

**IN THE PATENTS COUNTY COURT**

Rolls Buildings  
7 Rolls Buildings  
London EC4A 1NL

Date: 21/12/2011

**Before :**

**HIS HONOUR JUDGE BIRSS QC**

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**Between :**

<b>MICHAEL MITCHELL</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>BRITISH BROADCASTING CORPORATION</b>	<b><u>Defendant</u></b>

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**Michael Mitchell** represented himself  
**Jessie Bowhill** (instructed by **the BBC Litigation Department**) for the **Defendant**

Hearing dates: 17th, 18th November 2011  
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**Judgment**

**His Honour Judge Birss QC :**

1. This is an action for copyright infringement. The claimant (Michael Mitchell) is a Hertfordshire based creative. He drew a group of characters which he intended to be used in an animated television programme for children. They are called the Bounce Bunch. The Bounce Bunch are Feng, Simrita, Charlie, Yana and Jomo. They are a group of student eco-rangers studying at the Eco-Guardians summer camp. Mr Mitchell sent a proposal to the BBC. It included a sheet of drawings of the Bounce Bunch as well as a brief synopsis and a script for episode one, written by Mr Mitchell and Rory Champion. In May 2008 the BBC decided not to pursue the project and informed Mr Mitchell.
2. In November 2008 the BBC broadcast an animated children's television programme called Kerwhizz. It is a quiz combined with a futuristic race. The human characters are Ninki, Twist and Kit. Each character also has an alien side-kick. Ninki's side kick is Poop, Twist's is Snout and Kit's is Caboodle.
3. In April 2009 Mr Mitchell's daughter saw Kerwhizz and told her mother that the Bounce Bunch were on television. Mr Mitchell contacted the BBC. He was concerned about the similarities he perceived between the Bounce Bunch and the human characters in Kerwhizz. Following some phone calls, Mr Mitchell set out his case in a letter of 11 May 2009. The BBC carried out a thorough investigation and stated that they were satisfied that Kerwhizz and the characters in that programme

were a completely independent creation and that no use was made of Mr Mitchell's Bounce Bunch proposal.

4. The matter was debated between the parties further but to no avail. In February 2011 Mr Mitchell issued a claim for copyright infringement in the High Court. On 20<sup>th</sup> April 2011 the action was transferred to the Patents County Court by the order of Master Moncaster. On 11<sup>th</sup> May the BBC filed a full Defence to the claim and the matter came on for a CMC on 20<sup>th</sup> July 2011.
5. At the CMC I reviewed the issues with the assistance of counsel Jessie Bowhill instructed by the BBC and Mr Mitchell in person. It was clear that at least as matters stood, subsistence of, title to and qualification for copyright in the artistic works relied on (the drawings of the Bounce Bunch) were not in issue. The live issues on liability related to infringement, i.e. the similarities between the works relied on and the alleged copies, the question of access and copying and the question of independent design. An important issue (but not the only one) was the issue of access. Mr Mitchell contended that his works had been available online before his proposal was sent to the BBC. One of the directions at that stage was for the claimant to provide further details of his case on access. This was to be done by providing a list of the instances relied on.
6. Given that a key part of the BBC's defence was a case of independent design, it was going to be necessary for the BBC to call a number of witnesses to explain what happened. Cross-examination was likely to be necessary. The trial was fixed for two days on 17<sup>th</sup>/18<sup>th</sup> November 2011.
7. The BBC served statements for a total of ten witnesses. They were all available for cross-examination. Mr Mitchell indicated that he wished to cross-examine seven of them. The cross-examination was estimated to be quite brief and a timetable for the trial was agreed. At the trial the parties were represented as before at the CMC. In the result the case ran somewhat ahead of the timetable.

*Mr Mitchell's case*

8. Mr Mitchell's case is essentially simple. He contends that the Kerwhizz human characters bear striking similarities to the Bounce Bunch. The similarities are such, contends Mr Mitchell, that they can only have arisen as a result of copying (conscious or sub-conscious) by the artists working on the project for or on behalf of the BBC. He says that the artists had access to his work and so the similarities coupled with access to the work raise a strong case of copyright infringement. His case is that the three human characters reproduce a substantial part of Mr Mitchell's original artistic work in the Bounce Bunch.
9. Mr Mitchell's case on access has developed somewhat over time. In his letter of 11<sup>th</sup> May 2009 Mr Mitchell stated that he was the proprietor of the copyright in an artistic work entitled Space Kids/Bounce Bunch. It was first expressed in a material form in October 2005 and went through a documented evolution of ideas until June 2007. In the attachment to this letter Mr Mitchell provided an image of the five Bounce Bunch characters which was supplied to the BBC in October 2007, an image of three of the Bounce Bunch (Jomo, Charlie and Yana) which he said appeared on-line in 2007 at a website of Mr Mitchell's called [www.mikes-studio.co.uk](http://www.mikes-studio.co.uk) (which is no longer active),

and a side profile of the character who became Charlie, but is here called Sam, who appeared on-line in 2005.

10. The BBC informed Mr Mitchell that their case was that the initial pitch for Kerwhizz had been in 2006 and much of the illustration work had been done in 2006 and 2007 before his proposal was sent to the BBC in 2007. In response Mr Mitchell raised a new allegation. He contended that his work had been available online from 2004, well before his proposal was sent to the BBC, and was therefore accessible to the artists working on the BBC project. This question of access is one of the issues at trial. In a letter of 25<sup>th</sup> July 2011 Mr Mitchell set out his case on avenues of access. He listed a number of websites on which he said the Bounce Bunch were available at different times dating back to 2004. They included a site called ifreelance.com on which Mr Mitchell had a listing, his own mikes-studio.co.uk site, a listing Mr Mitchell had on eBay and some other sites. Mr Mitchell also relied on an instance involving the PC World shop and the University of Hertfordshire and a link between them and the animation company Blue Zoo who produced the final animations for Kerwhizz. The link was that Mr Mitchell had shown his designs to Tariq Amawi at PC World. He was a student at the University of Hertfordshire and offered to do a “short” of the Bounce Bunch. The link to Blue Zoo was that Kate Ellis, an animation student from the University, stated that she had done designs for Kerwhizz while working at Blue Zoo. More generally Mr Mitchell relied on the fact that the county of Hertfordshire has a substantial creative community and many of the relevant individuals in the case have a link to Hertfordshire.
11. The main Bounce Bunch drawing is attached as Annex 1. A representation of the Kerwhizz characters is at Annex 2. A schedule of the similarities relied on is at Annex 3. The side view of Charlie’s head is at Annex 4. In broad summary Mr Mitchell’s case on similarities is as follows. The Bounce Bunch were and the Kerwhizz characters are a group representing different races. All three wear a form of body armour which has various grommets and parts (the details differ a little between the characters). They each have a helmet with headphones, a microphone, and a microphone stalk. Looking at the three Kerwhizz characters:
  - i) Twist (in Kerwhizz) and Charlie (in the Bounce Bunch) is a Caucasian boy with a blond hair flick wearing blue.
  - ii) Ninki (in Kerwhizz) is an ethnically Afro-Caribbean girl and wears yellow. Jomo (in the Bounce Bunch) is an ethnically Afro-Caribbean boy and wears yellow. Simrita (in Bounce Bunch) is an ethnically Middle Eastern/Indian girl and also wears yellow. At one time Ninki had dreadlocks although in Kerwhizz as broadcast she has hair in bunches. Jomo has dreadlocks.
  - iii) Kit (in Kerwhizz) is a girl, ethnically from the Far East and wears pink. Feng (in the Bounce Bunch) is from the Far East although he is a boy and wears brown. Yana (in the Bounce Bunch) is Russian/Slavic and wears pink.
12. A final aspect of Mr Mitchell relates to the question of so called subconscious copying. Although, as Ms Bowhill rightly pointed out, “subconscious copying” appears to embody a contradiction because copying generally denotes a conscious or deliberate act; as she also accepted, the law does recognise this notion, in principle. I understood an important element in the case from Mr Mitchell’s point of view to be

that even if the relevant designers and other people were not aware of it, they were in fact influenced by the Bounce Bunch even if they have now forgotten they ever saw them. They had in fact reproduced elements from the Bounce Bunch, albeit perhaps unwittingly, so as to lead to infringement.

13. So, in the end Mr Mitchell says that one way or another his copyright has been infringed.

*The BBC's case*

14. The BBC deny infringement. They have set out to explain the entire process by which Kerwhizz came to be created. They contend it was independent of Mr Mitchell and the Bounce Bunch. They do not accept that Mr Mitchell's designs were accessible prior to the proposal being sent to the BBC.
15. The BBC's case about how Kerwhizz came to be produced is as follows. It was a product of the BBC's CBeebies department (with assistance from outside freelance designers and contractors). CBeebies is responsible for programming for children aged 0-6 years. In outline the project developed as follows:
  - i) The idea of Kerwhizz was conceived by Tony Reed, then a producer at CBeebies in December 2005.
  - ii) Nik Afia, a freelance illustrator, drew some black and white sketches in early 2006. Tony Reed and another CBeebies producer Stephen Cannon worked on it further in 2006 and pitched it to Michael Carrington, the Controller of CBeebies in May 2006.
  - iii) In 2006 Alan Robinson (then an assistant producer at CBeebies) started on Kerwhizz and created his own character designs. Barry Quinn, a producer at CBeebies Development became involved in July 2006 and arranged for various designers to present their ideas.
  - iv) One designer approached was Filip Krnja. He was a freelance automotive designer. He produced designs for Kerwhizz both of the characters and the racing pods. The BBC staff particularly liked the racing pods (no doubt influenced by Filip Krnja's work in automotive design). Directions were given to Filip Krnja to make the characters ethnically diverse.
  - v) Filip Krnja's work on Kerwhizz was complete by about January 2007. The project was pitched to BBC Worldwide in March 2007. Stephen Cannon took over the role as producer in May 2007.
  - vi) At the end of 2007 an independent animation company called Blue Zoo were engaged to work on the animation, based on Filip Krnja's designs. Christophe Rais was the art director at Blue Zoo and worked on the project. He was responsible for the final designs for Ninki, Kit and Twist, which were complete in March 2008 and approved in April. Kerwhizz was first broadcast in November 2008.

- vii) All the individuals involved deny copying the Bounce Bunch or ever having seen those characters until these proceedings.
16. Annex 5 shows an example of Nik Afia's drawings. Annex 6 shows Alan Robinson's characters. Annex 7 shows the designs of Filip Krnja and Annex 8 shows the trio of characters in their final form prior to sending to Blue Zoo, based on Filip Krnja's work with tweaks from Alan Robinson. Annex 9 shows the pencil sketches of the Blue Zoo designer, Christophe Rais.
17. As regards Mr Mitchell's proposal, the BBC explained it was sent to a department called CBBC which handles programmes for children aged 6 to 12 years. This was the appropriate department for the Bounce Bunch given the nature of that proposal. However Kerwhizz was the product of a different department, CBeebies, which handles programming for younger children. Kerwhizz is aimed at the 4 to 6 year old age group. Mr Mitchell's proposal was not sent to CBeebies from CBBC and no-one at CBeebies ever had access to it. CBBC did have a practice of sending CBeebies proposals which they thought might be of interest but that did not happen in this case. After all, as a proposal, the Bounce Bunch is not aimed at such young children.
18. A feature in the case relates to what happened to Mr Mitchell's proposal at the BBC. Mr Mitchell first sent his proposal in October 2007 and received an acknowledgement slip in November. The writing on the slip is by Claire Poulson, who was then Personal Assistant and Development Assistant for the Head of CBBC Co-productions and Acquisitions, Jesse Cleverly. Part of Ms Poulson's job was to receive such proposals. Mr Mitchell heard nothing for a while and in April 2008 Mr Mitchell appears to have written to the BBC chasing the matter. In May 2008 Ms Poulson indicated that the original script had been misplaced and asked Mr Mitchell to resend his proposal. He did so. The BBC's response on 28<sup>th</sup> May 2008 was that they decided not to pursue his proposal. In investigating the misplaced script, Ms Poulson found it had been filed in the wrong place. It was returned to Mr Mitchell.
19. The BBC obtained evidence from Kate Ellis to deal with the link between the University of Hertfordshire and Blue Zoo. Her evidence addressed her position in detail: dealing with her BA in Digital Animation from the University in May 2007; her knowledge of Mr Amawi (they were acquaintances only, they did not discuss Bounce Bunch); and her work at Blue Zoo. She joined Blue Zoo in May 2008 by which time the relevant designs were complete. She did work on props and scenery for Kerwhizz but did not make any changes to Kit, Ninki or Twist. Mr Mitchell found out about her connection with Kerwhizz from her online profile, which appears to have stated that she worked on the designs for Kerwhizz. Ms Ellis confirmed she had never seen Mr Mitchell's Bounce Bunch designs until 2010. A second witness statement from Ms Ellis was filed which dealt with a point of detail which Mr Mitchell raised. As a result Mr Mitchell decided he did not need to cross-examine Ms Ellis. Accordingly I can accept Ms Ellis' evidence. She does not provide a link between the Bounce Bunch and Blue Zoo.
20. A further aspect of the BBC's case is that they contend that the similarities relied on by Mr Mitchell are at such a high level of generality, given what is common in the field of children's cartoons and the commercial and practical realities, that the existence of such similarities does not raise an inference of copying in any event.

21. Finally, on subconscious copying they contend that special facts are required before such a case could be made out, and none arise here.

*The Law*

22. The Copyright, Designs and Patents Act 1988 provides at s.1(1) that copyright subsists in, *inter alia*, original artistic works. They are defined at s.4(1) as including “graphic works”, which are in turn defined in s.4(2) as including “paintings, drawings, diagrams, maps, charts and plans”. The copyright in an artistic work is infringed by copying it (s.17(1)) without a relevant licence, that is to say reproducing it in any material form (s.17(2)). The whole of a work need not be copied for there to be infringement. It will be sufficient if what is copied is a substantial part of the work (s.16(3(a))).
23. In his skeleton argument for the main trial, Mr Mitchell cited *Designers Guild v Russell Williams* [2000] 1 WLR 2416, [2001] FSR 11 p113. especially extracts from the speeches of Lord Hoffmann, Lord Millett and Lord Scott of Foscote. A particular passage relied on by Mr Mitchell is the following extract from the speech of Lord Millet:

The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.

24. Ms Bowhill also relied on the same passage and I will take it as a summary of the correct approach. Ms Bowhill also submitted that Mr Mitchell had misunderstood the nature of the shift in the burden passing to the defendant which is referred to in this passage. His case was that the BBC had to prove that there was “no possibility” of access. In a similar way, in his skeleton argument Mr Mitchell submitted that for the BBC’s defence of independent creation to succeed it had to be “categorically impossible” for the defendant to have had an opportunity to copy or for the defendant to have developed or revised the defendant’s works while they had an opportunity to copy.
25. These statements put the matter too high. If Mr Mitchell was seeking to argue that the criminal standard of proof was appropriate for this, a civil case, then I reject the submission. However in the end, beyond stating that the matter is one for the civil

standard of the balance of probabilities, it is impossible to lay down any sort of general proposition. Speaking entirely generally, it seems to me that the more strikingly similar two works may be, the more likely the proposition may seem that there has been copying, and that will mean that one might expect even more cogent evidence to rebut such a case than one might expect in a different case in which the similarities are less striking. It can only ever be a matter for weighing up the evidence.

26. Ms Bowhill also cited the observations of Laddie J in *IPC Media v Highbury* [2005] FSR 20 in which the learned judge noted that the presence of similarities do not necessarily indicate copying. He said (at p.443 para 10):

The author and the defendant may have worked quite independently from common sources, in similar environments, to achieve similar objectives and made use of similar common design techniques so as to produce works which have a degree of visual similarity.

27. Ms Bowhill also referred me to the danger of being misled by what Laddie J described as “similarity by excision” in the same case:

Michelangelo said of one of his sculptures, “I saw an angel in the marble and I carved until I set him free”. In copyright cases, chipping away and ignoring all the bits which are undoubtedly not copied may result in the creation of an illusion of copying in what is left. That is a particular risk during a trial. Inevitably the court will be invited by the claimant to concentrate on the respects in which his work and the alleged infringements are similar. But with sufficient concentration one may lose sight of the differences. They may be just as important in deciding whether copying has taken place. The effect can be explained by an analogy. Two individuals drop similar small quantities of sand on the floor. If one removes all the grains of sand which are not in equivalent positions, all you are left with are those which are in equivalent positions. If you look at those remaining grains it is possible to say that similar patterns of distribution exist. It is even possible to say that these similarities are surprising. But the similarities and the surprise they elicit are an artefact created by the very process of ignoring all other grains. This type of artefact created by close attention only to the areas of similarity is a risk in any court proceedings. (at p.443 para 11)

28. Ms Bowhill submitted that overall, the essential consideration was to ask whether the defendant had taken that which conferred originality on the claimant’s copyright work (or a substantial part of it). I accept that submission.
29. Ms Bowhill referred to the decision of the Court of Justice in *Infopaq* case, C-5/08 [2010] FSR 495 and the question of whether that decision has changed the law in relation to infringement. It seems to me that Ms Bowhill’s formulation, which I have accepted in the previous paragraph, would be in accordance with *Infopaq*. After the

trial the Court of Justice handed down judgment in the *Painer* case (C-145/10). Neither side referred to it. In any event it does not seem to me to make any difference on the fact of this case.

30. As regards subconscious copying, Ms Bowhill submitted that the most comprehensive summary of the law on this point was by the Court of Appeal in *Francis Day & Hunter v Bron* [1963] 1 Ch 587. The case was about whether the musical work “Why” had been composed in infringement of copyright in the work “In a Little Spanish Town”. At first instance Wilberforce J (as he then was) had found that the first eight bars of the chorus of “In a Little Spanish Town” constituted a substantial part of the whole tune and that there was a definite or considerable degree of similarity between those eight bars and the first eight bars of “Why”, though there were differences real enough to take into account when considering whether “Why” could be an independent creation. He accepted the defendants' case that there had been no conscious copying and held that there was insufficient evidence to prove unconscious copying and dismissed the plaintiffs' case. The plaintiff appealed to the Court of Appeal.
31. In the Court of Appeal Willmer LJ dealt with the issue of subconscious copying in the section from p614 onwards of his judgment. He observed that it is not necessary to prove anything in the nature of mens rea in order to establish infringement. A printer, for instance, may be held guilty of infringement though he has no conscious intent. He held that subconscious copying is a possibility which, if it occurs, may amount to an infringement of copyright. A prerequisite as far as Willmer LJ was concerned however was proof of familiarity with the work in question.
32. Upjohn LJ agreed with Willmer LJ. He understood the appellant in that case to be arguing that:

“if similarity of the alleged infringing work to the original work was established as a fact, and if it was further established that the alleged infringer had had some access to the original work, then although a denial of conscious plagiarism was accepted, we were bound, as an irrebuttable presumption of law, to say that the alleged infringer must have unconsciously copied the original work.”
33. Upjohn LJ rejected that submission. The issue is a question of fact. The defendant's work must be causally connected to the work of the original author. If it is an independent work, then, though identical in every way, there is no infringement.
34. Diplock LJ gave a similar judgment. He held that it was clear law that neither intention to infringe, nor knowledge that he is infringing on the part of the defendant, is a necessary ingredient in the cause of action for infringement of copyright. (p624) and pointed out that the real difficulty with a case based on alleged “unconscious copying” lay not with the law but on the facts, involving an inquiry into the workings of the human mind.
35. Willmer LJ also considered and approved the manner in which Wilberforce J had directed himself on the issue. That direction was:



"The final question to be resolved is whether the plaintiffs' work has been copied or reproduced, and it seems to me that the answer can only be reached by a judgment of fact upon a number of composite elements: The degree of familiarity (if proved at all, or properly inferred) with the plaintiffs' work, the character of the work, particularly its qualities of impressing the mind and memory, the objective similarity of the defendants' work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences upon the defendant composer, and not least the quality of the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiffs' work."

36. Ms Bowhill also cited the famous United States subconscious copying case of *Bright Tunes Music v Harrisongs* 420 F. Supp 177 (1976) which related to George Harrison's song "My Sweet Lord". However I note that Willmer LJ in the *Francis Day & Hunter* case specifically declined to consider the American decisions on this issue. He was satisfied that American copyright law was not sufficiently close to English law for the US decisions to be of assistance. I will not rely on the US decisions referred to by Ms Bowhill.
37. Ms Bowhill also submitted that there have been very few cases in this country in which infringement by subconscious copying has been made out in fact and that those cases where it has have involved particular circumstances and/or an original work of a certain character and quality. I was referred to *Sinanide v La Maison Kosmeo* (1927) TLR 371. That was the case about rival plastic surgeons and a short memorable advertising slogan "Beauty is a social necessity not a luxury". Humphries J held it has been taken unconsciously and found for the claimant. The judgment was overturned on appeal on other grounds, (1928) 139 LT 365. I was also referred to *John Richardson v Flanders* [1993] FSR 497. In this case Ferris J rejected a case based on deliberate copying but found that there was some limited infringement on the basis of unconscious or unintentional use of the claimant's work. In that case the defendant who had produced the work complained of also had a deep knowledge of the claimant's work (a computer program) because he had rewritten it in its entirety. Finally Ms Bowhill referred to *EMI Publishing v Papathanasiou* [1993] EMLR 307 which related to the theme music for the film *Chariots of Fire*. In that case Whitford J held there was no conscious copying and rejected a case based on subconscious copying as well. The only resemblance between the two pieces was a sequence of four notes (the "turn") which was a musical commonplace.
38. It seems to me that the only legal principle involved in the question of subconscious copying is the one decided in the *Francis Day & Hunter* case, namely that state of mind is not the issue and subconscious copying, if it occurs, may amount to an infringement of copyright. After that the issue becomes one of fact, to be decided on all the evidence in the case, whether it has been made out. It is an inference which may or may be not justified from the degree of objective similarity, the degree of familiarity and the character of the work.
39. However in my judgment there is an important distinction to be drawn between the basic inference which operates in all copyright cases which shifts the onus onto the defendant and the inference that subconscious copying has taken place, even though

they are both based on superficially the same material – the existence of similarities plus access to the claimant’s work. The former is the one referred to by Lord Millett in *Designers Guild* in the passage I quoted above. Relevant similarity combined with prior access may well be sufficient to shift the onus onto the defendant to satisfy the court that, despite the similarities, they did not result from copying. But the inference that subconscious copying has taken place is not concerned with a shifting evidential onus. That inference is one to be considered on the evidence as a whole. If subconscious copying is a proper inference to draw in all the circumstances that is not a presumption to be rebutted, it is a conclusion of copying. The evidence which would be necessary to support an inference of subconscious copying is likely to be a good deal more substantial than the evidence needed simply to shift the onus onto a defendant in a copyright case. Conversely the fact that similarities and evidence of access may be sufficient to shift the onus onto the defendant does not mean a case of subconscious copying is made out.

*The approach*

40. I will approach the issues in this case in stages. First I will consider Mr Mitchell’s case about access and his case that the similarities are such as to shift the onus onto the BBC to explain how their designs arose. Next, I will consider the BBC’s positive case, that the Kerwhizz characters were designed independently of the Bounce Bunch. In the nature of things much of the BBC’s case in this respect is focussed on explaining how the various designers and others involved in the project did what they did and whether they have ever encountered the Bounce Bunch. Much of this evidence is really directed to show that there is no question of conscious or deliberate copying and I will consider it on that basis. Finally I will look at the matters overall and consider whether infringement has been made out, bearing in mind in particular Mr Mitchell’s case on subconscious copying.

*Mr Mitchell’s case*

41. For the claimant, I heard evidence from Mr Mitchell. He was cross-examined on the issue of access and in particular in relation to his case that the Bounce Bunch were available through various websites online before 2007.
42. Mr Mitchell’s letter on access (dated 25 July 2011) appeared to contend that the Bounce Bunch characters themselves were available from 2004 online (e.g. on a site called [www.freelanceuk.co.uk](http://www.freelanceuk.co.uk)) but when asked about it Mr Mitchell confirmed that he meant only the side view of Charlie’s head. He was not referring to the Bounce Bunch characters as a whole in their completed form. The image of Charlie’s head in profile is Annex 4.
43. One of the issues was the mikes-studio website. This site was registered with Nominet in February 2007 and Ms Bowhill put to Mr Mitchell that that meant it simply could not have been available in 2006 because the site was not live until 2007. Despite that Mr Mitchell maintained that the website had been accessible for a few weeks before February 2007, in 2006. Mr Mitchell produced no documents to support his testimony on this and I am not satisfied the mike-studio website was available to the public before it was registered by Nominet in 2007. I note also that Mr Mitchell’s 11<sup>th</sup> May 2009 letter to the BBC puts the Bounce Bunch on mikes-studio in 2007 not 2006.

44. Another of the issues was the ifreelance website. This is a website used by freelance designers to offer their services. It has thousands of entries. As a creative person Mr Mitchell has carried on business selling his designs online and I do not doubt that he did indeed have a presence on ifreelance dating back well before 2007 and probably back to 2005. However there is no hard evidence that the Bounce Bunch characters were ever actually available on that site at that time. Mr Mitchell produced no evidence to back it up. I am not satisfied that Bounce Bunch characters were available on this site before 2007.
45. Mr Mitchell was asked about the process of design of the Bounce Bunch. It was put to him that the proposal had not been completed until 2007 (the year it was sent to the BBC) but Mr Mitchell stated that the artwork was complete in 2005 and stated that materials he had given to the BBC in the course of this case (i.e. floppy disks and the like) demonstrated that. Mr Mitchell had provided such material to the defendant's litigation team and accordingly I will accept his evidence that the artwork was complete in 2005. If the BBC had wished to contradict Mr Mitchell on this, they had the means to do so. However the fact the artwork was complete does not establish that it was ever made publicly available.
46. In his opening Mr Mitchell had asserted that the side view of Charlie had appeared on his eBay page. That was not something which was stated in the access letter of 25<sup>th</sup> July 2011 despite the fact that Mr Mitchell knew the access letter was important. Mr Mitchell said he had not put it in before because it was a minor point; the side view only appeared "once or twice" and it was so insignificant it was not worth mentioning.
47. In Mr Mitchell's letter of 11<sup>th</sup> May 2009 to the BBC the only artwork said to be online before 2007 was the side view of "Sam" (now Charlie) which was said to appear online in 2005-2006. The letter does not identify a website on which this took place. Most likely it was the ifreelance website.
48. The May 2009 letter also indicated that the three Bounce Bunch characters "appeared online 2007", referring to mikes-studio.co.uk. Ms Bowhill put to him that this reflected the true position and that the suggestion that other Bounce Bunch characters were online before 2007 had been dreamt up by Mr Mitchell in response to the fact that the BBC's Kerwhizz designs were created in 2006.
49. I reject the submission that Mr Mitchell simply dreamt up the allegation that the Bounce Bunch were available online as a deliberate attempt to mislead and to advance his case. However, taking the evidence as a whole, I am not satisfied that the Bounce Bunch were made available on the internet any earlier or in any other manner apart from as described in Mr Mitchell's 11<sup>th</sup> May 2009 letter. It was an important letter for Mr Mitchell to write and he was clearly alive to the question of availability prior to 2007 when he wrote it. That is because the letter puts the side profile of Sam/Charlie as being available online in 2005-2006. When, in the letter, Mr Mitchell used the phrase "appeared online 2007" to refer to the three Bounce Bunch characters on mikes-studio.co.uk, in my judgment he meant that that was when they made their appearance. In other words they were not present online before. There is no documentary evidence to support Mr Mitchell's assertion that any Bounce Bunch artwork, other than the side profile, was available online before 2007.

50. Accordingly I find that the Bounce Bunch drawn as full characters appeared online in 2007 and not before. Probably it was just the three figures Jomo, Charlie and Yana since they are the three in the May 2009 letter.
51. Apart from the availability online, Mitchell mentioned a number of other avenues of access prior to 2007 in his letter of 25<sup>th</sup> July 2011. However none of them amount to anything concrete. For example I have no doubt he promoted his services by email to local Hertfordshire, Cambridgeshire and Bedfordshire businesses but that does not bear on the issues I have to decide. Equally I do not doubt Mr Mitchell's daughter received emails of the Bounce Bunch while she was in Switzerland but there is no evidence linking this to the BBC or Blue Zoo. Nor is there evidence linking Kerwhizz to Mr Mitchell's screenwriter in California or to Anna Marie Davis, an American film producer, both of whom apparently received the Bounce Bunch illustration.
52. The PC World / Tariq Amawi / University of Hertfordshire episode took place in June 2007, however once the evidence of Kate Ellis was accepted, there is nothing to link that episode to Blue Zoo.

### *Similarities*

53. In summary, there is evidence that the Bounce Bunch artwork was visible on the internet from 2007 (with the side profile being earlier) and of course Mr Mitchell sent his proposal to the BBC in 2007 as well. Looking at the matter without consideration of the BBC's evidence, it seems to me that there is at least sufficient evidence that someone could have had access to the Bounce Bunch for it to be appropriate to consider whether the similarities relied on, coupled with that evidence of a possibility of access, raise an inference of copying.
54. I can deal with this aspect of the matter fairly shortly. Although side by side the characters look quite different and many of the similarities are at a high level of generality, there are a number of points which, prima facie, support Mr Mitchell's case. The overall similarities which strike me as being of significance are the combination of the fact that the characters wear a form of armour with helmets and microphones, the colour scheme used for the three characters in Kerwhizz, and their ethnic mixture. In addition to this, a particular element which stood out when I first looked at the images was the blond hair flick or quiff on the blue suited character (Charlie/Twist). Although none of these points on their own would be sufficient to raise an inference of copying, when they are considered as a combination, it seems to me that the onus shifts to the BBC to explain how the Kerwhizz characters were produced. One element I bear in mind is that although the Bounce Bunch has five characters, the three middle characters (in yellow, blue and pink) appeared online together according to Mr Mitchell.
55. Ethnicity as such is not a feature mentioned in Mr Mitchell's table of similarities. Nevertheless it is a matter one can infer from the facial tones and hair at least to some extent and it seems to me to be material.
56. There was evidence from the BBC directed to the commonplace nature of some of the features Mr Mitchell relies on, for example the obvious British cultural norm that blue is for boys and pink for girls. Part of Ms Bowhill's skeleton argument put these

points as relevant at that stage of analysing whether the similarities give rise to a presumption or inference of copying. While I can see that in some cases that might be appropriate, on the facts of this case when the similarities are put in combination, I think these points are better dealt with as part of the BBC's explanation for how the various elements in Kerwhizz came to be formed and chosen.

*Conclusion on Mr Mitchell's case*

57. Absent evidence from the BBC about how Kerwhizz was produced, Mr Mitchell's evidence establishes that it was possible for someone at the BBC to have seen the Bounce Bunch artwork before Kerwhizz was broadcast. Given the access, the similarities between the Bounce Bunch and Kerwhizz which call for an explanation.
58. However, I am not satisfied that the main Bounce Bunch artwork was available to anyone before 2007. Any influence from the Bounce Bunch on Kerwhizz, if it happened, must have happened from 2007 onwards. Furthermore, although one cannot dismiss the allegation of copying out of hand as one which does not raise a case to answer, the similarities are not so high as to make out a strong case on Mr Mitchell's behalf. In no sense is there a prima facie case of slavish or close copying.

*Charlie's head in profile*

59. Mr Mitchell did not suggest that his image of Charlies' head in profile, which was online before 2007, could support his case to any material extent. There is no group, only a single head with a helmet and a microphone stalk. I reject this part of the case at the first hurdle. The level of similarity between this artwork itself and Kerwhizz is so low that the onus has not shifted to the BBC.

*The BBC's positive case*

60. The BBC deny that Mr Mitchell's designs had any influence on Kerwhizz at all. They have pulled together the relevant witnesses to explain what happened and how Kerwhizz came to be made. I will deal with the evidence called in roughly chronological order from the point of view of the events which took place.

*Tony Reed*

61. Mr Reed's witness statement was brief. He conceived of Kerwhizz and worked on the initial development from late 2005 to early 2006 with Stephen Cannon and Nik Afia. He gave evidence that the first time he had heard of Mr Mitchell or the Bounce Bunch was when the complaint was raised in May 2009. In cross-examination he was asked about external guiding influences for Kerwhizz and explained that he had worked on a children's show called Doodle Doo with an episode with a quiz element in it. That went well and they decided that a quiz for CBeebies was a good idea. Mr Reed was asked about his work with Mr Cannon and Mr Afia in early 2006. They knew there would be a racing element and so the characters would need race wear and helmets. Mr Reed's speciality is puppets and Kerwhizz was to employ puppets rather than animation. Once the project had been approved by Michael Carrington, the project was passed onto Barry Quinn and Alan Robinson.

*Stephen Cannon*

62. Stephen Cannon is a CBeebies producer. His full name is Andrew Stephen Michael Parsons. “Stephen Cannon” is his professional name and the name by which all the people concerned know him. I will refer to him in this judgment as Mr Cannon. Mr Cannon’s witness statement was also a brief one. He stated that the first time he had heard of Mr Mitchell or the Bounce Bunch was in May 2009.
63. In cross-examination Mr Cannon explained that he worked on Kerwhizz with Tony Reed and Nik Afia in 2006. Initially his work was at Elstree in Hertfordshire. He was asked about character outlining, i.e. the indications of a character’s characteristics such as their actions and geographical location. The discussions included the quiz and race elements and the fact that they were to have boy racer and girl racer characters. He could not remember how much of the work arose from Nick Afia generating images himself and how much came from input from himself and Tony Reed. Mr Cannon explained his strengths did not lie in visuals but on overall programme structure and ideas. He said he did not search for designers online.
64. Once the project moved on to be dealt with Barry Quinn and Alan Robinson, Mr Cannon was shown the work as the project developed but his focus was on another programme called Tommy Zoom and a project which became a TV programme ZingZillas. He did not meet Filip Krnja.
65. Mr Cannon became involved again in May 2007. His role from that point was to complete the project. He attended Blue Zoo frequently in this period. He explained that the designs which had been established by the work of Alan Robinson, Barry Quinn and Filip Krnja stayed exactly the same right through 2007 until the beginning of 2008 (when the project was complete). In fact an assertion that the designs stayed precisely the same throughout 2007 and into 2008 is not right. However no criticism of Mr Cannon arises from that and Mr Mitchell made none. Mr Cannon was not being asked about the details at this point in his testimony.
66. Mr Cannon was asked about the contacts between Blue Zoo and CBBC. A particular person at Blue Zoo is Adam Shaw and Mr Cannon confirmed he would be surprised if Blue Zoo’s Adam Shaw did not have contacts with CBBC since Blue Zoo is an animation company.
67. Mr Cannon was also asked about his contact with Jessie Cleverly (of CBBC). They had met on only two or three occasions. It was not suggested to Mr Cannon that he discussed the Bounce Bunch (or Kerwhizz) with Jessie Cleverly.

*Nik Afia*

68. Nik Afia gave a full, detailed account in his witness statement. He is currently working as a children’s book illustrator although he has a background in character design for television. In 2006 Mr Afia prepared the first black and white designs of the Kerwhizz characters. He dealt with Tony Reed and Steve Cannon. At that time the project contemplated that the characters were to be puppets. There were to be boy and girl humanoid characters, each with a non-human side kick. Mr Afia is a great admirer of Japanese cartoons and comics and used that genre as a source of inspiration for his work.

69. I will only include an image of one of Mr Afia's characters to illustrate his work. In Annex 5 is a sketch he drew on 21<sup>st</sup> March 2006. A number of features are evident. The character is wearing a helmet and a racing clothing because racing was part of the Kerwhizz concept. Mr Afia's helmets were inspired by a Japanese cartoon called Gatchaman. The helmet also has a central stripe. Others of Mr Afia's Helmets had a central ridge. Mr Afia added the headphones. Some of the characters had hair quiffs sticking out from under the helmet (see Annex 5). Mr Afia listed a number of influences for the quiffs including Japanese anime and manga characters: Streetfighter's Cammy and Dragonball Z's Goku as well as another Japanese character called Black Jack and a 1950s Japanese character called Astroboy. The chunky boot shape were inspired by Astroboy and a computer game called Megaman. The gloves had separate fingers because the characters were to be driving racing cars/pods and so he assumed they would wear racing gloves.
70. In his witness statement Mr Afia also explained that when he did his design work on Kerwhizz he was not aware of Mr Mitchell's Bounce Bunch.
71. Mr Afia was cross-examined by Mr Mitchell. Mr Afia had stated that he had used a freelance website in the past and it might have been the ifreelance site relied on by Mr Mitchell. He accepted from Mr Mitchell that it is impossible to recall every piece of art and design that you see. It was put to him that it was not beyond the realms of possibility that he may have seen Mr Mitchell's Bounce Bunch and had a recall to it during his design process but not consciously. Mr Afia said "It would be possible but I do not think so. I think I would have remembered." Mr Afia's answer was entirely credible and I accept it.
72. Mr Mitchell submitted that this meant that Mr Afia had accepted that subconscious copying of the Bounce Bunch was possible. That puts the matter much too high. I take Mr Afia's evidence to be that if the Bounce Bunch had influenced his work he would have remembered. The fact that he did not remember is evidence that the Bounce Bunch was not an influence.

*Barry Quinn*

73. Mr Quinn also gave a full, detailed witness statement in this case. In July 2006 he joined CBeebies as a development producer based in Hertfordshire (Elstree). At that time CBeebies was in Elstree while CBBC was at Television Centre in London W12 although in late summer 2006 it moved to the Television Centre as well but remained completely separate.
74. Tony Reed and Steve Cannon had worked on the initial stages of Kerwhizz in 2006 but from July it was passed to Barry Quinn and Alan Robinson working together. Tony Reed and Steve Cannon shared an office at that time and Barry Quinn would often discuss things with them too. The brief was to find designers which were not traditional pre-school designers so they (Barry Quinn, Alan Robinson and to a lesser extent Steve Cannon and Tony Reed) researched various art colleges and other sources. The team were contacted by Filip Krnja as a result of a press release they posted on the Royal College of Art's website. The work of a number of designers was taken forward between May and September 2006. The team liked Alan Robinson's designs but felt they were too young. One of the elements discussed in September 2006 was that Barry Quinn thought the character Ninka could be black, Kit

could be Chinese or Japanese and Twist could be white in order to create a show which was global and have diverse characters. In November Filip Krnja produced a version of Ninka with dreadlocks coming out of her helmet (see Annex 7).

75. In November 2006 the project was presented to Michael Carrington by Tony Reed and Barry Quinn. Filip Krnja's designs were preferred and they went on to be developed further.
76. By January 2007 Mr Quinn was receiving the final emails from Filip Krnja with his final designs. There was a little confusion about the exhibited documents, images dated 15<sup>th</sup> January had been placed beside an email dated 12<sup>th</sup> January, but nothing turns on this mix up. It is clear that Mr Quinn received the final designs between 12<sup>th</sup> and 17<sup>th</sup> January 2007. The final trio are shown in Annex 8.
77. Mr Quinn's witness statement dealt with his access to the websites Mr Mitchell relies on and his access to the Bounce Bunch. The first time he saw the Bounce Bunch was when the complaint was raised in 2009. As regards websites, apart from eBay, nothing about the other sites relied on by Mr Mitchell made him think he had ever accessed them. Mr Quinn also explained that he found the allegation of copying to be offensive. He said that it beggared belief that anyone could suggest the lengthy process he and his colleagues undertook was all a charade. In his industry, individuals are all creative people with their own ideas and designs.
78. Mr Mitchell's cross-examination of Mr Quinn aimed to demonstrate the collaborative nature of the design process and to emphasise the involvement of Stephen Cannon and Tony Reed. Mr Quinn readily accepted that proposition.

*Alan Robinson*

79. Alan Robinson provided a detailed statement. He explained that he worked with Barry Quinn on Kerwhizz in 2006. In his work at CBeebies he has devised and created a number of characters and concepts. Mr Robinson was asked to create his own character designs, which he submitted in July 2006 (Annex 6). At that stage he was starting from Nik Afia's designs. Mr Robinson's designs included one black, one white and one character from the far east. Later in 2006 Mr Robinson was responsible for some small changes to Filip Krnja's final designs including putting a quiff on the Twist character (Annex 8).
80. In his witness statement Mr Robinson stated that nothing makes him think he ever saw any of the websites Mr Mitchell relied on as allowing access to the Bounce Bunch and he confirmed he had never seen the Bounce Bunch until this case arose. He was not cross-examined on that.
81. Mr Robinson was challenged on his recollection of the details of his input to the design process on the basis that in one place in his statement he had stated that it was possible he had made a small change to Twist's mouth but could not now recall. Mr Robinson did not accept that this showed that he had difficulty recalling the rest of his general evidence as to the design process. I accept Mr Robinson's answer. The fact that he did not recall one very specific point of detail did not undermine his evidence.

*Filip Krnja*



82. Mr Krnja provided a full, detailed witness statement.
83. Mr Krnja is an automotive designer. He has a Masters in Aerospace Engineering and Product Development from the Federal Institute of technology in Zurich and a Masters in Vehicle Design from the Royal College of Art in London. He has worked for Mitsubishi, Mercedes Benz, Volkswagen and is currently working for Ford.
84. Mr Krnja explained how he was commissioned by CBeebies in 2006. His work with CBeebies and in particular Barry Quinn is explained in detail. Mr Quinn sent him some reference images at the outset including pictures of Cactus people, a Munny doll and an image of Sioux Falls stadium in Beijing. Mr Krnja explained the design process in detail, with initial concepts in September 2006, including detailed consideration of the racing helmets, headphones, mouthpieces and body armour. Mr Krnja's first sketches included the idea that the characters may need microphones attached to their helmets as they were to be in racing pods. He thought a microphone was just "cool gear" to attach to a helmet. They were taken out of later presentations but Mr Krnja also gave the sidekick Snout a microphone on a stalk. Snout kept his microphone.
85. At one stage Mr Krnja drew simple C shaped hands on the characters (referred to as Playmobil hands) but he knew that he would need to develop the hands later because the script referred to the need for "fingers on buzzers". As the main characters were to race in pods, one influence on Mr Krnja was the glasses used by the character Anakin from the first episode of Star Wars.
86. In Barry Quinn's feedback to his initial designs, the ethnicity of the characters was raised, proposing that Ninka could be black, Kit Chinese or Japanese and Twist white. Mr Krnja's statement goes on to explain the work done in October / November and into December 2006. For example Mr Krnja explains that he designed Ninka wearing an orange/yellow body suit because he thought it went well with her black hair and black skin. For Twist, he had proposed a number of colours to Barry Quinn and Barry asked him to make the suit light blue. He designed Kit to have a pink suit because it seemed an obvious choice for a girl character and Alan Robinson's designs - which he had seen - had Kit in pink.
87. Over the Christmas period in December 2006 Mr Krnja stopped working on the designs and travelled to Switzerland. After he returned, on 12th January, Barry Quinn sent him a character synopsis document which included specific feedback for each character and asked him to ensure that certain common features (like elbow joints) were used for the characters. One particular request was to give Twist a blond tuft of hair or quiff. Mr Krnja's statement explains this particular point in detail and includes a copy of the notes he took during a phone call in which he and Barry Quinn discussed the quiff and made various changes to it. Mr Krnja had included a quiff in his initial rough sketches and stated that they were not unusual design features. Apparently when Barry Quinn asked him to add a quiff to Twist, Mr Krnja thought of the main character from the cartoon The Incredibles. To create Twist as an "all American hero", Mr Krnja gave him blue eyes and put blue stripes under his eyes (they had been black).
88. Mr Krnja's witness statement concluded with his evidence about the Bounce Bunch. Although he cannot be certain never to have accessed the various websites Mr

Mitchell relies on, he is sure he has never seen the Bounce Bunch on any of them. Mr Krnja refers to the various other possible avenues of access to the Bounce Bunch proposed by Mr Mitchell and rules them out. He had never seen the character designs until shown them by a solicitor in these proceedings.

89. Mr Krnja was not cross-examined by Mr Mitchell.
90. In this section I have referred to the yellow character as Ninka not Ninki. That is because during the development of the Kerwhizz characters from 2006 to 2008 the yellow character was called Ninka. However, the character name was changed to Ninki prior to broadcast in November 2008. So references to the final Kerwhizz character design should be to Ninki whereas when I refer to the design history the character is called Ninka.

*Christophe Rais*

91. Christophe Rais's statement was a detailed one. He is an Art Director at Blue Zoo. When Blue Zoo were informed they had won the BBC's tender for Kerwhizz, in December 2007, Mr Rais was a Designer. He was initially briefed by Adam Shaw and received the BBC's character designs. Mr Rais made a number of changes in order to animate the characters. So for example he explained that joints were added to make animation easier. Also the three characters were to be given a coherent overall style. He was the only designer at Blue Zoo to work on the characters.
92. The project had a fairly short turn around time and therefore Blue Zoo did not want to make many changes. They were aware that CBeebies had spent time developing the characters.
93. Mr Rais drew initial pencil sketches which were sent to CBeebies for approval (Annex 9). The only input Adam Shaw had was in briefings or if he happened to walk past Mr Rais's desk.
94. In coming up with the initial pencil designs Mr Rais was influenced by Star Wars Storm Troopers, Space Marines and Japanese manga style robots. These influences suggest a chunky style of body armour and strong geometric shapes (which are easy to animate). He particularly liked the armour on Space Marines; they do not generally have wrists or ankles but have forearms that go straight into fingers and legs that go into chunky boots.
95. A specific issue which arises in relation to Mr Rais is the matter of the microphones and microphone stalks the characters have in Kerwhizz. That is one of the features not present in the designs before they went to Blue Zoo but which were added there. Mr Rais refers to these features as a mouthpiece. He explains that the side kick Snout had a mouthpiece in the BBC's designs provided to him. He felt the characters needed mouthpieces so that they could communicate while racing and thought it looked odd that only Snout had one. He also explained that adding a mouthpiece helped the animation since it gave the characters a prop to move and readjust and was a unifying feature which made them look like a group. Mr Rais thought that giving Twist a mouthpiece made him look like a fighter pilot.

96. Mr Rais's witness statement explained all the various changes he made to the designs in detail and the reasons why he made them. The reasons are grouped by topic. I have dealt with the mouthpieces topic above. As another example, I will summarise what he said about the helmets topic. Mr Rais explained that he made Ninka's helmet very smooth and round because he thought it would appeal to a young audience and he added earphones to Kit's helmet and made her helmet slightly squarer so that her silhouette would be different from Ninka's. Mr Rais thought two dishes on Kit's helmet looked juvenile so he removed one. Twist's helmet was kept the same although he enlarged the headphones. The further topics addressed in the witness statement at a similar level of detail to the helmets were: bodies, clothing/ armour, chunky boots, hair, headphones, fingers, and the shoulder detailing. Finally in the evidence about the design process Mr Rais deals with the colour palette used for the characters in March 2008, which marked the end of his involvement. The BBC gave final approval in April 2008.
97. Like the other witnesses for the BBC, Mr Rais stated that he had not seen Mr Mitchell's designs at the time he created his own designs. The first time he was aware of them was in 2009 when the complaint arose. He also confirmed that save for eBay, he had not accessed or viewed the other websites relied on by Mr Mitchell.
98. None of Mr Rais's evidence was challenged by Mr Mitchell save for a specific point about animating joints. Mr Rais had explained that the shoulder grommets were a functional item to help the character move. He also expressed surprise that Mr Mitchell was claiming that his (Mr Mitchell's) joints were unique since he (Mr Rais) believed they were just a practical requirement for figures to move. Mr Rais was asked if there were other methods to achieve smooth animation movement and he indicated that there are but they take longer to create in the computer. In computer animation, robotic or mechanical looking animation is easier to create than animation of the manner in which skin behaves.
99. He was asked about the discussions with Adam Shaw and Stephen Cannon. Mr Mitchell asked if Mr Shaw was "guiding you or opening a door for you to walk through". Mr Rais did not accept that. He said the discussions with Adam Shaw were two way conversations and Mr Shaw provided feedback to Mr Rais. As regards Mr Cannon, he only came to Blue Zoo after Mr Rais' pencil sketches had been done and once Mr Rais was working in the three dimensional computer animation itself.

*Claire Poulson*

100. Ms Poulson was the person who handled Mr Mitchell's proposal to CBBC. Her witness statement explained how she must have misfiled Mr Mitchell's first proposal and the steps taken to review the second copy of his proposal on a fast track basis once it appeared that Mr Mitchell's first proposal had been lost. In the witness box Ms Poulson confirmed that the acknowledgement slip Mr Mitchell received when he sent in his proposal was in her handwriting.
101. In cross-examination Ms Poulson accepted that there was a link between CBBC and CBeebies. She explained what that link was. CBBC would send proposals they had received to CBeebies if they (CBBC) thought they were age appropriate. This testimony did not advance Mr Mitchell's case. Ms Poulson had explained in her witness statement that the Bounce Bunch proposal had a fairly complex concept

which was aimed at the CBBC age group and she (and her colleagues Jesse Cleverly and Melanie Halsall) did not consider it appropriate to send it to CBeebies and did not do so. I have no reason to doubt Ms Poulson's evidence and I accept it. She was a good witness.

102. Mr Mitchell sought to establish with Ms Poulson that the review process, involving Jesse Cleverly and Melanie Halsall, might allow for a sharing of ideas from them on elsewhere (such as Blue Zoo) but Ms Poulson did not accept that her colleagues would consult with anyone else.

*Katherine Ellis*

103. Ms Ellis has been mentioned above. She was not cross examined.

*Helen Kurau*

104. Ms Kurau is a solicitor working in the BBC Litigation Dept. Her evidence went to the mix up with exhibit pages mentioned above in relation to Mr Quinn. She was not cross-examined.

*Analysis of the BBC's positive case*

105. I have set out above a fairly full summary of the evidence provided by the BBC. The evidence provided was much more detailed than even my summary shows. It all had the ring of truth and was almost entirely unchallenged by Mr Mitchell. It is quite plain that none of the relevant individuals who provided witness statements in these proceedings could be said to have been aware of the Bounce Bunch at any relevant time. The evidence in support of this part of the BBC's case is overwhelming and I accept it. The account given by these individuals leaves no room for a case of deliberate or conscious copying by any of them. The BBC have plainly called the relevant witnesses who together explain how the Kerwhizz characters came to be derived and there is no basis on which to doubt their testimony that they did not deliberately or consciously copy the Bounce Bunch.
106. I have included the qualification "deliberately or consciously" in the previous findings because of argument about subconscious copying. This evidence illustrates an obvious problem with subconscious copying arguments. How can a creative person ever deny that they were not subconsciously influenced by something. Plainly all creative work is influenced by innumerable elements, some very apparent to the artist and some less so. I will deal with the sub-conscious copying case below.

*The fate of Mr Mitchell's proposal at the BBC?*

107. Mr Mitchell's proposal was sent to CBBC and not to CBeebies. It was clear on the evidence that the departments are different and distinct. I have accepted Ms Poulson's evidence that CBBC did not consider the Bounce Bunch to be suitable for sending to CBeebies and did not send it there.
108. What of the misfiled earlier copy of the proposal? By definition one cannot know for certain where the file was for the months in which it was not in its proper place. Ms Poulson's evidence was that she must have misfiled it. Although he did not say so, I

detected in Mr Mitchell's case a suggestion that perhaps the misfiled proposal was not really misfiled at all. Mr Mitchell did not make his case at all clear on this but as I understand it the hint is that the real reason the proposal was not in the proper place when Ms Poulson looked for it was because someone else at the BBC had taken it, used it as a basis for Kerwhizz and put it back in the wrong place. So Ms Poulson's view that she must have misfiled it was her genuine view but was mistaken. There is not a shred of evidence for this level of conspiracy or connivance and I reject any such case. I accept Ms Poulson's evidence that she misfiled the proposal and that is why it was in the wrong file when she came to look for it. It was not out being reviewed and plundered by staff at the BBC.

*A creative constant*

109. One way in which Mr Mitchell put his case was that Mr Cannon himself (or perhaps someone else at the BBC) was a "creative constant" from the first meeting with Mr Afia through to the work with Blue Zoo. The point is the same whether it was Mr Cannon or another individual and I will deal with it as an allegation about Mr Cannon. I understood Mr Mitchell to mean that he was contending that Mr Cannon had encountered the Bounce Bunch somewhere and that his input was always present in the project to a greater or lesser extent and was based on the Bounce Bunch. Mr Cannon was not involved in the middle of the project but that does not matter for Mr Mitchell's argument. I understood Mr Mitchell to be asserting that the Bounce Bunch were a constant influence on Kerwhizz in this way. Mr Mitchell contended that, at the point just before Blue Zoo were instructed, Kerwhizz did not infringe his rights because the similarities were not sufficiently high. However the changes made at Blue Zoo resulted in the characters becoming too close to his designs and thereby infringing.
110. However all the BBC's witnesses including Mr Cannon gave clear evidence that the first time they or he saw the Bounce Bunch was in 2009. In my judgment, if he was a "creative constant" influenced by the Bounce Bunch at all, then there is no basis for this to have been conscious or deliberate. I reject any such contention. As regards the sub-conscious copying allegation, it seems to me that the "creative constant" point does not add anything.
111. Furthermore and in any event I have already found that the Bounce Bunch was not available online until 2007 and so there is no route by which anyone could have accessed the Bounce Bunch before hand and thereby influenced the project beforehand.
112. Yet another problem with this allegation is that it was not put to any witnesses. Now the limited cross-examination regime in the Patents County Court means that the argument that a particular point was not put may well have lesser force than it might do in other cases. The limited cross-examination regime in the Patents County Court means that parties are certainly not obliged to seek to justify lengthy cross-examination on the basis that they are simply putting the entirety of their case to a witness (regardless of whether that is ever a justification for such cross-examination). However in this case cross-examination of the witnesses was clearly going to be necessary and proportionate and it was provided for at the directions stage. The creative constant point ought to have been put to someone, such as Mr Cannon, if it was to be advanced in the manner in which it was advanced. In any case all the

witnesses gave clear evidence that the first time they saw the Bounce Bunch was well after the event and Mr Mitchell did not challenge them despite having a clear opportunity to do so.

### *Gaps*

113. One problem with a case like this is that no matter how many witnesses a defendant calls, it will always be possible for a claimant to point out that another person might be the conduit through which the copying took place. This is illustrated by the references to Jessie Cleverly and Melanie Halsall of CBBC, who read Mr Mitchell's script but have not given evidence and references to Adam Smith of Blue Zoo who was Christophe Rais' boss, clearly influenced his designs at least to some extent and has not given evidence.
114. Jessie Cleverly and Melanie Halsall did see the Bounce Bunch but there is no evidence at all that they had any interaction with the Kerwhizz project. Moreover it is clear from Claire Poulson's evidence that their review took place in May 2008. This is after end of the project at Blue Zoo. The Kerwhizz characters were finished. There was no need to call Jessie Cleverly and Melanie Halsall as witnesses. They cannot have acted as a conduit between the Bounce Bunch and Kerwhizz on any view.
115. What about Blue Zoo's Adam Shaw? For him to have seen Mr Mitchell's proposal sent to the BBC would require an entirely fanciful series of events involving the misfiled copy finding its way from the wrong folder Claire Poulson had placed it in to Mr Smith. I reject that possibility.
116. However by 2007 the Bounce Bunch were online on the mikes-studio website. The evidence does not rule out the possibility that Mr Shaw saw that website. I rather doubt it but it is fair to say there is no evidence directed specifically to the point. Mr Mitchell did seek to suggest to Mr Rais that perhaps Adam Shaw had guided Mr Rais in his design work. Although Mr Mitchell did not say so explicitly, I understood this to be Mr Mitchell putting a case that the conduit was Mr Shaw. However Mr Rais did not accept that he was guided. Mr Rais' evidence was that there was a two way discussion. I suppose that evidence leaves open a crack through which it might be argued the Bounce Bunch slipped through to Mr Rais via these two way discussions with Mr Shaw but I find that suggestion wholly implausible and I reject it.

### *Events at Blue Zoo*

117. Part of Mr Mitchell's argument is that the events at Blue Zoo caused the Kerwhizz designs (which had on his case always been influenced by the Bounce Bunch anyway), to cross from non-infringing as at the end of Filip Krnja's work, into infringement once Blue Zoo had finished. Mr Mitchell used the animation point he put to Mr Rais about shoulder grommets as an example. Mr Mitchell's submission in closing was this:

“Mr. Rais confirmed that it was not the only way of animating an object, for an arm to move smoothly. I would suggest that there were other options available which would have taken the final designs that appeared online and broadcast in November 2008 away from any possible inference of copyright

infringement of the Bounce Bunch. But that did not occur. I am saying that they moved closer to the images of Bounce Bunch that were seen.”

118. It seems to me that this cannot add to Mr Mitchell’s case other than as an element in the sub-conscious copying question which I will consider below.

*Looking at the matter as a whole – subconscious copying?*

119. I have accepted the BBC’s positive case on the evidence that, as far as their witnesses are concerned, the designers of Kerwhizz believe that they did not copy the Bounce Bunch. In my judgment all the BBC’s witnesses gave honest and truthful evidence. But that evidence cannot rule out the possibility that, without realising it, someone involved did see the Bounce Bunch, presumably online, and without realising they were doing it reproduced elements of the Bounce Bunch in the Kerwhizz characters.
120. In order to consider this matter putting Mr Mitchell’s case at its highest, I will ignore for present purposes my finding that the Bounce Bunch were not online until 2007 and I will assume (contrary to my judgment) that the Bounce Bunch were available on the internet to be seen in 2005 and 2006 in the manner contended for by Mr Mitchell.
121. There are three elements to consider: the degree of familiarity with the Bounce Bunch, the character of the work, and the degree of objective similarity between the Bounce Bunch and the Kerwhizz characters.

*Degree of familiarity*

122. The witnesses called by the BBC had no relevant familiarity with the Bounce Bunch at all. At best for Mr Mitchell two things can be said. First, perhaps one or more of them encountered the Bounce Bunch at one stage but has or have now entirely forgotten about it. Something approaching a case of this kind was put to Mr Afia but his evidence was that he thinks he would have remembered. I have already accepted his evidence although no doubt Mr Mitchell would say that even accepting what Mr Afia says does not rule out the subconscious influence. It might be said that Mr Afia is entirely honest but he does not realise that in fact, unknown to him, he has been influenced by the Bounce Bunch and is oblivious to it. This illustrates the slippery nature of the allegation of subconscious copying when it is combined with the reality of the internet today. Since everything is available to everyone on the world wide web, no evidence can ever rule it out a subconscious influence. The legal process can only operate on evidence. In my judgment even if I assume in Mr Mitchell’s favour that the Bounce Bunch were online in 2005 and 2006, there is no evidence anyone was at all familiar with them and no evidence the relevant people concerned with Kerwhizz ever were.
123. The second possible point is that there are always more witnesses who could have been called by the defendant. In this case at least Jessie Cleverly, Melanise Halsall and Adam Shaw. They have not said they did not see the Bounce Bunch. However again this illustrates the problem caused by the subconscious copying argument. No matter who is called to give evidence, a further person can always be postulated on Mr Mitchell’s behalf as a subconscious influence on that witness.

*The character of the work*

124. This phrase was used by Wilberforce J (as he then was) in the *Francis Day Hunter* case in the passage approved by the Court of Appeal to refer to the qualities of the work in impressing the mind and memory. In other words supposing the designers did encounter the Bounce Bunch, does the artistic work have particularly memorable qualities such as to enhance the likelihood of subconscious copying?
125. Mr Rais expressed the unchallenged view that the Bounce Bunch designs were very simple and generic. He pointed out that the heads were just spheres and he said the designs were very basic and included functional rather than original features. I have also been provided with a good number of other designs for characters aimed at children which are well known and used in broadcasting and film. For convenience I will address them in one place, in the next section on objective similarity and other influences.
126. Bearing all this in mind however, in my judgment the Bounce Bunch designs are not particularly memorable as character designs for children's animations. They are, with all due respect to Mr Mitchell who created them, rather simple and generic in nature. I am not satisfied that a designer of the kind of artwork which this case is concerned would retain even a subconscious memory or influence from the Bounce Bunch if he or she encountered them. The only way in which this encounter could have taken place would be a brief look on the internet or perhaps a glance at the folder holding Mr Mitchell's proposal with its top flap open. The reason I mentioned the latter is because Mr Mitchell emphasised that the way he had placed his drawing in his folder for the BBC was such that only the three middle characters Simrita, Charlie and Yana were visible and they are respectively yellow, blue and pink running from left to right just like Ninki, Twist and Kit.

*Objective similarity*

127. In terms of a shifting onus, I have already held that the objective similarities between the Bounce Bunch and Kerwhizz are sufficient to mean that the BBC need to explain how Kerwhizz came about. That is very different from saying that the similarities are sufficiently striking to support a case of subconscious copying. For that latter proposition I need to consider the similarities in the context of whether they support an inherent probability that such similarity as is found could be due to coincidence. I also need to consider the existence of other influences and the BBC and Blue Zoo designers own evidence on the presence or otherwise in their mind of the claimant's work.
128. Mr Mitchell's schedule of similarities is at annex 3. The BBC produced evidence of a wide range of other influences to seek to illustrate the generic nature of many of the features relied on by Mr Mitchell. Particular characters which stood out in the evidence are mentioned below along with the reference numbers from the schedule of similarities in annex 3 which they seem to me to illustrate:
- i) Buzz Lightyear. A figure with chunky body armour, see items 10, 12, 13, 14, 16, and 17;



- ii) Lunar Jim. A space man with a blond quiff and a chunky space suit in blue and white with two human friends in green and orange highlighted suits. See items 5, 10, 19, 20 (colour blue and notably Lunar Jim has a blue colour scheme associated with a blond quiff, item 5) ;
  - iii) The Power Rangers, who are not animated but consist of a group of heroes designated by their colour scheme (yellow, blue, orange, pink and green) and wearing helmets. See items 1 and 20
  - iv) Star Wars pod racers and the character Anakin: see item 1 (a racing helmet)
  - v) The Gorillaz character with large headphones or earphones, item 6.
  - vi) Mr Incredible with a hair flick, item 5
  - vii) Star Wars Storm Troopers with chunky armour, item 10
  - viii) Space Marines, with chunky armour (item 10), separate fingers (item 12) and a single armoured forearm/hand (item 14)
129. Moreover I am far from convinced that some of the similarities relied on by Mr Mitchell really are similarities at all, save at the most nebulous level. Features 10 and 11 (upper body guard and design) refer to the upper body portion of the characters. Item 11 refers to the horizontal rings or hoops visible on Yana. In my judgment item 10 is in fact a difference between the characters and not a similarity. The bodies of the Bounce Bunch are single blocks to which their limbs are connected by grommets. The Kerwhizz characters have torsos covered by two pieces of armour and a black rubbery region in between. They are quite different. Item 11 is absurd. Kit does not have anything like Yana's horizontal hoops.
130. Other similarities which I reject are:
- i) Item 4 (front helmet raised area). This does not exist in the relevant character, Twist.
  - ii) Item 13 (no metacarpals). The Kerwhizz characters do have metacarpals.
  - iii) Item 14 (wrist guard). The Bounce Bunch have various different shapes joining their hands to their arms. Feng and Jomo have circles, Simrita and Yana have rings or bangles and Charlie has a sort of chevron shape. The Kerwhizz characters are entirely different. Their forearms and hands are effectively merged into a single armoured unit like the armour of Space Marines.
  - iv) Item 15 (hip grommet). This refers to the way the legs connect to the body. In the Bounce Bunch that connection is via a disk. In Kerwhizz it is by a rubbery material separate from the armour. Twist's does appear to stick out a bit but Ninki's and Kit's do not. I reject this similarity.
  - v) Items 16, 17, 18 and 19. These relate to the lower leg parts and boots. To my eye the characters bear no relation to each other in this area. The Bounce Bunch have thin shins below the knee and simple rounded boots. Yana and

Simrita have a pair on rings in their boots. The Kerwhizz characters have chunky space suit like boots commonly seen in other children's characters. I reject these similarities.

131. Taking the various similarities which I have not rejected in numerical order, my findings are as follows.
132. Beyond the fact that the characters have helmets of some kind (items 1 and 2), the actual helmets in question are totally different. The Bounce Bunch helmets are simple and rounded with a thin central ridge and come about half way down the side of the head. They are all the same for each character. The Kerwhizz characters have helmets unique to themselves albeit similar amongst the group. All three come down below the chin. Ninki's helmet has a rounded opening for her face and is smooth with a star. Twist's has a straight edge on his forehead and large headphones on the side. It has a central ridge but the ridge is broad and flattened. There is a swirl pattern. Kit's helmet is similar to Twist's, straight edge with big ears, but has no ridge. There is a dish aerial and a lightning bolt.
133. Item 3 (Hair) is said to be a similarity between Ninki and Simrita/Jomo. Beyond the colour (black) the hair is quite different. Ninki did have dreadlocks at one stage but they looked nothing like Jomo's dreadlocks.
134. Similarity 5 is the blond hair quiff. The quiffs as quiffs are different but nonetheless this is a legitimate point for Mr Mitchell to take. However I note that Lunar Jim is a space suited male with a blue colour scheme and a blond quiff. Plainly he was not copied from the Bounce Bunch.
135. The characters have microphones and stalks (item 7) but the actual designs for these are different. There is a similarity here but it is conceptual in nature.
136. Items 8 and 9 are the shoulder grommets. Again there is a conceptual similarity here but the specific designs are quite different. Mr Rais' evidence was that this feature arose from the need to animate the characters.
137. Item 12 is that the characters have separate fingers. This is not universal in children's animation but it is wholly commonplace.
138. Item 20 is colour and 21 is position in group. I will deal with these together. The leader of the group is male and has a blue colour. To associate the colour blue with a boy is wholly commonplace. While it may be the vestiges of sexism to place the male as the leader of a group, it is another wholly commonplace element. Moreover to place the Caucasian male as the leader may be another vestige of discrimination but it is also entirely commonplace. The shade of blue is quite different. Unlike Twist, Charlie's blue is in fact mainly a metallic grey colour with blue highlights.
139. To have a second character as a girl wearing pink suffers from the same commonplace considerations as having a blue boy. Kit is from the Far East but although there is a Far Eastern character in the Bounce Bunch, he is a boy, Feng, and he wears orange. That leaves a third character, Ninki, in yellow. She is Afro-Caribbean, like Jomo who also wears yellow but is a boy. On the other hand Simrita is a girl in yellow but she is Indian.

140. Yellow is hardly an original colour to choose. There are not many choices. Apparently purple would not have been acceptable because the purple character is the least popular of the four Tellytubbies (the others being red, yellow and green). Red/pink and blue have already been taken. At one stage the BBC sought to contend that green (perhaps the only other bold, simple choice available) was not possible because of the technical requirements for filming because a green screen was going to be used. That cannot be right since Poop is green. After trial I received a letter from Ms Bowhill (copied to Mr Mitchell) which clarified the position. At one stage a green screen was envisaged and at that stage Poop was blue. However when Blue Zoo became involved CGI animation (Computer Generated Imagery) was chosen which meant that green screens were not needed and there was no longer a restriction on the colour palette. Since Twist was already blue, Poop was turned green.
141. The central three Bounce Bunch characters are yellow, blue then pink and in Kerwhizz Ninki, Twist and Kit do line up in the same way whether with or without their sidekicks. I doubt this position in group point adds much to the point about having a blue leader since, once the leader is blue, there are only two ways of organising Ninki and Kit (or Simrita and Yana).
142. Item 23 is an oval knee shield. This point is tenuous at best. Kit has a tear drop shaped part at the top of her boot. It could be a kind of knee cap. Charlie, Feng and Jomo (but not Yana, the pink Bounce Bunch character) have circular knee joints. I am not convinced these would be seen as knee shields and they look nothing like Kit's part, but I am prepared to accept that there is a small visual similarity here.

*Subconscious copying overall*

143. I have considered the various factors to be weighed up. They do not support an inference of subconscious copying in this case. None of the designers were familiar with the Bounce Bunch at all. They are not aware the designs were ever seen and there is simply no evidence the relevant people saw the Bounce Bunch albeit that they have now forgotten that they did.
144. The Bounce Bunch are not especially memorable. Even if they were seen, there is no reason why they would be retained. The similarities are not non-existent but they are at a high level of generality. The best case is really the same combination of features which I considered at the outset: the combination of armour with helmets and microphones, the colour scheme, the ethnic mixture and the blond quiff. However these are not sufficient, in the context of a full explanation for how the design process took place, to support the relevant inference overall. I have accepted the BBC's account about how the designs came to be produced. Subconscious copying would have to be grafted on top of that exercise. I find that utterly implausible. There are cogent explanations for the origin of all the features and no reason to resort to a subconscious influence from the Bounce Bunch to explain Kerwhizz. The blond quiff is an example. I think it is Mr Mitchell's best point. But Nik Afia drew a quiff on his characters in 2006. He clearly did not get it from the Bounce Bunch even subconsciously. His quiff is on a character which looks nothing like Charlie. Alan Robinson put a quiff on his red or pink character in 2006. They look nothing like the Bounce Bunch on any view. Filip Krnja's designs did not involve a quiff initially but it was added at the end at the behest of the Mr Quinn and Mr Robinson.

145. The blond quiff, like all the other objective similarities relied on, is nothing more than coincidence. The Bounce Bunch and Kerwhizz are each the product of independent work by creative artists carrying out their own design work. These artists have worked in the same field of children's character design and no doubt have been influenced by the many of the same common elements, to a greater or lesser extent. There is no causal connection between the Bounce Bunch and Kerwhizz.
146. I reject the case of subconscious copying.

*Conclusion*

147. The Kerwhizz characters do not infringe Mr Mitchell's copyright. I will dismiss the action.