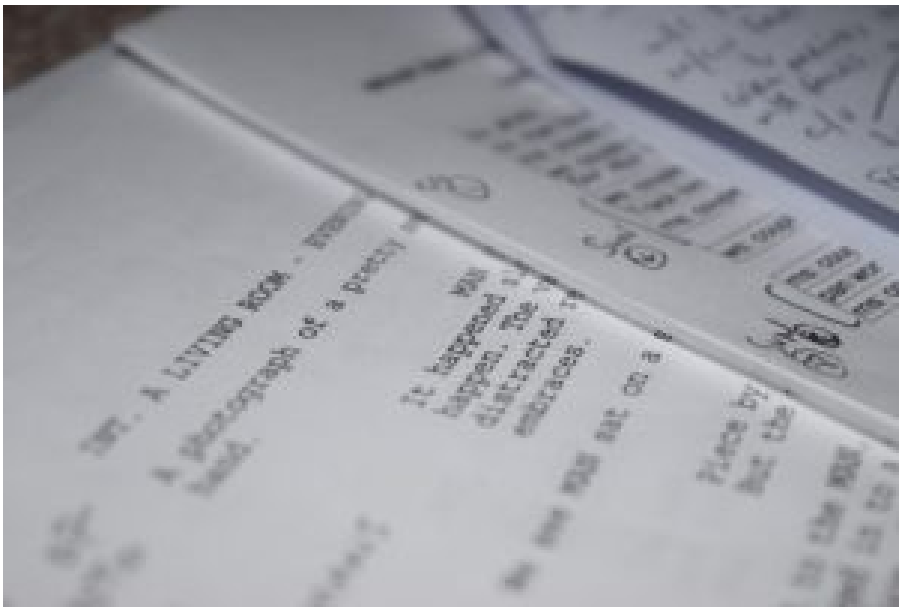
Kluwer Copyright Blog

When is a contribution sufficient to give rise to joint authorship?

Jeremy Blum (Bristows LLP) and Sarah Blair (Bristows) · Monday, December 11th, 2017

Have you ever given an idea to a friend, who then weaved that idea into their work? Did you feel that you should be recognised for your idea being included even though what you contributed was rather high level?



Two weeks ago, in the UK judgment *Nicholas Martin v Julia Kogan* [2017] EWHC 2927 (IPEC), Ms Kogan was unsuccessful in claiming joint authorship of the copyright in a screenplay for the recent blockbuster *Florence Foster Jenkins* starring Meryl Streep and Hugh Grant which premiered in April 2016.

The case provides a useful overview of the principles of when joint authorship arises, and when it does not, providing reassuring guidance to authors who might receive criticism and suggestions on their work from friends and colleagues.

In assessing the contribution of the purported author, the judge introduced a consideration of whether the contribution was due to ‘primary’ or ‘secondary’ skills. Some skills being more likely to give rise to a claim for joint authorship than other skills. Though a useful way of labelling different contributions, it is still fundamental in the UK to assess the statutory test and whether the authors collaborated in such a way which counts as joint authorship.

The Screenplay

Ms Kogan, a professional opera singer, was in a relationship and lived with Mr Martin during the origin and creation of the early drafts of the screenplay. The couple broke up before the *final draft*

of the screenplay was completed (the 'Screenplay', being the copyright work in question). Since 2014, Ms Kogan has claimed joint authorship and sought a proportion of Mr Martin's income from the film. The film is based on the New York heiress and socialite famous for her (amateur) soprano singing voice. Ms Kogan, being a professional opera singer, claimed to have contributed her experience to the Screenplay by way of, for example, technical language and song and character suggestions.

Mr Martin initiated proceedings seeking a declaration of sole authorship: Ms Kogan counterclaimed for a declaration of joint authorship in the Screenplay and for infringement (joining the production and financing companies as allegedly infringing defendants).

The test for joint authorship

Section 10(1) of the Copyright, Designs and Patents Act 1988 (the '**CDPA**') states:

"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."

Thus, there must be *collaboration* between two or more authors; the contribution of each author *must not be distinct* from that of the other author/authors (this was not in dispute between the parties); and (as an implied third requirement) the contribution must be *sufficient* for an individual to qualify as a joint author, given that the author must still be an author within the meaning of s.9(1) CDPA and therefore have contributed a significant part of the skill and labour protected by copyright.

Collaboration – common design

As to the first requirement, for collaboration to be found there must be *common design* at the time of its creation. Whilst this might be difficult to determine, it requires something more than mere suggestion or criticism, rather a collaboration between the parties to e.g. remodel a work *together*.

The final draft of the Screenplay (the copyright work of which Ms Kogan claimed joint authorship), was written after the parties parted ways. So, Ms Kogan lost as she could not have collaborated in authoring the work. Hacon J rejected Ms Kogan's submissions that her consent to the use of her material in the early drafts of the final Screenplay was sufficient to establish her as a collaborator. Whilst consent is necessary for collaboration, it is not sufficient: there must be common design which there could not have been given that she was not present for the Screenplay's creation.

Sufficiency

Given that each draft of the screenplay constitutes a separate copyright work, Hacon J went on to consider whether Ms Kogan's contributions to earlier drafts were sufficient to make her a joint author of a work which might have been infringed by the final Screenplay.

Hacon J drew out guiding principles from UK case law to help determine when a contribution might be sufficient to constitute joint authorship. Central to this is the test for originality. To be protected by copyright, a work must be original being an expression of the author's own intellectual creation, which constitutes a 'substantial part' (both parties agreed that the *Infopaq* test

was to be applied and Hacon J used the term ‘skill’ to mean the same). If the contribution alone is protected by copyright, the contribution constitutes a substantial part, and will be sufficient for joint ownership to arise (alongside the other requirements of collaboration, common design and indistinct contributions). This question, as in the case of infringement, involves both a quantitative and qualitative assessment.

Ultimately, contributing *ideas* is neither sufficient to derive copyright nor for establishing joint authorship: the collaborator must constitute an author and there must be common design and a shared responsibility regarding the necessary decisions as to the work (*Robin Ray v Classic FM*).

Primary and Secondary Skills

Hacon J went on to consider the *type* of skill being contributed by the collaborator, distinguishing between ‘primary’ and ‘secondary’ skills. Primary skills, he suggests, are more important to the copyright work, e.g. for an artistic work, the use of a pen or brush, or for a literary work, the selection and arrangement of words in the course of setting them down. Secondary skills are “*necessarily less important*”, e.g. the composition and selection of colour or plot and character development. Whilst Hacon J makes efforts to emphasise that this distinction does not affect the intrinsic capacity of either type of skill to give rise to joint authorship, he states that it is generally much easier to prove where the collaborator’s contribution is a primary skill. The bar is higher where the contribution is a secondary skill.

Ms Kogan’s case

Having heard oral testimony of the parties (on which the judgment provides interesting direction on the trustworthiness of recollection evidence in litigation) and considered the documentary evidence, Hacon J decided that Mr Martin was the sole writer of the Screenplay. Had Ms Kogan been involved in the collaboration of writing the Screenplay (it was not Ms Kogan’s case that her copyright in the earlier drafts had been infringed, though this also would have presumably failed), her contributions – the provision of useful jargon, constructive criticism and minor plot suggestions – were not sufficient to give rise to joint authorship. The contributions were not of the right sort, nor was there any evidence of common design to suggest that they were anything more than kind support. It went against Ms Kogan that she did not claim joint authorship until much later on in the process, and her case seemingly changed at each stage of proceedings.

Comment

This case provides a useful summary of UK law on joint authorship and the difficulties of having to assess the sufficiency of a putative author’s contributions. Whilst providing reassurance to authors that using friendly and constructive criticism and suggestions will very rarely jeopardise their ownership of their work, it is a warning to aspiring joint authors to adequately document their role and contribution/s, and to maintain a consistent claim to the work in question.

Hacon J provides useful insight as to the particularities of judging a contribution’s sufficiency. However, it is arguable that his consideration of primary and secondary skills is of limited value, being somewhat self-evident and perhaps misleading in the distinction itself. For example, presumably, taking a photograph is a primary skill and the selection of composition, light and angle secondary skills. However, it is arguably in the latter where the author’s own intellectual creation lies (*Painer* C-145/10). Provided that the contribution, whether primary *or* secondary, is capable of copyright protection (and deriving from the collaborator’s own intellectual creation), the

contribution should be sufficient. It is simply that secondary skill contributions might be harder to prove than that of having taken the actual photo, along with the additional burden that their contribution was made in common design and collaboration between the authors.

To make sure you do not miss out on posts from the Kluwer Copyright Blog, please subscribe to the blog ***here.***

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

This entry was posted on Monday, December 11th, 2017 at 12:17 pm and is filed under Authorship, Case Law, Infringement, Ownership, Subject matter (copyrightable), United Kingdom
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.