



IP ITeasers Post 024:

What is art? According to the judiciary...

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...