

EIP

Alleged copyright infringement in the famous love story that inspired Doctor Zhivago

Background

Anna Pasternak ("Pasternak") is the Claimant and author of *Lara: The Untold Love Story That Inspired Doctor Zhivago* ("Lara"). Lara is a non-fiction, historical book that was published in the United Kingdom in August 2016. It is a love story of the Claimant's great uncle, Boris Pasternak, poet and author of the book *Doctor Zhivago*, and his mistress and muse, Olga Ivinskaya, who is portrayed as Lara Antipova in *Doctor Zhivago*. The Claimant is also the owner of the copyright in a translation of extracts from a book called *Légendes de la Rue Potapov* ("the Legendes Translation").

Lara Prescott ("Prescott") is the Defendant and author of *The Secrets We Kept* ("TSWK"), a historical, fictional account of a late 1950s CIA operation, which used copies of *Doctor Zhivago* as propaganda against the Soviet Union. The Defendant, who is named after Lara Antipova has always been fascinated by the novel. TSWK was published both in the United States and the United Kingdom in September 2019.

The Claimant had been provided with a proof of TSWK which she read a small part of before concluding that it was "a trashy book ". She read no more of it but commissioned a review of TSWK and Lara. Subsequently, she alleged that the Defendant had copied a substantial part of the selection, structure and arrangement of events in 7 of the chapters in TSWK from 7 out of the 12 chapters in Lara, which the Judge refers to as the 'Selection Claim'. The Claimant also argued that the Defendant had infringed the copyright in an extract of the Legendes Translation which is referred to as the Translation Claim.

The Defendant denied both allegations. She stated the primary sources of inspiration used in writing TSWK were two novels, *A Captive of Time* ("ACOT"), and *The Zhivago Affair: The Kremlin, the CIA and the Battle Over a Forbidden Book* ("TZA"). The Defendant mentioned she used Lara after she had completed a draft of her book, as a secondary source to check historical details, but claimed that nothing in Lara was new compared to what was previously written in ACOT and TZA.

The Selection Claim

The Claimant alleges that the Defendant has copied a substantial part of the selection, structure and arrangement of the facts and incidents in the relevant chapters of Lara. The Judge has called these facts and incidents "Events".

A large part of the judgment was used to assess the allegations in the Selection Claim. For each Event, the Judge answered two questions:

- i. "whether copyright subsists in the relevant selection of events"
- ii. "assuming that copyright does subsists in the relevant selection," "whether the Defendant has copied that selection, or a part of it in which copyright subsists".

In relation to the second question, the Judge further elaborates his approach by discussing two forms of alleged copying. The first being the alleged copying of the selection of events and the second, being the particular instances of alleged copying, which are listed in relation to each Event. The latter is not alleged by the Claimant to constitute infringement of copyright in itself but is said to illustrate instances of copying of particular details from the relevant chapters of Lara.

The Judge's discussions on each chapter of TSWK includes a comparison of the selection of Events in a chapter of Lara with the selection of Events in that chapter of TSWK. He also discusses the supporting instances of alleged copying in the relevant Event made by the Claimant.

The Defendant explained her writing method consisted of numerous revisions over a significant period with reference and re-reference to her sources. Several previous drafts of TSWK had been disclosed which meant that the Judge was able to see what she had written before she received a copy of Lara and what material was written after.

The Judge found that in most cases where Events from Lara were alleged to be copied, these had arisen from when the Defendant relied upon her primary sources, ACOT and TZA, before she had consulted Lara. The historical events in Lara, ACOT and TZA were unsurprisingly similar. While the Claimant herself also acknowledged using ACOT and

TZA as sources when writing Lara, she believed her extensive research including interviews with members of her family, is what differentiates Lara from ACOT and TZA.

Looking at some of the more specific details the Defendant took from Lara, for example, reference to Olga's eyes as "cornflower blue", the Judge found these were not only too trivial, but also corroborated the Defendant's claim that she used Lara as a secondary source. He concluded the copying of such details offered no evidence of selection copying.

Additionally, the Judge found that when writing about similar Events, the writing style of the Defendant was completely different from that of the Claimant. Not only were Events written about in a different fashion, but also, the selection of events bore no particular relation to those in Lara.

Overall, the Judge concluded, in relation to each of the 7 chapters that were alleged to have been copied from respective chapters in Lara, that:

- a. the selection of the Events in the relevant chapter of Lara "is protected by copyright as a substantial part of the literary work that is Lara" and that the "same is true of the selection of these Events which is alleged to have been copied".
- b. the Defendant has not in the relevant chapter of TSWK or, elsewhere in the novel, "copied the relevant selection of these Events or any part of this selection".
- c. the Defendant has not in relation to the relevant chapter of Lara, infringed the copyright in Lara.
- d. accordingly, "the claim of infringement of copyright in [that chapter of] Lara fails".

The Translation Claim

Légendes de la Rue Potapov, was a French translation of a book originally published in Russian by Irina Kosovoi in 1997. The Claimant commissioned a translation of the pages that were relevant to Olga, Irina, and Boris from the French translation into English. The copyright which subsists in the Legendes Translation was subsequently assigned to the Claimant.

A section of the Legendes Translation describes Olga being sentenced to her first term of imprisonment in Potma. The same section also appears in TSWK, with changes from the Legendes translation marked below, as:

The witnesses' statements have enabled us to uncover your actions: you have continued to denigrate our regime and the Soviet Union. You have listened to the "voice of America" Voice of America. You have slandered S̄oviet writers withwho had patriotic views and you have praised to the skies the work of

Pasternak's work, a writer with anti-establishment antiestablishment opinions.

The Defendant's argument was that first, the text used constitutes a small part of the Legendes Translation and was incapable of qualifying as a substantial part of the translation. Second, that her wording was different from that in Lara, so she could not be seen as taking the intellectual creation of the translator.

The Judge dismissed the first argument as asking the wrong question. Applying Infopaq [1] he found copyright was capable of subsisting in just a few lines of a translation if it "contains elements which are the expression of the intellectual creation of the author of the work" and it did in fact do so.

In cross examination, it was admitted by the Defendant that she copied the text from Lara, indirectly copying the Legendes Translation. However, she argued she believed this to be an actual quote from history. The Judge noted that the original quote would have been in Russian.

Although the Defendant made minor changes from the text in Lara, the Judge held that the differences in the text are too minor to avoid infringement. As such, the Judge dismissed the second argument and held that while the Defendant did not directly copy the text from the Legendes Translation itself, she had copied the translation appearing in Lara which was indirect copying.

Outcome

The Selection Claims failed as the Defendant had not infringed the copyright in Lara in all or any of the ways alleged in the Selection Claim.

The Defendant was found to have infringed the copyright in the Legendes Translation.

Full judgment can be found [here](#)

[1] Infopaq International A/S v Danske Dagblades Forening (C-5/08) [2010] FSR 20