

*Interventions****Beckingham v. Hodgens: The Session Musician's Claim to Music Copyright***

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The High Court judgment in *Beckingham v. Hodgens*, delivered in July but as yet unreported, revisits the issue of the backing musician's entitlement to a share of the copyright in a song on which he has played. The decision seems to put the law in this area back on the right path, from which it had strayed in *Hadley & Others v. Kemp* (the Spandau Ballet case) [1999] EMLR 589. It also demonstrates the continuing divergence between conventions in the music industry and the law in relation to music copyright.

Music Industry Conventions

There is a hierarchy within popular music, with vocalists and guitarists at the top, followed by bass players and, at the very bottom, lowly drummers. Given the large egos frequently involved and the large sums of money earned from music copyrights, those who consider themselves the main creative forces in a band are not usually inclined to give credit to the contributions of supporting musicians.

The convention is that the songwriter or songwriters who compose the chords of a song and its main vocal melody are to be considered its authors and entitled to the entire music copyright. The group members who contribute the other musical parts are not considered to have earned a share of the music copyright and, still less, any session musician brought in to add a musical part on an instrument which no group member can play.

Where a group composes a song together in a jam session it is generally accepted that the group members are joint authors and joint owners of the music copyright. See *Stuart v. Barrett and Others* [1994] EMLR 448. Even in this situation a session musician is unlikely to be considered for a share of the music copyright.

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The Facts of the Case

The claimant in *Beckingham v. Hodgens*, Robert Beckingham professionally known as 'Bobby Valentino', had been a member of various bands and a session musician. He played a violin part on the recording by The Bluebells of the song 'Young At Heart' in 1984. For his services he was paid £75.

Robert Hodgens of The Bluebells and his girlfriend of the time, Siobhan Fahey, then a member of Bananarama, were credited as the writers of 'Young At Heart'. The song was a hit in 1984 and repeated its success in 1993 when it was used in a Volkswagen advertisement. Bobby Valentino maintained that he had composed the violin part. Robert Hodgens strenuously disagreed.

Having decided not to assert a claim in 1984, Bobby Valentino changed his mind in 1993 and told Robert Hodgens that he would be making a claim. Proceedings were eventually commenced in 1999.

Christopher Floyd Q.C. concluded that Bobby Valentino had indeed composed the violin part. The judge had then to consider whether this made Bobby Valentino a joint author of 'Young At Heart'.

Joint Authorship

The requirements for joint authorship are that:

- (i) there must be a collaboration in the creation of a new musical work;
- (ii) there must be a significant and original contribution from each author;
and
- (iii) the contributions of each author must not be separate.

The first and third requirements flow from the definition of 'work of joint authorship' in s.10(1) of the Copyright Designs and Patents Act 1988. All the authorities relate to its predecessor, s.11(3) of the 1956 Act, but there is no significant difference in the wording.

It is the requirement that each author's contribution must be 'significant and original' which has been at the centre of all the cases. These disputes have undoubtedly been exacerbated by the fact that in the absence of agreement to the contrary all joint authors own an equal share of the copyright regardless of their relative contributions.

The question is said to be one of 'fact and degree' for the Court. This never seems to deter parties from calling expert witnesses to give their opinions as to whether a particular contribution is 'significant'.

In the Bobby Valentino case Christopher Floyd Q.C. dealt briskly with the expert evidence. He concluded, after listening to the piece played, that

the violin part was significant and original. The session musician was a joint author and therefore entitled to a share in the music copyrights.

The Judge also dismissed the argument that Bobby Valentino should not be allowed to raise his claim at such a late stage. He found that Bobby Valentino had granted an implied licence, royalty free for the period 1984–93 but was entitled to give Robert Hodgens notice, as he had done in 1993, that this licence was revoked and that in future he would claim a share of royalties.

The Barclay James Harvest Case

The music industry was first made aware of the possibility of such claims by the decision in *Godfrey v. Lees and Others* [1995] EMLR 307.

The claimant Robert Godfrey had acted as an orchestral arranger and piano and organ accompanist for the group Barclay James Harvest, which enjoyed success in the late 1960s and early 1970s. He contributed arrangements and accompaniment to various works on the group's two albums. Robert Godfrey was not a member of the group and the group members had never considered that he was entitled to any share in the music copyrights in the songs to which he contributed.

In 1971 he ceased to work with the group. In 1985 he issued the first of two sets of proceedings against the group members in which he claimed a share in the music copyrights and a share of the income from them.

In coming to his decision Blackburne J. made it clear that it was unnecessary for each joint author of a musical work to establish that 'his contribution to the work is equal in terms of either quantity, quality or originality to that of his collaborators'.

He also emphasised that the qualifying threshold was not high. Referring to the decision in *Redwood Music v. Chappell* [1982] RPC 109, the judge commented that the 'case was not concerned with joint authorship but it well demonstrates how little originality is required of a person's contribution to a piece of music in order to attract copyright in the altered work which results'.

Blackburne J. went on to find that Robert Godfrey was a joint author of the various works on which he played even though in one 'borderline' instance his 'accompaniment [was] of a straightforward and largely repetitive nature'.

The claim to a share of the earnings from the music copyrights nevertheless failed on the basis that Robert Godfrey was estopped by his conduct in allowing the band members to proceed for 14 years under the assumption that he did not claim any interest in the music copyrights.

The issue came before the Courts again in 1999 and the position in the Barclay James Harvest case was effectively reversed.

The Spandau Ballet Case

In *Hadley & Others v. Kemp* the claimants Tony Hadley, John Keeble and Steve Norman were the vocalist, drummer and multi-instrumentalist respectively of the group Spandau Ballet, which enjoyed considerable success in the 1980s. The defendant Gary Kemp was the group's guitarist and principal songwriter.

Throughout the band's career Gary Kemp was acknowledged to be the writer of all but one of the songs recorded by the group. Nevertheless, he agreed to pay via service companies a share of the income from the music copyrights to the other group members.

In 1988, as the group reached the end of its career he decided to stop these payments. In 1996, the claimants commenced proceedings against Gary Kemp. Initially their claim was based only on an alleged agreement that they should continue to receive the share of the income from the music copyrights. In 1998 the claim was amended to include an alternative claim that they were joint authors of the songs and thus joint owners of the music copyrights.

Park J. was having none of this. While accepting that the test was whether the contribution of the backing musicians was 'significant and original', he appeared to move away from the principle established by *Godfrey v. Lees* that this was a threshold and not a high one.

The judge seemed to be adopting some sort of sliding scale test. He stated that 'the musical works in this case – the Spandau Ballet songs – are totally original, and, in my judgment if contributions to them by the members of the group other than Gary Kemp are going to be sufficient to make the other members joint authors, the contributions need to possess significant creative originality'. The effect of this was that the higher the quality of the contribution of the main songwriter the higher the quality of the contributions of the other musicians would have to be if they were to be considered joint authors.

Park J. also drew an unhelpful distinction, prompted by expert witnesses called on behalf of Gary Kemp, between composing music and performing it. He came to the conclusion that in relation to most of the songs Tony Hadley, John Keeble and Steve Norman had done no more than interpret in their performances the music composed by Gary Kemp.

This was correct in the case of vocalist Tony Hadley, because Gary Kemp always composed the entire vocal melody. However, in the case of the drum parts played by John Keeble and the various parts played by Steve Norman it is clear from the facts found by the judge that all that Gary Kemp had composed was the chords of the song.

What drum parts was John Keeble 'interpreting' when Gary Kemp hadn't composed any? The position was the same regarding the saxophone

parts played by Steve Norman. The judge found that Garry Kemp had simply left gaps for Steve Norman to fill with saxophone parts. Clearly the drummer and multi-instrumentalist had composed their own parts. The real issue was whether what they had composed was 'significant and original'.

Here Park J.'s sliding scale principle worked against the claimants. This was particularly evident in the case of the saxophone contributions by Steve Norman, which included the 16 bar solo in the group's biggest hit, 'True'. By the standard being applied by the judge, Charlie Parker would have been struggling to come up with a saxophone solo which would have entitled him to be considered a joint author alongside Gary Kemp.

The judge found that apart from one song on which the drums and percussion parts devised by John Keeble and Steve Norman were given 'substantial and prolonged prominence', their contributions did not entitle them to a share of the music copyright in the songs.

Park J. also found that having entered into a number of agreements on the basis that Gary Kemp was the sole composer, the claimants had effectively warranted that this was the position. On this basis also the claim must fail.

The Position Post-Bobby Valentino

The Bobby Valentino case has now reaffirmed that supporting musicians who make significant musical contributions will be held entitled to shares of the music copyright. Part of the reason for the differing approaches and the differing results may lie in the fact that while Park J. acknowledged his difficulty with musical matters, Christopher Floyd Q.C. was evidently quite expert, perhaps indicating a youth misspent jamming in dingy rehearsal rooms.

Increasingly those involved in the music industry are becoming aware that supporting musicians may be entitled to claim a share of valuable music copyrights. Session musicians are being asked to sign agreements designed to prevent such claims. It is a rather more difficult matter to ask group members to sign away their rights. Therefore we have probably not seen the last of these disputes over music copyrights.