

## The visual artist in the global information economy

Peter Drahos examines some recent developments on the Australian and international level.

It seems that the artist's back is set to join the sheep's back in helping Australia to prosper. The *Creative Nation* statement signals an ever deepening policy interest by the Commonwealth Government in the arts. In part this is motivated by a recognition of the intrinsic importance of art and culture, but no one reading *Creative Nation* can fail to notice the way in which it weaves together art, technological innovation and economic opportunities. Australia's interactive multi-media exports, it is said, could be worth more than \$20M by 1997-98.

There is, in *Creative Nation*, an implicit recognition of the fact that copyright based industries like the visual arts are making and will continue to make an increasing contribution to national economies as these economies struggle for a share of the global information market. Visual artists, provided they are willing to embrace digital forms of expression, are set for times of increased market opportunity.

### specific steps and downsides

As part of its *Creative Nation* package, the Government has promised to "provide a legal framework which will protect the interests of Australian creators and artists in the new communications environment. *Creative Nation* takes some specific steps in this direction. It commits the Government to funding the establishment of a copyright collecting society for the visual arts (known as VISCOPY). It also states that the Government will accept the recommendations of the Copyright Convergence Group on the reform of the Copyright Act 1968. Amongst other

things, this will mean that copyright owners will be given a broad-based right of transmission to the public. This will be an exclusive right which is not tied to a mode of delivery (eg broadcasting) but rather will be a general right of the owner to communicate information. More than likely if the Copyright Law Review Committee agrees, this right will be accompanied by a general right of distribution of copyright material.

*Creative Nation* seems to make good reading from the point of view of the visual arts community for it promises that the Government will reform copyright law to meet some of their needs and help them to participate in a brave new world of export opportunities in the global information and services market.

But brave new worlds have downsides. There are several reasons why visual artists should be cautious and critical readers of *Creative Nation*, rather than optimistic ones. It should be remembered that historically copyright law in the Anglo-American tradition began as a form of privilege that belonged to the Stationers' Company rather than to authors and artists. Within that tradition, it remains true even today that copyright statutes are primarily concerned with the protection of the interests of owners rather than the interests of creators. Creators may, of course, be owners but there is no necessary connection between the two since copyright is a piece of personal property the ownership of which may be assigned to others.

### the international order

Perhaps the first and most important thing for the visual arts community to understand is that the extent to which the

Australian Government can determine standards of copyright protection is itself limited by the emerging international regulatory order. Standards can be set locally, nationally or globally. More and more standards are set globally. A clear example of this trend is the Uruguay Round of the GATT (General Agreement on Tariffs and Trade), which saw the GATT becoming involved in the development of standards for things as diverse as food and intellectual property.

### GATT, TRIPS, the WTO & GATS

The GATT contained a separate agreement called TRIPS (Trade-Related Aspects of Intellectual Property Rights). TRIPS sets standards for most areas of intellectual property including copyright. The TRIPS agreement imposes obligations on member states to have proper enforcement procedures, and the dispute resolution procedures within the

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GATT will mean that intellectual property conventions will be tied to a workable enforcement mechanism. This benefits all copyright owners, including visual artists.

But there are ways in which TRIPS fails to help visual artists. For instance, Article 9(1) of TRIPS does not require members of the GATT to comply with Article 6 bis of the Berne Convention for the Protection of Literary and Artistic Works, the Article dealing with moral rights (the right of attribution and the right of integrity). As it happens, Australia will introduce some form of moral rights legislation in order to comply with its obligations under the Berne Convention, but the absence of these rights from the GATT signals the fact that the principal players at the GATT (the QUAD countries - the US, Europe, Japan and Canada) do not see them as a priority issue.

It should also be remembered that the drafting of the TRIPS agreement was heavily influenced by the private sector, with large US companies playing a leading role. Neither the US or its corporate intellectual property community are likely to pursue the interests of visual artists with even mild enthusiasm. One only needs to look at the US *Visual Artists Rights Act 1990* to see the very modest gains which visual artists have made in that country.

Visual artists will have to start thinking about ways in which to gain a voice in the GATT's successor organization, the World Trade Organization ("WTO"). The danger is that WTO will in the long run be responsible for globally implementing a weak scheme of moral rights protection, and perhaps even excluding it from certain new digital mediums that artists choose to use.

Visual artists also have to appreciate that the GATT agreement will have the effect of opening up the Australian market for the export of culture and art from other countries. The GATT agreement contains a General Agreement on Trade in Services (GATS) which establishes a multilateral framework for the progressive expansion of world trade in services. This may seem remote from the needs of the visual artist but it is not. Under GATS countries will come under pressure to remove barriers to trade in the audio-visual sector, a sector of importance to the visual artist.

In the dying stages of the last GATT round, Europe and the US disagreed on this sector, the US objecting to the use by European countries of film subsidies and television quotas. The US, the world's greatest exporter of audio-visual material argued, in essence, that art and culture ought to be able flow freely throughout the world. The Europeans proposed that

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various articles like Article XIV on General Exceptions of the GATS should be modified to recognize the cultural specificity of the audiovisual sector. The US probably in time will see its vision of trade in culture come to pass. Its National Information Infrastructure initiative (released by the Clinton Administration 15 September 1993) is being imitated by other countries.

The presence of a global information infrastructure will facilitate trade in culture and in any case the WTO can be expected to pursue the matter. A global trade in culture raises many issues, but if the theory of comparative advantage is right, then one can expect some countries to dominate this trade with the result that there will be a progressive homogenization of national cultures. Australian visual artists along with creators of all kinds may find themselves awash in a king tide of cultural and artistic imports.

### **property in expression and a US experience**

**T**he strong copyright protection which TRIPS implements and which *Creative Nation* promises to build on may have some unexpected effects on artists. To begin with, as copyright protection increases the cost of creativity also rises. Artists, like all creators, play a dual role in the creative process. They are both users and producers of material. In all areas of artistic life there are traditions, genres, ways of doing things that constitute the artist's raw materials. The greater the copyright protection of these raw materials, the greater the cost of expression and therefore, somewhat, paradoxically the less incentive to produce new works.

Artists will have to think long and hard about the degree of protection they want for images in the emerging global economy. Property in expression, it should be remembered, sets limits on the freedom of expression. The US case of *Rogers v Koon* illustrates the kind of problem that artists will have to confront. A photographer who had taken a photo of a husband and wife holding a litter of puppies brought a copyright action against an artist who had used the photo to create a wooden life-sized sculpture called "String of Puppies". The argument was that the sculpture was an unauthorized copy of the photograph and this succeeded.

Koons, the artist, never denied that he had used the photograph to create the sculpture, but argued that he had a defence under the fair use doctrine. One of Koons' central arguments was that he belonged to a tradition of postmodern art, a tradition which deliberately took popular broadly circulating images and relocated them in an artistic context. This method of work has as its goal the parody and criticism of a society that is thought by its artist critics to be full of banal, mass produced images that reinforce a shallow production line culture. Andy Warhol is one famous exemplar of this artistic method.

No First Amendment ("Congress shall make no law ... abridging the freedom of speech...") issue was raised in the case, showing the almost automatic priority that property principles have over free speech principles. (However, there are a number of copyright cases in which the First Amendment argument has been raised. See, for example, *Harper & Row Publishers v. Nation Enterprise*; *Sid & Marty Krofft Television Productions v. McDonald's Corp.*; *Triangle Publications v. Knight-Ridder Newspapers*; *Pacific & Southern Co. v. Duncan*).

The property economic perspective totally dominated the court's analysis. Essentially they saw Koons as an individual "sailing under ... the flag of piracy", rather than the representative of a distinctive kind of artistic tradition that was seeking to communicate a critical and unsettling message. The fact that Koons stood to make a considerable profit from the sculpture counted heavily against his claim of fair use.

### **free speech and protection**

**T**he free speech issue is not so remote in this case. If we accept that art is a form of speech, then the restrictions that intellectual property places on that speech at least require that the free speech issue be faced. Had the issue been raised in a First Amendment context, the outcome in the case would almost certainly have not been different, for the court would probably have found that Koons was not prohibited from using some similar image or the idea behind the photograph. In a balancing exercise, free speech interests would not have won here.

As visual artists enter a global economy which has a global information infrastructure, they will have to think creatively about their place in it. Amongst other things they will have to ensure that they receive meaningful moral rights protection rather than just symbolic protection, and they will have to reflect on how the balance of copyright protection is to be struck to accommodate their different interests.

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## **Insults on the Internet**

**Recent UK defamation cases may change the nature of Internet discourse permanently - a report from Denton Hall, Solicitors**

**T**he Internet, which has rapidly become an anarchist's playground, may soon be reverting to its original purpose: exchange of information between academics. The reason is that in both the US and the UK some users are abandoning the traditional Internet method of responding to defamatory comments - posting a reply on Internet - and are instead issuing proceedings for libel. Observers put this down to the increased numbers of users who are not versed in Internet protocol.

Either way it seems that the effect of the recent batch of libel cases will be to change the nature of Internet discourse permanently. Users in future may need to exercise more caution when sending criticisms and opinions.

### **how does Internet work?**

**I**nternet is, broadly, the result of interconnected regional computer networks. It does not exist as an independent body and has no central governing board or constitution.

Internet can be accessed via access providers such as CompuServe or Demon. A user may interconnect to Internet via an access provider's network and the access provider may also give access to online databases. When an E-mail message is sent, it passes from the sender's terminal to his/her access provider on to a destination access provider and finally to the destination E-mail address. A message can also be sent to bulletin boards (either open to all Internet users or just to subscribers of a particular access provider). These bulletin boards operate like a conventional notice board so