



Kogan v Martin: A New Framework for Joint Authorship in Copyright Law

Daniela Simone *

The Court of Appeal has set out a new framework for the application of copyright law's joint authorship test in a recent landmark case. *Kogan v Martin* brings some welcome clarity to the complex joint authorship landscape, embedding an inclusive pro-collaboration default standard. This case note contrasts the appeal court's nuanced framing of the dispute with the first instance court's narrower approach. The note then examines the new joint authorship framework and explains how it allows the test to be applied with an eye to the reality of collaborative creative endeavours. Finally, the significance of *Kogan v Martin* is highlighted, as are some questions which remain unanswered.

INTRODUCTION

Controversies about authorship abound in fields where collaboration is the default mode of creativity. It is rarely straightforward to determine which of many contributors merit an authorial credit, for example, on a film or a large scientific study.¹ Unsurprisingly, copyright law too has struggled when faced with the task of allocating authorship in respect of collaborative work. This issue is of great practical importance as authorship is usually the basis for copyright ownership. Thus, the author is positioned first in line to benefit from the economic exploitation of creative work.² Authors are also entitled to moral rights, which protect non-economic interests allowing them to safeguard the reputational benefits that might attach to authorial credit.³ For copyright purposes, the allocation of authorship in respect of collaborative copyright works is generally

*Lecturer in Law and Co-Director of the Institute of Brand and Innovation Law, University College London. My thanks to Lynne Chave and the anonymous reviewer for their valuable comments.

1 For a discussion of authorial credit in the film industry, see C. Fisk, 'The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000' (2012) 32 *Berkeley J of Employment and Labour* L 215. On authorial credit in science, see M. Biagioli and P. Galison (eds), *Scientific Authorship: Credit and Intellectual Property in Science* (New York, NY; London: Routledge 2003).

2 The author is usually the first owner of any copyright subsisting in the work (with certain exceptions such as employee works and Crown copyright): the Copyright, Designs and Patents Act 1988 (CDPA), s 11. Despite the central importance of the author, some consider copyright law to operate principally to the advantage of investors, producers and distributors in light of the ease at which authors may assign their copyright and waive their moral rights. This view is also supported by the existence of 'entrepreneurial' copyright (CDPA, ss5A-8) and default employer ownership of employee works (CDPA, s 11(2)).

3 CDPA, Ch 4. Although these rights can be waived and are limited by numerous exclusions and pre-conditions.

governed by section 10 of the Copyright, Designs and Patents Act 1988 (CDPA), which includes the definition of a ‘work of joint authorship’ as ‘a work produced by the collaboration of two or more authors in which the contribution of each other is not distinct from that of the other author or authors’ (the joint authorship test). The application of the joint authorship test has been fraught with uncertainty as case law has tended to employ brief, opaque or superficial reasoning.⁴ This uncertainty is concerning as it risks undermining copyright law’s objectives of encouraging creativity in the context of collaborative endeavours.

The Court of Appeal has now brought some welcome clarity in *Kogan v Martin* by setting out a new framework to guide the application of the joint authorship test.⁵ This landmark decision sweeps aside some troubling trends embedding an inclusive pro-collaboration default standard. The new framework recalibrates the joint authorship test in a way that leaves it better equipped to deal with the reality of the collaborative creative process. This case note begins by outlining the background to *Kogan v Martin* and then goes on to contrast the first instance and the appeal court’s framing of the dispute focussing on their different approaches to construing the copyright subject matter and assessing the evidence of the parties’ working relationship. The next part examines the framework which the Court of Appeal set out for the determination of joint authorship, explains how the framework operates, and identifies some questions which remain unanswered.

BACKGROUND TO THE DISPUTE

Kogan v Martin concerned the authorship of the screenplay to *Florence Foster Jenkins* (FFJ), a film directed by Stephen Frears, starring Meryl Streep and Hugh Grant. The film dramatises the latter part of the life of heiress and socialite Florence Foster Jenkins who loved music and dreamed of becoming an opera singer. Despite her terrible singing voice, Jenkins became a cult figure on the New York music scene.⁶ The film portrays the events leading to her infamous performance at Carnegie Hall in 1944, mining Jenkins’ self-delusion and the obsequious behaviour of her entourage for comic effect. Authorship of the screenplay to FFJ had been solely credited to Nicholas Martin, although Julia Kogan also contributed to its development.

The context of the relationship between the parties is crucial to understanding the dispute. Nicholas Martin is a professional scriptwriter for film and television. Julia Kogan is a professional opera singer, who has also worked

4 D. Marchese, ‘Joint ownership of intellectual property’ (1999) 21 EIPR 364, 364; A. Stokes, ‘Authorship collaboration and copyright: a view from the United Kingdom’ (2002) 13 Entertainment L Rev 121, 124; L. Zemer, ‘Contribution and Collaborations in Joint Authorship: Too Many Misconceptions’ (2006) 1 JIPLP 283, 283. For an overview of some of the areas of uncertainty, see D. Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge: Cambridge University Press, 2019) 29–53.

5 *Kogan v Martin* [2020] FSR 3, [2019] EWCA Civ 1645 (Floyd, Henderson and Jackson LJJ).

6 D. Wepman, ‘Jenkins, Florence Foster’ *American National Biography* April 2013 at <https://doi.org/10.1093/anb/9780198606697.article.1803857> (last accessed 13 April 2020).

on numerous writing, music and theatre projects. Kogan and Martin met in autumn 2011. As the pair began a romantic relationship, their lives became personally and professionally intertwined. They lived together from February 2012 to March 2014, during which time the idea for the film was conceived and the first drafts of the screenplay developed. The relationship broke down, however, before the project was completed. The parties agreed that Kogan's creative input was limited after the third draft.

After some time, a dispute emerged as to the authorship of the FFJ screenplay. Martin applied to the Intellectual Property Enterprise Court (IPEC)⁷ seeking a declaration that he was the sole author. Kogan counter-claimed that she was a joint author and that her copyright had been infringed by Martin and the film production companies. At the heart of the dispute was the question of whether Kogan's contributions to the screenplay were sufficient to entitle her to joint authorship in copyright terms.

At first instance, the IPEC decided in favour of Martin, affirming his sole authorship.⁸ The court's judgment is notable because it exemplifies some troubling trends latent in some of the previous case law which can combine to result in a restrictive approach to joint authorship. These include, first, a tendency to set out the law and then move swiftly to its application without a step by step consideration of each limb of the test; second, narrowing focus on an assessment of the authorial nature of each contribution, with limited regard to the nature of the collaborative creative process and its particular context; and third, a propensity to favour the claims of contributors with most creative control or over-arching 'responsibility for the writing' over those of minor contributors.⁹

The Court of Appeal took a completely different approach to the dispute, appearing to reject all three of these trends. The court set out a new framework for joint authorship which is closely tied to the wording of section 10 (as informed by the core copyright principles which ought to animate it, such as the idea/expression distinction). Whilst the trial judge appeared persuaded by 'short cuts' or heuristics of authorship, the Court of Appeal took pains to demonstrate how account must be taken of the reality the collaborative process. The first instance court's approach to the case led it to make numerous errors of law and even to fail to make crucial findings of fact. Viewed contextually, the authorial value of Kogan's contributions could not be so easily dismissed. In the circumstances, the Court of Appeal felt it necessary to take the extraordinary step of ordering a retrial.

7 IPEC's streamlined procedure is intended to provide a quicker and less costly route for intellectual property litigation than the High Court. It is aimed at individuals and SMEs involved in less complex and less valuable claims, see <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/intellectual-property-enterprise-court/> (last accessed 13 April 2020).

8 *Martin v Kogan* [2018] FSR 9, [2017] EWHC 2927 (IPEC) (HHJ Hacon).

9 Simone, n 4 above, 42-53.

FRAMING THE DISPUTE: CONSTRUING THE SUBJECT MATTER AND ASSESSING THE EVIDENCE

The Court of Appeal took a fundamentally different approach to the first instance court in framing the subject matter of the dispute. The FFJ screenplay had undergone several drafts, with both parties agreeing that Kogan did not have significant input past the third draft. At first instance, HHJ Hacon had treated the final screenplay as a work separate to any previous drafts (appearing to accept the claimant's 'first short cut'). This allowed the court to give short shrift to Kogan's claim based on a lack of collaboration between the pair at the time it was written, thus, the absence of a crucial ingredient for joint authorship¹⁰. The Court of Appeal rejected this approach in light of the conduct of the Case Management Conference (CMC) prior to trial in which parties had agreed that Kogan *could* succeed if she could prove she had made significant contributions to the earlier drafts (insofar as these contributions remained in the final draft). In this context, it was clearly unfair to allow Martin to later rely on a lack of collaboration in relation to the final draft to deny Kogan's joint authorship claim.¹¹

Identifying the boundaries of a copyright work can be a thorny issue.¹² Many creative processes are iterative, involving a series of drafts which are refined over time until the finished product emerges. Often this will have little practical significance because the drafts are created by the same author(s), or because copyright interests have been coordinated in advance by contract or consolidated in the hands of an employer.¹³ In some cases, however, where different people have contributed over time, identifying the scope of the relevant copyright work may well prove decisive. In such situations, the Court of Appeal in *Kogan v Martin* identifies two possible approaches.¹⁴ The first is to treat each draft after the first as a separate derivative work. In this case, a putative joint author must have contributed to the specific draft in question for a copyright interest to arise in their favour. The second is to treat the work holistically as a single work which required the totality of the skill and labour involved in all the drafts made to produce it. Here, it was clear following the CMC that the parties had agreed to proceed on the latter basis. Hence, the unfairness of allowing Martin to later rely on Kogan's failure to contribute past the third draft as a 'knockout' point.

As a practical matter, *Kogan v Martin* illustrates how case management decisions might fundamentally affect the way in which a dispute is understood. This

10 HHJ Hacon applied a relatively strict understanding of the collaboration as requiring 'co-operative acts by the authors at the time the copyright work was created, which led to its creation', n 8 above at [25]-[26].

11 n 5 above at [83].

12 *Kogan v Martin* involved a horizontal boundary issue as to the contours of a copyright work which changes over time. Vertical boundary issues are also possible, for example, where there are multiple potential copyright works within the same physical object (a book comprised of chapters or a magazine layout, etc). For a discussion of the latter problem in the US context, see M. Kaminski and G. Rub, 'Copyright's framing problem' (2017) 64 UCLA L Rev 1102.

13 The question might nonetheless be of relevance for establishing qualification or duration of protection, but such matters are rarely at the heart of disputes.

14 n 5 above at [80].

is particularly true of claims heard by the IPEC which relies heavily on early case management. Given the way in which the trial proceeded, it was clearly proper to conceive of the screenplay as the culmination of many drafts (rather than a separate derivative work). This approach also has the advantage of being truer to life compared to the alternative, which would require salami-slicing the work in a way that is likely to seem unreal to its creators.¹⁵ Nonetheless, the Court of Appeal ultimately fails to resolve the question of how iterative creative processes *ought* to be treated, appearing to suggest that it is open to parties to plead a case in either way.¹⁶ It remains to be seen how future courts will approach this issue. The question is of significance as either course of action may provide a strategic advantage to one party at the expense of another.

The Court of Appeal was particularly critical of the first instance court's approach to the evidence. It was a 'serious error' to rely almost exclusively on inferences drawn from agreed documentary evidence, disregarding much of Kogan's oral evidence.¹⁷ As the parties had been living together, it was inherently improbable that their interactions would be well documented (as might be expected in a commercial context).¹⁸ Indeed, the oral evidence was particularly relevant insofar as it might tend to cast a different light on the documentary evidence. So, for example, an email in which Kogan reassured Martin '... this is totally your baby' did not necessarily undermine her claim.¹⁹ This is because it ought to have been understood in the light of her evidence that, at the time, she had been concerned that Martin was tiring of what he saw as her constant nit-picking with the story and characters. Similarly, another email in which Kogan expressed affectionate encouragement and a desire that Martin receive all plaudits, understood in context, did not suggest the absence of a significant creative input on her part.

It is easy to understand the trial judge's preference for documentary evidence that does not depend on the vagaries of human recollection. However, the more comprehensive and nuanced approach mandated by the Court of Appeal is likely to be better suited to collaborative authorship which often occurs in informal settings that blur the line between the personal and the professional.

15 There may be a tendency for courts to salami-slice the work in this way to avoid competing ownership claims. It is not clear, however, that this approach reduces the complexity of the overall picture, as it might result in a copyright thicket which is difficult for users of copyright works to untangle.

16 This problem is of increasing relevance with the prevalence of digital tools which can store vast numbers of versions of a work each differing only slightly from the previous one. In such cases if each draft is considered to be a separate work, none may be sufficiently original to be protectable. This would potentially lead to absurd results in the case of some highly iterative works. Discussing this problem in the context of *Wikipedia*, see Simone, n 4 above, 79–84, 96–98.

17 The first instance court justified this approach by citing *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm) at [15]–[22] and *Blue v Ashley* [2017] EWHC 1928 (Comm) at [68]–[69]. HHJ Hacon took Leggatt J's comments in those cases as an 'admonition that the best approach for a judge is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations and instead base factual findings on inferences drawn from documentary evidence and known or probable facts' n 8 above at [61]. Additionally, the Court of Appeal considered that an inconsistent approach had been adopted to documentary evidence which supported Kogan's case: n 5 above at [90]–[103].

18 n 5 above at [88]–[89].

19 *ibid* at [94]–[96].

Parties who count on friendly relationships with collaborators may not insist on precise documentation of their authorship claims at every stage of the creative process.²⁰ Indeed, many of the cases on joint authorship have concerned musical bands, where interpersonal relationships might colour creative dynamics.²¹ In these contexts, documentary evidence might at best provide a partial insight; and at worst, it portrays a misleading picture.

The Court of Appeal's approach to the evidence for joint authorship sets UK law apart from jurisdictions such as the US, where some courts have sometimes insisted upon objective manifestations of intent to share authorship.²² US scholars have been critical of this requirement for tending to place less powerful contributors at a disadvantage, as established players are usually better able to bolster their claims with documentary evidence.²³ As collaboration often occurs in settings involving imbalances of power, a comprehensive approach to the evidence establishing collaboration is preferable.²⁴ Indeed, as the Court of Appeal reminds us, heuristics or mental short cuts can be no substitute for essential judicial functions.²⁵

THE JOINT AUTHORSHIP TEST

The Court of Appeal's approach to the application of the joint authorship test in *Kogan v Martin* is as nuanced as its approach to the evidence. The court sets out a principled framework, which provides entry points for the consideration of creative realities and resists simplistic short cuts for determining authorship. This framework is firmly anchored in the statutory wording, as its four limbs are

20 In the words of the Court of Appeal, it was 'hardly surprising that, whilst the parties were in a relationship, and supporting each other in their careers, Ms Kogan did not agitate for a public acknowledgement of her contribution' (n 5 above at [99]) and 'She was hardly likely to say "Look what you have achieved with all my help"' (n 5 above at [97]).

21 In *Godfrey v Lees* [1995] EMLR 307 (Ch), members of a band had lived together in a communal house embracing, as counsel for the defendants described it, the 'time of great informality among youth' in the late sixties (at 313). Blackburne J's judgment in that case includes a detailed account of the personalities involved and their changing relationship to one another over time. In *Hadley v Kemp* [1999] EMLR 589 (Ch), 624 a band was described as a 'close-knit group of friends who were in company with one another constantly. They had formed themselves into a band not just for the business purpose of making money (though they certainly wanted to do that, and rightly so), but also because they loved what they were doing'. Nonetheless, it was material that they were 'not a democratic band' with the first defendant Gary Kemp very much in charge of the creative process (at 641).

22 The intent requirement is included in the definition of a 'joint work' in the US Copyright Act 1976, s 101 ('a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole'). In *Thomson v Larson* 147 F3d 195 (2d Cir, 1998) 203–204 the court required 'objective indicia' of co-authorship intent ('such as how a collaborator regarded herself in relation to the work in terms of billing and credit, decisionmaking, and the right to enter into contracts' (at [30])).

23 F. J. Dougherty, 'Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under US Copyright Law' (2001) 49 UCLA L Rev 225, M. LaFrance, 'Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors' (2001) 50 Emory LJ 193.

24 For an example of a discussion of power imbalances in the joint authorship context, see *Bamgboye v Reed* [2002] EWHC 2922, [2004] 5 EMLR 61 at [61], [65], [79], [81].

25 n 5 above at [88].

derived from the section 10(1) definition of a work of joint authorship²⁶. These are: (a) collaboration, (b) authorship, (c) contribution, and (d) non-distinctness of contribution.²⁷ Although all four limbs must be satisfied, joint authorship is ultimately said to be a unitary concept. Thus, parts of the test are inter-related and some issues do not fit neatly under only one heading (most notably, the idea/expression distinction). The judgment, delivered by Lord Justice Floyd,²⁸ explains the role of each limb and provides detailed guidance for the application of the test.

Collaboration

The Court of Appeal instructs that the application of the joint authorship test must begin with the requirement for collaboration. This is because findings as to the true nature of the interaction between the parties provide the essential context for the application of the rest of the test.²⁹ Previously, some courts had tended to skip over the collaboration requirement, focussing instead almost exclusively on the characterisation of each contributor's input.³⁰ The Court of Appeal points out the logical difficulty in assuming that one can separate out the contribution of one author and ask if it is protected (given the definition of joint works as those in which contributions are 'not distinct').³¹ Indeed, as most collaborations require a division of labour it will rarely be accurate to assess the significance of a contribution in isolation from the context in which it occurs.

The Court of Appeal explains that the main purpose of the requirement of collaboration is to distinguish a joint work from a derivative work.³² So, when

26 'a work produced by the collaboration of two or more authors in which the contribution of each other is not distinct from that of the other author or authors'.

27 n 5 above at [30].

28 Although it is aptly acknowledged to be the fruit of judicial collaboration, *ibid* at [1]: 'This is the judgment of the court to which all its members have contributed'.

29 Thus, it is the 'logically prior issue' *ibid* at [33], [109].

30 *Hadley v Kemp* n 21 above; *Brighton v Jones* [2004] EWHC 1157, [2005] FSR 288. Cf *Beckingham v Hodgens* [2002] EWHC 2143 (Ch), [2002] EMLR 45 (and [2003] EWCA Civ 143, [2003] EMLR 18) and *Bamgboye v Reed* n 24 above. This may lead to a bias towards single authorship as courts can be persuaded to concentrate authorship in the hands of the contributor that appears to be the most 'deserving' because of their overall control over the creative process or because they have done the lion's share of the work: Simone, n 4 above, 50.

31 n 5 above at [69]. The court illustrates with the following example: 'If two people try to solve a crossword puzzle together, it may be easy to say who first uttered the correct answer to a clue, but more difficult to answer who contributed to it when the solution emerged from a prior discussion' (at [57]). The requirement, adopted by some US courts, for each joint author to make a separately copyrightable contribution has been criticised, see P.S. Fox, 'Preserving the Collaborative Spirit of American Theatre: The Need for a "Joint Authorship Default Rule" in Light of the Rent Decision's Unanswered Question' (2001) 19 *Cardozo Arts & Entertainment LJ* 497, 507-509; T. Huang, 'Gaiman v McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material' (2005) 20 *Berkeley Technology LJ* 673. Noting that this might result in 'peeling the onion until it disappeared': *Gaiman v McFarlane* 360 F3d 644 (7th Cir, 2004), 658-659 *per* Posner J. The possibility of any such requirement being read into the CDPA is now excluded by the Court of Appeal.

32 n 5 above at [33].

a secondary author adapts a pre-existing work in the absence of collaboration with the first author, he or she will have created a derivative work which may be separately protected if the changes evidence sufficient originality. But where collaboration is present, the resulting work is jointly authored and copyright in it shared. The court illustrates this with the example of Ezra Pound, who made extensive revisions to T. S. Eliot's *The Waste Land* but has never been regarded as the poem's author. This is, in the court's view, because Pound's work was done independently as a friend and critic, rather a collaborator.³³ Yet, by using this example the court does not mean to invite a consideration of the parties' subjective views on their roles in the creative process.³⁴ This can be inferred from the subsequent reference to *Beckingham v Hodgens* in which a session musician's improvised accompaniment entitled him to joint authorship of a musical work even though there was no intention to share authorship when he was hired.³⁵ Thus, collaboration is to be assessed on the basis of the parties' actual working relationship.³⁶ Industry views as to who is entitled to the status of 'collaborator' or 'author' (rather than mere assistant) are of limited relevance.³⁷ This helps insulate the joint authorship test from practices which may reflect industry power dynamics, rather than creative reality.

The Court of Appeal specifies that its understanding of the collaborative process is broader than, and separate to, the 'writing' or reduction to material form of the work.³⁸ The nature of the protectable copyright subject matter is relevant to a determination of collaboration. In this case, account should have been taken of the fact that a screenplay is a dramatic work that is primarily intended to be performed (not read).³⁹ Accordingly, the development of character and the choice of incidents of plot were likely to be important aspects of

33 It is hard to know exactly what to make of the use of this example to illustrate the collaboration requirement. Earlier case law might lead one to think that Pound should not be considered to be a joint author because his contribution may not have been of an 'authorial' kind (being more akin to proof-reading, as was the case for a technician debugging software in *Fylde Microsystems v Key Radio Systems* [1998] FSR 449, 457-460). One might see the use of this example as signalling the potential of the collaboration limb to act as a filter to ensure that the test is not over-inclusive. However, it seems unlikely that this was the court's intent given the inclusive approach to joint authorship which is taken throughout the judgment. More likely, it indicates the necessary overlap between the limbs of the test, given the court has stressed that joint authorship is a 'unitary concept'.

34 n 5 above at [53].

35 *ibid* at [33].

36 This being the case, the parties' approach at the outset was highly relevant: *ibid* at [90].

37 As in *Bamgboye v Reed* n 24 above at [61], where it was not relevant who 'Mr Bamgboye would have been thought of as a "collaborator", in the way that word might normally be used in the industry'.

38 n 5 above at [34]-[35]. The Court of Appeal indicates a broad approach to the protectable subject matter, citing Jacob J in *Ibcos Computers v Barclays Finance* [1994] FSR 269, 291: 'The true position is that where an "idea" is sufficiently general, then even if an original work embodies it, the mere taking of that idea will not infringe. But if the "idea" is detailed, then there may be infringement. It is a question of degree. The same applies whether the work is functional or not, and whether visual or literary. In the latter field the taking of a plot (for example, the "idea") of a novel or play can certainly infringe – if that plot is a substantial part of the copyright work. As Judge Learned Hand said (speaking of the distinction between "idea" and "expression"): "Nobody has been able to fix that boundary and nobody ever can".'

39 The trial judge had erred in treating the screenplay as a literary work: n 5 above at [66].

the creative process. It stands to reason, then, that collaboration on a screenplay need not be directed towards the writing and might relate to non-textual aspects of the work.⁴⁰ Insofar as collaboration must relate to input which is protectable by copyright there is some overlap with the authorship limb. Nonetheless, the question ‘were the parties collaborating?’ remains importantly distinct from that of whether a particular party’s input rose to the level of authorship from a copyright standpoint.

In light of the Court of Appeal’s framework, it was clearly wrong in principle for the trial judge to adopt a ‘compressed summary’ of the legal issues which tended to elide the separate issues of collaboration and contribution.⁴¹ This led to a failure to make an explicit finding as to the nature of the parties’ relationship, which brought about further errors of law in the evaluation of Kogan’s contributions.⁴² The value of first determining the nature of the parties’ working relationship is evident in how the Court of Appeal considers that this ruling might have shaped the application of the subsequent limbs of the test. Contributions which might not be relevantly authorial in isolation, when made in pursuance of a common design to produce a screenplay, ‘deserved to be put in the scales together’ to assess whether Kogan’s input was sufficient to entitle her to joint authorship.⁴³ For example, the idea to include a scene featuring Lily Pons singing the Bell Song (which serves as Jenkins’ inspiration to take up singing lessons), understood acontextually, might have been a mere suggestion which is not relevantly ‘authorial’. However, if made in the context of collaboration, with an eye to the effect of this choice on the drama of the screenplay and Jenkins’ character, it was likely to be a highly relevant contribution.⁴⁴ Although the Court of Appeal was not in a position to make a finding as to collaboration, comments such as these suggest that it was considered likely that the parties had been collaborating in the relevant sense.⁴⁵

Authorship and Contribution

Historically, most joint authorship cases have been decided on the basis of whether a putative contributor has made a significant contribution of the right kind (ie *authorial* in nature).⁴⁶ This is sometimes known as the ‘authorship limb’ of the test. The cases on joint authorship are an uneven patchwork that provide little guidance as to the quantitative and qualitative threshold which applies. In some cases, courts have appeared to require a higher standard for joint authorship than is the case for individual authorship.⁴⁷ This is despite

40 *ibid* at [110].

41 n 5 above at [112].

42 The Court of Appeal insists that it is essential for a separate finding of primary fact on collaboration to be made in order for the joint authorship test to be properly applied: *ibid* at [104], [111].

43 *ibid* at [117]-[119], [120], [126]-[128], [133], [138], [142].

44 *ibid* at [126]-[128].

45 For example, *ibid* at [115], [137].

46 *Robin Ray v Classic FM* [1998] FSR 622 (Ch).

47 L. Bently, ‘Copyright and the Death of the Author in Literature and Law’ (1994) 57 MLR 973, 981; C. Waelde, ‘What is beyond the score?’ in A. Rahmatian (ed), *Concepts of Music and*

the lack of any basis for such a restrictive approach in the statutory wording. Indeed, ‘authorship’ implies the same consequences in the CDPA whether a work is individually or jointly authored.

So, why have courts sometimes adopted a more demanding authorship standard? One explanation may be a pragmatic concern to avoid the ‘inconvenient multiplication of rights and remedies’ which may arise where there are multiple right holders.⁴⁸ Additionally, courts may hesitate to hand minor contributors a potential veto power to impede the exploitation of the work, especially where they have made a relatively minor creative contribution.⁴⁹ But, the lack of a principled basis for raising the authorship standard has tended to result in a degree of arbitrariness in case outcomes and attendant uncertainty in the law on joint authorship. Furthermore, denying minor contributors the benefits of authorial status may risk disrupting copyright’s incentives and chilling collaborative creativity.⁵⁰ To the extent that concerns remain about potential hold ups, these may be best addressed with ownership-based solutions.⁵¹

The Court of Appeal has now made it clear that there is no basis for a restrictive approach to joint authorship. *Kogan v Martin* adopts a unitary of concept of authorship that is the same for joint authorship as it is for individual authorship.⁵² This offers greater conceptual cohesion and accords with fundamental

Copyright: How Music Perceives Itself and How Copyright Perceives Music (Cheltenham: Edward Elgar, 2015) 23, 33; Simone, n 4 above, 39–50.

- 48 *Levy v Rutley* (1871) LR 6 CP 523, 531 *per* Montague Smith J: 528 *per* Byles J (in relation to the requirement for a common design): ‘The plaintiff was . . . the contributor of a very small part of the entire piece at a subsequent time . . . the consequence of holding [him to be a joint author] . . . would be that so many persons as may have contributed separate scenes or portions of a dramatic piece might each have separate and concurrent actions for penalties against a person who may have represented the whole or particular parts of it, without any means on his part of knowing that there was a plurality of authors, or who they were’. See also *Hatton v Kean* (1859) 7 CB NS 268; 141 ER 819 *per* Erie CJ: ‘One cannot but perceive, that, if the plaintiff were right in his contention, the labour and skill and capital bestowed by the defendant upon the preparation of the entertainment might all be thrown away, and the entire object of it frustrated, and the speculation defeated, by any one contributor withdrawing his portion’.
- 49 *Hadley v Kemp* n 21 above, 643 *per* Park J: ‘. . . [i]t would be surprising if a slight contribution was enough to make a person a joint author and thereby make him an equal owner with another or others who had contributed far more than he had’ (although note that joint owners may own unequal shares of the copyright interest). Nonetheless, all joint owners must agree to an exercise of any of the exclusive rights or to an assignment of the copyright subsisting in the work: CDPA, s 16(2), s 173(2); *Powell v Head* (1879) 12 Ch D 686. This explanation is also offered by others: D. Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) 76; D. Vaver, *Intellectual Property: Copyright, Patents and Trade-Marks* (Toronto: Irwin Law, 2nd ed, 2011) 120–121 (writing in the Canadian context, where the joint authorship test is similarly worded); M. Rimmer, ‘Heretic: Copyright Law and Dramatic Works’ (2002) 2 QUT L Rev 131; Bently, n 47 above, 981; Waelde, n 47 above, 33.
- 50 It must be assumed that the creators which copyright law seeks to incentivise are all those whose contributions rise to the level of ‘authorship’ in a legal sense. Although minor contributors may rely on contracts to protect their interests, they may find this tool of limited use without the underlying legal status of joint author.
- 51 See, for example, Simone, n 4 above, 256–268. Also, arguing that copyright ownership is often best managed with private ordering in highly collaborative settings and that an inclusive approach to joint authorship may improve the quality of private ordering by providing minor contributors with a ‘bargaining chip’ (*ibid*, 247–250).
- 52 Referring to the section 9(1) definition of the ‘author’ as the person who creates a work, n 5 above at [36].

copyright principles.⁵³ The court rejects short cut formulations which take overall ‘responsibility for the expression’ as a proxy for authorship and, thus, provide a narrow view of authorship.⁵⁴ It warns that too much focus on who does the writing is mistaken, as copyright’s protected subject matter is broad: ‘[i]t 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’.⁵⁵ In this light, overall responsibility for the final form of the work can provide only partial insight on questions of authorship.⁵⁶

The quantitative and qualitative conditions for a joint authorship are dealt with primarily at the third stage of the Court of Appeal’s framework (contribution). The contribution required must be of an authorial nature and, as a qualitative matter, this is an inquiry that must be acutely sensitive to the nature of the copyright work in question.⁵⁷ By this, the court appears to imply a degree of granularity – it is not just the statutory category of work (ie literary, dramatic, musical or artistic), but the specific type of work which is relevant. So, in this case, Kogan’s contributions should have been assessed bearing mind their impact on the comedic drama of the FFJ screenplay.⁵⁸

The quantum of authorial contribution is primarily to be measured by reference to the standard of originality which applies post-*Infopaq*.⁵⁹ Broadly speaking, this requires free expressive and creative choices made in producing the work, which result in an intellectual creation that reflects the author’s personality.⁶⁰ It is said to be a relatively undemanding standard. Indeed, the Court of Justice of the European Union has instructed that a relatively mundane portrait photo might be an intellectual creation where the photographer has made choices in posing subject, arranging the lighting, using particular developing techniques, etc.⁶¹ If there is any difference between the *Infopaq* standard and the previous approach to originality, it may be a shift in focus towards

53 In this way, the Court of Appeal lays important groundwork for a more coherent normative account of copyright authorship to emerge over time.

54 Such as *Robin Ray v Classic FM* n 46 above.

55 n 5 above at [41], explicitly approving Laddie J’s approach in *Cala Homes v Alfred McAlpine Homes* [1995] EWHC 7, [1995] FSR 818.

56 Indeed, the CDPA implies that a work might exist prior to its fixation: *Kogan v Martin* n 5 above at [37].

57 *ibid* at [53].

58 *ibid* at [42]: ‘A screenplay is concerned with providing a plot and dialogue which enable the reader to visualise what is going to happen on the screen, and get a feeling for what the audience will experience. The author is directly concerned with such matters as the choice of characters and the incidents in the film which will bring out those characters, and display their emotions. The storyline and plot are also of direct concern to the author and are a part of what he or she creates. These aspects of a screenplay can, in principle, amount to a contribution of an authorial kind’.

59 *ibid* at [106].

60 *Infopaq v Danske Dagblades Forening* ECLI:EU:C:2009:465 (*Infopaq*) at [45]; *Bezpečnostní softwarová asociace v Ministerstvo Kultury* ECLI:EU:C:2010:816 at [50]; *Painer v Standard Verlags GmbH* ECLI:EU:C:2013:138 (*Painer*) at [87]–[89]; *Football Dataco v Yahoo! UK Ltd* ECLI:EU:C:2012:115 at [37]–[38].

61 *Painer ibid*.

creative choices which reflect the author's personality, rather than merely the (non-creative) skill and labour which went into the production of the work.⁶²

In its judgment the Court of Appeal models the application of its framework. The court stresses, in particular, the need to assess the choices which contributors make in light of the specific creative context. In *Kogan v Martin* this meant, for example, appreciating that the choice of technical musical language might have an important impact on the authenticity and comedic nature of the dialogue; or, that the choice of particular incidents might help convey a sense of drama or contribute to character development in a particular way.

The first instance court had seemed to rely upon an apparently novel approach which distinguished between 'primary skills', which go directly towards the physical creation of a work, and other 'secondary skills'. This distinction appeared to operate to imply that less weight ought to be given to contributions of ideas than to written words.⁶³ The primary/secondary skill distinction may have been arrived at by extrapolating from some cases in which courts have granted sole authorship to those who put pen to paper, denying it to others who have made contributions more remote from the process of fixation.⁶⁴

The Court of Appeal found the primary/secondary skill distinction to be 'positively unhelpful'.⁶⁵ Indeed, the court reminds that any suggestion that textual contributions ought to be privileged over non-literal contributions is contradictory to fundamental copyright principles. Thus, the decision adopts a broad and inclusive approach to the contribution limb. This accords with the *Infopaq* conception of authorship, which focuses on the exercise of some creative choice (however channelled into the work). Whilst the trial judge had dismissed Kogan's contributions as merely useful jargon, helpful criticism and some minor plot suggestions; in the context of the specific collaboration, the Court of Appeal implies that her contributions were likely to count as valuable contributions of an authorial character.

Some questions remain unresolved. Although the Court of Appeal has clarified that the 'authorship' and 'contribution' limbs are separate, the boundary between these two elements of the test is unclear.⁶⁶ Additionally, the

62 Mere effort or 'sweat of the brow' will not suffice. On the impact of *Infopaq*, see E. Derclaye, 'Case comment: *Infopaq International A/S v Danske Dagblades Forening* (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in *Infopaq* on UK copyright law' (2010) 32 EIPR 247, 248-9; M. van Eechoud, 'Along the Road to Uniformity – Diverse Readings of the Court of Justice's Judgments on Copyright Work' (2012) 1 JIPITEC 60; J. Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) *Oxford Journal of Legal Studies* 1; A. Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 IIC 4; E. Rosati, 'Originality in a Work, or a Work of Originality: the Effects of the *Infopaq* Decision' (2011) 33 EIPR 746.

63 n 8 above at [43]-[52], described by the Court of Appeal as a 'novel theory', n 5 above at [65].

64 In *Brighton v Jones* n 30 above at [42] the court stressed that it was Jones who wrote the words of the play on her laptop; in *Ray v Classic* n 46 above, 636-637 it was relevant that Ray was 'solely responsible as author for the writing', with Lightman J considering that a lesser connection would only suffice in 'exceptional' cases such as *Cala Homes* n 55 above.

65 n 5 above at [34], [65], [42]. Indeed, the court considered that in some cases the person who contributed the 'ideas' may even be the major author. See: *Cala Homes ibid*; *Donoghue v Allied Newspapers* [1938] 1 Ch 106 (Ch); *Heptulla v Orient Longman* [1989] 1 FSR 598 (HC of India).

66 There is also some overlap between the collaboration and authorship limbs, see 'Collaboration' above.

requirement for a ‘significant’ contribution evident in many iterations of the ‘authorship limb’ appears conspicuously absent from the new framework. This question is at the root of many the inconsistencies in the case law, as copyright law does not appear to provide much of a principled basis for determining the significance of contributions to a joint work.⁶⁷ Sometimes significance has been considered a *de minimis* quantitative test requiring more than a trivial contribution.⁶⁸ Some authors have even considered it an unnecessary gloss.⁶⁹ However, most cases have taken qualitative factors into account above and beyond the literary, dramatic, etc character of the contribution. Judges have been influenced by the relevance, attractiveness or value of the contribution in the creative context concerned.⁷⁰ In cases where a particular creator has had ultimate control over the creative process this has occasionally been seen as a factor appearing to obliterate the significance of contributions made by other parties.⁷¹

The Court of Appeal affirms that joint authorship is inclusive and that there are no grounds for reading in a demanding standard of ‘significance’. Nonetheless, the question of the significance may not have completely disappeared. In the application of the contribution limb the court directs that regard must be had to the importance and relevance of a putative joint author’s contribution (ie its significance) in light of the specific creative context. This should be seen as a positive feature of the court’s framework, as it allows for an interplay between creative reality and the application of copyright rules on joint authorship.⁷² Although a *significant* contribution is not explicitly required in the new framework,

67 L. Bently, B. Sherman, D. Gangjee and P. Johnson, *Intellectual Property Law* (Oxford: OUP, 2018) 131 note 46 citing A. Barron, ‘Copyright Law and Musical Practice: Harmony or Dissonance?’ (2006) 15 *Social and Legal Studies* 25 and L. Bently, ‘Authorship of Popular Music in UK Copyright Law’ (2009) 12 *Information Communication & Society* 17.

68 *Fisher v Brooker* [2006] EWHC 3239, [2007] FSR 255 at [46] *per* Blackburne J, but the contribution in that case was substantial on any view, at [98] (partially reversed by the Court of Appeal considering it to be an ‘extremely unusual case’ ([2008] EWCA Civ 287 at [34]); then, upheld in the House of Lords ([2009] UKHL 41). The ruling on joint authorship was not challenged in either appeal.) A similarly low standard appears to have been applied in *Minder Music v Sharples* [2015] EWHC 1454.

69 Vaver (2011), n 49 above, 120–121 (writing in the Canadian context, where the joint authorship test is similarly worded). In *Martin v Kogan* n 8 above at [48] the first instance court preferred the term ‘sufficiency’, which it seemed to consider to be coterminous with the originality requirement.

70 For example: *Brown v Mcasso* [2005] FSR 846 (EWPC) at [46] (Brown’s contribution gave a rap an authentic feel); *Fisher v Brooker* n 68 above at [23], [10], [3] (Fisher’s organ solo was distinctive and famous); *Bamgboye v Reed* n 24 above at [27] (Bamgboye’s contributions made the work more ‘interesting’); *Stuart v Barrett* [1994] EMLR 448 (Ch), 460 (a drummer’s contribution gave the work ‘shape’ or ‘drive’).

71 *Brighton v Jones* n 30 above at [41]–[43]; *Hadley v Kemp* n 21 above, 641; *Fylde Microsystems v Key Radio Systems* n 33 above; *Hatton v Kean* (1859) 7 CB NS 268; 141 ER 819 *per* Erie CJ. In some of these cases, this was compounded by the characterisation of some contributions as something other than ‘authorship’ (on the basis that they related to the performance or theatrical presentation, rather than the *creation*, of the work). Calling this distinction between performance and authorship into question, see R. Arnold, ‘Are Performers Authors?’ (1999) EIPR 464.

72 The disconnect between creative communities’ notions of authorship and copyright’s own notion is discussed in, for example, L. Bently and L. Biron, ‘Discontinuities between legal conceptions of authorship and social practices: What, if anything, is to be done?’ in M. van Eechoud (ed), *The Work of Authorship* (Amsterdam: Amsterdam UP, 2014) 237 and L. Biron and E. Cooper,

the significance of a contribution is likely to remain relevant. As joint authors might be entitled to unequal shares of the copyright interest, courts will still need to determine the relative significance of joint authors' contributions when apportioning copyright entitlements. This ought not to result in intolerable uncertainty as the aim is to recognise the relative value of a contribution in the particular context. It will be for future cases to provide guidance on the permissible criteria for determining the significance of a contribution.⁷³

Non-distinctness of contribution

Kogan v Martin offers relatively little insight on the fourth limb of the test. The Court simply explains that where contributions are distinct there is no need for joint authorship, as each author can rely on the copyright which may subsist in his or her distinct part. This limb appears to be seen as indicating that a work of joint authorship is one in which contributions are 'fused' in such a way that distinct copyright in the parts is impossible. This area is likely to be the subject of future disputes, especially in regard to works comprised of multiple types of contributions.⁷⁴

The ultimate arbiter

The Court of Appeal addresses some aspects of joint authorship determinations which do not fall neatly within the four limbs of the new framework.⁷⁵ The most important of these is the question of the relevance of who has the 'final say' or as the trial judge put it, the 'ultimate arbiter'. The presence or absence of overall control over the creative process appears to have been highly relevant in some well-known joint authorship cases.⁷⁶ Indeed, at trial, the claimant argued the ultimate arbiter test as a 'second short cut' for determining authorship, which would operate to concentrate it solely in Martin's hands. Whilst the trial judge did not accept this factor as determinative, he did appear to place significant weight on the fact that Martin had had the 'final say' on the screenplay.⁷⁷

'Authorship, Aesthetics and the Art World: Reforming Copyright's Joint Authorship Doctrine' (2016) 35 *Law and Philosophy* 55.

73 Arguing that 'significance' is a question of fact and proposing a framework to guide the incorporation of contextual information drawn from the social norms of particular creative communities, see Simone, n 4 above, 56–57, 241–246.

74 Films are likely candidates for such disputes as they might often also be a dramatic work, following *Norowzian v Arks (No 2)* [2000] FSR 363 (CA). In this context, the contribution of a cinematographer is likely to be 'not distinct', but what of those who design props, make up or costumes? Discussing this problem, see Simone, *ibid*, 183–187.

75 For example, the lack of a requirement for a subjective intention to jointly author or the possibility of joint ownership in unequal shares.

76 *Hadley v Kemp* n 21 above, 641; *Brighton v Jones* n 30 above at [41]–[43]. This focus on the final say may risk introducing a bias towards individual ownership of the fruits of collaborative endeavours: Simone, n 4 above, 50.

77 n 8 above at [81], HHJ Hacon describing this as sometimes a 'highly relevant' factor (at [29]). The Court of Appeal considered that he had 'relied heavily' on this factor, n 5 above at [129].

The Court of Appeal clarified that one contributor with the ‘final say’ cannot eclipse the creative contributions of other putative joint authors. At most, the ‘final say’ may have some evidential bearing on whether collaboration exists or it may affect the share of copyright to which an author is entitled (because it involves additional creative choice).⁷⁸

By rejecting the ultimate arbiter test, the Court of Appeal steers clear of restrictive approaches to joint authorship that have found favour in other jurisdictions. In some cases involving motion pictures, US courts have located authorship in the hands of a ‘dominant author’ or ‘mastermind’ who has most control over the creative process.⁷⁹ US scholars have argued that where control is taken as a proxy for authorship, there is a risk of untethering joint authorship from basic copyright principles.⁸⁰ The dominant author approach is a poor fit for the many highly collaborative modes of creativity which have proliferated thanks to digital tools and modern communications technologies. Even where creative work is very hierarchically organised, significant creative choices are likely to be required to interpret and execute instructions from above. Post-*Infopaq* this clearly amounts to ‘authorial’ input. Also, as a practical matter, dominant parties (who tend to have most control over the creative process) are often already well positioned to protect their interests by contract. Copyright authorship is of greater relative value to minor contributors who might use it as a bargaining chip in negotiations with more powerful players.⁸¹

CONCLUSION

Kogan v Martin is a landmark case in which the Court of Appeal provides a new framework for the application of the joint authorship test that entrenches a pro-collaboration default standard.⁸² The court has navigated the complex case law on authorship, sweeping aside troubling trends which tend to encourage a restrictive approach. The new framework is firmly anchored in the statutory language and embeds fundamental copyright principles, such as the idea/expression distinction. The Court clarifies that the joint authorship test is inclusive, encompassing a broad variety of possible creative inputs in line with the *Infopaq* view of authorship. Although the elements of the joint authorship

78 n 5 above at [51] preferring the approach in *Bamgboye v Reed* n 24 above to *Brighton v Jones* n 30 above.

79 *Aalmuhammed v Lee* 202 F3d 1227 (9th Cir, 2000); 16 *Casa Duse v Merkin* 791 F3d 247 (2d Cir, 2015). J. Dougherty, ‘The Misapplication of “Mastermind”: A Mutant Species of Work for Hire and the Mystery of Disappearing Copyrights’ (2016) 39 *Columbia J L & Arts* 463 argues that the decision in *Merkin* is untethered from basic copyright principles as the court prefers a producer’s claim (based on managerial control) to that of a director (based on creative control).

80 Dougherty, n 23 above. Criticising the apparent circularity of granting control over the subsequent uses of copyright work to the party who already has most control over the work, see A. Casey and A. Sawicki, ‘The Problem of Creative Collaboration’ (2017) 58 *William & Mary LRev* 1793, 1830.

81 The value of copyright as a bargaining chip was recognised in *Slater v Wimmer* [2012] EWPC 7 at [90].

82 The Court of Appeal actively distinguishes its approach from the more restrictive approach which has found favour in the US.

test are inter-related and to some extent necessarily overlap, the court stresses that each must be separately assessed to avoid the risk of eliding crucial issues.⁸³

This new framework requires courts to begin by characterising the nature of the parties' working relationship (does it amount to collaboration?). This logically prior determination provides the essential context for the application of the authorship and contribution limbs. Detailed guidance is provided as to the amount and type of contribution required and how this ought to be assessed. The relevant contribution must reach the legal standard of copyright 'authorship' and this must be assessed with an acute sensitivity as to the subject matter in question. The Court of Appeal's joint authorship framework thus ensures that the test is applied with an eye to the reality of the creative process. This allows the test the flexibility to adapt to a wide range of different collaborative creative processes by providing a bridge between legal norms and creative reality.

The Court of Appeal takes a nuanced approach which is live to the reality of collaborative creativity and wary of short cuts which tend to oversimplify matters. In the court's view, there is also no role for proxies which locate authorship with the contributor who has had the 'final say' or who takes overall responsibility for the written expression. Context is vital, so it is an error to focus on documentary evidence without sufficient regard to oral evidence which might cast a new light upon it. *Kogan v Martin* has brought significant clarity to the joint authorship test, but some questions still remain. Most notably: What are the boundaries of a collaborative copyright work which is the product of multiple drafts? How does one apportion authorship shares where contributions are unequal? And, what constitutes a 'distinct' contribution?

83 n 5 above at [55].