



Joint Authorship & the Judgment of the Court of Appeal in *Martin v Kogan* [2017] EWHC 2927

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TRANSCRIPT

Hello. I am Professor Jonathan Griffiths of Queen Mary, University of London and this is a video blog for the intellectual property module of the University of London's Undergraduate Laws programme. I am talking to you under extraordinary circumstances, where, as a consequence of the Covid-19 outbreak, personal movement is significantly constrained in the United Kingdom. This explains why my beard is a little longer, and my hair a little wilder, than usual. I hope that you can forgive me and that you are all well wherever you are.

So, despite these unusual circumstances, I am going to talk to you briefly (or relatively briefly) about collaborative creativity and the law of copyright.

Collaborative creativity is common. Famous examples that come to mind are – the musical works composed for the Beatles by Paul McCartney & John Lennon, the paintings co-created by Warhol and Basquiat or, in the field of drama, many of the works of Shakespeare (if Renaissance scholars are to be believed). You can probably think of more famous examples of collaborative creativity yourselves.

More generally, all commercial blockbuster films will be collaborative works to some extent or other. The same is true of complex suites of computer software or large online productions. For example, each article on Wikipedia has been edited, on average, almost 100 times.

Collaborative creativity presents a challenge for law. Those of you studying intellectual property (or IP as you probably come to know it by now) will appreciate that the author of a copyright work (as long as he or she retains copyright in that work) acquires a number of potentially valuable exclusive rights and also benefits from certain moral rights.

But how does this work in the case of collaborative creativity?

Well, the copyright system did not exist in Shakespeare's day... so we can forget about Shakespeare. However, in the other examples of creative collaboration that I mentioned previously, we would probably expect both named authors to be recognised as authors by the law because they both made substantial contributions of one form or other to the ultimate creative work.

However, where should we draw the line? What about the contributor to Wikipedia, who corrects an apparent misconception in an existing article? What about the friend of a

novelist with writer's block who suggests a plot twist that eases the novelist's block and allows the completion of the work?

Copyright law has developed mechanisms for resolving these tricky situations.

First, it distinguishes between what is often described as a derivative work and works that are described, in UK law at least, as "works of joint authorship".

Derivative works are those which involve the exercise of follow-on creativity on a previously completed creative form. Translations, musical adaptations and dramatisations of novels are all examples of derivative work. In such instances, the pre-existing work and the derivative work are treated as two separate works for the purposes of copyright law.

If you go online, there is a very interesting Journal called *Modern Poetry in Translation*. In the works covered by that Journal, separate copyright interests subsist in the two distinct literary works displayed there – the original translated poem and the translation of the poem. As long of course as the translation satisfies the threshold of "originality", which operates in copyright law. But in almost all instances, they will invariably satisfy that relatively low standard.

By contrast with derivative works, works of joint authorship are works in which two or more collaborators create a work together, and in which the authors' contributions are not distinct. Examples of works of joint authorship are provided by the paintings of Warhol and Basquiat and some of the musical collaborations of Lennon and McCartney that I mentioned previously.

The rules on the treatment of joint authorship in the UK copyright law are to be found under s 10(1) of the Copyright Designs & Patents Act 1988. Which 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."

The meaning and effect of this provision has been considered in a number of cases. Some of these are discussed in Section 7.5 of the Module Guide, so you might want to go and have a look there. However, even on that case law, a number of uncertainties remained.

Fortunately, a number of these have now been resolved by the recent Court of Appeal Judgment in *Martin v Kogan* [2019] EWCA Civ 1645, the judgement was handed out at the end of 2019.

That case concerned the making of a film called *Florence Foster Jenkins*, a film focussed on the eponymous socialite and amateur soprano, who made a number of musical recordings in the early decades of the 20th Century. Oddly for a singer, she was famous for not being able to sing very well. Despite (or perhaps even because of) this incompetence she became famous. If you can stand it, you can listen to some of her recordings on YouTube.

The film focussed on her life and career. It was directed by Stephen Frears, famous director, and starred Meryl Streep and Hugh Grant, who many of you may have heard and seen. Authorship of the screenplay was credited to a man called Nicholas Martin, a professional scriptwriter. He had begun to write the screenplay when he was in a personal relationship with Julia Kogan, a professional opera singer. While they were together, they discussed the

script and, according to Kogan, she had used her technical musical knowledge and expertise to suggest or contribute in a variety of ways to a number of the scenes which appeared in the screenplay. However, by the time that the final draft of the screenplay had been completed, the pair were no longer in a relationship.

Martin was treated as, and credited as, sole author of the screenplay (which was a dramatic work for copyright purposes) and Kogan argued that she was, in fact, a joint author of that work. They both asked the court to make a Declaration as to the authorship and ownership of the screenplay.

In the Intellectual Property & Enterprise Court at first instance, His Honour Judge Hacon found, for a variety of reasons, that Kogan was not a joint author. She appealed, and this gave the Court of Appeal the chance to set out the principles that lower courts ought to be applied in such cases. The Judgment, given by Lord Justice Floyd, repays careful reading. You might find paragraph 53 particularly instructive because the Court of Appeal summarises the current law on works of joint authorship in a useful form.

However, for the purpose of this video, the most important thing to note is that the Court stated clearly that there are four conditions that have to be satisfied if a work is to be defined as a work of joint authorship under s 10(1). These are:

- (a) Collaboration
- (b) Authorship
- (c) Contribution
- (d) Non-distinctness of that contribution.

In the remainder of this video, I just want to spend a moment explaining what each of those conditions entails.

So, first, **collaboration**. Collaboration requires co-authors to work together towards a common design. In this respect, a work of joint authorship is different from the derivative works, like the translated poems, which I spoke about a moment or so ago, where there is no working together on a common design. The poet writes the poem in the original language, and then the translator separately works on his/her translation of that poem. However, one thing that's clear from *Martin v Kogan*, is that working together won't necessarily involve co-authors being involved in the writing of a work's final form. Collaboration could also involve the contribution of underlying elements of a work, such as its plot – as long as the co-authors do in fact work together towards a common aim.

The second requirement is **authorship**. On this point, Lord Justice Floyd explained that it is important to bear in mind that it is not necessarily only the person who "wields the pen" (or keyboard I suppose) who is a work's author:

"It is the skill and effort involved in creating, selecting or gathering together the detailed concepts or emotions which the words have fixed in writing which is protected in the case of a literary or dramatic work..."

So work on expression can entail work on the under surface elements of the creation as well as on the wording of the final form.

The third requirement is **Contribution**. In a work of joint authorship, each author must make an authorial contribution – as opposed, let us say to a simple editorial contribution. The scale of contribution that needs to be made by a claimant to joint authorship is relatively slight and according to the Court of Appeal is aligned with that required to be recognised as the author of a single-authored work. It's the same standard as the *Infopaq* creativity standard that you will have encountered in studying creativity or originality. Question is: "Has the person in question exercised creative choices in coming up with the work?" If they've done that, then they can be a joint author within this four element framework.

Finally, the fourth requirement is that the contributions of joint authors **should not be distinct**. The contributions of joint authors must effectively be fused together. If it is possible separately to identify the respective contributions of the authors, they will not be joint authors of a work for the purposes of copyright law. Thus, for example, a collection of essays, in which each chapter is separately written by a different author will not be a work of joint authorship for the purposes of UK copyright law. It will be a series of different individual copyright works held together under a single physical or electronic cover.

So – collaboration, authorship, contribution and non-distinctness – provide the four-element framework within which cases of joint authorship must be analysed in the UK copyright law.

In the case of *Martin v Kogan* itself, we do not yet know the result of the application of these principles on the facts because the Court of Appeal referred the case back to the first instance court for retrial. However, Floyd LJ's emphasis that work on the underlying elements of a work, such as plot and scenario, will hearten Ms Kogan – as will his explanation that a joint author's contribution needs only satisfy the relatively modest threshold established in *Infopaq*. So, there we see a very important recent judgement that clarifies and conceptualises the law in this important area within IP.

As I am going to stop at that point and ask you all to look after yourselves and wish you good luck in the forthcoming assessment in this subject. Thank you!