

Marketability is key: if a work can be separated it is not a joint work

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Facts

Decision

Comment

The Supreme Court recently ruled⁽¹⁾ that a combination of works by two artists does not constitute a joint work if it can be separated, even if the works involved were created for the sole purpose of being combined as a jointly planned contribution. Strong indicators of whether parts of a work are separable are the individual marketability and possible depreciation of the separated parts.

Facts

Both parties were designers and sculptors and were well known for their respective styles of artwork. The plaintiff was known for his pieces made of wire and cable ties, and the defendant was known for his figures which he called 'guardians'. In discussions between the plaintiff and defendant, they came up with the idea of combining their artwork to create a sitting guardian placed on top of T-shaped mesh made of wires and cable ties.

This combination was called *T-Guardian* and shown in galleries as a joint work. When controversy over the distribution of the proceeds from the sale of the *T-Guardian* arose, the defendant removed any mention of the plaintiff from his personal website and claimed to be the sole author of the joint work.

The plaintiff filed an action for declaratory judgment to declare himself as a joint author of the *T-Guardian*. The first-instance court ruled in the plaintiff's favour and declared him a joint author because the mesh of wires and cable ties had been an original and copyrightable contribution to the joint work. The appellate court confirmed this decision and stressed that the art piece constituted a unitary and inseparable whole. The Supreme Court accepted the defendant's appeal and overturned the previous rulings.

Decision

The Supreme Court confirmed that Section 11(1) of the Copyright Act stipulates three requirements for joint authorship:

- Each author must make an original copyrightable contribution to the joint work.
- Joint authorship requires conscious cooperation and the willingness of each joint author to contribute to the common goal.
- The created work must be an inseparable and unitary whole. In the words of the Supreme Court, a "combination of several independent works does not create joint authorship; not even if the works were created in order to be combined".⁽²⁾

On the question of inseparable unity, the Supreme Court stressed that the possibility of disassembling a work in a manner that allows the remaining parts to exist as independent works – the essence of which are not altered by the separation – rules out a joint work within the meaning of Section 11(1) of the Copyright Act.⁽³⁾ According to the Supreme Court,⁽⁴⁾ whether parts can exist

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independently from each other cannot be assessed according to the perception of the author, but rather by whether the individual parts appear to be complete and marketable by themselves. If the pieces of art appear – when separated – incomplete and would have to be altered or amended in order to be marketable, joint authorship must be assumed. The Supreme Court further pointed out that it is irrelevant whether the shares of the authors within the whole have significance exceeding the value of the separated parts because the interest in marketing the separated pieces of art independently is generally weighed more heavily. Joint authorship must be assumed only if separation would lead to an inorganic dissection of the complete work and necessitate the supplementation of the remainder of the work.

Further stressing the aspect of marketability, the Supreme Court stated that works of art have a market value; thus, the question of independent existence can be regarded in light of the amount of depreciation caused by a separation. In case of disproportionate depreciation, the work must be considered an inseparable unity. In the case at hand, the Supreme Court found that the plaintiff was known for his sculptures made of wire and cable ties, so that he could market the T-shaped sculpture by itself which thereby would not suffer a disproportionate depreciation.⁽⁵⁾ The Supreme Court therefore concluded that there were two pieces of art which were merely combined and did not constitute a joint work. Thus, the plaintiff's claim to be acknowledged as a joint author was denied.

Comment

The Supreme Court's decision is highly welcome and clarifies some issues which have been discussed in academic literature but have thus far eluded the courts. First, the focus on marketability in the context of the independent existence of pieces of art is well established in academic literature; however, this is the first time that the Supreme Court has confirmed it as a main criterion. Second, the Supreme Court introduced the concept of market value and possible depreciation by separation into the doctrine of joint authorship and basically stated that it is in general irrelevant whether the shares of the authors have a different significance in the whole (complete) work when compared to the separated pieces of work. Third, the works subject to the ruling were of the same type (ie, sculptures). As a rule, combined works which are of the same type are more likely to be considered joint works than combined works which are of different types. The latter are usually considered mere combinations (eg, an opera, where the author of the lyrics is not a joint author of the music and vice versa).

This present decision is a welcome development of Austrian copyright law and provides new and operable criteria for the assessment of a work of art to which two or more authors have contributed.

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Endnotes

- (1) OGH September 26 2017, 4 Ob 64/17s.
- (2) OGH September 26 2017, 4 Ob 64/17s, Paragraph 1.4.
- (3) OGH September 26 2017, 4 Ob 64/17s, Paragraph 2.3.3.
- (4) OGH September 26 2017, 4 Ob 64/17s, Paragraph 2.3.4.
- (5) OGH September 26 2017, 4 Ob 64/17s, Paragraph 3.2.