

## **Florence Foster Jenkins case – IPEC re-writes script on joint authorship of screenplays**

The Intellectual Property Enterprise Court has found joint authorship of the screenplay for the film *Florence Foster Jenkins*.<sup>1</sup> In a retrial, Meade J applied principles set out in the decision of the Court of Appeal and concluded that Julia Kogan made an authorial contribution to the screenplay that merited a 20% share of the copyright. So Nicholas Martin had infringed her copyright from the date when she withdrew her consent to dealings with the screenplay. Yet the producers and financiers of the film were held to have a substantive defence of estoppel that shielded them from liability to Ms Kogan, as long as they pay her for her share prospectively.

### **Back story**

The case concerns the screenplay for the 2016 biographical film about a wealthy 1940s American socialite, who suffered under a notorious delusion that she was a talented opera singer. The film starred Meryl Streep and Hugh Grant.

The defendant, Nicholas Martin, is a professional writer of film and television scripts. The claimant, Julia Kogan, is an opera singer and music teacher, who had some experience writing books. They were in an on-off romantic relationship and, while they were living together, the idea arose for a screenplay about the life of Florence Foster Jenkins. Early drafts were created while they lived together.

They ended their relationship after the film was optioned, and the final version was then produced by Mr Martin. He was credited as the sole author of the screenplay, and the film, released in 2016, was a commercial success. Ms Kogan sought a share of his income from the film, and he sought a declaration that he was the sole author of the screenplay.

### **First instance**

When the case first came before the IPEC in 2017, His Honour Judge Hacon accepted Mr Martin's submission that each draft of the screenplay should be treated as a separate copyright work, and he held that there was no collaboration in creating the final version. Ms Kogan's contributions were found to consist of technical musical expressions and minor editing, which were considered insufficient to constitute joint authorship.

### **Appeal**

Ms Kogan appealed, and the Court of Appeal ordered a retrial on the basis that, in the circumstances, HHJ Hacon had been wrong to restrict his analysis to the final version and had erred in his approach to the evidence and assessment of her contribution. The Court of Appeal also disagreed with HHJ Hacon's characterisation of the choice of words as the primary skill and the development of plot and character as secondary skills.

It was noted that a screenplay is a dramatic work with the primary purpose of being performed, rather than being read, as in the case of a novel. Floyd LJ, giving the lead judgment, set out the legal principles that apply to assessing joint authorship:<sup>2</sup>

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<sup>1</sup> *Martin and another v Kogan* [2021] EWHC 24 (Ch) (11 January 2021).

<sup>2</sup> *Julia Kogan v Nicholas Martin and others* [2019] EWCA Civ 1645 at para. 53.

- 1 Collaboration is required to create a work of joint authorship.
- 2 Collaboration exists where people jointly undertake to create the work with a common design as to the general outline and share the labour.
- 3 Derivative works, editorial critique and ad-hoc suggestions without wider collaboration do not qualify.
- 4 It is never enough to ask "who did the writing?" Collaboration can take many different forms, including, for example, where one person creates the plot and another writes the words.
- 5 A joint author must be an "author" in the sense of contributing a substantial portion of the skill involved in creating the work. The concept of an author is wide and includes everyone who created, selected or gathered the detailed concepts or emotions that were fixed in the writing.
- 6 A contribution that is not "authorial" in the above sense does not count. This is to be assessed in light of the nature of the specific copyright work in question.
- 7 The joint author's contribution must have involved exercising free and expressive choices that result in an expression of the author's own intellectual creation.
- 8 The joint author's contribution must not be distinct from that of other joint authors.
- 9 The authors need not have intended to create a work of joint authorship.
- 10 The fact that one author has the final say may be relevant, but it is not conclusive. The author with final say should receive credit for making those decisions when determining the relative shares of ownership in the work.
- 11 The joint authors' respective shares can be apportioned to reflect their relative contributions.

### **Retrial decision on joint authorship**

#### Witness evidence

Meade J found that certain parts of Ms Kogan's evidence were deliberately untruthful, and that other parts were inconsistent owing to thoughtlessness or improvisation under pressure. While Mr Martin was not considered to be deliberately dishonest, Meade J found that his recollection of events was influenced by his "possessive attitude to the creative process of making a screenplay",<sup>3</sup> which made it hard for him to accept that he might not be sole author. Accordingly, Meade J had to address the question of how to assess witness evidence where part of it lacks credibility. He found that:

- 1 While a witness may be lying on one issue, that does not mean that the entirety of their evidence must be rejected.
- 2 A witness may lie to bolster either a true story or a false story.

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<sup>3</sup> 2021 High Court judgment at para. 295. Paragraph references in the following footnotes are to the same judgment.

- 3 The fact that witness evidence is wrong does not necessarily mean that the witness is lying: a recollection may be distorted by reinterpreting events as they actually happened or even by delusion.<sup>4</sup>

### Collaboration

Meade J found that Ms Kogan had the original idea. The pair set about creating the screenplay by identifying the characters, feeling, main events and key musical content. While Mr Martin had final say, Ms Kogan's role was beyond that of a mere "sounding board", and they knew that they were working towards a screenplay. Accordingly, there was a common design as to the general outline of the work, together with shared labour. The couple may not have intended at the time to create a work of joint authorship, but that is not a prerequisite.

While Mr Martin was writing the final draft, Ms Kogan's input was less substantial in terms of quantity, but still went beyond mere editing. While the film was in early production, she continued to contribute to the musical feeling and content, but in a more limited scope.

### Nature of Ms Kogan's contribution

The only things that she contributed alone were the initial idea and technical musical terms. She made suggestions to the plot, dialogue and characters based on her feeling for the musicality of the screenplay and understanding of opera. She had focused her evidence on what were considered to be her six most significant contributions to the screenplay.

Those included the comic scene in which it is discovered that Florence cannot sing as well as she believes. Mr Martin alleged that Ms Kogan had only contributed the technical terms. Yet Meade J found that the words were integral to the humour and effect of the scene, and that she had contributed as much as Mr Martin.

The best six contributions also included two scenes in which she suggested songs that became deeply significant to the plot and characterisation. One song was used to develop a contrast between Florence and another character who was an accomplished opera singer. The other song served as the basis for the relationship between Florence and her pianist. Music was central to the whole film and influenced the characters. Accordingly, Meade J found that Ms Kogan's contribution was significant to all of the central characters, and that her dialogue suggestions were included in some of the most significant scenes in the film, and "she "contributed as a collaborator in terms of characterisation, musicality, choice of historical incident and musical terminology".<sup>5</sup>

### Was Ms Kogan's contribution authorial?

Mr Martin accepted that, if the facts were as alleged for Ms Kogan's best six contributions, her contribution was authorial. The judge considered that this acceptance was "proper and pragmatic" but said that he would have held that the contribution was authorial in any event, because it resided in the

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<sup>4</sup> Para. 51.

<sup>5</sup> Para. 272.

“creation, selection and gathering together of detailed concepts and emotions which the words have fixed in writing”.<sup>6</sup>

#### Did Ms Kogan express her own intellectual creation?

As noted above, in the initial trial HHJ Hacon considered Ms Kogan’s contributions to be technical and minor. However, Meade J found that her contributions were far from mechanical or constrained and were in fact highly creative. The fact that Mr Martin had the final decision did not prevent her contribution from being an expression of her own intellectual creation.

#### Was Ms Kogan’s contribution distinct?

The characterisation and musicality ran throughout the whole film, and trying to separate her contribution from Mr Martin’s would have been “like trying to unmix purple paint into red and blue”.<sup>7</sup> She was therefore a joint author.

#### Relative shares

Meade J then had to determine the parties’ respective shares in the screenplay, and he drew the following conclusions on the relevant principles:

- 1 The presumption is in favour of equal shares as between joint authors.
- 2 Joint authors may provide otherwise by agreement (which was not relevant here).
- 3 In certain situations it may be impossible to conclude any position other than equal shares.
- 4 If the circumstances justify a different result, the court may assign shares on a pro-rata basis according to each joint author’s relative contribution.
- 5 The decision is highly subjective, and it may be approached on a broad-brush basis.<sup>8</sup>

For convenience of analysis, the judge divided the history of the screenplay development into two periods: (a) the initial development of the treatments, during which Ms Kogan’s input was significant, but under half; and (b) the period afterwards, including when Mr Martin wrote the final version, during which she made similar contributions, but on a much smaller scale.

The judge found that the first period represented about a third of the overall creation (or perhaps slightly more), with her contributing about a third of it, while the second period represented about two-thirds of the overall creation, with her contributing only about a tenth.<sup>9</sup> The effort involved in the final version was considerably greater than in the earlier period, and it was undertaken much more by Mr Martin. It was for him to ensure that the screenplay was practical for turning into a film in the sense of length,

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<sup>6</sup> Para. 319.

<sup>7</sup> Para. 323.

<sup>8</sup> Para. 330.

<sup>9</sup> Para. 355.

settings, number of actors etc., which is complicated and highly creative work and so quantitatively and qualitatively important.

The fact that Mr Martin had final say attracted “relatively little weight in itself”, given that “if the party with the final say accepts that which the other contributor proposes, it becomes part of the joint work and all the party with the final say contributes then is the decision to accept it”.<sup>10</sup> Ms Kogan’s contributions to the screenplay were qualitatively significant, although more so during the first period, but Meade J noted that the fact that she had “the initial idea took a deal of time but is ... of rather small importance in terms of amount of contribution”.<sup>11</sup>

Overall, unequal shares were justified, and Meade J held that Ms Kogan’s overall contribution to the screenplay was 20%.

## **Remedies**

In light of the ruling on Ms Kogan’s interest in the screenplay, she was entitled to an appropriate declaration and credit on IMDb as to her co-authorship. She had originally consented to dealings with the screenplay, but she later withdrew that consent. The judge held that Mr Martin had infringed her copyright after the withdrawal, and she was entitled to an assessment of damages or an account of profits for the period that followed.

As a split trial had been ordered, Meade J was only to deal with issues of liability and not quantum. Mr Martin maintained that the agreement with the producers and financiers of the film had been made before Ms Kogan withdrew her consent, and so her recovery should be limited. Meade J expressed no views on the matter, but noted that Ms Kogan will be free to argue that the agreement allowed Mr Martin to conduct rewrites and to maximise his involvement with the film and corresponding credit, which are valuable benefits.

Ms Kogan also sought relief from the film companies, who raised defences of estoppel and acquiescence on the basis that she had watched the production of the film and, at least indirectly by silence, represented that she had no right to stop the film companies’ activities. Meade J found that the three basic elements required for an estoppel were made out, in that:

- 1 Ms Kogan knew that the film companies believed that they could commercialise the screenplay without her involvement;
- 2 the film companies relied on that belief; and
- 3 as a result, the film companies incurred a detriment.<sup>12</sup>

The judge also considered it highly relevant to unconscionability that she not only knew of the film companies’ belief, but had also fostered that belief by encouraging Mr Martin to commercialise the screenplay in his own name. So she was estopped from: (a) seeking an injunction against the film companies; (b) seeking to restrict the ways in which the film was distributed; and (c) seeking financial relief from the film companies, as long as they pay her 20% of anything otherwise owed to Mr Martin

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<sup>10</sup> Para. 333.

<sup>11</sup> Para. 339.

<sup>12</sup> Para. 390.

in the future. That would not put the film companies in a worse position, and while it was also for the film companies to arrange her IMDb credit, there was no downside to them in doing so.

### **Comment**

The Court of Appeal's decision in this case provided helpful guidance on how to determine whether someone is a joint author of a copyright work. In his judgment, Meade J has shown how those principles can be applied in practice to determine joint authorship of a screenplay, and to assess the respective overall contributions of the collaborating writers.

Film and TV producers are often concerned about the contributions of early-stage contributors to development. This case provides some clarity on when a contribution can amount to joint authorship, and the success of the film companies' estoppel defence may provide some comfort to producers and financiers. But to avoid any ambiguity it is always best to ensure that clear commercial terms and IP assignments containing the appropriate warranties and indemnities are in place from the outset of the development stage.

The film companies had argued that, if the IPEC found in favour of Ms Kogan, there would be a risk to investment in screenplays purportedly written by one person, in case they later turn out to be works of joint authorship. Meade J rejected this, stating that he was only applying the Court of Appeal's principles to assess joint authorship and not creating any new principles. Meade J commented that such risk already existed and is managed by due diligence, dealing with reputable authors, warranties and indemnities, and acting responsibly if any issues arise. This case turned on its specific facts that led Mr Martin to believe he was the sole author, and Ms Kogan did not come forward until the last minute.

The film companies also argued that there was a risk that any mere "sounding board" or researcher could become a joint author. Meade J rejected this on the basis that the facts were such that Ms Kogan was much more than a "sounding board" or researcher: she was inextricably involved in the development of character and plot, and that was what led to her joint authorship.

It remains to be seen whether Meade J's decision and the publicity the case has received might encourage more alleged joint authors to come out of the woodwork. Still, the moral of the story for contributors is to assert their rights as soon as possible, or else they may find that their potential remedies are limited.

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