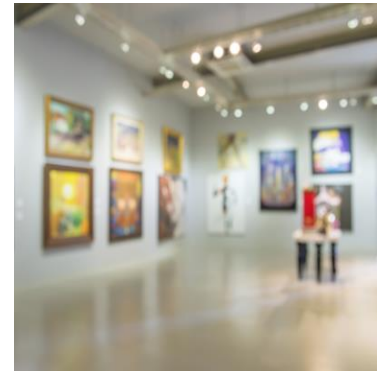




The cultural heritage sector's originality question – Impact of *THJ v Sheridan*

Does a gallery or museum have the right to claim copyright protection over and monetise access to its digital reproductions of artwork when the artwork itself is out of copyright?

This common practice and hotly-debated issue in the UK art and cultural heritage sector has been brought into sharp focus by a recent ruling of the Court of Appeal of England and Wales in the case of [THJ v Sheridan \[2023\] EWCA Civ 1354](#). The case deals with copyright protection, specifically the complex nuances of what qualifies an artistic work as "original" under UK copyright law such that it enjoys copyright protection. Although the case does not address photographic reproductions of artwork specifically, the judgment contains important commentary on the question of originality more generally which applies equally to the art world.



The decision

THJ v Sheridan concerned the question of whether copyright subsists in certain graphic user interfaces ("**GUIs**") in the form of "risk and price charts" ("**R&P Charts**") produced using a software program. The judgment reiterated and clarified the objective legal test of originality for determining whether copyright subsists in artistic works.

The claimants contended that the R&P Charts qualified as artistic works under Section 4(1)(a) of the [Copyright, Designs and Patents Act 1988](#) ("**CDPA**"). In order to assess whether copyright subsists in these R&P Charts, the Court of Appeal had to determine whether they were "original" in

accordance with Section 1(1)(a) of the CDPA which provides that an artistic work must be "original" in order for copyright to subsist in it.

Historically, English law had a low originality threshold. A work was considered original if it was the result of an author's deployment of labour, skill and judgement. Thus, copyright would subsist in a work if the author of such work had exercised some degree of "skill and labour" to create it. However, the Court of Justice of the European Union ("**CJEU**"), in its decision in [Infopaq International A/s v Danske Dagblades Forening](#) and a series of subsequent judgments expanded the "skill and labour" test by introducing a more stringent requirement that an

"author's own intellectual creation" should be an additional criterion to gauge originality of an artistic work. Thus, according to the current elevated test, in order to qualify as "original", a work must be the outcome of the author's exercise of "creative freedom" and contain the author's "personal touch".

In *THJ v Sheridan*, Lord Justice Arnold, who gave the leading judgment, restated the CJEU's higher threshold of originality and held:

*"The Court of Justice has elaborated upon the requirement that the work be its author's own intellectual creation in a number of subsequent judgments. What is required is that the author was able to express their creative abilities in the production of the work by making free and creative choices so as to stamp the work created with their personal touch ... **This criterion is not satisfied where the content of the work is dictated by technical considerations, rules or other constraints which leave no room for creative freedom.**"* [Emphasis added]

The Court of Appeal agreed with the defendants that the first-instance judge had applied the outdated "skill and labour" test, instead of the elevated "author's own intellectual creation" test.

Nevertheless, the Court of Appeal in reassessing the originality of the R&P Charts and applying the correct legal test continued to hold, as the first instance judge had done despite applying the wrong test, that the R&P Charts were original. This was because the claimant had made creative choices in laying out the various components of the R&P Charts and was responsible for the overall design and visual appearance of the charts. It was not contended by the defendants that the configuration of the various components was dictated by technical considerations. Lord Justice Arnold further reiterated that the originality test was an objective one consistent with Section 4(1)(a) of the CDPA that sets out that graphic works (such as GUIs) qualify as artistic works "irrespective of artistic quality". Thus, it was not a requirement that the R&P Charts should be of any artistic merit.

Impact on the UK art and cultural sector

The judgment has significant relevance in the UK art and cultural heritage sector as it has challenged and brought into question the validity of the legal basis on which UK cultural heritage institutions (such as museums, galleries, archives and libraries) monetise digital reproductions of artworks that are out of copyright, by claiming that copyright subsists in the digital reproductions and charging fees for their use and reproduction. Traditionally, such institutions had relied on the low threshold of originality based on

the old "skill and labour" test according to which such images enjoyed copyright protection if the photographer deployed a certain degree of skill, labour and effort in creating the images, even if the underlying artwork was in the public domain.



There is no question post *THJ v Sheridan* that in order for copyright to subsist in such digital reproductions they must now satisfy the elevated originality threshold of the "author's own intellectual creation". However, this was the case even before the judgment in *THJ v Sheridan*. The *Infopaq* decision came into force prior to Brexit, and it therefore forms part of the body of UK copyright law. In order for copyright to subsist, this would require the photographer to exercise free and creative choices and leave their personal intellectual imprint in creating the digital images, as opposed to being restricted by technical considerations and constraints. Thus, whether digital reproductions of museum collections will be copyright protected would depend on the process of creating the digital reproductions: did it involve free decision-making and creativity or was it purely dictated by technical considerations of producing the most realistic, high quality and accurate reproductions.

Given the standard set out in *THJ v Sheridan*, it can be argued that a digital reproduction of a public domain artwork created specifically for a museum's purposes, lacks the necessary exercise of intellectual creation and creative decision making and would not qualify as an original work. Further, the creation of these images arguably would involve conforming to certain rules and other constraints to ensure the production of high quality and accurate images for the museum's commercial purposes. For example, the images would have to be captioned, catalogued and colour corrected in a standardised and technical manner which might thwart the creative freedom

and personal intellectual markings of the photographer. In such a process, there might be limited scope for the photographer to exercise any creative choices if the purpose was merely to make a faithful digital record of an existing artwork. Thus, such digital images would fail to meet the originality threshold and would be free for use by the public as the museums would have no right to assert that copyright subsists in them.

However, commentators who have criticised museums and galleries for claiming that copyright subsists in digital reproductions may have focussed too heavily on Arnold LJ's comment that the originality criterion is not satisfied where the content of the work is dictated by technical considerations, rules or other constraints which leave no room for creative freedom. The judgment also commented that even a simple photograph could satisfy the objective originality test, and that a low degree of visual creativity would not necessarily mean the absence of originality, though it may warrant a low level of copyright protection. In [C-145/10 Eva-Maria Painer v Standard VerlagsGmbH and Others \(Third Chamber\) \[2011\] ECR I-12533](#), which was cited favourably in *THJ v Sheridan*, the CJEU held that even a simple portrait photograph may satisfy the originality test in an appropriate case, as long as the photographer exercised some degree of creativity and personal vision in setting up and capturing the photograph, irrespective of its artistic quality. The CJEU observed:

"Even though the essential object of such a photo is already established in the person of the figure portrayed, a photographer still enjoys sufficient formative freedom. The photographer can determine, among other things, the angle, the position and the facial expression of the person portrayed, the background, the sharpness, and the light/lighting. To put it vividly, the crucial factor is that a photographer 'leaves his mark' on a photo."

Thus, it could also be argued that cultural heritage organisations may have a narrow scope of protection in relation to certain digital images where the photographer has exerted an adequate degree of creativity and personal touch in creating them. The picture is not so "black and white" as some critics of museums and galleries have made out.

It is also important to note, that the CJEU has received several referrals asking it to clarify the "author's own intellectual creation" criteria for determining the originality of works and the standard may evolve further, at least at EU level.

Considerations for UK museums, art galleries and cultural heritage organisations

The elevated originality standard stemming from the harmonisation of EU and UK copyright law in the absence of any statutory reform in the UK should prompt cultural heritage institutions to strategise and rethink their policies on how to best protect and commercialise their assets. While there is uncertainty around whether institutions may be able to continue claiming copyright protection over assets such as digitised images of their out-of-copyright collections, they may very well be able to rely on alternative legal means such as contract law to regulate access to these images and charge fees for their circulation and use. Some institutions, however, may decide to tread differently by making these images readily available to the public. They may do this either for free or by charging nominal service-based fees with the goals of promoting inclusivity, widening access to art and building public goodwill, while diverting their investment to other more profitable revenue streams. It will be interesting to see in which way the cultural heritage sector chooses to respond and whether the courts have an opportunity to provide any commentary on what is meant by an "author's own intellectual creation" in the context of the art world specifically.

Contact



Alexandra Pygall

Partner

T: +44 20 7809 2137

E: alexandra.pygall@shlegal.com



Sriya Coomer

Associate

T: +44 20 7809 2912

E: sriya.coomer@shlegal.com