

The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's Comments

BY LEWIS F. MATUSZEWICH

Members of the International & Immigration Law Section Council met with John Cruikshank, Canadian consul general in Chicago. Cindy G. Buys summarized some of the points discussed in her article "Perspectives from the Canadian Consulate." Additional information about the visit is posted on International Law Prof Blog at <https://lawprofessors.typepad.com/international>

[law/2020/01/isba.html](https://www.isba.org/2020/01/isba.html).

Cindy also provided "Summary of Key Differences between NAFTA and USMCA," the preexisting 1994 North American Free Trade Agreement and the new United States Mexico Canada Agreement.

Cindy's "The Continuing Evolution of Immigration Law to Address Issues of

Continued on next page

Perspectives From the Canadian Consulate

BY CINDY G. BUYS

On Friday, January 17, the International & Immigration Law Section Council of the ISBA was privileged to meet with the Canadian consul general, John Cruikshank, and his staff at the Canadian Consulate in Chicago. Members of the Section Council who attended the briefing included Mark Wojcik, Megan Vander Schaaf, Susan Goldberg, and Cindy Buys.

Mr. Cruikshank was named the Canadian consul general to Chicago in 2017, following a long career in media. In addition to being the former publisher of the Toronto Star, Mr. Cruikshank spent several years in Chicago as the publisher

and vice president of the Chicago Sun-Times from 2002-2007.

Joining him at the meeting were other staff members, including Monica Robson, Colleen Duke, Tony Brown, and Julia Garcia, some of whom are Canadian and some of whom are American citizens. The American staff provide institutional and cultural knowledge about the host country.

Below is a list of topics that were discussed:

Downing of the Plane in Iran

On January 8, the Iranian military shot down a Ukrainian plane leaving

Editor's Comments

1

Perspectives From the Canadian Consulate

1

Summary of Key Differences Between NAFTA and USMCA

4

Jurisdiction Stripping and the Presumption of Judicial Review: Who Gets to Make the Call in 2020

5

Joint Authorship of Copyright: UK Court of Appeal Tears Up the Script

7

Editor's Comments

CONTINUED FROM PAGE 1

Domestic Violence” appeared in the June 2004 issue of *The Globe*. A total of 58 articles by Cindy have appeared in various ISBA publications and with these two articles she will have reached 60 publication credits.

Patrick Kinnally has previously provided 105 articles to various ISBA publications, including, “Costs: an imbroglia for trial courts and practitioners,” which appeared in the October, 2000 issue of *Civil Practice and Procedure*. This issue of *The Globe* includes his article “Jurisdiction Stripping and the Presumption of Judicial Review: Who Gets to Make the Call in 2020.”

The International and Immigration Law Section Council is not the only section whose interests touch on immigration concerns and international issues. Included

in this issue are: “Joint Authorship of Copyright: UK Court of Appeals Tears Up the Script” by Ben Milloy, which first appeared in the December 2019 issue of *Intellectual Property*; and “USCIS Revised Fee Waiver Requirements Impact on Pathways to Legal Immigration” by Bhavani Raveendran from the December 2019 issue of *Human Rights*.

As always, thank you to all of our authors and contributors. ■

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Perspectives From the Canadian Consulate

CONTINUED FROM PAGE 1

Tehran. All 176 persons on board were killed, including 57 Canadian nationals and 29 Canadian residents. Mr. Cruikshank stated that the government of Canada had announced that it is providing \$25,000 to each of the affected families to assist with travel, funeral, and other related expenses. He noted that Canada hoped to be reimbursed for those funds from Iran in the future. Mr. Cruikshank also stated that earlier in the week, the six nations who lost the most citizens on the plane met in Europe to discuss and develop a series of objectives for dealing with Iran. He further noted that Canada does not currently maintain diplomatic relations with Iran, which means it must rely on other nations as intermediaries.

Consular Notification and Access

Mr. Brown works with Canadian citizens who are arrested and detained in the United States. He stated that in recent years, when Canadian citizens are detained at Chicago O’Hare rather than being admitted to the

United States, U.S. Customs and Border Patrol has been notifying the Canadian Consulate and providing those citizens with an opportunity to talk to the Consulate. When this happens, the Consulate can help Canadian citizens understand and comply with U.S. law. He hopes the U.S. government will continue this policy.

If a Canadian citizen is arrested after being admitted to the United States, Mr. Brown usually advises the Canadian citizen to retain an attorney and to not make any statements until speaking to an attorney. Of particular interest to ISBA members, Mr. Brown stated that he refers Canadian citizens to the ISBA hotline to help find lawyers. The Consulate does not retain any lawyers.

Mr. Brown further stated that Canada is not a mandatory notification country, meaning that the U.S. authorities are only required to notify the Canadian consulate if the detained Canadian citizen requests that they do so. However, under the Vienna Convention on Consular Relations, the arresting or detaining authority must notify

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the Canadian national of his or her right to have the U.S. authorities contact the Consulate. Under Illinois law, this notice must happen within 48 hours of detention. Mr. Brown stated that if consular notice has not been provided, the trial should not go forward until the defendant has an opportunity to consult with the Consulate. He further stated that the relatively new Illinois law (which the International and Immigration Law Section Council drafted), has been fairly successful, especially in Cook County. Knowledge of the laws relating to consular notice and access is less widespread outside Cook County. Another continuing issue is understanding who must give the notice, especially if multiple police agencies are involved in the arrest and detention.

U.S.-Mexico-Canada Agreement (USMCA)

Mr. Cruikshank stated that the new agreement intended to update the North American Free Trade Agreement (NAFTA), which is called USMCA (or CUSMA as the Canadians cheekily refer to it), was signed in principal 14 months ago. Mexico has ratified the new agreement, but Canada decided to wait to see what changes might be made to the agreement after negotiations with the U.S. Congress. Those negotiations have now concluded and at the time of this writing, both Houses of Congress have passed the bill in favor of ratification and it is awaiting President Trump's signature. Mr. Cruikshank anticipates that once the U.S. ratification process is complete, the agreement will be submitted to the Canadian Parliament and will likely achieve ratification relatively quickly.

When asked what benefits Canada expects

from the agreement, Mr. Cruikshank stated that Canada will be happy to return to more certainty in trade relations. Trade in goods and services between the U.S. and Canada totaled \$718.5 billion in 2018. The Canadians agreed that NAFTA needed updating and the addition of a chapter on digital goods, like e-books, will bring the new agreement into the 21st century. Mr. Cruikshank also thought it important that the issues of labor and the environment were given more prominence by moving them from side agreements into the main body of the new agreement. He pointed out, however, that there are still details that must be resolved and regulations that must be written.

Cultural and Educational Issues

Ms. Duke has a wide-ranging portfolio that includes educational and cultural exchanges. She stated that the Consulate has recently seen more support for cultural exchanges from the Canadian government. One initiative is the musical, *Come From Away*, that depicts the experiences of the persons aboard a Boeing 777 plane that

was diverted to Gander, Newfoundland, en route from France to Texas on September 11, 2001. The pilot of that plane was Beverly Bass, a female American pilot, whose story is depicted in the musical. Discussions around that musical led to an exploration of additional stories about the terrorist attacks of 9/11, including the experiences of Canadian Lt. Gen. Finley, who was the NORAD Commander on that fateful date and made the decision to close North American airspace. The Canadian consulate is organizing programs around these and related stories pertaining to experiences of key players on 9/11. ■

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Pictured here (from left to right) are: Coleen Duke (Public Affairs Officer at the Consulate General of Canada); Susan Goldberg (UAW Legal Services and Secretary of the ISBA Section on International and Immigration Law); Tony Brown (Consular Program Manager at the Consulate General of Canada); Professor Cindy Buys (Interim Dean at the Southern Illinois University School of Law and former Section Chair); Canadian Consul General John Cruickshank; Professor Mark E. Wojcik (UIC John Marshall Law School and former Section Chair); Section Vice-Chair Meaghan E. Vander Schaaf (Senior Associate at Barnes Richardson Global Trade Law Firm); and Monica Robson (Consul for Foreign Policy and Diplomacy Services at the Consulate General of Canada).

Summary of Key Differences Between NAFTA and USMCA

BY CINDY G. BUYS

The new United States-Mexico-Canada Agreement (USMCA) is intended to replace the 1994 North American Free Trade Agreement (NAFTA); however, the USMCA is more of an update than a replacement. Most importantly, it continues the duty-free treatment for most goods moving between the three countries. Below is a summary of some of the main changes that USMCA will bring once fully ratified.

- A car must have 75 percent of its parts manufactured in a USMCA country to qualify as duty free (up from the current 62.5 percent).
- At least 30 percent of the car must be made by workers making at least \$16 per hour (which will be increased to 40 percent by 2023). U.S. labor believes this provision will protect jobs for American auto workers by reducing the number of jobs going to cheaper Mexican laborers. However, it may also increase the price of cars. It also will increase the standard of living for the workers who benefit from it.
- Mexico and Canada obtained commitments to be exempt from future auto tariffs imposed by the U.S. on other countries.
- Mexico has agreed to pass laws to provide additional workers' rights, such as protection for unionization rights, protection against gender discrimination, and protection for migrant workers. An interagency commission will be created to monitor Mexico's compliance, although sanctions for noncompliance remain unclear.
- Trucks from Mexico crossing the U.S. border will have to meet tougher

safety standards.

- U.S. farmers will be able to sell greater numbers of dairy products to Canada, as well as eggs and turkey.
- There is a new chapter on intellectual property that contains more stringent protections for trademarks and patents, including for biotech, financial services, and domain names. Copyright is extended to 70 years beyond life of author (rather than 50 years) and new protections are added for digital goods such as e-books.
- There is an expanded chapter on environmental protections which is now part of the core of the agreement, including enhanced protections for marine life and commitments to end overfishing.
- Chapter 19's dispute resolution mechanism for resolving antidumping and countervailing duty disputes largely remains; however, Chapter 11 on investor-state disputes is largely gone.
- The agreement contains a new chapter on Macroeconomics and Exchange Rate Matters which contains commitments not to engage in currency manipulation.
- If ratified, USMCA will take effect in 2020 and will be reviewed every six years; it will expire in 2036 but can be renewed until 2052. ■

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Jurisdiction Stripping and the Presumption of Judicial Review: Who Gets to Make the Call in 2020

BY PATRICK M. KINNALLY

To many practitioners, including myself, Congress's authority to strip federal courts of jurisdiction to hear certain cases, emanates in our politic because Congress does not like what federal judges might rule, or more probably it wants to control the outcome from the beginning. This seems troubling. *Patchak v. Zinke* 137 S. Ct. 2091 (2017) (*Patchak*).

Yes, Congress has the power to enact laws, even ones which define or limit the jurisdiction of federal courts. Do Legislators have the authority to tell a court to dismiss a case based on statute they create? Or, prescribe a certain outcome in single controversy? See Peck "Congress's Power Over Courts; Jurisdiction Stripping and the Rule of *Klein*," *Congressional Research Service* (August, 2018) (*Peck*).

On the flip side, is there truly a presumption of Judicial Review with respect to federal administrative agency actions? See, e.g. *Abbott Labs v. Gardner* 387 U.S. 136, 139-140 (1967). If so, where does it originate? It does not appear in the Constitution. Although, announced by the courts, and endeared to by litigants, its genesis seems murky. Bagley, "The Puzzling Presumption of Reviewability" *Harvard Law Review* 127 *Harvard Law Rev.* 1285 (2014).

Indeed in *Patchak* a plurality of the United States Supreme Court had a difficult time with this dialectic. The statute at issue said: Does a federal statute directing a federal court to "promptly dismiss" a pending lawsuit following actual rulings permit the lawsuit to proceed, violate the Constitution's separation of powers?" *Peck* at 12. It seems to me, the presumption of judicial review should have some force in our system of government. Perhaps, my view is mistaken.

In the guise of "changing the law" the

Supreme Court said Congress could do so. The dissent, authored by Justice Roberts opined the new statute clearly ordained the outcome in a single case, thereby, intruding unconstitutionally in an area left to solely to the judicial branch of government. See also *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329-38 (2016) (*Peck*, at 21).

But, is it clearly a role for Congress, even if a limited one? Congress should not be able to declare whether Pat Kinnally gets to win over Tom Prindable in his lawsuit. But *Patchak* can be read to say that. *Peck* at 22. Especially, where the Constitution not Congress, declared what cases and controversies the Judiciary was authorized to resolve (Article 3, Sec 2).

This tension seems more awkward in the immigration context. Stripping federal judges of the ability to decide cases or controversies involving federal immigration statutes, policies or regulations? Yes, they can do that. See 8 U.S.C. 1252 (a)(2)(D) *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001). Again, we should be asking ourselves, why? Should we permit administrative law judges and adjudicators, empowered by Congress, to supplant Article III Judges who have the authority to interpret all cases in Law and Equity arising under the Constitution and the laws of the United States? It is a knotty dilemma; the terrain, challenging.

In immigration law there is a form of procedural relief called a motion to reopen. This legal option provides a person in a removal proceeding to petition an administrative tribunal, the Board of Immigration Appeals (BIA) or an administrative law judge (IJ) and request either to revisit a decision previously made. The request must ask the BIA or

the IJ to make a new decision based on newly discovered evidence or a change in circumstances or law from the time of the previous removal hearing, See *Kucana v. Holder*, 558 U.S. 233 (2010) (*Kucana*).

For the most part, federal appellate courts do not have jurisdiction to review final orders of removal where certain criminal offenses occur. But see *Ghahremani v. Gonzalez*, 498 F.3d. 993 (9th Cir. 2007) (*Ghahremani*). However, those courts do retain jurisdiction to review constitutional claims and questions of law regardless of the predicate for the removal charge. And *Ghahremani* held that such review included not only questions of law but mixed questions of law and fact.

As to motions to reopen there are two variants. First, there is a regulatory strain to reopen 8 CFR 1003.23(b) or 8 CFR 1003.2(a), which is an administrative or executive branch fiat. It imposes a 90-day limit on reopening from a final removal order. Also, the person can invoke his/her statutory right to reopen removal proceedings under 8 U.S.C. 1229 a(c)(7) (the statute). Its temporal confine is disputed.

A motion to reopen must include the new facts that will be proven at a hearing to be held if the motion is granted. It needs to be supported by affidavits, the application for the relief sought, and other evidence. Generally, the motion should show that such proof is material, was not available at the time of the original hearing, and could not have been discovered or presented at the time of the original hearing. 8 CFR 1003.2(c) (1). Subject to certain exceptions, a motion to reopen must be filed within 90 days of the entry of a final administrative order of removal.

The government's view is that if a person

in removal proceedings departs from the United States while the motion is pending that such departure constitutes a withdrawal of the motion. Most circuit courts have rejected this view. See *Kurzban Sourcebook*, 16th Ed. (1758-60). To circumvent the 90-day limitation a person filing a motion to reopen claims that his or her failure to file should be equitably tolled. Equitable tolling is a time-honored maxim which affords a court the ability to waive the requirement of non-jurisdictional statutes of limitations where a litigant was diligent but unable to comply with a filing deadline. *Kucana*

The regulatory version; however, unlike the statutory prong imposes a restraint. It declares as to any person in a removal hearing whom has departed the United States from filing any motion. This is called the “departure bar” See *Resendez v. Lynch*, 831 F. 3d 337 (2016) (*Resendez*). The BIA, not an Article III judge has opined that its administrative regulations have stripped it, categorically, of any jurisdiction to entertain any motion to reopen filed by departed persons in removal proceedings. *Matter of Armendaraz* 24 I&N Dec. 646 (2008). The *Resendez* court saw it differently.

In 1973 *Resendez* was admitted as a lawful permanent resident alien. Almost 30 years later he pleaded guilty to possessing one gram of a controlled substance, a felony. The federal government sought to deport or remove him based on that conviction. He was ordered removed in 2003.

Eleven years later, *Resendez* filed a motion to reopen under the statute. The government said his motion was untimely because it was not filed within 90 days of his removal order. He had departed the United States since he was deported. *Resendez* replied that he was entitled to equitable tolling of the 90 day deadline, since the law had changed since he was ordered removed (*Lopez v. Gonzalez* 549 U.S. 47 (2006)); and, the Supreme Court had opined that a statutory motion to reopen should not wear the trappings of what the Executive Branch chose to say what it thought it was. See *Mata v. Lynch* 135 S. Ct. 2150 (2015).

Echoing *Kucana*, the *Mata* court, again held the court of appeals had misapplied the

clear meaning of the statute in the context of a motion to reopen.

Noel Mata entered the United States unlawfully and remained here for over a decade. In 2010 he was convicted of assault. A year later he was ordered removed by an immigration judge. His lawyer appealed, but the appeal was dismissed because no brief was filed. Over 100 days later, Mata hired a new lawyer who filed a motion to reopen, claiming Mata’s prior lawyer had rendered ineffective assistance of counsel. The BIA, although recognizing it had authority to equitably toll the 90-day filing restraint, in some cases, declined to do so. Mata filed a petition with the Circuit Court of Appeals to review the BIA decision. But the 5th Circuit Court of Appeals refused. It said it had no jurisdiction to review whether the BIA’s refusal to exercise its authority to reopen cases *sua sponte*, and therein equitably toll the 90 day limitation period.

The Supreme Court stated the circuit court of appeals conflated the issue of jurisdiction with the statutory right to file a motion to reopen and seek review of that decision. Said differently, whether the BIA rejects the alien’s motion to reopen because it is filed after 90 days from the final administrative order, or is inadequate in some other way, does not equate with law that the court of appeals is without power to review that decision. On the merits, perhaps, the BIA’s decision is erroneous. But to get there the Circuit Court has to take jurisdiction over the case, explain why this is or not so, and make a ruling.

On December 9, 2019 the U.S. Supreme Court heard arguments on *Guerrero-Lasprilla v. Barr* (S. Ct. No. 18-776) (*Guerrero*) and *Ovalles v. Barr* (*Ovalles*) S.Ct. No. 18-1015 (2019). The issue presented, is if a noncitizen files an untimely motion to reopen a removal case, explains the reason for the delay, and loses before the BIA, can the Circuit Court of Appeals review that decision? In other words, can Congress strip the Circuit Court of Appeals of jurisdiction to entertain such a motion to reopen? Who gets to make that call? Congress through its cadre of appointed administrative judges, or our judiciary?

In *Guerrero* and *Ovalles*, both were lawful permanent residents and were deported for criminal convictions. Congress stripped federal courts of jurisdiction to hear appeals from removal orders for the crimes they committed. *Guerrero* and *Ovalles* filed motions to reopen over a decade after their removal from the United States. Citing *Resendez* they claimed the right to reopen and they were diligent in filing their motions once *Resendez* was authored. Furthermore, they argued the Supreme Court could take a look at the mixed question of law and fact in determining whether Congress effectively stripped the federal courts of jurisdiction in those types of cases.

Pedro Guerrero-Lasparilla (*Guerrero*) was a lawful permanent resident for 12 years when he was removed for felony drug convictions in 1998. 18 years later in 2016 he filed a motion to reopen claiming a BIA decision (*Matter of Abdelghany* 26 I&N Dec. 254 (BIA 2014), afforded him a basis for relief from the removal order (*i.e.*, a change in law). The IJ and the BIA denied his motion. Since *Abdelghany* had been filed in 2014 both administrative tribunals found Guerrero, in the ensuing two years, had not been diligent in pursuing the motion. In their view, equitable tolling did not apply. In response, Guerrero said he could not have filed his motion until the court of appeals authored its decision in *Resendez* in 2016.

Again as, in *Mata*, the fifth circuit opined it lacked jurisdiction to review the BIA’s decision. It did so, by concluding that whether Guerrero pursued his motion in earnest was a factual question, not a legal one. Because Congress had stripped the courts of jurisdiction to entertain the matter based on the facts of Guerrero’s motion, (and the underlying criminal convictions) namely, the circumstances he undertook to perfect his motion, it had no power to consider it. According to the government it was a factual dispute which Congress had foreclosed our Judiciary from considering.

As we segue into 2020 with the issues of Congressional authority and eviscerating judicial authority to decide cases and controversies perhaps, as judges and advocates we might pause and return to

examine exactly what Article III actually says what it means. Our judiciary gets to interpret the law, not make it. In *Guerrero*, we may see the true extent of Congressional authority to strip federal judges to hear certain types of immigration cases. Article III of the Constitution states the Supreme Court shall have appellate jurisdiction with such exceptions and under such regulations as the Congress shall make (Art III, Sec. 2). But the presumption of judicial review in the face of a statute that seems unclear, may prove

telling. I guess we will see how that goes. The court's opinion will be much anticipated by many of us.

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Joint Authorship of Copyright: UK Court of Appeal Tears Up the Script

BY BEN MILLOY

A dispute concerning the screenplay for the 2016 Hollywood biographical comedy “Florence Foster Jenkins” (FFJ) – a film about a tone-deaf New York socialite who labours under the delusion that she is a talented opera singer – has this month produced a court of appeal decision centering on the parties’ own adjustment to reality. Apart from highlighting a perhaps lesser considered pitfall of working with your other half, the judgment emphasizes the practical difficulties of applying the test of joint authorship in English copyright law.

The matter first arrived at the UK’s Intellectual Property Enterprise Court (IPEC) in 2017, when screenwriter Nicholas Martin brought a claim against opera singer/children’s author Julia Kogan. Mr. Martin and Ms. Kogan had begun a romantic relationship in 2011, and lived together until the breakdown of their relationship in 2014. During that period, early drafts of the FFJ screenplay came into being. Whilst it was accepted that Ms. Kogan had introduced Mr. Martin to the real-life story of FFJ, little else about the creation of the script was agreed.

Mr. Martin, who had made warranties of IP ownership when he sold the rights to

the screenplay, was seeking a declaration that he was the sole author of the copyright. He accepted that Ms. Kogan had provided some “factual observations” and insight into the world of music and musicians. He also accepted that she had acted as a critic and editorial commentator, occasionally contributing ideas for short lines of dialogue (which were never transposed by him verbatim), minor characters and dramatic events.

However, he argued that he “wrote every word and made every decision about what should and should not be included”.

In response, Ms. Kogan counterclaimed that she was the joint author with Mr. Martin. She said the two of them had worked closely together, with Ms. Kogan sometimes doing the typing. In any event, she alleged that they had “bounced ideas off each other with such speed, that it was impossible to know who came up with what... [their] ideas came thick and fast, snowballed and became inseparable.”

The Law

The law on joint authorship of copyright works is set out in section 10(1) of the

Copyright, Designs and Patents Act 1988, which says 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” (emphasis added).

Whilst joint authorship is ultimately a “unitary concept,” caselaw has developed an understanding of each of the statutory components:

- “collaboration” has the idea of people undertaking “jointly to create a work with a common design”;
- “authorship” does not simply refer to the individual who “wields the pen” or “fixes” the copyright work, but also the “skill and effort involved in creating, selecting or gathering the detailed concepts, data or emotions which those words or lines have fixed”;
- any “contribution” must be “authorial” (i.e. that of an author) and “sufficient” (i.e. a “substantial” part of the whole work, judged from a qualitative and quantitative assessment); and
- “not distinct” means that the

contributions are fused (and so neither party can rely on their distinct part).

In addition, the courts have developed a further, non-determinative, consideration; namely, the idea of who has the final say regarding what stays in the work (the so-called “ultimate arbiter”).

IPEC Decision (First Instance)

Mr. Martin was successful in the IPEC, with Judge Hacon finding that he was the sole author of the screenplay.

On the question of collaboration, the judge could not reconcile the parties’ conflicting accounts. Whilst Judge Hacon was careful to state that he considered the evidence to represent each party’s “honestly held views,” he attributed the differences to the “unreliability of human memory” and ultimately placed “little, if any reliance on witnesses’ recollections” (instead, preferring “documentary evidence and agreed facts”).

As to that documentary evidence on Ms. Kogan’s “textual contributions” to the screenplay, Judge Hacon appeared to prefer the evidence of Mr Martin. In particular, he noted: Mr. Martin’s standing as a screenwriter at the time; his strong reaction to Ms Kogan’s suggestion that they might write a script together; his being the “ultimate arbiter” of what went into the screenplay drafts; and certain email correspondence between the two (including an email where Ms. Kogan had accompanied some of her proof-reading suggestions with the comment “please ignore whatever you please of what I say, this is totally your baby”).

Despite the evidential limitations, Judge Hacon was nevertheless able to come to a judgment, concluding that the “textual and non-textual contributions made by Ms Kogan never rose above the level of providing useful jargon, along with helpful criticism and some minor plot suggestions. Taken together they were not sufficient to qualify Ms Kogan as a joint author...even had those contributions all been made in the course of a collaboration.”

Court of Appeal Decision

This month Ms. Kogan had her appeal upheld, with the court of appeal ordering

a retrial of the case. It disapprovingly concluded that the IPEC judgment had “adopted an erroneous approach to the evidence, failed to make important findings of primary fact, failed to take account of material matters and applied incorrect legal standards to the assessment of the sufficiency of Ms. Kogan’s contributions.”

On Judge Hacon’s approach to the evidence, the court of appeal noted that “a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence.” In any event, it considered that there was strong documentary evidence to suggest that the parties were collaborating on the screenplay at the outset, including an email in which Mr Martin referred to Ms Kogan as “[his] special collaborator.” Whilst failing to give proper credence to evidence in favour of Ms. Kogan, the court considered that Judge Hacon had been too quick to interpret comments made by Ms Kogan as suggesting she truly considered Mr. Martin to be the sole author (rather than “mere affectionate encouragement”).

The judgment was also critical of what it perceived to be the development by Judge Hacon of a “novel theory of his own”; namely, that it was clear from case law that “the significance of a contribution depended on the type of skill employed in making that contribution”, as well as a distinction between “primary skills required to create a copyright work and other secondary skills”. In particular, it noted that the IPEC judge had characterised a “primary skill” in a literary work or screenplay to be “the selection and arrangement of words in the course of setting them down” and “secondary skills” (for which there was supposedly a higher bar to show joint authorship) to include “inventing plot and character”. The court found that there was no basis for this distinction, and the person who contributed the ideas (such as plot and character) could be the “major author”. It noted, in particular, that a screenplay is more accurately described as a “dramatic work” under UK copyright law, where “the arrangement of situation and plot” was even more crucial than that of a “literary work.”

The court of appeal also conducted

an assessment of Ms Kogan’s “six best contributions” as set out in the IPEC trial. Contrary to Judge Hacon’s findings, it found that Ms Kogan’s contributions generally were important (either in developing FFJ’s character or the plot). If provided in the course of a collaboration, it considered that these did “deserve to be placed on the scales together with the other evidence to assess whether the combined weight met the threshold for joint authorship.”

Conclusion

IP professionals (and no doubt their clients) will be well-acquainted with the statement that “copyright does not subsist in ideas, but in their expression”. However, this judgment reminds us that matters are not so straightforward. Provided the right criteria are met, a person who is not necessarily composing the words on the page (and might be regarded by the supposed principal creative as a mere sounding board) can find themselves promoted to the status of joint author. This, in turn, implies joint ownership and the need for both parties to reach agreement on the manner that they exploit the copyright.

For creatives embarking on a new project, the sensible move is to make sure that any co-workers or collaborators have assigned their copyright in advance of their starting work. This can clearly be a delicate matter in the context of romantic or plutonic relationships but, as can be seen from this case, the alternative (and the possibility of substantial legal costs) is hardly appealing. Whilst somebody might see themselves as the sole creative force behind a project, as FFJ might attest today, perceptions can be deceiving. ■

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