

Oxford International Intellectual Property Moot 2014

Instructions

The 2014 moot concerns the case *The Trustees of the Erewhonian Museum & Grey v Xavier* [2013] HCE 66. A copy of this case is included in the pages that follow, along with relevant provisions from the Erewhonian Copyright Act 1993.

At first instance in the High Court of Erewhon, Mr Justice Endicott found in favour of the **defendant** in relation to the claims grounded in breach of contract and infringement of copyright; and the **claimants** in relation to the aspects of the case relating to moral rights. The claimants sought leave to appeal from Mr Justice Endicott's decision, and that application was granted in relation to the following matters:

- (1) Whether the photograph of the Mosaic is an **original** work.
- (2) Whether Mr Xavier's use of the Images constitutes **fair dealing**.
- (3) Whether it is permissible for parties to **contract out** of exceptions under Erewhonian law.

The defendant brought a cross-appeal in relation to:

- (4) Whether Mr Xavier's use of the Illustration infringed **moral rights**.

A unanimous bench of the Court of Appeal upheld (without releasing an opinion) the decision of Mr Justice Endicott on all four aspects, and dismissed both the appeal and the cross-appeal. The claimants have been granted leave to bring a further appeal to the Supreme Court of Erewhon, and the defendant a further cross-appeal. It is your task to prepare written and (for teams that are invited to the Oral Proceedings) oral submissions for this appeal.

Some points to consider:

- a. Your submissions should focus on the four matters identified above. Whilst you are encouraged to present arguments and authorities not mentioned by Mr Justice Endicott, you should not seek to introduce entirely new causes of action or to press arguments that have been conceded. Leave was not granted to appeal the findings in relation to the construction of the contract in [13]-[14], so you must proceed on the basis of the construction set out in those paragraphs. Appeals to the Supreme Court are on points of law only, which you should bear in mind as you review the findings of fact by Mr Justice Endicott. It is permissible to challenge the legal conclusions that arise from those facts.
- b. The opinion of Mr Justice Endicott includes reference to a number of cases and statutes. For the purposes of both the written and oral submissions, it is expected that you will deal with, and be familiar with, such items. 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 is up to you, although the Panel/Bench will not look favourably upon strong reliance on an unduly narrow spectrum of authorities.

- c. Although the moot is held in Europe, this is an international competition and it is expected that you will invoke authorities from around the world to help make your arguments under Erewhonian law. You should not, therefore, feel the need to consider only European authority.
- d. Erewhon is a signatory of, amongst others, the Berne Convention, the WIPO Copyright Treaty and the TRIPS Agreement. It has ratified, amongst others, the International Covenant on Civil and Political Rights.
- e. Requirements for your written submissions are contained in §14 of the Rules. The following is some additional guidance:
 - i. 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.
 - ii. 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.
 - iii. 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.

Any requests for clarifications of and corrections to the moot problem should be directed to the Moot Secretary at mootsec@oiprc.ox.ac.uk by **Friday 1st November 2013**. Requests should note the paragraph number to which they relate, and explain why the requested clarification or correction is expected to have legal significance for the problem. Requests will be treated as confidential. If any clarifications or corrections are deemed necessary by the Organising Committee (OC), these will be released on the moot website no later than **Friday 15th November 2013**. 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 **8:00pm** on **Friday 13th December 2013**, 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.

Before:
THE HONOURABLE MR JUSTICE ENDICOTT

Between:

The Trustees of the Erewhonian Museum and Grey

- and -

Xavier

Mr Justice Endicott:

[1] In October 2012, an exhibition opened at the Erewhonian Museum (“**Museum**”) exploring the history and culture of the people of Rakaia, an ancient town situated on what is now the east coast of Erewhon. The proceeding before me concerns complaints about the reuse by the defendant, Mr Xavier, of images of two artworks that appeared in this exhibition: an ancient mosaic and a contemporary illustration. I will set out some brief background in relation to the Museum and the exhibition before describing the acts that gave rise to this proceeding.

Background

[2] The Museum is – on the basis of collection size, number of staff, and funding – one the largest collecting institutions in Erewhon. Its particular focus is on human history and culture in Erewhon. Visits to its main campus in the Erewhonian capital number in the millions every year, and the Museum also maintains a website that hosts an array of information, including in relation to collection items, current and future exhibitions, research at the Museum, and public outreach activities. Included on its website is a password-protected “Education Portal” that contains materials created for teachers and educators. These materials are produced to complement temporary and permanent exhibitions being held at the Museum, and include images of collection items, text for handouts, PowerPoint slides, activity sheets, short films and other teaching aids. Access to the Education Portal costs ERD\$25 per year. In order to gain a username and password for the Portal, prospective users must satisfy the Museum that they teach in an educational institution or training body (whether at the primary, secondary or post-secondary level), and must sign a document (“**Terms of Use**”) that includes the following:

Item 3 Permitted Uses

The materials in the Education Portal are provided to you solely for the purposes of non-commercial education, study and research. You may not use them for any other purposes, nor rely on any exception of the Copyright Act 1993 in relation to any use you make.

[3] The Museum does not seek to actively record or monitor reuse of materials on the Portal. In his witness statement, the Director of the Museum stated that this approach reflected the view that such activity would be a poor use of already stretched museum resources.

The Rakaia Exhibition

[4] In late October 2012, the Museum launched an exhibition titled *The Lost Civilisation of Rakaia* (“**Rakaia Exhibition**” or “**Exhibition**”). Rakaia was a port town located on the east coast of Erewhon. It grew to become a thriving hub for fishing and trade until the town was destroyed by a massive earthquake early in the third century, CE. The few survivors abandoned the town and migrated northwards, many settling in areas not far from the modern capital. Rakaia has been a target for much research and archaeological activity over the last hundred years. This has resulted in the discovery of numerous artifacts and works of art that give us a glimpse of life in Rakaia. The Rakaia Exhibition included many such objects from the Rakaia site. Relevantly for this case, the Exhibition included display of:

- i. An ancient mosaic floor of approximately 150h x 150w cm depicting a fish-like female figure with blue skin, believed to be a sea goddess (“**Mosaic**”). This is arguably one of the best extant examples of Rakaian mosaic. The Mosaic has been in the Museum’s collection for the last 50 years, although its fragility is such that it is not on permanent display.
- ii. A watercolour-on-paper illustration by the second claimant, Ms Grey (“**Illustration**”). The Illustration was commissioned by the Museum in early 2012 for use in the Exhibition, and measures 62.1h x 77.4w cm. The instructions to Ms Grey were to produce an artist’s rendition of the Rakaia foreshore, including the temple that housed the Mosaic. One of the terms of the commissioning agreement was that copyright in the Illustration would be assigned by Ms Grey to the Museum. Ms Grey retained moral rights, which under Erewhonian law cannot be assigned.

[5] Digital images of the Mosaic and Illustration (together “**Images**”) were included in the Education Portal, on a page providing resources associated with the Rakaia Exhibition. They were each accompanied by, *inter alia*, suggested forms of attribution.

Mr Xavier's use of the Images

[6] Mr Xavier is employed as a history teacher at the Erewhonian School for Gifted Youngsters (“**ESGY**”), a private educational institution providing schooling for primary and secondary school pupils. He has been a registered user of the Education Portal since April 2011. In early March 2013, he downloaded the Images of the Mosaic and Illustration, which he included in handouts for a class on Rakaia. Neither the Museum nor Ms Grey complain about this use. However Mr Xavier also used the Images on his personal blog, *Politics with Professor X*. This blog contains commentary on political and social matters. On 16 March 2013, Mr Xavier posted an item urging readers to support the Fishers Party, a political party in Erewhon. (Mr Xavier is neither a member of, nor has any official connections with, this organisation). The central thesis of Mr Xavier’s post is encapsulated in this quote:

Many of you might think the Fishers Party is concerned with furthering the rights of those who fish recreationally, and question why this is important. However outside metropolitan regions, many of the most economically and socially disadvantaged groups in Erewhon derive much of their sustenance from fishing. Moves by the Erewhonian government to increase the regulation of such activities (through permits, seasonal limits on fishing, and so forth), though arguably well-intentioned, are making criminals of people who are simply trying to support themselves and their families. There are those who fish commercially, and those who fish for pleasure – but we must not forget those who fish for survival.

[7] Further into his post, Mr Xavier included the following statement:

Fishing has long been a central part of Erewhonian life. Archaeological evidence reveals ancient populations whose existence was tied closely to maritime activities. They even worshipped sea deities, such as the mystical blue goddess of the people of Rakaia, who was believed to protect and guide fishers when they were at sea.

[8] The underlined text contains links to a separate page on the *Politics with Professor X* website which contains eight paragraphs of text written by Mr Xavier about the history of Rakaia, and a number of images, including those of the Mosaic and the Illustration. The latter images were derived from those on the Education Portal; were presented at relatively low resolution; and included attributions adhering to those suggested by the Museum. The claimants say that they never agreed to the use of the Images on Mr Xavier’s website. The Museum pleads its case as involving breach of contract and infringement of copyright. It says that although it does not usually take a hard line on pursuing users for alleged infringement involving Museum images, it is inappropriate for collection items to be used for political purposes. Ms Grey, who brings her claims under the auspices of moral rights, says that she is a committed animal rights activist and is aghast that her

Illustration is being used to support the Fishers Party. Mr Xavier, on the other hand, says that the case raises important values of free speech and access to information. He expresses particular concern over publicly-funded collecting institutions using copyright law and contract to claim rights over images of public domain items.

[9] I will deal with the claims of the Museum and Ms Grey in turn. No claim is made against either ESGY or the Fishers Party, neither of whom have anything to do with Mr Xavier's website.

The Museum's claims for breach of contract and infringement of copyright

[10] The Museum argues that there is a contract between itself and Mr Xavier (as a registered user of the Education Portal). It says that by using the Images for a purpose outside that permitted by Item 3 of the Terms of Use, Mr Xavier has engaged in breach of contract and infringement of copyright.

[11] The copyright claims rely on there being works in which copyright subsists. This is undoubtedly the case for the Illustration. (The Museum did not plead there was a separate copyright in the digital scan an employee created of the Illustration, however this is not necessary for it to make out its case.) In contrast the Mosaic is, given its age, in the public domain. Therefore to the extent the Museum can sustain any claim for copyright infringement, it must demonstrate that it owns a separate copyright in the *photograph* of the Mosaic. Photographs are protected under the exhaustive list of copyright works in s 2(1) of the Copyright Act 1993, but only if they are "original". Mr Xavier argues that since the photograph is a faithful reproduction of the Mosaic (or a "slavish copy", in the words of his counsel), it is not an original work, meaning that all the Museum's copyright claims must fail. I note that authority on the originality standard in *Erewhon* is mixed, and that we await a decision from the Supreme Court to resolve the precise test to be applied. However it is my view that this is precisely the sort of artistic endeavor we ought to encourage and reward, similar to Dr Sawkins' work with out-of-copyright music: see *Hyperion Records Limited v Sawkins* [2005] EWCA Civ 565. The evidence from the Museum was that production of the photograph of the Mosaic required many hours of work by an experienced photographer in order to ensure that it was true to the underlying work. As such, I am of the view that the photograph is an original work. Mr Xavier does not (rightly) challenge the Museum's arguments that the other requirements for subsistence are made out.

[12] The next issue for the Museum is whether they are the owner of copyright in the Illustration and the photograph of the Mosaic. The former was assigned by Ms Grey to the Museum as part of the commissioning agreement. The latter was taken in 2005 by an employee photographer, Mr Magneto. Under s 6(1) of the Copyright Act, the default rule is that the "author" is the owner of copyright in an artistic work, although there is a qualification to this rule in s 6(2) for employees.

There being nothing in Mr Magneto's contract to alter the statutory position, I find that copyright in that work is also owned by the Museum.

[13] The test for infringement is contained in s 10 of the Copyright Act. Including a photograph on a public website is clearly within the exclusive rights of the copyright owner: see s 9(4). However Mr Xavier says that his use falls within the Terms of Use of the Education Portal, which permit activities undertaken for "*non-commercial education, study and research*". He says that the page on which the Images appear is educational in nature, and that there is nothing in the terms of use to suggest that materials may only be used in traditional classroom settings. If right, this would provide an answer to the claims of both breach of contract and infringement of copyright.

[14] In my view there is merit in his argument that his use is educational. However the Museum argues that the Portal is clearly set up for users *in their capacity as teachers in an educational institution or training body*. Although these words are not expressly included in Item 3 of the Terms of Use reproduced above at [2], I agree that this was the clear intention of the parties and am prepared to accept this construction. I will imply a term into the contract with Mr Xavier accordingly.

[15] However Mr Xavier had another defence in the event that his submissions on the scope of the Terms of Use were not accepted. He says that his use is covered by the fair dealing exception in s 11 of the Copyright Act, which provides that:

Copyright in a work shall not be infringed by any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary.

[16] Mr Xavier says his purpose also falls squarely within s 11, his aim being to facilitate research into both the history of Erewhon and its current political system, and to provide a critique of the policies of the Fishers Party. He argues that this court should follow the lead of the Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13 in giving terms like "research" and "criticism" "a large and liberal interpretation in order to ensure that users' rights are not unduly constrained": *CCH* at [51]. I agree. Although Mr Xavier himself may not have been conducting research when he uploaded images of the Mosaic and Illustration to his website, he was facilitating the research of others, and that brings him within the fair dealing defence. It is less obvious to me that Mr Xavier was undertaking criticism by this act, as the relevant critique was not of a copyright work but rather the policies of a political party: see *Ashdown v Telegraph Group* [2001] EWCA Civ 1142. However this is not fatal to Mr Xavier's case, given my conclusion that his use was for research purposes. Given I am of the view that his dealing was fair – for instance, the quantity of the work taken was appropriate for the use, and the source of the Images was attributed accurately – his use is within s 11.

[17] Mr Xavier then argues that I should hold that Item 3 of the Terms of Use has no effect, to the extent that it states: “*You may not ... rely on any exception of the Copyright Act 1993 in relation to any uses you make.*” I am aware that there is much debate over the status of “contracting out” of copyright law, with some saying that freedom of contract is a bedrock of the Erewhonian law of obligations, and that great difficulties will arise if courts start interfering unduly in the capacity of individuals to strike their own bargains. However if we are to give proper weight to exceptions as users’ rights, then courts cannot sit idly by and watch as private entities seek to override through contract the careful balance between owner and user rights created by copyright legislation, at least in relation to fundamental exceptions like fair dealing. I am fortified in this conclusion by the existence of ss 36(4), 296A and 296B of the UK Copyright, Designs and Patents Act 1988; of s 137 of the UK Broadcasting Act; and by Proposal 17–1 of the Australian Law Reform Commission in its Discussion Paper *Copyright and the Digital Economy* (DP 79, May 2013).

[18] I therefore find that the Terms of Use were not effective to oust Mr Xavier’s right to use the Images for fair dealing purposes. This provides Mr Xavier with a defence to both the claim for breach of contract and for infringement of copyright.

Ms Grey’s claim for infringement of moral rights

[19] The moral rights provisions of the Copyright Act 1993 cover attribution and integrity of authorship. They were introduced when the Copyright Act was passed in order to ensure there is no doubt that Erewhon is compliant with its obligations under the Berne Convention. The latter category is relevant to this case, Mr Xavier having accurately identified Ms Grey as the author of the Illustration. The core of the integrity right is the right to object to derogatory treatment of a work: s 51(1). Thus for Mr Xavier to be liable, there must be a “treatment” that is “derogatory”.

[20] The Copyright Act provides that the term treatment “means any addition to, deletion from or alteration to or adaptation of the work”: s 51(2). Ms Grey argues that one way in which the work has been altered is through being published as a small, low resolution image. It would seem to be uncontroversial that there has been a “treatment”. However the treatment must also be “derogatory”, in the sense it amounts to a distortion or a mutilation of the work or is otherwise prejudicial to the honour or reputation of the author: s 51(3). I find it hard to see how this terminology would be apt to describe Mr Xavier’s use: *Tidy v Trustees of the Natural History Museum* (1995) 39 IPR 501 (Ch D).

[21] However Ms Grey presented an alternative submission: she also argued that at least for artistic works, the words “alteration to” can include an alteration outside the four corners of the work, such as an “alteration to” its context or environment. I think there is merit in this submission – in my view, treatment ought to be defined broadly and the intellectual heavy lifting, so to speak, ought to be done by the qualification “derogatory”. In this regard, Ms Grey argues that even if there are

educational or research aspects to Mr Xavier's use, her work has been used on a website whose aim is to support a political party. She says that this should be derogatory *per se* (for instance as a distortion), or in the alternative, that the Fishers Party supports policies to which she is opposed (such as permitting hunting for recreational purposes, sustenance, and vermin control) and that this is derogatory because it is prejudicial to her honour or reputation. In support of this she called two witnesses from the Erewhonian Society for the Protection of Animals ("ESPA") who gave evidence that they had been shocked to see her Illustration appear on Mr Xavier's website. Mr Xavier, on the other hand, urged me to discount the reactions of Ms Grey and the ESPA witnesses on the basis that any such reaction must not only be genuine but (in the eyes of the court) be reasonably held. He cautioned against moral rights being used as a tool of censorship.

[22] In the end – and after much deliberation – I have decided in favour of Ms Grey. I do so *not* on the basis that there has been any prejudice to her reputation, as I believe that people viewing Mr Xavier's website would not have understood her to have authorised Mr Xavier's use. Rather, I see this as a matter of honour, which is an entirely different concept, being concerned with how we view ourselves. There being no relevant exception available to Mr Xavier (for instance in the nature of fair dealing in s 11, which applies only to *copyright* claims), and no evidence that Ms Grey consented to Mr Xavier's use for the purposes of s 55, I find that the claim of moral rights infringement is made out.

Mr Justice Endicott made orders dismissing the claims of breach of contract and copyright infringement, and upholding the claim for infringement of moral rights. He set a date for a further hearing on the questions of remedies and costs. However before that hearing took place, the claimants were granted leave to appeal to the Court of Appeal. The defendant filed a cross-appeal in relation to the findings on moral rights.

Oxford International Intellectual Property Moot 2014

Copyright Act 1993 – extracts

Section 1 Interpretations

“Artistic work” means:

(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not; and

...

(c) a work of artistic craftsmanship whether or not mentioned in paragraph (a).

...

Section 2 Subject matter of copyright

(1) Subject to this Act, 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) In this Act, the term “copyright work” means a work of any of those descriptions in which copyright subsists.

(3) Copyright does not subsist in a work unless the requirements of this Act with respect to qualification for copyright protection are met.

Section 6 Ownership

(1) Subject to this section, the author of a copyright work is the first owner of any copyright subsisting by virtue of this Act.

(2) Where a copyright work is made by the author in pursuance of the terms of his or her employment by another person under a contract of service or apprenticeship, that other person is the owner of any copyright subsisting in the work.

...

Section 9 Exclusive rights

...

(4) Copyright, in relation to an artistic work, is the exclusive right:

(a) to reproduce the work in a material form;

(b) to publish the work; and

(c) to communicate the work 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.

...

Section 11 Fair dealing

Copyright in a copyright work shall not be infringed by any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary.

Section 51 Author's right of integrity

(1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right not to have his or her work subjected to derogatory treatment.

(2) For the purposes of this section, "treatment" of a work means any addition to, deletion from or alteration to or adaptation of the work.

(3) The treatment of a work is "derogatory" if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director.

Section 52 Infringement of the right of integrity

...

(2) In the case of an artistic work the right is infringed by a person who—
(a) publishes commercially or exhibits in public a derogatory treatment of the work, or communicates to the public a visual image of a derogatory treatment of the work;

...

Section 55 Consent

It is not an infringement of any of the rights conferred by the Chapter to do any act to which the person entitled to the right has consented.

[Note: the reference to Chapter in s 55 means the moral rights chapter of the Copyright Act 1993.]