
United Kingdom: Court of Appeal Clarifies When a Work is a Product of Joint Authorship

By [Maritza C. Schaeffer](#)

Kogan v. Martin et al., [2019] EWCA Civ 1645, Case No: A3/2018/0070.

In a recent decision addressing works of joint authorship, the U.K. Court of Appeal sets out factors to consider when undertaking the often complex analysis of whether a work is indeed a product of joint ownership. [More](#)

By [Maritza C. Schaeffer](#)

Kogan v. Martin et al., [2019] EWCA Civ 1645, Case No: A3/2018/0070.

In a recent decision addressing works of joint authorship, the U.K. Court of Appeal sets out factors to consider when undertaking the often complex analysis of whether a work is indeed a product of joint ownership. It is important to bear in mind that the person who wields the pen is not necessarily the sole author of the work, and other elements of collaboration must be taken into consideration.

In a recent decision addressing works of joint authorship, the U.K. Court of Appeal sets out factors to consider when undertaking the often complex analysis of whether a work is indeed a product of joint ownership. It is important to bear in mind that the person who wields the pen is not necessarily the sole author of the work, and other elements of collaboration must be taken into consideration.

Background

The underlying dispute relates to the authorship of the screenplay of a film about the life of Florence Foster Jenkins, a wealthy American socialite who became a prominent musical figure in New York City despite her lack of talent. A film *Florence Foster Jenkins* based on the screenplay at issue was released in 2016, starring Meryl Streep and Hugh Grant.

Nicholas Martin (a screenwriter) and his company Big Hat Productions Limited brought the proceeding against the defendant and appellant, Julia Kogan (a professional opera singer), for a declaration that Mr. Martin was the sole author of, and sole owner of the copyright in, the screenplay. Ms. Kogan, in response, sought a declaration that she was a joint author with Mr. Martin and was therefore entitled to a share of the royalties. Ms. Kogan also sought relief for copyright infringement against various film companies involved in the production and financing of the film.

Mr. Martin and Ms. Kogan were previously romantically involved with each other and during the course of their relationship the idea for the screenplay was conceived and multiple drafts of the screenplay were written. Ms. Kogan claims that it was her idea to write a screenplay based on the life of Florence Foster Jenkins, and that writing the screenplay was a collaborative process in which she contributed ideas and criticism, suggested dialogue, and worked on various drafts. Mr Martin, on the other hand, claimed that he was the sole author of the screenplay, that Ms. Kogan did not assist in any way in defining the structure of the film, and that he made all the creative decisions.

Following a hearing before the Intellectual Property Enterprise Court (“IPEC”), the IPEC determined that Mr. Martin was the sole author and owner of the copyright in the screenplay and that Ms. Kogan’s contributions were not sufficient to qualify as joint authorship in the work. Ms. Kogan was estopped from asserting any right she might have had in the copyright against the film companies so as to interfere with the public performance of the film.

Ms. Kogan filed an appeal before the Court of Appeal. The appeal was upheld and the Court of Appeal set aside the IPEC’s declaration and other orders. Rather than finding for Ms. Kogan, however, the Court of Appeal sent the case back to IPEC for reconsideration by a different judge. IPEC’s final decision is pending.

Court of Appeal’s Guidance on Joint Authorship

The Court of Appeal’s decision provides guidance on the law relating to works of joint authorship. The governing law, namely, Section 10 (1) of the Copyright, Designs and Patents Act 1988 (“the Act”) 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 four elements of joint authorship are (a) collaboration, (b) authorship, (c) contribution and (d) non-distinctness of contribution.

Although joint authorship is a “unitary concept,” the decision of the Court of Appeal considered each element in turn, and sets forth the following key factors to consider when analyzing whether a work is a product of joint ownership:

- A work of joint authorship is a work produced by the collaboration of all the people who created it.
- A collaboration exists where those involved undertake jointly to create the work with a common design as to its general outline, and where they share the labor of working it out. The court must focus on the nature of the cooperation between the joint authors which resulted in the creation of the work, noting an “important distinction to bear in mind, which is that between the making of the work and its reduction to material form (or fixation). The work may exist before its reduction to material form.”
- Certain types of work do not qualify for joint authorship, including (i) derivative works; (ii) works where one of the authors only provides editorial corrections or critique, but where there is no wider collaboration; and (iii) works where one of the contributors provides only *ad hoc* suggestions of phrases or ideas but where there is no wider collaboration.
- In deciding whether there is a collaboration, it is never enough to simply ask “who did the writing?” Authors can collaborate to create a work in many different ways (e.g., if one person creates the plot and the other writes the words). The Court notes that “the person who wields the pen is not necessarily the sole author of the work.”
- Joint authors must be *authors*, in the sense that they must have contributed a significant amount of the skill which went into the creation of the work. It is improper, however, to focus exclusively on who fixed the work in writing, as the statutory concept of an author includes all those who created, selected or gathered together the detailed concepts or emotions which were then reduced to material form.
- Contributions which are not “authorial” as conceived by the statute do not count. What constitutes an authorial contribution is “acutely sensitive to the nature of the copyright work in question,” and must be considered on a case-by-case basis.
- The question of whether a contribution is sufficient is determined by the *Infopaq* test, i.e., whether the joint author has contributed elements which expressed that author’s own intellectual creation.

That is, the author in question must have exercised free and expressive choices, and the more restrictive the choices, the less likely it will be that they satisfy the test.

- The contribution of a presumed joint author must not be distinctive from one another.
- There is no further requirement that the authors must have subjectively intended to create a work of joint authorship.
- Whether one of the authors has the final say on what goes into the work may have some relevance as to whether there is a collaboration, but is not determinative on its own.
- The respective shares of joint authors are not required to be equal, but can reflect, *pro rata*, the relative amounts of their contributions.

The Court of Appeal's analysis sheds light on determining future joint authorship claims in the UK and Europe, which can often involve complex facts as to the level of collaboration and creative input.

Potential joint authorship claimants must remember that "it can never be enough simply to ask who did the writing," and that other elements and collaborative contributions can also be meaningful. With that said, it is important to bear in mind that the respective shares of joint authors are not required to be equal, but rather can reflect the relative amounts of their contributions.

Primary Contacts

Maritza C. Schaeffer