

Oxford International Intellectual Property Moot 2023

Instructions

The 2023 moot concerns *Bouvier v Erewhonian Airlines* [2022] HCE 213. A copy of this case is included in the pages that follow, along with relevant statutory provisions and a list of the cases referred to by Justice Chen-Wishart.

At first instance in the High Court of Erewhon, the Honourable Justice Chen-Wishart held that:

1. A film can constitute a dramatic work for the purposes of Erewhonian copyright law. The motion picture, *The Substitute*, is protected as a dramatic work and as a film.
2. The authors of *The Substitute* are as follows:
 - a. As a dramatic work – the director, Ms Webb, is the author. Ms Bouvier is not a joint author in her capacity as Director of Photography.
 - b. As a film – the joint authors are Ms Webb (as director and producer) and Ms Bouvier (as producer). They are joint owners of copyright in the film.
3. There was no infringement of copyright in *The Substitute* as a film by copying three extracts from that work in the short film, *Takeoffs*.
 - a. The extracts constituted a substantial part of *The Substitute*.
 - b. However, copying the extracts was a fair dealing for the purpose of pastiche.
4. Had Ms Bouvier been an owner of copyright in *The Substitute* as a dramatic work, it would have been held that there was no infringement by the creation of a lookalike sequence in EA's new Flight Safety Video.
 - a. A substantial part of *The Substitute* was reproduced in the Safety Video.
 - b. However, this reproduction was a fair dealing for the purpose of pastiche.
5. Had Ms Bouvier been an author of *The Substitute* as a dramatic work, her claim for infringement of her integrity right would have failed as there was no derogatory treatment.

The claimant was granted leave to appeal from this judgment in relation to Items 2(a), 3(b), 4(b) and 5; and the defendant was granted leave to appeal in relation to Items 1 and 3(a). The defendant did not seek leave to appeal Items 2(b) and 4(a). The Court of Appeal upheld (without releasing a substantive opinion) the decision of Justice Chen-Wishart and dismissed the appeal and cross-appeal. The parties have been granted leave to bring a further appeal to the Supreme Court of Erewhon.

It is your task to prepare written and (for teams that are invited to the Oral Proceedings in March 2023) oral submissions for this appeal.

Some points to consider:

- a. Each written submission must cover all issues on appeal, i.e. set out the arguments on Items 1, 2(a), 3(a), 3(b), 4(b) and 5 in the list above. Present these arguments in the order that you consider to be most logical. Do not worry about the presence of the appeal and cross-appeal, such that the claimant is sometimes the appellant and sometimes the cross-respondent.
- b. Whilst you are encouraged, within the grounds of appeal, to present arguments and authorities not mentioned by Justice Chen-Wishart, you should not seek to introduce entirely new causes of action, press arguments that have been conceded or that were never ventilated in the original proceedings, or press matters outside the appeal. For instance, you may not seek to argue that the use of extracts in *Takeoffs* was a fair dealing for the purpose of quotation.
- c. Erewhon is a common law jurisdiction, and the opinion of Justice Chen-Wishart includes reference to a number of cases. For the purposes of the written submissions, it is expected that you will deal with these cases as appropriate, and you risk missing out on credit if you omit any analysis of them. However, these references are **not** intended to constitute your sole authorities for the moot, and indeed you are expected to rely on other primary and secondary materials. The emphasis you give to any particular authority (including those cited by Justice Chen-Wishart) is up to you, although the Panel will not look favourably upon strong reliance on an unduly narrow spectrum of authorities.
- d. Appeals to the Supreme Court are on points of law only, although it is permissible to challenge the legal conclusions that arise from findings of fact.
- e. Although the moot is held in the UK, this is an international competition and you are not limited in the jurisdictions from which you use authority. You may therefore use cases from around the world. Ensure you make it clear why any given case is relevant to the legal issues in dispute. It is also permissible to cite academic commentary in support of your legal arguments.
- f. Erewhon is not a member of the European Union. It is a party to the Berne Convention and is a member of the World Trade Organization and signatory to the TRIPS Agreement. Treaties are not self-executing in Erewhon.
- g. Requirements for your written submissions are contained in §14 of the Rules. The following is some additional guidance:
 - i. You do not need to include such things as a table of contents, statement of jurisdiction, statement of facts, index of authorities, etc. Submissions should focus on the substantive matters raised in the appeal.
 - ii. When marking your submissions, the Panel will be instructed not to give extra credit for court headings and other flourishes that merely give the

submissions the superficial 'look' of an official court document. Credit may be awarded for a presentation style that facilitates the arguments being made (for instance, in the content and number of headings, the use of a logical paragraph numbering system, and so forth). You should not, therefore, be worried about purely stylistic matters when constructing your submissions.

- iii. The word count includes all the text in the footnotes. It is recommended that footnotes are used primarily for citation purposes, and that you minimise the amount of substantive text that appears in the footnotes.
- iv. There is no prescribed style guide for the submissions. Teams should, however: (i) maintain consistency of style throughout each submission; (ii) include full citations for sources on which they rely (at least the first time any given source is cited); and (iii) ensure that whenever they *quote* from a source, a pinpoint reference is included to the relevant page number and/or paragraph.
- v. Justice Chen-Wishart is a woman. You may refer to her as 'Chen-Wishart J' and 'Her Honour' in your written submissions.

Any requests for clarifications of or corrections to the moot problem should be directed to the Moot Secretary at moot@oiprc.ox.ac.uk by **midday** on **Thursday 3 November 2022** (Oxford time). Requests should note the paragraph number to which they relate and explain why the requested information is expected to have legal significance for the problem. If any clarifications or corrections are deemed necessary by the Organising Committee (OC), these will be released on the moot website by the end of **Tuesday 15 November 2022**. The OC will not respond individually to any requests for clarifications or corrections, nor will it respond to requests that are seeking assistance with substantive aspects of the moot.

Your submissions must be received by the Moot Secretary (at the email address above) by **midday** on **Tuesday 13 December 2022**, Oxford time; see further §15-§16 of the Rules. As noted there, within their written submissions, teams must identify themselves **only** by use of the anonymous identifier given to them in advance by the Moot Secretary. To apply for this identifier, you should email the Moot Secretary **well before** the submission deadline.

The registration process will not open until *after* invitations have been issued to compete at the oral rounds. These invitations will be issued in mid-late January 2022. **Only those teams who are invited to the oral rounds will need to register and pay the registration fee.**

To keep apprised of announcements and news in relation to the moot (#OxIPMoot), please follow us on Twitter: **@OxIPMoot**.

Before:

THE HONOURABLE JUSTICE CHEN-WISHART

Between:

Ingrid Bouvier

- and -

Erewhonian Airlines

Justice Chen-Wishart:

[1] This case relates to the motion picture, *The Substitute*, directed by Charlotte Webb and released in 2007. *The Substitute* is a modern classic of Erewhonian cinema. It was released to critical acclaim and won numerous awards, including for acting, direction, screenplay, cinematography, costume design and musical score. Ingrid Bouvier, who brings these proceedings, had two roles in the *The Substitute*: first, she was its Director of Photography (i.e. cinematographer), and second, she co-produced the film with Ms Webb. The defendant is Erewhonian Airlines ('EA'). Ms Bouvier claims that EA infringed copyright in *The Substitute* in two ways: first, it included a 'lookalike' sequence that reproduced a substantial part of *The Substitute* in its 2022 Flight Safety Video ('Safety Video'); and second, extracts from *The Substitute* were included in a short film, *Takeoffs*, that EA has played in its business class lounges.

[2] In order to understand Ms Bouvier's claims, I will start by providing a synopsis of *The Substitute*, including its iconic final scene, along with the two allegedly infringing works: the Safety Video and *Takeoffs*. I will then turn to subsistence of copyright in *The Substitute*, and in particular whether it is a dramatic work in addition to being a film. This is crucial, as Ms Bouvier's claims in relation to the Safety Video would seem to be dependent on *The Substitute* being a dramatic work for which she is the author. I have found that *The Substitute* is a dramatic work, however, in my view the author of that work is the director, Ms Webb, meaning that Ms Bouvier's claims in relation to the Safety Video must fail. However, given the significance of this case, I have set out what I would have found in relation to infringement, fair dealing and the moral rights claim. For film copyright, for which Ms Bouvier is clearly an author and owner, I have concluded that a substantial part of *The Substitute* was copied in *Takeoffs*, however, there is no infringement as the defence of fair dealing for the purpose of pastiche applies.

Description of the works in this dispute

The Substitute

[3] *The Substitute* is 95 minutes long and is set in the early 1950s in Princess Cove, a small town on the southern coast of Erewhon. The film centres on Eliza Sharkey, an eleven year old girl who attends Princess Cove College, a school with around 50 pupils. Eliza is struggling to find her place in the world. She loves her family but finds it difficult to fit in. Eliza is serious, cerebral and prone to anxiety. She enjoys music and reading. Eliza's father and brother, on the other hand, are laid-back to the point of laziness. Both avoid hard work, whether at work or school. Eliza's endlessly patient mother is left to do almost all of the emotional and physical labour to keep the household going, a point that is not lost on Eliza.

[4] One day, Eliza goes to school to find that her regular teacher has taken leave of absence to recover from an illness. The substitute teacher is Miss Bergstrom, whose intelligence and passion for education are immediately obvious to Eliza and the other children. In the first lesson, on the gold rush era of 1860s Erewhon, Miss Bergstrom attends class in full costume and regales the students with stories from that time. Miss Bergstrom has unconventional teaching methods, a fact that goes down poorly with the school principal but very well with the students. We learn that in addition to being intellectually adventurous, Miss Bergstrom is actually adventurous – she has a pilot's licence and owns her own small plane, which she flew to Princess Cove. A number of sequences, including the final scene, are of Miss Bergstrom flying her plane. The evidence before me demonstrates that these aviation sequences have been the subject of considerable praise from film critics and other members of the film industry. One user of IMDb, giving *The Substitute* ten out of ten, even titled their review, '*Dead Poets Society* meets *Top Gun*'.

[5] Miss Bergstrom is the adult role model Eliza never had. Eliza is able to speak with Miss Bergstrom about her dreams and insecurities, and Miss Bergstrom helps Eliza to connect better with Eliza's family. On the final day of term, Eliza goes to Miss Bergstrom's classroom to invite her to a family dinner over the break. She finds Miss Bergstrom packing her school things into a briefcase. Miss Bergstrom explains that the regular teacher is better and will be returning next term. Sadly, Miss Bergstrom needs to fly immediately to the west of Erewhon for another role. Eliza is inconsolable and says she will never have another teacher as good as Miss Bergstrom. Miss Bergstrom sits Eliza down and explains that she is sorry to be leaving but that Eliza has everything she needs. Miss Bergstrom gives Eliza a card and tells her whenever she is feeling lonely or scared, she should read the card. Eliza gives Miss Bergstrom a hug goodbye and makes her way to assembly. As Eliza is entering the assembly hall, she observes one of the other teachers, Miss Simpson, fighting back tears as she reads a card on the same notepaper. Eliza opens her own card; in it is written the message, 'You are Eliza Sharkey'.

[6] The movie cuts to the final scene. Miss Bergstrom is shown walking across the playground carrying a briefcase in one hand and a suitcase in the other. The assembly hall, from which we can hear children singing, perches high in the background. Miss Bergstrom pushes through a small gate and walks onto a field where her plane is waiting. The camera follows her as she climbs into the plane and settles into the pilot's seat. The next shot is of the propellor starting. The camera angle then shifts to behind the plane, where we see that the field is next to the ocean, and that there is only a small amount of terrain before a cliff to the water below. Miss Bergstrom accelerates towards the cliff; with only metres to spare, the plane leaves the ground. The plane heads out over the ocean, before taking a right turn. The final moments of the film show Miss Bergstrom flying along the Erewhonian coast, including over the famous 'Seven Sisters' rock formation. This footage was captured from a second plane that followed Miss Bergstrom's journey. The credits then begin to roll.

The Safety Video

[7] EA released a new Safety Video in April 2022. EA wanted this video to be strongly connected to its brand values and its status as national carrier of Erewhon. It decided that it would create a video that was inspired by scenes from famous Erewhonian films. The seven minute video covers all the usual safety information, such as how to use one's seatbelt, where to find and how to put on one's lifejacket, correct procedure for wearing oxygen masks, the brace position, the location of the exits, and evacuation procedures. For each element, the information is presented in a way that draws from the source film, for instance the scenery, costumes, storyline, and so forth; plus the name of the source work appears briefly on the screen. The Safety Video was created under the leadership of employee, Otto McManus, a member of staff who has considerable expertise in film production. The budget was well over ED\$800,000, given the personnel, special equipment and actors required.

[8] The seatbelt component – which takes 45 seconds of the entire Safety Video – is inspired by the final scene in *The Substitute*. The same filming location is used, and the scene starts with a woman walking across the same schoolyard that Miss Bergstrom did, with the same assembly hall in the background. The woman is wearing 1950s-style pilot clothing. She walks through a gate and towards a similar propeller aircraft to that in *The Substitute*. As she is walking, she looks to the camera and says:

Seatbelts have improved a lot since they were first introduced on planes. Here's how to use yours.

She climbs into the plane and sits in the pilot's seat. The next shot is of the lap of the woman, where she demonstrates the instructions described in the voiceover (with a modern seatbelt, for avoidance of any doubt). The voiceover says:

Fasten your seatbelt by inserting the clasp into the buckle. Tighten by pulling the strap. You can undo your seatbelt by pressing the button.

The next shot is taken from behind the plane, which at that point is stationary. The plane starts to accelerate towards the cliff edge. Once the plane is airborne and has executed its right turn, the Safety Video shows the plane heading towards the Seven Sisters (which are visible in the distance). This footage was taken from a drone hovering above the cliff edge. The voiceover (which resumes when the plane starts moving down the 'runway') says:

Keep your seatbelt done up low and tight during takeoff, landing and whenever the seatbelt sign is on. That includes infants and children. When seated at other times, we recommend you keep your seatbelt fastened.

The Safety Video then cuts to the next element, in relation to lifejackets.

[9] EA did not request a licence from Ms Webb, Ms Bouvier or anyone else in relation to its use of elements inspired by *The Substitute*. Mr McManus gave evidence that he once attended a public lecture given by Ms Webb in relation to her experiences directing *The Substitute*. This included how they selected the locations for filming and how they handled the aviation scenes. Mr McManus drew from this knowledge, along with watching *The Substitute*, when directing the seatbelt scene for the Safety Video.

Takeoffs

[10] The short film, *Takeoffs*, was created by Mr McManus. It is 14 minutes long. There is no original footage in the film – *Takeoffs* was created by carefully editing together short extracts from other films, including motion pictures, documentaries, actuality footage, livestreams and CCTV. Some of the extracts are as short as five seconds; the longest one is fifteen seconds. They are edited together to produce ten takeoffs in which the plane is shown taxiing to the top of the runway, accelerating down the runway, becoming airborne, and then climbing into the air. The editing is done so that, for each takeoff, the transition between each clip is as seamless as possible. For instance, Mr McManus gave evidence that, for the climb phase, he would do his best to calculate the altitude of the plane, so that the next extract would be a plane at that altitude. The clips are of varying ages and locations and show different plane types. The camera angles vary, although as I just noted, the editing is intended to give the impression of a single uninterrupted journey for each takeoff. The resulting product is extremely engaging, even for the aviation non-enthusiast like myself. Mr McManus did not clear the rights for any of the extracts.

[11] In making *Takeoffs*, Mr McManus used three clips from *The Substitute*, being: (1) a five second extract of Miss Bergstrom's plane flying over agricultural land in southern Erewhon, this coming from the middle of the film where Miss Bergstrom takes Miss Simpson on a picnic; (2) another five second clip, this one taken from the reverse-angle shot of Ms Bergstrom's plane accelerating towards the cliff in the final scene of *The Substitute*; and (3) a seven second clip of Uncle Anny, Miss Bergstrom's favourite relative, driving his own light plane towards the runway at Princess Cove airfields. These clips were taken from a DVD of *The Substitute* owned by Mr McManus.

[12] Ms Bouvier did not suggest that *Takeoffs* was made in the course of employment. Mr McManus, who is a video artist, explained that directing the Safety Video provided some creative inspiration for *Takeoffs*, which was created by him at around the same time. However, *Takeoffs* was produced entirely in his own time, and there can be no suggestion that making *Takeoffs* was within the scope of Mr McManus's duties. Rather, Ms Bouvier's complaint relates to EA playing *Takeoffs* in its business class lounges in Erewhon. Each lounge includes a space that is used to 'celebrate and promote' major Erewhonian events and other forms of artistic and cultural production. In the past, this has included displaying paintings by Erewhonian artists, and installing a giant model of an A380 plane constructed entirely out of Lego bricks when there was a Lego-themed exhibition at the National Gallery of Erewhon. In May 2022, EA used this space to celebrate four Erewhonian video artists, including Mr McManus. *Takeoffs* has been shown as part of this exhibition. The information panel in relation to Mr McManus provides information about him and his work, including that he is an employee of EA and directed the Safety Video.

Subsistence

[13] In order for Ms Bouvier to prevail in her claims, *The Substitute* must fall within the exhaustive categories of subject matter in section 2(1) of the Copyright Act 1997. Ms Bouvier argued that *The Substitute* is a film, a point that was accepted by EA, and which is clearly correct, given the definition of 'film' in section 1 of the Act. However, the parties differed over whether *The Substitute* is also an original dramatic work. Arguments focused solely on whether the category 'dramatic work' includes films, it being accepted by EA that if *The Substitute* falls within this category, it is original.

[14] In Erewhon, the term 'dramatic work' is defined in section 1 to include 'a work of dance or mime'. This can be contrasted with jurisdictions in which the statutory definition of dramatic work either excludes films (e.g., Copyright Act 2021 (Singapore), s. 15(1)) or includes them (e.g., Copyright Act RSC 1985, c. C-42 (Canada), s 2 (definition of dramatic work)). It can also be contrasted with countries that list cinematographic works as a category of authorial works: e.g., Act on Copyright and Related Rights (Germany), ss. 2(1).

[15] In the absence of any express indications in the Erewhonian definition, should I read 'dramatic work' to include films? Mr Tiny KC, counsel for Ms Bouvier, suggested that I adopt the same approach as the Court of Appeal of England and Wales in *Norowzian v Arks (No 2)* [2000] FSR 363. In that case, which also considered the status of a film, it was held that the phrase 'dramatic work' was 'at large' and should be given its ordinary meaning. Nourse LJ said at p. 367:

My own [definition] would be this: a dramatic work is a work of action, with or without words or music, which is capable of being performed before an audience. A film will often, though not always, be a work of action and it is capable of being performed before an audience. It can therefore fall within the

expression 'dramatic work' in section 1(1)(a) [of the CDPA 1988] and I disagree with the judge's reasons for excluding it.

[16] Ms Jam KC, counsel for EA, pointed to a number of reasons why the category 'dramatic work' should not include films. She argued that such an interpretation would conflict with the structure and language of the Erewonian copyright statute, in which there is already a category for 'films', which is defined broadly, and for which the 'authors' are the principal director and the producer: section 8(2)(b). She argued that I should understand the category 'films' to be, in effect, a hybrid of an authorial and an entrepreneurial work. Concluding that some films can also constitute dramatic works would create uncertainty and undesirable complexity.

[17] Overall, I prefer the approach of the claimant to the definition of dramatic work. Nourse LJ was correct that the definition of 'dramatic work' should be given its ordinary meaning, and I was also swayed by the observations of Buxton LJ that this interpretation of 'dramatic work' is the only one that permits Erewon to comply with its obligation under the Berne Convention. As such, on the first question, in relation to subsistence, I conclude that *The Substitute* is protected as an original dramatic work and as a film.

Authorship & Ownership

[18] My second task is to determine authorship of *The Substitute* as a dramatic work and as a film. This is a crucial step for ascertaining whether Ms Bouvier owns copyright and enjoys moral rights. If she is not an author of the dramatic work, her claim for moral rights will fail, as she conceded she is not a 'director' for the purposes of those provisions. For copyright, Ms Bouvier must show standing to enforce rights, which in this case requires her to be an author (and hence first owner) of copyright, as she did not introduce any evidence to suggest an assignment or exclusive licence of rights in her favour.

[19] I shall start with film copyright, as this is the most straightforward. Section 8(1) of the Copyright Act says that the 'author' of a work is 'the person who creates it'. The next subsection contains further guidance in relation to the identity of this person, including that for films, 'that person shall be taken to be ... the producer and the principal director': s. 8(2)(b). Producer is defined as 'the person by whom the arrangements necessary for the making of the ... film are undertaken': s. 1. Principal director is not defined, but would seem to be 'the person who had creative control of the making of the film': *Slater v Wimmer* [2012] EWPC 7, para. 72. Thus, even if Ms Bouvier contributed to the creative vision of the film in her role as Director of Photography – which she undoubtedly did – she is not the 'principal director'. That person is Ms Webb. That said, entirely separate to Ms Bouvier's role as cinematographer, she co-produced *The Substitute* with Ms Webb. As such, Ms Bouvier is a joint owner of the film copyright with Ms Webb. EA did not seek to resist this conclusion in relation to ownership of the film copyright.

[20] In contrast, EA argued that if, contrary to its submissions on subsistence, *The Substitute* is also a dramatic work, Ms Bouvier is not an author of that work. Authorship was not discussed in *Norowzian (No 2)*, perhaps because Mr Norowzian was the only realistic candidate to be the author. However, it is necessary to confront this question, as many films are mass collaborative works involving the creative efforts of a large number of people. While some might be able to claim copyright in some discrete, severable element of the film, the claims of others can only be to the film as a whole. For these people, whether they are joint authors will involve application of the test of joint authorship in section 8(6) of the Copyright Act: 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'.

[21] My concern with applying this test to films is that recognition of a long list of authors would lead to great difficulties in the management and exploitation of film copyright. This is especially so in a jurisdiction like Erewhon, in which the cooperation of all copyright owners is required for licensing and exploitation. That is, like the UK, a licence must be given by or on behalf of all copyright owners, and one owner can enforce rights against another owner who uses the work outside any express or implied permission: *Slater v Wimmer*, paras 88-90.

[22] Ms Jam pointed me to the US case, *Aalmuhammed v Lee*, 202 F 3d 1227 (9th circuit, 2000), which echoes these concerns. That case considered whether the film *Malcolm X* was a 'joint work' under US copyright law for which Jefri Aalmuhammed (credited as 'Islamic technical consultant') was an author. Mr Aalmuhammed made numerous contributions to that film, including suggesting changes to the script to ensure the film's historical and religious accuracy, directing actors on set, creating two new scenes, translating Arabic into English, and editing parts of the movie. In considering whether these contributions were authorial, Judge Kleinfeld was concerned that if the bar were set too low, such that anyone who made a substantial creative contribution was an author, the 'test' would not distinguish one putative 'author' from another:

Everyone from the producer and director to casting director, costumer, hairstylist, and "best boy" gets listed in the movie credits because all of their creative contributions really do matter. (at p. 1233)

In Judge Kleinfeld's view, it is not enough to make a creative contribution, even if significant. The legal test for authorship should ask who 'superintended' the work, i.e. who was the 'master mind':

In a movie this definition, in the absence of a contract to the contrary, would generally limit authorship to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter — someone who has artistic control. (at p. 1233)

Ms Jam argued that taking this approach, which prioritised creative control (and not just contribution), the master mind was Ms Webb.

[23] Mr Tiny accepted the thrust of my concerns about a mammoth authorial group but submitted that the approach in cases like *Aalmuhammed* was unduly restrictive and represented pragmatism over principle. He argued that dramatic works are ‘works of action’ (*Norowzian v Arks (No 2)*, p. 367), and that for a film, the ‘action’ – the story arc, message or drama – is created through the interplay of visual imagery, dialogue, musical score, sound, and so forth. In fact, he argued that cinematographers have a particularly strong claim to authorship, being responsible for creating the visual image. He referred me to evidence given by Ms Bouvier (which I accept) in relation to her role as Director of Photography on *The Substitute*. During the pre-production phase, this included: reviewing the script to devise a look and visual approach for the film, in consultation with Ms Webb and other colleagues; providing input into the selection of filming locations; and a great deal of technical planning in relation to the equipment, locations and crew, including, for the flight scenes, research into the weather conditions, sun position and likely filming challenges, and devising and testing plans to obtain the required shots. During the production phase, Ms Bouvier, amongst other things: watched rehearsals to fine-tune shooting plans in consultation with Ms Webb; designed and set up the lighting; and oversaw the actual photography of the film. Ms Bouvier had less of a role in post-production, although she gave input into the editing process and arranged for additional photography to be undertaken.

[24] Did these acts – which were no doubt creatively significant to the film – render Ms Bouvier a co-author? I agree with Judge Kleinfeld and others regarding the dangers of too loose a test of authorship, and that for films, creative control helps distinguish authorial from non-authorial contributions. The evidence suggests that creative responsibility for *The Substitute* was with Ms Webb. Although the screenwriter, cinematographer and editor each made contributions, these were under Ms Webb’s control and coordination. She could require that revisions be made to the script. She guided the look and feel of the film across multiple parameters, including directing the actors and working with the crew in relation to the sound and cinematography. She conveyed her creative vision to the editor during the post-production phase. I accept the evidence that Ms Webb did not micro-manage the film, instead encouraging Ms Bouvier (and others) to make their own artistic and technical decisions. However, Ms Bouvier was implementing Ms Webb’s creative vision, and Ms Webb had the final say. As such, Ms Bouvier is not an author of the resulting dramatic work, which in my view was authored solely by Ms Webb.

[25] In conclusion, Ms Webb is the sole author and owner of copyright in *The Substitute* as an original dramatic work, there being nothing in the contractual arrangements to assign rights to another individual. Ms Bouvier is joint owner of the film copyright in her capacity as producer of *The Substitute*.

Copyright Infringement

[26] Ms Bouvier made two complaints. The first was that copyright in *The Substitute* was infringed by the making of a lookalike sequence in the Safety Video. This claim fails, as Ms Bouvier does not have the necessary rights to bring this action. She owns film copyright, for which the reproduction right pertains only to making copies of the recording: *Norowzian v Arks Ltd (No 1)* [1998] FSR 394. It does not extend to reshooting the film. Had I held that Ms Bouvier was an author of *The Substitute* as a dramatic work (which copyright is ‘thick’ and extends to reshooting), I would have held that EA reproduced a substantial part of that work and had prima facie infringed copyright. Substantial part is judged by reference to the claimant’s work and is a qualitative test: even if quantitatively short, a part may still be a ‘substantial part’ if it is a vital or material part: *Boomerang Investments Pty Ltd v Padgett (Liability)* [2020] FCA 535, para 203. In this case, EA did not copy the (unprotectable) idea of a plane taking off near a cliff. It took an iconic scene – a recognisable and memorable part of the source work – and used the same location and broadly the same sequence of events and filming choices.

[27] Ms Bouvier’s second complaint relates to the copying of three extracts from *The Substitute* in *Takeoffs*. Although EA did not create this work or authorise its creation, it played *Takeoffs* in public through showing it in its business class lounges. This is an exclusive right for film copyright: Copyright Act, s. 9(4)(b). EA may therefore be liable for copyright infringement if *Takeoffs* contains infringing content.

[28] The core of EA’s submissions on infringement was that *Takeoffs* did not copy a substantial part of *The Substitute*. Ms Jam pointed out that the three clips amounted to only 17 seconds from a film that was of 95 minutes duration. To the extent that qualitative considerations were relevant, two clips were of scenes that were not a distinctive part of the film (the picnic scene and Uncle Anny), and the other one, although a significant moment (the final scene), was not a substantial part as it was only five seconds long and excluded much of the surrounding content (especially Miss Bergstrom, the school assembly hall and the Seven Sisters).

[29] Mr Tiny argued that in assessing substantial part, the three clips could be aggregated, and that despite omitting the surrounding content, the clip of the final scene was still immediately recognisable. However, he also submitted that substantial part is assessed differently for films compared with dramatic works. He directed me to the judgment of the Court of Justice of the European Union in *Pelham GmbH v Hütter* (C-476/17) [2019] ECDR 26, where it was held that reproduction of a sound sample from a phonogram, even if ‘very short’, was a reproduction ‘in part’ for the purposes of the Information Society Directive, unless it was modified to be unrecognisable to the ear. I was struck by the importance, in that case, of the goal of the Directive not only to establish a high level of protection of copyright and related rights but also:

the specific objective of the exclusive right of the phonogram producer, referred to in recital (10), which is to protect a phonogram producer’s investment. As

stated in that recital, the investment required to produce products such as phonograms, is considerable to such an extent that it is necessary in order to guarantee phonogram producers the opportunity of satisfactory returns.
(para 30)

[30] I agree with Mr Tiny that the same can be said of the investment of the producer of a film. Indeed, the evidence from Ms Bouvier (which I accept) demonstrates that shooting the flying scenes were particularly resource-intensive, given the need to hire functioning 1950s planes, hire pilots (the actors not actually flying the planes), secure large locations for filming, and so forth. The photography of these scenes was not straightforward either, and indeed for a number of sequences – including the final shot over the Seven Sisters and the footage of Miss Bergstrom flying over agricultural lands after her picnic with Miss Simpson – the camerawork was done from a second plane. I am taken by the need to protect the investment of producers in creating sequences such as these. As such, irrespective of the dramatic significance of these three scenes for *The Substitute*, they were all significant to the producers' investment.

[31] In conclusion, *Takeoffs* copied a substantial part from *The Substitute*. Unless a defence applies, EA will be liable for copyright infringement by playing *Takeoffs* in its business class lounges.

Fair dealing

[32] EA argued that even if it prima facie infringed copyright in *The Substitute* through its acts with the Safety Video and *Takeoffs*, these acts fell within fair dealing for the purpose of pastiche in section 45A of the Copyright Act. I agree, and given this defence is a recent addition to the statute, will set out my reasoning for both works, even though fair dealing is only a live issue for *Takeoffs*.

[33] In reaching my conclusions on pastiche, I drew assistance from the judgment in *Shazam Productions Ltd v Only Fools The Dining Experience Ltd* [2022] EWHC 1379 (IPEC). This case related to an interactive dining show in which the actors used the appearance, mannerisms, voices and catchphrases of characters from the famous UK series, *Only Fools and Horses*. The backstories of and relationship between the characters informed the show, although the show itself departed from anything that appeared on the series, being constructed around a pub quiz. One of the arguments presented by the defendant was that the Only Fools Dining Experience ('OFDE') was a fair dealing for the purpose of pastiche in section 30A of the Copyright, Designs and Patents Act 1988.

[34] I agree with the approach in *Shazam* at paras 186-187 that in interpreting the word 'pastiche', we should start from the term's ordinary meaning, which covers two types of use: imitation of the style of pre-existing works, and the utilisation or assemblage of pre-existing works in new works. This is seen, for example, in the definition of pastiche (as a noun) in the *Oxford English Dictionary*:

1. a. *A novel, poem, painting, etc., incorporating several different styles, or made up of parts drawn from a variety of sources.*

b. *A musical composition incorporating different styles; a medley.*

2. a. *A work, esp. of literature, created in the style of someone or something else; a work that humorously exaggerates or parodies a particular style.*

b. *The technique of incorporating distinctive elements of other works or styles in a literary composition, design, etc.*

[35] In *Shazam*, it was held that that the OFDE was not a pastiche, including because there was no imitation in the style of the source work, or an assemblage of parts, but rather the transposition of characters into a new format. I am not sure I agree with this conclusion, however, even if it is correct, the facts before me differ significantly: *Takeoffs* is clearly a pastiche film (in the ‘assemblage’ sense), and I would have found that the Safety Video is a pastiche (in the ‘imitation’ sense). The question in both cases is whether EA’s use was a fair dealing.

[36] Starting with *Takeoffs*, although I held that even a quantitatively small part can comprise a ‘substantial part’ of the source work, it is important, as noted in *Pelham v Hütter*, to also have regard to the defendant’s interest in artistic expression. The pastiche exception is one way of reflecting this important interest. I believe that Mr McManus’s use was fair: his copying did not involve the same sort of ‘wholesale’ taking found to have occurred in *Shazam* (para 196), he added a great deal of new expression, and his use did not, in my view, compete with a normal exploitation of *The Substitute*. If Mr McManus could take the shelter of the pastiche exception in creating the work, so too could EA in playing it in their business class lounges.

[37] For the Safety Video, I likewise would have found that EA’s use was fair. Although it arguably involved more extensive copying than *Takeoffs*, this level of copying was proportionate and was necessary for the pastiche purpose. The voiceover, dialogue delivered by the pilot, and inclusion of the sequence on how to use the seatbelt meant that there could be no confusion that viewers were in fact watching an extract from *The Substitute*. Indeed, in the introduction to the Safety Video, the voiceover states that the video is a celebration of Erewhonian cinema. I appreciate the argument of Mr Tiny that EA had a commercial motivation, in that the Safety Video was intended to embody EA’s brand values and, in addition to being played in-flight, has been made available on EA’s social media channels. However, if I were to find that mere commerciality was enough to destroy fairness, the reach of fair dealing would be significantly curtailed.

[38] In summary, EA has a defence to copyright infringement in relation to *Takeoffs* and (had it been in play) the Safety Video.

Moral rights

[39] Ms Bouvier’s final claim related to moral rights. She argued that as an author of *The Substitute* as a dramatic work, she enjoys moral rights; and that through the seatbelt sequence in the Safety Video, EA did an act that resulted in a material alteration or distortion to *The Substitute* that was prejudicial to Ms Bouvier’s honour or reputation. Because I have held that Ms Bouvier is not an author of the dramatic work, this claim must fail. However, even if she had been an author, I would have held that although there was a material alteration or distortion, there was no prejudice and hence no infringement under section 96 of the Act.

[40] Mr Tiny argued that in considering whether there has been prejudice, I need to take subjective considerations into account, in particular when considering prejudice to honour. Mr Tiny pointed me to *Boomerang Investments*, where Perram J of the Federal Court of Australia observed that the phrase honour or reputation ‘involves two distinct concepts and it is not a composite expression’: para 400. Perram J (speaking in obiter) observed that the relevant conduct of the defendants, being the use of a modified version of a line from the song ‘Love is in the Air’ in advertising for Air France, did not disclose any harm to reputation, which in Perram J’s view was ‘something which can be objectively determined’. In contrast, Perram J was not prepared to hold that there was no prejudice to honour. Mr Tiny drew my attention to para 407:

I therefore accept that Mr Vanda’s sense of honour was prejudiced by the change in the lyrics and I make the same finding in relation to Mr Young. Although I am not sure my sense of honour would be offended by having the lyrics of a song changed, I have never written a song and the question is whether Mr Vanda and Mr Young’s sense of honour is an objectively reasonable one. In my view, it is. That would be sufficient to establish derogatory treatment ... as it requires prejudice to honour or reputation.

[41] Mr Tiny referred to evidence from Ms Bouvier, which I accept, that she was upset by EA’s use; considered the Safety Video to be borderline advertising; did not agree with EA’s ‘jingoistic’ brand values; and would never have agreed to such a use.

[42] Ms Jam argued that honour and reputation should both be judged objectively, lest moral rights be used as a tool of censorship. She argued that allowing subjective considerations would create uncertainty in the law – to use *Boomerang Investments* as an example, how would a user know whether the lyrics they wished to modify were penned by a person who wanted great control over their work or someone who had a more relaxed viewpoint? Finally, Ms Jam argued that it would be problematic if an act that did not infringe copyright due to fair dealing for the purpose of parody or pastiche was held to contravene the integrity right (bearing in mind that the permitted acts in Chapter II of the Act do not apply to moral rights in Chapter III).

[43] I found Ms Jam's submissions to be compelling, in particular her point about the need for symmetry between copyright and moral rights. Like Perram J in *Boomerang Investments*, I cannot see how anyone would have thought less of Ms Bouvier (or Ms Webb) on account of the Safety Video. Furthermore, the video was a tribute to *The Substitute*, and in no sense an insult or objectively unsavoury. As such, I would have found that there was no derogatory treatment by EA.

Justice Chen-Wishart made orders dismissing the copyright and moral rights claims. The parties were granted leave to appeal to the Court of Appeal in relation to the conclusions on the following issues:

- *Whether The Substitute is protected as a dramatic work.*
- *(Assuming the answer to this question is yes) Whether Ms Bouvier is an author of that work.*
- *Whether Takeoffs copied a substantial part of The Substitute.*
- *Whether EA's dealings with Takeoffs and (if Ms Bouvier is an owner of copyright in any dramatic work) the Safety Video were fair dealings for the purpose of pastiche.*
- *(Assuming Ms Bouvier is an author of any dramatic work) Whether EA infringed Ms Bouvier's integrity right.*

Oxford International Intellectual Property Moot 2023

Copyright Act 1997 – extracts

Part I COPYRIGHT

Chapter I SUBSISTENCE, AUTHORSHIP, OWNERSHIP & RIGHTS

Section 1 Interpretations

'Dramatic work' includes a work of dance or mime.

'Film' means a recording on any medium from which a moving image may by any means be produced.

'Producer', in relation to a sound recording or a film, means the person by whom the arrangements necessary for the making of the sound recording or film are undertaken.

Section 2 Subject matter of copyright

- (1) Subject to this Part, copyright subsists in the following types of work:
 - (a) original literary, dramatic, musical and artistic works;
 - (b) sound recordings, films and broadcasts; and
 - (c) the typographical arrangement of published editions.
- (2) Copyright does not subsist in a literary, dramatic, musical or artistic work unless and until it is recorded in writing or some other material form; and references in this Part to the time at which such a work is made are to the time at which it is so recorded.
- (3) It is immaterial for the purposes of subsection (2) whether the work is recorded by or with the permission of the author.

Section 8 Authorship

- (1) In this Part, 'author', in relation to a work, means the person who creates it.
- (2) That person shall be taken to be—
 - (a) in the case of a sound recording, the producer;
 - (b) in the case of a film, the producer and the principal director;

...

- (6) In this Part, 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.
- (7) A film shall be treated as a work of joint authorship unless the producer and the principal director are the same person.
- (8) References in this Part to the author of a work shall, except as otherwise provided, be construed in relation to a work of joint authorship as references to all the authors of the work.

Section 9 Exclusive rights

- (1) Copyright, in relation to a literary, dramatic or musical work, is the exclusive right:
 - (a) to reproduce the work in a material form;
 - (b) to publish the work;
 - (c) to perform the work in public;
 - (d) to communicate the work to the public;
 - (e) to make an adaptation of the work;
 - (f) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in subparagraphs (a) to (e), inclusive.

...

- (4) Copyright, in relation to a film, is the exclusive right:
 - (a) to make a copy of the film;
 - (b) to cause the film, in so far as it consists of visual images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
 - (c) to communicate the film to the public.

Section 10 Infringement of copyright

- (1) Subject to this Act, the copyright in a copyright work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Erewhon, or authorises the doing in Erewhon of, any act comprised in the copyright.

- (2) References in this Part to the doing of an act comprised in the copyright in a work are to the doing of it:
 - (a) in relation to the work as a whole or any substantial part of it; and
 - (b) either directly or indirectly.

Chapter II PERMITTED ACTS

Section 45A

- (1) Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.

Chapter III MORAL RIGHTS

Section 90 Definitions

- (1) For the purposes of this chapter, 'author', in relation to a film, means the director of the film.

Section 95 Author's right of integrity of authorship

- (1) The author of a work has a right of integrity of authorship in respect of the work.
- (2) The author's right is the right not to have the work subjected to derogatory treatment.
- (3) "Derogatory treatment", in relation to a literary, dramatic or musical work, means:
 - (a) the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or
 - (b) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.

...

- (5) 'Derogatory treatment', in relation to a film, means:

- (a) the doing, in relation to the film, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the film that is prejudicial to the author's honour or reputation; or
- (b) the doing of anything else in relation to the film that is prejudicial to the honour or reputation of the author of the film.

Section 96 Infringement of the right of integrity of authorship

(1) A person infringes an author's right of integrity of authorship in respect of a work if the person subjects the work, or authorises the work to be subjected, to derogatory treatment.

(2) If a literary, dramatic or musical work has been subjected to derogatory treatment of a kind mentioned in paragraph (a) of the definition of derogatory treatment in section 95(3) that infringes the author's right of integrity of authorship in respect of the work, a person infringes the author's right of integrity of authorship in respect of the work if the person does any of the following in respect of the work as so derogatorily treated:

- (a) reproduces it in a material form;
- (b) publishes it;
- (c) performs it in public;
- (d) communicates it to the public;
- (e) makes an adaptation of it.

...

(4) If a film has been subjected to derogatory treatment of a kind mentioned in paragraph (a) of the definition of derogatory treatment in section 95(5) that infringes the author's right of integrity of authorship in respect of the film, a person infringes the author's right of integrity of authorship in respect of the film if the person does any of the following in respect of the film as so derogatorily treated:

- (a) makes a copy of it;
- (b) shows it in public;
- (c) communicates it to the public.

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Cases cited by Justice Chen-Wishart

Norowzian v Arks (No 2) [2000] FSR 363 (Court of Appeal of England & Wales)

Slater v Wimmer [2012] EWPC 7 (Patents County Court)

Aalmuhammed v Lee, 202 F 3d 1227 (9th circuit, 2000)

Norowzian v Arks Ltd (No 1) [1998] FSR 394 (High Court – Chancery Division)

Boomerang Investments Pty Ltd v Padgett (Liability) [2020] FCA 535 (Federal Court of Australia)

Pelham GmbH v Hütter (C-476/17) [2019] ECDR 26 (Grand Chamber)

Shazam Productions Ltd v Only Fools The Dining Experience Ltd [2022] EWHC 1379 (IPEC)