

Copyright and Related Rights Law

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WEEK - 02

LECTURE - 07

Meaning of 'Artistic' in Artistic Work

In today's session, we are going to be taking a look at what the meaning of artistic in artistic work is. In the previous session, we had discussed various definitions of artistic work in copyright Acts of different countries. Artistic work is understood as graphical works, works of architecture, and works of artistic craftsmanship. We had seen how graphical works are to be understood by looking at the ordinary meanings of these types of artistic work which have otherwise not been defined in the said copyright acts. But something that we also saw in the last session was that with respect to graphical works in these acts, it says that such graphical work need not possess any artistic quality. Which brings us to the issue in this session.

What is the meaning of artistic in artistic work? In terms of what these provisions are looking to encompass, they're very similar. They seem to be suggesting graphical work protection, architectural work protection and artistic craftsmanship protection. But these two provisions also have a common factor in terms of the removal of the consideration of artistic quality in determining whether a painting or a drawing gets to be considered as an artistic work. Take a look at this image.

What you can see in this image is a painter who is going to paint on a canvas, having to choose between different colors. But say for example, the painter chooses to paint on that canvas with a single brush stroke of brown paint. Question is, would this single brush stroke be enough to make this expression an artistic work. The question of qualitative consideration which would essentially be: whether a single brush stroke of this brown paint is in some way serving some aesthetic appeal does not arise because of the exclusion within this provision. In fact, purely going by this provision, which further on in the statute is not clearly defined; that is, where graphical works are understood as a painting, a drawing etc., where painting itself has not been defined, we must understand

and apply the ordinary meaning of a painting or drawing. And as we saw in the previous session, the ordinary meaning of painting is simply the application of color on the surface, which then is satisfied here. Since there is no definition of painting in the given statute, the ordinary meaning applies and to the question whether there is a test of quality that needs to be satisfied, it is clear that it is not a requirement. Therefore, we seem to be headed in a similar direction as literary works. To quickly recall, when we discussed literary works, we were looking to answer a question whether literary quality will play a role in whether the existence of a literary work? we had seen the question whether an expression in order to become a literary work must satisfy some literary merit.

And in answering that, we had seen that literary merit is not a requirement. But if indeed quality had to be assessed with respect to such a graphical work, how would it be assessed? Perhaps an important point here would be to consider whose perspective will be relevant to make such a qualitative assessment. Will it be the viewer's perspective? Will it be the artist's perspective? As you must have guessed, when we are considering the viewer's perspective Each viewer comes with their own background understanding of various aspects of society; various aspects of art; and when they see a single brush stroke of brown color on the canvas, they could have a different perspective on qualitative assessment. In addition to a viewer's perspective and the artist's perspective, there could also be a perspective of other artists in the field. Still another perspective could be one of the judge when the judge is sitting on a case of infringement and determining whether the expression can be considered to be a work at all.

When faced with such a heady mix of perspectives, what we can then see is that if objective assessment is not made, there could be a great deal of ambiguity that will seep in - in terms of assessing whether a graphical work like a painting is an artistic work or not. Instead of focusing on the skill of the artist, we would simply be focusing on subjective assessments which could vary greatly depending on whose perspective we are looking from. And therefore, we can then conclude this particular understanding. In choosing to design the definition of artistic work in the way that they have, both the Indian legislation and the UK legislation - require an objective assessment of the expression on whether it is becoming an artistic work or not. And therefore to this question, we can conclusively say that for even a single brush stroke of brown color on the canvas, it will be considered as a painting - because it satisfies the ordinary meaning of painting and we do not need to engage in an assessment of whether it is serving any aesthetic appeal or not.

Now take a look at this image. What do you see? Take a look at this image. The question that we are looking to answer is if indeed qualitative assessments do not need to be made, then can a technical drawing be considered as an artistic work? Can the design of fabric which this possibly is or a product design which it could be, could such a design be considered as an artistic work? As you must have been able to answer. Because both of

these images are representative of what a drawing is, as we had discussed in the previous session - a drawing is an expression wherein the artist uses lines and delineation, and therefore, in this image, what we see, even though it is a technical drawing, it is still an artistic work. The objective assessment that the provision requires leaves no room for confusion.

It is an artistic work. Similarly, what you see in this image is also an artistic work. But in terms of What this provision provides? A work of artistic craftsmanship is also an artistic work. But importantly, it is not an artistic work of craftsmanship. It is a work of artistic craftsmanship.

What is the difference? Artistic seems to be used as a qualification for the craftsmanship. Is this actually the case? Because something that we note from this provision is that an express separation of artistic quality from the expression has been made with respect to 2(c)(1) and not with respect to the other categories present under artistic work. In fact, the usage of the term artistic in work of artistic craftsmanship seems to be suggesting that artistic quality is not a factor that can be separated. Is that actually the case? To answer this question, we must first understand what exactly a work of artistic craftsmanship encompasses. As you can see in this image, there is a craftsman who is using his crafting skill to create an artistic pottery.

If you notice the words, that I used, I used them very specifically to denote two particular factors which are very relevant. One, the skill of the craftsman and two, the quality of the object that is being prepared. These two dimensions of a work of artistic craftsmanship were in fact discussed and clarified in a very important case in copyright law. This is a 1976 case of *George Hensher versus Restawhile Upholstery*. In George Hensher's case, something that was set out clearly was that a work of artistic craftsmanship does in fact need to satisfy a dual requirement - of both the skill test being satisfied and the craftsmanship itself, which is the output of the product satisfying some artistic quality.

But in order to answer the question of what is artistic quality? Because this is so subjective, the court undertook an assessment of what could be artistic quality or in other words, what could be artistic appeal. On this slide, you can see an extract from the judgment wherein Lord Reed looks to explain what artistic appeal could be. "It is, I think, of importance that the maker or designer of a thing should have intended that it should have an artistic appeal, but I would not regard that as either necessary or conclusive." "If any substantial section of the public genuinely admires and values a thing for its appearance and gets pleasure or satisfaction, whether emotional or intellectual, from looking at it - I would accept that it is artistic, although many others may think it meaningless or common or vulgar." This extract can be considered in the line of the

discussion that we were having on whose perspective must be considered if at all qualitative assessment has to be made.

The two most important perspectives are one of the viewer and second of the artist. As Lord Reid explains, even if there is an artist's intention that can be shown that the work should have some artistic appeal, that in itself would not be conclusive. It should be complemented with the viewer's perspective on whether there is such an artistic or aesthetic appeal. We also see that Lord Reid is looking to place a caution. In the last portion of this extract, you can see.

Lord Reid says, I would accept that it is artistic, although many others may think it meaningless or vulgar or common. What this caution tells us is that there is every possibility that there are perspectives out there which state that there is no artistic quality in a given expression. But as he explains, if the artist's intent and a substantial section of the public's perspective can state that there is in fact an artistic quality to it, then there is an artistic quality. A recent development that we have seen has come from the CJEU in the Cofemel decision wherein the court has pointed to the application of originality solely and deterred the application of an artistic appeal consideration. This step comes on account of a move towards uniformity of application in the various members of the EU.

In line with the Cofemel decision, we see that in UK, in the case of *Response Clothing versus Edinburgh Woollen Mill* - The court has stated that for fabric designs and in order to consider it as a work of artistic craftsmanship or not, originality will be a sufficient consideration and an additional requirement of aesthetic appeal need not be met. But because this is something that's evolving. We must not overlook the importance of the *George Hensher* judgment; and what it looks to be explaining as a clear distinction in the provision itself which seems to be removing artistic quality specifically from some types of artistic works and not others. Now that we have understood that artistic quality need not be met by some types of artistic works, but it seems to be a requirement for some other types. When we looked at the *University of London Press versus University tutorial* case in literary works discussion - we discussed a two-step consideration wherein the first step looks to see whether an expression becomes a literary work and then followed by the consideration of whether that literary work is original or not.

Can this two-step consideration be applied to artistic works? As we have discussed a single brush stroke of any color on a canvas because it satisfies the ordinary meaning of painting - It will be considered as an artistic work. Once this determination has been made - The second step consideration would be then to see whether it is original or not. In concluding this particular session, let us remember that the distinction between literary works and artistic works is very clear. Literary works are expressions comprised of words or numbers or such other symbols and they are having an informative value primarily. And artistic works on the other hand have their relevance in visual perception.

And as you understand for visual perception to exist, there must be some physical form to the said art. In other words, there should be a fixation of the expression. To conclude, we have understood that in the same way literary merit is not a requirement for consideration of an expression as a literary work. With respect to artistic works, with the distinction or with the difference of works of artistic craftsmanship, it seems to be that artistic quality consideration doesn't play an important role. In the next session, we will be taking a look at two types of artistic works which do not seem to be fitting within the conventional notion of what art is.

What makes these works artistic works? That is something which we will see in the next session. Thank you for joining me. See you all.