

## ART AND COPYRIGHT

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Simon Stokes, *Art & Copyright*

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[335] Arts law as a specialist area of legal practice is considered to be relatively young — a view supported by the limited number of specialist resources available. Whilst not attempting to be a definitive text on arts law, Stokes' *Art & Copyright* is both thorough and interesting in its coverage of copyright, moral rights, resale rights, digital rights and modern art practices.

Although the text primarily approaches art and copyright from the perspective of a practising lawyer, it is clearly suitable for the lawyer and artist reader alike. Through his illustration of various concepts with varied and interesting examples it is obvious that Stokes has a personal affection for the arts.

Indeed one's enjoyment of *Art & Copyright* is enhanced throughout by Stokes' illustration of concepts with interesting examples such as the acquisition of title to but not copyright in, Sir Winston Churchill's papers by Churchill College, Cambridge (copyright in the personal papers was retained by his estate and in State papers by the Crown),<sup>2</sup> and the action taken by the beneficiaries of the Matisse Estate against the publishers of the *Twentieth Century Art Book* for the copyright infringement and the publishers attempt to defend on the basis of fair dealing for criticism and review (a difficult defence to make out for what is generally regarded as a 'coffee table book').<sup>3</sup>

Stokes describes *Art & Copyright* as drawing on his work with the Institute of Art and Law (IAL).<sup>4</sup> The text aims to explore the UK law of copyright and [336] related rights

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<sup>1</sup> Arts Law Centre of Australia.

<sup>2</sup> *Art & Copyright*, 6.

<sup>3</sup> *Ibid* 152.

<sup>4</sup> A small independent research and educational organization, founded in 1995, which analyses the interface between the world of art and antiquities and that of law. The focus of the IAL can be gleaned from a discussion on the IAL website concerning art law and cultural property law, in which the following prediction is made: 'commercial interest, the need for human expression, the appreciation of

as applied to 'art', broadly defined, with emphasis on the fine arts.<sup>5</sup> It deals primarily with the relationship between the fine arts and copyright, including the development of moral rights, appropriation, the internet; commercialization of the activities of galleries and the establishment of 'arts law' as an accepted discipline. It is essentially a UK text with cases from other common law jurisdictions, in particular the USA. Moral rights cases from European countries are considered in some detail. The text also includes discussion on attempts to harmonise copyright in the European Union.<sup>6</sup>

Where Stokes identifies a connection between the law of copyright and other areas of law, he provides useful and often extensive cross referencing, allowing *Art & Copyright* to maintain a purity in dealing with its stated aims.<sup>7</sup> An example of this is the interaction of copyright and obscenity law and the idea that if the work in question is blasphemous, offensive or immoral it may not be protected by copyright, or at the very least the courts will not enforce it.<sup>8</sup>

Four chapters have been selected for further comment.

### **History and justification of copyright**

The first chapter provides a clear overview of copyright and its background, written with an ease of style that is rarely found in legal texts. Stokes then discusses the history of and justification for copyright, including:

- economic arguments of ensuring a continuing profit to the creator;
- public policy justifications that it is in the public good that as wide a dissemination of knowledge and culture occur as possible; and
- the intrinsic human right to just reward for labour.

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beauty, and a common fascination and passion for the past will inevitably push the law into forming a coherent and established set of rules that aims to encourage and protect our expression of humanity', <[www.ial.uk.com/artlaw/12.htm](http://www.ial.uk.com/artlaw/12.htm)>.

<sup>5</sup> Those with a primary interest in film and television ought note that this media is given very limited coverage in the text.

<sup>6</sup> See, eg, 81–5 dealing with the common law position on resale royalties.

<sup>7</sup> *Art & Copyright*, 1: 'This book aims to explore the UK law of copyright and related rights as applied to art broadly defined with a stress on the fine arts.'

<sup>8</sup> *Ibid* 29. Here a couple of fascinating examples are provided such as Serrano's *Piss Christ* and earrings made from human foetus, and references to research in the area are made. Another example is the ample referencing to publications dealing with the economic and sociological approaches to authorship and intellectual property: 7.

These concepts are illustrated by diverse references including contemporary cases such as *Designers' Guild Limited v Russell Williams (Textiles) Ltd*<sup>9</sup> and 17th century academic writings such as John Locke in his *Second Treatise of Civil Government* (1690).

### **Moral rights and resale royalties**

The chapter on moral rights deals with the UK and to a lesser extent the USA. In Australia, the introduction of moral rights has been met with considerable interest from both the arts and legal communities. It is disappointing that the timing of the introduction of moral rights into Australian legislation has presumably prevented inclusion of the Australian position.

Resale royalties (*droite de suite*) are discussed with use of striking illustrations from the art world, such as the wife of impressionist Jean-Francois Millet being left in penury while his paintings sold for millions.<sup>10</sup>

### **Digital rights**

Issues arising when art is digitised are adequately dealt with for the copyright lawyer dealing primarily with the visual arts. Stokes' also simply explains other implications of the digital environment such as [337] transitory copying, caching, linking and framing and the liability of ISP's. In particular, use of the internet is discussed in detail.

There is some discussion on the future of legislation in this area, in particular the European *Digital Copyright Directive*, which implements the WIPO Treaties. There is no discussion on the USA position in this area, aside from noting the implementation of the *Digital Millennium Copyright Act*, which implements the treaties in the USA.

Stokes notes that the European Commission adopted the *Directive* in its amended form on 9 April 2001<sup>11</sup> and that Member States will have 18 months to implement the

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<sup>9</sup> [2000] 1 WLR 2416.

<sup>10</sup> *Art & Copyright*, 77.

<sup>11</sup> *Ibid* 99.

Directive into national law. Apparently this will occur in the UK by the end of the year.<sup>12</sup>

### **Current issues**

The chapter on current issues is particularly interesting. It deals with copyright in photographs, use of internet visual search engines, modern art and copyright, and Aboriginal art and copyright.

### ***Copyright in photographs***

The standard of originality required for copyright protection of photographs is increasingly important for museums and publishers who exploit photographs of artistic works for commercial gain. The history of this issue is developed well by Stokes' noting the prevailing view that:

provided that the author can demonstrate some small degree of time, skill and labour in producing the photograph, which may be demonstrated by the exercise of judgment as to such matters as the angle from which to take the photograph, the lighting, the correct film speed, what filter to use etc the photograph ought to be entitled to copyright protection, irrespective of its subject matter.<sup>13</sup>

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<sup>12</sup> The position is outlined in a UK Patent Office Notice, <[www.patent.gov.uk/copy/notices/2001/implement.htm](http://www.patent.gov.uk/copy/notices/2001/implement.htm)>:

The EC Directive on copyright and related rights in the information society which was formally adopted on 9 April 2001 has now been published in the Official Journal of the European Communities ... The Directive has therefore entered into force, and as required by Article 13 it must now be transposed into the national laws of EU Member States before 22 December 2002. This is undoubtedly a tight deadline for a complete set of provisions but we believe it is achievable in the UK. As with earlier adopted directives in the copyright field, we intend to use the powers in section 2(2) of the European Communities Act 1972 to implement the Directive's provisions by secondary legislation. We are aiming to have a draft Statutory Instrument ready by the end of the year for consultation with interested parties. The Directive harmonises the core rights relevant to uses of copyright material in the information society and e-commerce, namely the rights of reproduction (copying) and communication (electronic transmission, including digital broadcasting and 'on-demand' services) as well as exceptions to these rights such as the matter of copies made for private purposes. It also provides protection for technological measures used to safeguard rights or identify material (such as copy protection systems or digital watermarks). Furthermore, the Directive will enable Member States and the Community to ratify the 1996 World Intellectual Property Organisation (WIPO) treaties in the copyright field by implementing a number of obligations arising from the treaties.

<sup>13</sup> *Art & Copyright*, 102-3 as expressed by Copinger and cited by Neuberger J in *Antiquesportfolio.com.plc v Rodney Fitch and Co Ltd*, *The Times*, 21 July 2000.

The US decision of *The Bridgeman Art Library Ltd v Corel Corp*<sup>14</sup> that held that [338] there was no copyright protection in photographs of public domain works is given careful review. Not surprisingly, Stokes discusses the US court's consideration in *Bridgeman* of the Privy Council decision in *Interlego AG v Tyco Industries Inc.*<sup>15</sup> *Interlego* held that: 'there must be some element of material alteration or embellishment which suffices to make the totality of the work an original work. ... Skill, labour or judgement merely in the process of copying cannot confer originality.'

Stokes opines that following *Bridgeman* there is some doubt about the copyright protection of photographs, where they are simply copies of other artistic works. However, he draws an interesting conclusion from the analysis of the decisions in *Antiquesportfolio* and *Graves' Case*<sup>16</sup> based on the difference in the way in which two and three dimensional items are treated and concludes with the view that the recent UK position is that photographs of artistic works may well be protected by copyright if the photographer could show that he or she had used some degree of care and skill in taking the photograph — this would be sufficient to make them 'original' for copyright purposes.<sup>17</sup>

Mitch Tuchman has made another recent analysis of this issue in *Inauthentic Works of Art: Why Bridgeman May Ultimately be Irrelevant to Art Museums.*<sup>18</sup> Tuchman gives a thorough history of the law of copyright as it applies to photographs and the US decisions. One of the more recent decisions included is *Atari Games Corp v Oman*<sup>19</sup> where the necessity of creativity was reaffirmed: 'to constitute a work of authorship the material ... must embody some modest amount of intellectual labor'.

Tuchman raises three points that the *Bridgeman case* has not dealt with:

- the decisions were based on a consideration of mechanical versus fine art and not based on the fact that the underlying works were in the public domain;

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<sup>14</sup> 25 F Supp 2d 421 (SDNY 1988).

<sup>15</sup> [1988] 3 All ER 949, 972.

<sup>16</sup> (1869) LR 4 QB 715 where Blackburn J held that photographs of pre-existing engravings were entitled to independent copyright protection.

<sup>17</sup> *Antiquesportfolio v Fitch*, 21 July 2000 as discussed in *Art & Copyright*, 112–13.

<sup>18</sup> (2001) 24 *Columbia-VLA Journal of Law and the Arts* 287.

<sup>19</sup> 888 F 2d 882 citing *Baltimore Orioles Inc v Major League Baseball Players Ass'n* 805 F 2d 668.

- the author's work and not the author's act are protected — thereby substituting creativity for 'sweat equity' as a requirement for copyright protection; and
- the decisions do nothing to determine whether photographs of three-dimensional works in the public domain are subject to similar restrictions regarding protection.

It is noteworthy that this final point is the apparent basis for Stokes' view that:

It is hard to see how in most cases a court could reasonably make a distinction between photographs of two and three dimensional items; the labour and skill in aspects of selection, focus, angle, shutter speed, lighting etc are common to both sorts of photography.<sup>20</sup>

Arts Law has had recent cause to consider the issue on the basis that reproducing or using images posted on the web, of photographs of public domain artworks, may infringe the rights of owners of copyright in the photographs. It appears that while the *Bridgeman* case is good law in the US, an argument remains in Australia (and probably the UK) about how to reconcile *Graves*' case. However, regardless of whether labour and skill are sufficient to provide originality, it appears that a change of medium alone is not sufficient to render the product original and afford copyright protection — the copier must make some original contribution.

[339] *Use of internet search engines*

The US decision of *Leslie A Kelly v Arriba Soft Corp*<sup>21</sup> determined whether the unauthorised creation of 'thumbnail images' from existing works to create a database for the search engine is copyright infringement. It was successfully defended on grounds of fair use, involving consideration of four factors: purpose and character of the use; nature of the copyright work; amount and substantiality of the portion used; effect of the use on the potential market or value of the copyrighted work.

Stokes conducts a legal analysis of the UK position with respect to photographs on the web, dealing with both moral rights and copyright, concluding that prima facie there

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<sup>20</sup> *Art & Copyright*, 113.

<sup>21</sup> United States District Court, Central District of Southern California, Southern Division, Case No SA CV 99-560 GLT {JW} Judge Gary L Taylor, 15 December 1999.

would be an infringement of copyright.<sup>22</sup> He notes however, that no defence analogous to fair use would be available in the UK. UK law (like Australian law) is narrower in its provision of defences for copyright infringement and Stokes concludes that the public interest in this case would not sway a court to allow copying to be permitted as per the decision in *Hyde Park Residence v David Yelland*.<sup>23</sup>

The moral rights aspect of this decision was the question of whether the production of the thumbnail image could be said to infringe the photographer's moral right not to have his or her work subjected to derogatory treatment. Stokes also considers whether a search engine is a 'collective work of reference' as defined in the *Copyright Designs and Patents Act 1988*.

Stokes discusses the implied licence argument that, because photographers and other creators of images have made their work available on the internet, they have granted implied licences to enable the copying and cataloguing of their work, to allow for internet searching.<sup>24</sup> This argument is frequently used to defend the unauthorised actions of copyright users of digital material. Stokes suggests caution in implying such a licence, concluding that an English court would decide *Arriba* rather differently.<sup>25</sup>

The analysis of this case is useful because it raises the issue of protection of copyright on the internet and highlights the debate in Europe over the *Digital Copyright Directive* about the balance struck between the rights of copyright owners and others in the context of the effective functioning on the Internet. The case highlights the current US approach to 'fair use' which focuses on the transformative character, if any, of the defendants work.

The appeal is awaited with much interest.

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<sup>22</sup> Referring to s 17(2) of the *Copyright Designs and Patents Act 1988*.

<sup>23</sup> [2000] 3 WLR 215 where such an argument was unsuccessful.

<sup>24</sup> *Art & Copyright*, 122.

<sup>25</sup> *Ibid* 123.

It is disappointing that the recent Australian decision in *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd*<sup>26</sup> (*The Panel* case) was not included in the discussion in this area of the law. Although *The Panel* case does not involve use of the internet, it contains an analysis of the equivalent provisions (that is, the fair dealing exceptions in the *Copyright Act 1968*) as pertaining to use by a television broadcaster of excerpts of another's programs. A comparison between [340] the two courts' treatment of substantiality would be interesting.

### **Conclusion**

It is hoped that the selection of four chapters in writing the review will not mislead potential readers as to the content of the text. Such is the content that those matters not dealt with in this review, such as appropriation, modern art practices, and other intellectual property rights could easily have been the focus of closer review. Stokes' work is a pleasure to read.

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<sup>26</sup> [2001] FCA 108.