



[2012] EWPC 1

Case No: 1CL 70031

**IN THE PATENTS COUNTY COURT**

Rolls Building  
7 Rolls Buildings  
London EC4A 1NL

Date: 12/01/2012

**Before :**

**HIS HONOUR JUDGE BIRSS QC**

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**Between :**

**TEMPLE ISLAND COLLECTIONS LIMITED**

**Claimant**

**- and -**

**(1) NEW ENGLISH TEAS LIMITED**

**(2) NICHOLAS JOHN HOUGHTON**

**Defendants**

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**Michael Edenborough QC and Gareth Tilley (instructed by McDaniel & Co) for the  
Claimant**

**Richard Davis (instructed by Wright Hassall) for the Defendants**

Hearing date: 28th November 2011  
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### **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**HIS HONOUR JUDGE BIRSS QC**

**His Honour Judge Birss QC :**

1. This is an action for copyright infringement. The claimant claims to be the owner of copyright which subsists in a black and white photograph of a red bus travelling across Westminster Bridge. A copy is at Annex 1. The image is largely in black and white, with the Houses of Parliament and the bridge shown in grey. The sky is white, with no visible clouds or anything else. A bright red London Routemaster bus stands out on the bridge. The claimant's image is used on souvenirs of London.
2. The defendants produce tea. They created an image which was alleged to infringe the claimant's copyright. That action settled on the basis that the defendants agreed to withdraw the image, subject to some disputes which I resolved on paper ([2011] EWPC 21). Nevertheless the defendants wished to produce an image using these iconic London landmarks and with the same general form: grey scale Houses of Parliament and a red bus on the bridge. They believed the claimant's copyright did not prevent them from doing so. An image was produced. That second image is the subject of this action. It is at Annex 2.
3. The claimant contends Annex 2 infringes its copyright in Annex 1. The defendants deny infringement. This superficially simple question involves a tricky area of law: i.e. copyright in photographs; and, in the end, turns on a disputed qualitative judgment.

*The basic facts*

4. The basic facts are not in dispute. The claimant's managing director Mr Fielder created the work by taking a photograph in August 2005. He wanted to create a single, modern and iconic scene of London. Having taken images of the river and the Houses of Parliament for many years Mr Fielder knew where to stand. In fact the place he stood is where many tourists also stand with their cameras. He knew he would be able to capture the bus heading to the south side of the river and thus show the front of the vehicle. He could ensure that other landmarks, i.e. Parliament, Westminster Bridge, and the river, were included and he would have a strong skyline.
5. Once the photograph was taken Mr Fielder manipulated it on his computer using a well know standard piece of software called Photoshop. He had the idea of making the red bus stand against a black and white background from the film Schindler's List. That film includes striking use of the technique in a different context.
6. In summary the manipulations Mr Fielder undertook were: the red colour of the bus was strengthened; the sky was removed completely by (electronically) cutting around the skyline of the buildings; the rest of the image was turned to monochrome save for the bus; some people present in the foreground of original photograph were removed (there was a small group on the stairs and a person at the top under the lamppost); and the whole original image was stretched somewhat to change the perspective so that the verticals in the buildings were truly vertical. Mr Fielder spent about 80 hours on this including the photography trips.
7. The image was published in February 2006 and has been used by the claimant on souvenirs ever since. Many products are sold bearing the image including mugs, stationery, key fobs and the like. The image has become famous in the claimant's

industry. A number of other organisations have licensed the image from the claimant. Historic Royal Palaces, the organisation which operates the Tower of London, approached the claimant to expand the range of products on to t-shirts. Although the Tower is not in the photograph, this remains their best selling range 4 years later. The National Gallery took on the claimant's range in their shop. It was the only range of products of that style they stocked at the time.

8. Mr Houghton's company supplies tea to a wide variety of customers throughout the world. The company's best selling packs of tea include tins and cartons bearing images of English landscapes, Icons of England. They include images of London. Mr Houghton had participated in the creation of the so called "First Allegedly Infringing Work" along with a company called Sphere Design. As I mentioned above, that dispute was settled. To produce the second work, the one with which this case is concerned, Mr Houghton took four photographs. Three were of different aspects of the Houses of Parliament and the fourth was a picture of a red Routemaster bus while it was stationary on the Strand. Of the three, one photograph showed the facade of the Houses of Parliament, one showed Big Ben and one showed part of Big Ben with Portcullis House across the road. Mr Houghton explained how the defendants' work had been produced by Sphere Design. They combined and manipulated Mr Houghton's images as well as an iStockphoto image of a Routemaster bus. The bus was resized to fit and the road marks were changed to be consistent. The stock image was used for parts of the bus. Annex 2 was the result.

*The rival arguments*

9. The claimant contends the work at Annex 2 infringes its copyright in the work at Annex 1, it reproduces a substantial part of the claimant's work. The defendants deny infringement. They say one must be careful to identify precisely what it is in which claimant has rights (i.e. by asking: in what does the claimant's originality lie?). For there to be infringement a substantial part of that (i.e. the things in which the claimant has rights) must have been reproduced by the defendants. Putting the matter another way, the defendants contend that the key consideration is the assessment of the relevant skill and labour which went into the expression of the copyright work and whether *that* skill and labour has been reproduced in the alleged infringement.
10. It is quite obvious that in no sense has any photocopying style reproduction taken place. The defendants' work was created from photographs Mr Houghton took himself. It is also quite obvious that the point of the exercise was to avoid infringing. Mr Houghton was clearly trying to avoid infringing. His and his company's case is that the claimant cannot use copyright law in effect to give them a monopoly in a black and white image of the Houses of Parliament with a red bus in it. He clearly knew about the claimant's work when the second image was produced because the whole point of the exercise was to produce a non-infringing image given the complaint about the first image the defendants had used.
11. The claimant contends it is a clear case of infringement. At the crudest level the two images in question simply look strikingly similar. There are a myriad of ways in which a bus could be portrayed in front of the Houses of Parliament that would not have been inappropriately based upon the claimant's work yet the defendants have done so in a way which is very similar indeed to the claimant's work.

12. There is no dispute that if infringement is found, Mr Houghton and his company, the first defendant, would be liable as joint tortfeasors.

*The trial*

13. At the trial Michael Edenborough QC and Gareth Tilley instructed by McDaniel & Co. represented the claimant and Richard Davis instructed by Wright Hassall represented the defendants.
14. The claimant's only witness was Justin Fielder. He took the photograph in which the claimant claims copyright and made the manipulations of it which led to the image in its final form. He was cross-examined by Mr Davis. The point being made in the cross-examination served to emphasise that the place at which Mr Fielder stood to take the photograph was a standard spot, where many tourists will take photographs of the Houses of Parliament every day. He was asked if he had seen various images relied on by the defendants. He had not seen them before.
15. The defendants' only witness was the second defendant Mr Houghton. He is the sole director of the first defendant. His evidence addressed the publicly available images of red buses and the Houses of Parliament as well as the production of the defendants' work. The cross-examination focussed on how the defendants' work had been produced.
16. Neither witness was criticised by counsel. They both gave their evidence fairly and honestly.

*The Law*

*Subsistence of copyright*

17. Copyright subsists in original artistic works (s1(1)(a) of the Copyright Designs and Patents Act 1988). "Artistic work" means "a graphic work, photograph, sculpture or collage irrespective of artistic quality" (s4(1)(a)). "Photograph" means a "recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film" (s4(2) of the 1988 Act).
18. At trial it was common ground that the impact of European Union law meant that the judgment of the CJEU in the *Infopaq* case (C-5/08 [2010] FSR 20) was such that copyright may subsist in a photograph if it is the author's own "intellectual creation". After trial it was also common ground that the recent judgment of the CJEU in the *Painer* case (C-145/10, 1<sup>st</sup> December 2011) was to the same effect and did not necessitate further submissions from the parties.
19. Mr Edenborough also referred me to and relied on *O (Peter) v F KG* ([2006] ECDR 9) decided on 16<sup>th</sup> December 2003. This is a decision of the Austrian Oberster Gerichtshof (Supreme Court). It is a court which comprises judges with considerable expertise in intellectual property matters. The court there was considering a claim to copyright in photographs of grape varieties used as illustrations in a book. They were applying an approach to copyright based on the principle that the work must be the creator's own intellectual creation. They held (in translation):

In accordance with more recent jurisdiction of the finding Senate, photographs are to be considered photographic works in the sense of s.3(2) UrhG (Copyright Law), if they are the result of the creator's own intellectual creation, with no specific measure of originality being required. What is decisive is that an individual allocation between photograph and photographer is possible in so far as the latter's personality is reflected by the arrangements (motif, visual angle, illumination, etc.) selected by him. Such freedom of creation does certainly exist not only for professional photographers with regard to works claiming a high artistic level, but also for a lot of amateur photographers, who take pictures of everyday scenes in the form of photos of landscapes, persons and holiday pictures; also, such photographs shall be deemed photographic works, as far as the arrangements used cause distinctiveness. This criterion of distinctiveness is already met, if it can be said that another photographer may have arranged the photograph differently [...]. The two-dimensional reproduction of an object found in nature is considered to have the character of a work in the sense of copyright law, if one's task of achieving a representation as true to nature as possible still leaves ample room for an individual arrangement [...].

*(Paragraph 2 1. of the judgment. References have been omitted.)*

20. Although the language used in this judgment differs from the way in which an English court would traditionally express itself in a copyright case, I believe there is no difference in substance between the law as applied here by the Austrian Supreme Court and the law here. A photograph of an object found in nature or for that matter a building, which although not natural is something found by the creator and not created by him, can have the character of an artistic work in terms of copyright law if the task of taking the photograph leaves ample room for an individual arrangement. What is decisive are the arrangements (motif, visual angle, illumination, etc.) selected by the photographer himself or herself.
21. The parties also referred to the commentary in the text book *Laddie Prescott & Vitoria* (4<sup>th</sup> Ed.) in paragraphs 4.60 and 4.61. There the learned authors discuss some of the special problems with photography in copyright law given that the mere taking of a photograph is a mechanical process involving no skill at all and the labour of merely pressing a button. The authors, with almost but not quite perfect geographical prescience, make the following observation and pose a question:

It is obvious that although a man may get a copyright by taking a photograph of some well known object like Westminster Abbey, he does not get a monopoly in representing Westminster Abbey as such any more than an artist who painted or drew the building. What then is the scope of photographic copyright?

22. The question is answered by drawing attention to three aspects in which there is room for originality in photography:
  - i) Residing in specialities of angle of shot, light and shade, exposure and effects achieved with filters, developing techniques and so on;
  - ii) Residing in the creation of the scene to be photographed;
  - iii) Deriving from being in the right place at the right time.
23. Neither side made detailed submissions about aspect (i). There is clearly room for originality there. It relates to the same category as the decision of the Austrian Supreme Court.
24. Aspect (iii) is supported by the dissenting judgment of Romer LJ in *Bauman v Fussell* (1953) [1978] RPC at 493 (CA) but of course that was a dissenting judgment. Mr Davis questioned whether it was correct in law and referred to the judgment of Neuberger J (as he then was) in *Antiques Portfolio v Rodney Fitch* [2001] FSR 345. The learned judge detected (at p352-353) a difference between the passage I have quoted above from *Laddie Prescott & Vitoria* (albeit an earlier edition) on the one hand and the text books *Copinger* and *Nimmer* in the other in relation to a case about “a purely representational photograph of a two dimensional object such as a photograph or painting”. Thus the context in which Neuberger J’s problem arose was a long way from the facts of this case. I do not have to resolve that particular legal dispute.
25. Mr Davis referred to *Krisarts v Briarfine* [1977] FSR 557 (Whitford J). That case was an application for an interlocutory injunction concerning paintings of yet more well known views of London such as Big Ben, the Houses of Parliament and Westminster Bridge. At p562 Whitford J said this:

When one is considering a view of a very well known subject like the Houses of Parliament with Westminster Bridge and part of the Embankment in the foreground, the features in which copyright is going to subsist are very often the choice of viewpoint, the exact balance of foreground features or features in the middle ground and features in the far ground, the figures which are introduced, possibly in the case of a river scene the craft may be on the river and so forth. It is in choices of this character that the person producing the artistic work makes his original contribution.
26. Mr Davis submitted that this served to emphasise that particular attention must be paid to the details in the case of commonplace works. I agree. One does need to be a little careful given that the quoted passage obviously related specifically to the facts of the case Whitford J was considering. The particular details mentioned clearly related to the facts of the case before the learned judge.
27. I can take aspects (ii) and (iii) together. The relevant point in this case seems to me to be that the composition of a photograph is capable of being a source of originality. The composition of an image will certainly derive from the “angle of shot” (which

Laddie Prescott and Vitoria categorise in sub-paragraph (i)) but also from the field of view, from elements which the photographer may have created and from elements arising from being at the right place at the right time. The resulting composition is capable of being the aggregate result of all these factors which will differ by degrees in different cases. Ultimately however the composition of the image can be the product of the skill and labour (or intellectual creation) of a photographer and it seems to me that skill and labour/intellectual creation directed to that end can give rise to copyright.

28. The present case also illustrates what could be a fourth category which could be added to the three given by *Laddie, Prescott & Vitoria*. Mr Fielder's manipulations do not easily fall into any of these three headings although they could be regarded as an extended form of type (i). It may be noted on the facts of this case that Mr Fielder's manipulations were not just matters affecting the colouring and contrasts in the image, they also had an effect on the composition itself, since people were removed from the foreground.
29. At one point at trial there was a brief discussion about whether the image at Annex 1 was strictly speaking a photograph at all within the terms of the Act. Perhaps it is a form of collage but in any event the defendants did not suggest that the work fell outside s4 of the 1988 Act. In my judgment the work is a photograph since what has been manipulated is still ultimately a recording of light. I suppose one can say that the white sky is not a recording of the light which was there when Mr Fielder opened the shutter in his camera because Mr Fielder cut it out in the computer. If that is of such significance that the work has ceased to be a photograph then it must be a collage.

#### *Infringement of copyright*

30. Copyright is infringed by reproducing the whole or a substantial part of a work in a material form (s16 and s17 of the 1988 Act). It was common ground between the parties that a "substantial part" is a matter of quality not quantity. Mr Edenborough summed up the task here based on *Designers Guild* [2000] 1 WLR 2416 in the House of Lords. First one asks whether there has been copying and if so which features have been copied, and then asks whether that represents a substantial part of the original. One does not then ask if the alleged infringement looks on the whole similar, because one can reproduce a substantial part without necessarily producing something that looks similar even though of course it may do so.
31. Mr Edenborough referred to the United States case *Gross v Seligman* 212 F 930 (1914) to establish the proposition that copying a photograph does not require a facsimile reproduction, it is enough to recreate the scene or a substantial part of it. I entirely agree that as a matter of principle photographs, as one species of artistic work in s4 of the Act, are not to be treated differently from other artistic works and one consequence must be that s17(2) cannot be construed as referring only to facsimile reproductions of a photograph itself since it does not mean that for other artistic works. Mr Davis did not suggest otherwise. To say that it is "enough" to recreate a scene puts the matter too high. The point is that it is possible as a matter of principle to infringe copyright in a photograph in an appropriate case by recreating a scene which was photographed. The sort of appropriate case which comes to mind would be when the skill and labour of the author (or in *Infopaq* terms the author's

intellectual creative effort) went into creating the scene which was photographed in the first place.

32. The defendants' submissions tended to seek to minimise the effort undertaken by Mr Fielder in creating the work in this case. So the place where he stood was where many tourists stand and Photoshop is a bog standard bit of software which anyone can use. It seems to me that one needs to be careful with arguments of this kind in cases about copyright in artistic works.
33. Mr Davis submitted that if all that can be said to have been taken from the claimant's work is too general to be original then there can be no infringement. I think that is probably true in the abstract and may be nothing more than a potted summary of *Designer's Guild*, especially bearing in mind *Infopaq*. However the way in which Mr Davis sought to apply that idea to the facts of this case seemed to me to risk confusing what the artist actually did to create the work and what the result of that effort was. The case of *Interlego v Tyco* [1988] RPC 343 in the Privy Council has a bearing on this point. It was concerned with originality. That case held that the skill and labour which was relevant to the originality of an artistic work was that which was visually significant.
34. Visual significance must also be relevant to infringement and to the question of whether a substantial part of an artistic work has been taken. What falls to be considered, in order to decide if a substantial part of an artistic work has been reproduced, are elements of the work which have visual significance. What is visually significant in an artistic work is not the skill and labour (or intellectual creative effort) which led up to the work, it is the product of that activity. The fact that the artist may have used commonplace techniques to produce his work is not the issue. What is important is that he or she has used them under the guidance of their own aesthetic sense to create the visual effect in question. Just because the Act provides for copyright in these original artistic works irrespective of their artistic quality (s4(1)(a)), does not mean that one ignores what they look like and focuses only on the work which went into creating them.
35. I will approach this based on *Designers Guild* itself.

#### *Analysis of the case*

#### *Independent creation?*

36. A question arose at the outset of the trial about the scope of the defence and the scope of what was in issue. Although it is not said (clearly) in their skeleton argument, the way Mr Davis put his clients' case in opening seemed to suggest that they were seeking to run a case of independent creation as a defence. Mr Edenborough objected to that suggestion. The matter was discussed and it was decided that the case could proceed to be heard with me ruling on the issue in this judgment.
37. At the case management conference in this case the issues had been reviewed and the directions order (a) permitted witness statements on certain issues set out in a schedule to the order and (b) provided that the statement of case would stand as evidence in chief in relation to the remaining issues. The Schedule listed four issues. The first two related to creation of the claimant's work, the third to other publicly



available works and the fourth to the extent of the defendants' knowledge of the other publicly available works. These could be identified as the major issues to be addressed because the defendants' case was tolerably clear at the CMC. As it happens I gave a judgment dealing with certain matters arising at the CMC, *Temple Island v New English Teas* [2011] EWPC 19. In paragraph 10 I said as follows:

10. Reviewing the matter in court, a measure of clarity emerged, the upshot being that defendants deny infringement but they do not advance a case of independent design. They contend that the question of infringement can be decided objectively, considering two matters, first taking care about what exactly is original about the claimant's copyright work and second by conducting an objective comparison between the Tea Bag Tin Image and the 2005 Work. They contend that Mr Houghton's intention when he set out in February 2010 to produce a new red bus image was to avoid producing a substantial reproduction of the 2005 Work but they accept that his intention is irrelevant and accept that Mr Houghton obviously knew about the claimant's work in question

*[emphasis added]*.

38. Indeed as Mr Edenborough pointed out, at the CMC, Mr Davis resisted an order requiring the defendants to provide Further Information about their defence and no order was made precisely because there was no defence of independent design being advanced.
39. Mr Davis recognised that the suggestion of a defence of independent design was inconsistent with paragraph 10 of the judgment. He submitted that paragraph 10 was “not wrong depending on the level of generality”. Making that submission is not the correct approach. The defendants have had the judgment since June. They had ample opportunity to raise this issue at an earlier stage and they could and should have done so if they wished to make the submission now being made.
40. However in the end the point is not as substantive as it might at first appear. The defendants do not really have a case of independent design at all. It is not in dispute that Mr Houghton had access to the claimant's work at all material times and that he participated in the creation of the defendants' work in issue in this case. The defendants' work was “for the most part created at his request by Sphere” [paragraph 14(4) of the Defence]. It was created using the photographs Mr Houghton had taken and the iStockphoto image. What is clear is that there is an issue about the extent of the defendants' knowledge of the other publicly available works relied on. That is catered for as issue 4 in the relevant schedule to the CMC order and addressed in evidence.
41. The real point is that the defendants do not admit that, for a given common element present in the defendants' work as well as the claimant's work, its presence in the defendants' work derives from the claimant. The element may have come from somewhere else. That is why they refer to other publicly available works. It is entirely correct that derivation is a necessary element to be established. That is a question of fact which is in issue and needs to be addressed.

*The other similar works*

42. The one area in which I need to make findings of basic facts relates to the other similar works relied on by the defendants. Mr Houghton exhibited a collection of images used in support of the defendants' case. One of the points these images were intended to illustrate is that the collocation of a red Routemaster bus with Big Ben and the Houses of Parliament is a conventional image. They are both in themselves and in combination iconic images representing London. I will address each of Mr Houghton's images in turn.
43. Page 1 of his exhibit is an extract from a BBC website in 2002 about the fact that the Routemaster bus may be being phased out. There is a colour picture of a red Routemaster driving on the road on Westminster Bridge with Big Ben and the Houses of Parliament in the background. Pages 2 to 6 are a series of black and white images with a red Routemaster bus, all of which show the Thames and Big Ben with the Houses of Parliament. However Mr Houghton has not been able to date any of these images although he confirms they pre-date the second allegedly infringing work. The image on page 7 is similar and dates from 2006. Page 8 is not a high quality reproduction but it appears to be a colour image. It shows old red trolley buses on Westminster Bridge. It is presumably an old photograph but there is no evidence when it was published. Page 9 is a stock photograph available on the internet. It is a completely black and white picture taken from what must be almost the same place where Mr Fielder stood. There is a bus on the bridge. Mr Houghton was aware of this image before he created both the first allegedly infringing work and the second work, the one in issue before me.
44. Page 10 shows a colour photograph taken in December 2005 of the last Routemaster bus crossing Westminster Bridge (in front of Big Ben and the Houses of Parliament). It is available from Getty Images. Clearly it is independent of the claimant's work and Mr Fielder accepted that. Mr Houghton had seen this before the creation of the second work. I infer he had not seen it before he created the first allegedly infringing work.
45. Page 11 is another colour photograph of a red Routemaster in front of Big Ben. This time the riverside frontage of the Houses of Parliament is not visible. It was taken by Andres Rodriguez in July 2005. It has been available on iStockphoto since July 2005. Mr Houghton had seen this image before the first and second allegedly infringing works were created. He stated in his witness statement that in the image the bus is depicted in red against a predominantly black and white photograph with what appears to be a manipulated enhanced sky. He was not challenged on that. Whether the buildings are in fact monochrome is not clear to me. Whether the sky has been manipulated is also not clear to me and I will make no finding on either point. To my eye the sky in the image has clouds in it. Apparently the image is now being used by one of Mr Houghton's competitors, Ahmad Tea. Mr Fielder had not seen it before.
46. Page 13 is a poster dating from 2008 showing a red bus beneath Big Ben. Mr Houghton had seen it before the first and second allegedly infringing works were created. Pages 14-15 are other black and white iconic images of London with prominent bright red objects (buses and a telephone box). Mr Houghton uses them to illustrate how common place the use of black and white photography with enhanced

colour is. Pages 16-17 show that Granta Books published a book in 2005 about the Routemaster bus. The cover shows a red bus against a black and white background.

47. These images were put to Mr Fielder. He had seen none of them. I accept his evidence. It follows that they cannot be said to have influenced his work.
48. Mr Houghton's evidence about his awareness of various of the images (set out above) was not challenged and I accept it.
49. It seems to me this evidence adds up to the following:
  - i) The Houses of Parliament, Big Ben and so on are iconic images of London. So too is the Routemaster bus.
  - ii) The idea of putting such iconic images together is a common one. That includes in particular the idea of an image of Big Ben and the Houses of Parliament with a London bus on Westminster bridge (or the road nearby). The Getty Images picture (p10) is an example. Mr Fielder obviously did not suggest he was the first person to come up with such an idea.
  - iii) The technique of highlighting an iconic object like a bus against a black and white image is not unique to Mr Fielder (he did not suggest that it was). The Granta Books image (p16) shows an image which pre-dates Mr Fielder.
  - iv) Whether anyone had ever produced a black and white image of Big Ben and the Houses of Parliament with a red bus in it before Mr Fielder is not clear. The images at pages 2 to 7 predate the defendants' work but Mr Houghton could not otherwise date them. The Rodriguez image (p11) predates Mr Fielder's photograph but whether the background is truly black and white (as opposed to just a typical grey London street scene and sky) is not clear.
50. If Mr Fielder had not seen these images, what is the relevance of them? As I understand it the case Mr Davis sought to advance was that for the ones Mr Houghton was aware of before the creation of the work in question, these images could have been the origin of a given element in the defendants' work rather than the claimant's work being the source. I will address that submission in its proper context below.

### *Originality*

51. Plainly the claimant's work is original and I so find. It is the result of Mr Fielder's own intellectual creation both in terms of his choices relating to the basic photograph itself: the precise motif, angle of shot, light and shade, illumination, and exposure and also in terms of his work after the photograph was taken to manipulate the image to satisfy his own visual aesthetic sense. The fact that it is a picture combining some iconic symbols of London does not mean the work is not an original work in which copyright subsists. The fact that, to some observers, icons such as Big Ben and a London bus are visual clichés also does not mean no copyright subsists. It plainly does.
52. Particular elements worthy of attention in the picture are these:

- i) Its composition: not just Big Ben but a substantial frontage of the Houses of Parliament and the arches of Westminster Bridge. The bus is on the central left side near a lamppost. It is framed by building behind it. People can be seen on the bridge and some are in front of the bus, but they are not prominent. Portcullis House is visible as well as the river itself.
  - ii) The visual contrasts: one between the bright red bus and the monochrome background, and the other between the blank white sky and the rest of the photograph.
53. These elements above derive from and are the expression of the skill and labour exercised by Mr Fielder, or in *Infopaq* terms, they are his intellectual creation.
54. While it seems to me that comparisons with other similar works are irrelevant as a matter of law in terms of originality, they do serve to illustrate how different choices made by different photographers lead to different visual effects. For example in the 2002 photograph on the BBC website (p1), the Rodriguez image (p11) and the poster (p13) the bus is directly under Big Ben. The tower is rising out of the top of the bus and a different visual effect is the result. The Getty images photograph is taken from a very similar spot to the place Mr Fielder stood and the bus is in much the same place but there are many more people visible in the foreground and the image is much busier as a result. The bus on p2 is below the level of the facade, the bus on p3 is small and travelling from left to right, the image at p4 is from a different vantage point west of Lambeth Bridge, the bus on p5 is the same size as Big Ben, the bus on p6 is travelling left to right and the image at p7 looks straight down Westminster Bridge.

### *Infringement*

55. On the question of copying, I find that the common elements between the defendants' work and the claimant's work are causally related. In other words, they have been copied. There are two points. First the evidential onus to address a point like that is on the defendants here given the obvious similarities between the claimant's and defendants' work and the undoubted access of the defendants to the claimant's work. Mr Houghton did not refer to any particular element and assert that it came from a source independent of Mr Fielder. Sphere did not give evidence at all.
56. I have referred to the obvious similarities between the works. The defendants went to considerable lengths to point up the differences between the images. They analysed the overall composition which is said to be very different both vertically and horizontally. The balance of foreground, middle ground and far ground features were analysed and said to be different in key respects. The fact the river is absent from the defendants' work was pointed out. These differences all exist but it seems to me that on the question of copying they do not help. In this case it is not a coincidence that both images show Big Ben and the Houses of Parliament in black and white with a bright red bus driving from right to left and a blank white sky. The reason the defendants' image is like that is obviously because Mr Houghton saw the claimant's work. The differences do not negative copying, on the facts of this case they have a bearing on whether a substantial part is taken (but taking care to bear in mind *Designer's Guild*).

57. Second Mr Houghton did not suggest he had seen any of the other similar works relied on above before seeing Mr Fielder's image. The whole point of this case is that Mr Houghton and his company wish lawfully to produce an image which does bear some resemblance to the claimant's work. The inference that I draw is that Mr Houghton sought out this other material after he had decided to produce an image similar to the claimant's. He found examples of common elements in various different places. That does not avoid a causal link. If Mr Houghton had seen Mr Fielder's image, decided he wanted to use a similar one, found the Rodriguez or Getty photographs and put one of those on his boxes of tea, there would be no question of infringement. Those images are not causally related to Mr Fielder's, they are independent works. But that is not what happened. At best the defendants used these other images to show that certain individual elements in Mr Fielder's work can also be found elsewhere. That does not make those different sources the actual origin of an element in the defendants' image. I reject the submission that the other similar works acted as a relevant independent source for the defendants.
58. That leaves the issue of whether what has been reproduced from the claimant's work represents a substantial part of that work. To address that I need to identify what has been reproduced. For convenience I will address features of composition and visual contrast separately. In terms of composition:
- i) Elements of the composition of the claimant's work which have not been taken are the prominent arches of the bridge and the river, the steps in the foreground and the prominent lamppost. The angle to the vertical is somewhat different since the road can be seen with the bus sitting on it in the defendants' image whereas from the angle of the claimant's picture a balustrade obscures the road. The angle presented by the facade of the Houses of Parliament is different: in the defendants' image the perspective of the facade falls away more sharply whereas in the claimant's image there is much less perspective. The bus is on the central right side of the image, touching Big Ben, it is not left of centre as in the claimant's picture. The defendants' bus is bigger and presents a slightly different angle to the viewer. There are no people in front of the defendants' bus.
  - ii) Although the images undoubtedly differ in their composition, elements of the overall composition of the claimant's image have been reproduced. The bus is a Routemaster, driving from right to left with Big Ben on the right of the bus. The riverside facade of the Houses of Parliament is part of the image. The bus is on Westminster Bridge (albeit in a different place) in both images. This is obvious in the claimant's image and can be seen from the presence of the balustrade on the left in the defendants' image. There are some people visible but they are small (and in different places). There is no other obvious traffic. The edge of Portcullis house is visible on the right. Running from top to bottom, there is a substantial amount of sky in the picture (albeit more in the claimant's) and the top of the bus is roughly the same height as the facade of the Houses of Parliament.
59. In terms of visual contrast features:
- i) The element of bright red bus against a black and white background has been reproduced.

- ii) The element of the blank white sky, which creates a strong sky line, has been reproduced. A small point arose that the image produced by Sphere actually has no sky at all, so that it takes on the background of the box it is placed on. Nothing turns on that since in use it is placed on a white (or very pale grey) tin.
60. It is clear that some important and visually significant elements of Mr Fielder's original artistic work have not been reproduced by the defendants. The question is whether, without them, what has been reproduced is a substantial part of the claimant's work. Looking at the two images side by side, the differences are apparent. The vantage point in Annex 2 is different from the point in Annex 1. They are not the same photograph. The defendants submit that copyright law does not stretch to protecting Mr Fielder's idea; it protects his expression of that idea but the expression of the idea by the defendants is different, they say, in almost every respect. They urge on me that the composition of the claimant's work is extraordinarily ordinary. As such it could only really be infringed by lifting the image itself, i.e. facsimile reproduction. The level of skill and labour which went into the image manipulation is so low that it would not be infringed by anything other than facsimile reproduction, which of course has not happened.
61. Conversely the claimant says:
- The defendants are free if they wish to create a red on grey London icon image. They can even have a Routemaster before the Houses of Parliament. As their own evidence shows, these can be depicted in all sorts of different ways. But what they cannot have is a southbound Routemaster on Westminster Bridge before the Houses of Parliament at the same angle as the claimant's work on a greyscale background and a white sky, in circumstances where they have admitted seeing the claimant's work.
62. Each side put its case too high. The defendants are wrong to urge that only facsimile copying will do. I also disagree with the claimant's formulation. The angles are similar but not the same and in any case I am sure there are many things satisfying the claimant's definition which would not infringe.
63. I have not found this to be an easy question but I have decided that the defendants' work does reproduce a substantial part of the claimant's artistic work. In the end the issue turns on a qualitative assessment of the reproduced elements. The elements which have been reproduced are a substantial part of the claimant's work because, despite the absence of some important compositional elements, they still include the key combination of what I have called the visual contrast features with the basic composition of the scene itself. It is that combination which makes Mr Fielder's image visually interesting. It is not just another photograph of clichéd London icons.
64. Although the techniques used by Mr Fielder to achieve the effect he did may have been simple, the result has an aesthetic quality about it which is the product of his own work. The blank sky serves to emphasise the buildings and gives the whole image a dramatic appearance and the bright red bus stands out even more prominently. This has been reproduced. The basic composition of the image has the

Routemaster driving from right to left on the bridge but there is more to it than that. The bus is actually framed by the building. Although the framing is a little different in Annex 2, to my eye the essence of the framing effect has been reproduced. Although the bus is larger in Annex 2 than Annex 1, in both images the bus roughly in scale with the facade of the Houses of Parliament. Also the riverside facade of the building is a prominent feature. There are no other vehicles clearly visible and although there are some small people visible they are not prominent. This all gives the image an element of simplicity and clarity.

65. Two factors which have influenced my decision are (i) the nature of Mr Fielder's image, and (ii) the collection of other similar works relied on by the defendants.
66. On the first point, Mr Fielder's image is not what I will call a mere photograph; by which I mean an image which is nothing more than the result of happening to click his camera in the right place at the right time. I do not need to grapple with the scope of copyright protection arising from such a photograph. Mr Fielder's image could perhaps best be called a photographic work; by which I mean to emphasise that its appearance is the product of deliberate choices and also deliberate manipulations by the author. This includes choosing where to stand and when to click and so on but also includes changes wrought after the basic image had been recorded. The image may look like just another photograph in that location but its appearance derives from more than that.
67. On the second point, the collection of other similar works relied on by the defendants have worked against them because the collection has served to emphasise how different ostensibly independent expressions of the same idea actually look.
68. I sympathise with Mr Houghton in his wish to use an image of London landmarks. He is free to do so. There are entirely independent images of the same landmarks available to be used which predate publication of Mr Fielder's picture. But the defendants do not want to use those, no doubt for their own good reasons. Perhaps they did not look as attractive as the claimant's image? The defendants went to rather elaborate lengths to produce their image when it seems to me that it did not need to be so complicated. Mr Houghton could have simply instructed an independent photographer to go to Westminster and take a picture which includes at least a London bus, Big Ben and the Houses of Parliament. Whatever image was produced could then have been used on the tins of tea. Such an image would not infringe. It may or may not have the same appealing qualities as the claimant's image. Even if it did they would be the result of independent skill and labour employed by the independent photographer. Again however that is not what happened.
69. Mr Davis submitted that a finding of infringement in this case would give the claimant a monopoly which was unwarranted. He uses the word "monopoly" in a pejorative sense but it does not help. All intellectual property rights are a form of monopoly, properly circumscribed and controlled by the law. In any case I do not accept that a finding for the claimant in this case is unwarranted.

### *Conclusion*

70. I will give judgment for the claimant. The defendants' work infringes the claimant's copyright.

*Another matter*

71. What is behind this case is that the defendants' tea tins and boxes are sold side by side with souvenirs bearing the claimant's image. I have been shown pictures of this in the evidence. There is a hint of an allegation of unfair competition or some sort of confusing similarity of the kind seen in a passing off case. I have ignored that evidence. Whether or not consumers confuse the products of the parties (or their licensees) is not the issue.

*Postscript - a portrait version of the defendants' image*

72. After providing the parties with a draft version of this judgment and before formal handing down, I was asked to consider and rule on a version of the defendants' image which is printed in portrait format. It is a cropped version of the image as shown in Annex 2. Annex 2 could be called a landscape format as opposed to portrait format. The defendants submitted by letter that on my findings in relation to the landscape version, the portrait version does not necessarily infringe and they invited me to rule on the point. They submitted significant visual elements present in the landscape version are not present in the portrait version and invited me to decide that it did not infringe. The claimant submitted that this was a new point and that it was not open to the defendants to contend that even if the landscape version infringed, the portrait version did not. The claimant pointed out that no case distinguishing between the two versions was pleaded and submitted that such a case was not advanced clearly by the defendant in their skeleton or in oral submissions. In any event they submit the point was without merit.
73. The parties had mentioned the portrait version during the course of the hearing but it had not been clear to me that a separate case was advanced in relation to it by either party and that was why I did not consider it in the judgment I prepared. However given the submissions from the parties, it seems to me to be in the interests of justice that I now deal with the point.
74. I agree with the claimant that the defendants did not plead a case distinguishing between the two versions. At trial a point was indeed made but the case advanced did not make any effort to draw a major distinction. Paragraph 44 of the defendants' skeleton states:
- “It should be recalled that there is a ‘portrait’ version of the Alleged Infringement which appears on the smaller boxes of tea as well as on the side of the larger boxes. For the most part the case against this image will turn on the same issues, save that there are additional points on the cropping, which can best be illustrated overleaf.”*
75. There is no further elaboration. Moreover the reference to cropping must be seen in the context of an earlier submission by the defendants seeking to prevent the claimant from relying on cropped versions of the claimant's work. Mr Fielder had presented evidence of cropped versions of the claimant's work but the defendants objected to it at paragraph 22. In a footnote to the paragraph the defendants submitted:



*“ ... since nothing is likely to turn on the cropping, consideration of these others merely serves to confuse.”*

76. It seems to me that the defendants did not emphasise a separate case in relation to the cropped portrait version because it was inconsistent with their stance on cropping in general and because it was unlikely to avoid infringement if the main landscape version infringed.
77. I have no clear image of the portrait version suitable for insertion in the judgment so I have placed two X marks on Annex 2 to depict its the approximate edges. The reason the defendants' image is cropped is either to fit it onto the short side of a tin of tea, with the landscape version on the long side, or else to fit it on a smaller tin.
78. The cropping has been carried out to discard only the most insignificant parts of the original. In saying that I remind myself that the question is whether the cropped portrait version reproduces a substantial part of the claimant's work, not whether it reproduces a substantial part of the defendants' work. The cropped portrait version has lost about half the riverside facade and the edge of Portcullis House relative to Annex 2. These are two features to which I drew attention in paragraph 58(ii), and the facade is also mentioned in paragraph 64. The cropped, portrait version also has less visible sky than the landscape version (c.f. paragraph 58(ii)).
79. In my judgment, the omission of some of the facade and the edge of Portcullis House is of significantly less consequence than the main elements of the claimant's work that have been retained. Similarly, the reduction in the amount of sky is also inconsequential. The exact amount of sky is not particularly significant; what is important is the contrast between white sky and the grey-scale used for the Houses of Parliament. I find that the cropped portrait version does reproduce a substantial part of the claimant's work.

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Annexes

Annex 1

The claimant's work:



Annex 2

The defendants' work



X

X