

## Exercise for mock seminar with Rebecca Howe

Please read the following extracts of the judgement of Lawton LJ in *Merchandising Corporation v Harpbond* on whether Adam Ant's make-up could be a 'painting' for the purpose of the Copyright Act 1956.

Lawton LJ:

This is an appeal by the plaintiffs against an order of Walton J. made on 25 November 1981, whereby he granted the plaintiffs some interlocutory relief by way of injunctions. But the plaintiffs, like Oliver Twist, have asked for more and, like Oliver Twist, they are not going to get it.

The appeal centres round what seems to me to be a novel and startling proposition, that there can be copyright in unusual facial make-up. Perhaps it is a sign of the times that it does not arise connection with women's make up but in connection with the make-up which he uses in the course of his performances as a pop star and in the publicity material with which he advertises himself to what no doubt is his adoring public.

The plaintiffs are four in number. The principal one is Mr. Goddard. His stage name is Adam and he is the singer and the leader of a group which perform under the name of "Adam and the Ants," It is a matter within the knowledge of this court from another appeal a few weeks ago that, since 1979, the second plaintiff has risen from comparative obscurity in the world of pop music to international fame. He has a large following in this country and it would appear from what we know of this case that he has followings outside the United Kingdom....

As I have already said. the reputation of Mr. Goddard as a pop singer began about the year 1979. Like so many of his kind, he presents himself to his audience in somewhat garish style From time to time between 1979 and the summer of 1981 he adopted various people. In respect of performing, which were Photographed by various people. In respect of those photographs were taken or reproduced in breach of copyright. One of the ways in which Mr. Goddard impressed himself on the public during the period of his rise to fame was to make markings on his face. One marking was to have a white line running from one ear to the other and crossing his face in the region of his nose. His garments when he was using that make-up, as far as we can see from the pictures which have been put before us, were either non-existent from the waist upwards or were somewhat bizarre.

In the summer of 1981, according to the evidence, he decided to change his image. There is every reason to think that Mr. Goddard is an intelligent young man and perhaps he saw that the kind of image which he had been presenting to the public in the early days of his rise to fame was passing out of fashion. He decided that what he would do from the summer of 1981 onwards was to present himself in a way which was at once, in one sense, old-fashioned and, in another sense, new-fashioned. According to what he said in an affidavit, he gave a great deal of thought to how he should present himself. He decided that what he would do from the summer of 1981 onwards was to present himself in a way which was at once, in one sense, old-fashioned and, in another sense, new-fashioned. According to what he said in an affidavit, he gave a great deal of thought to how he should present himself. He decided that one way of doing so was to dress himself up in

the kind of clothes which were in fashion in the Regency period in this country. Another way he thought of using was to have his hair arranged in a way which some Red Indians in North America had used in the past: in particular—and this is an important feature of this case—he would have his face made up in a startling way. What he chose was this: he had seen in some museum in the United States of America the markings which American Indians had put on their faces and he decided to copy them. For the future, in presenting himself to the public, he would have two broad red lines with what seems to be grease-paint on one cheek running diagonally down from the region of the nose to the jaw and in between those two broad red lines he would have a line of a lighter colour—the colour seems to have been a lightish blue. He also decided that over his left eyebrow he would, again probably with grease- \*44 paint, put a small heart; he would have a beauty spot near his left nostril; and that he would have gold braid around hair hanging down from his head. To finish off this picture for the future he would have a kiss curl on his forehead and what we are told are known as Valentino side-burns....

Mr. Wilson's bold submission at the beginning of his presentation of his clients' case was that the marks on Mr. Goddard's face by way of facial make-up were painting. That caused me very considerable surprise, because, although there are various statutory provisions in the Act defining various words used in it, there is no statutory definition of a painting. "Painting" is a word in the ordinary usage of the English language and it is a question of fact in any particular case whether that which is under discussion is or is not a painting. It seemed to me, right at the beginning of Mr. Wilson's submissions (and I want to be restrained in my language), that it was fantastic to suggest that make-up on anyone's face could possibly be a painting.

Mr. Swift, in his succinct and concise reply, pointed out what had occurred to me and I had mentioned to Mr. Wilson in the course of argument, that a painting must be on a surface of some kind. The surface upon which the startling make-up was put was Mr. Goddard's face and, if there were a painting, it must be the marks plus Mr. Goddard's face. If the marks are taken off the face there cannot be a painting. A painting is not an idea: it is an object; and paint without a surface is not a painting. Make-up, as such, however idiosyncratic it may be as an idea, cannot possibly be a painting for the purposes of the [Copyright Act 1956](#).

**Please think about answers to the following:**

1. For what reasons does Lawton LJ find that facial make-up could not be a 'painting'?
2. How would you, therefore, state the 'test' for whether something is a 'painting'?
3. How would you answer if Mary tells you that she has created lovely tattoo of a cow on her arm and asks whether it would be a 'painting' for copyright purposes?

4. How would you answer if Aisha graffiti's a picture on a wall of a building due to be demolished the next day and asks you whether this is a 'painting'? What if Aisha had created a light display, using coloured lights shone against a wall, for a permanent installation in a gallery?
5. What do you think of Lawton LJ's approach to what is a 'painting'? Is it useful in the modern age? If not, why not?
6. Should the court be asked to decide this question or should someone else formulate such a test? Who else could be asked to decide what is or is not a 'painting' for legal purposes?
7. Do you think Lawton LJ is a fan of what he refers to as 'pop' music?