Timelines And Translations: Copyright Protection Of Historical Research in *Pasternak v Prescott [2022] EWHC 2695 (Ch)*

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3PB

1. Where tales from history are retold, whether as fiction or non-fiction, authors will draw on the earlier writings of others. In *Pasternak v Prescott*[1] the High Court considered how copyright applies to the use of historical research, focusing on two aspects: the protection of the selection, structure and arrangement of facts and incidents; and the use of quotations from historical sources. This includes the first judicial consideration of the defence of quotation for Section 30(1ZA) Copyright, Designs and Patents Act 1988.

Background

2. In 2016 Anna Pasternak ("**Pasternak**"), great-niece of Russian author Boris Pasternak ("**Boris**"), published a non-fiction account of the affair between Boris and his mistress, Olga Ivinskaya ("**Olga**"), which had inspired Boris's novel *Doctor Zhivago*. Pasternak's account was published as "*Lara: The Untold Love Story That Inspired Doctor Zhivago*" ("**Lara**").

3. In 2019, American author Lara Prescott published a fictionalised account of the writing of *Doctor Zhivago*, titled "*The Secrets We Kept*" ("**TSWK**"). This depicted the involvement of the CIA in the publication of *Doctor Zhivago* in the late 1950s and the affair between Boris and Olga, and drew on many published sources including *Lara*.

4. Pasternak started copyright infringement proceedings against Prescott in 2020 based on alleged similarities between *Lara* and the love story elements of TSWK. Two substantive claims were advanced at trial: a "**Selection Claim**", that Prescott had copied the selection, structure and arrangement of facts and incidents which Pasternak had created

[1] [2022] EWHC 2695 (Ch): https://caselaw.nationalarchives.gov.uk/ewhc/ch/2022/2695.

in writing Lara; and a "**Translation Claim**", that Prescott had infringed the copyright in a translation commissioned by Pasternak for the writing of *Lara* and partially published in *Lara* (the "**Legendes Translation**").

Legal Principles

5. The relevant legal principles are set out in Edwin Johnson J's judgment at [83]-[120], citing the Copyright, Designs and Patents Act 1988 (the "**CDPA**"), Directive 2001/29/EC (the "**InfoSoc Directive**"), and UK and EU case law.

6. Copyright protection is limited to parts of a work which are original. The key question in both the Selection Claim and Translation Claim was whether Prescott had copied a substantial part of Pasternak's original intellectual creation in *Lara*. Applying *Infopaq*,[2] 'intellectual creation' means the exercise of "*expressive and creative choices*" in producing the work.[3] Copyright protects expression; it does not protect facts, theories, themes, styles or ideas.[4] Ideas of a non-literary kind, such as matters of historical fact or technical information, cannot be subject to copyright protection.[5]

7. Original expression can include the selection, arrangement and compilation of historical events where the selection and arrangement itself is original.[6] Copying of the selection and arrangement of texts, such as in an anthology of poetry, can infringe copyright in the original work.[7]

8. Copyright is not infringed unless the whole or a 'substantial part' of an original work is copied.[8] A 'substantial part' of a work is protectible if that part "*contain[s] elements which are the expression of the intellectual creation of the author of the work*".[9] The essential consideration is the qualitative question of whether a defendant has taken that which conferred originality on the substantial part of the claimant's copyright work.[10]

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[2] *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 20.
[3] *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482 [2014] R.P.C. 8 per Lewison LJ at [31].
[4] *IPC Media v Highbury* [2004] EWHC 2985 (Ch) per Laddie J at [14], citing Judge Learned Hand in *Nichols v Universal Pictures Co* 45 F 2nd 119 (2nd Cir. 1930; also *Baigent v The Random House Group Ltd [2007] EWCA Civ 247 [2007] F.S.R. 24* per Mummery LJ at [156].
[5] At [97], citing *Designers Guild v Russell Williams (Textiles) Ltd* [2000] 1 W.L.R. 2416 per Lord Hoffmann at 2423A-D.
[6] See e.g. [179].
[7] *Baigent* per Mummery LJ at [141]-[142].
[8] Section 16(3) CDPA.
[9] *Infopaq* at [39]; applied in *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482 [2014] R.P.C. 8 per Lewison LJ at [38].
[10] *Sheeran v Chokri* [2022] F.S.R. 15 per Zacaroli J at [21].

9. A claimant will normally ask the court to infer that copying has taken place by pointing to similarities between the alleged infringement and the copyright work, taking into account evidence of opportunity to copy and motive. However, similarities do not necessarily indicate copying, particularly where the works are based on historical events: the parties may have worked independently from common sources, in similar environments, to achieve similar objectives, and made use of common techniques.[11] Where writers deal with the same historical events, and work from common sources, one must not jump to the conclusion that there has been copying merely because of similarity of historical incidents.[12]

10. Courts can be misled by "similarity by excision": concentration on similarities can lead parties to lose sight of differences between works, which may be just as important in deciding whether copying has taken place.[13] Laddie J in *IPC Media v Highbury* described a 'grains of sand comparison exercise', in which "*similarities and the surprise they elicit are an artefact created by the very process of ignoring all the [differences]*". This should be avoided.

The Selection Claim

11. To set out the Selection Claim, Pasternak had summarised chapters from *Lara* as lists of over 60 individual events. She claimed that the selection and arrangement of those events was protectible by copyright and had been copied by Prescott.

12. Prescott argued that Pasternak's selection of events was too general and abstract to qualify for copyright protection, and was an artificial construct which bore no relation to the actual structure and arrangement of the events of Lara.[14] Despite finding fault with the accuracy of Pasternak's lists, the Judge did not agree. A claimant is entitled to identify a particular selection of events which they allege to have been copied, which need not be an exhaustive statement of the events in their work. However, if (as here) it was in fact only a partial selection of such events, then that could be relevant to the separate question of whether copying had actually taken place, and could be relevant to the risk of similarity by excision.

[11] *IPC* per Laddie J at [10].
[12] *Harman Pictures v Osborne* [1967] 1 WLR 723 per Goff J at 278C-D.
[13] *IPC* per Laddie J at [11]
[14] This point was defined by the judge as "the Baigent Point" (after *Baigent v Random House)* at [180]-[183].

13. Pasternak's selection of events in each chapter did constitute a 'substantial part' of *Lara*, and was protectible. However, that did not mean that the details of each event identified were protected by copyright. Descending to the level of individual detail, there comes a point where one is no longer considering matters protected by the copyright in the *selection* (which was the part of *Lara* which Pasternak claimed had been copied).[15]

14. Prescott had admitted taking some details from *Lara* during her research. However, the Selection Claim failed because no copying of any protectible selection and arrangement of events was established. This included similarities in *Lara* and *TSWK* where:

    (a) the use of common historical sources was the explanation for apparent similarity in the selection of events, which were not in fact copied from Pasternak's work;[16]

    (b) the similarity was in the simple chronological order of historical events;[17]

    (c) the similar detail was commonplace, such as the use of commonplace words and phrases, and the detail was not protected by copyright and/or was not in fact copied;[18]

    (d) the similar concept or idea was obvious in the context,[19] regardless of whether it was in fact copied; and/or

    (e) the similar detail was so trivial that it was "*neither necessary nor possible to determine*" whether or not it was copied from Pasternak's work.[20]

15. Pasternak claimed that the examples of similarity taken together supported an inference of wider copying from *Lara*. The Judge identified an overarching problem with this point:[21] if Prescott had been copying from *Lara* as alleged then one would expect to see much more similarity of detail, but analysis of the two books showed too many differences for an inference of copying to be sustainable. The writing of *TSWK* and *Lara* was different in style and structure. There were many points of difference in the selection of events, the order of events and the context in which those events were placed. All of these differences were consistent with Prescott's case that she had used *Lara* only as a secondary source.[22]

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[15] This point was defined by the judge as "the Selection Copyright Qualification" at [184]-[185].
[16] See e.g. [143], [273].
[17] There can be no copyright in the chronological order of events: at [191].
[18] See e.g. at [275].
[19] See e.g. at [310], [333(2)].
[20] At [204], [208].
[21] This point was defined by the judge as "the Consistency Problem" at [224]-[227].
[22] At [405(2)].

16. Pasternak pointed to details present in the historical sources which had been omitted from both *TSWK* and *Lara*, and asked the court to infer that Prescott had made those omissions because she was copying the selection of events in *Lara*. The Judge was not persuaded; the omission of some of these details suggested "*the reverse of copying, if it demonstrates anything*".[23]

17. In the Judge's view, Pasternak had carried out the illegitimate 'grains of sand' exercise identified by Laddie J in *IPC*. To produce a similar list of events in the two books, Pasternak had ignored a raft of differences and ignored substantial parts of the structure of *TSWK*. Pasternak had pruned her lists of events during the action, which the Judge saw as a significant recognition of the weakness of her case and "*an apt warning, in a case where authors are using common sources and making reference to actual historical events, against assuming copying simply because of a similarity or apparent similarity of events and their selection*".[24] The Selection Claim failed.

The Translation Claim and the Section 30(1ZA) Defence

18. Prescott had admitted copying a short passage of text from *Lara* assuming that it was a historical quote, when it had actually come from the *Legendes Translation* commissioned by Pasternak. The passage was a summary of Olga's alleged political crimes, apparently as spoken by the prosecuting authority. The Judge held that it should have occurred to Prescott that the passage must have been translated by someone: it was clear in context that it would not originally have been spoken or written in English.[25] There was no acknowledgement in *TSWK* and the author of the translation was not identified.

19. Copyright can protect a translation of text from one language to another. A translator will normally have exercised their own creativity in choosing how to express the original subject matter in translation.[26]

20. Prescott raised the defence of quotation under Section 30(1ZA) CDPA, which came into force in 2014, and which provides as follows:[27]

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[23] At [380].
[24] At [176].
[25] At [451].
[26] At [423].
[27] Section 30(1ZA) was introduced to the CDPA by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014/2356 reg.3(4), pursuant to Article 5(3)(d) of the Infosoc Directive and Article 10(1) of the Berne Convention:

(1ZA) Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that—

(a) *the work has been made available to the public* [satisfied in this case],

(b) *the use of the quotation is fair dealing with the work,*

(c) *the extent of the quotation is no more than is required by the specific purpose for which it is used* [satisfied in this case]*, and*

(d) *the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).*

21. Fair dealing: s.30(1ZA)(b)

Fair dealing is a matter of fact, degree and impression. Three factors are particularly important: whether the alleged fair dealing is commercially competing with the copyright proprietor's exploitation of the copyright work; whether the copyright work has already been published or otherwise exposed to the public; and the amount and importance of the work that has been taken.[28]

22. Prescott was not in commercial competition with the *Legendes Translation*, which had no independent function other than to assist Pasternak in the writing of *Lara*. The quotation was short, and was a small part of the *Legendes Translation*. In *TSWK* it was used only to set out factual detail. Prescott had acted in good faith, and her use of the extract was fair dealing.[29]

23. Sufficient acknowledgement and reasonable inquiry: s.30(1ZA)(d) and s.178

"Sufficient acknowledgement" is defined in Section 178 CDPA as follows:

"sufficient acknowledgement" means an acknowledgement identifying the work in question by its title or other description, and identifying the author unless-

(a) *in the case of a published work, it is published anonymously;*

(b) *in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry;*

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https://www.legislation.gov.uk/uksi/2014/2356/pdfs/uksiem_20142356_en.pdf.

[28] *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142 [2002] Ch. 149 per Lord Phillips MR at [70], summarised from Laddie, Prescott & Vitoria, The Modern Law of Copyright and Designs, 3rd Edition (2000) at paragraph 20.16.

[29] At [453].

24. The *Legendes Translation* was not itself a published work, so fell under Section 178(b). The question became whether it was not possible for Prescott to ascertain the identity of its author by 'reasonable inquiry', given that its author had not been identified in *Lara*.

25. The judge gave guidance on what constitutes 'reasonable inquiry'. It requires the identification of all reasonable inquiries which ***could*** have been made in the relevant case. Then one must consider whether, if all of those reasonable inquiries had been made, it would still not have been possible to ascertain the identity of the author by those reasonable inquiries.[30]

26. If an author makes inquiries but is provided with incomplete information or met with a refusal to provide any information, then they would have made 'reasonable inquiry' for s.178(b) and the s.30(1ZA) defence would be made out. In that situation, section 30(1ZA)(d) provides a "*double layer of protection for an author who has failed to prove an acknowledgement of a quotation*" because sufficient acknowledgement would also be 'impossible for reasons of practicality or otherwise'. [31]

27. *Lara* attributed the extract to a work with a French title by a Russian author, which should have alerted Prescott to the fact that the extract in English was or might have been a translation subject to its own copyright protection.[32] She should have appreciated that an acknowledgement of the author of the translation might be required. She had made no inquiries of the Claimant to ascertain the identity of the author. For this reason the s.30(1ZA) defence failed and the Translation Claim succeeded.

Comment

28. This judgment gives plentiful guidance on how not to approach a literary copyright claim. In addition to Pasternak's 'grains of sand' comparison exercise, her summary of the events of her own book was criticised as inaccurate, and she had, extraordinarily for a copyright action, never read the book which she claimed infringed her copyright. Her motivation for the claim did not come from the similar content of the books, but from the perception of a form of 'identity theft' in Prescott telling an 'untold' story which Pasternak "*had very clearly told*" before. [33]

[30] At [468]-[475].
[31] At [482].
[32] At [470].
[33] At [74].

29. That is not to say that such claims cannot be successful. The bar for copyright protection in a selection copying claim is low: even where the selection of events is not comprehensive (or accurate), it can constitute a substantial part of a chapter and thereby a substantial part of the work as a whole. In one chapter of *Lara*, the selection of only five out of thirteen 'events' was held to be a substantial part of the whole work.[34]

30. Originality is critical to copyright protection. A defendant does not infringe unless they copy the part of a work which contains elements of the expression of the intellectual creation of the author of that work. If (as here) the order of a historical chronology and trivial, commonplace or obvious details or ideas are not original, they will not be protectable by copyright.

31. Further difficulties come in proving that copying took place, which cannot always be inferred from similarities alone. The differences in the tests for subsistence and copying of a 'substantial part' of a work are subtle, and the question of originality is fact-specific. A court may not infer copying even where there are numerous identifiable similarities between works: here, Pasternak pointed to over 60 similar 'events' but her Selection Claim still failed.

32. A claimant is expected to conduct a full and fair comparison between works. They should not overlook differences when considering similarities, and they should heed warnings against 'similarity by excision'. If the allegedly copied elements are present in other historical sources which a defendant has researched independently, then mere similarities between works will not raise an inference of copying.

33. Authors drawing from historical sources will be expected to consider whether a quoted text is likely to be a translation with its own copyright protection. It may be clear from the context that the original words will have been communicated in a different language from that in which they are written. Authors should acknowledge the translator, or demonstrate that 'reasonable inquiries' have been made. The quotation defence has two layers of protection where no acknowledgement has been provided: firstly, where Section 178(a) or (b) CDPA apply and no acknowledgement is required; and secondly, where acknowledgement would have been impossible for reasons of practicality or otherwise for Section 30(1ZA)(d) CDPA.

34. Researchers have no monopoly over historical fact, but authors of history and historical fiction alike should not rely too heavily on any one historian's expression of their

[34] At [322].

research. Drawing from a wide base of scholarship, as Prescott did in this case, is always prudent. As the saying goes, "*if you copy from one book, that's plagiarism; if you copy from many books, that's research*".[35]

Mark Wilden worked closely with Carpmaels & Ransford LLP in Prescott's defence of this claim.

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[35] https://quoteinvestigator.com/2010/09/20/plagiarism/.