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in Works of Artistic Craftsmanship

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An Economic Approach to Copyright in Works of Artistic Craftsmanship

The term “works of artistic craftsmanship” appears in the copyright legislation of Canada,¹ the US,² and the UK,³ as a type of work for which the creator is entitled to copyright protection. Each of these countries also has legislation governing designs, and so there is some attempt to define borders in what has always been a gray area. But the question of the appropriate domain of copyright, and in particular a definition of artistic craftsmanship, remains. The issues raised in the seminal case on the subject, *Hensher v. Restawile*,⁴ have not yet been satisfactorily resolved.

This paper tries to shed some light on the artistic craftsmanship question by taking a few steps back, and asking what is the purpose of copyright. From there we can assess the various ideas that have been put forward on artistic craftsmanship, in light of what things we think should, or should not, be under copyright’s umbrella. The approach I will take is economic. Economic analysis has previously been applied to copyright,⁵ trademarks,⁶ and moral rights,⁷ all of which will have some bearing on the issue at hand. However, it should be noted that the “law and economics” tradition in the intellectual property field is usually positive; authors are seeking to show that various aspects of the law can be explained in light of the assumption that the legal system is for the most part “efficient”, that is it serves to further the goals of maximizing

¹ Copyright Act, R.S.C. 1985, c. C-42, s.2.

² 17 U.S.C. § 101.

³ Copyright, Designs and Patents Act 1988, s. 4 (1).

⁴ [1976] A.C. 64.

⁵ Landes and Posner, “An Economic Analysis of Copyright Law” (1989) 18 J. Legal Stud. 325.

⁶ Landes and Posner, “Trademark Law: An Economic Perspective” (1987) 30 J. Law & Econ. 265.

aggregate wealth, broadly defined.⁸ But that is not the focus here. Instead, I will try to show that economic analysis can assist in the normative task of defining the limits of what should be included in copyright. I begin this task by reviewing the relevant results from the economic analysis of intellectual property.

⁷ Hansmann and Santilli, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" (1997) 26 J. Legal Stud. 95.

⁸ See generally Posner, *Economic Analysis of Law* (4th ed., 1992).

The Economic Approach to Copyright and Trademark

The economic approach to copyright is centered on finding the level of copyright protection that solves a benefit-cost problem. The benefit from an increased degree of protection is that it will provide additional revenues to creators and so encourage the creation of more works. The costs of increased protection are first that it will increase the costs of creating works, since all creators borrow to some degree from what has gone before, second that it will restrict access to those who would simply enjoy creations for their own sake, and third that it will increase the costs of administering the system, whether through an increased need for private contracts or through the judicial system. Adopting the simplification that the degree of copyright protection can be described by a single metric, the *net* benefits from copyright – i.e. total benefits less total costs – are maximized at the point where the marginal benefits from increasing the degree of protection are exactly equal to the marginal costs from increasing protection.

In itself that formulation is not surprising; *all* benefit-cost problems are solved by finding the level of the activity that equates marginal benefits and marginal costs. But there are interesting implications for the analysis of copyright.

The first point to note is that the *only* benefit to be had from increasing the degree of copyright protection is that it would encourage the creation of more works through a revenue incentive; potential creators see higher expected revenues if their works will have fewer fair use provisions, or will have copyright for a longer duration. If it were the case that at the present level of protection an increase in protection would have no stimulative effects on creation, say

because duration is already so long that creators are already discounting the value of the copyright in the last years of its life to zero, then there would be no rationale at all for increasing the degree of protection. In addition, since there are almost certainly marginal costs from increasing protection, such a situation would be a rationale for *lowering* the amount of protection.

Second, the optimal degree of copyright protection will be less the greater the difference in cost between that faced by the original creator to produce extra units of the work and for a copier to produce units of the work.⁹ The reasoning is as follows. Copyright is necessary in the first place because the creator of the work entails costs in creating the expression (researching, composing, trial and error), called the costs of expression, which a copier does not have to bear. If a copier can make units of the work, say editions of a book, just as cheaply as the licensee of the original creator, then competitive markets will drive prices for units of the work down to their marginal cost, and there will be no way for the creator to recoup the costs of expression. The result would be a great lack of incentive to undertake the costs of expression, and society would be the poorer for it. But if the creator of the work has a cost advantage in producing units of the work, then she can earn some profits on sales. For example, suppose a world with no copyright. If a printmaker can produce individual copies of her own print at a cost of £12 each, but it would cost anyone else £15 to make copies, then the market price of copies will be at least £15. The printmaker will make at least £3 profit on each unit sold, and this could go some way to recovering the cost of expression. If the cost of expression were £300, then as long as the printmaker could sell at least 100 copies she would have the

necessary incentives to create works, even in the absence of copyright. On the other hand, if copiers were able to produce copies at £13 each, then that would be the market price. The printmaker would then earn only £1 per unit sold, and she would need to be assured of selling at least 300 units for the venture to be worthwhile. It is easy to imagine that different forms of expression will have different degrees to which the creator of the work has a cost advantage in copies; for paintings it would be a much higher cost advantage than for books, for example.

A third result from the economic analysis of copyright is that the optimal amount of copyright protection will be less the greater the degree to which creators draw on the works of others to form new works.¹⁰ The intuition is clear. The goal of copyright is to ensure that creative works are produced. But if strengthened copyright protection increases the cost of expression, say by further restricting fair use provisions, or through lengthening the term of copyright so that fewer works are in the public domain, then it may lead to a decrease, rather than an increase, in works produced. This is why it makes economic sense that expressions of ideas, but not ideas themselves, are in the domain of copyright.

The final result from this simple model of copyright that will prove relevant to the problem at hand is that the optimal degree of copyright protection is lower the greater is the increase in administration costs from any increase in copyright.¹¹ As with physical property, the benefits that arise from a system of private ownership in terms of the efficient allocation of effort and resources must be weighed against the costs to society of defining and enforcing those

⁹ Landes and Posner, n. 5, p. 335.

¹⁰ *ibid.*, p. 343.

¹¹ *ibid.*, p. 344.

rights.¹² In this light it is worth noting that the absence of property rights and markets in a particular good is not necessarily evidence of a “market failure.” Rather, it might simply be a practical response to a situation where the creation of property rights would entail more costs than could be justified.

Artists’ moral rights can also be studied from an economic perspective. Although moral rights are sometimes thought of as the non-pecuniary aspect of copyright, it remains the case that moral rights are a property right with exchange value, and whose assignment will have economic implications. For example, the artists’ right of integrity to some degree reflects the fact that artists retain a strong attachment to their works as they created them, and feel a sense of genuine non-pecuniary loss if the work is altered by a subsequent owner. However, the reputation of the artist, which will have significant pecuniary implications, perhaps provides the stronger rationale for moral rights legislation.¹³ Indeed, Hansmann and Santilli go so far as to suggest that concern for the moral right of integrity provides us with a working definition of the timeless question “What is Art?”:

First, knowledge of the artist’s name is considered informative or useful in assessing the work. Put in commercial terms, this means that the work of art sells for more if it can be attributed to the artist than if it is anonymous. Second, the reputation of the artist is, in turn, based on the entire body of work he has created.¹⁴

When these conditions hold, there is a strong efficiency argument for moral rights, since they allow purchasers of a work of art to know that their investment will not be devalued

¹² The seminal paper is Demsetz, “Toward a Theory of Property Rights” (1967) 57 *Am. Econ. Rev. Papers & Proc.* 347.

¹³ Hansmann and Santilli, n. 7, pp. 103-104.

through the alteration of other pieces created by the artist. In other words, more people than the artist herself have an interest in preserving the artist's reputation. If I purchase a work from artist Jones, I receive a benefit through the fact that Jones will prevent other owners of her works, whom I have not met, from devaluing the work that I bought by tampering with their purchases.

Hansmann and Santilli go on to claim that this is why we don't observe an integrity right in inventions; "[a] plausible justification for this distinction between inventors and artists is that the marketability of an invention has little relationship to the personal identity of the inventor and, in particular, to the other items that the inventor has patented."¹⁵

Discussion of reputational effects leads us directly to the law of trademark, since the very essence of trademark is that purchasers who would otherwise face high costs in determining the quality of a particular product can rely on brand name as an assurance of a particular quality. This quality might be manifested through the utilitarian characteristics of the good – a tasty beer or a comfortable, durable shirt – or through the signaling characteristics of the good – beer and shirts that denote the owner has fine taste and a high income. Of course art works may be purchased for either reason as well; one could buy a new book by an author of high reputation either because it is likely to be a good read or because it is likely to impress visitors when they see it on one's bookshelf. In either case, the point being made is that both manufacturers and artists will desire to have good reputations based on consistency of product quality.

¹⁴ *ibid.*, pp. 108-109.

¹⁵ *ibid.*, p. 110.

There are two aspects of the economics of trademark law that will be relevant to the discussion of works of artistic craftsmanship, even though the analysis of artistic craftsmanship will be confined to the way that it should be handled by copyright law.

First, it is generally the case that infringement of trademark requires demonstration that there is a likelihood of confusion in the mind of the consumer regarding the source of the product.¹⁶ As with the law of copyright, there is no rationale in enclosing the intellectual commons unless it will contribute to improved incentives. In the case of copyright it involves the incentives to create new works. In the case of trademarks, it involves the incentive to develop a good reputation for one's brand through consistency of quality. If two producers adopt similar marks for their products, but consumers are not likely to be confused between the two, then each producer still has strong incentives to build a strong reputation for quality, and this works to the advantage of the consumer as well as the producers. But if there *is* a possibility of confusion, then each producer has less incentive to create a good reputation, since each will try to "free ride" on the other's reputation. Courts will judge whether there is a possibility of confusion by taking into account the knowledge that could be expected from consumers; the more information buyers have, the less important it is for sellers to supply information about their brand.¹⁷

Second, a functional aspect of a product cannot be a trademark.¹⁸ Functionality can be in terms of aesthetic appeal - for example a heart-shaped box of chocolates for Valentine's

¹⁶ Landes and Posner, n. 6, pp. 300-309.

¹⁷ *ibid.*, p. 301.

¹⁸ *ibid.*, pp. 297-299.

Day¹⁹ - or in practicality. The rationale is to avoid the social cost of a firm establishing a monopoly (without limits on duration, in the case of a trademark) on a useful feature. Since there are many substitutes for non-functional trademarks – an endless supply of words, shapes and colours that can be invented or used in unusual contexts – a monopoly on one symbol, say a red triangle to identify a particular ale, does not in any substantial way diminish the number of potential symbols for other ales. But since there is a cost associated with allowing a property right to be established in a functional feature care must be taken that the right is a limited one. So, for example, a functional feature might be patentable, but it would require registration, would have to pass a test of non-obviousness, and would be of limited duration.

However, Landes and Posner note that

A producer of a consumer product will never deliberately uglify the product – and we do not want him to. Any design feature he seeks to trademark will be designed in part to please. Hence courts have the difficult problem of disentangling the aesthetic from the identifying function of a trademarked design feature.²⁰

The solution is to confine trademark to non-functional aspects. Producers will still have incentives to make their trademark as attractive as possible, since it will increase the price they will be able to obtain. But for aesthetic features that are a part of the product, a design patent is more appropriate. Landes and Posner confess that in practice determining when a feature of a product is functional will be very tricky, and so this is an area where we would expect to have substantial social costs of administering the system.²¹

¹⁹ Denicola, “Freedom to Copy” (1999) 108 Yale L. J. 1661, p. 1671.

²⁰ Landes and Posner, n. 6, p. 297.

²¹ *ibid.*, p. 299.

I close this section with an example of Posner judging just such a case, as it is an excellent example of the economic approach to the functionality problem, and indeed provides an economic definition of functionality:

The jury has to determine whether the feature for which trademark protection is sought is something that other producers of the product in question would have to have as part of the product in order to be able to compete effectively in the market – in other words, in order to give consumers the benefits of a competitive market – or whether it is the kind of merely incidental feature which gives the brand some individual distinction but which producers of competing brands can readily do without. A feature can be functional not only because it helps the product achieve the objective for which the product would be valued by a person indifferent to matters of taste, charm, elegance, and beauty, but also because it makes the product more pleasing to people not indifferent to such things. But the fact that people like the feature does not by itself prevent the manufacturer from being able to use it as his trademark. He is prevented only if the feature is functional, as defined above, that is, only if without it other producers of the product could not compete effectively. If it is nonfunctional, it can be trademarked even though it is pleasing.²²

Works of Artistic Craftsmanship

In this section of the paper I consider different proposals that have been put forward as the appropriate definition of works of artistic craftsmanship. These will be assessed not from the perspective of what the drafters of copyright statutes “really meant” when they included works of artistic craftsmanship, but rather from the perspective of whether it makes economic sense to grant copyright protection to works meeting these definitions. With that in mind, what follows is slightly unusual for the literature in this topic in that I will freely draw on cases and analysis from each side of the Atlantic.

Separability

US copyright law protects:

works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article ... shall be considered a [copyrightable] work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are being capable of existing independently of, the utilitarian aspects of the article.²³

The separation test was drawn in part from the reasoning in *Mazer v. Stein*,²⁴ where the plaintiff was appealing a decision that found he had violated the copyright of statues of dancers that had been used as lamp bases. The statues had been registered with the US Copyright Office, and were made with the intent that they would be used in lamp bases. The Court rejected the claim that because the statues were used in mass-produced objects the copyright would not be valid: “We find nothing in the copyright statute to support the argument that the intended use in industry of an article eligible for copyright bars or invalidates its registration.”²⁵

In refining the standard for copyright after *Mazer*, the Copyright Office excluded from consideration any object whose “sole intrinsic function ... is its utility.”²⁶ However, the word “sole” was ultimately dropped from the regulations, and now a “useful article” is described as “an article having an intrinsic function that is not merely to portray the appearance of the article

²² *W.T. Rogers Co. v. Keene*, 778 F.2d 334 (7th Cir. 1985), p. 346. Quoted by Brown, “Design Protection: An Overview” (1987) 34 UCLA L. Rev. 1341, p. 1366.

²³ 17 USC § 101.

²⁴ 347 US 201 (1954).

²⁵ *ibid.*, p. 218.

²⁶ 37 C.F.R. § 202.10(c) (1959) (revoked Jan. 1, 1978, 43 Fed. Reg. 966 (1978)); see Denicola “Applied Art and Industrial Design: A Suggested Approach to Copyright Protection in Useful Articles” (1983) 67 Minn. L. Rev. 707, pp. 727-738 for general discussion of the evolution of the definition.

or to convey information.” So it was in *Esquire, Inc. v. Ringer*²⁷ that copyright was denied to the design of an outdoor lamp; Esquire argued that the designs were modern sculptures, attractive for their own sake, but they could not pass the separability test, and had “an” intrinsic function as a useful article.

The Artist's Intent

The separability test as written does not inquire at all into the motives of the creator. But Robert Denicola has argued that the creator's intent and the process he used should be critical in setting the boundary for works of artistic craftsmanship under copyright: “[c]opyrightability ... should turn on the relationship between the proffered work and the process of industrial design. Because the dominant characteristic of industrial design is the influence of the nonaesthetic, utilitarian concerns, copyrightability ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations.”²⁸ The goal here is a clear separation between works that should be protected by design legislation and works that warrant copyright. Denicola does not disagree with the court in *Mazer*, since the statue's “form is not responsive to utilitarian demands.”²⁹ However, the point is that the separability should be defined not by what the viewer sees, but by what the creator saw.

Denicola's interpretation has much in common with the aesthetic theory of Croce, for whom art is intuition.³⁰ It is a vision by the artist that she invites the viewer to share. This idea leads Croce to distinguish art from two things. First, art should not be thought of as residing in

²⁷ 591 F.2d 796 (D.C. Cir. 1978).

²⁸ Denicola, n. 26, p. 741.

²⁹ *ibid.*, p. 743.

the physical object itself. It resides in the intention of the artist and in the contemplation of the viewer. Second, art cannot be a “utilitarian” act. Art must have nothing to do with usefulness. Croce even goes so far as to separate the pleasure a work of art might give the viewer as something different from its aesthetic worth, i.e. its worth as art. The art is in the expression of the artist, and that is what we are invited to contemplate. Note with this conception of art there is not a distinction between high and low art.³¹ Further, there can be, within Croce’s theory, artistic expression *within* a useful object; it is a matter of whether the creator is trying to express something from within: “Artisans who think a chair looks wrong and fiddle with it until they can say “that’s it” are doing something continuous with what the greatest artist does. Workers who simply churn out MFI furniture to pattern aren’t in some full sense active at all...”³²

Collingwood claimed “not to differ in any essential respects from Croce.”³³ But Collingwood devotes much effort into trying to distinguish art from craft. For him, the chief characteristics of craft as something separate from art are, *inter alia*:

- (1) Craft always involves a distinction between means and end ...
- (2) It involves a distinction between planning and execution. The result to be obtained [from craft] is preconceived or thought out before being arrived at. ...Moreover, this foreknowledge is not vague but precise.³⁴

³⁰ Croce, *Guide to Aesthetics* (1913).

³¹ Lyas, *Aesthetics* (1997) pp. 104-105.

³² *ibid.*, p. 105.

³³ *ibid.*, p. 80.

³⁴ Collingwood, *The Principles of Art* (1938) pp. 15-16.

These factors, for Collingwood, are not present in works of art. But if art is expression, *why* must these considerations be absent? “That a chair has to be fit to sit on does not prevent a chair expressing its creator’s conception of how furniture might be.”³⁵

Among the many opinions on “works of artistic craftsmanship” found in *Hensher*,³⁶ (to continue on the theme of furniture), Lord Kilbrandon’s is closest to Denicola: “In my opinion, the first essential of a work of art (which I think an artistic work must be) if it is to be distinguished from a work of craftsmanship - a distinction upon which Parliament insists - is that it shall have come into existence as the product of an author who is consciously concerned to produce a work of art.”³⁷

Hensher made a prototype of some living-room furniture - the “Bronx” suite. Restawile subsequently produced the “Amazon” suite, and Hensher claimed infringement of copyright. In the lower court it was held that the Bronx suite deserved the label “artistic”, and was not simply a purely utilitarian article, and that the respondents’ suite infringed copyright. The appeal was based on the Bronx suite’s not being a work of “artistic craftsmanship” under section 3 (1) (c) of the Copyright Act of 1956,³⁸ and the Court of Appeal allowed the appeal. Lord Kilbrandon made the claim that “[t]he conscious intention of the craftsman [to produce a work of art] will be the primary test of whether his product is artistic or not.”³⁹

³⁵ Lyas, n. 31, p. 219.

³⁶ n. 4, above.

³⁷ *ibid.*, p. 96.

³⁸ Section 3 (1) reads: “In this Act ‘artistic work’ means a work of any of the following descriptions, that is to say, -(a) the following, irrespective of artistic quality, namely paintings, sculptures, drawings, engravings and photographs; (b) works of architecture, being either buildings or models for buildings; (c) works of artistic craftsmanship, not falling within either of the preceding paragraphs.”

³⁹ *Hensher*, n. 4, p. 97, quoted by Booton, “Legal Determinations of Artistic Merit under United Kingdom Copyright Law” (1996) 1 *Art Antiquity & Law* 125, p. 134.

Although, as we have noted, there are aesthetic theories that rely on the intention of the artist when classifying works, Lord Kilbrandon's test of artistic craftsmanship is based on the practical matter of wanting to avoid judicial evaluation of the merit of the object in question: "It has been said that the courts will be reluctant to make aesthetic appreciations, and that is right, not because so to do is for a judge difficult or unseemly, but because it is a decision which, in this context, is not required."⁴⁰ Of course, "work of art" is a term whose meaning must still be decided, and here Lord Kilbrandon does ask judges to judge: "you cannot get on without exercising, in any case in which this kind of dispute arises, the judicial function of holding whether the facts bring the object within the meaning of the statutory definition. ...It is for the judge to determine whether the object falls within the scope of the common meaning of the word."⁴¹

A version of Lord Kilbrandon's test is used in *Merlet v. Mothercare plc.*⁴² The plaintiff made a baby's cape for her own child, which later served as a prototype for a cape made for sale, the Raincosy, by the second plaintiff. The defendant, a large enterprise, obtained one of the capes and began to manufacture and sell a copy. Infringement of copyright was alleged, and the dispute centered on the question of whether the cape was a work of artistic craftsmanship. Walton J. divides artistic craftsmanship into parts: "There are obviously two elements - the craftsmanship, and the artistic nature of that craftsmanship, which are bound up together in the phrase 'artistic craftsmanship'".⁴³ Speaking to the creator's intent, it was held that if the "intention was to create a work of art and he has not manifestly failed in that intent, that is all that

⁴⁰ *Hensher*, n. 4, pp. 96-97.

⁴¹ *ibid.*, p. 97.

⁴² [1986] R.P.C. 115.

is required. ...But of course he may have manifestly failed in his object, and his own *ipse dixit* cannot therefore be the sole, although it is the predominant, test.”⁴⁴ Although intent matters, like Lord Kilbrandon, Walton J. still requires us to know whether the object is a work of art. Merlet herself did not claim to be an expert craftsman, but by Walton J.’s standard the case should not hinge on this point. The artistic aspect was held to matter more, and Walton J. reckoned “it would be extremely difficult, if not totally impossible, to submit that any substantial section of the public would value the Raincosy for its appearance, or get pleasure or satisfaction, whether emotional or intellectual, from looking at it.”⁴⁵ He cites *Burke and Margot Burke Ltd. v. Spicers Dress Designs*,⁴⁶ where it was held that “artistic craftsmanship” must be, first, “artistic”, and that dress designers do not create work which would meet the Oxford English Dictionary definition of “artistic”, and so the only copyright a dress designer would have is in the drawings of the design, since such works need not meet any aesthetic standard at all. Since there is insufficient evidence that the defendant in *Merlet* copied the drawings of the design (indeed, they made their own drawings based on observation of the Raincosy itself), there is no infringement of copyright.

In a recent article, Boton argues that “Lord Kilbrandon was essentially correct in arguing that the conscious intention of the craftsman should form the basis of any determination

⁴³ *ibid.*, p. 122.

⁴⁴ *ibid.*, p. 126.

⁴⁵ *Ibid.*

⁴⁶ [1936] Ch. 400, [1936] 7 All E.R. 99.

of artistry. Only if the craftsman intended to produce an artistic work can it reasonably be argued that, in producing the work, he engaged in artistic craftsmanship.”⁴⁷ His reasoning is that:

[t]he legislation requires that it is the craftsmanship which must be artistic and not the work itself. It follows that whether or not the work itself is artistic will not be determinative of whether it is a ‘work of artistic craftsmanship’. It is submitted therefore, that any test which has as its basis the examination of the finished work itself is wrong in law.⁴⁸

Returning to US law, Denicola justifies focusing on the creator’s intent in establishing separability first on the ground that conceptual separation rejects from copyright some creations which should be entitled to protection. For example, a pencil sharpener in the shape of an old-fashioned telephone is the work of a creator unconstrained by the utilitarian features of the article, even though there is no physical separability. Second, “a model emphasizing the influence of utilitarian factors frees the judicial analysis from its unfortunate fixation on appearance alone.”⁴⁹ Third, “emphasis on artistic independence has the additional advantage of neutralizing the arbitrary nature of the ‘useful article’ characterization.”⁵⁰ If the work in question has an aspect that is independent of the utilitarian needs of the article, then there is no need to inquire into whether the object is being purchased primarily for its aesthetic or useful properties. Finally, the simple ‘separability’ formula tends to discriminate against nonrepresentational art – a telephone inspired by Mickey Mouse has a more obvious ‘separability’ than one inspired by

⁴⁷ n. 39, p. 138.

⁴⁸ *ibid.*

⁴⁹ Denicola, n. 26, p. 743.

⁵⁰ *ibid.*, p. 745.

Henry Moore.⁵¹ A consideration of the creator's intent, and whether she was unconstrained by the utilitarian features of the article, should go some way to removing this particular bias.

The Eye of the Beholder

Putting to one side the artist's intent, if the standard is also to demand a certain standard of work beyond simply an intent to create art, who should be the judge of whether the attempt was successful? There are three possibilities: the judge, the general public, and expert opinion.

In *Hensher* Lord Kilbrandon said of the word 'artistic', "[s]ince the word is a word of common speech, it requires, and permits of, no interpretation by experts. It is for the judge to determine whether the object falls within the scope of the common meaning of the word."⁵² But is it so simple? As Booton notes, "in the case of the word 'artistic', the observation that the word is in common usage does nothing to assist in the determination of its meaning. Indeed, the very fact that the word is in common usage is part of the problem since such usage tends to create a broad range of subjective opinions as to its meaning."⁵³

If there is a broad range of subjective meanings, one approach is to adopt the stance of a representative buyer, and ask why they would purchase the work. In the Canadian case of *Cuisenaire v. South West Imports Ltd.*,⁵⁴ copyright infringement was claimed in some coloured rods which were designed to accompany, and be used in conjunction with, a children's arithmetic book. As Canadian law also uses the phrase "artistic craftsmanship", the Court of Appeal in *Hensher* cited Noel J. in *Cuisenaire*: "An artistic work ... must to some

⁵¹ *ibid.*, pp. 745-746.

⁵² n. 4, p. 97.

⁵³ n. 39, p. 132.

degree at least, be a work that is intended to have an appeal to the aesthetic senses not just an incidental appeal, such as here, but as an important or one of the important objects for which the work is brought into being.’⁵⁵

Lord Reid in *Hensher* also looked to whether the creation would have appeal to the general public:

Judges have to be experts in the use of the English language but they are not experts in art or aesthetics. In such a matter my opinion is of no more value than that of anyone else. ...I think that by common usage it is proper for a person to say that in his opinion a thing has an artistic character if he gets pleasure or satisfaction or it may be uplift from contemplating it. ...[I]f unsophisticated people get pleasure from seeing something which they admire I do not see why we must say that it is not artistic because those who profess to be art experts think differently. After all, there are great differences of opinion among those who can properly be called experts.⁵⁶

Lord Reid goes on to explain that the public’s thinking that an object “looks nice” does not mean that they necessarily think it is artistic, and opines that *Hensher*’s appeal should be dismissed on the grounds that there was no evidence that even buyers of the furniture suite thought it was artistic.⁵⁷

Booton submits that “of all the definitions of ‘artistic work’ suggested in *Hensher*, only Lord Reid put forward a test which was workable, consistent with established legal principles, and which ensured that the type of works which the legislature intended should be protected came within the category ‘works of artistic craftsmanship’.”⁵⁸ Booton thereby arrives at a two-

⁵⁴ [1968] 1 Ex.C.R. 493.

⁵⁵ *ibid.*, at 514.

⁵⁶ *Hensher*, n. 4, p. 78.

⁵⁷ *ibid.*, p. 79.

⁵⁸ Booton, n. 39, p. 138.

part test for works of artistic craftsmanship: as noted above he supports Lord Kilbrandon's opinion that the creator must have *intended* to produce an artistic work, and in addition the general public must recognize it as such.

Polakovic also has a two-part test, where one part is consistent with Booton's – that the public perception is critical. Polakovic notes that if we adopt a standard that relies on the reasons certain works are purchased, we can avoid the many problems inherent in the US standard of 'conceptual separability.'⁵⁹ In particular, Polakovic is concerned that the application of conceptual separability forces courts to rule on artistic merits of particular works, since if there is no physical separability in the aspect for which copyright is being claimed, there needs to be a decision on whether the design is aesthetic or useful.⁶⁰ He agrees with Denicola that there should be a focus on the process of creation, since that gets to the heart of why we have copyright in the first place – to encourage production. However, Denicola's approach raises the question of why we should treat artists unconstrained by utilitarian considerations differently from artists who do take them into account. Polakovic comments that "it is be no means a truism that the motivations that lead to pictorial, graphic, or sculptural work without an intrinsic utilitarian function are all that different from those leading to the creation of a useful article."⁶¹ And so, Polakovic's refinement of conceptual separability would have a two-step test. First: "conceptual separability must operate in the somewhat pedestrian confines of the ordinary observer. More accurately, the conceptualization of a particular article as aesthetically pleasing

⁵⁹ Polakovic, "Should the Bauhaus be in the Copyright Doghouse? Rethinking Conceptual Separability" (1993) 64 U. Colo. L. Rev. 871.

⁶⁰ *ibid.*, pp. 874-875.

⁶¹ *ibid.*, p. 876.

must not be based upon the article's technological attributes."⁶² A person skilled in a particular industry might find a particular object "beautiful" because it performs its function so well. But that is a utilitarian concern that should not be given copyright protection on the general grounds of not protecting functional aspects of products. But if an "ordinary observer", who knows little about its practical application or utility, finds an object beautiful, then we have the basis for conceptual separability. The second part of Polakovic's test would ask whether the source of the aesthetic appeal also augments the function of the article; for the usual reasons, copyright would not apply to such aspects.

If expert opinion is to be used, on what would it base *its* judgments? One influential school holds that whether something is, or is not, a work of art is a social construct, and that the relevant society is that which has an understanding of artistic theory and the history of art, an "artworld".⁶³ In its most concise form, "a work of art in the descriptive sense is (1) an artifact (2) upon which some society or some sub-group of society has conferred the status of candidate for appreciation."⁶⁴ Such a definition has the value of avoiding the confusion of the definition of art with the question of how to evaluate whether an object is good or bad art. It allows the definition of art to change as the world changes, being tied to actual practices. "Appreciation" poses some difficulties; the artworld, for the most part, considers Duchamp's exhibition of a urinal, "Fountain", art, but it is not a "candidate for appreciation."⁶⁵ Indeed, it seems inescapable that we are drawn to the identity of the creator: "It is because he did "Nude [Descending a Staircase]" that Duchamp is an artist; it is because he is Duchamp that "Fountain"

⁶² *ibid.*, p. 890.

⁶³ Danto, "The Artworld" (1964) 61 *J. Philosophy* 571.

⁶⁴ Dickie, "Defining Art" (1969) 6 *Am. Phil. Q.* 253, p. 254.

is not just a misplaced urinal.”⁶⁶ (This would seem to take us back to Collingwood’s idea that it is the personality of the creator that determines whether something is a work of art.) The case could be made that the artworld, if it has this decision-making power granted to it, should set its criteria for a work’s admission to the artworld in a way that maximizes the probability that good art will be produced, although it does not always seem to do so.⁶⁷ However, Karlen is led to conclude that “[t]he man in the street, although knowledgeable about art since its effects are all around him, is not necessarily the best judge of new art forms, and neither is the community of such individuals necessarily capable of so judging. ...[I]n the world of art the professional standard as represented by the ... art world should govern.”⁶⁸

Lord Simon in *Hensher* would rely on expert evidence in assessing the work, although he would look to acknowledged artist-craftsmen rather than the expert in art theory: “Parliament can hardly have intended that the construction of its statutory phrase should turn on some recondite theory of aesthetics.”⁶⁹

So of the three possibilities for evaluating a work, the Lords in *Hensher* covered them all. Why such a lack of clarity on this aspect? One way of approaching the problem is given by Kearns, who identifies the crux of the matter thus:

Although judges strive for as much definitional certainty as possible, so that the law’s language is as clear as possible and applied as consistently as possible, unfortunately for legal purposes at least ... the word “artistic” cannot be confined exhaustively by other verbal formulae. Moreover, its application cannot be a matter of the application of language alone when it, possibly more than any other, is a term of taste, not only an adjective that has to be applied to a noun but a quality that has to be felt of a thing or

⁶⁵ Cohen, “The Possibility of Art: Remarks on a Proposal by Dickie” (1973) 82 Phil. Rev. 69, pp. 71-72.

⁶⁶ *ibid.*, 74-75.

⁶⁷ Young, “Defining Art Responsibly” (1997) 37 Brit. J. Aesthetics 57.

⁶⁸ Karlen, “What is Art?: A Sketch for a Legal Definition” (1978) 94 L.Q. Rev. 383, p. 400.

⁶⁹ *Hensher*, n. 4, p. 95.

exuded by a thing so as to be inferred by the subjective senses. ... The law ignores this complex human process intrinsic to the discernment of the artistic, and prior to the application of the word “artistic”, because its desire is understandably a clarity of terms *per se* for its own purposes i.e. an avoidance of anything that suggests unruly subjectivity of judgement.⁷⁰

In this view the essential problem of identifying something as “artistic”, whether by a judge, the public, or art experts, is that in any case the person or persons making the classification will need to do so based on the experience of the article, and it will be impossible to convey verbally the reasons for their opinion.

But there is a further problem. It may be the case that “art” is an “essentially contested concept”, that is, it is a term, like “democracy” or “freedom”, which has meaning *only* in the context that its definition is open to debate.⁷¹ If this is the case, then the problem with defining “artistic” is not that it is a “vague” term, with fuzzy boundaries as to what should or should not be included, and which require clarification, but that “everyone knows there is no authoritative dictionary that could settle the true meaning in a way that all the contestants would acknowledge. It is a debate in which it is impossible to imagine anyone having the last word.”⁷² This does not mean that an essentially contested concept is without value to society; rather, it is valuable *because* of its contested nature: “[w]ould anyone deny ... that an understanding of art is enhanced, rather than impoverished, by the continuing debate among artists, art critics, and aesthetes about what art ‘really’ is? The dynamics of that debate ... results in any modern claim about the nature of art being considerably richer and more subtle than it would have been if the

⁷⁰ Kearns, *The Legal Concept of Art* (1998), pp. 72-73.

⁷¹ Gallie, “Essentially Contested Concepts” (1956) 56 Proc. Aristotelian Soc. 167. Also see MacIntyre, “The Essential Contestability of Some Social Concepts” (1973) 84 Ethics 1.

⁷² Waldron, “Vagueness in Law and Language: Some Philosophical Issues” (1994) 82 Cal. L. Rev. 509, p. 531.

claim had issued straightforwardly from an historically unchallenged consensus.”⁷³ That being said, the question remains as to whether it is a good thing to have these valuable debates about the meaning of contested terms in our statutes. Waldron argues that in some cases there can be such value – the debates in US Constitutional cases over what constitutes “cruel and unusual punishment” or “speech” (in the context of freedom of speech) are valuable in that they provoke a social debate over important issues.⁷⁴ It remains to be shown, however, whether the courts are a useful place to engage in debates over the meaning of “art”. On the other hand, there is an argument that within the copyright statutes “art” and “artistic” do not require definition, since the works in question are “works of artistic craftsmanship”, which it can be argued is an indivisible phrase.

The Artist-Craftsman

Again turning to *Hensher*, Lord Simon puts forth the case that asking whether a work submitted as a “work of artistic craftsmanship” is “artistic” is to ask the wrong question: “the statutory phrase is not ‘artistic work of craftsmanship,’ but ‘work of artistic craftsmanship’; ...this distinction accords with the social situation in which Parliament was providing a remedy.”⁷⁵ The “social situation” was that until the Copyright Act of 1911 the only art works granted copyright protection were works of fine art. But the late 19th century and first decade of the 20th century saw the rise of the Arts and Crafts movement, led by William Morris, which held that “art” extended beyond the so-called fine arts, in fact beyond objects of art in general,

⁷³ *ibid.*, p. 532.

⁷⁴ *ibid.*, p. 539.

⁷⁵ *Hensher*, n. 4, p. 94.

and was a way of life to be practiced by any dedicated craftsman who would choose it. Morris held that society was losing its capacity to produce art due to increased mechanisation, beyond that required to reduce menial toil. He held the view that a factory cannot produce art, and that the aim of art is to enrich life for both the buyer and the creator, “to make work happy and rest fruitful.”⁷⁶ Oscar Lovell Triggs, writing from America at the turn of the century, held that “[i]f ... the article evidences the maker’s pleasure, his affection for his work, his play of memory and intelligence and faith ... if, in fine, the work be individualized, it becomes to that degree a work of art, a part of the pleasure of men’s lives, the source of happiness.”⁷⁷ It is important to take note of the importance of *tradition* in the philosophy of the Arts and Crafts movement. While the personality of the artist-craftsman is manifested in the work, it is not the personality of the romantic, creative genius.⁷⁸

It is the essence of the arts and crafts movement that the notion of “conceptual separability” in works of artistic craftsmanship is to completely misunderstand what the artist-craftsman does, and Denicola’s idea that the artistic aspect of a work is that which is unconstrained by the utilitarian aspects is fully contrary to the practice of artistic craftsmanship. As Morris put it (in a discussion of textiles): “if you feel yourself hampered by the material in which you are working, instead of being helped by it, you have so far not learned your business, any more than a would-be poet has, who complains of hardship of writing in measure and rhyme. The special limitations of the material should be a pleasure to you, not a hindrance...”⁷⁹

⁷⁶ Morris, *Selected Writings* (1948 [1934]), p. 593.

⁷⁷ Triggs, *Chapters in the History of the Arts and Crafts Movement* (1902), p. 165.

⁷⁸ *ibid.*, p. 195.

⁷⁹ Morris quoted by Naylor, *The Arts and Crafts Movement* (1971), p. 104.

The Arts and Crafts movement emphasized the importance of the designer and craftsman being one and the same person. Bernard Leach wrote:

In the work of the potter-artist, who throws his own pots, there is a unity of design and execution, a co-operation of hand and undivided personality, for designer and craftsman are one, that has no counterpart in the work of the designer for mass production, whose office is to make drawings or models of utensils, often to be cast or moulded in parts and subsequently assembled.⁸⁰

The importance of the unity of design and craft in works of artistic craftsmanship played an important role in *Burke*,⁸¹ where it was held that the dress in question could not be a work of artistic craftsmanship, and so not eligible for copyright:

It is said that having regard to the beauty of this frock, it is not only a work of craftsmanship, but it is a work of artistic craftsmanship. Where was the artistic element originally? It was not in the plaintiff company's workpeople. They only produced the article by mechanical processes. They were craftsmen, but not artistic craftsmen. They produced the artistic qualities from the inspiration of Mrs. Burke in her sketch, and accordingly, although I can well understand that the work the plaintiff company made was a work of craftsmanship, it is not original and is not protected by the Act, and upon that ground I do not feel able to hold that the frock is an original work of artistic craftsmanship.⁸²

The view held in *Burke* has not always been held in subsequent cases, for example *Merlet*.⁸³

The issue is not raised in *Hensher*. Recent texts have held the distinction in *Burke* to be wrong, as long as there is an artistic aspect to the craftsman's work.⁸⁴

Lord Simon provides a detailed discussion of the Arts and Crafts movement in his opinion in *Hensher*, and although the evidence is based on the coincidence of timing between

⁸⁰ Leach, *A Potter's Book* (1948) pp. 1-2.

⁸¹ n. 46, above.

⁸² *ibid.*, p. 101.

⁸³ n. 42, above, pp. 123-124.

the peak of influence of the movement and the inclusion of “works of artistic craftsmanship” in the Copyright Act of 1911, there is no documentary evidence referred to that would clearly establish the intent of the drafters of the Act. However, Lord Simon’s interpretation of what “works of artistic craftsmanship” was meant to represent receives support from numerous modern commentators.⁸⁵

Should Works of Artistic Craftsmanship Have Copyright?

In this section I want to show that the inclusion of “works of artistic craftsmanship” under copyright is not justified by economic analysis. This is so regardless of which of the various means proposed for identifying such works is chosen. My position is consistent with Kaplan’s, who wrote of *Mazer*⁸⁶ that “[c]opyright itself seems out of place where the artistic structure is only one of a number of elements attracting customers to the particular goods, that is, where the goods are not ‘fragile’ in the sense in which books customarily are,”⁸⁷ and that the extensions being proposed in the US in the 1950s and 60s to include various useful articles within copyright protection was a “curious form of supererogative folly.”⁸⁸

My reasons are as follows:

1. Regardless of which definition of “works of artistic craftsmanship” is chosen, the resulting administration costs will be high, which in turn lowers the rationale for

⁸⁴ See Holyoak and Torremans, *Intellectual Property Law* (1995), pp. 158-159, or Cornish, *Intellectual Property* (4th ed., 1999), p. 392.

⁸⁵ See Booton, n. 39, Karlen, n. 68, or MacQueen, *Copyright, Competition and Industrial Design* (2nd ed., 1995), p. 33.

⁸⁶ n. 24, above.

⁸⁷ Kaplan, *An Unhurried View of Copyright* (1967), p. 55.

⁸⁸ *ibid.*, p. 56

copyright. Oliver Wendell Holmes famously remarked in an early copyright case that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits.”⁸⁹ This concern is generally avoided with most works covered by copyright – no aesthetic evaluation by the court is required. But works of artistic craftsmanship always carry the need for a judgement, whether of the degree of conceptual separability, or of whether the creator was working unconstrained by the utilitarian needs of the article, or of whether the object is valued for its beauty rather than its usefulness, or of whether it was created by an artist-craftsman. All major texts in the field note the uncertainty that surrounds this branch of copyright law, and it is no wonder when there is no clear guide as to how decisions will be made. In fairness it should be said that sometimes vagueness in a definition can be a positive thing, if it is the case that allowing courts some latitude will on balance produce better judgements than a strict interpretation of a detailed statute.⁹⁰ But it has not been demonstrated that vagueness has served a useful function regarding works of artistic craftsmanship.

2. In granting protection to works of artistic craftsmanship there will be a constant threat of granting protection to functional aspects of the work. This represents an additional administrative cost, and one where the cost of judicial error is large.

⁸⁹ *Bleistein v. Donaldson Lithographing Co.* 188 US 239 (1903), p. 251.

⁹⁰ See Hadfield, “Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law” (1994) 82 Cal. L. Rev. 541.

While all authors on this subject would agree that there should be no protection to functional aspects, in practice this will often be a difficult distinction to make.

3. Awarding copyright to works of artistic craftsmanship provides little extra incentive for new creation. Recall that if copyright is not serving to stimulate the creation of new expression then there is no economic justification for the copyright. Even without the protection of copyright, manufacturers of useful articles have an incentive to make their products attractive to the buyer. A critic may charge that without copyright protection there may be less investment by firms in the aesthetic aspects of their creations, that there will be less attention to detail and quality in statues that form the bases of lamps. But a counter-example to this criticism is the world of fashion. Copyright protection is not given to garment design, but it remains a flourishing industry, well-known for its inventiveness. Designers know that copiers exist and will attempt to construct knock-offs, but the value in obtaining works known to come directly from the intellectual creator is sufficient to make this a lucrative field.

4. Not only in fashion, where the designer and the craftsman are usually different individuals, but also in works of artistic craftsmanship as per the definition “works made by an artist-craftsman”, there is very high value placed on the work’s being original rather than a copy. This means that the original creator of a type of work will reap a sufficient return in sales through being able to charge a price higher than

could be charged by potential copiers. This is much less likely to be the case for such goods as books or recorded musical performances, where there is little premium placed on purchasing the good from the “original” publisher or record company.

5. Continuing on the theme of the “artist-craftsman”, as we noted above in these fields – pottery, jewelry, textiles, furniture – there is a high value placed on the artist-craftsman working within a tradition. Indeed, the value of the work will be highly dependent on how it is placed within a tradition.⁹¹ If this is the case, then creativity is crucially dependent on there being a large public domain of works from which the artist-craftsman can draw inspiration. As we noted above, increased copyright protection is a double-edged sword for creators, in that it will generally increase their own cost of expression. It is worth asking whether it is the case that many artist-craftsman would actually *want* a well-enforced copyright regime in their field.

6. It is certainly the case that the founders of the Arts and Crafts movement would have had no interest in copyright, since opposition to capitalism was at the core of their beliefs.⁹² Lord Simon may be correct in *Hensher* that works of artistic craftsmanship were included in the copyright statutes to recognize their works, but who in the movement would have ever made such a request? Morris called the

⁹¹ See Leach, n. 80, and see Eliot, “Tradition and the Individual Talent” in *Selected Essays* (1932).

⁹² See Williams, *Culture & Society 1780 – 1950* (1958), esp. ch. 7.

results of capitalism an “artificial famine”, the working class “the slaves of society”, and blamed the degradation of the beautiful cities of Rouen and Oxford on “the monster ... whose name is Commercial Profit”.⁹³ He went so far as to fondly describe working life in mediaeval times: “The mediaeval craftsman was free in his work, therefore he made it as amusing to himself as he could; and it was his pleasure and not his pain that made all things beautiful that were made, and lavished treasures of human hope and thought on everything that man made, from a cathedral to a porridge-pot.”⁹⁴ Leach reserves his highest praise for the pottery traditions of the Far East, which greatly downplayed an individual’s proprietary attachment to works. It is very difficult to hold that copyright would have provided much inspiration to these men or their followers.

7. In the economic analysis presented earlier in the paper, it was noted that the more expensive it is for potential copiers to make a copy acceptable to the market, relative to what it would cost the original creator to make copies, the less necessary is copyright protection. This condition is very likely to hold for works of artistic craftsmanship. When the designer and creator are the same person – the artist-craftsman – this is obvious. But even where there is something more akin to a manufacturing firm, it is still likely to be the case that a perfect copy will be difficult to construct; again, it is not like books, plays, or published or recorded music.

⁹³ Morris, n. 76, p. 599.

⁹⁴ *ibid.*, p. 596.

8. Landes and Posner note that there are good reasons for awarding copyright in derivative works to original authors; it removes what would otherwise be an inefficient incentive for authors to withhold the release of original works until they could also prepare any associated derivative works, and it reduces transactions costs by directing potential licensees of works to a single person rather than to the original creator and all the various creators of derivative works.⁹⁵ However, it is difficult to imagine what derivative works from a work of artistic craftsmanship would look like. The absence of copyright in works of artistic craftsmanship should present no problems arising from the lack of protection in derivative works.

9. Earlier in the paper it was suggested that there is an economic rationale for moral rights in a copyright regime. If works of artistic craftsmanship did not receive copyright protection, then of course there would be no moral rights protection either. However, when we recall the rationale for moral rights, it is that there is an efficiency gain in giving potential buyers of works some kind of assurance that the work will not suffer from a future devaluation owing to actions by other owners of pieces by that creator that diminish the artistic integrity of the creator. While it is easy to imagine how this applies to works of fine art like paintings and statues, it is very difficult to imagine this problem ever arising in works of artistic craftsmanship. The only potential moral rights issue that might arise in the context of works of

artistic craftsmanship would be the right of paternity: the right of the creator to be identified as such. But there are means of eliminating the problem of passing-off without resorting to copyright legislation.

10. The economic theory of copyright has suffered from a lack of empirical work. Perhaps due to the range of works which are granted copyright, and the complexities involved in measuring the costs of creating and copying works and the actual value of copyright to authors, economists have been able to set out the principles of the analysis of copyright and some rules of thumb, but when it comes to numbers they will rely on their intuition. That being said, I submit that economists would generally be in agreement that in many respects copyright protection in general is stronger than can be justified. I know of no economist who has advocated that the term of copyright is either just right or should be extended; almost all would suggest that shortening the term would be welfare enhancing. Likewise, economists would generally express concern about increased encroachment into the domain of fair use. Given that all of the reasons I have given above suggest that works of artistic craftsmanship are less deserving of copyright protection than works of fine art, the rationale for eliminating the protection given to works of artistic craftsmanship is further enhanced when we note that it is very likely that even works of fine art are “over-protected.”

⁹⁵ n. 5, pp. 354-357.

Concluding Remarks

The question of how to deal with works of artistic craftsmanship is fascinating because it forces the question “What is Copyright For?”, a question that is always worth reviewing. Without a clear conception of copyright’s purpose, the debate over works of artistic craftsmanship will remain as it has, inconclusive and unsatisfactory.

The law and economics tradition attempts to find explanations of the law in the conditions that help promote economic efficiency. While that may be useful for some branches of the law, there is too much in copyright that suggests that conditions other than efficiency have driven legal reform – especially the lobbying power of certain producer collectives, but also the belief among many public officials, keen to be seen as on the side of the “information economy”, that stronger rights for owners of intellectual property cannot but help economic growth. But in a number of areas, including the rather small one that is the topic of this paper, it remains to be demonstrated that efficiency demands a complete set of property rights for every conceivable sort of creation.