

Kluwer Copyright Blog

Kogan v Martin & others - UK Court of Appeal sends Florence Foster Jenkins screenplay copyright dispute back to the IPEC for a re-trial

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In a highly unusual move, the Court of Appeal has set aside the first instance judgment in *Nicholas Martin v Julia Kogan* [2017] EWHC 2927 and ordered that a new trial take place in the IPEC, but this time before a different judge.

In its judgment, *Julia Kogan v Nicholas Martin & others*, [2019] EWCA Civ 1645, the Court of Appeal made a number of striking criticisms of the first instance judgment of HHJ Hacon, the Presiding Judge of the IPEC. Of more interest to copyright practitioners will be the Court of Appeal's useful clarification and summary of the law in the area of joint authorship of a copyright work. In this post we will consider the Court of Appeal's views on the type and nature of contributions required in order to establish someone as a joint author. We will also look at the impact of the judgment on the ability of a plot to be protected by copyright.

Background

Ms Kogan is a professional opera singer. Between 2011 and March 2014, she was in a relationship with Mr Martin, a professional writer of film and TV scripts who, it appears, has had some success in his career but also long periods without any of his screenplays being produced. The couple lived together between 2012 and 2014, when their relationship ended.

It was during the period of their co-habitation that a screenplay was written which would become the film *Florence Foster Jenkins*. The film, starring Meryl Streep and Hugh Grant, premiered in April 2016 and was a box office success, **grossing around \$56 million**. *Florence Foster Jenkins* is based on the life of the New York socialite of the same name who, as the Court of Appeal says in its judgment, "*considered herself to be a talented operatic singer, but she was an awful one.*"

Mr Martin is credited as being the sole author of the screenplay. However, he does not dispute that Ms Kogan was involved in some way in creating the earliest three drafts of the screenplay (although not the final version). It was the extent and nature of those contributions which is in dispute. Mr Martin initially sought a declaration that he was the sole author of the screenplay. Ms Kogan counterclaimed seeking

recognition as a joint author. Ms Kogan also sought a variety of other remedies, including a proportion of Mr Martin's income from the film.

In 2017, the claim was heard by HHJ Hacon in the IPEC. For anyone unfamiliar with the IPEC, it is a division of the English High Court whose procedure and costs regime is intended to make it suitable for IP disputes, such as this one, which are relatively low in value and less complex than disputes which might be heard before the main Chancery Division of the High Court.

At first instance, HHJ Hacon dismissed Ms Kogan's claim to be recognised as a joint author. In doing so, HHJ Hacon concluded that *"the textual and non-textual contributions made by Ms Kogan never rose above the level of providing useful jargon, along with helpful criticism and some minor plot suggestions. Taken together they were not sufficient to qualify Ms Kogan as a joint author of the Screenplay, even had those contributions all been made in the course of a collaboration to create the Screenplay."*

Ms Hogan appealed to the Court of Appeal. In this judgment, the Court of Appeal set aside the IPEC decision and ordered that a re-trial take place.

The Law

Section 10(1) of the Copyright, Designs and Patents Act 1988 (the 'CDPA') governs works of joint authorship. It provides:

"In this part a 'work of joint authorship' means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors."

The four elements of joint authorship are therefore: (a) collaboration, (b) authorship, (c) contribution and (d) non-distinctness of contribution.

In its judgment, the Court of Appeal considers the various authorities on joint authorship and assesses how these apply specifically in the context of a screenplay. The judgment then helpfully draws the strands together into an 11-step test for joint authorship, at paragraph [53] of the judgment.

Below is a summary of the 11-step analysis:

1. A work of joint authorship will be the product of a collaboration between all of the people who created it.
2. A collaboration occurs where two or more people *"undertake jointly to create the work with a common design as to its general outline, and where they share the labour of working it out"*. The first task is therefore to determine the nature of the co-operation between the putative joint authors - for example, are they genuine collaborators, or is the relationship akin to that of author and technical researcher? In the latter situation, the technical researcher *might* not be a collaborator for the purposes of s.10(1), and therefore would not qualify as a joint author.
3. The following will not qualify as works of joint authorship: derivative works; works where one of the putative authors only provides editorial corrections or critique; or

where the second person only provides ad hoc suggestions of phrases or ideas, but there is no wider collaboration.

4. It is never enough to ask, “*who did the writing?*” For example, there may be joint authorship in a situation where one person creates the plot and the other writes the words.
5. A joint author must have contributed a significant amount of the skill which went into the creation of the work. This could be satisfied by a person who created, selected or gathered together the detailed concepts or emotions which the other author’s words have fixed in writing.
6. What counts as an authorial contribution is dependent on the nature of the copyright work in question (literary, dramatic, artistic).
7. The question of what level of contribution is enough shall be judged by the *Infopaq* The question is therefore whether the putative joint author has contributed elements which expressed that person’s own intellectual creation. If the putative author’s contribution involves the exercise of free and expressive choices, then that contribution is likely to be sufficient to qualify. On the other hand, the more restrictive the choices which were available, the less likely it will be that they satisfy the test.
8. The contribution of a putative joint author must not be distinct from the other contributors.
9. There is no further requirement that the authors must have subjectively intended to create a work of joint authorship.
10. The ‘final arbiter’ test (a situation such as the one in this case where one author has the final say on what does and does not go into the final work) may have some relevance but is certainly not conclusive.
11. The respective shares of joint authors are not required to be equal, but can instead reflect the relative amounts of their contributions.

The 11 steps set out above are interesting as much for the criteria which were rejected as those which have been included. In particular:

- There is no further requirement that the authors must have subjectively intended to create a work of joint authorship (see step 9 above). This was a requirement which has in some cases been seen to be relevant.
- The distinction which HHJ Hacon made in his first instance judgment between ‘primary’ skills required to create a copyright work and other ‘secondary’ skills is, in the Court of Appeal’s words, “*positively unhelpful*”.

Ms Kogan’s contributions to the screenplay

There was conflicting evidence before HHJ Hacon as to the extent of Ms Kogan’s contributions to the screenplay. Even in cases where Ms Hogan and Mr Martin agreed that she had made a contribution (such as the suggestion of technical operatic terms in certain scenes), there was a further dispute as to the impact of the language which was chosen on that scene and whether this was just ‘useful jargon’ or something more substantive and creative and therefore sufficient to qualify Ms Kogan as a joint author.

Whilst at first instance HHJ Hacon was dismissive of the importance of certain language suggestions which Ms Kogan had made, the Court of Appeal found that it

was clear that in some situations the choice of certain words within a dialogue “*has an important impact on the scene*”. In addition, it was clear to the Court of Appeal that Ms Kogan could have chosen from a range of expressions, but not all of these would have had the same comedic effect as the ones she chose. In other words, the Court of Appeal was open to accepting that she was exercising free and expressive choices.

The Court of Appeal’s view was also that, in certain circumstances, non-textual contributions (such as the suggestion that a certain character is introduced, or that a particular song is used in a scene) might be sufficient to qualify the contributor as a joint author. It will depend, amongst other things, on (i) whether the putative authors were working together as collaborators; and (ii) whether the contributed elements express that person’s own intellectual creation.

Ultimately, the Court of Appeal concluded that they did not have sufficient material before them to reach a conclusion as to whether Ms Kogan’s contributions were sufficient to make her a joint author. This was in large part because the first instance judge had expressly declined to have regard to the witness evidence which he heard at trial, leaving the Court of Appeal judges without the benefit of “*essential findings of primary fact, which we are in no position to make ourselves*”.

Despite this, it is difficult not to conclude from the judgment that the Court of Appeal was very tempted to reach the conclusion that Ms Kogan should be considered a joint author of the screenplay for the film. Instead, however, the parties will have to go back to the IPEC for a re-trial.

Comment

The Court of Appeal judgment is a fascinating read, particularly given the unusually frank criticism of the lower court’s judgment. And for copyright practitioners, the case is interesting for two main reasons.

Firstly, the Court of Appeal has set out in clear terms the current position on the law of joint authorship of copyright works. This is a useful checklist, and the judgment sets out various points to illustrate what can otherwise feel like nebulous ideas.

The judgment is also interesting because the court’s analysis of joint authorship leads it to tackle the boundary which lies at the heart of copyright subsistence between mere ideas (which are not protected by copyright) and the expression of those ideas (which can be).

In the context of a collaboration, one might assume that the suggestion that a character is introduced, or that the plot develops in a particular way, would be considered merely an idea and therefore not capable of protection. However, citing with approval the judgment of Jacob J. in *Ibcos Computers* ([1994] FSR 269), in which he said that “*the taking of a plot (i.e. the idea) of a novel or play can certainly infringe – if that plot is a substantial part of the copyright work*”, the Court of Appeal said that:

“If copyright protection can extend to the plot of a literary work, even where the precise words of the work are not taken, then it seems to us to be logical to suppose that the skill which goes into devising the plot is properly to be regarded as part of

creating the work”.

The Court of Appeal therefore seems to accept that it is possible for the plot, perhaps of a novel or screenplay, to be protected separately from the written words that give effect to that plot. In a similar way, Jacob J. had said in *Ibcos Computers* that “*if the “idea” is detailed, then there may be infringement*” if it is copied. This will be a question of degree and, of course, the other requirements for copyright protection must still be satisfied. The development is interesting, however, as there are parallels to the comments which were made in *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd & Anor* [2017] EWHC 2600 (Ch), in which the court held that a format for a TV show can *potentially* be protected by copyright.

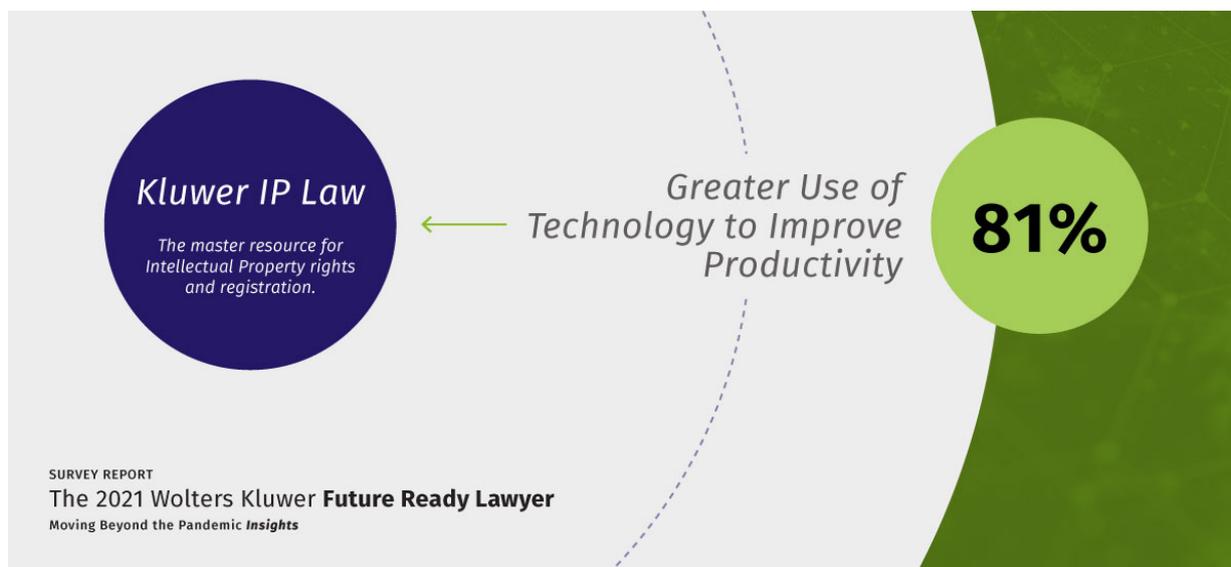
As a result of the Court of Appeal’s judgment, it seems to us that the idea/expression dichotomy, which has been described as “*notoriously slippery*”, may become even more so, and that parties will be encouraged to allege copyright subsistence in what might previously have been dismissed as mere ideas which were not capable of protection as copyright works.

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