

Book Review

Art & Copyright by Simon Stokes

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As the title suggests, Simon Stokes' book, *Art & Copyright*, provides a detailed examination of legal protection for artistic works and the rights of artists. The focus is on copyright as it applies in the United Kingdom, but reference is made to the laws of other jurisdictions where appropriate. In particular, Stokes discusses the laws of European countries and the inevitable assimilation of "authors' rights" into the laws of the United Kingdom in the wake of the harmonisation process within the European Community.

Stokes is a partner in the London law firm Tarlo Lyons, where his main areas of practice are intellectual property, information technology and competition law. The firm also provides a specialist "art law" service, in which Stokes plays a major role. His genuine interest in artistic pursuits and how the law affects them is made clear throughout the book.

Stokes is careful to point out that although *Art & Copyright* is written from a lawyer's perspective, "copyright is too important a matter to be left to practitioners alone". It is refreshing to find that he is true to his word. The result is a book on art and copyright that strikes a balance between legal and artistic perspectives.

After a thoughtful introduction, the book begins with an examination of the history of copyright and the arguments that have been used to justify its existence. Traditionally, it has been argued that there must be some economic incentive to create. While acknowledging the intrinsic value of "the original", Stokes discusses the increasing value of "the copy" with particular reference to photography, lithography and more recently, digitisation. While acknowledging the notion that an artwork may be imbued with the personality of the artist, he argues that no artwork could truly be said to be the result of the artist's personality alone, since a mixture of forces come into play. Among these are social and political forces and the influence of the works and ideas of other artists.

Stokes goes on to look at the law of copyright as it currently stands in the UK. He provides a well-organised and methodical overview of English legislation and case law that is comprehensive without being overly technical. The author looks at the classes of material that are protected as artistic works under UK legislation and at the various ways in which these classes have been defined and interpreted by courts, both in the UK and internationally. The concept of art is broadly considered and Stokes provides a lucid discussion of various judicial decisions in which some "artistic works" have been deemed worthy of copyright protection and others have not. Among these case notes he includes discussion of *Creation Records Ltd & Others v News Group Newspapers Ltd* [1997] EMLR 444. In that case, Oasis was unsuccessful in its claim of copyright protection for an arrangement of items (including a Rolls Royce submerged in a swimming pool) that had been assembled for a photographic shoot. In that case, the court considered whether the arrangement

could be considered a sculpture or a collage but eventually found that it was intrinsically ephemeral and therefore not protected.

Stokes considers photographs with particular reference to the issue of originality. In particular, he provides a summary and commentary of *Bridgeman Art Library Ltd v Corel Corp* [2000] 5 Ent LR 104. In that case, it was found that copyright did not subsist in photographic reproductions of two-dimensional artworks in which copyright had expired.

Works of artistic craftsmanship are discussed in some depth, with reference to a myriad of cases concerning the protection of items such as baby rain jackets, patchwork bedspreads and furniture.

The author also provides an in-depth analysis of the idea/expression dichotomy, with particular reference to the recent UK case, *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [1998] FSR 803; [2000] FSR 121; [2000] 1 WLR 2416. In this case, a fabric design that employed an impressionistic style was found to infringe copyright in another fabric design which used the same style and the same design elements of stripes and flowers. The court held that the designs were so similar that a substantial part of the first design had been copied by the second. Interestingly, an informal poll taken within Stokes' office decided that the two works were not sufficiently similar to warrant a finding of infringement.

Stokes also takes the reader through the criteria for copyright protection. In an examination of the requirement of originality, Stokes compares the requirements of common law jurisdictions (where skill and labour are usually cited as necessary elements) with those of authors' right regimes (where the personality of the creator is paramount).

He continues by considering the exceptions to infringement of copyright in an artistic work. Most of these exceptions have equivalent provisions in Australian legislation. One UK exception that does not have an Australian equivalent is section 63 of the UK *Copyright Designs and Patents Act 1988* (CDPA) which allows an artistic work to be copied for the purposes of selling that artwork. Stokes interprets this section as likely to cover the inclusion of artworks online as well as in hard copy catalogues.

Having provided an overview of copyright, Stokes then considers other rights that are related to copyright protection of artistic works, including the publication right, database right, passing off and confidential information.

Of particular interest, however, are the discussions of moral rights and *droit de suite* (resale right) which are provided in light of the process of harmonisation of laws being undertaken by member states of the European Community. The CDPA provides creators with the rights of paternity and integrity. However, in contrast to authors' rights regimes, moral rights under UK law can be waived and the right of paternity must be asserted by the author. Using relevant cases from several jurisdictions, Stokes illustrates relevant concepts as he examines them. In particular, he considers the application of subjective and objective tests where a creator believes his or her right of integrity has been infringed, and looks at the probable interpretation of derogatory treatment under UK law.

Also of interest is a section which canvasses issues surrounding digitisation, ISP liability and the implementation of a 'transmission' right. In this section, Stokes incorporates discussion of the application of moral rights in a digital and online environment. From an Australian viewpoint this discussion is curiously absorbing to read in light of the introduction of the Digital Agenda and Moral Rights amendments to the Australian *Copyright Act 1968*.

One of the later chapters of the book is devoted to practical copyright issues that are likely to arise for museums, art galleries and art publishing houses. This section is striking for its clarity and its common sense approach. Practical advice is provided to those lending or borrowing works of art in circumstances where copyright issues may arise. An example of one such circumstance may be where an art gallery borrows artworks and wants to reproduce those artworks for the purposes of promoting the exhibition or for producing merchandise related to the exhibition. Stokes also considers the use of artworks on the Internet and the reproduction of artworks in art books.

Overall, the book is interesting, comprehensive and accessible. It provides an effective and enjoyable exploration of the scope and nature of UK copyright protection of artistic works with reference (where appropriate) to the corresponding laws of other jurisdictions. When referring to pertinent cases, Stokes often provides a useful summary of the facts and the reasoning behind the decision. His references to sections of the CDPA are provided in a clear manner, generally with examples of how they are likely to apply in practice. *Art & Copyright* is likely to appeal to both lawyers with an interest in the law as it affects artistic pursuits and to those non-lawyers who create or deal with art in a way that finds them pondering questions about copyright and related legal rights. Australian readers may be interested in comparing UK legislation with that of Australia, and will find the case summaries and analyses useful when considering the decisions that may be made by Australian courts in similar circumstances.

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