

IS YOUR JOINT COPYRIGHT WORK PURPLE OR RED/BLUE?

‘Two heads are better than one’ goes the old saying. Is this always right? It is true that collaboration can foster creativity and a better overall output. However, such collaborations can later lead to painful copyright ownership disputes. This happened in the long running case of *Martin v Kogan*, which concerned the ownership of the screenplay for the successful Hollywood film *Florence Foster Jenkins*. Although the case concerned a dramatic screenplay for a film, the overarching principles are nonetheless important to all businesses who are involved in creative processes, such as through collaboration programs or joint ventures.

Mr Nick Martin is a screenwriter. He was in a relationship with Ms Julia Kogan, an opera singer, during most of the time the screenplay for the film was written. For those who have not seen the film, it tells the story of the life of Florence Foster Jenkins; she was an American socialite, amateur soprano and some say the world’s worst opera singer. The relationship ended between Mr Martin and Ms Kogan and (perhaps unsurprisingly) since then they have been in dispute concerning whether Ms Kogan was a joint owner of copyright in the screenplay. Mr Martin said no, as he was the sole author. Ms Kogan said yes, due to her input and contributions throughout the writing process.

Copyright and joint authorship

Section 10(1) of the Copyright, Designs and Patents Act 1988 (the “CDPA”) provides that 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.”

As emphasised above, the elements of joint authorship can be separated into four elements: (i) collaboration; (ii) authorship; (iii) contribution; and (iv) non-distinctiveness of contribution. What constitutes a contribution is assessed by reference to the Infopaq test - i.e. whether the putative joint author has contributed elements which expressed that person’s own intellectual creation. The judgment in Fylde Microsystems Ltd v Key Radio Systems Ltd [1998] further clarifies that the contribution must be an “authorial” one. For example, the Court considered where a person may have worked extensively in setting

the specification for computer software, and in fixing errors and bugs in it, then that person would still not be a joint author with the person who actually wrote the software. Of course, what counts as an authorial contribution may vary depending on the type of work - this was at the heart of the debate in *Martin v Kogan*.

Limitations of joint authorship

Joint authorship is fraught with difficulty and usually best avoided for at least two reasons. First, sections 16(2) and 173(2) CDPA restrict a joint UK copyright owner’s ability to deal with (including assign or license) the copyright work without the other joint owner’s consent. Such limitations may impinge upon a joint owner’s ability to commercially exploit jointly owned copyright work, particularly if the joint owners fail to agree on a particular course of action from the outset. Indeed, at the outset, it may be commercially unattractive to potential purchasers, licensees and/or collaborative partners who may be alive to the uncertainties of dealing with reluctant joint copyright owners.

Second, the law of joint copyright ownership varies from jurisdiction to jurisdiction, leading to a potential patchwork of treatment if not handled very carefully. For instance, in the US, each joint copyright owner has an independent right to use or license the use of the work, subject to a duty of accounting to the other co-owners for any profits. This could, however, lead to situations that undermine the value of that copyright to the other joint owner.

Twists in the tale: the proceedings

Back to the case at hand, the proceedings between Mr Martin and Ms Kogan went through several stages. In Act 1 Mr Martin obtained a declaration in the Intellectual Property Enterprise Court (IPEC) that he was the sole author of the screenplay. This was decided on the basis that Mr Martin had contributed a ‘primary’ skill to the copyright work, that is the writing, whereas, Ms Kogan had only contributed a ‘secondary’ skill, that is her ideas and proof-reading. The judge at first instance dismissed Ms Kogan’s contributions as nothing above the level of “useful jargon, along with helpful criticism and some minor plot suggestions” and together were not enough to

establish her as a joint author of the screenplay. However, in Act 2, Ms Kogan successfully appealed to the Court of Appeal on the basis that the first instance judge made several errors, including applying the wrong approach to the treatment of evidence and the primary and secondary skills test for joint ownership (which was held to have “no basis either in the statute or in decided cases”). In Act 3, the case was retried in the IPEC, where Ms Kogan maintained that she was entitled to 50% copyright ownership.

During the retrial, Meade J was skeptical about Ms Kogan’s claim for 50% copyright ownership and described elements of her evidence as “very unreliable” and “heavily overstated”. Nonetheless, the judge found that Ms Kogan had made some significant contributions at the drawing-board stage of the writing process. These included the initial idea for a film about Florence Foster Jenkins, providing plot and character ideas based on her technical musical knowledge and providing dialogue for key scenes. Although Mr Martin and Ms Kogan never had “a formal planning meeting to allocate tasks”, the judge found that there was an understanding that Mr Martin would “hold the pen”, and Ms Kogan would provide ideas on “characters, feeling, main events and key musical content.” As the characterisation and musicality run throughout the film, the judge was unable to separate their contributions, likening the process to “trying to unmix purple paint into red and blue.” On the basis that Ms Kogan’s contributions went far beyond a mere “sounding board” and were “a common design as to general outline” and a “sharing of labour”, the judge decided that the contribution split in the final screenplay was Mr Martin 80% and Ms Kogan 20%.

Ms Kogan also sought recovery from the production and financing companies for the film. These claims were rejected on an estoppel basis (as Ms Kogan had full knowledge at the time that Mr Martin was presenting the screenplay in his sole name to the film companies, and did not raise an objection to that alleged sole authorship until a later date).

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Key messages

A case about the world’s worst opera singer has some good practical points for businesses developing copyright materials.

1. Be wary that contributions can be without written words

Joint author/ownership can be applied widely. Ms Kogan was Mr Martin’s sounding board and provided ideas on characters, feeling and musical content which ran through the whole film. She did not actually write down any words. As her contribution became a significant part of the final work, she was entitled to a pro rata apportionment of the copyright.

2. Use robust contractual protections

Although it is very unromantic, one problem of Mr Martin’s and Ms Kogan’s situation is that they did not consider at the outset what kind of collaboration they were undertaking and who owned rights in anything they might create. Before engaging in significant collaborative projects, it is important for businesses to consider and document the contributions of key contributors and to agree ownership. Otherwise, they run the risk of the matter becoming litigious and a court deciding the ownership split for them.

Another factual feature of this case was that Ms Kogan knew Mr Martin presented the screenplay as his sole work to the film and financing companies. The film financing companies presumably did not know whether he was telling the truth, nor have the time, money or inclination to verify his assertion. To cover themselves from future problems from unknown joint authors, it would have been advisable for the film financing companies to have robust warranties on Mr Martin as to ownership and authorship. The point is relevant not just in the film screenplay scenario, but more broadly to users or purchasers of copyright materials.

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