

Refereed Paper

Visual artists and creative labour: intellectual property rights as a basis for individual and collective interventions

Authors

Kate MacNeill and Colleen Chen
University of Melbourne

Abstract

The practice of visual art is often regarded as an individual and autonomous form of labour. While the making of the art work might occur in isolation, its public exhibition will often bring artists together in negotiation with an art institution. This article analyses two such occasions: artists whose work is exhibited in the National Gallery of Canada, and those who were selected for inclusion in the 2014 Sydney Biennale. We argue that these case studies demonstrate the way in which visual artists, at a certain point in the value chain, acquire greater power to negotiate, frequently by invoking intellectual property and ancillary rights in their artwork.

Keywords

Intellectual property, moral rights, Sydney Biennale, exhibition rights, artists

Biographies

Dr Kate MacNeill is a Senior Lecturer in the Faculty of Arts at the University of Melbourne and Program Director of the Master of Arts and Cultural Management. With degrees in law and economics she had an extensive experience in policy work in the government and non-government sector, prior to her doctoral studies in art history. Her research interests include the intersection between law and artistic practice and the nature of leadership in the arts industry.

Colleen Chen is undertaking graduate studies in law at The University of Melbourne and works in private legal practice. With a background in creative industries, Ms Chen is the co-founder of Interns Australia and has written broadly on youth unemployment and precarious work. Colleen recently presented her findings on global trends in intern labour activism to the International Labour Organization and in 2015 was awarded the Youth Employment Award by the Australian Government for her work in raising awareness of youth employment issues in Australia.

Contact: cmmacn@unimelb.edu.au

The Asia Pacific Journal of Arts and Cultural Management is available at: apjacm.arts.unimelb.edu.au and is produced by the School of Culture and Communication: www.culture-communication.unimelb.edu.au at the University of Melbourne: www.unimelb.edu.au

Introduction

Artistic labour is a particularly autonomous and precarious form of employment; characterized by low rates of industrial organizing and low incomes. At the same time the rhetoric of the creative industries implies that creative labour of the type that produces intellectual property is empowered in the new knowledge economy. In reality there is a deeply fragmented workforce in the creative industries, where the named creatives are likely to have far greater negotiating power than those whose labour is anonymous. The importance of the artist's name, and the artist's retention of copyright and moral rights, is highlighted in this discussion of artists' collective action, suggesting that the close attachment between the artist's name and the artwork enables a utilization of intellectual property rights as an exercise of power long after the artistic product of their labour has left their hands.

As noted by Hesmondhalgh and Baker, there is a tendency to generalise the experiences of creative labour without paying close attention to the specific forms of labour that characterise the conditions within sub-sectors of the creative industries (2008, p. 99–100). In this article we take up their challenge and examine a subcategory of the creative industries, namely visual art. One might regard visual artists as being the most autonomous and singular form of creative labour. The eponymous nature of an art practice stands as the quintessential Romantic form of cultural production, in which the artist and the artwork are considered inseparable. We draw on two examples of action on the part of visual artists to demonstrate the potential for collective action in what is otherwise a rather singular pursuit.

In early 2014 a group of artists threatened to withdraw their artwork from the Sydney Biennale because of the corporate sponsor's relationship with the administration of detention centres for asylum seekers. Under different circumstances and over an extended time period, artists have taken legal action against the National Gallery of Canada, not only asserting their intellectual property rights but also the right to collectively bargain with government institutions in respect of these under the Status of the Artist Act 1992. This legislation was specifically enacted so as to provide a mechanism for bargaining on the part of artists who would not otherwise qualify for industrial protection as they failed to meet the test of employee.

In a study on labour activism among precarious workers in the arts, media and cultural industries, de Peuter identified several ways in which this manifested itself, including campaigns that identified forms of wageless labour and through "voicing grievances and asserting demands ... outside the bounds of a circumscribed workplace" (2014, p. 277). The two examples discussed herein encompass these features. Firstly, the common purpose among the visual artists is not based on a shared experience of poorly remunerated or sporadic labour, although this is a reality for many, but on the value represented through the intellectual property in their artwork and its appropriation by an exhibiting institution. Secondly, the collective activity does not occur in a shared workplace, but is strategically focused at a particular point in the value chain of visual art – that of its exhibition to the public.

The actual expenditure of labour in the visual arts industry is largely invisible. Most often, the artist is not present when the viewer or buyer enjoys the product of an artist's labour. Value attaches to a work of visual arts as a result of the author effect – the name of the artist being so closely identified with the artwork. It is this author effect that gives rise to intellectual property rights and to moral rights, which ensure that artists are attributed. The events discussed in this article rely on the rights of an artist, who has retained copyright in their work, to refuse permission for reproductions of their work in advertising and promotional material associated with its exhibition. These rights extend to moral rights, namely the right to be attributed as the author of a work, the right not to be attributed as author, and the right to protect the integrity of the work. Together these rights can create a circumstance where artists can effectively withdraw their artwork from exhibition by declining related copyright permissions, refusing to attach their name to the work or asserting that its exhibition impacts on the integrity of the work.

While visual artists might be associated with individual and autonomous art practices, their reputations are made in a more collective fashion as their work is displayed alongside that of others in particularly prestigious environments. It is at this moment that a collective interest between artists becomes most pronounced. Indeed, it was the imbalance in power between collecting institutions and artists that gave rise to the formation of labour associations representing visual artists in Canada. By targeting a national gallery and a biennale, the artists involved in the Canadian and Australian collective actions discussed herein, have identified a critical moment of value creation, the moment of display to the public, an act that will often require their consent as a result of rights conferred by intellectual property law referred to above.

In the next section we examine the form that artistic labour takes as a category of creative labour, highlighting areas where the specific character of artistic labour gives rise to possibilities for the exercise of intellectual property and moral rights in unique and ongoing ways. We then present details of the two case studies to illustrate the way in which artists have leveraged the specific circumstances of value creation within the fine arts world to their advantage through collective action. The conclusion discusses some implications of this analysis in respect of existing and potential opportunities for collective organising among visual artists.

Visual artists and creative labour

In spite of an extensive and a growing literature that has developed around the concept of creative labour, there has been very little attention paid to the circumstances of visual artists. The labour of the creative industries is seen as the source of what Ross described as the "oil of the 21st century" (2003, p. 32), namely intellectual property, and visual artists as members of the creative class are endowed with almost mythical qualities (Florida, 2002). As members of the creative class visual artists are more often considered to fall within that category of work for whom intellectual property payments represents the dominant source of income. Yet because of the focus of the high art world on the original and singular nature of the artwork, the reproduction rights or performance rights that characterize other aspects of the creative industries are notably absent. Fine artists rely on the sale of the original artwork, and in some jurisdictions an entitlement to a resale royalty when a work circulates in the secondary market.

Creative labour is largely considered to be precarious labour, "self-reliant, risk-bearing, non-unionised, self-exploiting, always-on flexibly employed" labour (de Peuter, 2014, p. 263). While the visual arts is regarded by some as a quintessentially precarious field of endeavour, We note Hesmondalgh and Baker's suggestion that the extent to which the concept of the precariousness of labour provides a useful analytical tool will depend upon a close examination of the specific of the particular arts sector (2008, p. 99).

Ned Rossiter is highly critical of the creative industries model for reducing "creativity" to content production and the submission of the arts and humanities to the market test" (2006, p. 109). He argues that "creative workers need to situate themselves in ways that close down the possibility of exploitation" (p. 147). Studies of the economic circumstances of visual artists suggest that few are able to leverage either their intellectual property or their labour so as to produce living wages. The low remuneration

received by visual artists through their creative practice is most often supplemented through employment in other areas (Throsby & Hollister, 2003; Throsby & Zednick, 2010).

In 1972, Hyman R. Faine published an article in *The American Economic Review* entitled "Unions and the Arts" in which he expressed the rather optimistic view that the interests of the art institutions and arts workers should be seen as aligned rather than in tension. Such a collaborative approach, according to Faine, would see arts workers, management and the boards of arts organisations in indirect negotiation with the public, represented by the government, for more funding for the arts (1972, pp. 70-77). However, as Christopherson points out, while the fine artist, gallery owner and/or publicist might all be engaged in creative careers, each will have different motivations (2008, p. 74). Add to this the increasing role of corporate sponsorship, without which many large scale events may not occur, and the potential for conflict between an artist's self-expression and autonomy and that of other interests, is very high.

As important as the actual sale of the work is to an artist, is the valorizing of the artwork that occurs through its circulation within the art world, attaining an imprimatur through its display in prestigious public galleries or a biennale, triennial and international art fair. The strong emphasis placed on attribution falls within this highly visible valorising process. There are several examples of individual artists seeking to protect their reputation by controlling the manner in which their work was exhibited. When the Venice Biennale arranged a retrospective exhibition of the work of Italian painter Giorgio de Chirico in 1950, the artist brought an unsuccessful action to prohibit the exhibition of the particular works curated for presentation, arguing that the show misrepresented him by over-including his earlier paintings and under-including his later ones (Merryman & Elsen, 1998, p. 241). The granddaughter of French painter Henri Rousseau used a moral rights action to stop a Paris department store from using "reproductions" of the painter's work in its window decorations (Merryman & Elsen, 1998, p. 234). Likewise in Canada, sculptor Michael Snow applied successfully for an injunction order to remove the red ribbons tied around his sculpture, *Flightstop*, as part of the Christmas embellishments in the department store in which the sculpture was located and for which it had been commissioned (Prowse, 1989).

At times, artists had been able to maintain ongoing rights in the circulation of their work through introducing clauses into contracts of sale. One notable example, prior to the introduction of moral rights in Australia, is that of Hans Haacke. In 1994 when the National Gallery of Australia purchased his work, *Freedom Fighters Were Here*, Haacke inserted a clause in the contract, which gave him the right to determine the circumstances in which the work would be exhibited. It gave him a right of veto when the gallery wanted to include the work in a themed exhibition. When the National Gallery of Australia sought to include *Freedom Fighters Were Here* in an exhibition closely associated with telecommunications companies, Haacke invoked his veto right drawing attention to the fact that he had not only "critically followed the gradual takeover of art institutions by corporate interests" but had also made this issue a major subject of his work" (Bonyhady, 1996, p. 16). Haacke's withdrawal of his work from this particular curated exhibition relied on a specific contractual commitment arising at the moment of the purchase of the work by the gallery.

Not all artists would be able to insert such a condition in a sale contract, but it is arguable that a similar right might now be claimed by artists as a result of moral rights legislation. Indeed, a recent Australian case awarded a financial penalty for a moral rights infringement that was three times higher than the damages awarded to the copyright holders of the work. The case resulted from Fernandez, a DJ and promoter, modifying a work by Perez, a performing artist known internationally as "Pitbull" (among other monikers), making it available on a website used by Fernandez to promote his events and playing it at nightclubs during his DJ sets. The judge accepted Perez's argument that (i) "an artist's honour and reputation depends on whom he or she associates with, and is a driver of artistic (and with it commercial) success"; and (ii) "the distortion of Mr Perez's work, such as to create a false association, should be regarded as prejudicial to his honour and reputation as an artist *per se*" (*Perez v Fernandez*,

2012). This is one of very few cases that have been determined in Australia and may rest on its particular facts, specifically an ongoing and acrimonious dispute between the parties (McCutcheon, 2013).¹

In the United States, recording artists have often requested the removal of their works from being used as campaign songs by political parties if its use created intentionally or unintentionally, the impression that the campaign has been endorsed by the artist (Bilasz, 2011; Edwards, 2011). When Springsteen and Heart urged the withdrawal of their song *Born in the USA* from the Reagan campaign, their rationale was not dissimilar to Haacke's, in that a song that was originally written to cast a shameful eye on America's treatment of its Vietnam Veterans, was now used to glorify the very nationalistic sentiments it was intended to critique (Bilasz, 2011, p. 307). The exercise of individual property rights when the work is compromised by association with a political campaign highlights the primacy of the "integrity" of the work to an artist even when the copyright of the work is no longer privately owned.

The moral rights of artists are an element of their intellectual property rights – and endure because of the unbreakable attachment between an artist's reputation and their work. Described by Driver FM in his decision on the Perez case as "inalienable", his honour also drew attention to their "independent existence from the bundle of "economic" rights protected by copyright". Not all artists will explicitly assert their moral rights – and not all artists are even aware of them. Nonetheless the examples discussed in this section demonstrate the potential power and rights afforded artists through an ongoing interest in their artwork in the form of moral rights. In the next section we consider how what have most often been asserted as peculiarly individual rights can provide an impetus for public and collective action.

Individual intellectual property rights and collective bargaining – Canada

CARFAC (Canadian Artists' Representation/Front des Artistes Canadiens) and, in respect of Quebec, RAAV (Regroupement des Artistes en Arts Visuels du Québec) are both certified to represent the interests of visual artists under the Canadian Status of the Artists Act 1992. CARFAC arose out of an artist-led "refusal to work" for free for the National Gallery of Canada in 1967. The Gallery had asked artists for permission to reproduce their work for the purpose of assembling a slide collection of Canadian art. No offer was made to pay the artists for this copyright protected use of their work and the Gallery's contact with the artists advised that, should they not hear from the artist, they would proceed with the project. One of the artists, Jack Chamber, initiated action by contacting the other exhibiting artists, an action that resulted in the Gallery abandoning the project and to the formation of an artists' representative body, the precursor to CARFAC (Carleton 1991; Goetzl & Sutton, 1984).

Largely through the efforts of CARFAC, the Canadian Copyright Act has since 1988 made specific provision for an exhibition right. While not widespread, the logic of this provision is compatible with copyright provisions that relate to other art forms when they are performed in public (MacNeill, 2012). Section 3(1)(g) of the Canadian act provides that copyright encompasses the right "to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan." The effect of this amendment was to provide a right to Canadian artists to be paid on each occasion that an artistic work is exhibited. The recommended fee schedule differentiates between international, touring and local exhibitions and takes into account the budget of the exhibiting gallery. Exhibition rights are a corollary of intellectual property rights – an interest in a previously created work which may or may not be owned by the artists but in which the artist retains rights when the work is dealt with in legislatively defined ways. It arises, not out of the immediate labour expended in the production of the work but in the value that an institution places on the display of the work to the public. The enforcement of this provision has proved problematic and a number of commentators have observed that the imbalance in bargaining power between an artist and an institution has ensured that many artists agree to the exhibition of their works without enforcing their right to payment of an exhibition royalty. Like most rights under intellectual property legislation, these are individual rights bestowed on the creators of works; that is, the artists themselves, and are enforced

through individual legal action – or action on an artist's behalf through a copyright collecting agency arrangement.

In 2014, CARFAC together with RAAV succeeded in a long running court action, which gave the organisations the right to negotiate entitlements under the Status of the Artist Act as part of a scale agreement between artists and the National Gallery of Canada (Sibley, 2014). Scale agreements set out “minimum terms and conditions for the provision of artists’ services” (section 5 SAA). In 2003, the artists’ representative bodies commenced negotiating a scale agreement with the National Gallery of Canada which was to cover, among other matters, a binding minimum fee that the Gallery would pay when using existing works by visual artists. In 2007, the Gallery removed provisions relating to copyright in pre-existing artworks from the draft agreement, for two reasons: firstly that the Status of the Artist Act can only apply to the “provision of artists’ services” and hence the rare occasions when the Gallery commissioned works, that is, paid artists to make a work, or in the context of this article, at the time of the expenditure of their labour; and secondly that CARFAC/RAAV did not have authority to bargain in relation to copyright in existing works as many artists had assigned the right to collect royalties to copyright collecting agencies.

CARFAC/RAAV won an initial victory at the Canadian Artists and Producers Professional Relations Tribunal which decided that the National Gallery had failed to negotiate in good faith. In other words the Tribunal did not accept the reasons that the Gallery had given for its decision to withdraw certain items from negotiations. This decision was overturned on appeal, but eventually upheld when CARFAC/RAAV took the matter to the Supreme Court. The Court’s decision highlighted the significance of the uses of existing artworks in the package of remuneration that visual artists receive and that these uses lay at the heart of the Act. Indeed, it noted that the Status of the Artist Act was intended to ensure that artists “be compensated for the use of their works, including the public lending of them” (s 2e SAA). The provisions of the Act itself, and the way in which this decision highlighted the importance of the “use” of artwork in generating income reinforces the moment of circulation of work to the public as pivotal in the shared interests of artists. The matter of a conflict with the *Copyright Act* was swiftly dismissed with the Court. It noted that “an artists’ association’s function is to bargain with producers for the fixing of what is analogous to a minimum wage ... for the use of existing work” (*CARFAC v National Gallery of Canada* p. 208), but that these scale agreements would not bind copyright collecting agencies, who will continue to act on behalf of those artists who had individually assigned the right to recover copyright fees to the agency.

The victory was heralded in Canada, and represented not only a significant victory for the artists’ representative organisations, but also for artists themselves. It determined that artists have the right to collectively bargain with the National Gallery of Canada for minimum fees, both in the form of exhibition fees and copyright fees, in relation to the “use” of their artwork. The Status of the Artist Act has been a pivotal part of the industrial protections for a range of creative workers in Canada, and clearly sits alongside the individual rights granted by the Copyright Act.

Individual reputation and collective action - Sydney Biennale

Australian law has no equivalent to the Status of the Artist Act. The Copyright Act 1958 provides copyright and moral rights protection and more recently resale royalty legislation establishes a number of legal entitlements on the part of visual artists. And yet, with the rare and short lived exception of arts workers’ unions, visual artists have rarely organized in Australia in ways that would collectively represent the interests in enforcing minimum payments with these provisions. Instead, as is explored in this section, the focus has been on collective action around the moral and ethical concerns of visual artists.

Early in 2014, the actions of activists and artists led to the severance of a longstanding relationship between the Biennale of Sydney and key sponsor Transfield Holdings, just prior to the opening of the 19th Biennale. A founding sponsor of the event, Transfield is a finance and infrastructure conglomerate comprising three entities: Transfield Holdings, Transfield Services Ltd and Transfield Foundation. Founded in 1956,

Transfield was privately owned until 2001, when its operations and maintenance division, Transfield Services, was floated on the Australian Stock Exchange. In 2010, Transfield Holdings and Transfield Services formed Transfield Foundation as a philanthropic endeavour. Transfield Holdings now operates as an investment company for its owners and retains a minority shareholding in Transfield Services. Franco Belgiorno-Nettis, the founder of Transfield Holdings, was also the Founding Governor of the Biennale of Sydney. In 2014, his son Luca Belgiorno-Nettis, was the Chairman of the Biennale Board and the Transfield Foundation provided approximately six per cent of the Biennale's total funding.

The events that gave rise to the artists' protest and ultimately the resignation of Luca Belgiorno-Nettis as Chair of the Biennale Board arose from the involvement of Transfield Services Ltd in the operations of Australia's offshore detention centres. Controversy over its services for the Department of Immigration and Border Protection intensified when the federal government awarded Transfield Services Ltd a \$1.22 billion contract to operate a detention centre on Manus Island in Papua New Guinea in addition to its existing operations in Nauru (Butler, 2014).

The new contract followed a string of whistleblowing by past employees of the centre and expressions of concern about the conditions in the detention centres. This reached a crescendo after a violent clash between asylum seekers and on-site security forces. During this incident, Reza Berati, an asylum seeker detained inside the Manus Island detention centre on 17 February 2014 was assaulted and died. According to the review into the event by the Department of Immigration and Border Protection, Berati's cause of death was cardiac arrest as a consequence of "severe brain injury" (Cornall, 2014, p. 62-65). Mandatory detention of asylum seekers has been Australian government policy for over 20 years, amid ongoing debate and contention over the ethical and legal status of this policy. The refugee organisation RISE and others were already urging a boycott of the Biennale before these events (RISE, 2014). The death of Berati, and the apparent culpability of detention centre operators, meant that public awareness and opposition was heightened in the months leading up to the opening of the Biennale.

On February 19, 2014, two days after the death of Reza Berati, 28 artists due to participate in the 19th Biennale presented an open letter to the Biennale Board in which they voiced their concerns for the "ethically indefensible" activities of the event's sponsor, Transfield (de Vietri, 2014). The artists considered that their participation in the Biennale would be "adding value to the Transfield brand" and that it would be "an active endorsement, providing cultural capital for Transfield." The artists asserted an individual moral position and invoked a wider responsibility on the part of social institutions: "Our interests as artists don't merely concern our individual moral positions. We are concerned too with the ways cultural institutions deal with urgent social responsibilities" (de Vietri, 2014).

By 26 February 2014, following a stalled round of negotiations, five artists announced their withdrawal from the Biennale as an "act of conscience" and an as "act of hope" (Castro et al, 2014). Ólafur Ólafsson, Libia Castro, Ahmet Öğüt, Charlie Sofo and Gabrielle de Vietri announced that: "we have revoked our works, cancelled our public events and relinquished our artists' fees". The group, comprising three international and two local artists, regarded withdrawal as their "most constructive choice" in exercise of their rights as artists. Olafsson and Castro's *Bosbolobosboco #6 (Departure-Transit-Arrival)* was the only work based around the theme of refugees selected for the Biennale. A sound sculpture created in collaboration with the Refugee Art Project, the work featured voices of several refugees in dialogue with a psychologist as they recounted their journey and arrival to Australia (Refugee Art Project, 2014). Ólafur Ólafsson highlighted how the link between sponsorship arrangements and its association with the broader political context of offshore detention had detracted from the integrity of the work and the artist's relationship with it. "Who says events of this scale are necessary?" lamented Olafsson. "If going large means you have to roll back any ethical reflection on how money comes about then maybe it's time to reconsider the scale of the event" (cited in Taylor, 2014). Likewise, Ögüt felt that the existing sponsorship arrangements meant that the Biennale risked losing "credibility in the art world" (Gooding, 2014).

The stated intention of the withdrawal was to demonstrate that artists had a “right to act, when necessary, beyond the body of their works – if the institutions and their funders undermine their social values and basic human rights” (Katz & Ögüt, 2014). The artists sought to collectively assert these rights so as to avoid an association being made between their own artwork and what they believed to be the questionable sources of funds for the Biennale. The campaign was focussed on integrity, their own and that of the event. While Ögüt conceded that “all money is dirty” she argued that it “should not be used as an excuse to deliberately compromise social responsibility” (Katz & Ögüt, 2014).

Less than a week later, a second group of artists also withdrew their works from the Biennale in an “act of solidarity” (Polska et al., 2014). Their brief statement read: “After much consideration we: Agnieszka Polska, Sara van der Heide, Noline van Harskamp and Nathan Gray have decided to withdraw our works from the 19th Biennale of Sydney, because of its relation to Transfield, a company involved in the Australian government policy of mandatory detention”. Demanding that the “withdrawal be registered on [the Biennale’s] website and signposted at the physical site of exhibition”, the artists sought to ensure the documented absence of their work so that the “action will not be unnoticed” (Polska et al., 2014). The proximity of the event and increased media scrutiny over the death ultimately led to the resignation of the Chair of the Board and, on the part of the Biennale, the severance of the relationship with Transfield Holdings (Jabour, 2014).

These particular artists felt compromised by the contribution that the artwork would make to the cultural capital of Transfield Corporation. In so doing, the artists identified the value of their personal reputations conveyed through their name and the way in which this was inseparable from the artwork itself. As long as their artwork was in the Biennale, their fear was that it gave rise to a personal endorsement of the sponsor, and of the corporate activities with which the sponsor was associated.

In support of the boycotting artists, UK-based artist collective, the Precarious Workers Brigade, drew attention to the fact that “withdrawal of labour in a notoriously fragmented and un-unionised sector can be effective” (2014). As we have seen from this discussion, the activities by the artists did not constitute a withdrawal of labour in any conventional manner. Instead, they leveraged the value that their work represented when displayed in public, accompanied by their names as the artist. At this strategic moment they were able to operationalise Rossiter’s invocation to “situate themselves in ways that close down the possibility of exploitation” (p. 147), not through the withdrawal of their labour, but through the withdrawal of the right to exhibit their work. Where the artists remained the owner of the work, this might have been a matter of physically removing their art work. For those who no longer owned their art the same result could be achieved by refusing to co-operate in activities that relied upon the exercise of their ongoing intellectual property rights in their artwork. In both cases the key aspect was the refusal to attach their name in a way that would add value to the Biennale and hence Transfield’s reputation.

The artists’ boycott served two purposes: firstly it used a high profile event to draw attention to a government policy that was widely opposed, making the connection between the Biennale sponsor and its contracts to operate the detention centres; and secondly, it made a clear statement that they as artists did not want their work to be used in a way that recuperated Transfield’s reputation, through association with cultural activity and the cache of contemporary art. Indeed, one might consider this second purpose action an instance of artists asserting their moral rights – in this case they chose to withdraw their work – but they could equally have decided to deny the Biennale the right to attribute the work to them – under their moral rights – or decline to agree to reproduction rights for marketing purposes.

Conclusion

The purpose of this article has been to determine the strategic moment when visual artists may be most inclined, and most empowered, to assert their rights as producers of artwork. Two case studies have been examined in which visual artists have asserted

collective rights. Neither of these relate to the moment of production of artwork when their artistic labour is being expended, but focus on the moment in which artwork is displayed to the public. The authorial status of artists bestows upon them rights under intellectual property law that continue well after their creative labour has been expended. As property rights the artist continues to have a legal interest in their artwork and the way that it circulates in the world.

In an ongoing campaign and supported by successful legal action, visual artists in Canada succeeded in forcing the National Gallery of Canada to include the codification of copyright payments and exhibitions fees in their collectively bargained scale agreements. Long removed from the circumstances of production, the focus of this litigation was on the rewards due to artists when their work is included in exhibitions and reproductions made in connection with an exhibition. The judgement explicitly recognised the artists' intellectual property right as part of their package of remuneration, and ordered that CARFAC and RAAV, the organisations representing visual artists, could negotiate copyright entitlements as part of a scale agreement with the National Gallery of Canada.

In a different context, but once again seizing the moment of display as the realization of a value accruing from their work, a number of artists whose work was selected to appear in the 19th Biennale of Sydney in 2014 withdrew their work from the exhibition. The refusal to associate their art and their names with the activities of one of the key corporate sponsors of the Biennale might be seen as an assertion of their moral rights.

The significance of these events is that they demonstrate the way in which the visual arts sector offers opportunities for artists to organise collectively, not as labour but as holders of property rights, namely intellectual property in their artwork. The withdrawal of the intellectual property of the artist is also the withdrawal of reputation, with the ultimate threat of removing one's name from the artwork. Ironically, these very individual forms of property ownership, that of reputation and the intellectual property rights of an artist, provide the impetus for joint action at the moment when an art institution seeks to present the collective art works of a number of artists to the public.

Notes:

i. There is a paucity of jurisprudence that has arisen from the moral rights amendments to the Australian Copyright Act. One case found for an artist when his artwork featured in a photograph in a newspaper, credited to a different artist (*Meskenas v ACP*); another in favour of photographers who were not credited as the authors of photographs that were used without permission, together with a finding of copyright infringement (*Corby v Allen & Unwin*) and the *Perez* case discussed herein (*Perez & Ors v Fernandez*).

References

Cases:

Canadian Artists' Representation/Le Front des artistes canadiens v. National Gallery of Canada, [2014] 2 SCR 197, 2014 SCC 42.
Corby v Allen & Unwin Pty Limited [2013] FCA 370 (24 April 2013)
Meskenas v ACP Publishing Pty Ltd [2006] FMCA 1136 (14 August 2006)
Perez & Ors v Fernandez [2012] FMCA 2 (10 February 2012)

Texts:

Bilasz, L. M. (2011). Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events. *Cardoza Law Review*. 32, 305-336.
Bonyhady, T. (1996). Streeton's ghost. *Eureka Street*, 6, 9, 14–16.
Butler, B. (2014, February 25). Transfield Services shares soar after it wins offshore detention centre contract, *Sydney Morning Herald*. Retrieved from <http://www.smh.com.au/business/transfield-services-shares-soar-after-it-wins-offshore-detention-centre-contract-20140224-33d1i.html>.

- Carleton, W. A. (1991). Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite 76 *Cornell Law Review* 510, 510–548.
- Castro, L., Ólafsson, Ó., Sofo, C., de Vietri, G., & Ögüt, A. (2014, February 26). Statement of Withdrawal from 19th Biennale of Sydney. #19BoS Working Group. Retrieved from <http://19boswg.blogspot.com.au/2014/02/statement-of-withdrawal-from-19th.html?m=1>.
- Christopherson, S. (2008). Beyond the Self-expressive Creative Worker: An Industry Perspective on Entertainment. *Theory, Culture & Society*, 25, 7–8.
- Cornall, R. (2014). *Review into the Events 16-18 February 2014 at the Manus Regional Processing Centre*. Department of Immigration and Border Protection: Canberra.
- de Peuter, G. (2014). Beyond the Model Worker: Surveying a Creative Precariat. *Culture Unbound: Journal of Current Cultural Research*, 6, 263–284.
- de Vietri G., et al. (2014, February 24). Open Letter to the Board of the Sydney Biennale From Participating Artists. *19BoS Working Group*. Retrieved from <http://19boswg.blogspot.com.au/2014/02/open-letter-to-board-of-sydney-biennale.html?m=1>.
- Edwards, C. (2011, June 29). When It Comes to Music, Republican Candidates Can't Get Enough 'Cease-and-Desist'. *Solid Principles*. Retrieved from <http://www.solidprinciples.com/blog/when-it-comes-to-music-republican-candidates-cant-get-enough-cease-and-desist/>
- Faine, H. R. (1972). Unions and the Arts. *The American Economic Review*, 61, 1-2, 70-77.
- Florida, R.L. (2002). *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life*. New York: Basic Books.
- Goetzl, T. M. and Sutton, S. A., 'Copyright and The Visual Artist's Display Right: A New Doctrinal Analysis' (1984) 9 *Columbia VLA Journal of Art and the Law* 15-56.
- Gooding, J. (2014, March 26). Artists boycott Biennale over asylum camps. *Alt Media*. Retrieved from <http://www.altmedia.net.au/mayor-to-address-pm-as-biennale-under-pressure/90222>
- Hesmondhalgh, D. & Baker, S. (2008). Creative Work and Emotional Labour in the Television Industry. *Theory, Culture & Society*, 25, 7–8.
- Jabour, B. (2014, March 13). George Brandis threatens Sydney Biennale over Transfield 'blackballing'. *The Guardian*. Retrieved from <http://www.theguardian.com/world/2014/mar/13/george-brandis-threatens-sydney-biennale-transfield-blackballing>.
- Katz, M. M., & Ögüt, A. (2014, April 1). Editor's Letter. *Creative Time Reports*. Retrieved from <http://creativetimereports.org/2014/04/01/editors-letter-april-2014-ahmet-ogut-biennale-of-sydney/>
- MacNeill K. (2012). The Performance of Visual Art. *Media and Arts Law Review*, 17, 1-12.
- McCutcheon, J. (2013). Perez v. Fernandez: Australia's first decision on the moral right of integrity, *Australian Intellectual Property Journal*, 23, 3, April, 174-186
- Merryman, J. H., & Elsen, A. E. (1998). *Law, Ethics and Visual Art*. Boston: Kluwer Law International.
- Polska, A., van der Heide, S., van Harskamp, N., & Gray, N. (2014, March 4). Four More Artists Withdraw from the 19th Biennale of Sydney, #19BoS Working Group. Retrieved from <http://19boswg.blogspot.com.au/2014/03/four-more-artists-withdraw-from-19th.html?m=1>
- Precarious Workers Brigade. (2014, March 18). Precarious Workers Brigade// Open letter of solidarity with those who have withdrawn their labour from the Sydney Biennale and with detainees, *ArtLeaks*. Retrieved from <http://artleaks.org/2014/03/18/precious-workers-brigade-open-letter-of-solidarity-with-those-who-have-withdrawn-their-labour-from-the-sydney-biennale-and-with-detainees/>
- Prowse, T. (1989). Moral rights under the copyright Act: beyond 'be-ribboned' geese. *Canadian Intellectual Property Review*. 6, 1, October, 98-103.
- Refugee Art Project. (2014). Refugee Art Project and the 19th Biennale of Sydney. *The Refugee Art Project*. Retrieved from <http://therefugeeartproject.com/home/refugee-art-project-and-the-19th-biennale-of-sydney/>

- RISE (2014). Refugees, Survivors and Ex-Detainees. <http://riserefugee.org/>
- Ross, A. (2003). *No-collar: The Humane Workplace and Its Hidden Costs*. New York: Basic Books.
- Rossiter, N. (2006). *Organized networks: media theory, creative labour, new institutions*. Rotterdam: Institute of Networked Cultures, NAI.
- Sibley, R. (2014, May 13). Supreme Court ruling in favour of artists' rights paints National Gallery into tight corner. *Ottawa Citizen* <http://www.ottawacitizen.com/entertainment/Supreme+Court+ruling+favour+artists+rights+paints+National+Gallery+into+tight+corner/9839867/story.html>
- Taylor, A. (2014, March 7). Artists pull out of Biennale of Sydney due to Transfield sponsorship, *Sydney Morning Herald*. Retrieved from <http://www.smh.com.au/entertainment/art-and-design/artists-pull-out-of-biennale-of-sydney-due-to-transfield-sponsorship-20140306-349ug.html#ixzz3XjkdCHuC>
- Throsby, D. & Hollister, V. (2003). *Don't Give Up Your Day Job*. Australia Council: Sydney.
- Throsby, D. & Zednick, A. (2010). *Do You Really Expect to Get Paid?* Australia Council: Sydney.