

How do you credit a non-writing screenplay author?

What credit on IMDb do you give someone found by a court to be a joint author of a film screenplay, who may not actually have written any of it? That question was considered by Mr Justice Meade at the IPEC in the latest chapter of the *Martin v Kogan* case.¹

After considering IMDb rules and the definitions in the respective guidelines of the Writers' Guild of Great Britain (**WGGB**) and the Writers Guild of America (**WGA**), Meade J decided that "(written by) (originally uncredited)" was the fairest credit, reflecting as far as possible the relevant guidelines, his main judgment and the test of "authorship" under UK copyright law.

Background

Nicholas Martin is a professional writer of film and television scripts, and Julia Kogan is an opera singer and music teacher, who has had some experience in writing books. Mr Martin and Ms Kogan were in an on-off romantic relationship and, while they were living together, the idea arose for a screenplay about the life of Florence Foster Jenkins. Early drafts of the screenplay were created while the pair lived together. The couple ended their relationship after the film was optioned, and the final draft of the screenplay was produced by Mr Martin after the parties' relationship came to an end. Mr Martin was credited as the sole author of the screenplay for the feature film released in 2016, starring Meryl Streep and Hugh Grant.

Ms Kogan sought a share of Mr Martin's income from the film, and Mr Martin sought a declaration from the court that he was the sole author of the screenplay. After a trial before HHJ Hacon² and an appeal to the Court of Appeal,³ the case went back to the IPEC for a retrial before Mr Justice Meade on the basis that HHJ Hacon had erred in his approach to the evidence and assessment of Ms Kogan's contribution.

Meade J, applying principles set out in the decision of the Court of Appeal, found that Ms Kogan had in fact made an authorial contribution to the screenplay, which merited a 20% share of the copyright. Among other things, the judge ordered the film production companies (who were Part 20 defendants) to arrange a credit on IMDb, the online database of information related to films, TV programmes and other audio-visual content, to reflect Ms Kogan's work on the screenplay for the Film.

At the consequential hearing before Meade J, a disagreement arose between Mr Martin and Ms Kogan over what credit should be given to Ms Kogan. By that time, the film production companies had already arranged a credit, which appeared under the section title "Writing Credits" on the IMDb webpage, as follows:

Writing Credits

Nicholas Martin (written by)

Julia Kogan (written by) (originally uncredited)

¹ *Nicholas Martin v Julia Kogan* [2021] EWHC 1242 (IPEC) (19 May 2021).

² *Martin and Another v Kogan* [2017] EWHC 2927 (IPEC) (22 Nov 2017).

³ *Martin and another v Kogan* [2019] EWCA Civ 164.

Meade J explained that the words "Writing Credits" will appear on IMDb in any event and are not created by user or IMDb input; only the remainder of the text is subject to user input. In arriving at that text, the film production companies had applied IMDb rules, to the effect that the credits would be as they appeared on the screen when the film was played, but that exceptionally an "(originally uncredited)" could be given where there was later evidence that someone else had contributed to the work.

In their written submissions the parties referred to the WGA and the WGGB guidelines, each of which had written definitions, and offered an arbitration service to determine their application. The guidelines' respective definitions differ, in particular as to what is meant by "Written by", "Screenplay by" and "Story by".

Apart from the guidelines, Meade J considered that as far as possible the IMDb credit should actually reflect his judgment. In that respect, however, he had to have regard to the facts that:

- the WGA, the WGGB and IMDb use their own definitions, so while "written" would be a good word to reflect the test of "authorship" in the CDPA, it did not follow that the word had the same connotation in the context of the WGA or WGGB guidelines or IMDb;
- the IMDb credits were multiple-choice, so it was not possible to write a narrative text to capture the nuances of his judgment, although Meade J was satisfied that they could usefully convey reasonably accurate information; and
- taking into account that anyone who wanted to know what his judgment said in detail could read it, the judge's aim was to ensure a reasonably accurate impression was given to users of the IMDb website who did not read the judgment.

Judgment

The judge aimed to make an overall, merits-based assessment of what was fairest and at the same time most reflective of the relevant guidelines and his judgment, while recognising that "nothing can be a perfect fit".

First, the court rejected Mr Martin's suggestion that Ms Kogan's quantitative contribution, at 20%, was too little to get a "Screenplay by" or "Written by" credit at all, but that a "Story by" credit would be more appropriate. The time to raise such point was at the retrial and, in any case, there was no hard limit for percentage contribution set out in the WGGB guidelines.

The judge considered there was strength in Ms Kogan's submission that the WGGB guidelines were more significant in this case, given that the case was about UK copyright, although he considered it acceptable to refer to both sets of guidelines. The judge did note that the WGGB guidelines were not entirely favourable to Ms Kogan's case, since they required a "substantial written" contribution to the screenplay for a "Screenplay by" credit, whereas she in fact did very little writing, if any at all. In addition, the WGGB guidelines provide that a "Written by" credit requires that the same person undertook both the screenplay and the story.

Meade J did not consider that either the WGGB or the WGA guidelines allowed only one person to have a "Written by" credit, and there was nothing in either of the guidelines that disallowed writing teams. He considered that to give Mr Martin a "Screenplay by" and a "Story by" credit and to accord Ms Kogan only a "Story by" credit would suggest a significant qualitative difference in input, which his judgment did not justify. It would imply that Ms Kogan did not contribute to the screenplay, when she clearly did, as in his judgment, Meade J found that Ms Kogan's contribution went beyond just the story, her dialogue

suggestions were included in some of the most significant scenes in the film, and “Ms Kogan contributed as a collaborator in terms of characterisation, musicality, choice of historical incident and musical terminology”.⁴

Lastly, the judge rejected Ms Kogan’s reliance on an assessment by IMDb of the right credit, since IMDb simply replicated the “Written by” credit that was shown in the film for Mr Martin and used the same categorisation for Ms Kogan, plus “uncredited”, but in his view IMDb made no assessment of whether Ms Kogan specifically merited a “Written by” credit.

The judge considered that these factors pulled in different directions, but overall, the credit as it currently stood was the best option. It reflected what credits were shown in the film itself, which was the IMDb approach, and the later change (“originally uncredited”) for the judgment. Putting Mr Martin first was appropriate given his greater input, and such credit did not contravene any strong principle in any of the guidelines.

Meade J acknowledged that Ms Kogan’s quantitative contribution was small, but it was nevertheless a real and not trivial contribution, and the judge considered that putting her credit in second position implied that she was a more minor, sub-50% contributor. The judge acknowledged that, since she did not write many words of the screenplay, Ms Kogan should not, on a narrow reading of the WGBB guidelines, get a “Screenplay by” credit or therefore a “Written by” credit. But the judge noted that the WGA guidelines clearly went broader than just words, and considered that this point was, in any event, outweighed by other factors.

Comment

Credits play an enormous role in determining a writer’s position in the film and TV industry. Film scripts are often the work of a few writers, but quite often the credit that we see on screen isn’t wholly representative of the work that went into putting the final script together.

While Mr Martin wrote the final version of the screenplay in this case, Ms Kogan’s contribution was held to be significant to all of the central characters, and she defended her right to a credit in a six-year legal battle. The judge was satisfied that the film production companies’ credit for Ms Kogan’s contribution on IMDb complied with their obligations under his judgment. He noted that this was the first time a court has had to rule on such a matter and stressed that he did not purport to create any general principle. Nevertheless, should such an issue arise again in another case, the parties’ agreement on the appropriate credit is likely to be informed by the judge’s approach.

In any event, this case is an important reminder for any producer on the need for clarity as to whether other writers have worked (or are working) on a project and, for work that has been created collaboratively, the need to make a determination of the authorship of the work to make sure that the necessary rights have been obtained, and that the correct individuals are credited.

Further, from a writer’s perspective, in addition to including adequate credit and credit arbitration provisions in the writer’s contract, writers should ensure that their name is on any draft of a script delivered. They should also keep copies of all materials (scripts and supporting work) and accurate records of delivery dates and, if it is a collaborative work, ensure that the contractual position is reflected from the outset.

⁴ *Martin and another v Kogan and others* [2021] EWHC 24 (Ch) at [272].

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