



IP ITeasers Post 019:

What is art? According to the judiciary...

For many years the UK and EU approaches to subsistence and infringement of artistic copyright have been somewhat at odds with each other. Following Brexit, and the retention of CJEU case law as if it were domestic authority, the UK law on artistic works is now at odds with itself.

The CJEU in *Cofemel* C-683/17 made quite clear that there should be no requirement of artistic appeal for a work to qualify for copyright protection. This CJEU decision, however, sits alongside domestic House of Lords authority on works of artistic craftsmanship such as *Hensher v Restawile* [1976] AC 64. This case acknowledges the origins of the protection of works of artistic craftsmanship as a perceived need to protect the likes of William Morris over “mere” designers who could not also claim to be artists.

The ways in which nations protect creations through copyright law are, and should be, a reflection of how society values different types of creativity. British artistic copyright law has evolved from a championing of the skilled master craftsman over the jobbing “hack”. This is evidenced from the very first copyright act (the Engraving Act 1735) which did not grant rights to all artists but only those engravers who designed *and* executed their own original prints. The EU, and in particular France, has more consistently endorsed a populist approach to valuing creative output.

At some point the Supreme Court will have to resolve the conflict between its homegrown law and the acquired European approach on artistic copyright. While we await that, we shall be reviewing some interesting, and niche, cases where Judges have grappled with the question of “what is ‘art’” ?

IP ITeasers Post 020:

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"This is no doubt a new and an important question, but I cannot help thinking that we are asked to put upon the Copyright Act a construction which was never dreamt of when it was passed, and which it does not really bear."

LINDLEY, L.J.:—

This is the opening sentence per Lindley, LJ in *Hanfstaengl v HR Baines & Co Ltd*, [1894] 2 Ch. 1 in 1984. However, it would be an equally apposite opening to many cases addressing artistic works over the subsequent 128 years.

One of the key differences that remains between EU and UK copyright, is the closed list definition for works in the UK compared to the 'open' approach of EU law. This has led to many UK judges having to grapple with whether an artistic work fits sufficiently neatly within the UK legislated categories.

The issue which the Court of Appeal considered in *Hanfstaengl v Empire Palace* was whether tableaux vivants infringed a painting. Those who have seen the film *Mrs Henderson Presents* will be familiar with the concept of tableaux vivants. A scene is created on the stage using actors dressed in similar costumes and posed in an attempt to recreate a picture. The Court held this was not a reproduction of a painting as anticipated in the Copyright Act.

The decision would not be the same today owing to developments in the law, and judges appear to have become more willing to take a flexible approach to categories of works. However the problem still remains, and will remain so long as a closed list approach is maintained. The reality of artistic practice is that new and innovative media and concepts will develop far quicker than the law can adapt to define them.

In next week's post we will follow the progression of judicial thoughts on artistic categories into the twentieth century.

A link to Hanfstaengl is here: <https://bit.ly/3LJo7PI>

IP ITeasers Post 021:

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Recommended pre-viewing: <https://bit.ly/3MaVGtD>

"The appeal centres round what seems to me to be a novel and startling proposition, that there can be copyright in unusual facial make-up."

Lawton LJ

This week we consider the views of three judges, startled in varying degrees by the requirement to consider copyright subsistence in "works" related to make-up.

Merchandising Corporation of America Inc. and Others v Harpbond Ltd. and Others [1983] F.S.R. 32 concerns the famous Prince Charming make up worn by Adam Ant. The works considered for copyright protection were a sketch of the make-up design, photographs of Adam Ant in make-up and the make-up itself.

Whilst the language of the judgments show how far social and artistic expectations have moved on, some of the observations remain astute. It can be difficult to explain to clients why similarity does not always equate to copying. Walton J summed up why similarities in a photograph altered to super-impose the make-up onto a "clean" Adam Ant was not an infringement of the make-up design sketch as follows:

"There are, of course, similarities. If you are going to dress up as a Hottentot and be photographed in that state and somebody is going to alter a photograph of you to make you look a Hottentot, naturally the two are going to bear quite a considerable resemblance, but there the matter ends."

On appeal, the focus was on the make-up itself which was not considered to be a "painting" within the meaning of the Copyright Act 1956 because it did not comprise a "surface" and was impermanent.

37 years later, ephemerality did not trouble Deputy Master Linwood who was "in no doubt" that copyright could subsist in designs which were embossed into make-up powders in *Islestarr Holdings Ltd v Aldi Stores Ltd* [2020] E.C.D.R. 20. It is difficult to reconcile this decision with *Merchandising Corporation* (which was cited to the Deputy Master). A full reading of Walton J and Lawton LJ's judgments show just how bizarre they found the consideration of the make-up design, both culturally and legally. It appears there was also no evidence relied upon, for example, of non-Western body art nor arguments that the fixation requirement could be satisfied through photography. Presented with such evidence, it is difficult to envisage the reasoning in *Merchandising Corporation* being applied to make-up today.

IP ITeasers Post 022:

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This week's case demonstrates both why the U.K.'s closed list of artistic works belongs in the legislative archives, and why copyists should beware of posting on social media.

Taylor v Maguire [2013] EWHC 3804 (IPEC) considers the application of copyright to works of paper cutting. Images of the works in question can be seen in at the end of the judgment which can be found on Bailii here: <https://bit.ly/3sKbThX>

It should be immediately obvious that these are the type of works which should benefit from copyright protection. They involve the artists' creative expressions and are intended to have visual appeal. However, consideration was given as to how such a work would fit within the U.K.'s closed list, the options considered being "graphic works comparable to a woodcut or engraving" or a "drawing".

From a common sense perspective, they are none of the above. They are not drawn, which requires the application of a mark to a surface (for the significance of a surface in graphic works see last week's post here: <https://bit.ly/39wJgOm>). The visual effect is achieved by subtraction rather than addition. They are also not prints, such as woodcuts and engravings, which whilst involving the subtraction of matter from a print block ultimately results in the addition of marks to a surface. The Judge (DJ Clarke as she then was) considered *Radley Gowns Ltd v Spyrou* [1975] FSR 455 which concerned copyright dressmaking patterns. That judgment however only found that there is a serious issue to be tried that cutout patterns could be "drawings". Another potential argument, which was not made, was that the paper cuts could be considered sculptures-albeit very flat ones... Again, questionable.

Ultimately it was found that the works benefited from copyright protection as original and either drawings or graphic works, the judge taking a pragmatic view that it was not material which. It is worth noting that the Defendant in this case was unrepresented and did not attend, and did not take a point on the definition of the type of work. The defendant was also the mother of a teenage girl who created the majority of the infringing works for her GCSE portfolio, and sold some to raise money for charity on a Facebook page which is how they were discovered by the claimant.

The continuation of the prescribed categories of artistic works, and inconsistently liberal application of them, creates uncertainty for litigants and increases legal argument and therefore costs. They do not reflect modern creative or judicial practice and they have well outstayed their welcome.

IP ITeaser 023:

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So far we have considered a number of judgments showing lawyers and judges attempting to squeeze "square peg" artworks into the "round holes" provided by the closed list of artistic works provided under the Copyright, Designs and Patents Act 1988.

This week we consider an example of how German judges dealt with the application of copyright protection to an unusual type of work. The work in question was the "Wrapped Reichstag" by Christo and Jeanne-Claude which was installed for a period of 14 days in 1994. Images of the project, together with preparatory drawings and models, can be found on the artists' website here <https://bit.ly/3x5ZXJM>. It became the subject of litigation when an unauthorised party sold postcards using photographs of the installation. It reached the Bundesgerichtshof (German Supreme Court) in 2002 (*RE POSTCARDS OF THE WRAPPED REICHSTAG* (CASE I ZR 102/99) reported in English at [2004] E.C.C. 25).

It is interesting to speculate how a British judge would have determined the case. The "work" is the wrapping of the Reichstag building in Berlin in cloth. No doubt lawyers for the Defendant would have argued that there wasn't a work which attracted copyright protection at all. It is not a work of architecture, but the application of new material to an existing work of architecture. There is no separately recognised category in UK copyright law for "installation art". The best candidate would probably be "sculpture" - but there is no permanent manipulation of form. The Claimants would probably have to have resorted to also pleading indirect infringement of the preparatory sketches and models which were clearly graphic works and sculptures. It would have no doubt been a fascinating case for the lawyers and an expensive one for the clients.

So what was the judicial determination of this interesting question? The Bundesgerichtshof said: "the project "Wrapped Reichstag" is protected by copyright ... Since it is a distinctive creation of an individual character, which in its specific form undoubtedly demonstrates the degree of artistic design that is necessary for copyright protection." There was no philosophising on the boundaries of artistic mediums, nor was the fact that the work qualified copyright protection even appealed. The first instance and appeal courts simply applied a test akin to the EU test and held that it was too obvious that this was the sort of creation to which copyright is intended to apply to be worth debate. German lawyers are certainly missing out on some fun, but one cannot deny the efficiency of the approach.

IP ITeasers Post 024:

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No tour of UK artistic copyright law would be complete without considering *Lucasfilm v Ainsworth* [2011] UKSC 39 (Bailii link here: <https://bit.ly/395bLmk>). It is a significant case for a number of reasons, including refining the legal parameters of "sculpture". It enforced the view that "sculpture" should not be extended beyond the meaning understood by "ordinary members of the public" and situated functionality as a contraindication to an object being an artistic work in law. Much of the reasoning on functionality does not sit well with the CJEU decision in *Cofemel* C-683/17, and it would be interesting to see what the CJEU would make of a similar question today.

It is also a significant case for me, as it was the case that made me first consider a career in law. I became aware of it as an art history student at the [Courtauld Institute of Art, U. of London](#), during a presentation given by a law student on artistic copyright and the legal definition of art. To say I was horrified by the complete clash of how the creative world understood and talked about artistic creations, and how the law processed them, was an understatement. Full of undergraduate idealism I was driven to embark on a legal career to try and "sort out" the law on art.

Each of the judgments in *Lucasfilm* is worth reading (or re-reading) for their slightly different approaches to how the judges tried to articulate whether something should be declared "artistic" or not. The Court of Appeal (per Jacob LJ) spoke in terms of an "elephant test" (you know one when you see one) which was criticised by the Supreme Court. However Jacob LJ was not endorsing such an approach, but acknowledging that the flexibility required to any multi-factorial approach owing to the fluidity of the subject matter came close to one.

The ultimate, and eternal, problem is that the law wants and needs certainty and predictability. Contemporary creative practice however often seek to subvert these very things. Art, and any law which seeks to define it, will therefore never be a comfortable fit. A law which expects otherwise is going to be harder work than one which acknowledges this fact.

With more pressing concerns facing the legislators, it is more likely that we will see movement on the law on artistic works by a higher level court applying the EU approach to an appropriate test case. However, creative industry clients rarely have the funds (or the will) required to take such a case as far as would be necessary.

"Sorting out" the law on art is therefore still very much a work in progress...