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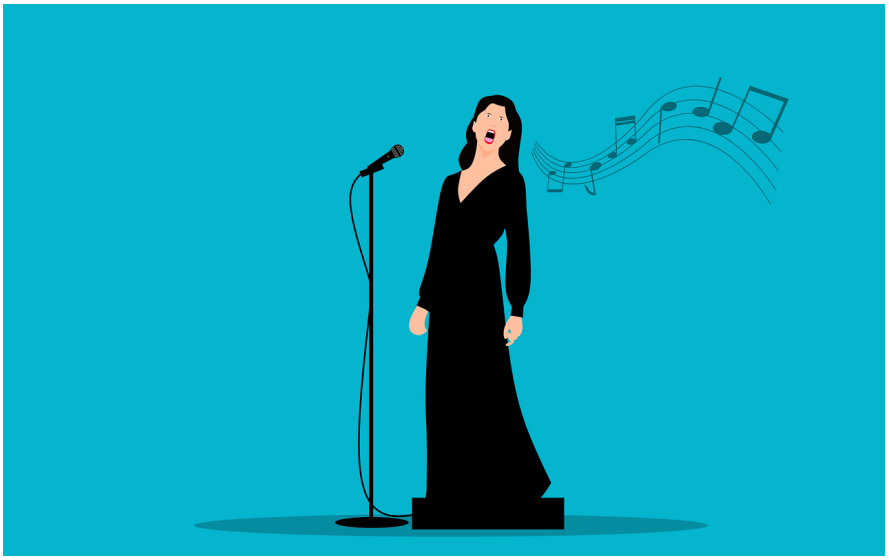
Martin v Kogan 2: Florence Foster Jenkins returns to the IPEC

Jeremy Blum, Jake Palmer (Bristows LLP) · Monday, January 25th, 2021



The relative contribution of a joint author is a factually complicated and difficult matter to assess. The re-trial of Martin and another v Kogan [2021] EWHC 24 (Ch) confirmed this to be the case. We have previously written about this authorship dispute regarding the film *Florence Foster Jenkins* [here] and [here].

In this post, we consider how Meade J, in his lengthy decision, applied the joint authorship principles that were set out in the Court of Appeal decision that ordered the re-trial. For a summary of the legal principles on joint authorship enunciated by the Court of Appeal, see our post here. After hearing all the evidence and wading through contemporaneous documents the judge found that the screenplay work was jointly authored, however, the contribution of the defendant was 20%.

The outcome has potential implications for when an author seeks or obtains input from a third party and whether that third party could potentially claim to have made an authorial contribution. However, it is important not to take this too far; the reality is it was always the case that if a party provided input that was an expression of their own intellectual creation, then they ought to be a joint author. This case is most interesting in light of the facts that were considered to establish joint authorship and also the fact that the joint authorship was determined not to be equal contributions.

Background

Florence Foster Jenkins is a biographical film starring Meryl Streep as the titular

character. Florence was a New York heiress in the 1940s, determined to become an opera singer despite her comically poor voice. Hugh Grant stars as her husband and Simon Helberg as her hired pianist.

The dispute concerned the screenplay written for the film. Nicholas Martin is a writer, primarily of TV show scripts. He was an accepted author of the screenplay, but contended he was the sole author. Julia Kogan is primarily an opera singer, music teacher and occasional writer of books. She claimed her contributions were sufficient for her to be a joint author. Writing the screenplay for a major film represented a "big break" (to borrow a term from the industry) for both.

Mr Martin and Ms Kogan were in an on-off romantic relationship during the period in which Mr Martin wrote the screenplay with, it was accepted, Ms Kogan contributing. The couple fell out after the film was optioned but before the final draft was written and Mr Martin received the only writing credit in the film when released. Meade J had to decide whether Ms Kogan's contribution was sufficient, in light of guidance from the Court of Appeal, for her to be considered a joint author and, if so, her percentage ownership.

Ms Kogan also brought a case against the film companies that had optioned and subsequently produced the film. They raised a defence of acquiescence and estoppel, having not known of Ms Kogan's interest until a later stage in development (which was successful in substance).

Case history

The decision represents the third time the case has been before a trial court.

In the initial IPEC decision Nicholas Martin v Julia Kogan [2017] EWHC 2927 (discussed here) HHJ Hacon held that Ms Kogan's contributions were not sufficient to qualify her as a joint author. His factual finding was that such contributions *"never rose above the level of providing useful jargon, along with helpful criticism and some minor plot suggestions"* ([85] of [2017] EWHC 2927).

The Court of Appeal, in Julia Kogan v Nicholas Martin & others, [2019] EWCA Civ 1645, set aside the IPECs decision and ordered a retrial with a new judge. In the process they helpfully set out an 11-step analysis to determine joint authorship to be applied to the facts in the re-trial. The post available here considers the Court of Appeal's judgment and the 11-step analysis.

Analysis to determine joint authorship

The collaboration and its nature

There was never any formal planning meeting allocating tasks between the couple. However, their discussions were *"close and iterative"*, going far beyond a mere *"sounding board"* relationship. They both contributed ideas for *"characters, feeling, main events and musical content"* [313], notwithstanding the understanding that Mr Martin had the final say and performed the act of writing.

In light of this, despite considering it unlikely the couple would have agreed at the time they were joint authors, they recognised they were on a path together towards a screenplay. Their conduct indicated a "*common design as to general outline and a sharing of labour*" [313]. As a result, Meade J held there was sufficient collaboration.

Nature of Ms Kogan's contribution

Meade J considered the six aspects of the screenplay being the most significant contributions made by Ms Kogan (the "top six"). These were used to *"illustrate but […] not limit her contribution"* [318]. Separately, on the characterisation generally, Meade J held that Ms Kogan's input *"was of great importance to all the central characters"* [310].

This followed the Court of Appeal's finding that certain words in a dialogue could have an important impact on the scene and that non-textual contributions (including song choice and characterisation) could be sufficient to qualify someone as a joint author. The fact that Mr Martin did the actual writing and had the final say were relevant factors, but by no means decisive.

In his review of the top six, it was held that Ms Kogan's knowledge of the opera industry and the film's era and setting fed into her plot, character and dialogue suggestions. These dialogue suggestions were included in some of the most important scenes. She also had a good understanding of the screenplay's musicality and its interaction with the characters.

Accordingly, Meade J held that *"Ms Kogan contributed as a collaborator in terms of characterisation, musicality, choice of historical incident and musical terminology"* [272].

By their nature, such contributions were *"highly creative and imaginative"*, rather than *"mechanical or constrained"*. Therefore, they amounted to expressions of her own intellectual creation. Similarly, they were "authorial", since they resided in the "*creation, selection and gathering together of detailed concepts and emotions which the words have fixed in writing*" (referenced by Meade J from the Court of Appeal judgment at [41]).

Distinctiveness of contributions

It was not possible to separate Mr Martin's and Ms Kogan's contributions by their very nature: the characterisation and musicality contributed by Ms Kogan ran right through the film.

Ms Kogan's share

In reviewing the legal principles, Meade J explained that the circumstances justified derogating from the presumption that joint authors should enjoy equal shares in ownership of the screenplay. On a *"qualitative and quantitative assessment"* [345] it was held that Ms Kogan's ownership share amounted to 20%. Meade J admitted to this being *"highly subjective"* and thus approachable *"on a broad-brush basis"* [330].

Meade J divided the history into two parts. The first part was the initial development up until the final treatment (a "treatment" being a *"story outline […] much shorter than a screenplay and with less, if any, dialogue and shooting directions"* [121]). The second period was from then onwards, when Mr Martin actually wrote the screenplay.

He then attributed a share of the overall creation to each part and considered Ms Kogan's contribution to each as follows: (1) the first part was a third of the total work and Ms Kogan contributed one third to this part; and (2) the second part was the remaining two thirds of the total work, and Ms Kogan contributed one tenth to this part. The summation gave him Ms Kogan's 20% of the overall creation.

In arriving at these numbers, Meade J observed the following.

· Quantitatively, there were large areas of work exclusive to Mr Martin in both parts: the story structure and scene card work in the first, and the work on the actual screenplay in the second. This worked in Mr Martin's favour.

· Ms Kogan's contributions were qualitatively significant and similar throughout the process of the screenplay, but significantly more numerous in the first part.

· Having the final say, as Mr Martin did, attracted little weight. This was on the basis that the only creative decision in such a process is whether to include or exclude the suggestion from the other party.

· Similarly, it was of *"small importance"* [339] that Ms Kogan had the initial idea to create a film about Florence Foster Jenkins.

· Contrary to Ms Kogan's arguments, Meade J found that Mr Martin's work on actually writing the screenplay was *"highly creative, difficult and intricate"* [251] so was quantitatively and qualitatively significant.

Comment

In their submissions, the film companies (who were joined as parties) raised a concern with the judge finding in Ms Kogan's favour: there would be a detriment to investment in creative industries out of fear that an unknown joint author later emerges. In particular, "mere" researchers or "sounding boards" could now claim to be authors.

Meade J responded that his judgment does not raise any new principles as to whether and when joint authorship arises. His role was to make findings on the facts and apply those to the principles laid down in the Court of Appeal judgment.

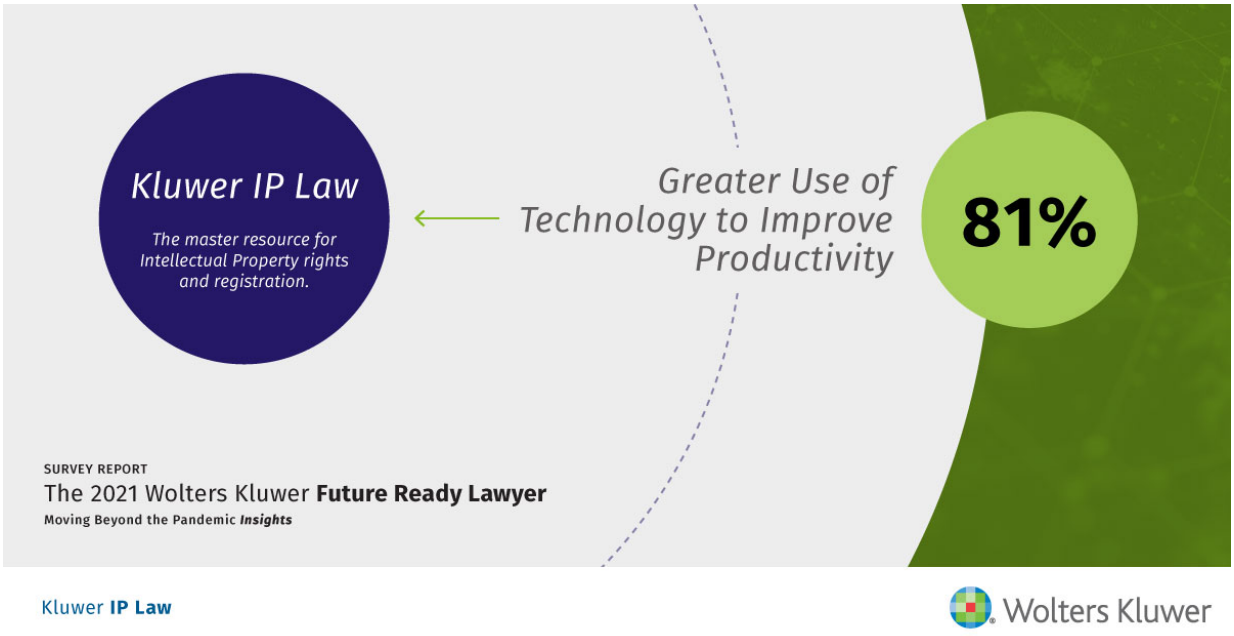
Furthermore, Meade J found that Ms Kogan's contributions were well beyond that of a sounding board or an arm's length researcher. Indeed, there were other dramatis personae who were held to be merely sounding boards.

Finally, Meade J set out the various safeguards investors should employ to protect against this concern: working with reputable authors, making inquiries, contractual protections and acting responsibly in the event of issues arising.

That being said, Meade J's willingness to pro rata a contribution (which was as low as one fifteenth for the later part of the screenplay's development) could well encourage those with small contributions to attempt to make claims. Contributors could well test the limits of this approach to see if there is a *de minimis* contribution. For example, what if, instead of the top 6 and her other contributions, Ms Kogan had contributed only one valuable idea to one important scene?

Another potential issue in our view, not raised by the film companies, is stifling of creativity to the detriment of consumers: writers may fear reaching out to others. For example, what if a "sounding board" suddenly has a very good suggestion. On the other hand, perhaps those contributing meaningfully should indeed be rewarded for such.

In any event, this case is significant as the first to apply the principles as set out by the Court of Appeal. Moreover, Meade J gives some guidance on the sort of factors (as set out above) that will be relevant in deciding the pro rata share of joint authors in circumstances where there is reason to look beyond the presumption of equal shares.



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