Current Trends in Litigating Value and Transparency in the Visual Art Industry

Dougal Phillips, Lawyer (Banki Haddock Fiora), examines recent disputes within the art world and comments on the challenges facing art litigation.

It is without doubt a very interesting time in the intersection of the visual art industry with the complex protocols of disputes and litigation. Nebulous questions of authorship and value in works of art are being litigated at high levels, particularly in the United States. The cut and thrust between the majority and the dissent in the 18 May 2023 US Supreme Court decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*[1] is the most high-profile recent example, with the majority opinion (authored by Sotomayor J) reaffirming that the judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue.[2] Meanwhile, Kagan J in dissent (with whom the Chief Justice joined) embarked on a spirited journey down that particular rabbit hole. The *"fistfuls of comeback footnotes"* (in Her Honour's words) directed at the dissent in the majority opinion paint the picture of the high stakes of the debate over authorship and aesthetic value that took place in this lofty forum.

The transformative use analysis in US copyright law of course sets the table for this sort of conceptual grappling. Courts are effectively required to consider where the value lies in an artwork: as an original authored work; in relation to other original works; and in the market in which all of these artworks exist in economic constellation. One interesting phrase pops out in the dissent: Kagan J interprets the majority's view of the first fair-use factor codified in 17 U.S.C. §107 – the purpose and character of the use – as being "uninterested" (that is, the factor itself is uninterested) in *"the distinctiveness and newness of Warhol's portrait [...] What matters under that factor, the majority says, is instead a marketing decision [...]".*[3]

The Warhol decisions has been widely received as a shift back from the approach taken by the Second Circuit in the Richard Prince case,[4] which commentators (and another appellate court) saw as weighting "transformative" use too greatly in the fair use assessment, effectively undermining the §107 fairness factors. These factors are roughly comparable to subsections 40(2)(a) to (e) of the *Copyright Act 1968* (Cth), although these are of course confined to specific fair dealing exceptions rather than fair use. Harnessing the transformative argument, Richard Prince (and perhaps more importantly, his megadealer gallerist Larry Gagosian) preserved the market value in his appropriation artworks, with 25 of the very expensive artworks in question held to be transformative and the other five remanded to the lower court for assessment prior to the case eventually settling.

In the *Warhol* case, the value of the artwork of the other Prince (the late musician) is seemingly affirmed as being grounded as much in its commercial purpose as in the process of its emergence as a standalone aesthetic object. Again, the American transformative doctrine presses this question in a way that would not be possible under Australian copyright law. Nonetheless, a consideration of deployment of the original artwork in the visual art economy underlies many recent high-profile legal proceedings (unsurprisingly, particularly in the US where recourse to high-profile litigation is a key tactic). The courts continue to be presented with quandaries around authorship, originality and value, most blatantly in the inescapable current topic of AI and art.

On 18 August 2023 the U.S. District Court for the District of Columbia reaffirmed the decision of the U.S. Copyright Office to refuse a copyright registration to plaintiff Stephan Thaler, he of the famous Australian Patent Application No. 2019363177 which nominated the AI system DABUS as inventor and was eventually the subject of a denial of special leave by the High Court in *Thaler v Commissioner of Patents* [2022] HCA Trans 199.

Thaler's claim was in respect of an artwork titled "A Recent Entrance to Paradise", with said entrance being a fairly banal digital image of train tracks running through a plant-covered stone arch. An uncharitable viewer might find this work falling far short of the monumental power of Anselm Kiefer's *Abendland [Twilight of the West]* (1989), which hangs in the National Gallery in Canberra depicting more or less the same train tracks motif, but is 4 metres tall, made of paint, lead sheet, ash, and earth, and weighs 347 kilograms. Nonetheless, as section 10 of the Copyright Act expressly states, it does not matter whether the artistic work to be protected is of artistic quality or not. The key point is that an AI model run by Thaler's company Imagination Engines had generated the image. At issue here is both the absence of a human author and the opaque "appropriation" of a huge dataset of art in the training of the AI model.

Thaler – who intends to appeal – is of the view that denying AI-generated works the protection of registration under the US system goes against the principle of protection of original works of authorship fixed in any tangible medium of expression. For the moment, the US Copyright Office and the courts disagree with Thaler on the point of authorship, but the point of transparency as to which other (human) artists have had their works scraped to be re-deployed as generative images remains unresolved.

It might in fact be argued that just as the economic value of Goldsmith's photographic portrait of Prince was supplanted (at least in part) by Warhol's re-deployment of the image

1 *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. ___, 2023

2 *Warhol v. Goldsmith* at [482]

3 *Warhol v. Goldsmith* at [490]

4 *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013)

in similar channels, the economic value of all the original artwork available online is in danger of being silently leeched by private companies training generative AI art models. There is no doubt more litigation and policy debate to come on this point.

Litigation can indeed serve an effective role in clearing away the notorious opacity of the essentially unregulated art industry. In a recent expansive *New Yorker* profile of the aforementioned Larry Gagosian, Patrick Radden Keefe writes that "*[l]itigation occasionally offers a glimpse of the shadowy backroom aspects of the trade*",[5] going on to detail the 2010s lawsuit filed by the billionaire financier Ronald Perelman who had bought over two hundred artworks (most likely each valued in the millions or even tens of millions) from his "*trusted art advisor*" Gagosian since the 1990s. Keefe reports that Perelman claimed in the pleadings that Gagosian was "*undervaluing works when purchasing them, overvaluing them when selling them, and pocketing the substantial differential*", and put forward "a *novel legal theory—that an art dealer should have a duty of loyalty to the people he is representing*".

The disputed dealings included a painting by Cy Twombly, considered one of the great painters of the late twentieth century and whose *Three studies from the Temeraire* (1998-1999) was a headline acquisition of the Art Gallery of New South Wales for $5 million in 2004. The lack of transparency in these dealings seemed to be the core of Perelman's complaint, which riled him to the point that he took the long-standing relationship into the courtroom.

What is perhaps notable (in Keefe's view) is that Perelman, after settling, returned to dealing with Gagosian. The brand, the *imprimatur* of Gagosian – with his gallery empire on which the sun never sets – is as or more important (again, in the view of the author of the profile) than the originality and rarity of the artwork created by a Twombly or a Jeff Koons. Similary, we have recently seen that where claims for legal relief have arisen in respect of the much-maligned artform of NFTs, these claims have been directed at the marketing decisions underpinning the value of the artworks.

The NFT market has certainly dropped from the giddy highs of 2021 (although it is likely too early to say whether the NFT form of visual art ownership is completely defunct) with recent media coverage of the precipitous drop in value of a Bored Ape Yacht Club NFT owned by Justin Bieber. Bieber's Bored Ape #3001 has (at time of writing) declined in value by approximately 95% over a period of eighteen months.[6] Valued at USD$1.3 million in 2022, the work is now worth around USD$60,000 – still, it must be noted, a significant valuation for a visual artwork.

On 17 August 2023 CNN reported that a group of investors is suing Sotheby's Holdings Inc. and others over a 2021 auction and promotion of Bored Ape NFTs, with "*the four named plaintiffs in the class action lawsuit alleg[ing] that the auction house "misleadingly promoted" the NFTs and colluded with creator Yuga Labs to artificially inflate their prices.*"[7] Sotheby's is one of thirty defendants named in the lawsuit – alongside celebrities like Paris Hilton, Stephen Curry, The Weeknd and indeed Bieber himself – who have been accused of promoting the NFT collection without disclosing relevant financial relationships. The claim is also focused on the "air of legitimacy" Sotheby's involvement gave to the sale of the Apes.

Seeking relief on the basis of misleading and deceptive commercial conduct by high-profile artworld entities and celebrity figures is perhaps the best remedy available for a devaluation NFT collection. It could be worse, though – the recourse for a stolen NFT is seemingly non-existent and presumably outside the reach of the courts when anonymous hackers are involved. Despite the proprietary position of the owner of an NFT being arguably the same as the owner of a Cy Twombly painting, there does not appear to be much one can do at present to protect this property under the law. Nor does the general public seem to be particularly sympathetic to the owners of the unique NFT pieces – the theft of NFTs spawned the *"all my apes gone"* meme when Twitter user @toddkramer1 posted in December of 2021: "*I been hacked. all my apes gone. this just sold please help me*". @9_volt_, a subsequent victim of a digital heist was even more succinct, tweeting on 11 February 2022: "*they went straight for my ape*".

Back in the physical world of painting on a surface, celebrity and the value of the artwork come together again in an ongoing claim in the United States District Court of Puerto Rico in the matter of *Roman v. Ocasio, et al., Civ. No. 21-1621 (ADC),* which in March 2023 survived a motion to dismiss.[8]

The plaintiffs, with their own money, designed and painted a mural on the wall of a basketball court in Puerto Rico's Santurce neighbourhood. In 2018, Benito Antonio Martínez Ocasio, a Puerto Rican rapper, singer, songwriter known professionally as Bad Bunny, shot a music video for his song "Ser Bichote" which consisted of a static camera shot with the mural occupying the majority of the background.

While the plaintiffs recognised in their submissions that the value of the artwork was in "*us[ing] street art to revitalize Santurce's abandoned buildings and deteriorated public areas... [giving] residents a renewed sense of ownership over public spaces*", it did not go unnoticed that the music video the subject of the claim amassed 9.2 million views on YouTube in less than 3 months and reached 15,422,615 million views in less than 10 months, or that Bad Bunny had since gone on to megafame. In both 2020 and 2021 he was the first non-English language artist to be Spotify's most streamed artist, and then reportedly had the biggest streaming year for any artist on Spotify in 2022.

Again, Australian law would likely take a more measured approach via the application of section 67 of the Copyright Act which carves out an exception to infringement where an artistic work is included in a cinematograph film or television broadcast, but only where the inclusion is incidental to the principal matters represented in the film or broadcast. Interesting queries might be raised as to both the non-incidental status of the mural backdrop and the value it adds to the music video (and perhaps by extension to the artist's street credibility).

5 "How Larry Gagosian Reshaped the Art World", *The New Yorker*, July 24, 2023

6 https://www.cnbc.com/2023/07/07/justin-biebers-bored-ape-nft-has-lost-95-percent-of-its-value-since-2022.html

7 https://www.cnn.com/style/article/bored-apes-sothebys-lawsuit

8 https://casetext.com/case/roman-v-ocasio

In the high-stakes world of global pop media, a visual artist can quickly find themselves reframing the value of their artwork beyond the value it holds in its place of exhibition as an aesthetic object. In much the same way, artists are now having to identify value in their art in its place in a gigantic dataset upon which AI eyes are trained.

Some artists are looking to harness the technology and dive headfirst into questions of AI authorship – consider Hito Steyerl a "post-internet" artist, the first woman to top *ArtReview* magazine's "Power 100" list, and arguably one of the most important contemporary artists of our time. Steyerl's 2023 work "*Green Screen,* featured in the group show "Dear Earth: Art and Hope in a Time of Crisis" at the Hayward Gallery in London (21 June to 3 September 2023), combines an LED screen constructed from empty bottles and crates with a vertical garden of plants behind the screen. The plants generate bioelectrical audio signals which are then fed into an AI engine which generates images of blooming flowers across the screen.

In terms of a copyright law position in respect of authorship, here we might recall selfie-taking Naruto the Sulawesi crested macaque from *Naruto v. Slater, 888 F.3d 418,* and note that plants may be even behind animals in the queue for whom there might one day be granted protection of their valuable intellectual property as authors.

However, we might also note that an artist as established as Steyerl can afford to be less threatened by AI than most. Artists and those in the art industry will no doubt continue to seek to protect the value of their work against de-authoring and decentralising control of originality, rarity, and commercial exchange. Transparency in the use of AI and in the commercial dealings underpinning highly valuable works of art (whether that value is as original pieces or as a dataset of a signature style) is likely to be as much the battleground in the courts going forward as traditional legal questions around infringing uses – subsistence, substantiality and so on.

Transparency, it might be said, is not the art industry's strong point. We might recall the Christopher Nolan film *TENET* (2020), which made a central feature of a fictional freeport, a highly-secured tax-free zone featuring climate-controlled storage for extremely valuable artworks, which in the real world are located in places like Singapore and Geneva. The Geneva Freeport reportedly stores more than fifty billion dollars' worth of works by da Vinci, van Gogh, Picasso and others, and it is said that it would rival the Louvre, if only it were publicly accessible.

Event Report: The 2023 CAMLA CUP

The CAMLA Cup was held on 31 August 2023, at the Sky Phoenix. Teams from across Sydney gathered to showcase their knowledge and intellect in a fierce trivia competition.

The turnout was impressive, with around 270 participants, with teams from the ABC, Addisons, Allens, Ashurst, Baker McKenzie, Banki Haddock Fiora, Bird and Bird, Clayton Utz, Corrs Chambers Westgarth, Creative Lawyers, Dentons, Free TV, Gilbert + Tobin, Holding Redlich, Herbert Smith Freehills, Level 22 Chambers, Marque Lawyers, MinterEllison, McCullough Robertson Lawyers, Netflix, SBS and Thomson Geer. Despite the intense competition, Allens demonstrated exceptional knowledge and unwavering expertise, earning them the title of champions at the 2023 CAMLA Cup. The CLB's Co-Editor Eli Fisher surprised even himself, coming out the victor in a Guess Who round (spoiler: answer was Margot Robbie).

In addition to the prestige of being recognised as champions in the field of media, technology, and communications related knowledge, all those who competed were up for a selection of exciting prizes. These included passes to Taronga Zoo, double tickets to the Belvoir Theatre, wine, chocolate, cookbooks, keep cups, sporting equipment, and G+T branded gin.

The 2023 CAMLA Cup was a resounding success, with everyone enjoying

themselves immensely. Not only does this event challenge participants to stay updated on industry developments and test their knowledge, but it also provides a great atmosphere for networking and catching up with friends, clients and colleagues.

If you missed out on securing a table at this year's sold-out event, make sure to lock down your spot early next year. Both CAMLA members and non-members are welcome and encouraged to attend.

CAMLA extends its thanks and gratitude to the event's illustrious hosts Deb Richards, Sylvia Alcarraz, and Nicholas Kraegen. A huge thank you also to the ever-dedicated CAMLA Young Lawyers volunteers, Kathy Janevska, Laksha Prasad, Erin Mifsud Belyndy Rowe and Lilli Thompson, and of course the CAMLA Board for orchestrating yet another exceptional event.

A huge thank you to all the organisations for the prize donations. The night would not be the same without your support and generosity. Thank you!

Join us next year as we eagerly await to discover whether Allens can defend their championship or if a new contender will seize the CAMLA Cup crown.