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A resource book for students

Allan Durant
and Janny H.C. Leung

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Chapter C6

Deciding Legal Meaning

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C6 DECIDING LEGAL MEANING

In this unit, we extend our exploration of similarities and differences between how meaning is understood in linguistic approaches to language and in statutory interpretation. We do this by examining the reasoning developed in one among a large number of cases worldwide that have looked at the meaning of the word *sculpture* for the purpose of copyright law. The main question in this case (on which a number of the legal issues turned) was: is a *Star Wars* Stormtrooper helmet a *sculpture*?

The task in this unit consists of two sections: first, a directed exploration of the meaning of the word *sculpture*; second, some questions that follow a description of essential points in the case. (Both accounts are quite long by comparison with material presented to introduce other activities in this book; but each is brief and selective in relation to the detail contained in the case in question.)

First, we approach the issues in the case by thinking about how the meaning of *sculpture* can be investigated outside the specialised sphere of legal interpretation.

1 Make a note of three or four objects or artefacts you consider to be obviously sculptures. They may have names or you may need to describe them.
2 Now make a second note of the same number of objects or artefacts, but ones you believe to be clearly not sculptures.
3 Now make a third note, of objects or artefacts you consider to be borderline cases: objects you think would divide people consulting their intuitions about whether the word *sculpture* fits.
4 Now, drawing on Unit A6, assess how the exemplars in your three lists might fit into a 'prototype' account of word meaning.
5 Your three lists begin to map your mental model of the **extension** of the word *sculpture*: the set of things in the world that the word can be used to refer to. How far do you detect historical and/or cultural variation in decisions whether objects will satisfy the concept 'sculpture'? How far is such variation also likely to exist within a single society?
6 Write a brief definition, looking at your three lists (but not at the paragraph that follows) that tries to capture what you think a *sculpture* is.
7 Now compare your definition with some definitions produced by scholars in relevant fields, including dictionary-writing:

   7.1 In the *Concise Oxford Dictionary*, *sculpture* is 'the art of forming representations of objects etc. or abstract designs in the round or in relief by chiselling stone, carving wood, modelling clay casting metal, or similar processes'.
   7.2 Dictionaries arrive at their statements of meaning in different ways, however; so it is interesting to compare their entries for the same word. The *Collins COBUILD Dictionary*, for example, bases the order in which it presents different senses on their frequency of use in a corpus of several billion words;

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and the full *Oxford English Dictionary (OED)* describes each word by showing the historical development and branching of interwoven senses. The *OED* entry for sculpture as a noun gives four main meanings, each divided into subsidiary senses, matched to periods of use and supported with illustrative quotations.

8 Develop your sense of *sculpture* further by considering the **sense relations** the word enters into with other words. For example, is *sculpture* a **hyponym** (type of) either *fine art* or *craft*? Of *hobby* or *pastime*? Of *furniture*? Beyond sense relations of this kind, you may also want to consult a **thesaurus**, which relates words to their neighbours and opposites by meaning in the same semantic field. *Roget's Thesaurus*, for example, locates *sculpture* next to 'carving, statuary, ceramics, plastic arts'. To develop a fuller understanding of sculpture as a concept, you might consult encyclopedias, either online or in print, and/or histories of relevant fields. Computer-generated **KWICs** ('key word in context' reports) can show a list of occasions of use of a given word in a given corpus, with a selected number of words on either side of the target word; these are also helpful in considering a word's behaviour in context. (It is possible to download a free **concordancer** software programme, such as Laurence Anthony's AntConc, to enable you to do this.)

9 Using these various methods and resources, try to build up a profile of possible and likely use of *sculpture*, including contexts in which the word occurs and the values and implications associated with it. Such a profile gives a picture of the word's ordinary use, subject to the proviso that such data will certainly show up variation on several dimensions rather than a single meaning.

10 Now we will go on to ask how, faced with such variation and complexity, a court can go about arriving at a singular, legally correct meaning for *sculpture* in a given legal context. To do this, first it is necessary to read a brief account of the case:

Lucasfilm v. Ainsworth

The case of *Lucasfilm v. Ainsworth* concerned the designs for Imperial Stormtrooper helmets and armour featured in the first *Star Wars* film (somewhat enigmatically called *Star Wars: Episode IV – A New Hope*, released in 1977). Ainsworth, the defendant, had created moulds and other materials to make the helmets and armour used during filming, based on initial storyboard sketches and a clay model prepared on behalf of Lucasfilm (the main claimant). The resulting white helmets and armour became known as the 'cheesegrater', 'jawbone', 'X-wing fighter pilot', 'rebel troop', 'chest box', and others. Roughly 30 years later, Ainsworth set up a website selling replicas of the helmets and armour online to *Star Wars* fans (who organise themselves as 'Garrisons' and enjoy costumes and other designs related to the continuing film series).

Lucasfilm alleged copyright infringement in California and obtained a default judgment against Ainsworth. They then sought to enforce that judgment against Ainsworth, or enforce their American copyright claim, in the UK (where Ainsworth was based). There were numerous claims, and issues both of fact and law, in the case. But the questions all buttressed a central claim and counterclaim, each of which depended on whether any of the helmets were either 'sculptures' or 'works of artistic

craftsmanship' within the meaning of s. 4 ('Artistic works') of the Copyright, Designs and Patents Act 1988.

This central question occupied the English courts throughout three proceedings at successive levels: first instance court, Court of Appeal, and Supreme Court. At first instance, it was held that the Imperial Stormtrooper helmet was *not* a sculpture within the meaning of the Act. Rather, it was a mixture of costume and prop, whose function was utilitarian: it made a contribution to the film, which overall was the work of art. The same reasoning was applied to the armour, and analogous argument made on the different requirements for 'works of artistic craftsmanship'. Toy models marketed by Lucasfilm were also deemed not to be sculptures, because their primary purpose was to be used in play rather than 'exhibited, viewed or contemplated'. The Court of Appeal and Supreme Court concurred with that first instance judgment.

Because no copyright subsisted in the helmets or armour as sculptures under UK copyright law, and so were not protected as 'artistic works' by UK copyright law, only Lucasfilm's claim based on infringement under US law succeeded. The claimant's other claims (totalling USD 20 million) failed; and Ainsworth's counterclaim that he had produced artistic works (defending an income derived from sales of the helmets and armour of roughly USD 14,000) also failed.

Interpreting *sculpture*

The reasoning process through which the courts arrived at a correct, legal meaning for *sculpture* illustrates some key features of statutory interpretation outlined elsewhere in this thread.

At first instance, Mann, J (i.e. Mr Justice Mann, the judge) acknowledged difficulty with the concept that a sculpture is an artistic work under the 1988 Act (CDPA 1988). He noted that:

> There is no statutory definition of 'sculpture' for the purposes of this area of legislation. The only statutory assistance one has in relation to this question is a somewhat circular indication of what is included: '"sculpture" includes a cast or model made for purposes of sculpture' (s. 4(1)(2)(b)).

The judge looked to relevant authorities for guidance. He found that what such authorities provide is principally a series of examples, linked to factors taken into account by judges in deciding a particular case. Early authorities included an 1891 case applying an earlier Copyright Act in which artistic merit played a part that was no longer a feature of the 1988 legislation. In a 1995 case brought by the appliance manufacturer Breville, the claimants successfully claimed copyright in plaster shapes used as moulds for differently shaped sandwiches produced by their sandwich maker (though there was then found to have been no infringement). Another relevant case was a case in which it was claimed that a Frisbee (the plastic flying disc) was a sculpture, though the court found they were purely functional, indeed industrial objects.

In these and other cases, dictionary definitions, including one from the *Shorter Oxford English Dictionary* and one from *Webster's Third New International Dictionary*, were introduced. They were not used as authorities, but as aids to memory and more

precise formulation. Judicial reference was also made to an article on 'Art of sculpture' in the *New Encyclopaedia Britannica*, which stated that:

> Sculpture is not a fixed term that applies to a permanently circumscribed category of objects or sets of activities. It is, rather, the name of an art that grows and changes and is continually extending the range of its activities and evolving new kinds of objects. The scope of the term is much wider in the second half of the 20th century than it was only two or three decades ago, and in the present fluid state of the visual arts, nobody can predict what its future extensions are likely to be.

Despite this description, the courts concluded that what was required was that a work in question should be a sculpture 'in the ordinary sense of that term' or 'as included in the extended definition of sculpture contained in the Act'. Interpretation could proceed, therefore, by reasoning from 'what is the normal understanding of the expression *sculpture*', despite the view of one judge suggesting that 'that is a pretty loose boundary'. In another case, the judge (Laddie, J) pointed to a sense of purpose inherent in whether the definition should be a broad or narrow one:

> The law has been bedevilled by attempts to widen out the field covered by the copyright Acts. It is not possible to say with precision what is and what is not sculpture, but [. . .] a sculpture is a three-dimensional work made by an artist's hand. It appears to me that there is no reason why the word 'sculpture' in the 1988 Act should be extended far beyond the meaning which that word has to ordinary members of the public.

Extending the process of analysis further in *Lucasfilm*, Mann, J proposed a 'multi-factorial' approach, formulating a list of eight 'points of guidance' to be taken into account in considering the meaning of the term *sculpture* for the purposes of the Copyright, Designs and Patents Act 1988.

The first three points of guidance appear merely to provide general orientation:

(i) some regard had to be had to the normal use of the word;
(ii) nevertheless, the concept could be applicable to things going beyond what would normally be expected to be art in the sense of the sort of things expected to be found in art galleries; and
(iii) it was inappropriate to stray too far from what would normally be regarded as sculpture.

Mann, J's fourth point noted that, by statute, no judgment should be made as to artistic worth. His fifth point echoes Laddie, J's concern above, regarding possible overexpansion of the category of protectable sculptures:

(v) not every three-dimensional representation of a concept could be regarded as a sculpture, otherwise every three-dimensional construction or fabrication would be a sculpture.

Points (vi) and (vii) highlight purpose and function:

(vi) it was of the essence of a sculpture that it should have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well [. . .]; and
(vii) the fact that the object had some other use did not necessarily disqualify it from being a sculpture, but it still had to have the intrinsic quality of being intended to be enjoyed as a visual thing.

The final point concerned materials or mode of production:

(viii) the process of fabrication was relevant but not determinative; there was no reason why a purely functional item, not intended to be at all decorative, should be treated as a sculpture 'simply because it had been (for example) carved out of wood or stone'.

Immediately following this list, the judge emphasised that the enumerated factors were guidelines, not rigid requirements. The question 'What is a sculpture?', he concluded, 'has some of the elements about it of the unanswerable question: "What is Art?" '. Analysed by multifactorial reasoning, nevertheless, the helmets were found to be intended to express something and to have interest as objects, but served the purpose principally of character portrayal within the film rather than being aesthetic in themselves. This did not give them the necessary quality of artistic creation required by the Act.

The Court of Appeal and Supreme Court commended multifactorial analysis for its adaptation of implicit understanding of normal usage in the direction of requirements specific to the protection afforded by copyright; and the first instance outcome was upheld. Reservation was nevertheless expressed about points (vi) and (vii), which draw a fine distinction between the purpose for which an object may actually be used and its purposive nature: what Mann, J had described as 'its intrinsic quality of being intended to be enjoyed as a visual thing'. The difficulty presented by that fine distinction was described by Jacob, LJ (i.e. Lord Justice Jacob) in the Court of Appeal as precisely the reason why the judge in the lower court had outlined 'a number of considerations which should act as signposts to the right answer'. Joining in commendation of the multifactorial approach, Jacob, LJ nevertheless appeared to undermine it with a comment pointing in a different direction (which was later queried in the Supreme Court):

> The result of this analysis is that it is not possible or wise to attempt to devise a comprehensive or exclusive definition of 'sculpture' sufficient to determine the issue in any given case. Although this may be close to adopting the elephant test of knowing one when you see one, it is almost inevitable in this field.

Declaring, attributing and deciding meaning

Having read this condensed (but still quite long) account of the interpretation of *sculpture* in *Lucasfilm*, now address the following issues:

Activity

- ❏ How closely does the approach adopted by the judge at first instance (Mann, J) reflect your understanding of approaches to legal interpretation as outlined in Units A6 and B6?
- ❏ Is using 'ordinary' or 'normal' meaning helpful as a starting point in deciding what a word means, if whatever is decided as that meaning will then be modified to fit the requirements of a piece of legislation being applied?
- ❏ How successful do you consider the multifactorial test for *sculpture* approved by the Supreme Court? Is using some such test essential if problems of 'the elephant in the room test' or the 'What is Art?' question are to be avoided?
- ❏ Finally, one school of legal theory, known as **legal realism**, has seriously queried the sorts of reasoning judges engage in. It suggests that such approaches to interpretation serve merely as a vehicle for decisions that are ultimately made on other grounds. Do you consider this to be a risk with the kinds of semantic argument put forward by the courts in interpreting a statutory word such as *sculpture*?

SPOKEN AND WRITTEN PERFORMATIVES

C7

In this unit, we look at how performative speech acts take place in three different mediums: in speech, in writing, and in electronic communication. We consider the history of performativity in changing linguistic and social relations brought about by the shift from orality to literacy, and speculate about challenges facing performatives that have accompanied the rise of electronic means of communication and increased frequency of legal transactions and interactions at a distance.

Identifying legal speech acts

Consider the following excerpt from the will made by the American actress Marilyn Monroe (1926–1962):

> **Last Will and Testament of Marilyn Monroe**
>
> I, MARILYN MONROE, do make, publish and declare this to be my Last Will and Testament.
>
> FIRST: I hereby revoke all former Wills and Codicils by me made.
>
> SECOND: I direct my Executor, hereinafter named, to pay all of my just debts, funeral expenses and testamentary charges as soon after my death as can conveniently be done.
>
> THIRD: I direct that all succession, estate or inheritance taxes which may be levied against my estate and/or against any legacies and/or devises hereinafter set forth shall be paid out of my residuary estate.

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