

COPYRIGHT v. CONTEMPORARY ART PRACTICE

It is a tradition that arts practitioners explore and challenge the community's social, moral and intellectual boundaries. It might also be said that it is the lawmakers who provide some of the most concrete definitions of those boundaries. Those limits are constructed from bundles of rights and their co-relative duties.

Problems arise when an individual exercises a right that either conflicts with the exercise of rights by another or with a duty owed to the other. One of the most important examples of this is the current practice of image appropriation: The exponents of this, use the images of works by earlier artists and quote them (sometimes verbatim), the difference being, perhaps not in the visual form but rather the intellectual intent of those images. Copyright does not recognise such nuances of artistic intent. The court will not look at the subjective intent of the artist but rather at the objective similarity of the new work with the older work, the perceived extent of the appropriation, the significance of the appropriated portion to the earlier work, its significance to the later work and the degree of skill and labour applied by the second artist in the creation of the second work.

This creates a practical difficulty for artists in that it is not their opinion which matters but rather that of the court. The court's view may well differ from that of the artist when it comes to adjudicating whether the skill applied by the second artist is sufficiently independent of that applied by the first.

The problem is high-lighted by the recent Kitaj exhibition at the Australian National Gallery. This is a selection of screenprints entitled "In our time: Covers for a small library after the life for the most part (1969-1970)". Known for his appropriation of images from popular culture, Kitaj applied this practice to book covers and made 50 screenprints which are enlarged but faithful reproductions of the original bookjackets. Some of these amount to a prima facie breach of the copyright in the artistic works that are featured on those covers.

Perhaps it is reassuring to know that in most cases it is not going to matter in the slightest whether the appropriation amounts to a breach of copyright for one must always ask, "What damage has been suffered?" If it is slight, none but the wealthiest and most determined copyright owner would commence an action for breach of copyright. Such actions are usually very expensive and would-be plaintiffs must balance the damage caused by such a breach with the cost of enforcing their rights. However, some plaintiffs, particularly large corporations, will not hesitate to commence proceedings if they think that their corporate image may be affected by the unauthorised use of their logo or name. In such cases the artist should be aware that conflict is very likely.

The Kitaj exhibition highlights the absence of any formal right of freedom of expression in Australia. It is yet another example of the fact that in exercising the self-awarded right to create, the artist often breaches the legal rights of another. Thus, the expectation created in the first artist (by the grant of statutory rights) is transgressed by the second (in exercising a self-awarded "right" to create).

The source of this conflict lies, at least to some extent, in the very nature and development of copyright protection. The laws of copyright establish and confer economic rights which may be exploited exclusively by their owners. If one looks to the earliest of such statutes, (which concerned literary not artistic works), it is clear that the laws were designed to protect the interests of the publishers rather than the interests of the writers. It was the former who were accorded the economic rights.

Indeed it was the invention and proliferation of the printing press that created the need for copyright in its modern form. The impact of that new technology on that earlier community may be likened to the effect on copyright of the invention

and/or proliferation of radio broadcasting in the 'teens, talking movies in the twenties, vinyl records and television in the fifties, photocopiers and home recording in the sixties, silicon chips in the seventies, and video technology and satellite communication in the eighties. Note that it is not necessarily the invention of a new technology that creates the pressure for a new body of rights to be created, rather it is the proliferation, the ready availability, the successful exploitation of that technology.

Each time a new form of reproduction is made generally available there is a pressure to protect, not only the already existing rights that may be threatened by the new technology, but also the considerable investment that has been spent on the development of the new inventions and, of course, their new opportunity for profit. Thus the conflict between the artist's self-assumed "right" to create and the formal rights of the copyright owner of the appropriated images, is exacerbated by newly accessible technology. For those artists who use recently developed technology in their art practice it is almost inherent in their methodology that breaches of the law will be committed. This is no defence. It merely describes a problem.

The photocopier has become a commonplace tool of visual artists but the laws of copyright have not evolved apace. Similarly, computers, using programs such as Paintbox and Thunderscan are now not only allowing artists to reproduce but also to sample images and either reproduce, alter, distort and reapply the sampled images. However, while the laws protect against the reproduction of pre-existing material they insufficiently recognise the capabilities of the machine as a tool in the creation of new original works.

The conflict between those who have legal rights and those who seek or challenge such rights, creates pressure for law reform. The manner, extent and speed with which that pressure is acceded to depends to some extent on the agitator's access to the maker of the laws. The evidence of artists having a major influence upon legal change has not been overwhelming and so it should not be surprising that legal boundaries, which so often lag behind the current standards of the general community, will often fail to provide for the demands of contemporary art practice.

The development of new laws to deal with new exigencies are drafted with all of the weakness of attempted foresight. The law makers usually do not, indeed cannot, predict the novel applications of a new technology or new art practice. Like leather shoes, laws tend to lose their meticulous shape after they have been exposed to wear for a while and accommodate themselves to particular group needs. That chaffing is the process of agitation for reform.