[GB] Claim of joint authorship rejected by the IPEC in the Florence Foster Jenkins case

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On 22 November 2017, the Intellectual Property Enterprise Court (IPEC) in London, which is part of the Business and Property Court of the High Court of Justice, considered in Martin & Anor v Kogan & Ors the nature and extent of the defendant's contribution to the writing of a screenplay, and whether that contribution was sufficient to give rise to joint authorship in a copyright work within the meaning of section 10(1) of the Copyright, Designs and Patents Act 1988.

The dispute arose between Nicholas Martin, a professional writer of film and television scripts, and Julia Kogan, a professional operatic singer, over the screenplay of the critically acclaimed film Florence Foster Jenkins, a comedy drama starring Meryl Streep. Mr Martin and Ms Kogan lived together as partners when the idea about the film was born and when early drafts of the screenplay were written. It was accepted that the couple frequently discussed the project. By the time Mr Martin produced the final draft used to shoot the film, their relationship had gone irreversibly sour. The film premiered in April 2016, crediting Mr Martin as the screenplay's sole author.

The claimants, Mr Martin and his company, sought a declaration that the first claimant was the sole author of the screenplay for the film. The defendant counterclaimed for a declaration that she was joint author of the screenplay and that both claimants had infringed her copyright in it. Ms Kogan contended, in particular, that her creative work, originally contained within the first three drafts of the script, had found its way into the fourth and final version, of which it formed a substantial part. She was thus entitled to claim joint authorship of the final screenplay and sought a proportion of Mr Martin's income from the film. The High Court judge, Hacon J., rejected Ms Kogan's contention, holding that she failed to satisfy two of the three conditions for joint authorship under the 1988 Act, namely, the condition of "collaboration" between two or more authors and "sufficient contribution" needed to qualify her as a joint author of the work. It was not in dispute in this case that the third criterion concerning absence of distinction in contributions was met.

Based on documentary evidence, Hacon J. found that the shooting script was written after Mr Martin and Ms Kogan had parted ways. Unlike previous drafts, the

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parties had not discussed the final version and there had been no collaboration between them in creating it. Ms Kogan's consent to the use of her material generated for the first to third drafts in the final screenplay was "no doubt necessary for collaboration, but not sufficient." There must have been a "common design", that is, "co-operative acts by the authors at the time the copyright work in issue was created." Moreover, Ms Kogan's textual and non-textual contributions to the first three drafts "never rose above the level of providing useful jargon, along with helpful criticism and some minor plot suggestions." As such, these were insufficient to qualify her as a joint author of the final screenplay, "even had those contributions all been made in the course of a collaboration" to create it. Mr Martin was therefore entitled to a declaration that he was the sole author of the screenplay and that the claimants had not infringed the copyright in it.

The judgment provides a useful overview of the principles of when joint authorship arises in England and Wales. Previous cases suggest that constructive criticism, proof-reading or minor editing changes are insufficient to demonstrate collaboration. In addition, according to Hacon J., the significance of the contribution which went to the creation of the work depends on the "type of skill" employed in making that contribution. The judge supported this by making a new distinction between "primary skills" (for example, physically writing) and "secondary skills" (for example, inventing plot and characters). Whilst this differentiation does not imply that the latter are less important in the creative process, "it may often be harder to establish joint authorship by reference to secondary skills."

Martin & Anor v Kogan & Ors [2017] EWHC 2927 (IPEC), 22 November 2017

http://www.bailii.org/ew/cases/EWHC/IPEC/2017/2927.html

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