

Art and cultural assets news - autumn: a pile of bricks and an unmade bed

26 NOVEMBER 2008

CATEGORY:

ARTICLE

CLIENT TYPES:

ART AND CULTURAL INSTITUTIONS

It is often unclear how far certain types of contemporary artworks, in particular conceptual artworks and art installations, are protected from unauthorised copying under English copyright law.

The main reason for this is that the UK's 'Copyright, Designs and Patents Act 1988' ('the Act'), does not afford, unlike its French equivalent, general protection to artistic works. Instead, the Act stipulates that in order to be protected, 'artistic works' must fall within certain categories, including 'graphic work', 'painting', 'sculpture' and 'photography', or works of 'artistic craftsmanship'. In addition, artistic works must be 'original' in the sense that they originate from the artist, though they are not, with the exception of works of artistic craftsmanship, to be judged by their 'artistic quality'.

For artworks based on or involving three-dimensional objects, works of 'sculpture' and of 'artistic craftsmanship' are the only suitable potential categories for protection under English law. Yet how far do the boundaries of these legal categories extend? Would the English courts protect innovative and controversial artworks incorporating ready made objects such as Carl André's floor based, rectangular construction of 120 fire bricks, *Equivalent VIII* (1966) (collection: Tate Modern), or Tracey Emin's notorious *My Bed*, (1998) (collection: Saatchi Gallery) consisting of the artist's unmade bed? This is particularly an issue when the work of art is not even fabricated by the artist.

The recent High Court case of *Lucas v Ainsworth* [2008] EWHC 1878 (Ch), offers an illuminating insight into how the English courts might approach this issue, whilst also offering some hope that they may be willing to recognise key developments in modern and contemporary art as worthy of copyright protection.

Star Wars

Lucas v Ainsworth concerned the reproduction of replicas of various props used in the first 'Star Wars' film, in particular, the highly memorable, white plastic armour and helmets of the so-called 'Imperial Stormtroopers' featured in the film. The claimant was the company, Lucas Films, controlled by George Lucas, the film's director and the owner of the intellectual property rights associated with the film. The defendant, Mr Ainsworth, was a prop designer who had worked on the film and had assisted in designing and producing the Stormtrooper's costumes in vacuum-moulded plastic. Mr Ainsworth had recently opened a business in England, selling replicas of the costumes through his website. Lucas Films wished to prevent this and had obtained a court order and damages in the United States against Mr Ainsworth.

As well as addressing other issues, including passing off, Mr Justice Mann had to consider whether the Stormtrooper helmets and model toy Stormtroopers were protected by English copyright law in their own right, in particular, as works of 'sculpture' or 'artistic craftsmanship'. This included examining the boundaries between the laws of copyright and design. Under s51 of the Act, copyright is not infringed by making an 'article', e.g. an industrial or mass produced product, from a design document or design model where the design is for "anything other than an artistic work or a typeface".

Sculpture in the expanded field

There is no core definition of what constitutes 'sculpture' under s4(1) of the Act. Instead, the section states that "'sculpture" includes a cast or model made for purposes of 'sculpture'.

Previous English copyright case law on the relationship between 'sculpture' and utilitarian artefacts has been mixed. In *Breville Europe plc v Thorn EMI Domestic Appliances Ltd* [1995] FSR 77, (prior to the introduction of s51 into the Act) Falconer J, held that the plastic shapes in a sandwich toaster could be protected as 'sculpture'. However, in *Metix UK v G.H. Maughan* [1997] FSR, Laddie J disagreed with this approach (in a case involving moulds for functional cartridges) and said that the maker "must be concerned with shape and appearance rather than just with achieving a precise functional effect".

In *Lucas*, Mann J. cited the definition of sculpture provided in the *New Encyclopaedia Britannica*. Helpfully, this definition states that sculpture is "not a fixed term that applies to a permanently circumscribed category of objects or set of activities" and "the scope of the term is much wider in the second half of the 20th century than it was two or three decades ago, and in the present fluid state of the arts, nobody can predict what its future extensions are likely to be". The term 'sculpture' can therefore encompass "non-representational" three dimensional works of art, and can no longer simply be "identified with any special materials or techniques".

The Judge then set out a list of various factors which should be considered when determining whether an object is a work of sculpture for copyright purposes. These include:

- having regard to the normal use of the word 'sculpture';
- paying attention to what one would normally expect to find in art galleries described as 'sculpture';
- the creation of a three dimensional object of 'visual appeal'; and
- the artistic purpose of the creator.

From this list, the last criterion proposed by the judge has perhaps the most significance. Referring to Carl Andre's *Equivalent VIII* [1966] as an example, the judge considered that a "pile of bricks, temporarily on display at the Tate Modern for 2 weeks, is plainly capable of being a sculpture", whilst "the identical pile of bricks dumped at the end of my driveway for 2 weeks preparatory to a building project is plainly not". The reason for this is because "one is created by the hand of an artist, for artistic purposes, and the other is created by a builder, for building purposes".

Recognising that definitions of 'art' and 'sculpture' are highly subjective in the artistic field, the Judge indicated that artistic purpose nevertheless must be the starting point for a legal analysis of these terms. Mann J's approach must be welcomed from the point of view of contemporary art. In addition, the Judge also said that "the process of fabrication is relevant, but not determinative".

The result of this approach is that the overwhelming majority of three dimensional works of art irrespective of medium, from found objects to video installations, will if they are exhibited in private galleries and public museums, almost certainly be protected as works of 'sculpture' under English copyright law. For the artistic purpose of such works will be clear from their institutional context. With the requirement that the artwork be fabricated by the artist being relaxed, this approach is also likely to include such works as Marcel Duchamp's famous ready made consisting of an inverted urinal, signed by the artist, *Fountain* [1917], but clearly not fabricated by the artist.

Interestingly, the Judge concluded that the original Stormtrooper helmet from which Mr Ainsworth's replicas were copied, was not a sculpture but was rather a "mixture of costume and prop". He held that the helmet could not be a sculpture because its "primary function is utilitarian" and it lacked the necessary quality of "artistic purpose". Mann J. also held that the toy Stormtroopers which Mr Ainsworth had also copied were not sculptures because play (by children) was their primary, if not sole purpose. Perhaps unsurprisingly, the Judge did not consider the helmet or the toys to be works of 'artistic craftsmanship'. Referring to the New Zealand authority of *Bonz Group v Cooke* [1994], he said that for a work to be of artistic craftsmanship, it must be made by both a craftsman and an artist. Whilst a craftsman is a person "who makes something in a skilful way and takes justified pride in their workmanship", an "artist is a person with creative ability who produces something which has aesthetic appeal". The Stormtrooper toys and helmets had not been designed with the purpose of creating aesthetic appeal and therefore could not be treated as works of artistic craftsmanship.

It remains to be seen whether the judge's analysis of artistic purpose fully squares with copyright law's traditionally low-level requirements of originality, and in particular the stipulation that artistic works are to be analysed, 'irrespective of artistic quality'. The Judge has granted the claimants leave to appeal. Whatever the consequences of this decision, the Judge has given the contemporary art world hope that a wider field of contemporary artistic works will be recognised and protected by English copyright law.