiler’ who arranges or compiles the separate works to form a single collective work. Paul Goldstein and P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (3<sup>rd</sup> edn, Oxford University Press 2013) at pp 253-254.

52 In France, the joint (collaborative) work forms a whole over which each co-author has an indivisible right. Frédéric Pollaud-Dulian, *Le Droit d’Auteur* (2nd edn Economica, Paris 2014) at p 350 citing the case of “*Donizetti*” Cass. Civ. 7 April 1925, 1925 –I-268. As discussed further in section C.V., under the law of the UK and the US, the co-authors own copyright over the work as ‘tenants in common’.

of creation is reliant on a contributor's ability to establish a direct and individual link to the whole or part of the original expression incorporated in that work. In France, this is expressed through the requirement that each author must make an original creative contribution in the sense that it contains the manifestation of the stamp of the author's personality.<sup>53</sup> In the UK it is reflected in the condition that each co-author must make an original and significant contribution to the authorship of the work<sup>54</sup> and in the US by the requisite that each co-author must make a contribution that is copyrightable.<sup>55</sup> Thus, in all three systems of copyright law any person who is not able to establish a direct individual link to the original expression incorporated in the work would be denied a claim of co-authorship and consequently precluded from claiming ownership (or co-ownership) of copyright in the work.

## b) Creative Control

36 In France, co-authors of a joint work are deemed to engage in creation under a 'common inspiration' or 'spiritual intimacy' that enables them to work towards a common goal by means of a creative concerted effort.<sup>56</sup> Similarly in the UK, co-authors are deemed to jointly labour together in pursuance of a common goal or in prosecution of a common design.<sup>57</sup> I argue that, as the common inspiration' or 'common design' under which the co-authors labour dictates and directs the original expression

that is contributed by each of them to the joint work, this gives rise to a fiction that the group of authors act together as *one single entity* in pursuance of a common creative agenda in the creation of the joint work. Thus, creative control over the work is deemed to be shared by all co-authors acting as a single organic creative entity that enables the establishment of an individual (in the sense of a 'distinct') link between the original expression incorporated in the joint work and the plurality of authors. This fiction therefore allows the creation of a joint work to be subsumed within copyright's individualistic conception of authorship.

37 Arguably, this element of a common creative agenda is also reflected in US copyright law's notion of joint authorship in the criterion of 'mutual intent', which requires that, at the time of making their individual contributions, each co-author intends that their contribution be merged into inseparable or interdependent parts of a unitary whole.<sup>58</sup> Goldstein opines that this requirement of 'mutual intent' essentially mirrors the UK law requirement of the existence of a common design among the authors of a work of joint authorship. Indeed, in the case of *Childress v Taylor*<sup>59</sup>, the Second Circuit regarded the sharing of creative decision-making authority among authors as a core element in establishing the 'mutual intent' criterion. It is logical that the existence of an intention on the part of each co-author that their contribution be absorbed into a single unitary work, compels each contributor to create their own contribution in anticipation of those made by others to ensure that the contributions complement each other. This pre-supposes the existence of some form of pre-agreed common scheme of creation or creative agenda that is shared by the co-authors of the work of joint authorship and therefore unifies them in its prosecution. Accordingly, the criterion of 'mutual intent' can also be interpreted as giving rise to a fiction that the co-authors of a joint work act together as a one single entity in the prosecution of a common creative agenda; this yet again locates the authorship of a joint work within copyright law's individualistic conception of authorship.

53 Ibid, Pollaud-Dulian at p 351 citing Cass. civ.1er, 30 janvier 1974, « *Wogenscky c. Polieri* », Bull. civ. I, n°34, p 30. See also André Lucas, Henri-Jacques Lucas and Agnès Lucas-Schloetter *Traité de la propriété littéraire et artistique* (4th edn Lexis Nexis, Paris 2012) p 119.

54 The requirement of 'significance' has been interpreted to mean 'substantial', 'considerable' or 'non-trivial' as opposed to being 'aesthetically important'. Bently and Sherman (n 50) at pp 130-131.

55 *Childress v. Taylor* [1991] 945 F. 2d. 500. In Goldstein's opinion this requirement should be interpreted to mean that the contribution made by each contributor is independently copyrightable. See Paul Goldstein, *Copyright Vol. I 2005 Supplement* (3rd Ed. Aspen Publishers, New York 2005) s.4.2.1. p 4:13.

56 Lucas (n 53) 189 at p 195. See also CA Paris, 1er ch., 11 mai 1965 D 1967, p 555 note Françon.

57 This criterion was established in the case of *Levy v. Rutley* (1871) LR 6 CP 523. See also Bently and Sherman (n 50) p 126 and W R Cornish, *Intellectual Property* (4<sup>th</sup> edn Sweet and Maxwell, London 1999) p 386.

38 Independently of the 'mutual intent' criterion, the US Court of Appeals for the Ninth Circuit has developed a 'control-based' test pursuant to which the creative and financial control exercised over a joint work is considered a deciding factor in the establishment of co-authorship. Thus, in the case of *Almuhammed v Lee*<sup>60</sup>, the Ninth Circuit held that, the

58 Goldstein (n 55) s. 4.2.1., at p 4:7.

59 *Childress v. Taylor* [1991] 945 F. 2d. 500. See also, *Thomson v Larson* 47 F.3d 195 (2d Cir. 1998).

60 *Almuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000). See also Richlin

absence of control over creative decision-making is “(...) strong evidence of absence of co-authorship”. On the other hand, in the case of *Lindsay v Titanic*<sup>61</sup> a high degree of actual control was held to give rise to a presumption of authorship.

### c) Static work

- 39 Once created, the joint work remains closed to further changes and each new addition or modification will result in a separate and independent derivative work as opposed to being absorbed within the joint work. Thus, changes effected to the joint work by subsequent contributors will not affect the legal relationships that exist between the co-authors and the original expression of the work.

## 2. The derivative creation model

### a) Originality

- 40 The derivative creation model refers to the creation of a new work by modifying, building upon or adding to the original expression of an existing work and by combining it with ‘new’ original expression. This ‘new’ original expression enables the author of the derivative work to establish an individual link with the work. Accordingly, in French copyright law, the author of the derivative work is required to imbue it with a sufficient degree of independent originality in order to enable it to be protected as a new work of authorship.<sup>62</sup> In UK copyright law, this is framed in terms of the derivative work incorporating a material alteration or embellishment that is original and suffices to make the totality of the work an original work.<sup>63</sup> In US copyright law, the derivative work must demonstrate a sufficient level of originality in the sense that it incorporates a distinguishable and non-trivial variation from the pre-existing work. On the other hand, an individual link is also established between the derivative work and the author of the pre-existing work by reason of the original expression belonging to that pre-existing work which is incorporated in the new derivative

*v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962 (9th Cir. 2008).

61 *Lindsay v Titanic* [1999] 52 U.S.P.Q.2d 1609 (S.D.N.Y. 1999).

62 Once again, originality would be judged under the general standard of originality in French copyright (author’s rights) law which requires that the work contains an imprint of the author’s personality. Lucas (n 53) p 119.

63 *McMillan and Company Ltd. v. K and J Cooper* (1924) 40 TLR 186.

work.<sup>64</sup> The copyright over the new derivative work will therefore belong to the author who produces it, subject to the reservation of the rights of the author of the pre-existing work over their own original expression that is incorporated in the derivative work.<sup>65</sup>

### b) Creative control

- 41 In terms of creative control, the author of the pre-existing work is able to exercise negative control over the creation of the derivative work by imposing restrictions and limitations on the nature and extent to which the original expression belonging to the pre-existing work can be added to, modified, built upon and combined with the new original expression contributed by the author of the derivative work. This ability to exercise negative control, enables the author of the pre-existing work to ensure the preservation of their own individual link with the original expression incorporated in the derivative work (for instance by invoking the moral right to integrity to prevent the modification of their original expression in a way that results in an obliteration of their ‘personal stamp’ from that expression). Within

64 In French copyright law, the derivative work is required to incorporate original elements of the pre-existing work which express the personality of that preceding author. See Pollaud-Dulian (n 45) at p 403. Under UK law, in order to qualify as a derivative work, a work must appropriate a substantial part of the content belonging to a pre-existing work. That content must constitute original expressive content which made the pre-existing work an original work. See Kevin Garnett, Gillian Davies, Gwilym Harbottle (eds), *Copinger and Skone James on Copyright* Volume I (16<sup>th</sup> edn Sweet and Maxwell, London 2011) p 232. In the US, a derivative work is required to change i.e. recast, transform or adapt original and expressive content belonging to the pre-existing work. See William F. Patry, *Patry on Copyright* (Thomson/West, USA 2006) 3:47.

65 In France this was emphasised in the decision delivered in « *L’Affaire Tosca* » Cass 1er Civ. 22 juin 1959.

In the UK, if the derivative work reproduces a substantial part of the original expression of a pre-existing work then the authorization of the copyright owner of the pre-existing work is required for the exploitation of the derivative work, see Copinger and Skone James on Copyright (n 64) p 232. In the US, decisions delivered in the cases of *Stewart v. Abend* 495 U.S. 207 (1990) and *G. Ricordi & Co. v. Paramount Pictures Inc.* 189 F.2d 469 (2d Cir. 1951) emphasize that, so long as the pre-existing work is under copyright protection, the author of a derivative work is prevented from making use of any part of the pre-existing work that may be contained in the derivative work, without first obtaining the authorization of the copyright owner of that pre-existing work.

the framework of the authorization granted by the author of the pre-existing work, the author of the derivative work is able to exercise positive creative control in terms of determining the way in which the original expression contained in the pre-existing work should be modified, altered and combined with their own original expression to create the new derivative work. Thus, both the author of the pre-existing work and the author of the derivative work can claim an individual relationship to the original expression that is incorporated in that work, thereby rendering the new derivative work a work of plural authorship.

**c) Static work**

42 Although derivative creation is necessarily an incremental process, existing copyright law artificially compartmentalizes each point in this creation process into a series of separate and static derivative works. Thus, any modification to an existing derivative work will result in the creation of a new derivative work as opposed to being recognized as a point in an evolutionary and incremental process of creation.

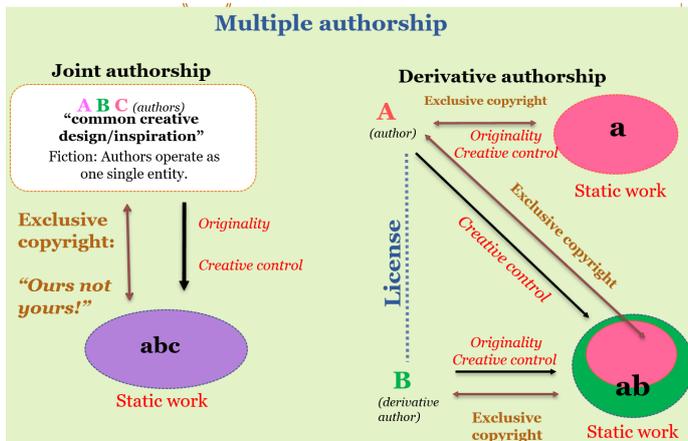


Fig. III: Illustration of individual relationship between authors and works of plural authorship

**III. Why does the POCC authorship model not fit within copyright's notion of plural authorship?**

43 The architecture of the POCC model precludes any single contributor to a POCC work from establishing an individual relationship between themselves and the original expression of the work as envisioned by copyright's conception of individualistic authorship and the tripod of originality, creative control and the existence of a static work.

**1. Originality**

44 Not all contributions that build upon existing content would be able to demonstrate sufficient originality as required for establishing authorship under copyright law. For example, within the process of 'tweaking' that is commonly used in the creation of POCC works contributions that on their own would fail to satisfy the standard of originality would, through their combination with each other along the process of sequential innovation, give rise to an original copyrightable contribution. In such an instance, it would be difficult to correctly determine the source of that original expression.

45 On the other hand, as upstream contributors are not able to exercise any degree of negative control to limit the ways in which downstream contributors may modify their contributions, it is quite possible that the original expression contributed by an author becomes obliterated<sup>66</sup> from the POCC work in the course of the sequential creation process. Such obliteration would effectively extinguish the individual relationship that author could claim to the POCC work.

**2. Creative control**

46 The absence of a pre-determined scheme of creation, the high degree of creative autonomy exercised by each contributor and the random and sporadic nature of the contributions precludes the possibility for any person or group of persons to claim creative control over the creation of the POCC work. The open-ended creation process allows any downstream contributor to change the POCC work in a way that could not have been envisioned or anticipated by an upstream author without those authors being able to control or prevent such changes from being effected. Thus, it is not possible to establish the existence of a common creative agenda that enables contributors to act as a single entity in the prosecution of the common work. In contrast, the POCC model relies on and celebrates the existence of different creative visions that enable the work to constantly evolve in new directions.

47 Furthermore, the format of the POCC model does not allow for the existence of such a common creative agenda by reason of the minimal scope that is available for interaction and discussion among

<sup>66</sup> This could take-place unintentionally as a consequence of the incremental modifications made to the content of the POCC work within the sequential creation process or as a result of intentional overwriting where this is allowed under the terms and conditions applicable to the creation process.

contributors to a POCC work.<sup>67</sup> Contributors may share a consensus as to the general goal of the creation endeavour (e.g. to create an encyclopaedia entry on a particular topic that can serve as an authoritative source of reference on that topic or the creation of a work of fiction or a work of graphic art). They would (and in most instances do) also share a common goal or objective as regards certain technical aspects of the creation process (e.g. writing style, standard of language to be used etc.). However, this cannot be considered as the sharing of a ‘common creation design’ or a ‘spiritual intimacy’. Those terms refer to a consensus and a shared creative vision on the part of joint authors that relate to the *nature and form of the original expression* that is to be incorporated in the work and thus imply the exercise of shared control over the creative decision-making process. Thus, the existence of a common creation design or spiritual intimacy cannot be reconciled with the POCC process where each contributor makes independent decisions relating to the original expression that is contributed by them and consequently the direction in which the POCC work evolves.

- 48 As demonstrated by the foregoing discussion, incorporating the POCC work within the existing categories of joint and derivative works would require a radical transformation of the core premise of individuality-based authorship on which they are founded. Furthermore, attempting to fit the POCC model within any of these conventional categories of collaborative authorship recognized under copyright law would lead to different stages of its evolution being artificially compartmentalized, either as successive ‘versions’ of a joint work or as a series of derivative works, or an mixture of both (as a result of different portions of the work being categorized as different works). This would distort the true nature of a POCC work as a dynamic and evolving work that nevertheless forms a cohesive whole.<sup>68</sup>

67 Although some online platforms such as *Wikipedia* provide spaces (or forums) where contributors can interact and engage with one another, discussions taking place on these forums usually relate to technical aspects of the creation process (e.g. accuracy of factual information, relevance of certain information) or issues relating to the administration and governance of the platform (e.g. decisions taken by editors, complaints relating to the behaviour of certain contributors within the platform). They typically do not relate to creative aspects of the authorship process or to the nature of the original expression incorporated in the work.

68 Interestingly, in a determination delivered by the Court of Appeal of Versailles in France, it was pointed out that the technical and functional developments effected in the successive versions of a software program did not result in the creation of a new software program, but merely a represented stage in the technical and functional evolution

## IV. Constructing a notion of POCC authorship

- 49 As Lavik notes, authorship does not possess a timeless quintessence that is independent of human perspectives and purpose.<sup>69</sup> On the contrary, it is a by-product of social, historical and cultural context<sup>70</sup> and as such, is subject to transformation and evolution in accordance with changes in the ways in which creation is carried out and experienced. The following section constructs a new notion of POCC authorship that is founded on the core elements of inclusivity and dynamism.

### 1. Inclusivity

- 50 As envisaged by Dusollier, the term ‘inclusivity’ denotes the quality of a legal right to benefit from all or some utilities of a tangible or intangible good that is held by a plurality of legal subjects in a collective way without any person having the power to exclude the rightholder from such benefit.<sup>71</sup> Thus, it presents a counterpoint to the exclusivity-based notion of individualistic authorship in copyright law. How is this quality of inclusivity reflected in the POCC authorship process?

- 51 Firstly, the sequential innovation process that is integral to the POCC authorship model relies on the ability of contributors to add to, modify and build upon contributions made by others and sometimes (as in the case of *Wikipedia*) to even overwrite or delete content contributed by others. As noted in section B.I.2. above, this cumulative creation process forms the core of the POCC authorship process and reflects an intention on the part of each contributor to dedicate their own individual contribution to a common creation endeavour in the course of which

of that software program at a given time. The Court of Appeal acknowledged that software programs, such as the one under review, would necessarily constitute an evolutionary product by reason of the practical need to adapt to rapid technological developments, and that this evolutionary process would continue so long as the software program was in the process of commercialization. CA Versailles 4 octobre 2001, *Thomas et SARL Ready Soft c. SARL Codat Informatique et Mattern*, 327 RJDA 3/2002, 276.

69 Erlend Lavik, ‘Romantic authorship in copyright law and the uses of aesthetics’, in Mireille van Eechoud (ed), *The Work of Authorship* (Amsterdam University Press, 2014) 57.

70 Jessica Reyman, *The Rhetoric of Intellectual Property* (Routledge 2010) 11.

71 See section A.

it is absorbed into a common good (i.e. the POCC work) to be used, re-used and enjoyed by all other contributors. Within this collective creation process, individual contributions become contextually inseparable and entwined with each other in terms of relying on preceding and/or succeeding contributions for their context and meaning. This means that, as a matter of practical necessity, contributors are compelled to enjoy the benefits of the utilities of the content contributed by them to the POCC work in a shared and collective manner.

- 52 Secondly, as noted in section B.I.4. above, the ideology of POCC authorship is built upon the notions of collectiveness, sharing and equality. This ideology reflects the nature of the POCC process as a collaborative value creation and value sharing endeavour. Pursuant to the concept of equality that underscores the authorship process, each contributor has an equal entitlement to engage in the creation process by using and re-using content contributed to the POCC work by upstream contributors, subject to generally applicable terms and conditions (e.g. CC license) and platform governance rules, without any other person (including the contributors of specific content) having any power or privilege to exclude them from such use or re-use. In turn, upstream contributors expect to share in the benefits of the value created through new expression contributed to the work by downstream contributors, without any downstream contributor having the power or privilege to exclude them from sharing in that value.
- 53 Thus, the relationship between contributors to the POCC work mirrors the quality of inclusivity in terms of each of them having an equal claim to benefit from the utilities of the POCC work in terms of adding to, modifying, building upon the POCC work and reproducing, distributing communicating and making it available to the public either in whole or in part, subject to generally applicable terms and conditions (e.g. CC license in the case of a *Wikipedia* article).
- 54 Accordingly, authorship under the POCC model represents a collaborative value creation and value sharing endeavour wherein authors are compelled to enjoy the utilities of the POCC work in a shared and collective manner, without any single author having a discretionary power to exclude another from benefitting from those utilities.

## 2. Dynamism

- 55 Dynamism relates to two aspects of POCC authorship. First, the POCC process is dynamic in terms of the potential held by each contribution to inspire and direct succeeding contributions and to determine

the trajectory of the creation process. Secondly, the output of the POCC process is a dynamic and evolving work as opposed to a static unchanging work. Within this sequential innovation process the expression contributed by a contributor could become obliterated at any point in time thereby disrupting the individual relationship that may be considered to exist between the contributor and the POCC work. The dynamic nature of the POCC work demands that any person who has contributed to the work at any point in its evolution is recognized as having an equal claim to the authorship of the work. This equal claim to authorship is not reliant on the quantitative or qualitative nature of the contribution since a relatively small contribution, which appears unimportant or commonplace at the time at which it is made, may have a significant influence on the work's evolution based on the way in which it is interpreted and built upon by downstream contributors.

- 56 Accordingly, the notion of POCC authorship presented here, diverges from copyright's concept of collaborative authorship by being based on a notion of collective as opposed to individual authorship (see Figure IV). Furthermore, it is not dependent on the establishment of an individual link between the original expression incorporated in the POCC work and the person claiming authorship. Thus, as opposed to the conventional notion of authorship in copyright law the notion of POCC authorship needs to be conceptualized as a relationship that exists between a person (i.e. an author) and an incremental process of creative exchange (i.e. the POCC process) that culminates in the production of a dynamic and evolving work (i.e. the POCC work).

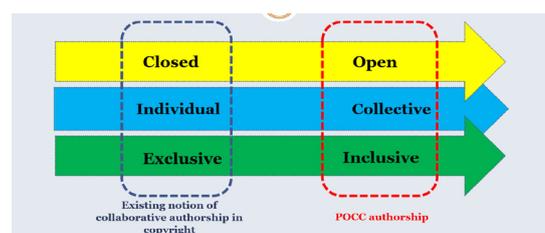


Fig IV: POCC as a new archetype of collaborative authorship

- 57 Therefore, the notion of POCC authorship presents a new archetype of collaborative authorship that is open, collective and inclusive. The existing exclusivity-based copyright law that is founded upon the conventional closed, individualistic notion of collaborative authorship does not have the capacity to give legal expression to the inclusivity that is inherent in the relationships among the authors of a POCC work. Nor can it adequately capture the dynamism of the POCC work and the temporal dimension of rights of authorship over the evolving POCC work.

## V. Inadequacy of exclusive copyright in giving expression to inclusivity and dynamism in POCC authorship.

58 As noted in the foregoing discussion, within the POCC authorship process, the contributions of each author are dedicated to the common creation endeavour. In the course of the sequential innovation process, the original expression contributed by each individual author becomes inextricably linked in such a manner that prevents any author from benefitting from the utilities of the original expression created by them without also benefitting from the original expression created by another. The individual copyrights held by contributors over the original expression contributed by them become similarly intertwined in a manner that precludes any single contributing author from exercising or enforcing their copyright without encroaching upon the copyright belonging to another. Thus, the final POCC work is subject to a web of copyrights, the individual exercise and enforcement of which would give rise to a host of ideological and practical problems. This section will explore the impact of the application of exclusivity-based copyright law to a POCC work as regards the exercise and enforcement of copyright over a POCC work. It will focus on the implications for the copyright clearance procedure (i.e. the ability of an individual to obtain authorization to modify and build upon the POCC work) and the ability of an author(s) of the POCC work to bring a legal action against the infringement of their rights (both copyright and contractual rights) in the POCC work.

59 As noted above, the application of exclusive copyright would lead to different stages of evolution of a POCC work being artificially compartmentalized into a series of separate static works that may be categorized either as joint works or as derivative works or even as a mixture of both. This would result in the fragmentation of copyright over the POCC work among a multiplicity of authors. The nature and extent of the exclusive copyright granted to these individual authors over the work would differ according to whether their particular means of collaboration within the POCC creation process leads to their classification as a co-author of a joint work or as an author of a derivative work. As discussed below, the granting of an exclusive copyright to each author over their specific contribution to the work would go against the ideological framework of inclusivity on which the POCC authorship model is based and create inefficiencies relating to the exercise and enforcement of copyright over the POCC work. In the long-term it would also threaten the sustainability of the POCC process.

60 Under both joint and derivative authorship models, exclusive copyright grants to each individual author (i.e. co-author of a joint work or author of a derivative work) a copyright that can be exercised individually and according to personal discretion. For instance, under the copyright law of the UK the co-authors of a work of joint authorship are deemed to hold copyright over the joint work as ‘tenants in common’.<sup>72</sup> This means that the exploitation of the work by a co-author or the licensing of such exploitation to a third party requires the authorization of *all* co-authors.<sup>73</sup> The same principle applies in French copyright law where the exploitation of the joint work is required to take place in accordance with the principle of unanimity (*accord commun*).<sup>74</sup> This would mean that in the UK and France (unless the POCC work has been made available to the public under an open public license such as CC or GPL) any downstream author who wishes to engage in the sequential creation process in relation to a particular portion of content belonging to the POCC work would need to identify all authors who have copyright over that portion of the content and to individually obtain their authorization to use such content for the purpose of participating in the POCC authorship process.<sup>75</sup> The same holds true as regards derivative works, as the copyright law systems in all three jurisdictions hold that any addition to or modification of a derivative work (i.e. the creation of a further derivative version) requires authorization of the author of the derivative work as well as the authors of all pre-existing works on which the derivative work is based.

72 *Powell v Head* (1879), 12 Ch. D., 686.

73 *Ibid* see also *Cescinsky v. George Routledge and Sons* [1916] 2 KB 325 and *Robin Ray v. Classic FM Plc.* [1988] F.S.R. 622.

74 Article L113-3 of the French Intellectual Property Code (1992).

75 In the case of *Morris c. Gosciny* the Cour de Cassation (Supreme Court) of France went on to hold that the exploitation of a collaborative work without obtaining the proper consent of one co-owner would amount to an infringement as per Article L 335-2 of the Intellectual Property Code, « Puisqu’il n’y avait pas de véritable accord, l’opération, non autorisée, était contrefaisante par application de l’article 335-2 du Code de la propriété intellectuelle » [As there has been no valid agreement, the unauthorized action amounts to an infringement as per Article 335-2 of the Intellectual Property Code: Translated by the author]. « *M. de Bévère dit Morris; société Lucky Productions et autres c. Mme Gosciny* » Cass. 1re civ., 27 nov. 2001. Similarly in the case of *Powell v Head* (1879), 12 Ch. D., 686, the Chancery division (UK) determined that in a situation of co-owned copyright, it is not possible for a single co-owner to license a third party to represent the work without the consent of the other co-owner.

- 61 The fragmentation of exclusive copyright over the POCC work among a multitude of authors and the need to obtain their individual authorization prior to adding to or modifying the POCC work within the sequential innovation process can result in several problems and inefficiencies.

## 1. Copyright clearance

- 62 Firstly, it would lead to an increase in the transaction costs relating to the license clearing process and thereby create inefficiencies regarding the exploitation of the POCC work. For instance, where the POCC work is made available under an open public license (e.g. CC or GPL) any user who wishes to exploit the POCC work or any portion thereof in a manner that is *not* covered under the terms of that license will need to identify and obtain the authorization of each contributing author who holds a copyright over the work or over that particular portion. Secondly, it would mean that the authorization granted to a downstream contributor to use the content belonging to the POCC work stems from a web of licenses granted by a plurality of copyright holders. This could give rise to serious inefficiencies (e.g. holes in the web of licenses, incompatibility among licenses) in the enforcement of the license terms in the event of a possible violation.<sup>76</sup> Thirdly, it would allow any author to block the sequential creation process either by preventing downstream contributors from modifying or building upon the specific expression over which they hold copyright or, by granting their authorization subject to conditions that restrict the creative freedom and autonomy of downstream contributors. The capacity of an individual author to disrupt the sequential innovation process by refusing to grant authorization to downstream contributors to modify the expression contributed by them to the POCC work poses a serious risk to the sustainability of POCC process. Furthermore, it would create an asymmetry in the entitlements held by different authors over the POCC work that negates the inclusivity inherent in the POCC process. For instance, an author who has contributed a larger or qualitatively more important portion of the work would be able to exercise greater control over the work's future development process in comparison with other authors. Similarly, upstream authors would exercise greater control over the work's development in comparison with downstream authors.

- 63 On the other hand, while US copyright law also deems that owners of a joint work enjoy copyright as 'tenants in common', in contrast to the UK and France, each co-author is entitled to independently

exploit the joint work without the need to obtain the authorization of the other co-authors. Thus, a co-author may also unilaterally grant a non-exclusive license to a third party to exploit the work without the authorization of the other co-authors, and if necessary, even overriding their objections.<sup>77</sup> In doing so, the co-author is not bound by any fiduciary duties to exercise their copyright in a way that is not detrimental to the ability of other co-authors to benefit from the utilities of the work.<sup>78</sup> While the US approach dispenses with the difficulties of license clearance and prevents the exercise of exclusive copyright by individual contributing authors to a POCC work to block the sequential creation process, it also means that any single contributing author would be able to exercise exclusive copyright over the work in a manner that impedes the others from fully enjoying the benefits of the utilities of the POCC work. It would further enable a contributing author to exploit the POCC work in a manner that is contrary to the fundamental values of sharing and openness on which the POCC authorship process is founded.<sup>79</sup>

## 2. Action for copyright infringement

- 64 The individualistic approach to authorship under exclusive copyright also means that any contributing author of the POCC work who wishes to bring an action for infringement of copyright over that work would be required to establish their status as an author (i.e. co-authorship of joint work or authorship of derivative work) in order to establish legal standing (*locus standi*) to bring the action. This would give rise to difficulties relating to the determination of legal standing when the copyright infringement claim is brought in relation to a specific portion of the POCC work. In such a case the question arises whether any co-author of the work would have legal standing to bring the action for infringement or if only those

77 Avner D. Sofer, 'Joint Authorship: An Uncomfortable Fit with Tenancy in Common', (1988) 19 Loyola L.A. Ent. L. Rev. 18.

78 William F. Patry, *Patry on Copyright* (Thomson/West, USA 2006) 5:13;5-46.

79 For example, pursuant to a *Wikipedia* article being judged a joint work under US copyright law, a contributing author of a *Wikipedia* article who is determined to have the status of a co-author of the article would be able to exercise their own individual discretion to grant a non-exclusive license to an online for-profit encyclopedia to reproduce the *Wikipedia* article and to exploit it for commercial purposes. This would be contrary to the shared ideology of openness and sharing based on which the other authors contributed to the article.

76 See Maxime Lambrecht 'Copyleft Licensing' ERC Inclusive Report 1 (Sciences Po 2011) [Unpublished].

persons who are able to establish co-authorship or derivative authorship over that specific portion would be able to establish legal standing. On the other hand, what would be the status of an author who has in fact made an original contribution to the POCC work that has since become obliterated in the course of the sequential creation process? Would they still be able to claim legal standing based on the original expression contributed to the POCC work at a certain point in its evolution, or would the obliteration of their original expression also lead to a loss or extinguishment of copyright over the POCC work, thereby precluding them from establishing legal standing?

## VI. Inadequacy of open public (copyleft) licenses

- 65 The CC-SA (*Creative Commons* licenses with the ‘Share-Alike’ component) and GPL licenses constitute legal tools that can be used for securing the perpetuation of the inclusive copyright along the chain of sequential innovation. The copyleft requirement that is incorporated in these licenses ensures the sustenance of inclusivity by preventing any person from appropriating the POCC work (or any portion thereof) to their own exclusive use and by ensuring that any original expression that is added to the POCC work becomes a part of the inclusive good (or resource) that can be modified and built upon by downstream contributors.<sup>80</sup>
- 66 Open public licenses constitute standard-form royalty-free licenses that allow any member of the public to use and exploit copyright protected content in specifically defined ways, while allowing the owner of the copyright to reserve certain forms of exploitation to their own exclusive use. The licenses are irrevocable and perpetual (i.e. valid for an infinite period of time). Accordingly, any person is free to reproduce, distribute and transmit the work or any portion thereof as long as they respect the terms and conditions of the license.
- 67 The application of an open public license obviates the need for each potential user of a POCC work to individually obtain the authorization of each and every person who holds copyright over that content as a pre-condition to participating in the POCC authorship process. As such, it is a successful technical solution to the problem of license clearance and enables the smooth functioning of the process of sequential innovation associated with the POCC creation process.
- 68 Nevertheless, open public licenses rely upon the traditional copyright law framework for their own legal validity. For example, questions relating to the scope of rights granted under the license and issues relating to the legal title and ownership of rights for the purposes of enforcement will be determined within the scope of the traditional copyright law framework. Accordingly, under an open public license, each author of a POCC work will individually grant a license to a downstream contributor to use the content in which they hold a copyright in ways that are permitted under the license. This leads to the creation of a web of licenses that preserves the attendant inefficiencies relating to enforceability. Although they constitute useful legal tools for sustaining the perpetuation of inclusivity and collectiveness of the POCC process along the chain of sequential creation, open public-licenses do not offer a remedy for the inefficiencies arising from copyright fragmentation for the enforcement of copyright.

## D. The case for an inclusive copyright

- 69 Taking into account the increasing importance of the POCC authorship model as an instrument for the creation of socially valuable content and the promotion of social dialogue, there is a need to revisit the existing exclusivity-based narrative of copyright law and to re-interpret copyright in a way that gives legal effect to the inclusivity inherent in the legal relations between persons engaged in the POCC authorship process. Such re-interpretation should be carried out especially keeping in mind the need to ensure more effective enforcement of copyright over the POCC work and the perpetuation of the quality of inclusivity along the chain of sequential creation.
- 70 As noted above, within the POCC authorship process, the individual contributions made by contributing authors to the POCC work become contextually inseparable and entwined with each other. The copyright held by those contributing authors over their individual contributions become similarly entwined thereby compelling authors to exercise and enjoy the copyright held by them over the POCC work in a collective manner as opposed to each author individually enjoying their copyright to the exclusion of others. Thus, the POCC authorship process demands a shift from the existing individualistic paradigm of copyright as an instrument for exclusion to a collective paradigm that is based on inclusion. It is noted that the communicational theory<sup>81</sup> of copyright law, which

80 This is carried out through the ‘Share-Alike’ elements of CC-SA and GPL licenses, *ibid* (n 76).

81 See for example, Abraham Drassinower, ‘From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law’ (2009) 34 *Journal of Corporation Law* 991; ‘Authorship

upholds the function of copyright as an instrument for advancing social enrichment through dialogic interaction and supports the creative and flexible interpretation of existing concepts and rules of copyright law to enable copyright to fulfil this function, provides a suitable normative framework for the development of such an inclusive copyright.

## I. Concept of an 'inclusive' copyright

71 As discussed in section A. above, Dusollier's concept of an 'inclusive' property right is based on two key characteristics: (a) a legal right to a good that is held by a plurality of persons that is characterised by the collective enjoyment of the utilities of that good; and (b) an absence of a power or privilege on the part of the owner of the inclusive property right to exclude any other person having ownership of the same inclusive property right from benefitting from the utilities of the good. This denotes that an inclusive property right would grant each rightholder an equal and symmetrical right to collectively benefit from the utilities of the good without any single rightholder having a power or privilege to exclude any other rightholder from benefitting from those utilities.<sup>82</sup> Building upon this notion, I propose an 'inclusive' copyright that is held by each contributing author over a POCC work which would grant them an equal and symmetrical right to enjoy the utilities (e.g. reproduction, adaptation, distribution, communication and making available to the public) of that copyright protected work collectively with the other contributing authors, without any other contributing author having the ability to exclude them from benefitting from those utilities. The inclusive copyright holder would have the right to reproduce, distribute, adapt (including the creation of derivative works), make available and communicate to the public, the POCC work (either in whole or in part) in any manner, as long as the use of the POCC work does not have the effect of preventing any other contributing author from benefitting from those utilities of the POCC work.

72 The inclusive copyright would also grant authors the right to authorize any other third person to benefit from these utilities in accordance with the generally applicable terms and conditions (e.g. open public licenses) under which the POCC work is made available to the public.

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as Public Address: On the Specificity of Copyright vis-à-vis Patent and Trade-Mark' (2008) 1 Michigan State Law Review 199; 'Taking User Rights Seriously', in Michael Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law*, (Irwin, 2005) 462.

82 Ibid Dusollier and Rochfeld (n 5).

73 The inclusive copyright is designed to include other persons in collectively enjoying the benefits of the common work. As will be discussed below in section D.II., its enforcement will be 'defensive' as its effect would be to prevent any person from appropriating the POCC work (or any portion thereof) to their own exclusive use or to prevent any person from using the POCC work in violation of the generally applicable terms and conditions under which it has been made available to the public. This is contrasted with existing exclusive copyright and its enforcement mechanism that is 'offensive' in the sense that it is aimed towards excluding any outside persons from benefitting from the utilities of the copyright protected work and for reserving those utilities to the exclusive enjoyment of the copyright holder.

## II. Nature and scope

### 1. Who can obtain an inclusive copyright?

74 The inclusive copyright would vest in any person who contributes to the 'expression' of the POCC work at any stage of its evolution provided that the contribution has been integrated into that work. The requirement of contributing to the 'expression' of the POCC work would serve as a delimiting factor that reserves the enjoyment of the inclusive copyright to persons who have contributed to the authorship process as opposed to those whose contributions are merely of a technical (as opposed to a creative) nature (e.g. the correction of grammatical errors or spelling mistakes) or is peripheral to the authorship process without directly contributing to it (e.g. the contribution of ideas or research). Thus, in order to obtain an inclusive copyright in the POCC work, it is not required that the contribution made by a person qualifies as original expression in the sense that it is independently copyrightable. It suffices that the contribution is made towards the expression of the work and is therefore directly linked to the authorship process.

75 The term 'integrated' refers to the fact that at some point in the sequential creation process the contribution made to the expression of the POCC work has been incorporated into the work in the sense that it has been accepted by the creator community as being a legitimate step in the POCC authorship process. This would not be the case if, for example, the original expression has been removed by an editor (or other authorized person) or otherwise rejected for being an act of vandalism or for being contrary to community guidelines and platform policy. On the other hand, once the contribution has been integrated into the POCC work, its obliteration over the course of the

sequential innovation process (or even its deletion or overwriting by a succeeding contributor where this is permitted under the terms and conditions of participation in the POCC process) would not result in the loss or extinguishment of the inclusive copyright held by that contributing author in the POCC work. This is because the claim to authorship of a POCC work does not stem from the individual relationship that subsists between the author and the original expression contributed to the work. Rather, it is rather based on the author's participation in the POCC process through contribution to the expression of the work at a certain point in the work's evolution. The essence of the POCC process is the incremental creation process within which contributing authors enjoy creative freedom and autonomy to build upon and modify content contributed by previous authors. The gradual obliteration of a contribution through improvements effected by succeeding contributors is a core feature of the POCC process and divesting a person of authorship status on the grounds of such obliteration would go against the rationale of POCC authorship. It would also allow space for gaming in the sense that any person who wished to divest a contributing author of copyright could maliciously delete or overwrite the contribution made by them. In addition, it would create uncertainty in the determination of copyright ownership in a POCC work. For example, imagine that the contribution made by an author of a POCC work who brings an action for the enforcement of inclusive copyright becomes obliterated during the course of the litigation process. Would this mean that they lose legal standing in the action?

## 2. Temporal dimension

76 In view of the evolutionary nature of a POCC work, it is necessary to recognize that the inclusive copyright extends to the entirety of the work (as opposed to the actual portion of the work in which the author's contribution was integrated). One consequence of this is that the inclusive copyright held by a contributing author would extend to the original expression that forms a part of the POCC work, both before and after obtaining inclusive copyright. Thus, when a person contributes to the expression of the POCC work at time 'X', the inclusive copyright they obtain over the work at that time should grant the ability to benefit from the utilities of any original expression contributed to the work both before and after time 'X'. This means that the inclusive copyright would extend to original expression that formed a part of the POCC work prior to the date on which they obtained inclusive copyright as well as to any contributions that have been made afterwards, including those that may be made in the future. Thus, the inclusive copyright would have

a temporal dimension to it. This is based on the premise that the POCC work, although an evolving entity, constitutes a single work that is owned by all authors collectively. This would also give rise to a legitimate expectation on the part of the holder of the inclusive copyright to benefit from the value created by contributions made to the POCC work by other contributors at any point in the evolution of the POCC work, regardless as to whether that contribution has been made before the obtaining of the inclusive copyright over the work or after.

77 Nevertheless, it is necessary to make a distinction between contributions that are made to the POCC work in the sense of being integrated into the POCC work (by modifying, adding to and developing on existing content) and free-standing derivative creations that are based on the POCC work (or any portion thereof) but are meant to form separate and independent works on their own and are therefore not intended to form a part of the POCC work. Such derivative creations would not be considered as a part of the POCC work nor would their creation be considered to form a part of the POCC authorship process. Therefore, the inclusive copyright held by authors of the POCC work would not extend to such free-standing derivative works. Similarly, the author of the free-standing derivative work would not obtain an inclusive copyright over the POCC work but merely a license to use the content belonging to the POCC work in the creation of the new derivative work. The failure to make this distinction would mean that creators who wish to use the POCC work in their derivative creations, but do not wish to engage within the POCC creation process or to dedicate their original expression to the common creative endeavour, would be drawn into the POCC authorship process against their will and be forced to grant an inclusive copyright over the original expression contributed by them in creating the derivative work. This would then, serve as a disincentive to such persons from using the POCC work in the creation of new free-standing derivative works. Therefore, this limitation of the scope of the inclusive copyright is meant to incentivize persons who do not wish to participate in the POCC authorship process from creatively interacting with the POCC work in socially valuable ways, which thereby promotes the process of dialogic authorship.

## 3. Duration of protection

78 Determining the basis on which the duration of inclusive copyright over the POCC work is to be calculated is problematic. One approach would be to calculate the duration of protection from the date of the first publication of the POCC work (i.e. the initiation of the project). however, this would

mean that once the period of protection over the work has expired, the work would revert to the public domain and any person who contributes to the expression of the work after that date would not obtain an inclusive copyright. Another approach would be to grant an inclusive copyright over the POCC work to each person who contributes to the expression of the work that would run from the date on which that contribution was made. This would mean that the POCC work (as an evolving entity) remains under copyright protection so long as the sequential creation process continues and result in 'active' POCC works (i.e. works with regard to which the sequential creation process is continuing) remaining under copyright protection over an indefinite period of time, without falling into the public domain. I argue that, since the inclusive copyright is defensive in nature and is aimed towards the prevention of exclusive appropriation of the POCC work as opposed to the exclusion of persons from benefitting from its utilities, its protection under copyright over an indefinite period of time would not be unduly damaging to the public interest.

#### 4. Creator Community

79 In most instances, it would be possible to identify a creator community that exists in relation to the collaborative creation endeavour within which the POCC authorship process takes place. This creator community would be formed by holders of an inclusive copyright who have engaged in the authorship process with the intention of collaborating in a common creation endeavour. This creator community would, in most instances, be a diffused community without any formal organization or identity. However, as will be discussed below, membership in the creator community could form a basis for the establishment of legal standing in an action brought against a holder of an inclusive copyright for the purpose of enforcing the terms and conditions under which the POCC work has been made available to the public.

### III. Application and Effects

80 The inclusive copyright is designed as a tool for the 'inclusion' of other persons in the collective enjoyment of the benefits of the POCC work. In doing so it can be enforced at two levels.

81 At one level, the inclusive copyright can be enforced to prevent any person from excluding the holder of an inclusive copyright from benefitting from the utilities of the POCC work. For instance, if an author of the POCC work (i.e. holder of an inclusive

copyright) or a third party seeks to appropriate the POCC work or any portion thereof to their exclusive private use, any other author of the POCC work would be able to enforce their inclusive copyright to prevent such exclusive appropriation on the basis that it infringes inclusive copyright to benefit from the utilities of the common work, collectively with the other rightholders.

82 At the second level, each holder of an inclusive copyright has the right to authorize or prohibit the use of the POCC work (or any portion thereof) either within the dedicated platform or outside it, within the framework of the generally applicable terms and conditions under which the POCC work has been made available to the public. For example, where the POCC work has been made available to the public subject to a CC or GPL license, each holder of an inclusive copyright over the POCC work would, by virtue of the collective nature of the inclusive copyright, qualify as a licensor of the CC or GPL license. This would mean that any holder of an inclusive copyright would be able to prevent the use of the POCC work by a third party in violation of the generally applicable terms and conditions for the public, regardless as to whether that use infringes upon an author's inclusive copyright to benefit from the utilities of the work. For instance, if the POCC work uses a public CC-BY-SA 3.0 license that requires the attribution of the creator community in any use of the work that takes place outside the dedicated platform, any holder of the inclusive copyright would, as a licensor of the CC-BY-SA 3.0 license, have legal standing to bring an action against any person who violates this condition for the breach of the CC-BY-SA 3.0 license contract.

83 Thus, in its enforcement, the inclusive copyright has both an inclusive and exclusive dimension. It is inclusive in the sense that it is designed to include any person within the common creation endeavour and to enable the enjoyment of the resulting POCC work by members of the public at large. Yet, it can also be used to prevent the exclusive appropriation of the common work and to exclude any person from enjoying the utilities of the POCC work in a manner that violates the terms and conditions.

84 It is important to note that, each author of the POCC work would not only be a licensor but would also be bound by those terms and conditions of the chosen license by virtue of having engaged in the POCC authorship process. Where the holder of an inclusive copyright violates these terms and conditions (even if such violation does not result in the exclusion of other holders of an inclusive copyright from enjoying the utilities of the work) it is necessary to recognize the right of any other holder of an inclusive right (as a member of the creator community) to bring an action based on breach of the license.

- 85 The symmetrical nature of the inclusive copyright that extends to the entirety of the POCC work as an evolving entity, enables any author of a POCC work to individually exercise and enforce inclusive copyright independently.
- 86 Given the fact that the inclusive copyright extends to the entire work as an evolving entity, the question arises as to whether an author who obtains copyright at time X could bring an action against any person (either based on copyright infringement or breach of contract) relating to an act that occurred or (in the case of an ongoing infringement or breach of contract) commenced prior to time X. The legitimate expectation held by each holder of an inclusive copyright to benefit from the value created by contributions made to the POCC work at any point in time provides a legal basis on which the author could claim legal standing in such an action. It is also noted that, in bringing such an action, the author will not be claiming legal relief on their own behalf but on behalf of all holders of an inclusive right and in the interests of sustaining and perpetuating the inclusivity of the POCC work along the chain of sequential creation. Therefore, such an author should be able to bring an action even though the cause of action arose prior to obtaining a legal claim (i.e. an inclusive copyright) over the POCC work.
- 88 Another interesting question relates to the potential of the inclusive copyright to extend to other fields of application such as the protection of traditional cultural expression and folklore. As noted above in section B., the folkloric model of authorship as well as certain models of authorship used in oral traditions of religious discourse closely mirror the POCC authorship model. It would be fascinating to explore whether the inclusive copyright that has been devised in the context of the POCC authorship model can be also made applicable to such models of authorship.
- 89 Thus, the notion of an inclusive copyright opens up exciting vistas for further research. It is hoped that the concepts and arguments developed in this paper might serve to initiate a robust scholarly discussion on this issue that could lead to the introduction of a new inclusive right into copyright's legal toolbox.

## E. Final observations

- 87 It must be reiterated that the concept of an inclusive copyright is still nascent. This paper has attempted to outline the concept of an inclusive copyright, its basic features and modalities of enforcement. Many important issues remain unresolved. For instance, how can the inclusive copyright be reconciled with moral rights that vest individually with each author as regards the original expression contributed by them, especially in jurisdictions that do not allow for the waiving of moral rights?<sup>83</sup> The moral right to prevent distortion is especially problematic since it could be invoked by an upstream author in order to prevent downstream authors from modifying the original expression contributed to the POCC work. A possible solution to this problem would be to substitute the individual moral rights held by various authors with a moral right that is collectively held by the community of authors, which can be exercised and enforced in accordance with the terms and conditions applicable to the POCC authorship process and community guidelines.

83 For example, the copyright law frameworks of France and Belgium do not allow an author to waive moral rights over the original expression.