

**THE ARTIST IN A GLOBAL VILLAGE:
HARMONISATION AND ARTS LAW IN THE UK**

MIRA T SUNDARA RAJAN¹

INTRODUCTION

[151] The past year has been an exceptionally active time in British art law. In this, the UK mirrors the international scene. The year 2005 marks an important anniversary in the international development of law related to the arts: it is the year in which the intellectual property provisions of the TRIPs Agreement,² including the sections dealing with copyright law and its enforcement, enter fully into force throughout the world.³ TRIPs is representative of an intensifying international [152] trend towards the ever closer harmonisation of copyright law among different countries, with major implications for the arts, as well as the arts industries.

Over the past year, developments in the international community have clearly demonstrated that harmonisation no longer refers only, or primarily, to legislative change. Rather, the term reflects a significant new reality that countries are moving towards greater uniformity in their implementation and enforcement of intellectual rights. In particular, attempts by representatives of the arts and entertainment industries in the United States to enforce a new level of recognition for copyright has had far reaching implications. In some respects, the international drive towards the harmonisation of copyright practices has brought about significant improvements to the protection offered to authors' rights in the international community. In other instances, however, the move towards international harmonisation is calculated to improve the position of industry, sometimes to the detriment of those engaged in creative activities. As the arts are increasingly transformed by technological change — whether in relation to the means of creating art, the dissemination of creative work, or the development of previously unknown categories of artistic creation — it will become important to develop policies specifically designed to protect the creative opportunities of artists and authors in the 'Digital Age'.

In the UK, it is apparent that the pressures of international harmonisation have affected art law at every level, from driving legislative change to influencing the decisions of courts on artistic issues — and even, creating an environment that encourages the pre-litigation settlement of disputes in the arts industries by parties in conflict. This update will consider developments in two highly significant areas: the adoption of a new artists' resale right in UK copyright law, and the problem of music 'piracy' in the UK.

¹ Mira T Sundara Rajan, Assistant Professor, Faculty of Law, University of British Columbia, Vancouver, Canada.

² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to the *Agreement Establishing the World Trade Organisation*, 15 April 1994, 33 ILM 1197 (entered into effect 1 January 1996), online: WTO Homepage (Legal Texts). The Agreement was one of the founding instruments of the World Trade Organisation, making membership mandatory for all members of the WTO.

³ The TRIPs Agreement officially entered into force on 1 January 1995, but it made provision for a one year grace period for all member countries. The Agreement allows for an additional transition period of four years for developing countries, plus five years in relation to certain patent provisions, while the least-developed countries are entitled to an additional 10 year-period from the effective date, with further, unlimited extensions of the transition time being available on request. See Part VI, Transitional Arrangements, Articles 65 and 66.

DROIT DE SUITE: A NEW MORAL RIGHT FOR THE UK

In 2001, the European Union adopted the latest in its series of directives on copyright. The directive, 'on the resale right for the benefit of the author of an original work of art,' seeks to harmonise among the member countries of the European Union, the right commonly known by its French name, *droit de suite*.⁴ The *droit de suite* is based on a recognition of the fact that works of visual art often do not realise their commercial value until long after they are completed by the artist and first sold. Indeed, the work may not achieve its true value until it has been bought and sold many times after the artist first parted with it.

Droit de suite provides for an artist to receive a portion of proceeds from the sale of his or her work to subsequent buyers, even though the artist is no longer the owner of the work. While the royalty scheme may represent significant earnings, the percentages themselves are modest. The European directive provides for a maximum royalty of four percent, to be available only for works of art priced at 50,000 EUR or less, while, at the other end of the spectrum, works sold for more than 500,000 EUR will be subject to a minimal royalty of 0.25 percent, and capped at an absolute maximum of 12,500 EUR.⁵ The practical difficulty which *droit de suite* is supposed to remedy can be illustrated by countless examples throughout the history of art. A notable case is Vincent van Gogh: the artist whose painting, *Portrait of Dr Gachet*, made history in 1990 as the most expensive painting ever sold, remained in financial straits throughout his life.⁶

[153] Although most European countries already recognise some form of *droit de suite* in their legislation, harmonisation of this area has proved to be highly controversial.⁷ The debate surrounding the resale right was largely a result of British objections to its inclusion in the European copyright scheme. The right has been contentious in the UK for a variety of reasons, including questions of legal doctrine and tradition, as well as practical objections.

From a primarily legal perspective, implementation of the *droit de suite* is difficult because it embodies two aspects of art law that have traditionally been sensitive areas in the United Kingdom: the Europeanisation of British copyright law through the Harmonization Directives of the European Union, and the development of 'moral rights,' which offer protection for the personal and non-commercial interests of authors, in British law. The two concerns are closely related. On the first count, harmonisation of copyright often appears to British lawyers to be importing new legal concepts into UK law. In keeping with the common law tradition, which places special emphasis on the cumulative value of precedent built by judges, concepts

⁴ The French term literally signifies a 'follow-on' right.

⁵ Directive 2001/8/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (13 October 2001) OJ L 272/32, available online through the EU database of Community Legislation in Force, Eur-Lex: <<http://http://europa.eu.int/eur-lex>>.

⁶ The painting sold in 1990 for \$82.5 million, to Ryohei Saito, Chairman of Daishowa Paper Manufacturing, a Japanese company. The record has since been broken by Pablo Picasso's 'Boy with a Pipe,' sold on 5 May 2004, for \$104 million, to 'an anonymous telephone bidder.' See D Teather, 'The world's most expensive piece of art...a £58m Picasso painting', 6 May 2004, *The Guardian Unlimited Arts News*, available online: <<http://www.guardian.co.uk/arts/news/story/0,11711,1210629,00.html>>.

⁷ Eleven European countries traditionally recognise the *droit de suite*, while the UK, Ireland, and, interestingly, the Netherlands and Austria, have not. See Charles-Edouard Renault 'Resale Rights: toward a European Harmonization' 14:2 Ent L Rev 44, 46-47. Renault also summarises the provisions in French law, dating from 1920, and modified in 1992.

introduced by the European regulatory process are often viewed with suspicion. In the area of moral rights, in particular, the reluctance of the British legal community to embrace European legal concepts is greatly intensified by the historical ambivalence of the UK towards the protection of the personal rights of authors.⁸ European influence, through both the Berne Convention and the subsequent development of the harmonisation agenda, was a key factor behind the British decision to adopt moral rights in 1988, for the first time in the history of UK copyright legislation. It is worth noting, however, that legal ambivalence and political hostility around moral rights was so great that their incorporation into the *Copyright, Designs & Patents Act 1988* was severely restricted in scope.⁹ The rights are subject to an extensive scheme of exceptions;¹⁰ the right of attribution, in particular, must be asserted by the author, a stark contrast to the general availability of copyright on an automatic basis, free of formalities.¹¹ Indeed, the Berne Convention specifies that copyright must be available to authors on this ‘natural rights’ basis, leading experienced commentators to question the compatibility of the UK provisions with the country’s international obligations.

At first glance, the idea of the ‘moral right’ of the author may seem surprisingly uncontroversial. Moral rights are based upon the simple idea, intuitively apparent to most people, that the relationship between an author and his or her work may involve something more than purely commercial considerations. For example, the author may wish to ensure that his or her name is associated with the work, or may wish to protect the work from being damaged or mistreated. These two considerations, in particular, enjoy legal recognition in the *Berne Convention for the Protection of Literary and Artistic Works* as the moral rights of ‘attribution’ and ‘integrity.’¹² The Berne Convention, concluded in 1886, is the [154] international instrument which established a minimum standard of copyright protection followed by most countries in the world for over 100 years, and it continues to supply the core content of copyright protection under TRIPs.¹³

Ambivalence towards moral rights in the UK is deeply rooted in the early development of British copyright law. While the idea of protection for the non-commercial interests of authors was intuitively appealing to common law judges, it was explicitly excluded from copyright legislation in a landmark decision of 1774, *Donaldson v Becket*.¹⁴ Notwithstanding the largely political reasons for this change of direction, the subject of a classic analysis by Professor L Ray Patterson, historical developments led to a belief that the idealism of moral rights was fundamentally at

⁸ See discussion below.

⁹ *Copyright, Designs & Patents Act 1988* (c 48) (hereinafter CDPA).

¹⁰ For example, see CDPA ss 79 (exceptions to the attribution right), 81 (exceptions to the integrity right), 82 (‘Qualification of right in certain cases’).

¹¹ CDPA, above n 9, s 78.

¹² 9 September 1886, 828 UNTS 221, *Paris Act* of July 24, 1971, as 28 September 1979, online: World Intellectual Property Organisation <<http://www.wipo.int/treaties/ip/berne/index.html>> (hereinafter Berne Convention) Article 6bis.

¹³ Above n 2.

¹⁴ *Donaldson v Becket* 4 Burr 2408, 98 Eng Rep 257 (HL 1774). Interestingly, the initial reaction of common law judges was to recognise something akin to the moral right of the author at this early date. In the landmark 1769 case of *Millar v Taylor* 4 Burr 2303 (KB 1769), Lord Mansfield went so far as to state that moral rights could be found within the common law, itself. This finding was reversed in the subsequent case of *Donaldson v Becket* — ironically, with the primarily political goal of preventing publishers from indefinitely extending their control over literature, in contravention of the legislative scheme introduced by the Statute of Anne. This fascinating history is examined by L Ray Patterson in his classic study: LR Patterson *Copyright in Historical Perspective* (1968) c 4.

odds with the practical concerns of the common law tradition. Indeed, the term 'moral rights' is itself an awkward translation of the French *droit moral*; the unseemly marriage between law and morality is enough to make any common law educated lawyer cringe, and should probably be replaced by a more precise term, such as 'personal' or 'non-economic', rights of the author.¹⁵

Clearly, the doctrinal basis of moral rights is exceptionally broad. Not surprisingly, when the doctrine is distilled into legislative provisions, it may become embodied in a great variety of rights including, not only the internationally recognised rights of attribution and integrity, but also, additional rights such as the recognition of one's right to withdraw a work from public circulation, or potentially, a right against malicious criticism.¹⁶ It is perhaps not entirely correct to characterise *droit de suite* as a moral right, because it is not a direct reflection of an author's permanent relationship with his or her own work. Indeed, the Berne Convention, which includes a *droit de suite* that member countries had the option of enacting in their legislation, places the right in a separate article 14*ter*, well removed from the moral rights in Article 6*bis*.¹⁷ However, in many ways, the resale right does resemble moral rights. Notably, even after ownership of the work in question has been transferred, the author does continue to have an ongoing relationship with it, reflected in the author's continuing right to claim a royalty from subsequent sales. The implications of a right persisting beyond ownership can hardly be overstated: the idea fundamentally contradicts the general drive of common law copyright towards facilitating the commercial exploitation of works as its primary policy goal.¹⁸ Moreover, the purpose of the *droit de suite*, like that of moral rights more generally, [155] is to protect the author as a creative individual; it is not to favor the economic interests at stake in the sale and purchase of a work of art. The framing of the *droit de suite* in the European Directive reflects the close association between this right and the moral rights of the author. The preamble to the Directive clearly states that the right is to be 'unassignable and inalienable,' and it is developed under the obligations of the European Union to 'take cultural aspects into account' in its development of copyright policy.¹⁹

¹⁵ For example, the German term *persönlichkeitsrecht* (personality right) is comfortingly precise.

¹⁶ Art L121-4 *Code de la propriété intellectuelle du 1er juillet 1992*, JO, 3 juillet 1992, Titre 2, Ch 1, Article L 121-1; available online: <<http://www.adminet.com/code>>. The CPI is a codified version of two earlier laws, the *Loi no 57-298 du 11 mars 1957 sur la propriété littéraire et artistique*, JO, 14 March, 2723 (as am JO, 19 April 1957 4131) and the *Loi No 85-660 du 3 juillet 1985 relative aux droits d'auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audiovisuelle*, JO, 4 juillet 1985 7495.

¹⁷ It should be noted that the right in the Berne Convention is purely optional: Article 14*ter*(2) states, 'The protection provided by the preceding paragraph [of the inalienable right to an interest in any sale of the work subsequent to the first transferred by the author] may be claimed in the country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed' (emphasis added).

¹⁸ Common law copyright identifies two fundamental policies: the provision of incentives to creators, and the encouragement of the dissemination of works. Dissemination means, in effect commercialisation; and this is how the two objectives are reconciled. Copyright, by restricting the free circulation of a work and, provides economic incentives to both the author and the publisher. This approach is embodied in the American Constitution, for example, where it is stated that intellectual property protection exists 'to promote the progress of Science and useful Arts.' US Constitution, Article I, Section 8, Clause 8, available online: United States House of Representatives, <<http://www.house.gov/Constitution/Constitution.html>>.

¹⁹ *Droit de suite* Directive, above n 5, Preamble, clauses (1) & (4).

By an interesting irony, in the debates surrounding the moral right of the author, common law lawyers tend to fall back upon ideological and political objections to these rights, arguing that they are fundamentally incompatible with British legal tradition and the culture of the common law world. As is often the case in situations like these, however, the key to their hostility may ultimately lie in the economic implications of these rights. In practice, the enforcement of moral rights can entail powerful economic penalties, including, most importantly, the withdrawal of published works from circulation. In the case of the *droit de suite*, the resale royalty could have a major impact on the British art market. The United Kingdom enjoys the largest and most dynamic art market in Europe.²⁰ Britain's main non-European rival in the art world is the United States, where New York presents an alternative forum to London for trade in artworks.²¹ The most significant practical fear about the implementation of the resale right in the United Kingdom is that it may lead to a significant diversion of artworks to the United States. The fear of a chilling effect was undoubtedly at the heart of the British art lobby's objections to the Directive, and was probably the key reason for government support of this constituency.²² In 1999, Prime Minister Tony Blair commented, 'I do not see what Europe as a whole has to gain from forcing Britain to sacrifice its art market to the United States.'²³

Currently, the British government is faced with the unenviable task of 'implementing [the] ... Directive it never wanted.'²⁴ Nevertheless, the British Patent Office has taken a refreshingly constructive approach to implementation. It is currently engaged in consultations on implementation, to be closed on May 16, 2005. The consultation document raises a number of interesting questions concerning the policy goals which the *droit de suite* should attempt to further in the UK, and the potential impact of implementation on the British art market.

The consultation raises five important questions of policy: the effects of [156] inalienability of the *droit de suite*;²⁵ measures which could serve the interests of poorer and lesser known artists;²⁶ the impact of the royalty on the British art market;²⁷ the appropriate form of administering the resale right;²⁸ and nationality requirements for the enjoyment of the right.

Inalienability

Inalienability is a classic feature of the moral right of the author. It has its roots in the doctrinal position that moral rights are the legal embodiment of an indissoluble relationship between an author and his or her own work. In theory, inalienability means that the author cannot divest himself of moral rights, whether through sale, gift, or renunciation; in practice, many countries allow moral rights to be waived, in whole

²⁰ Renault, above n 7, 47, provides some impressive statistics about the British art market: the market is currently worth £57 million per year, and employs 50,000 people in London. London represents 70 percent of the European art market, the second-largest in the world after New York.

²¹ *Ibid.*

²² See S Stokes 'Implementing the Artists' Resale Right (*Droit De Suite*) Directive Into English Law' (2002) 13:7 *Ent L Rev* 153, 153.

²³ Quoted in Renault, above n 7, 48. Austria and the UK ultimately voted against the Directive.

²⁴ Stokes, above n 22, 157.

²⁵ The UK Patent Office 'Consultation on the Implementation of Directive 2001/84/EC on the Resale Right for the Benefit of the Author of an Original Work of Art,' available online: <www.patent.gov.uk/about/consultations/resalerights/full_droitdesuite.pdf> [15].

²⁶ *Ibid* [17–25].

²⁷ For example, Consultation, above n 25, [37–40, 41, 43–45].

²⁸ Consultation, above n 25, [30–33].

or in part. In Canada, for example — notwithstanding the fact that it was the first common law country to enact moral rights in 1931, just three years after their inclusion in the Berne Convention — moral rights may be widely waived; in contrast, French law frowns upon waivers and only allows them in special circumstances. The British copyright legislation of 1988 allows extensive waivers of moral rights. Questions therefore arise about the strictness of the inalienability requirement for the resale right in UK law.

The British Patent Office recognises that inalienability of the resale right continues after the death of the artist, and therefore, cannot be sold or assigned by the author's heirs.²⁹ The Directive is strict in stipulating that the right cannot be waived in any circumstances, so that there is little opportunity for the UK to revisit this question.³⁰ However, the Patent Office has specific concerns about the practical consequences of inalienability. For example, in the case of an artist's bankruptcy, will the resale right to allow creditors to collect the royalty in satisfaction of the artist's debts before the artist, himself, can claim any of these earnings? The answer to this problem will depend on how the UK Patent Office decides to view the philosophical basis of a British *droit de suite*: is it an individual right designed to protect the artist from unfair exploitation by art dealers — among his or her most likely creditors — or a practical right designed primarily to remedy economic inequities?

Measures to Help Poor Artists

This question is perhaps the most interesting policy problem which confronts the new legislation. The philosophical purpose behind the *droit de suite* is the idea of compensating artists for their years of early struggle with proceeds from the growth in value of their work. Indeed, there is a further implication that, depending on the form in which it is implemented, the collection of royalties from a resale right could potentially fund a future community of artists with earnings from the past.³¹

However, the capacity of the right to benefit poorer and lesser known artists depends on the practicalities of implementation. Notably, the Directive provides some flexibility in relation to the minimum value of eligible artworks, and the time period over which the right is to come into force. For example, the Directive allows member states to exempt from the resale royalty works of art worth less [157] than EUR10,000 within a three year period of the artist's first sale of the work. The Consultation document specifies that '[t]his should encourage buyers to invest in works by less well known artists whose potential is uncertain,' while the limit will 'protect [their] interests ... if their work ... becomes particularly valuable'.³² Below threshold of EUR3000, resale royalties will not be payable at all. An exception based on a minimum threshold amount is allowed by Article 3 of the Directive. However, the British patent office is interested in the possibility of setting the threshold still lower. The consultation document points out that, 'it could be argued that authors who are producing works of lower value and are probably less well-established are those who stand to benefit most from royalties and, to encourage continued creativity, the UK

²⁹ Consultation, above n 25, [15].

³⁰ See Art 1(1) of the Directive, above n 5, Stokes, above n 22, 155.

³¹ While the Directive does not make this point directly, the idea is implicit in the logic of the preamble, and can be considered to resemble the system of *domaine public payant*, whereby the successes of artists from the past are used to support the work of current artists. *Domaine public payant* is discussed in the German context by A Dietz 'Term of Protection in Copyright Law and Paying Public Domain: A New German Initiative' (2000) 22(11) EIPR 506.

³² UK Patent Office, above n 25, [18].

should set a lower threshold than 3000 EUR, possibly one of 1000 EUR.’³³ These measures might respond to concerns that the resale royalty rate usually serves only to benefit the descendants of highly successful artists — Picasso and Matisse are frequently cited examples³⁴ — without necessarily improving the status of current creators.

Impact on London’s Art Market

The British Patent Office proposes to exploit to the full whatever measures in the Directive are aimed at minimising, as far as possible, the negative impact of the resale royalty on the London art market. In particular, the *droit de suite* is perceived to be an additional cost of buying and selling art in the United Kingdom relative to the United States, where New York City remains London’s premier rival.³⁵ In a global economy, it is conceivable that the art trade could relocate to the United States, particularly in view of the fact that Christie’s and Sotheby’s, London’s leading auction houses, are already well-established in New York. However, it should be emphasised that this question has not been thoroughly investigated.³⁶ Unlike other types of copyright works, works of ‘plastic and graphic arts’ remain subject to certain physical requirements, and the costs and risks of transporting a work from Paris to New York — or indeed, Nigeria to New York — may still outweigh the payment of the resale royalty.

The issue of the appropriate royalty for the least valuable works of art is, again, an area of flexibility. Notably, Article 4 (2) of the Directive provides for the possibility of setting a higher royalty rate for the lowest priced range of artworks, of five percent rather than four percent. Here, the British Patent Office proposes to maintain the level of four percent, to minimise the costs associated with the purchase and sale of art in the UK, in accordance with the provisions of the European Directive.

Administration of the Royalty

Ease of administration is likely to be an important factor reducing the intrusiveness of the resale royalty. In particular, a centralised form of administration will allow for the greatest transactional smoothness for buyers of artworks. Moreover, the right continues to subsist for the duration of copyright, for seventy years after the lifetime of the author, leading to the question of how the right should be exercised after the author’s death. For this reason, the British art lobby [158] has supported the idea of collective administration of the resale royalty. It is not yet clear on what basis collective administration will be developed; most likely, a specialised agency established for this purpose will be responsible for collecting the royalty and transmitting it, not only to British artists, but also to artists in other European Union member states.

Application of *Droit de suite* to Non-European Artists

A final issue of concern to the British government is whether the resale royalty should be applied to works of art produced by non-European artists who are ordinarily resident in the UK. The answer to this question would seem to be a resounding ‘yes,’

³³ UK Patent Office, above n 25, [24].

³⁴ Renault, above n 7, 47.

³⁵ The *Visual Artists’ Rights Act* provides for a *droit de suite* in California: see Renault, above n 7, 46.

³⁶ However, Renault, above n 7, 47 discusses data which suggest that the introduction in 1994 of a Value-Added Tax of 2.5% on works of art imported into the UK led to a significant drop in imports of art from non EU countries, the US, and Switzerland.

since any other approach would probably contradict the general understanding in copyright law that the country of first release to the public should provide a basis for international legal recognition. From the perspective of collective administration, however, this could present problems in the long term: a British collecting society could become involved in sending royalty payments to family members who are resident outside the European Union area, for example, in Asia, Africa, or elsewhere. The question of whether exemption from the resale royalty could somehow be beneficial to artists of foreign origin, by making it easier for them to sell their works in the European Union, and making their works relatively less expensive than European works, remains open. Nevertheless, there is no clear policy basis to justify the appearance of negative discrimination against artists living in the UK on the basis of their nationality of origin.

Conclusion: A Positive Step for Artists' Rights?

While the Directive on *droit de suite* has been imposed on the United Kingdom against the will of the British art lobby, it is not entirely clear that the impact of the Directive need be wholly negative on Britain's thriving art market. In fact, there may be opportunities for greater diversity and fairness in the practices of the market.

The recognition of *droit de suite* seems to fit harmoniously with a broader trend in British law towards a preoccupation with developing justice and equity in its considerable role in the international art trade. Just a year ago, the UK ratified the UNESCO Convention on Cultural Property, a historic step towards assuming responsibility for Britain's role in supporting a vast international trade in illegally obtained artworks.³⁷ The British Patent Office seems poised to make use of the Directive on *droit de suite* to achieve the compatible goal of helping artists to succeed in a difficult profession.

The United Kingdom has taken advantage of transitional periods which allow it to delay implementation of the Directive until 2010.³⁸ The time following the closing of the British Patent Office's consultation process is likely to be an interesting one. The views of British experts, and of the public, on this controversial new right may provide an interesting counterpoint to the attempts of the Patent Office to maintain a 'stiff upper lip' in implementing this European legislation in British law.

MUSIC PIRATES: THE UK JOINS AN INTERNATIONAL TREND

Art and media law in the UK is showing the effects of international harmonisation in another important area: a problem of how to enforce copyright effectively in the era of digital reproduction and communications technology. The TRIPs Agreement, in response to growing concerns about the vulnerability of copyright works to unauthorised use in the Digital Age, brings an unprecedented emphasis to the effective implementation and enforcement of copyright rules in the international arena, [159] supported by the powerful trade-related dispute mechanism of the WTO.³⁹ However, the aspirations of TRIPs have often seemed unrealistic in view of

³⁷ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at Paris 14 November 1970, 10 ILM 289 (entered into force 24 April 1972).

³⁸ Article 8 of the Directive allows a further derogation of two years for the purpose of allowing economic adjustment to the resale right system; in paragraph 39 of the Consultation, the UK Patent Office proposes to make use of this further transitional provision.

³⁹ See the early assessment by RC Dreyfuss & AF Lowenfeld 'Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together' (1997) Va J Intl L 275.

the ability of individual consumers to obtain copyrighted material directly from the Internet. This issue has been a source of intense concern in the affected industries, making unexpected allies across the arts and technology fields, implicating music, computer software, and, most recently, film.⁴⁰

Industry groups in the UK have maintained a close watch on events in the United States, where perceptions of a growing threat to the arts and entertainment industries from consumers who obtain copyrighted works via the Internet has led the recording industry — and, more recently, film — to take the law into their own hands. The American group representing recording artists, the Recording Industry Association of America (RIAA), has brought a series of highly controversial lawsuits against individual consumers in the United States for downloading copyrighted music for their private use. While the move has been heavily criticised by industry-watchers as a failure to address the long term need for transformation in the recorded music industry, and further polarised public opinion against excessive protection for copyright owners, it now appears to have met with some, rather surprising, early success. A number of individual defendants have chosen to settle their suits with RIAA, leading the association to claim both a moral victory for its position, and a legal victory for the approach to copyright law established in the TRIPs Agreement. On the other side of the Atlantic, the UK High Court's decision to require Internet Service Providers (ISPs) to provide the names and addresses of individuals associated with the file-sharing networks is an interesting corollary to the British courts' support for arts and entertainment industry representatives. In this attitude, the High Court appears to be closer to the European than the American view, holding ISPs responsible for the activities carried on by Internet users who subscribe to their services. The idea of ISPs liability was famously developed by French courts in the notorious *Yahoo!* case, involving the availability of Nazi memorabilia on the Internet through Yahoo!'s websites.⁴¹

The success of the RIAA in the United States seems to have encouraged industry groups in the UK and Europe to adopt a similar approach to maintaining the viability of the recorded music and film industries in their current form. In the UK, 90 lawsuits for downloading of copyrighted music from the Internet are currently pending.⁴² The cases have been brought by the British Phonographic Industry, which successfully settled lawsuits against 26 individuals accused of illegal file-sharing for an astonishing £50,000 in compensation. In contrast to the United States, where action has been taken against individuals who have downloaded music for their private use, individuals who have been targeted in the UK all appear to have been engaged in file-sharing activities, while many have actually 'uploaded' files to illegal peer-to-peer Web sites such as Kazaa, Grokster, WinMix [160] and BearShare.⁴³ The UK approach

⁴⁰ See 'DVD copy protection strengthened' 15 February 2005, BBC News (UK Edition) online: <<http://news.bbc.co.uk/1/hi/technology/4266977.stm>>.

⁴¹ See 'Landmark ruling against Yahoo! in Nazi auction case' Special report: Free speech on the net, 20 November 2000, The Guardian online: <www.guardian.co.uk/freespeech/article/0,2763,4000,491,00.html>.

⁴² 'Music industry extends piracy war' 14 April 2005, BBC News (UK Edition) online: <<http://news.bbc.co.uk/1/hi/entertainment/music/4318765.stm>>.

⁴³ 'Peer-to-peer,' meaning that individuals make use of software provided on these Web sites to download songs from other individuals by logging onto the site; Napster was the first peer-to-peer network to enjoy large-scale success. The Grokster service has just been the subject of a landmark Supreme Court hearing in the United States, on 29 March 2005: see K Dean 'File Sharing has Supreme

suggests that there may be a greater awareness within UK industry bodies of a higher standard of behavior for infringement than in the US, where the public domain seems to be rapidly losing visibility in the debates surrounding copyright.

CONCLUSION

Outside the issue of music piracy, there have been few copyright cases of note over the past year. A case on performers' rights is one possible exception. Brought by the estate of the late Jimi Hendrix, the ruling in this case clarifies that the provisions of the *Copyright Designs & Patents Act 1988* are fully retroactive in effect, not only applying to performances that occurred before the entry into the force of the Act, but also, to countries, like Sweden in this case, which were not members of the European Union at the time of the infringing acts. Here, too, the sub-text to the UK ruling is the entry into force of the WIPO Performances and Phonograms Treaty, signaling a new importance for performers' rights in the international community.⁴⁴

Indeed, this survey of recent developments in UK art law seeks to show the increasingly global nature of British preoccupations. The UK, like many other countries, is grappling with the consequences of technological change and legal globalisation for its arts industries. In some respects, global trends appear to be pulling the UK towards a reluctant but undeniable awareness of the difficulties facing authors and artists in a global society. This appears to be the attitude of the British Patent Office towards the implementation of the European Directive on *droit de suite*, adopted by a patently recalcitrant British government. A similar preoccupation with survival is driving the cases brought by the British Phonographic Industry against individuals who download music from the Internet. However, legal protection in these two situations may ultimately support very different goals: if the British Patent Office is exploring the protection of individual artists through the artists' resale right, the British Phonographic Industry is more concerned with the immediate problem of protecting the economic well being of stakeholders with entrenched interests in the arts industries. Whether or not its strategy will ultimately benefit individual creators, or the public as a whole in the UK, remains to be seen. The alternative, long feared by American commentators on copyright law, is the discrediting of cultural law altogether. Developments over the next year will begin to answer the question of what longer term lessons the UK will draw from an ambiguous American example.

Moment' 29 March 2005, Wired News online: <<http://www.wired.com/news/digiwood/0,1412,67060,00.html>>.

⁴⁴ WIPO Performances and Phonograms Treaty, adopted by the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions in Geneva; on December 20, 1996 [WPPT]; entry into force 20 May 2002. Available in the WIPO Collection of Laws for Electronic Access, online: <<http://clea.wipo.int>>.