IPPIL – how surreal?

Intellectual Property and Private International Law.

The late Bank of England Governor, Eddie George, famously remarked that there were three sorts of economists; those who can count and those who can't. Similarly it is well known that there are two varieties of property lawyer; intellectual ones and the other sort.

For private client practitioners, intellectual property (IP) becomes ever more important. IP becomes more valuable and more commonplace as wealth and the economy dematerialise. However, the situs of intangible movable property is always a matter that shows up the differences between legal systems. If a copyright is the right to sue someone who copies your work, then the situs of it will be in each jurisdiction where litigation is necessary. Dealing with probate in every jurisdiction to enable copyright to be enforced is clearly to be avoided where possible.

The EU Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights is an example of the EU attempting to simplify such enforcement.

In addition to copyright, royalties, trademarks and patents, the EU introduced the concept of Artists Resale Rights (commonly referred to as 'droit de suite' by auction houses and dealers) by way of an earlier Directive, 2001/84/EC of 27 September 2001. In the UK this was implemented by the Artist's Resale Right Regulations 2006 SI 2006 No. 346. Artists now have the right to a sum like a royalty on the resale of one of their works.

Initially, the rights were not to apply to the estates of deceased artists (and only for 70 years after death) until 1 January 2010. Practitioners may not have spotted that the application to deceased estates in the UK was deferred in October 2009 by two years until 1 January 2012 by virtue of the *Artist's Resale Right (Amendment) Regulations 2009* No. 2792.

For those practitioners, who are less directly affected by local EU issues, do bear in mind that the rights also apply to numbers of non EU nationals including from such diverse states as Brazil, Iraq, Russia and Turkey.

The April 2010 European Court of Justice (ECJ)decision of *Fundación Gala-Salvador Dalí*, *Visual Entidad de Gestión de Artistas Plásticos (VEGAP)* v *Société des auteurs dans les arts graphiques et plastiques (ADAGP),Juan-Leonardo Bonet Domenech*, C-518/08 is an example of the interaction of succession law with the Artists Resale Rights as enacted in France.

Salvador Dalí died on 23 January 1989 in Spain, leaving five heirs at law. By will dated 20 September 1982, he had appointed the Spanish State as sole legatee, within the meaning of the French law of succession, of his intellectual property rights. Those rights are administered by the Fundación Gala-Salvador Dalí, a foundation established by Dali under Spanish law in 1983.

Under Article L. 123-7 of the French Intellectual Property Code, which was not amended by the transposition of Directive 2001/84: 'After the death of the author, the resale right referred to in Article L. 122-8 shall pass to the author's heirs and in usufruct – provided for in Article L. 123-6 – to his or her spouse, to the exclusion of any legatees and successors in title, for the remainder of the year of the

author’s death and the next 70 years thereafter.’

Under Spanish law the rights belong to the Fundación. Under French law they belong to the five heirs. Was France permitted to restrict the persons entitled to French resale rights to heirs only?

The ECJ held that the Directive on the artists’ resale right does not preclude a national law, which reserves the benefit of the resale right to the artist’s heirs only, to the exclusion of testamentary legatees. However, it also stated that it is a matter for the French court to take into account the relevant rules of conflicts of laws relating to the transfer on succession of the resale right.

Whatever, they may be. Perhaps we now need a new category of intellectual private international client practitioner?

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