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Daubism: Copyright Law and Artistic Works

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Contents

- [INTRODUCTION](#)
- [PART 1 - CROP CIRCLES ON A BANNON LANDSCAPE: THE ARTISTIC COMMUNITY](#)
 - [Aesthetics](#)
 - [Ethics](#)
- [PART 2 - SHOOTOUT AT THE ERIC MINCHIN LANDSCAPE: LEGAL RELATIONS](#)
 - [Economic Rights](#)
 - [False Attribution](#)
 - [Defamation Law](#)
 - [Summary](#)
- [PART 3 - THE CROP CIRCLE CONSPIRACY LANDSCAPE: THE MEDIA](#)
 - [Moral Rights](#)
 - [Right of Resale](#)
- [CONCLUSION](#)
- [NOTES](#)

[INTRODUCTION](#)

1. An artistic controversy over a group of landscape painters called the Daubists provided impetus for copyright law reform in Australia in the early 1990's.
2. In the first exhibition of Daubism in 1991 driller Jet Armstrong painted a crop circle over a painting of the Olgas by Charles Bannon - an artist, print-maker, and the father of the State Premier at the time, John Bannon. He called the resulting work, Crop Circles on a Bannon Landscape. Armstrong also inserted an inverted crucifix over a painting of the Flinders Ranges by Bannon, and renamed the work The Crop Circle Conspiracy Landscape. In response, Bannon took legal action against Armstrong in the Federal Court of Australia on the grounds

of false attribution and defamation. He won an interlocutory injunction against Armstrong and the gallery, but then reached a settlement with the Daubists. An anonymous buyer purchased the work for \$650 on the condition that it was returned to the painter. In his fight against the Daubists, Bannon received help and support from the National Association for the Visual Arts (NAVA). This professional group used the controversy to campaign for the reform of copyright law - in particular, the need for a moral rights regime.

3. The artistic controversy over the Daubists was a catalyst for the introduction of the Copyright Amendment (Moral Rights) Act 2000 (Cth) in Australia. It offers an illuminating case study of the operation of copyright law in the visual arts. First, the case suggests that judges in a common law system will interpret moral rights, in light of jurisprudence about copyright law and defamation law. As David Vaver observes:

A new right may be introduced and treated more sympathetically in a jurisdiction where it resembles existing rights, or flows logically from accepted principles, than where it is a completely new transplant on to inhospitable soil. Writers in both the United States and the Commonwealth have therefore sought to demonstrate the presence of common law analogues to moral rights of attribution and integrity.^[1]

4. Second, the conflict highlights the industry-specific approach of the moral rights regime. The visual arts community engaged in special pleading, and demanded legislation sympathetic to its particular circumstances. As a result, the legal scheme has a particular impact upon the visual arts community - especially in relation to the scope of the moral rights, the defence of reasonableness and the impact of consent provisions. Third, the controversy foreshadows a number of future developments in relation to copyright law and the visual arts. In particular, it anticipates the introduction of a right of resale to ensure that artists can flourish in the marketplace.
5. The dispute over Daubism was understood differently within various interpretative communities, social fields, and discursive domains. It operated within a number of institutions: the artistic community, the legal system, and the media. Part 1 considers the dispute over Daubism in the artistic community of Adelaide. It examines the debate over the meaning and nature of landscape painting in terms of the movements of romanticism, modernism, and post-modernism. Part 1 examines the dispute over Daubism in the legal system. Bannon sued Armstrong in the Federal Court alleging that the treatment of his painting was defamatory and a breach of the Copyright Act 1968 (Cth). Part 3 focuses upon the dispute over Daubism in the media. Bannon used *The Adelaide Advertiser* and other syndicated papers to support the litigation and to push for the introduction of a moral rights regime. In response, the Daubists have used the media to defend their reputation, and oppose the implementation of moral rights.

PART 1 - CROP CIRCLES ON A BANNON LANDSCAPE: THE ARTISTIC COMMUNITY

6. The Daubists were originally a group of South Australian visual artists. Manne Schulze recalls that the name of the group refers to the crude and sloppy techniques used in idealised landscape paintings in Australian art:

We did not choose this name because our main concern was to daub over other people's paintings but in reference to our own deliberately badly painted landscapes and other works that formed the basis of the exhibition. As such not a brilliant new idea, but another variation of a continuing investigation of the Australian bushscape.^[2]

7. The Daubists re-used the work of other people as a basis for this analysis in much the same way as lots of artists recycle all sorts of found objects and ready-mades. Their art form involved painting directly onto the canvasses of other artists, and in some cases cutting up the original and rearranging the segments.
8. In the first exhibition of Daubism in 1991, Armstrong painted a crop circle over a painting of the Olgas and called the resulting work, Crop Circles on a Bannan Landscape.[3] He also inserted an inverted crucifix over a painting of the Flinders Ranges by Bannan, and renamed the work The Crop Circle Conspiracy Landscape. He also subsequently cut up a painting by Bannan and used the pieces to form a new work, which depicted the Queen holding a wine glass and carrying out an obscenity. In the first Adelaide exhibition, Manne Schulze daubed photographs. He moved onto reusing found paintings in the follow-up show. The other two painters - Chris Gaston and Andy P - produced, in their own judgment, 'sloppy' pastiches of landscape paintings. [3]The dispute over Daubism was a microcosm of a larger debate about appropriation going in the artistic community. The anthology, What is Appropriation?, gives a sense of the range and diversity of appropriation art within Australia.[4] The practices of quotation, borrowing, and copying have been employed in a diverse range of contexts - landscapes, political art, feminism, ethnicity, race and identity. Its practitioners include post-modernists like Imants Tillers,[5] queer painters such as Juan Davila,[6] digital photographers such as Hou Leong[7] and Indigenous iconoclasts - Gordon Bennett,[8] Destiny Deacon,[9] and Tracey Moffatt.[10]
9. There has been a division within the artistic community about the legitimacy of such methods. The conflict over Daubism touched upon the anxieties about authorship and copying that were present in the artistic community.

Aesthetics

10. The dispute over Daubism prompted a debate in the artistic community over the nature of landscape painting in Australia. The romantics depict nature as an Arcadia, an idyll, a pastoral scene. In his painting of Olgas, Bannan hopes to inspire sublime feelings of awe. He suggests that the Australian landscape is a wilderness untouched by human contact. The modernists are interested in the alienation of people from nature. They emphasise the intrusion of urban expansion and industrialisation onto the rural landscape. The post-modernists go further and claim that nature is a simulation in the age of mass media. By superimposing a crop circle onto a painting of the Olgas, Armstrong suggests that the natural landscape is not a sublime wilderness untouched and unsullied by human contact. He indicates that the pastoral image is a product of invention, paranoia and trickery. The crop circle is a symbol of paranormal superstitions, conspiracy theories, and scientific hoaxes.
11. Bannan defended his work in terms of romantic authorship, individuality, and possession. He emphasised the professional status of the artist: 'My concern is the principle involved in someone defacing or altering a professional artist's work, whether good or bad, and exhibiting it under his own name and creative output.' [11] Bannan spoke about the appropriation of his work in terms of violation and desecration. He felt that Armstrong had done the equivalent of 'adding some drivel to Shakespeare's Macbeth and calling it your own'. [12]
12. The literary comparison to the Bard is an interesting one. Bannan assumes that Shakespeare's Macbeth is a work of romantic genius and originality, and by extension suggests that his own art deserves a similar respect. However, he overlooks the evidence that the Bard borrowed much of his material for the Scottish play from other historical and dramatic works. [13] Bannan was conscious that he might be portrayed as encouraging censorship. He declared that he was not an enemy of any art school and was a champion of all art. However, he noted: 'I don't think anyone has the right to grab anyone else's painting and do what the hell they like,

which indeed is what happened'.^[14] The Adelaide artist ignores that much of modern art and post-modern art is based upon the reuse and re-cycling of past work.

13. The Daubists were critical of the romantic ideas of authorship and creativity. Schulze declares:

The notions of the artist as a sublime creator and his/her art being sacrosanct, as well as the still prevalent pseudo-religious veneration and relic-like treatment awarded to some art objects, can be traced back to social conditioning.^[15]

He was unimpressed by the display of wounded professional pride by Bannon.^[16] Furthermore, it was suggested that Bannon was being a little precious about the sanctity of the art. It is not uncommon for painters to paint over another canvas. Bannon himself acknowledged that in his student days he bought canvases and stretches at sales and painted new paintings over other works. He said: 'But I never added, detracted, or trivialised another's work or held it up for ridicule'.^[17] Even a painter who espouses romantic ideals of authorship and creativity is not above a form of Daubism.

14. Schulze is well aware of a long standing tradition in modernist art to appropriate pre-existing images - the ready-mades of Dada, the theft of popular culture in pop art, and the political subversions of the Situationists.^[18] He has been particularly influenced by the work of the Danish Situationist Asger John:

The person who should be mentioned as the daddy of Daubism is the Dane Asger Jorn. He was a member of a subgroup of the Situationists, the Affichists, in the late fifties and early sixties. They were interested in the basics, what makes art art. Stuff like: why is it that graffiti is considered vandalism, while quite similar material is presented in galleries for good money? Specifically they were into tearing apart and then reassembling of the brightly coloured posters (affiches) that were thrown up by the infant consumer societies in post World War II Europe. And out of his interest in graffiti, Asger Jorn started to paint over other people's paintings. He even had a name for the products: detournements, which translates as diversions. In line with the revolutionary vibes of the sixties he intended them to be conscious investigations into plagiarism and subversion. Some active analysis of some of society's value systems, I guess.^[19]

15. The Daubists are inheritors of the modernist movements of Dada, pop art, and Situationism. They share a similar anarchic approach; they use ready-mades; and they also display a subversive attitude towards the political and economic system.

16. Under attack in the media, Armstrong claimed that the paintings made 'a classic post-modern art statement'.^[20] He said: 'In fact, I would probably go as far as to say that they probably signify the death of landscape painting'.^[21] Schulze concurred with Armstrong that Daubism belonged to the movement of post-modernism. The practices of the group serve to undermine notions of authorship, originality, and art. Schulze explains that Daubism was sympathetic to post-modern art theory:

Daubism needs to be seen in this tradition of inquisitive investigation into the very nature of art. The Daubist act of over-painting, or more generally, the re-using and recycling of originals sits comfortably with this analysis. It is a neutral and clinical process which does not intend to ridicule or 'deface' the original (although the appearance of the original might be changed in the process), or tarnish the honour and reputation of the author of the original. Instead of being an act of philistinism, the Daubist principle has been and still is to embrace original material which would not have seen the inside of an art gallery under normal

circumstances, and by re-contextualising it, to lift it to a new plane so it can be appreciated from a fresh point of view. Daubism creates the new by using the old.
[22]

17. However, the claim by the Daubists that landscape painting is dead is contentious. There remain a number of promising artistic modes and methods with which to investigate nature - the minimalism of Fred Williams,[23] the hyper-realism of Jeffrey Smart,[24] the lambent work of Mandy Martin, the figurative painting of Gary Sheard,[25] and the naivety and whimsy of William Robinson.[26] In light of such work, this pronouncement of the death of landscape painting seems to be hyperbole.
18. However, there has been resistance from some critics to the theories of post-modernism practised by groups such as the Daubists and featured in critical art theory journals such as *Art & Text*. In his career as a reporter, art critic, and television presenter, Robert Hughes has inveighed against the evils of post-modernism.[27] He abhors post-modernism because it has come to challenge the fundamentals of his artistic faith: firm critical standards for art, based on the premise of a demonstrable tradition of great works or masterpieces; a belief and a pride in the unity and continuity of Western art, the possibilities of moral or spiritual or social or political meaning in art.[28]
19. However, Robert Hughes has been hoist by his own petard. He was accused of plagiarising a review of the exhibition held at the National Gallery of Australia, 'New Worlds from Old, 19th Century Australian and American Landscape Painting', by Patricia Macdonald in a column in *Time Magazine*. [29] In response, Hughes offered a humble apology to the author. He observed: 'I am not a great believer in post-modernist "appropriation" and I can only ask you to believe that this was due to inattentiveness, and not to premeditated larceny'. [30] His defence was that the taking of the review was excusable because it was unconscious. It is little wonder that the art critic was the target of the Daubists in their latest exhibition in 1997.

Ethics

20. It is common for artistic disputes between artists to be settled, if not resolved within the visual arts community of painters, critics, dealers, gallery owners, and curators. The members of the society can be held accountable to the ethical standards and norms of their peers. Therefore, along with taking legal action for copyright infringement, Bannon could have addressed his art peers about the daubing of his paintings. Social pressure could have been placed on the Daubists to offer an apology, relinquish their exhibition space, or lose public funding from the government arts funding bodies. If such action was ineffective, the landscape painter could still take legal action.
21. Bannon did argue that the daubing of his painting was a violation of 'natural justice', quite apart from being an infringement of copyright. He alleged that the Daubists had transgressed the ethical standards and norms of the artistic community, and should therefore be treated with opprobrium.
22. Armstrong denied that it was his intention to cause offence: 'It has got nothing to do with that Charles Bannon painted it or that he is the Premier's father or anything personal at all'. [31] Similarly, Schulze absolved his colleague of any ethical wrongdoing or misdemeanour:

As far as I am concerned, driller Jet Armstrong did not intend to make fun of Charles. He just did something to paintings that were rejected at auction and then passed on to him. And in no way did he try to obscure the identity of the original. The whole thing was just blown out of proportion by the legal action of the first family and by Charles' idea of what was going on, which totally missed the point.

[32]

23. However, in the face of mounting acrimony, Armstrong sought to mollify his critics. He agreed that he was morally bound to ask Bannon for his permission to carry on with the exhibition, even though he was not legally bound. However, Armstrong stopped short of giving an apology. He was not ready to disown the work that he had created according to the principles of Daubism. Bannon was not placated by this conditional sign of respect granted by Armstrong.
24. Publicity of the dispute was not without consequences for the artists. The Daubists were first exhibited at the Chesser Gallery by Garth Pye; and then at the Art Images Gallery by Colin Burgen. However, the group then encountered difficulties in finding space for their exhibitions in Adelaide. Vena Swain said that she would refuse to hang such paintings because it was reprehensible.[33] Another Adelaide gallery owner Paul Greenaway was unwilling to hold an exhibition of Daubism. Schulze observed: 'Paul Greenaway still thinks that the whole Daubism idea was pushed to a state of fame and infamy by The Adelaide Advertiser, and that there is not much substance behind it partially because it has been done in various forms in the past'. [34]
25. The Adelaide galleries seemed reluctant to exhibit Daubism because they did not want to be tarnished by any controversy. They were also concerned about the political and legal repercussions - such as the threat of a legal action for secondary infringement of copyright for displaying illegal work.[35] The Sydney galleries demonstrated less concern. The Michael Nagy Gallery was happy to show the third Daubism exhibition. This Sydney show was unaccompanied by any political scandal or legal action at all.
26. The Daubists and other appropriation artists can also be discouraged by a lack of public arts funding from government arts bodies. The Australia Council plays an active role in copyright law in terms of arts policy and funding. Its mandate was to carry out the restructuring necessary to ensure that Australian artists' incomes are improved by new technologies, that Australian copyrights are exploited to the full and that Australian talent is employed in the new broadcasting technologies.[36]
27. The Australia Council also funds a number of advocacy organisations, including the Australian Copyright Council, the Arts Law Centre of Australia, and the National Indigenous Arts Advocacy Association. The State and Territory Government arts agencies also match this funding. The Australia Council has campaigned for the introduction of moral rights. It released a booklet in 1991 as a first step in educating the artistic community about possible abuses of rights and the moral obligations one artist should observe when dealing with the work of another.[37]
28. The Australia Council's process of peer assessment is also informed by a respect and deference for copyright law. The denial of public funding would be a discouragement to artists who practice appropriation. The Australia Council has also influenced State and Territory Government arts agencies in regard to this policy about copyright infringement.
29. The dispute over Daubism was not resolved in the artistic community. More prominent artists have weathered storms of appropriation because of their status and reputation in the artistic community. Imants Tillers, for instance, has received little criticism for his strategies of appropriation. His paintings continue to receive glowing critical reviews; his paintings are hung in respected Australian galleries; and his work is sold for significant sums of money by dealers. By contrast, the Daubists were more vulnerable to ethical criticism and condemnation because they were on the fringe of the artistic community. As Schulze points out: 'driller Jet Armstrong was an outsider in the Adelaide art scene, because he never attended art school.

And suddenly this self-acclaimed artist, without the formal tertiary education and without any help from friends or cronies, overtook all these important-artists-in-waiting, and lots of people couldn't handle it'.[\[38\]](#)

30. Yet, the Daubists had little to lose because they were outsiders. They have no expectation of government funding or easy access to exhibition space. As a result, Bannon was dissatisfied with the ethical measures available against the Daubists. He shifted the dispute from the visual arts community into the realm of the legal system.

PART 2 - SHOOTOUT AT THE ERIC MINCHIN LANDSCAPE: LEGAL RELATIONS

31. Charles Bannon was represented in the Daubism dispute by the barrister, Robyn Layton. She has a distinguished record as a solicitor, a barrister, and a policy-maker. After starting off as a solicitor in the South Australian law firm Johnston Withers, Robyn Layton went on to become a barrister, and a Queen's Counsel. She specialises in industrial relations law and administrative law. Furthermore, Robyn Layton has a close personal connection to Bannon. She was the first wife of his son, John Bannon. On behalf of Bannon, Layton sought an interim injunction from Justice von Doussa, the Federal Court judge hearing the case over the Daubism dispute. His Honour granted an interim injunction against Armstrong and his gallery to stop them from exhibiting the painting or selling it to buyers.

Economic Rights

32. In the legal action, the Daubists were in a strong legal position, because it did not appear that they had violated the economic rights of the artist, Bannon. They had not used or reproduced a substantial part of his work. An arts lawyer, Natasha Serventy, commented that the issue of copyright infringement did not arise if the owner of the painting had not reproduced the work of Bannon:

If Armstrong owns the works and has the property right to the works, he has the right to do with them what he will and that includes cutting them up, painting them over, improving them, destroying them, exhibiting or selling them. But the fact that Charles Bannon is disturbed by what has happened to his work is in fact evidence, if you like, for some aspects of moral rights. It seems as though the whole idea of it is quite a subversive one and more of a political statement than a desire to improve upon the work.[\[39\]](#)

33. A recent Canadian decision reinforces this point about the right of reproduction. In the case of *Galerie d'Art du Petit Champlain v Theberge*, the Supreme Court of Canada considered whether an artist could stop galleries from transferring authorised reproductions of his artistic works from a paper poster to a canvas.[\[40\]](#) The majority of the Court concluded that no new reproductions of the artist's work had been brought into existence, and therefore there was no infringement of the artist's right of reproduction. It took the view that Parliament intended modification without reproduction to be dealt with under provisions dealing with moral rights rather than economic rights. Binnie J observed: 'Economic rights should not be read so broadly that they cover the same ground as the moral rights, making inoperative the limits Parliament has imposed on moral rights'.[\[41\]](#)
34. First the Daubists question the relevance of the legal culture to artistic practice. Schulze comments:

It becomes very difficult for the law to have clearly justifiable opinions. What a

judge would be interested in would be the classical issues - was there an infringement of copyright? was it done for financial gain? was the integrity of the original author harmed? Judges can only assess situations according to established criteria. Obviously, contemporary art is about establishing new criteria. The legal side cannot see all these things, because they cannot be specialists in a field that hardly exists. But it should be the job of committed artists to establish new perspectives and paradigms.[42]

35. An artist will infringe the economic rights of the owner of an original work if they use or reproduce a substantial part of that work without permission. For instance, the Canberra artist Hou Leong encountered legal difficulties because he did not first get permission or authorisation before scanning his Chinese face onto a series of copyrighted photographs of Australian icons and archetypes. [43] The photographer of the 'I'm Australian as Ampol' image asserted his right of restraint as grounds for payment of a licence fee. Hou Leong was advised by the Arts Law Centre of Australia that he was open to legal action for a copyright infringement because he had reproduced a substantial part of the work. He was forced to negotiate and gain copyright permission to use the series of photographs.
36. Second, the Daubists support an expansive reading of the doctrine of fair use. In reply to such accusations, artists engaged in appropriation have sought protection from the defence of fair dealing. They claim that they are not guilty of copyright infringement because they are engaged in criticism and comment. However, there has only been limited protection provided under the defence of fair dealing.
37. The United States decision of *Rogers v Koons* is a cause célèbre about copyright law and post-modern art.[44] The case involved a photographer, Art Rogers, who alleged that an artist, Jeff Koons, and his gallery had infringed his copyright in a photograph of a couple with a litter of puppies by creating a sculpture called a 'String of Puppies'. Jeff Koons argued that he was part of a tradition of post-modern art, which incorporated popular images and icons into art work to comment critically both on the incorporated art and the political and economic system that created it. The Court of Appeals rejected Jeff Koons' defence that his work was a fair use of copyright material for the purposes of criticism or comment. It held that the copied work must be, at least in part, an object of the parody, and not just a critique of society. It found that Jeff Koons' sculpture was not a parody of the photograph or its owners, although it accepted that the work was a satire of society. The Court of Appeals stressed that Jeff Koons did not transform the original work by turning the photograph into a sculpture. It found that the work was just a copy or a pastiche. The Court of Appeals was also hostile towards Jeff Koons' substantial profit from his intentionally exploitative use of Rogers' work. It emphasised Jeff Koons' conduct in tearing the copyright mark off a Rogers notecard prior to sending it to the Italian artisans to create the work.
38. The case of Jeff Koons has divided and fragmented the artistic community.[45] He has been hailed as a martyr in the cause of artistic expression and free speech by some commentators. The artist has also been condemned as a pariah who has flouted the authority of copyright law with contempt. It might be thought that the Daubists would show some solidarity with Jeff Koons given that they are both working within the framework of post-modern art. However, that it is not the case. In an interview, Schulze displays little sympathy for the plight of Jeff Koons, because of a belief that his work undermines the cause that they are supporting:

The Jeff Koons case is a very strange one. Jeff Koons is basically a businessman. He has come up with a few striking post-modern icons - like his famous bunny. But I do not think that he is the best artist on the planet. That is my personal viewpoint. In this specific case, he obviously used a photograph of a distinct photographer. He did not do anything to that photograph. He just had it turned

into a sculpture by artisans. My guess would be that the original inputs and ideas came more from the photographer than from Koons who just got hold of the photograph and passed it onto his carvers. In this particular case, my personal opinion is that the photographer should have received copyright fees. Jeff Koons went to court, stonewalling, insisting on his right of artistic expression. He has done more harm to the cause than anything else. It is a clear breach of copyright as far as I am concerned.[46]

39. Schulze attempts to distinguish the case of Jeff Koons from the Daubists in a number of respects. He does not want the group to be associated with this disreputable artist. First, Schulze emphasises that the Daubists are interested in working with original artistic works. They are not interested in the mass marketing of copies. Second, Schulze stresses that the Daubists are engaged in the transformative or productive use of copyright works.[47] He suggests that Jeff Koons is merely involved in the reproduction of artistic works. Schulze falls back on the old distinction between money and art to distinguish between a 'good' and a 'bad' post-modernist. He claims that Jeff Koons is complicit with the capitalist marketplace. By contrast, Schulze suggests that the Daubists display a critical engagement.
40. Third, the Daubists are rather ambivalent about whether artists engaging in artistic appropriation should pay fees to obtain licenses to use copyright work. Schulze is concerned that the visual arts has become dictated by commercial interests, so that art has been turned into a commodity. However, he concedes that private contracts between owners of art and creators can prevent the grievance caused by the possibility of having one's work recycled. By contrast, the professional organisation for visual artists is much more enthusiastic about licensing of copyright work. Since the late 1980s, NAVA advocated the establishment of a visual arts copyright collecting society. It has argued that collective administration would overcome visual artists' lack of understanding of legal rights, weakness of bargaining position, and inadequate enforcement mechanisms. After a report by Shane Simpson, the Federal Government set up a collecting society for the visual arts called VI\$COPY in 1995.[48] It was set up under the Creative Nation program, and continues to receive support as a new company in the copyright industry from the current government. It remains to be seen whether VI\$COPY will be a viable broker between copyright owners and users.
41. In light of the strong position of the Daubists, the lawyers acting for Bannon were forced to rely upon radical arguments about false attribution and defamation.

False Attribution

42. In the absence of any moral rights legislation, Robyn Layton brought an action for damages or an injunction under s 194 of the Copyright Act 1968 (Cth) on the grounds that there was a breach of duties in relation to false attribution of authorship. She argued that Armstrong and the gallery was in breach of s 190 of the Copyright Act 1968 (Cth) because the painter superimposed his own signature over the name of Bannon, in such a way to imply that he was the author of the work. Alternatively, she argued that Armstrong and the gallery was in breach of s 191 of the Copyright Act 1968 (Cth) because they were falsely attributing the authorship of a work that had been altered without the permission of the copyright owner.
43. Such claims seem to be well-founded. However, the case law suggests that this set of statutory provisions only have a limited operation. In *Crocker v Papunya Tula Artists*, the Federal Court rejected a claim of false attribution in relation to the authorship of a commentary on a catalogue of Aboriginal art, stating that s 191 required a 'material alteration' to have been made and that the alterations in this case were minor and did not affect the character or reputation of the author in any way.[49]

44. Furthermore, the statutory provisions at the time conferred no positive right on an artist to be known as the author of the work. Bannon would have no remedy had the signature been erased altogether. There would have been nothing to stop the Daubists from daubing over his paintings in the future if they got rid of his name altogether. However, that loophole has been closed with the introduction of the Copyright Amendment (Moral Rights) Act 2000 (Cth).

Defamation Law

45. Due to the limited moral rights protection available, Robyn Layton also relied on defamation law to protect the artistic integrity of the painting by Bannon. She argued that this was a 'ground-breaking action'.^[50] There were a number of limitations in this case.
46. First, defamation law has been applied to the written and spoken word and cartoons but it is not usually applied to artistic works. However, in spite of the unusual nature of the publication, the form in which the defamation is communicated is irrelevant.
47. Second, the Daubists argued that they were not attacking the personal reputation of Bannon or his art style at all. Rather, they were commenting upon the nature and philosophy of landscape painting.
48. Third, although Bannon may have considered that the Daubists had harmed his reputation, it is possible that a reasonable person would not consider it sufficiently offensive to warrant a finding that the defendant had been defamed. Fourth, in defence to the action in defamation, the Daubists could have raised the defence of fair comment.^[51] They could argue that the comment is a statement of opinion, fairly held, on a matter of public interest. The Daubists could give range to idealistic notions of the freedom of artistic expression and political speech. Schulze said: 'It would equal censorship and constitute a serious restriction on the freedom of expression'.^[52] However, there would be a debate over whether the Daubists were fair towards Bannon, or motivated by feelings of spite or ill will.
49. Finally, even if the defamation action was successful, there would be no guarantee of anything more than nominal damages. In the contemporaneous case of *Meskenas v Capon*, the court found that Edmund Capon had defamed in his criticism Vladas Meskenas' painting of Rene Rivkin, which was entered into the 1988 Archibald Prize competition for portraiture.^[53] However, it was a pyrrhic victory because the jury only awarded \$100 to Meskenas. This fate could have also befallen Bannon.

Summary

50. In the end, the dispute was resolved between the parties outside the arena of the Federal Court. So rather than rely upon the decision-making ability of the Federal Court, the barrister Robyn Layton preferred to maintain control over the controversy, and seek a settlement. Her claims about copyright law and defamation law were allowed to stand unopposed and unchallenged outside the courtroom. The lawyer Layton brokered a settlement. A buyer bought the work for \$650 on the condition that it was returned to Bannon. The identity of the purchaser was anonymous - the artist denied that he had bought the painting back himself. Armstrong agreed to settle the case with Bannon because he could not afford to run a legal case. He was upset about the lack of access to justice:

I was placed in a situation where I had no other option but to accept. I don't have the money to fight for my right to express myself. I'm also upset that Charles Bannon will not let people decide for themselves whether or not what I've done is wrong. I have sold it. It is now out of my control.^[54]

51. Armstrong received bad legal advice, and was scared that going to court was going to cost him a lot of money. He did not know of his strong legal position that he had not reproduced the original work, and he had criticised the work, not the author. The rules of copyright law, and defamation law, were undermined by legal practices. Robyn Layton used the threat of legal power to persuade Armstrong to submit and accept her offer of a settlement. Her opponents did not have the legal expertise to question whether this claim was valid.

PART 3 - THE CROP CIRCLE CONSPIRACY

LANDSCAPE: THE MEDIA

52. It is striking that the Daubism dispute was played out not only in the artistic community and the legal system, but also in the media. Bannon and the Daubists debated the merits of the legal action, and the need for moral rights legislation in the public domain. The media was guided by a number of norms and standards about appropriation. Robert Hughes comments that the public is 'conditioned by its museums, by the art market and by the pervasive journalistic attitude that finds works of art interesting only if they are fabulously expensive or forgeries, or ideally both'.^[55]
53. The mass media was not interested in the aesthetic issues about Australian landscape painting or ethical questions about the rights and wrongs of Daubism. It paid scant attention to the legal technicalities about copyright law and defamation law. The mass media was interested in the political and economic connotations of the Daubism dispute. It emphasised that the daubing of the paintings was an attack upon the personal reputation of Bannon, the first family, and the integrity of the State of South Australia. It also stressed the financial rewards at stake in the dispute.

Moral Rights

54. In the wake of the Daubism dispute, Bannon sought to highlight the lack of moral rights legislation in Australia: 'It was my firm intention to bring this ambiguity and discrepancy in the law into public arena and politicise it'.^[56] Susan Reid, of NAVA, supported a call by Bannon for more protection for the moral rights of the artists.^[57] The professional organisation agitated for the introduction of a scheme of moral rights.
55. The Adelaide Advertiser provided extensive coverage of the conflict, and its developments. Samela Harris broke the story about the Daubism dispute in her article 'Arts Uproar over Defaced Painting'.^[58] It received generous front-page coverage, with a picture of Armstrong with his controversial work. The following day there was a discussion of the litigation brought by Bannon against the Daubists in the Federal Court.^[59] A week later, there was a report upon the resolution of the dispute.^[60] They emphasised the wider implications of the dispute for the introduction of moral rights legislation protecting visual artists. Furthermore, The Adelaide Advertiser has been willing to revisit the aftermath of the Daubism dispute. It reported upon a new controversy, in which Armstrong had cut up one of the paintings of Bannon.^[61] It also covered the new exhibition of the Daubists in The Adelaide Advertiser.^[62]
56. The stories by The Adelaide Advertiser were picked up by national newspapers, such as The Australian^[63] and The Age.^[64] As a consequence of this attention, the Daubism dispute went beyond the local confines of South Australian society, and became a matter of national importance.
57. The media represented the Daubists as transgressive artists, calling them 'vandals', 'graffitists' and 'thieves'. This imagery lent support to Bannon, and his push for the introduction of moral

rights. Schulze reflects that the media frenzy shifted the focus of the dispute away from the analysis of the significance of landscape painting in the post-modern world. He observes that 'the act of recycling the work of one artist by another was portrayed as cultural vandalism, and the symbolic meaning of over-painting the work in question was interpreted as a personal attack against not only Bannon, but the whole first family and even the integrity of the South Australian Government'.^[65]

58. In response to this media attention and vigorous lobbying from the visual arts community, the Federal Government released a Discussion Paper on moral rights. Not surprisingly, the prime example in the Discussion Paper was the Daubists. It presumes that the dispute over Daubism was a representative case of moral rights violation.^[66] It cites the dispute as evidence that there was insufficient protection under the present law, and there is a need for the introduction of a scheme of moral rights protection. The Federal Government introduced the Copyright Amendment Bill 1997 (Cth) into Parliament. However, after protest from the film industry, this bill was withdrawn. After further consultation, the Federal Government introduced the Copyright Amendment (Moral Rights) Act 2000 (Cth), which has since passed into law.
59. Under a regime of moral rights, Bannon could maintain that Armstrong was culpable for violating the moral right of attribution.^[67] He could allege that the Daubist failed to name him as the artist of the paintings in a clear and reasonably prominent way. In support of his case, Bannon could point out that Armstrong erased his signature, and he was not given enough credit. He could complain that it would be unsatisfactory that the artist's signature alongside that of Armstrong because dual attribution would give rise to uncertainty and confusion. In reply, the Daubists could claim that on occasion they do provide proper acknowledgment of the origins of the paintings that they daub. For instance, Armstrong refers to Bannon in the title of the painting, *Crop Circles on a Bannon Landscape*. The problem here seems one of excessive attribution. However, the Daubists are rather contrary about the credits that they provide for the paintings. They supply their own titles for the daubed works; they do not refer to the originals. Moreover, the Daubists sometimes omit to acknowledge the source of the artistic works at all. For example, Armstrong renamed a daubed painting of the Flinders Ranges by Bannon, *Crop Circle Conspiracy Landscape*. Such inconsistencies could expose the movement to legal actions.
60. Furthermore, Bannon could also claim that the Daubists were guilty of the infringement of the moral right of integrity.^[68] He could give range to his romantic feelings of violated authorship and complain that his work was subjected to derogatory treatment, which was prejudicial to his honour and reputation. The Daubists could claim that the act of over-painting is a neutral and clinical process, which does not intend to ridicule the original, or tarnish the honour and reputation of the author of the original. They could reiterate their claims that recycling a work of art will lift it into a new context so that it can be appreciated from a fresh point of view. Although they might take such artistic intentions on notice, the courts might not take kindly to the claims of the Daubists. They would be unwilling to accept that the defacement of a painting was 'reasonable in all the circumstances'.^[69]
61. It is possible that the courts would also take prim objection to the salacious content of the work of the Daubists. For instance, it could take offence at the Bannon painting cut by Armstrong and turned into a picture of the Queen holding a wine glass and carrying out an obscenity. Thus the Daubists could be punished under the moral rights regime for failing to respect the integrity of the work that they are using to daub over. In the wake of the dispute, Schulze became interested in the legal issues surrounding the Daubist affair:

Personally, I only became more interested in the legal issues a few years after the Bannon/driller incident when I ended up having a relaxed lunch with an intellectual property rights lawyer from Adelaide, Bill Morrow.^[70] He put the

whole issue into context for me, and it dawned on me that there were dodgy assumptions and inconsistencies in the laws applying to Daubism. That is when I decided to summarise my own view point. I thought that there was a lack of insight in legal circles of what one can do or even should do in the visual arts. If nobody else does it, who is going to do it? I thought it had to be me.[71]

62. Enlightened by this dialogue, Schulze became a self-publicist, campaigning for copyright law reform in the media. He spread his message on underground channels of communication - such as manifestos, magazines, and alternative radio. The Daubists have sought to correct the public record. However, they have been a little more cautious and circumspect in the managing the media.
63. Schulze released a polemical tract entitled, 'The Death of Daubism? The Case against the Introduction of Moral Rights'. He offers a historical background to the push for the introduction of moral rights, and a partisan account of the dispute over Daubism. Schulze questions the philosophical basis of moral rights, which posits a personal connection between the artist and their work. He observes that the treatises of Idealist philosophers like Hegel and Kant are of little significance for artistic practice in the materialistic reality of the late 20th century. Schulze concludes that the moral rights legislation will be unable to outlaw Daubism:

Whatever the outcome of the current debate, artists will keep re-using 'found' images. Daubism is only the most concerted effort based on this concept whose time not only has come, but which is well advanced and appears in many forms and disguises. Outlawing Daubism would lead to a rather silly cat and mouse game which ironically could represent the perfect epitome of the current state of the arts.[72]

The article was featured in Artlines, a journal published by the advocacy organisation Arts Law Centre of Australia. It draws upon a mixture of art history, legal doctrine, and journalistic opinion to communicate its message to the public. The article attracted the attention of the Arts Law Centre of Australia.[73] He also conducted interviews with a couple of community radio stations in the Sydney region.

64. In protest, the Daubists threatened to exploit the waiver provisions in the Copyright Amendment Bill 1997 (Cth), which provided that the creator can waive all or any of his or her moral rights for the benefit of everyone, a particular person or persons or a particular class of persons.[74] They saw the waiver provisions as an opportunity of subverting the moral rights legislation that was proposed by the Federal Government. Schulze planned to attach waivers to the works exhibited at his new exhibition to enable buyers to engage freely in some daubing of their own. He would be flattered if another person would have daubed one of his own works:

If someone would do something to one of my art works, and re-exhibit it, I would say, 'Beautiful'. Instead of being stored away or exhibited on a lounge room wall, it again sees the light and is re-exhibited. I would be pleased that someone would think that my work is worthy of re-using. Obviously that indicates what different views there are about one's personal outpourings.[75]

65. The Daubists hope to encourage an endless process of recycling of art works. However, the waiver provisions were removed from the moral rights legislation - mainly due to the protests for screenwriters in the film industry. However, there were a number of measures designed to control the operation of moral rights - including consent clauses,[76] and industry agreements.[77] So the Daubists would now have to give specific consent to let individuals alter or modify their artistic works.

Right of Resale

66. Not only does the Daubism dispute touch on matters of moral rights, but it also raises the questions of a right of resale. In this case, Bannon was upset that Armstrong had been given some of his paintings at an auction, daubed them, and sought to sell them for money at the Daubists exhibition. Quite apart from his moral concerns about the use of the work, the painter was concerned that there was no possibility of any economic recompense from the resale of the paintings. The newspaper reports made much of the fact that Armstrong was selling the work for \$650. Yet, without a right of resale, the Daubist was legally entitled to sell someone else's work and even make a profit.
67. NAVA has passionately lobbied the Federal Government to implement a right of resale or the 'droit de suite' in Australia, which is provided for under the Berne Convention for the Protection of Literary and Artistic Works 1886.[78] It points out that there is a continuing problem with the lack of legislation to protect the right of creative producers to receive a royalty from the subsequent sales of their work after its initial purchase. NAVA claims that copyright law discriminates against visual artists because it is based upon the model of literary works.[79] It argues that artists are unfairly treated in comparison to authors and composers because the value of the art depends upon the uniqueness of its physical embodiment, not its mass reproduction - as in books or sound recordings. NAVA argues that a right of resale would remedy the prejudice against visual artists under the present system of copyright law. It believes that the droit de suite would give visual artists the counterpart to the right of reproduction or performance in other art forms. NAVA maintains that the right of resale is a way to ensure that the visual artist is fairly rewarded and is encouraged to create further works. It would allow the visual artist to maintain a continuing relationship with their work.
68. In the Report of Contemporary Visual Arts and Craft Inquiry, Rupert Myer recommended that the Commonwealth Government introduce a resale royal arrangement.[80] He observed that artists would obtain a substantial benefit from such a scheme. The case for a right of resale was particularly strong for Indigenous artists. Myer advised that a working group be established to analyse the options for introducing a resale royalty arrangement. He maintained that the proceeds of resale royalties should be paid directly to the individual artists, rather than to a communal fund. Furthermore, he recommended that the Federal Government to conduct a tender to determine an appropriate body to administer the resale royalty arrangement. There has been much debate in the artistic community about the merits of a right of resale.[81]
69. In the face of these calls by the professional association for visual artists, the Daubists have been opposed to the introduction of a right of resale in Australia. Schulze argues that visual artists do not deserve special treatment. He points out that the idea of droit de suite is based upon romantic myths about the artist. Schulze contends that the right of resale will benefit the elite group of art stars and celebrities who are popular and command high prices for their current works. He argues that such a right would not benefit the mass of artists who really need help:

The idea of passing on some fee to the artist each time a work of art is sold has something to do with the bad financial situation of the artist. If the artist is originally poor, and later in life becomes well-established, the logic is that the artist should participate in the gains made from his or her earlier work... What I do not understand is why artists should receive a special position in society, especially since this special position is not maintained in discourse and discussion about art. It is only brought up in this specific context. Who really cares about the masses of artists on this planet apart from the top few percent who are treated like kings and queens? The masses of artists are basically just ignored. The argument about the right of resale is brought up whenever it suits the establishment - the

gallery system, the museums, and the wealthy artists. I think that it just becomes a specific administrative tool.[82]

70. However, Schulze does not mention the impact that a right of resale would have on Daubism and similar artistic practices. It is arguable that the droit de suite would act as a financial disincentive to the art of appropriation because it would increase the cost of purchasing the raw materials to create new art works. So it is understandable why the Daubists would oppose the right of resale.

CONCLUSION

71. The dispute over Daubism is significant in terms of formal law, even though it did not result in a binding decision of a court. It was an important discursive event. The controversy sponsored debate in the artistic community, the legal system, and the media. The experience of the Daubists provides a salutary lesson for copyright activists. It shows that a small vanguard of artists will find it difficult to bring about social change by themselves, however committed and passionate they may be. The Daubists needed to build alliances and coalitions. They could have sought to rally and organise support in the artistic community. The Daubists also required a good legal advocate to translate their artistic claims into legal language. It would have helped them fend off the legal threats of Bannon and Robyn Layton. The Daubists also recognised the importance of good media presentation. They needed access to mainstream channels of communication to press their case more forcefully.
72. The Daubist dispute touches on questions of copyright law and new technologies. Schulze comments that the artistic practices of daubing and appropriation should be set in the context of the digital age:

In this day and age the storerooms of museums overflow with deteriorating art. Digital processes and advanced printing techniques generate copies more 'real' and of better quality than the originals. Therefore the idea of trying to preserve the one exact original state of an art piece reeks of ill-founded sentimentality and impractical retro vision. The Daubists envisage an enlightened future in which it will be considered normal to recycle works of art over and over again.[83]

73. However, the Daubists are in some respects a retro, nostalgic group. They see themselves as archivists, conservationists, and curators of original works of art. The Daubists do not exploit the digital technologies of reproduction and dissemination. They are not really interested in the copies that simulate the originals. By contrast, a number of their contemporaries are wired to the possibilities of electronic art. They seek to use digital technologies to copy, manipulate, and replicate works of art out into the electronic ether.
74. The Daubist dispute also ran parallel to the controversies over the authorship, collaboration, and appropriation of Indigenous art. However, such matters were complicated by questions of racism, colonialism, and imperialism. In the Daubism debate, Armstrong argued that Australian landscape paintings were idealised visions of nature based upon inappropriate European models. He said that landscape paintings were 'white man's dreaming' and 'little pretty pictures', which only represented a small part of the world.[84]
75. In a pamphlet, the Daubists proclaim: 'One could say that white Australia itself is a daub on this continent'.^[85] They hint that Australia is a palimpsest, in which Aboriginal and Torres Strait civilisations has been written over by Western colonisers. However, the Daubists steer clear from the appropriation of Indigenous art and culture. Schulze observes: 'It becomes a bit tricky because Indigenous people have been exploited ever since Australia was settled two hundred years ago'.^[86] It would seem that the appropriation of Indigenous culture is different

in nature and kind from the appropriation of European art.

NOTES

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