



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’” ?