

UK ARTS LAW UPDATE
A TIME OF CHANGE IN THE UNITED KINGDOM

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[241] The past year and a half has been an interesting and important time for legal developments affecting the arts in the United Kingdom. The British government has undertaken changes in the two most influential areas of art law, cultural property regulation and intellectual property rights, and British judges have also developed at least one important precedent dealing with the fine arts.² In addition, the Department of Culture, Media and Sport, the UK government department charged with policy development in relation to culture and the arts, has introduced a draft communications bill that is expected to revolutionise the treatment of communications media in the UK.³ Changes to communications policy will be highly significant for the arts, particularly performing arts that depend on the broadcasting media for public exposure. It seems likely that current changes to the legal regime for the arts in the UK will determine the direction of British policy for many years to come.

The current treatment of culture and the arts in the UK draws on an intriguing mixture of novel and traditional approaches. For example, the British government has adopted a radical new stance towards cultural property. In particular, the United Kingdom has shown an unprecedented commitment to confronting Britain's role in the illicit international trade in art and antiquities, undertaking concrete measures to improve the situation. However, the British government has simultaneously been strikingly reserved in adopting new measures for the protection of authors and artists in the United Kingdom. The UK is reassessing its measures on copyright and moral rights in order to harmonise its standards with the latest European Union directives in the area, but British law continues to suffer from a deep-seated suspicion that [242] improved protection for authors' rights will inevitably impose socially undesirable costs on

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² The case is *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, [2001] FSR 11 (HL).

³ Draft Communications Bill Cm 5508-II (May 2002, presented to Parliament by the Secretary of State for Trade and Industry and the Secretary of State for Culture, Media and Sport), available online: <www.communicationsbill.gov.uk>.

publishers and 'users' of creative works. It will be interesting to see whether Britain's growing sensitivity towards cultural heritage issues eventually helps to improve protection for the intellectual property rights of authors and artists — especially 'personal' rights — or if British law will continue to reflect a degree of tension between the protection of cultural heritage and the treatment of its creators.

Cultural property law: accession to the UNESCO Convention

On 14 March 2001, the British Arts Minister announced the government's intention to accede to the UNESCO Convention on Cultural Property (UNESCO Convention).⁴ The decision was the result of a detailed examination of cultural property issues undertaken by the British government. In May 2000, as part of these efforts, the Department of Culture, Media and Sport appointed an advisory panel of experts specifically to investigate the problem of the illicit trade in art and antiquities, and Britain's role in perpetuating it. Among other recommendations, the panel emphasised that the United Kingdom should join the UNESCO Convention. In accepting its recommendation, the British government was indicating a fundamental shift in its policy towards cultural property, and in particular, signalling a new commitment to restraining the illicit trade.

The UNESCO Convention is one of two international instruments dealing with cultural property. Adopted in 1970, its main purpose is to secure the return of cultural property that has been stolen from its country of origin, or exported in contravention of local export regulations. The Convention's approach to cultural property may be said to be consciously political. Its commitment to the repatriation of cultural heritage reflects sympathy towards 'source' countries, often developing countries whose past cultural and artistic wealth presents a stark contrast to the widespread poverty their populations endure today. The high prices that art and antiquities command on the international market act as a catalyst to encourage the movement of objects of cultural value out of developing countries. This illicit trade has had devastating effects on cultural heritage in a number of developing countries,⁵ as well as creating a danger of

⁴*UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris 14 November 1970, 10 ILM 289 (entered into force 24 April 1972).

⁵ Bangladesh, Mali, and Western Samoa are some examples cited by Lyndel V Prott and Patrick J O'Keefe, *Law and the Cultural Heritage* vol 3, *Movement* (1984) 11.

harm to objects that are travelling *incognito*, perhaps uncatalogued and certainly unmonitored.⁶

The strong stance of the UNESCO Convention on repatriation — an attitude that one influential Western commentator has rather ambiguously labelled cultural ‘nationalism’⁷ — has led to difficulties in securing its acceptance internationally. In particular, many art-market countries have been reluctant to join the *Convention* because of fears about its impact on cultural heritage and the lucrative art trade in their territories.⁸ Indeed, a second convention has been drafted to address some of their concerns — the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted in 1995 (UNIDROIT Convention).⁹ The UNIDROIT Convention takes a somewhat different approach to the illicit trade in cultural property. It requires the return of stolen property, but it deals with illegally exported objects as a separate and distinct problem: in this case, repatriation depends on the satisfaction of a stringent ‘materiality test’ by the claimant, and is not by any means guaranteed.¹⁰ In spite of these departures from [243] UNESCO, the UNIDROIT Convention has not yet achieved widespread acceptance, and its membership remains inferior in number to that of the UNESCO Convention.¹¹

The British decision to participate in the UNESCO Convention represents a major step forward in addressing the illicit trade in cultural objects. Since the city of London is one of the world’s great art markets, the provisions of UNESCO should now become applicable to a much wider range of objects and transactions than ever before. Moreover, UK accession to the Convention suggests that the Convention, itself, is in the process of becoming a more significant international force. Indeed, Switzerland is

⁶ The dangers posed by the illicit movement of objects are discussed by Prott & O’Keefe, *ibid*.

⁷ See John Henry Merryman’s highly influential article, ‘Two Ways of Thinking About Cultural Property’ (1986) 80 *American Journal of International Law* 831.

⁸ Prior to 2001, four art-market countries joined the *Convention*, Australia, Canada, France, and the United States: see Patrick J O’Keefe, ‘Unlawful Traffic in Cultural Heritage and UNESCO’ (2001) 6(2) *Media & Arts Law Review* 139, 140 (International Arts Law Update).

⁹ *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* (opened to signature at Rome, 24 June 1995).

¹⁰ UNIDROIT Convention art 5(3).

¹¹ *Report of the Advisory Panel on Illicit Trade* (Department Of Culture, Media and Sport, December 2000), reprinted in (2001) 6(1) *Art, Antiquity & Law* 65, [49].

now the last major art-market country that has not joined UNESCO — and it, too, has begun to take steps towards membership.¹²

Accession to the Convention, however, has not proven to be as straightforward as the British government may initially have hoped. Interestingly, the expert advisory board pointed out that the legal considerations which previously impeded accession had ceased to pose problems. In the past, technical obstacles to joining were presented by a number of the Convention's requirements, including the creation of a list of protected objects, the promotion of supervision for excavations, and the imposition of standards of conduct on professionals who deal with cultural property, for example, art dealers and museums.¹³ According to the advisory panel, the United Kingdom now has measures in force that address all of these provisions.¹⁴

Nevertheless, over the past year, the British Government has become involved in a detailed study of the terms of accession to the Convention. The Government's concerns seem to have touched upon a great many of the substantive provisions of the Convention, including art 7 on the procedures for the recovery of illegally exported objects acquired by museums, the main provision dealing with the issue of repatriation.¹⁵ In addition, the compatibility of Scottish law with the Convention has been a source of uncertainty.¹⁶ The delay in implementing the formal procedures for accession to the Convention appears to have been a cause of concern even within the government. However, on 14 March 2002, exactly a year after the government's initial announcement, the UK Arts Minister announced that accession procedures will be initiated over the spring of 2002, and that 'the process of accession should be completed by July.'¹⁷

¹² O'Keefe, above n 8, 140.

¹³ See *Advisory Panel Report*, above n 11, [56]–[59].

¹⁴ In one case, the panel also recommended re-interpretation of the Convention provision: see *ibid* [57].

¹⁵ See United Kingdom, *House of Lords Debates, UNESCO Convention: UK Accession*, House of Lords, 20 March 2002 (Baroness Blackstone, Arts Minister), Lords Hansard, Column WA158, <www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds02/text/20320w05.htm#20320w05_sbhd0>. Teresa Blackstone, Arts Minister at the time, mentions arts 1, 3, 4, 5, 6, 7, 9 and 10 as problematic.

¹⁶ See the speech of Lord Davies of Oldham in United Kingdom, *House of Lords Debates*, 4 March 2002, Lords Hansard, Column 28, <www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds02/text/20304-08.htm>.

¹⁷ Department for Culture, Media and Sport, *Arts Minister Says UK Will Sign up to UNESCO Convention on Illicit Cultural Trade This Summer*, Press Release, No 42/02 (14 March 2002)

Accession to the UNESCO Convention is part of a broader initiative in the UK to [244] address cultural property issues. The recommendations of the advisory panel on the illicit trade deal with a number of issues other than UNESCO that its members believe the government will eventually have to confront. However, some of the panel's recommendations are quite controversial. For example, it advised against UK accession to the UNIDROIT Convention, mainly on the grounds that the limitation periods after which claims under UNIDROIT will be barred are potentially too extensive. A limitation period in the UNIDROIT Convention will be triggered only when the claimant comes to know details of the lost object's whereabouts; the issue of whether he has taken 'reasonable' measures to discover this information in due time does not arise.¹⁸ The panel's reasoning on this issue is not entirely persuasive, as measures were proposed to soften these implications of UNIDROIT in Britain, if necessary.¹⁹ As Martin Bailey of the *Art Newspaper* comments: '[T]he panel seriously considered recommending that Britain should also sign the 1995 UNIDROIT Convention, [but] this was resisted by the trade members.'²⁰

Indeed, the panel's initial inclination to recommend membership in UNIDROIT was shared by the Select Committee, which had previously recommended that the UK join the UNIDROIT Convention.²¹ Membership in this second convention might add substantially to the strength of Britain's new policy towards cultural property. The Convention is generally considered less onerous than UNESCO, and it might provide a more appropriate framework for certain claims — for example, in the case of newly discovered or privately owned objects.²²

A second area in which the panel's recommendations may give rise to difficulties lies in its suggestion that:

<www.nds.coi.gov.uk/coi/coipress.nsf/546794c477bc2d35802567350057e87d/e538c19516f9651280256b7c005a0a1d?OpenDocument>.

¹⁸ *Advisory Panel Report*, above n 11, [49]–[53].

¹⁹ *Ibid* [52]–[53].

²⁰ Martin Bailey, 'Britain says Yes to UNESCO Convention: The Government Clamps Down on the Trade in Stolen Artefacts', *The Art Newspaper* (International Edition), 2002, <www.theartnewspaper.com/news/article.asp?idart=5351>.

²¹ The advantages of the Convention as seen by the Select Committee are summarised in the *Advisory Panel Report*, above n 11, [47].

²² For example, art 3(2) of the UNIDROIT Convention states that newly discovered objects that are illegally retained will be considered stolen.

consideration be given to the imposition of conditions requiring overseas countries to observe the proper treatment of their cultural resources. Such conditions might operate through economic aid, export credit guarantees and other economic, cultural and diplomatic exchanges between the UK and overseas countries.²³

The panel's recommendation is clearly a product of its laudable focus on improving the care of cultural objects, particularly when this property may be finding its way back to poor countries that may not have the resources to conserve it properly. However, the recommendation may be difficult to put into practice, and it is potentially so complex to interpret that it might work against the interests of even the best intentioned source countries.

For example, what would constitute the 'proper' treatment of an ancient religious object that has now become a coveted artwork? Should the object be placed in a museum? The answer to this question is far from straightforward: the object originally was not intended merely to be displayed, and it may also have originated in a culture where museums are not traditionally a part of cultural life. Should the object be returned to active worship? If so, will it be able to withstand the rigours of life, climate and activity? Who is to make this determination? If money is provided by donors from an art-market country to assist in maintaining the property, who is to ensure that it is used properly? Much more than the physical [245] preservation of objects is at stake in the illicit trade in cultural objects — there are also issues of maintaining heritage, tradition, and cultural sovereignty — and the panel's recommendation opens a Pandora's box of troubling questions.

Ways of resolving these controversial issues may become apparent over time, as the international art market is influenced by a newly vigorous *UNESCO Convention*. In the meantime, British accession to the *Convention* signifies a changed environment for cultural property. UK membership will greatly facilitate claims for return and repatriation, issues that British courts could address only obliquely in the past.²⁴ Though membership will not have retroactive effect, accession may help to create a

²³ Advisory Panel Report, above n 11, Recommendation 12 on 'Reciprocity and incentives.'

²⁴ In one interesting instance, the English Court of Appeal assigned legal personality to the stolen artefact, itself: see *Bumper Corporation v Union of India* [1991] 1 WLR 1362 (CA).

conciliatory climate in which longstanding conflicts like those over the 'Elgin Marbles' may be satisfactorily resolved.

Copyright, moral rights, and droit de suite

Implementation of EU Directives in British Law

Copyright law in the United Kingdom is in a period of flux. As in the case of cultural property regulation, changes to British copyright law are primarily a response to international developments. The recent conclusion of two directives on authors' rights at the European Union has set in motion a process of implementation in UK law that is likely to be unusually complex. This is due to the comprehensive and fundamental nature of the Directive on Copyright in the Information Society,²⁵ on the one hand, and to the narrow and specialised character of the Directive on Droit de Suite,²⁶ on the other.

The EU Directive on Copyright in the Information Society is the most ambitious harmonisation directive to date in a series of directives attempting to create a common approach to copyright law and practice among EU member states. The Information Society Directive seeks to harmonise three fundamentally important aspects of copyright, the right of reproduction, the right of communication to the public, and the right of distribution. To some extent, it also attempts to update these rights for the 'Digital Age.' Most importantly, perhaps, the directive accomplishes a major innovation in expanding these traditional rights to encompass the relatively new possibility of gaining access to literary and artistic works on the basis of individual and instantaneous demand through current communications technologies such as the internet.²⁷

The deadline for member states of European Union to implement the Information Society Directive is 22 December 2002. The British Patent Office has identified a number of areas of insufficient protection in the *Copyright, Designs and Patents Act*

²⁵ Directive 2001/29/EEC of the European Parliament under the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (22/06/2001), OJ L167/10.

²⁶ Directive 2001/84/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 (13/10/2001), OJ L272.

²⁷ For example, see Jorg Reinbothe and Silke von Lewinski, 'The WIPO Treaties 1996: Ready to Come into Force' (2002) 24(4) *European Intellectual Property Review* 199, 201.

1988²⁸ that will have to be clarified in the implementing legislation. [246] These include performers' right to control communication of their performances to the public by 'on-demand' means, the protection of technological measures designed to safeguard against infringement, and the protection of electronic rights management information.²⁹ The implementation of the Directive in UK law will improve the ability of UK copyright to protect authors and works in a digital environment, and the adoption of the implementing legislation promises to be the major legislative event in UK copyright over the next year.

The implementation of the Information Society Directive will be an important event for British copyright law because of its landmark approach to digital technology, and its aspirations to make the European Union an area of seamless regulation in the wireless movement of information, technology, and culture. The directive will require changes in British law, but their purpose will be to update British provisions without necessarily involving changes of policy. The situation presented by the EU Directive on Droit de Suite is quite different.

Droit de suite is an artist's resale right: it allows an artist in the visual arts who has sold a work to continue to receive a small percentage of the proceeds from subsequent sales of the work, although he has ceased to be its owner. The right arises out of the awareness that artists are not usually able to sell their work at any price close to its ultimate market value, which rather tends to build up over time as the artist's reputation and appreciation of the artist's work grow. Technically, droit de suite is an economic right of the author, in the sense that it allows the artist to earn a royalty from the resale of his or her works. However, most jurisdictions that recognise this right also consider it to resemble more closely other, personality based interests of authors and artists. For example, like moral rights, droit de suite is often considered to be an inalienable right.

British law — and indeed, common law copyright in many countries — tends to resist the recognition and enforcement of the personality based rights of authors in

²⁸ As amended: see the overview of these issues in The Patent Office, Copyright Notices, *Implementation of the Copyright Directive in the UK*, <www.patent.gov.uk/copy/notices/2001/index.htm> (updated 18 March 2002).

²⁹ Ibid.

copyright legislation. In contrast to Continental European jurisdictions, the United Kingdom has always been hesitant to make the author the focus of copyright protection, preferring, instead, to deal with copyright as a publisher's or owner's right. Due, in part, to international and European influences, moral rights were recognised for the first time in British legislation in the 1988 revisions to the *Copyright, Designs, and Patents Act*. However, the Act expresses them in a highly restrictive formula that deprives moral rights of most of their potential for practical effectiveness.

Droit de suite, like moral rights, raises the difficult question of the appropriate treatment of authors in British law. The adoption of the EU Directive on Droit de Suite has created an obligation to introduce a resale right for artists in UK legislation. The timeline for the establishment of droit de suite is quite generous — the right comes into force for living artists on 1 January 2006 and, in the case of a deceased artist's descendants, 1 January 2012 — and the UK has yet to develop implementation measures.³⁰ However, the process of concluding the directive was highly controversial in the UK. When the Directive was voted on in the summer of 2002, the British government took the highly unusual step of voting against the adoption of the Directive. While the British vote, by itself, could not block the Directive, its opposition will be on record, and will allow the measure to continue to be debated by the member states.³¹ It will be interesting to see how the UK approaches the issue of harmonising British copyright with this Directive, especially since the droit de suite, in order to be effective in practice, particularly requires effective and efficient enforcement measures.³²

[247] The coming into force of the two WIPO 'internet treaties' is likely to intensify the pressures on British copyright traditions further. Membership in the WIPO treaties is widely perceived to be a key indicator of the status of domestic copyright laws, and, in particular, their success in keeping abreast of the digital revolution. The WIPO treaties are closely related to the Information Society Directive, which re-states some of its key provisions. However, with respect to moral rights, the WIPO Performances

³⁰ See The Patent Office, Copyright Notices, *Artists' Resale Right (Droit De Suite) Directive*, <www.patent.gov.uk/copy/notices/2001/index.htm> (updated 18 March 2002).

³¹ 'Blair will still vote against artists' levy', *Antiques Trade Gazette*, 20 June 2001, <www.ial.uk.com/news/200601.htm>.

³² See Clare McAndrew and Lorna Dallas-Conte 'Implementing Droit De Suite (artists' resale right) in England', UK Arts Council, <www.artscouncil.org.uk/publications/pdfs/droitdesuiteexec.pdf>.

and Phonograms Treaties introduces an unprecedented innovation: it creates moral rights of attribution and integrity for performers.³³ This treaty came into force on 20 May 2002, and it is not clear how the United Kingdom will eventually adapt to its requirements on moral rights.

UK Decisions: *Designers Guild*

In this period of active legislative change, it is interesting to note that UK courts have also been developing legal principles related to the arts. The decision of the House of Lords in the long running copyright case of *Designers Guild Ltd v Russell Williams (Textiles)* was issued on 23 November 2000.³⁴ *Designers Guild* is an unusual recent case, dealing directly with the issue of copyright in artistic works. It developed an interesting view of the distinction between freely available 'ideas' and protectable 'expression,' and how the questions of originality and infringement in the arts will be assessed in future copyright cases under British law.

The case involved a design for a fabric, painted by a designer employed at Designers Guild, and 'inspired by the "handwriting and feel" of Matisse.'³⁵ The design was based on a striped pattern, with flowers decorating it. The following year, Russell Williams Textiles displayed a fabric at a number of trade fairs that was also decorated with stripes and flowers. When Designers Guild sued on the grounds that its design had been copied, a decision in favour of the plaintiffs was overturned in the Court of Appeal. While the Court of Appeal recognised that the defendants may have been inspired by the Designers Guild fabric, it found that the 'visual effects' of the fabric that they designed were different.

When the House of Lords considered the appeal, its approach to the issue of infringement was quite different from the treatment of the Court of Appeal. It deliberately disapproved Justice Morritt's consideration of the details of the design, with a view to determining if it had been precisely copied to such a degree that the original creator's copyright was infringed — in other words, if the designs were

³³ See *WIPO Performances and Phonograms Treaty*, adopted by the Diplomatic Conference on 20 December 1996, art 5 [hereafter *WIPO Performances Treaty*], WIPO Collection of Laws for Electronic Access <<http://clea.wipo.int>>.

³⁴ *Designers Guild* [2001] 1 All ER 700, [2001] FSR 11 (HL).

³⁵ The expression is cited in Simon Stokes, 'Copyright and the "Idea/Expression Dichotomy"' (2001) 6(1) *Art, Antiquity & Law* 57, 57.

‘sufficiently similar’ to constitute an infringement of copyright.³⁶ In contrast, the House of Lords undertook a holistic examination of the two designs to see if they were similar in essence. Lord Hoffman did point out that the originality of a work may be more easily perceived where the idea is developed in greater detail.³⁷ Nevertheless, he maintained that copyright could be infringed where the new work is driven by the concept expressed in the old, even if they assume different forms [248] of expression.³⁸

In making the concept of originality in the arts somewhat more legally rigorous under British copyright, the House of Lords is in step with developments that seem to be strengthening this concept internationally. Notably, the highly influential decision in *Feist* introduced a new standard of originality — one combining the ideas of labour and quality — into American copyright law. This case also opens the door for greater deference to the artist’s point of view on copyright infringement.

Communications law: the Draft Bill of the Department of Culture, Media and Sport

A consideration of current developments in art law in the UK would not be complete without mention of the draft Communications Bill, whose details were announced by the government on 7 May 2002.³⁹ While the bill does not deal directly with the arts, it does propose a new framework for the treatment of communications media, in all their varied dimensions in the ‘Digital Age’. Fundamentally, the bill aspires to increase the competitiveness and openness of Britain’s communications and media market. It does so by undertaking four fundamental changes. First, the framework for media regulation is simplified by the introduction of one regulatory body in lieu of the five currently operating regulators. Secondly, the bill seeks to liberalise the rules governing media ownership, even abolishing traditionally important requirements of nationality. Thirdly, it outlines special protections for public service broadcasting in

³⁶ See the discussion in Jonathan D C Turner, ‘When Is Inspiration Lawful?’ (2001) 6(3) *Art, Antiquity & Law* 235, 235.

³⁷ See *Designers Guild* [2001] 1 All ER 700, [2001] FSR 11, [26] (Lord Hoffman): referring to Isaiah Berlin’s essay, ‘Copyright Law Protects Foxes better than Hedgehogs’.

³⁸ *Ibid* [23]–[26] (Lord Hoffman).

³⁹ See Secretary of State for Trade and Industry and Secretary of State for Culture, Media and Sport, *The Draft Communications Bill — The Policy*, <www.culture.gov.uk/creative/tv_media.html>

the new competitive environment, and finally, it specifically introduces a new regime for telecommunications.⁴⁰

The new communications regime is likely to affect artists in two important ways over the long term. First, it should greatly expand the possibilities for disseminating and communicating artistic work in the UK. A negative side to this situation may be that, in the absence of sufficiently specific regulation, infringement of artists' copyright, in both its economic and moral rights dimensions, may become a chronic and difficult problem. Secondly, however, the increased availability of information and limitations on the intervention of bureaucracy between the public and intangible knowledge is likely to enrich the world of artistic creation. In these very basic terms, the new Communications Bill signifies a change of environment for art and artists in the UK.

Conclusion

A survey of recent developments shows that art law in the UK is undergoing a period of significant change. Developments in British law and policy have occurred as a combination of responses to international legal developments and technological change. In some cases, they also represent a shift in domestic perspectives on culture. Current changes will set the tone of future regulation for some time to come, and they are likely to have a positive impact on the situation of art and culture in Britain. However, UK legislators and judges confront a fundamental difficulty in reconciling past traditions with present change. The challenge of the future will be to achieve a coherent and far-sighted treatment of cultural issues in British law.

⁴⁰ These points are summarised in the policy document noted above.