UK Extends Copyright Terms for Artistic Works

In July, the U.K. repealed a provision that provided a shortened term of copyright protection for ‘‘artistic works.’’ Because this change also revives protection that had expired under the old law but would be revived under the new, rights holders in certain industries such as furniture makers may now have resurrected rights that can be asserted against those copying their works.

Section 52 Repealed

Notwithstanding the vote by the U.K. to leave the EU, EU law is still making its presence felt in the U.K. Section 52 of the UK Copyright, Designs and Patents Act 1988 (CDPA) has been repealed because it was perceived to clash with the EU Directive 2006/116.

Section 52 cut the term of protection in respect of most acts of infringement for artistic works to 25 years if the owner had exploited an artistic work by making copies by an industrial process, meaning that more than 50 articles reproducing the artistic work must be produced and marketed. That reduced 25 year period was thought to conflict with the requirement in EU 2006/116 for copyright protection to last the life of the author plus 70 years and so has been repealed.

What Did the Limitation Affect?

This shortened term was somewhat controversial because there was uncertainty as to what was covered.

At first glance, the Section 52 limitation seemed somewhat harsh. For example, a photograph in which copyright subsists might be exploited by making postcards by an industrial process. Would the copyright protection for the photograph be restricted to 25 years by Section 52? No – subordinate legislation specified a number of articles, the manufacture and marketing of which did not trigger Section 52.

Some of the types of works excluded from Section 52 include sculptures, wall plaques, medals and medallions, and printed matter primarily of a literary or artistic character including, amongst others, calendars, dress making patterns, playing cards and postcards.

Section 4 of the CDPA defines ‘‘artistic work’‘‘ as 1) a graphic work, photograph, sculpture or collage, irrespective of artistic quality, 2) a work of architecture or 3) a work of artistic craftsmanship.

In the case of three dimensional artistic works, there was uncertainty as to the effect of Section 52. If the work qualified as a sculpture, although it would be prima facie caught by Section 52 it was excluded from its operation by the subordinate legislation. However, if the work in question was a work of artistic craftsmanship but not a sculpture then it would be caught by Section 52.

Therefore, to understand what sort of articles will be affected by the repeal of Section 52, we need to understand what a work of artistic craftsmanship is, and what a sculpture is.

What’s a Sculpture?

The Supreme Court most recently considered this in the case *Lucasfilm v. Ainsworth* [2011] UKSC 39. There, the court ruled that some regard has to be given to the normal use of the word ‘‘sculpture,’’ but that the concept can be applicable to things beyond what one would expect to find in art galleries.

Not every three dimensional construction can be regarded as a sculpture, but no judgment is to be made about artistic worth. The fact that an object has some other use, aside from its visual appeal, does not necessarily disqualify it from being a sculpture but it still has to have the intrinsic quality of being intended to be enjoyed as a visual thing.

Also, the creator’s purpose is important: for example, a pile of bricks in an art gallery is intended to be a sculpture, while a pile of bricks in a building site is not.

Finally, the process of fabrication is not relevant and therefore a purely functional item is not to be held to be a sculpture simply because it was carved from wood, with carving being an artistic means of creation.

In general terms, then, a sculpture is something created for the purposes of visual appeal, but it can also have some function.

In *Lucasfilm*, the defendant Andrew Ainsworth was selling replicas of the stormtrooper helmet from the ‘‘Star Wars’’ movies. The court found that the helmets were not sculptures and thus the sale of replicas by Lucasfilm
itself had triggered Section 52. Because 25 years had expired, Lucasfilm no longer had an enforceable UK copyright.

What’s a Work of Artistic Craftsmanship?

There is very little case law on what constitutes artistic craftsmanship, and what little there is unclear. The leading House of Lords authority on the point is *George Hensher Ltd. v. Restawhile Upholstery* (Lancs) Ltd. [1976] AC 64 (UK).

There, the House of Lords held that the plaintiff’s prototypes for mass-produced couch and armchair sets were not works of artistic craftsmanship. That decision came from five judges, with each having a different view.

Lord Reed felt that the maker should have intended that such a work should have ‘‘an artistic appeal.’’ Lord Morris felt that the word ‘‘artistic’’ calls for something ‘‘additional and different.’’

Meanwhile, Viscount Dilhorne felt that a work of craftsmanship is something ‘‘made by hand and not something that is mass

produced.'' Lord Simon felt that a work of craftsmanship ''at least presupposes special training, skill and knowledge for its production,'' while Lord Kilbrandon felt that the ''conscious intention of the craftsman will be the primary test of whether his product is artistic or not.''

Further guidance comes from the New Zealand High court in *Bonz Group (Pty.) Ltd.v. Cooke* [1994] 3 NZLR 216. That case, which held that a woolen sweater was a work of artistic craftsmanship, explained that ''for a work to be regarded as one of artistic craftsmanship it must be possible fairly to say that the author was both the craftsman and an artist. A craftsman is someone 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.''

This latter is the test followed most recently in the *Lucasfilm* case.

It is to a large extent a value judgment by the court as to whether an article is both a work of craftsmanship and artistry.

What's Protectable Again?

What types of products might fall into this category, and might therefore benefit from the change in the law? What is a work of artistic craftsmanship which is not a sculpture?

Some commentators suggest that certain iconic pieces of furniture fall into this category, for example the Barcelona chair. It could be argued that some pieces of jewelry might also fall within this category. The Supreme Court in *Lucasfilm* commented that ''the Ribchester helmet in the British Museum or a decorated medieval suit of armor, would come more naturally under the head of works of artistic craftsmanship, together with fine furniture, musical instruments, silverware and ceramics.''

The definition is sufficiently unclear that there is likely to be a certain amount of litigation started by owners of copyright in artistic works who feel there is a chance that their protection has been resurrected. Some clue might be found in identifying types of product whose production run has sometimes been restricted to 50 pieces, presumably intending to avoid Section 52's shortening of the copyright term. Internet searches reveal limited production runs of articles including clothing with handmade print designs, model trains, crystal panels, crystal bowls, teddy bears, wristwatches, and even an electronic music synthesizer (which the manufacturers describe as ''hand-soldered, handcrafted and handmade piece-of-art wooden enclosure'').

Are they made by craftsmen, with some artistic appeal but not so much that they qualify as sculptures? Time, and litigation, will tell.

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