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Introduction

1.1 BACKGROUND AND SCOPE¹

THE INTERNET AND the increasing commercial activities of museums and galleries mean that copyright has gained increasing importance in the art world. Artist's resale right (*droit de suite*), a branch of copyright, has also now been harmonised across Europe and is in effect in the United Kingdom, bringing into copyright's ambit those who deal in, buy or sell works of art. Artists are becoming more and more aware of their rights, and arguments about the appropriation of artists' works by others are arising more frequently.² There is also a growing debate about the extent to which existing law protects innovative works of modern art and the works of traditional cultures. At the same time, the law of cultural property is now an established legal discipline, as increasingly is art law.³

¹ It has been endeavoured to state the law relating to the UK as at 1 April 2011, although where possible, significant developments up to 23 June 2011 have been included, as has the judgment of the Supreme Court in *Lucasfilm Limited v Ainsworth* (27 July 2011).

² For example, in the UK the copyright infringement arguments surrounding the Turner Prize entry 'The Loves of Shepherds 2000' (discussed below in ch 6) hit the headlines late in 2000 and brought the issue of art and copyright to the fore; and in the USA, street artist Shepard Fairey recently faced high-profile allegations of copyright infringement over his iconic painting, entitled 'Hope', of then US presidential candidate Barack Obama. The painting allegedly infringed an Associated Press (AP) photograph taken in April 2006 by Mannie Garcia, on assignment for the AP at the National Press Club in Washington: see *Huffington Post* (4 February 2009), http://www.huffingtonpost.com/2009/02/04/ap-accuses-shepard-fairey_n_164045.html (accessed 23 June 2011). The case was reported as settled in January 2011: 'Associated Press and Artist Settle Copyright Infringement Claims over Obama "Hope" Image', reported by Associated Press (12 January 2011).

³ Art law is already an established legal discipline in the USA, and the first holistic treatment of art law in the UK by Paul Kearns was published in 1998: P Kearns, *The Legal Concept of Art* (Oxford, Hart Publishing, 1998). The Institute of Art and Law in the UK was founded in 1995.

2 Art and Copyright

This book, first published in 2001, aimed to explore the UK law of copyright and related rights as applied to art as broadly defined⁴, with a stress on the ‘fine arts’.⁵ The protection of utilitarian or mass-produced items, except to the extent these comprise art—‘ready-mades’, for example—was not considered in detail.⁶ Nor were works of architecture. The law of industrial design, for example, already had received detailed treatment in a number of works.⁷ So it was felt that the growing relationship between the ‘fine arts’ and copyright, including the development of artists’ moral rights, the permitted scope of appropriation in copyright law, the copyright protection of modern art and the challenges of digitisation and the Internet, pointed to the need for a UK text exploring this area.

Although the book was not specifically concerned with the law of jurisdictions other than the United Kingdom, the international nature of the area meant that it was often helpful to note the approach taken

⁴ No other attempt is made to define ‘art’ for the purposes of this book. It will be clear in any event from the discussion of the law that follows that the legislature and the UK courts define ‘art’ for the purposes of copyright protection in various ways, the category of ‘artistic works’ in the Copyright, Designs and Patents Act (CDPA) 1988 being crucial. For an early and very useful discussion of the legal protection of ‘art’ under UK law, see PH Karlen, ‘What is Art? A Sketch for a Legal Definition’ (1978) 94 *Law Quarterly Review* 383. See also Kearns (ibid). Photographs, given their importance in modern art and their categorisation as ‘artistic works’ in the CDPA, are included for the purposes of this book. Films and video works do not receive extensive treatment but nevertheless are specifically discussed in ch 6, s 6.4.

⁵ The *Concise Oxford English Dictionary* 8th edn, (Oxford, Oxford University Press, 1990) defines the ‘fine arts’ as those ‘appealing to the mind or to the sense of beauty . . . especially painting, sculpture and architecture’. In fact, with limited exceptions, UK copyright law now makes no express distinction between works of fine art and other artistic works in affording copyright protection but imposes limits on the copyright protection for industrial/utilitarian designs. But historically, a distinction between the fine arts and the applied arts was maintained, at least in the classes of work protected: see L Bently and B Sherman, *The Making of Modern Intellectual Property Law* (Cambridge, Cambridge University Press, 1999). Other jurisdictions also have made or do make such distinctions. For example, early French (revolutionary) copyright law limited protection to the fine arts, but in 1902 protection was extended to sculptors and decorative designers, irrespective of the merit of their work. The quality of the work can also be relevant in US law: see, eg, L Bently and B Sherman, ‘Copyright Aspects of Art Loans’ in N Palmer (ed), *Art Loans* (London, Kluwer, 1996). In particular, as discussed below in ch 4, it is an issue in the US approach to moral rights.

⁶ ‘Ready-made’ is the name given by Marcel Duchamp to a type of work he created that consists of a mass-produced article isolated from its functional context and displayed as a work of art: I Chilvers, *A Dictionary of Twentieth-Century Art* (Oxford, Oxford University Press, 1999). See also generally below ch 6, s 6.4.1.

⁷ Eg, C Fellner, *Industrial Design Law* (London, Sweet & Maxwell, 1995); U Suthersanen, *Design Law in Europe* (London, Sweet & Maxwell, 2000); and M Howe QC, *Russell-Clarke on Industrial Designs* (London, Sweet & Maxwell, 1998).

in other major jurisdictions. In particular, a number of cases from other common law jurisdictions were noted, especially those from the United States, where there was already a considerable amount of case law and scholarship in this field. Also in light of the attempts to harmonise copyright law in the European Union and the long tradition of moral rights protection in continental Europe, these areas were also considered in some detail.

Ten years or so on, the opportunity has been taken to update the book, primarily from a UK perspective, and also to try to address some of the comments made by reviewers of the first edition. The second edition is not a wholesale rewriting of the first edition (nor of the revised paperback edition of 2003), as much of the original text retains its relevance. But the law has of course developed further, and to ensure the book remains of practical use, UK cases and statutes have been updated where considered helpful. Moreover, in a number of areas—including the relationship between art and design law, artist's resale right, the impact of European jurisprudence on UK copyright, online issues, and the protection of video, film and 'new media' works—additional revisions have been made. In addition, some precedent material has been added. The intention has been to try to keep the work an overview of the area, a place where the reader can be led to avenues to explore and routes to take across the artistic copyright landscape, but also to have the work retain its practical value as a resource for those who create, deal in or exploit art and reproductions of art or who are otherwise looking for guidance on artistic copyright.

1.2 COPYRIGHT AND ART

Artists, like other 'authors', may be entitled to the protection of their works under the law of copyright and related rights. Most legal systems recognise two elements to such protection: economic rights, which are also generally referred to as 'copyright' or 'copyrights', and moral rights. In the United Kingdom, the economic rights include the rights to control copying (reproduction), the issuing of copies to the public, renting or lending the work, performance, communication to the public and adaptation;⁸ the moral rights include the right to be identified as

⁸ S 16, Copyright, Designs and Patents Act (CDPA) 1988.

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‘author’, to object to derogatory treatment of a work, the right to object to false attribution and the right to privacy of certain photographs and films.⁹

Living artists and the estates of recently deceased artists are likely to benefit from moral rights, which only an artist or that person’s estate can exercise. This is in distinction to the economic rights, which can be freely transferred in whole or part by way of assignment.¹⁰ In this sense, copyright is an intangible property right like other intellectual property rights (patents, registered designs, trade marks, rights in confidential information and so on) but with the added dimension that the creator, the author/artist, retains moral rights in the work irrespective of who owns the actual copyright. It is important to note that copyright is a purely negative right: it is primarily a right to stop others copying a work in which copyright subsists. But it does not prevent someone else independently creating a similar work,¹¹ nor does it necessarily mean that copyright owners have the right to exploit their work themselves.¹²

Copyright and related rights are national rights—there is of course no universal law of copyright. In particular, the Anglo-American system of copyright law has tended to stress the economic aspects of copyright, whereas Continental civil laws, which stress ‘authors’ rights’ (*droit d’auteur*), have generally afforded greater protection to artists/authors, especially in the context of moral rights.¹³ However, from the nineteenth century onwards, there has been a series of attempts to protect works internationally, the most important being the Berne

⁹ Ch IV, CDPA. How artist’s resale right/*droit de suite* should be characterised can be debated, as it has elements of both copyright (it is an economic right) and moral rights (it is inalienable). See below ch 4.

¹⁰ At least in the UK: the position may well be different in civil law jurisdictions. See A Rahmatian, ‘Non-Assignability of Authors’ Rights in Austria and Germany and Its Relation to the Concept of Creativity in Civil Law Jurisdictions Generally: A Comparison with UK Copyright Law’ (2000) 5 *Entertainment Law Review* 95.

¹¹ However, absolute monopoly rights such as patents and registered designs can protect against this.

¹² For example, take the publication of an illustrated book. The publisher will own the copyright in the printed edition (see, eg, s 8, CDPA); but the author may retain the literary copyright in the text, and the illustrator the artistic copyright in the illustrations. To exploit the book, the publisher needs the consent (‘license’) of both the author and the illustrator, although once the book is published, the publisher will be able to enforce the copyright in the printed edition and any other copyright it may have in the work against pirates.

¹³ Von Lewinski usefully sets out the main differences between the copyright and author’s rights systems, noting that many countries now have elements of both systems in their laws: S von Lewinski, *International Copyright Law and Policy* (Oxford, Oxford University Press, 2008) para 3.20.

Convention for the Protection of Literary and Artistic Works, which dates back to 1886. In recent years, the European Commission has devoted considerable effort to harmonising and strengthening the law of copyright across the European Union, and this has generated an increasing amount of legislation. It has also meant that UK copyright law must increasingly address copyright concepts imported from authors' rights systems.¹⁴

Broadly speaking, common law 'copyright' systems have tended to emphasise the protection of the 'work', allowing the 'author' of such a work to be either an individual or a legal entity, such as a limited company; in contrast, civil law 'authors' rights' systems have tended to emphasise the individual creator of the work and do not as a rule consider legal entities to be eligible as 'authors'—only an individual can be an author of a 'work', as the work is an emanation of that person's personality.¹⁵

Another distinction between authors' rights systems and the UK law of copyright is the concept of originality. In general, in both systems copyright is afforded only to 'original' works: in UK law, skill and labour alone ('sweat of the brow') will, with limited exceptions, confer 'originality', whereas under authors' rights systems there must be creativity, on the basis a work reflects the personality of its creator. In fact, following the landmark Supreme Court *Feist* case,¹⁶ US law now also requires 'some minimal degree of creativity'.¹⁷

It is also important to be aware from the outset of the so-called 'idea/expression dichotomy' in copyright law.¹⁸ Simply put, copyright does

¹⁴ This is discussed below in ch 6, s 6.6.

¹⁵ K Garnett et al, *Copinger and Skone James on Copyright*, 14th edn (London, Sweet & Maxwell, 1999) [hereafter '*Copinger*'] para 1-05. The 'personality theory' approach to copyright is discussed in ch 2.

¹⁶ *Feist Publications v Rural Telephone Service Co* 499 US 340 (1991) 113 L Ed 358 (1991) (Sup Ct) at 369.

¹⁷ Note that the concept of 'originality' under UK and EU law is considered further in ch 3 and ch 6, s 6.6.

¹⁸ Not all authors have admitted the existence of such a 'dichotomy' in UK law, which has no express statutory basis. The late Professor Sir Hugh Laddie called it the 'idea/expression fallacy': HIL Laddie, P Prescott, M Vitoria et al, *The Modern Law of Copyright and Designs*, 3rd edn (London, Butterworths, 2000) [hereafter '*Laddie*'] 3.74; but it nevertheless appears in copyright cases on a regular basis. A few examples include *ENTEC (Pollution Control) Ltd v Abacus Mouldings* [1992] FSR 332 (per Nichols LJ); *George Ward (Moxley) Ltd v Richard Sankey Ltd and Another* [1988] FSR 66; and *Bradbury, Agnew & Co v Day* (1916) 32 TLR 349. See also the cases cited below and also n 19 below. In any event, as Lord Hoffmann more recently observed in *Designers Guild v Russell Williams* [2000] 1 WLR 2416 (HL), 2422, the distinction does find a place in the Agreement on the Trade-Related Aspects of Intellectual Property (TRIPS) (OJ 1994

not protect ideas, only the form in which they are expressed. As Lord Salmon once put it, 'It is trite law that there can be no copyright in an idea.'¹⁹ So for example, no one could copyright pointillism as an artistic style, but Seurat's paintings (if in copyright) would themselves be protected from copying, as they are original artistic works. This dichotomy appears in copyright infringement cases from time to time where the style, technique or other elements of a design or painting have been reproduced, but there has been no literal copying.²⁰ It is then frequently necessary to determine whether what has been copied is (protected) expression or merely an idea not capable of copyright protection.

Finally, copyright and related rights are distinct from the ownership (ie, personal property) rights in a work of art or other work, such as a literary manuscript, which may benefit from copyright protection.²¹ Indeed, the US Copyright Act makes this expressly clear.²² The sale or even the commissioning of a work of art will not necessarily transfer the copyright in the artwork to the buyer/commissioner.²³ This, of

L336, 213), to which the UK is a party (in Art 9.2). It is therefore submitted that this distinction is a useful and necessary starting point when considering if there has been infringement of an artistic work. Certainly it must be used with care; as Lord Hailsham commented (citing Professor Joad of 'Brains Trust' fame), 'it all depends on what you mean by ideas': *LB (Plastics) Limited v Swish Products Limited* [1979] RPC 551 (HL), 629. Lord Hoffmann also referred to this in *Designers Guild* (at 2422)). Laddie in any event was prepared to restate the principle on the basis that whilst there is no copyright in general ideas, an original combination of ideas may constitute a substantial part of a copyright work (at 4.43), citing Lord Hailsham in *Swish Products* (above) (at 629) and Astbury J in *Austin v Columbia Gramophone Co* [1917–23] MCC 398, 408 and again in *Vane v Famous Players Film Co Ltd* [1923–28] MCC 374, 398. The dichotomy is discussed in more detail below in ch 3.

¹⁹ *LB (Plastics) Limited v Swish Products Limited* [1979] RPC 551 (HL), 633. For a discussion of how the UK and USA have developed and applied this principle with emphasis on software copyright, see S Lai, *The Copyright Protection of Computer Software in the United Kingdom* (Oxford, Hart Publishing, 2000).

²⁰ See for example, *Designers Guild v Russell Williams* (above n 18) (per Morritt LJ and Lord Hoffmann), discussed below in ch 3.

²¹ There are limited exceptions to this rule: eg, pre-CDPA photographs. See *Copinger* (above n 15) para 5-02.

²² S 202: 'Ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied.' This section was introduced following *Pushman v New York Graphic Society Inc* 287 NY 302, 308, 39 NE 2d, 249, 251 (1942), which held that transfer of ownership of an unpublished work transferred the common law copyright in the work as well. See DM Millinger, 'Copyright and the Fine Arts' (1980) 48 *George Washington Law Review* 354, 365.

²³ If such an assignment of copyright is sought, this should be agreed in writing. Copyright (as opposed to moral rights) is transferable by assignment—this must be in writing (s 90(3), CDPA) and signed by the owner. Copyright is also transmissible on death by testamentary disposition. Note that the bequest of 'an original document or

course, is of particular relevance to art loans, where the borrower may well wish to benefit from the economic rights in the work by producing cards, catalogues and merchandise and may accordingly need to seek permission from the copyright owner.²⁴ Whether the work is protected by copyright, and who owns the copyright, may be difficult questions to answer. For example, when Churchill College, Cambridge acquired some of Sir Winston Churchill's personal papers a number of years ago with a controversial £12 million grant from the National Lottery,²⁵ they acquired physical title to the papers but not the copyright: copyright in Churchill's personal papers was kept by the Churchill trustees; copyright in the State papers (which were also given to the College by the Government at the same time) was kept by the Crown.

For many years copyright was the Cinderella of intellectual property law, overshadowed in importance by patents and trade marks. However, the advent of digital technology means copyright now has centre stage—those seeking to protect and exploit their works on CD-ROM, DVD, other new media and the Internet increasingly need to rely on copyright. There is a continuing debate about whether the economic rights need to be broadened to cope with the challenges of the new digital technologies. This also brings to the fore another aspect of copyright: the conflicting relationship between owners who wish to control the economic rights to their commercial benefit, on the one hand, and users who claim the benefit of what is called 'fair use' in the United States and 'fair dealing' in the United Kingdom. Users wish to be able, free of charge, to publish and reproduce works in connection with non-commercial purposes (such as study or research) or for public interest purposes (such as reporting current events). These and other issues are explored in chapters three and six. Artists, museums, galleries and publishers are also increasingly looking to other intellectual property laws for protection as well as copyright. This area is considered in chapter eight.

other material thing' recording or embodying an unpublished artistic or other work shall include the copyright in the work unless the contrary is indicated in the testator's will or codicil, insofar as the testator was the owner of the copyright immediately before his or her death (s 93, CDPA). Commissioned artistic works are considered below in ch 7.

²⁴ Note also that once an artist has sold his or her work and transferred possession of it to a third party, he/she has no right under English law (absent a contractual right of access) to, eg, gain access to the work to photograph it or otherwise copy it, despite the fact he/she still retains the copyright in it. The position appears similar in the US: Millinger (above n 22) 363–64.

²⁵ To be more correct, the National Heritage Memorial Fund purchased the papers using monies generated by the National Lottery.

Finally, in discussing art and copyright it is important to keep in mind the range of disciplines and perspectives now being brought to bear on the study of copyright law. The approach taken in this book follows in the main the ‘self-contained’ legal approach to copyright law—readers interested in detailed consideration of recent economic and sociological approaches to ‘authorship’ and the cultural aspects of intellectual property are referred elsewhere.²⁶ Having said this, it will become apparent as this book progresses that notions of authorship and varying assumptions about the function of copyright remain important currents, albeit not always stated ones, in copyright law.²⁷ So

²⁶ Professor Sterling speaks of the ‘self-contained’ approach in his *World Copyright Law* (London, Sweet & Maxwell, 1999) 39. For a consideration of copyright and ‘authorship’, see for example, B Sherman and A Strowel (eds), *Of Authors and Origins* (Oxford, Clarendon Press, 1994). In particular, Brad Sherman, in his paper in Sherman and Strowel (eds) (above), ‘From the Non-original to the Ab-original: A History’, criticises the ‘increasingly self-referential nature of copyright law’ (114). He is of the view that in order to understand and explain copyright law, not only must the rules and principles underlying the law be examined, but also it is necessary ‘to engage in more abstract, relexive, and historical examinations of the subject’ (129). See also P Jaszi, ‘Toward a Theory of Copyright: The Metamorphoses of “Authorship”’ (1991) 42 *Duke Law Journal* 455 for an exploration of the extent to which copyright has received a constructed idea of ‘authorship’ from literary and artistic culture and how this ‘authorship construct’ has been mobilised in legal discourse. For a discussion of the two main theories underpinning copyright law (copyright as an economic incentive that advances social welfare versus the legal vindication of a person’s right to property in the fruit of his or her labour (natural law theory)), both of which are discussed below in ch 2, and the need for an interdisciplinary approach to the subject that gives due weight to the natural law theory, see AC Yen, ‘The Interdisciplinary Future of Copyright Theory’ in M Woodmansee and P Jaszi (eds), *The Construction of Authorship* (Durham, NC, Duke University Press, 1994). Finally, an introduction to the various perspectives from which copyright has been approached (eg, by legal historians, historians of publishing and a variety of scholars with various perspectives on authorship) is K Bowrey, ‘Who’s Writing Copyright’s History?’ (1996) 6 *European Intellectual Property Review* 322. She comments on: (1) B Edelman, *Ownership of the Image: Elements for a Marxist Theory of the Law*, E Kingdom (trans) (London, Routledge and Kegan Paul, 1979) (a Marxist perspective), which is discussed by Kearns (above n 3) in ch 3; (2) others such as Mark Rose who are influenced by Foucault’s writings on authors, publishers and copyright; and (3) commentators from cultural studies and legal perspectives, including J Gaines, who is author of *Contested Culture: The Image, the Voice and the Law* (Chapel Hill, University of North Carolina Press, 1991) and Rosemary Coombes, a legal scholar and anthropologist who takes an interdisciplinary approach, particular in her book *The Cultural Life of Intellectual Properties* (Durham, NC, Duke University Press, 1998).

²⁷ For example, Peter Jaszi has argued that the Romantic conception of authorship (which he describes as ‘the Wordsworthian vision of the “author-genius” with privileged access to the numinous’: Jaszi (ibid) 459, referring to M Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”’ (1983–84) 17 *Eighteenth-Century Studies* 425, which continues to have an abiding influence. Jaszi cites the example of computer software copyright as being often justified on the grounds that programs are no less inspired than poems and that the imaginative

whilst this book primarily approaches art and copyright from the perspective of a practising lawyer, the author has endeavoured to alert readers to examples of writing on this area from a range of viewpoints, not just those of a practitioner. As will become clear, copyright is too important a matter to be left to practitioners alone.

processes of programmers is fundamentally akin to that of a conventional author (463). For a critical view of the relationship between copyright and art that challenges the Romantic conception of authorship, as well as of the law's focus on categories of artistic works ('its taxonomic approach') and of the law's commitment to the *genus* rather than the *genius* (ie, to categorising works rather than having a broader category of 'art' that is protected), see A Barron, 'Copyright Law and the Claims of Art' (2002) 4 *Intellectual Property Quarterly* 368: 'Copyright law in the UK has no category of "art", and it does not demand of the objects it protects that they elicit an aesthetic response. Copyright law therefore cannot recognise whole swathes of contemporary practice in the visual arts as having any claim to legal protection as such' (372). For a critical look at authorship, see L Zemer, *The Idea of Authorship in Copyright* (Aldershot, Ashgate, 2007).