Artistic Works and Artists' Rights– Redrawing the law

"Art, like morality, consists of drawing the line somewhere"

- Gilbert K. Chesterton

Law, like Art and Morality, also consists of drawing the line somewhere. Since the Engraving Act 1734, the law has recognised the economic value of artistic works. The Berne Convention, to which the United Kingdom became a signatory in 1886, also provided for the protection of moral rights, such as the right to attribution and integrity. As the boundaries of what is considered "Art" have been progressively pushed to their limits, it has become more and more difficult for the law to draw the line on what is an artistic work.

There are three key issues which this essay identifies and seeks to resolve. Firstly, that the categories of artistic works are vaguely defined and do not adequately reflect contemporary artistic practice. Secondly, that the test for what qualifies as an artistic work should be linked to artistic purpose. Finally, that given the developments of Art and the Art market, copyright no longer gives artists sufficient protection of their works and other rights need to be strengthened to compensate.

1. The Current Law on artistic works

In order for a creative work to gain copyright protection under UK law it must fall within a closed list of categories set out in The Copyright, Designs and Patents Act 1988 s.4. These are: "literary, dramatic, musical and artistic works; films; sound recordings; broadcasts; and typographical arrangements of published editions". Therefore UK copyright protects eight – and only eight- types of creative works.[1] The category of artistic works is further split into subcategories within which a work must fall in order to benefit from copyright protection:

> (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,
>
> (b) a work of architecture being a building or a model for a building, or

[1] T Aplin and J Davis, *Intellectual Property Law Text, Cases, and Materials*, 2nd Edition, 2013, p.64

(c) a work of artistic craftsmanship.

These subcategories are based upon a traditional formalist theory of Art which defines works according to its medium.[2] However, anyone who has visited a modern Art gallery will be well aware that many modern works of Art do not neatly fit into the above categories. Furthermore, although the categories themselves are based on a formalist theory of Art, this is where recourse to Art theory and practice ends. Definitions of artistic work subcategories have been developed by way of judicial precedent, leaving judges open set the boundaries of Art according to law.

Some critics suggest that the UK "closed list" approach to defining copyright is too restrictive and a more open approach to intellectual creations should be adopted. For example, France has an "open list" approach whereby "the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose" are protected. [3] Other suggestions have been made that the divisions of copyright works according to formalist theory is misguided as formalist theories of Art have largely been discredited.[4] Although these proposals are worth considering, the line has to be drawn somewhere as to which works should be protected and which should not. There is a risk that a more open approach to copyright would leave judges having to make difficult conceptual and qualitative judgements which risks uncertainty and subjectivity.

The only statutory guidance to assessing whether a work is an artistic work, as listed in CDPA 4(1), is in CDPA 4(2):

"building" includes any fixed structure, and a part of a building or fixed structure;

"graphic work" includes—

(a) any painting, drawing, diagram, map, chart or plan, and

(b) any engraving, etching, lithograph, woodcut or similar work;

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[2] See generally J Pila, 'Copyright and its Categories of Original Works' (2010) 30 Oxford Journal of Legal Studies 229–254

[3] Intellectual Property Code, Article L112-1

[4] J Pila, 'Copyright and its Categories of Original Works', p.229

> *"photograph"* means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film;
>
> *"sculpture"* includes a cast or model made for purposes of sculpture.

Whilst one may think that words like "painting" or "sculpture" do not warrant definition, there have been cases which demonstrate that there is genuine uncertainty as to what constitutes particular artistic works as a matter of law. Alternatively it may be that, due to lack of definition, it is open to parties to abuse the law in order to gain legal protection. For example, it has been held that a plastic Frisbee is an engraving[5] and that plaster casts of a sandwich maker were sculptures.[6] Clearly a statutory definition of Art is impossible and undesirable. However, leaving judges with too much scope to decide what is an artistic work is also undesirable. In the postmodern and conceptual artistic era this could result in a game of pin the tail on the meta-donkey.

It is important to note that CDPA 1988 s.4(1) states that graphic works, photographs, sculptures and collages, are artistic works *irrespective of artistic quality*[7]. Therefore it is clear that judges should not apply any value judgement on whether something is "Art". "What is Art?" and "what is an artistic work?" are distinctly different questions, one subjective and one a matter of law. However "Art" and "artistic works" should not become too divorced in meaning. It is necessary to better define the categories of artistic works in order to put the "Art" back into "artistic work" whilst avoiding legislating a definition too close to a qualitative judgement. My proposed amendments to s(4) of the

[5] *Wham O Manufacturing Co v Lincoln Industries* [1985] R.P.C. 127 (New Zealand)
[6] *Breville Europe plc v Thorn EMI Domestic Appliances Ltd* [1995] FSR 77
[7] My emphasis

CDPA adds some guidance to the terms “painting” and “sculpture” and also introduces a test of “artistic purpose” which is explained below.

2. The need for new categories

At present, images created digitally can be protected as artistic works but only if conceptually shoe-horned into the categories of “painting” or “drawing”. It is time to stop hammering digital pegs into analogue holes. My proposed inclusion of digital Art is set out below.

Installation Art and found objects form a large component of modern Art, however they are not recognised in law unless they can be claimed to be a sculpture. Installation Art involves the selection, assembling and arranging of objects, images, videos and sounds for particular spaces - as opposed to a traditional manipulation of materials. It was stated in *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 44 that installations are not artistic works. This view is completely contradictory to modern Art practice. For example, the main gallery in the Tate Modern, the Turbine Hall, is reserved exclusively for installations. Although some installations could be protected as sculptures so long as they have the requisite characteristics, this is intellectually unsatisfactory and risks stretching the definition of sculpture to breaking point. Furthermore, as a matter of policy, the law should accommodate developments in culture and technology and legal recognition of installation Art is long overdue.

I have considered carefully the difficulties of protecting installation Art within the current copyright framework. My definition of installation deliberately creates a high threshold for subsistence by designating that an installation must be site-specific work. This is necessary as installation Art relies heavily on conceptual ideas and if the definition were drawn too broadly there would be a risk of protecting the idea rather than the expression.[8]

[8] Only the expression and not the idea is protected by copyright, (WIPO Copyright Treaty 1996, Article 2).

Although the site-specific nature of my definition makes a finding of infringement difficult, it is still important that there can be subsistence in installations so that artists can control the display and communication to the public of their installations. Furthermore, unless a work falls within the prescribed categories for "artistic works" an artist has no moral rights such as the right to be identified as author or director (CDPA 1988 s. 77), or the right to object to derogatory treatment of their work (CDPA 1988 s. 80).[9]

It is also essential to consider artistic purpose when establishing whether a work is an installation.[10] For example, Mark Wallinger's installation Art work "State Britain" was made for display in the Tate Britain as an exact recreation of a display set up outside Parliament by Brian Haw protesting against the Iraq War. What makes State Britain an installation *qua* installation is that the objects were *selected and arranged for display in a specific site for an artistic purpose* whereas Brain Haw's display was clearly not.

3. Suggested reform of CDPA 1988 s.4

The following provision is to be inserted into s.4 (1) of the CDPA 1988

(d) an installation

The following provisions are to be inserted into s. 4 (2) of the CDPA 1988: —

"graphic work" includes—

(a) any painting, drawing, diagram, map, chart or plan, and

(b) any print-based two-dimensional media including engraving, etching, lithograph, woodcut, digital printing or a similar work;

(c) an image made using a computer program which enables the creation of a two-dimensional image using line and/or colour.

[9] G Davies and K Garnett *, Moral Rights*, 2010 p.83

[10] The requirement of artistic purpose is set out in my suggested reform of section 4 of the CDPA, new subsection (3), and is set out in detail below.

"installation" means - one or more objects, images, videos, sounds or lights selected and arranged for display in a specific site

"painting" means a two or three-dimensional work created by applying paint, pigment, colour or other liquid medium to a surface.

"sculpture" means a three-dimensional object created by the carving, modelling, or casting of a solid substance, or by assembling and combining other materials

4. The Importance of Artistic Purpose

As stated above, it is not always easy to establish whether a work falls within one of the categories of artistic works. This problem cannot be solved by more detailed definitions of artistic works without creating the opposing problem that the categories are too narrow. Sculpture, as a category of artistic works, has proved particularly difficult and has provided a wealth of case law. In *Metix (UK) Ltd v GH Maughan (Plastics) Ltd* [1997] F.S.R. Laddie J held that sculpture was "a three-dimensional work made by an artist's hand". The High Court decision of *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch); [2008] E.C.D.R. 17 by Mann J considered previous jurisprudence on sculpture in depth, recognised the difficulty of attempting a definition of sculpture and suggested a "multi-factorial approach" which was approved by the Supreme Court.

One of the key aspects of this approach is the intention of the artist, or artistic purpose. Mann J describes this as follows:

A pile of bricks, temporarily on display at the Tate Modern for two weeks, is plainly capable of being a sculpture. The identical pile of bricks dumped at the end of my driveway for two

> weeks preparatory to a building project is equally plainly not. One asks why there is that difference, and the answer lies, in my view, in having regard to its purpose. One is created by the hand of an artist, for artistic purposes, and the other is created by a builder, for building purposes. [11]

Mann J rightly notes that in many cases it is only the artistic purpose of the artist which makes an otherwise banal object an "artistic work". I believe that this factor for determining whether or not a work is an artistic work is so crucial that it should be included in a statutory description of artistic works. It avoids judges becoming the arbiter of "what is Art" and instead places the onus on the intentions of the artist. Furthermore it guards against the risk that, unless the law is better married to contemporary artistic practice, the legal definition of artistic works will develop independently and become divorced from their original meaning.

I therefore suggest the following provision be added to s. 4 of the CDPA 1988:

> *(3) A work cannot be an artistic work for the purpose of this Part unless it was created by the author for artistic purpose.*

5. Moral Rights

As well as economic rights, namely copyright, artistic works also attract moral rights. It is well-known that moral rights in the UK are weak when compared to other jurisdictions, particularly other European countries. Firstly, in the UK there are only three moral rights which are relevant to authors of artistic works: the right to be identified as author, the right to object to derogatory treatment of the works, and the right against false attribution. France, for example, affords other moral rights such as the right to prevent modification and the right to determine when the work was first

[11] *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878(Ch) para.118

published. In France these rights are automatic, perpetual, inalienable and inviolable. In contrast, even the limited moral rights afforded in the UK must be asserted in order for the artist to benefit from them and can be waived.

The fact that moral rights must be asserted in the UK goes against the principal that copyright need not be asserted or registered. It is illogical that moral rights must be asserted when economic rights do not. Furthermore the requirement of assertion is prejudicial to many artists who do not have legal advice and do not know that they need to take action to gain the fundamental right to be identified as the creator of their works. I therefore propose that s. 78 of the CDPA 1988 requiring that moral rights be asserted should be abolished.

6. Contractual Rights

In the days of Hogarth, who successfully campaigned for a copyright for engravings in 1734, the right to exclusivity in making copies was the key to an engraver making money from his works. The modern Art world has moved on a long way from then. The change in Art methods and communication has led to an oversaturation of creative works. Sadly, it is increasingly difficult for up-and-coming artists to make money from their works. To make matters worse, it has become a common requirement that galleries or publishers require an assignment or waiver of the artist's rights in order to display or publish work. Therefore young artists are faced with a catch 22: give away valuable economic and moral rights in their works, usually for little or no consideration, or struggle to gain exposure.

Take the following example:

> *Zoe is an up-and-coming, but not very legally savvy, animation artist. She spent 3 months skilfully creating a stop-motion short film from thousands of her own drawings. Gallery A offers her £200 to exhibit her video in the gallery and asks her to sign a contract. Zoe is thrilled and signs a contract which is headed "standard terms*

and conditions". Gallery A now owns the copyright in the animation, and she has waived her moral rights. Furthermore, because the video is made from photographs of her drawings, she cannot even sell or exhibit these drawings without infringing the copyright which Gallery A now owns. Zoe has essentially been paid £200 for 3 months work and has lost any economic or moral rights in her works.

There is clearly too great an imbalance in power between artists and organisations which exploit artistic works. Regrettably, contracts requiring the assignment or waiver of rights have become standard form. This cannot be right, particularly when there is little or no consideration for the assignment of copyright, which is a valuable proprietary right. In fact, this is a problem across all copyright works. For example, a condition of entering this competition is that, in the event of winning, all intellectual property rights in my essay will be transferred to the Bar Council. This is unnecessary, as a simple license would entitle the Bar Council to reproduce and publish the essay, and was an unfair exploitation of the imbalance between myself and the Bar Council. However, it reflects a common practice which is based on a lack of respect for the common person's proprietary rights in their intellectual creations.

In order to redress unfair practice in the contemporary Art market, I propose that contractual terms assigning copyright and waiving moral rights should have no effect unless the terms are individually negotiated. My proposal is based on the Unfair Terms in Consumer Contracts Regulations 1994 and I believe goes no further than to protect artists against unfair exploitation of an imbalance in power. In doing this, more artists will be able to earn fair money for their works and creativity will be encouraged.

The proposed provision:

Unfair Assignment and Licensing Terms

(1) A contractual term assigning copyright or granting an exclusive license to use the copyright work which has not been individually negotiated shall be deemed an unfair term and have no effect.

(2) A contractual term waiving an author's moral rights which has not been individually negotiated shall be deemed an unfair term and have no effect.

(3) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the author has therefore not been able to influence the substance of the term.

(4) Where an unfair term assigning copyright is deemed to have no effect under (1), a non-exclusive licence to exploit the copyright work will be implied in place of the unfair term.

Conclusion

In conclusion, my proposed reforms for s.4 of the CDPA 1988 put the "Art" back into artistic works and guard against the legal categorisations of Art becoming legal fictions. My proposed abolition of s.78 of the CDPA 1988 gives artists greater protection, as they do not need to assert their moral rights to benefit from them. Finally, my suggested prohibition of "standard form" waiving of economic and moral rights prevents unfair and disproportionate exploitation of artists, without hindering freedom of contract.

Stephanie Wickenden

Word count: 3000