

ART, ACTUALLY! THE COURTS AND THE IMPOSITION OF TASTE

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A prelude, in the form of two snapshots

How do we read art, at least in law? The traditional approach of the courts has been to disavow, or at least avoid any discussion on matters of aesthetics or connoisseurship, or more accurately *assert* such a disavowal. Because whether the courts acknowledge it or not, they actively judge art, even when they say they don't. Judging art by judges, as we will see, is not a particularly edifying spectacle, but is it better for the courts to avoid judging art? In this article, I will explore what happens when the courts grapple with the problem of judging art, but to begin, I would like to ask you to look at two snapshots of judicial entanglements with art in the form of extracts from the case law.

Snapshot One: A mass of junk

Harcourt J in *Re Pinion*:

It was said that this is a matter of taste, and de gustibus non est disputandum² but here I agree with the judge that there is an accepted canon of taste on which the court must rely, for it has itself no judicial knowledge of such matters, and the unanimous verdict of the experts is as I

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² There is no translation in the original judgment. The phrase translates as 'There can be no dispute about taste'.

*have stated I can conceive of no useful object to be served in foisting upon the public this mass of junk.*³

In the process of deciding that Arthur Watson Hyde Pinion had failed to properly establish a charitable trust, the Court of Appeal found itself caught between a judicial rock and a hard place. Courts have always asserted that they do not indulge in matters of taste or artistic quality – connoisseurship - when they are required to deal with art, irrespective of the area of law in which they have to engage. But in this decision, buttressed, it must be said, with the views of expert witnesses, Harmon LJ could not hold back from expressing the inexpressible – the judgment had to be based on the character and quality of a collection of art and other objects. His Lordship continues:

Where a museum is concerned and the utility of the gift is brought in question it is, in my opinion, and herein I agree with the judge, essential to know at least something of the quality of the proposed exhibits in order to judge whether they will be conducive to the education of the public. So I think with a public library, such a place if found to be devoted entirely to works of pornography or of a corrupting nature, would not be allowable ... there is a strong body of evidence here that as a means of education this collection is worthless. The testator's own paintings, of which there are over 50, are said by competent persons to be in an academic style and 'atrociously bad' and the other pictures without exception worthless. Even the so-called Lely turns out to be a 20th century copy.

Apart from pictures there is a haphazard assembly — it does not merit the name collection, for no purpose emerges, no time nor style is illustrated — of furniture and objects of so-called art about which expert opinion is unanimous that nothing beyond the third-rate is to be found. Indeed one of the experts expresses his surprise that so voracious a collector should not by hazard have picked up even one meritorious object. The most that a skilful cross-examination extracted from the expert witnesses was that there were a dozen chairs which might perhaps be acceptable to a minor provincial museum and perhaps another dozen not

³ *Re Pinion* [1965] 1 Ch 85, 106.

altogether worthless, but two dozen chairs do not make a museum and they must to accord with the will be exhibited stifled by a large number of absolutely worthless pictures and objects.⁴

It was junk, or in Davies LJs view, an ‘intolerable deal of rubbish’.⁵ Not surprisingly, the gift failed. These outraged sentiments – ‘junk’ and ‘rubbish’ are not unemotive terms – may be seen to be exceptional, able to be confined to the ‘facts’ of this type of case, and the special position held by courts in equity. And, surely, Harman LJ was simply approving of the evidence of the experts, without more? I do not think so; *Re Pinion* drips with an unmitigated distaste for the deceased Mr Pinion and his collection – ‘junk’ and ‘rubbish’ are not the words of the experts but of the court itself.

I will suggest that the heightened language emanating from this 1964 decision exposes a more generally disguised judicial connoisseurship that inhabits most cases dealing with art. I have intentionally chosen not to define this concept at this stage of the article, but will return to its character and influence later.⁶ But for the law itself, the decision stands for the imposition of a particular type of aesthetic sensibility in relation to the establishment of charitable trusts for the establishment of museums.⁷ Anything other than an accepted ‘canon of taste’ has the potential to be found wanting. The decision, in an oblique way, echoes infamous exclusionary exhibitions, which failed to meet accepted canons of taste such as the 1863 Paris Salon des Refusés, an art exhibition of excluded material. The paintings included in that exhibition included now prized, canonical, Impressionist works, including Manet’s *Le déjeuner sur l’herbe*. It’s amazing what time and space can do to the eye, and what can be seen once new ideas permeate the mind. We can easily read Impressionists because we know what to look for. To a mid 19th century audience, it was impossible to understand these images. They simply looked unfinished, mere sketches, and lacking in quality.

⁴ *Re Pinion* [1965] 1 Ch 85, 106 – 107.

⁵ *Re Pinion* [1965] 1 Ch 85, 108.

⁶ Under the heading: *The Monkey with the Magnifying Glass?*

⁷ Charities Commission, *RR10 - Museums and Art Galleries* (Version August 2002), <<http://www.charity-commission.gov.uk/publications/rr10.asp>>, moderates these concepts for contemporary purposes, but treats *Re Pinion* as good authority for issues of ‘merit’.

Snapshot Two: Our own uninformed opinions

The Court in *J B Hawkins Antiques*:

*Without professing to any expertise in the fine art field, it was obvious to each of us, even from these illustrations, that View of the Town of Sydney is considerably more detailed and more aesthetically pleasing than Sydney Capital ... our own uninformed response to the illustrations of these paintings conforms entirely with the views expressed by [two experts].*⁸

It is rare for a court to undertake an aesthetic discursus as part of its process of decision-making but in *J B Hawkins Antiques and Minister of Communications and the Arts*⁹ the Administrative Appeals Tribunal ('AAT') takes on the role of finder of fact as part of a review of a Ministerial decision under the *Protection of Movable Cultural Heritage Act 1986* (Cth) to refuse the grant of an export permit for a painting depicting a colonial scene. In deciding that the Minister was correct to refuse the permit, the AAT waxed lyrical over the subject painting - *View of the Town of Sydney* dated between 1799 and 1802 - and its aesthetic qualities, when tested against the quality of another lesser quality painting dealing with the same subject matter - *Sydney Capital*. The case hung on the question of aesthetics, and a clash between two sets of experts. Mr McCormick for the applicant seeking the grant of the export permit liked both paintings, but considered neither to be 'fine' art:

We're not talking artistic merit, we're not talking about J and W Turner, we're not talking about the great topographers and painters of the late 18th, early 19th century in England, this is not what we're talking about in these pictures. We really do have to look at the artistic merit, we have to view the artistic merit of these pictures in a considered light because in England if you showed it

⁸ *Re J B Hawkins Antiques and Minister of Communications and the Arts* (1995) 38 ALD 323, 330 [32] – [33]. Curiously, a version of the painting in question was referred to in evidence in the first case dealing with art in the colony of New South Wales in 1814, *Parr v West* (Court of Civil Jurisdiction Proceedings, 1788-1814, State Records N.S.W., 5/1110 (case no. 260)).

<<http://www.law.mq.edu.au/scnsw/html/Parr%20v%20West,1814.htm>>.

I am grateful to the anonymous referee for drawing this case to my attention.

⁹ (1995) 38 ALD 323.

to an art historian in England most of them would put any of these pictures into the English provincial school style. These aren't pictures of great artistic merit.¹⁰

Two of the experts for the Minister, however, were prepared to distinguish one painting over another. Barry Pearce 'was even more outspoken',¹¹ in the words of the AAT, in his criticism of *Sydney Capital*:

He described it as 'sloppy' compared to *View of the Town of Sydney*. He does not believe, he says, that the two paintings were executed by the same hand. He thinks that *Sydney Capital* was probably painted by a 'journeyman artist who was asked to make a copy'. This painting he says is truly a 'document' rather than a work of art, and it would not matter if it lived in storage racks and was not seen by the public, because it does not convey 'the excitement of being in a place' as *View of the Town of Sydney* does.¹²

Nearly thirty years after *Re Pinion*, and half a world away, the AAT was to make an aesthetic judgment, based ostensibly on the views of experts who positively assessed the cultural significance of the subject painting, to assert a view about the quality of a painting – only to confess to having not actually seen it:

We have not seen the original painting. Had we considered it necessary to do so, we could have arranged a viewing of it at Mr McCormick's gallery. However we regarded this as unnecessary. We had access to excellent illustrations of all four paintings in Mr McCormick's book *First Views of Australia*. And without professing to any expertise in the fine art field, it was obvious to each of us, even from these illustrations, that *View of the Town of Sydney* is considerably more detailed and more aesthetically pleasing than *Sydney Capital*.¹³

¹⁰ *Re J B Hawkins Antiques and Minister of Communications and the Arts* (1995) 38 ALD 323, 329 [25].

¹¹ *Re J B Hawkins Antiques and Minister of Communications and the Arts* (1995) 38 ALD 323, 330 [30].

¹² *Re J B Hawkins Antiques and Minister of Communications and the Arts* (1995) 38 ALD 323, 330 [30].

¹³ *Re J B Hawkins Antiques and Minister of Communications and the Arts* (1995) 38 ALD 323, 330 [32].

The AAT in this case took a most surprising position – that of amateur connoisseur, deferential to and cognisant of distinguished experts, yet firmly establishing the eye of the finder of fact as a capable viewer of art and its qualities. That it did so one step removed, by looking at a *reproduction* and not the original, seems to suggest that looking does not have to be detailed, does not need the eye, other than to form an impression. But what I will suggest is that ‘seeing’ is a matter of choice, to achieve an instrumental result.

In other words, the facts of the art cases, and how they are seen and then read, rely on an aesthetic in order to achieve the ‘right’ result.¹⁴ It does not take much imagination to think that Mr Pinion was trying to create his museum to avoid providing for the members of his family - but the case rendered his will intestate. Whatever the quality of the art, the result would have been the same. In the case of the Sydney paintings, the thought that rare Australian art would be lost to Australia means that *Sydney Capital*, the lesser work, would also have been refused an export permit, albeit on different grounds.

500 balls of string: knowing what to look for

It is a curious thing that these two paintings of Sydney and Mr Pinion’s much maligned, ‘atrociously bad’, paintings have something in common, aside from the intrusion of the courts into questions of aesthetics and connoisseurship. Neither of the paintings concerned rated as ‘high’ art or ‘fine’ art, yet the paintings of Sydney are redeemed by their rarity (only three or four extant pieces exist of The Rocks area of Sydney at the time), and the distance of time. Similarly, no one in *Re Pinion* thought for a moment that the rubbish and junk of Mr Pinion’s ‘collection’ might have an educative purpose (if in nothing less than as an exploration of ‘what non-art looks like’) and no-one saw that a time might come when it might be prized for something that could not be seen in the here and now.

¹⁴ Alison Young, ‘Aesthetic Vertigo and the Jurisprudence of Disgust’ (2000) 11 *Law and Critique* 241; Alison Young, ‘Piss Christ on Trial: Disgust, Obscenity and Transgression’ in Daniel McClean (ed), *The Trials of Art*, Ridinghouse Press, London, 2007; *Pell v Council of Trustees of the National Gallery of Victoria* [1997] [1998] 2 VR 391. See generally Costas Douzinas, Ronnie Warrington with Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law*, London, Routledge, 1991, Costas Douzinas and Linda Nead (1999) *Law and the Image: the Authority of Art and the Aesthetics of Law*. The University of Chicago Press, Chicago, 1999.

Looking safely from the distance of centuries, something ordinary can be vouchsafed as ‘art’ or as something else that transforms the ordinary into the extraordinary – such as rarity or quality.¹⁵ But problems arise when art does not look like art,¹⁶ and for Russell LJ in *Re Pinion*, it went without question that ‘Five hundred balls of string’ would fail any test of artistic quality.¹⁷ Only if the ‘chattel’ is able to shift from being an ordinary chattel to one which is obviously art, can any further questions about its status or quality be sanctioned: ‘The judge cannot conduct that enquiry on his own, unless the matter be so obvious as to call for no hesitation. He may be lacking in aesthetic appreciation.’¹⁸

Indeed. For Russell LJ, there would be no need to look further than the chattel itself if presented with 500 balls of string. The door, as it were, would be closed for art that did not look like art. 500 balls of string would not be art. Nor, on this assessment, would the 300 or so components – petrol cans, beads, and shells among other things - that make up Romuald Hazoumé contemporary (1997-2005) installation work, *La Bouche du Roi*, which is held in the British Museum.¹⁹ The anti-slavery installation mirrors the image of an 18th-century print of the slave ship, the *Brookes*, but uses petrol cans as masks in the place of slaves.²⁰ Knowing more about the chattel will allow more to be known about the art, and ‘seeing isn’t always believing’ when it comes to looking at art.

But then, it is easy to mistake art that does not look like art, as the cleaner who threw away a garbage bag filled with discarded paper and cardboard which was part of Gustav Metzger's *Recreation of First Public Demonstration of Auto-Destructive Art*.²¹ The work was shown at the Tate Modern, on London’s Southbank, one of the premier art museums in the world. And,

¹⁵ Marett Leiboff, ‘Law’s empiricism of the object: how law recreates cultural objects in its own image’ (2007) 27 *Australian Feminist Law Journal* 23, 36 – 38.

¹⁶ Alison Young, *Judging the Image: Art, Value, Law*, Routledge, London & New York, 2005.

¹⁷ *Re Pinion* [1965] 1 Ch 85, 108.

¹⁸ *Re Pinion* [1965] 1 Ch 85, 108.

¹⁹ British Museum, *La Bouche du Roi: An artwork by Romuald Hazoumé*: Media Release, <http://www.britishmuseum.org/the_museum/news_and_press_releases/press_releases/2007/la_bouche_du_roi.aspx>.

²⁰ For background, see [http://en.wikipedia.org/wiki/La_Bouche_du_Roi_\(artwork\)](http://en.wikipedia.org/wiki/La_Bouche_du_Roi_(artwork)) and http://farm2.static.flickr.com/1333/3269865847_3524384996.jpg and <http://en.wikipedia.org/wiki/File:Slaveshipposter.jpg>

²¹ For background, see ‘Cleaner bins rubbish bag artwork’ at <http://news.bbc.co.uk/1/hi/entertainment/arts/3604278.stm>.

for the record, balls of string have featured proudly as sculpture.²² There is no accounting for taste.

How to view an art object – facing facts

The only difference between these ‘snapshot’ cases, and most other cases involving art is that they belie the language of indifference and avoidance that inhabits most cases involving judicial engagement with art and its cultural products. Yet, despite the cases used in the snapshots at the start of this article, most law in the area is based on an express purported avoidance by the courts of creative intention, aesthetics, cultural value or quality.²³ The statement of Morrison J in *De Balkany v Christie Manson and Woods Ltd* is characteristic of the approach:

One of the issues I must rule upon is whether the painting may properly be attributed to Schiele. That is a matter which has given rise to considerable dispute in the art world. I do not pretend that what I have to say will impress the scholars who take a different view. I remind myself, and them, that this is a judicial decision based upon the evidence and it is not, and it does not purport to be, a contribution to the academic debate, in which I am not qualified to participate.²⁴

And in *Johansen v Art Gallery of NSW Trust*,²⁵ in yet another case dealing with the character of a winning entry in the annual Archibald Prize for portraiture, Hamilton J felt obliged to make this statement:

²² *Ball of String* <<http://www.flickr.com/photos/becca3k/61549873>>; <<http://www.artomi.org>>; Fred Sandback: *Remarks on my Sculpture 1966-86* <<http://www.diacenter.org/exhibs/sandback/sculpture/remarks.html>>.

²³ Compare the decision in *Brancusi v. United States* 54 Treas. Dec. 428 (Cust Ct 1928). This case concerned the imposition of customs duty on the Brancusi sculpture *L'Oiseau*, or *Bird in Space* and the dispute surrounding its status as ‘art’ has engendered a considerable literature. A detailed account of the trial is found in Stéphanie Giry ‘An Odd Bird’ *Legal Affairs* September/October 2002 <http://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp>.

Other accounts include: Nadia Walravens, ‘The Concept of Originality and Contemporary Art’, in Daniel McClean and Karsten Schubert (eds), *Dear Images: Art, Copyright and Culture*, Institute of Contemporary Art and Ridinghouse, London, 2002. An image of the sculpture appears on the cover of *The Trials of Art*, n 14 above, and is the subject of an essay in the collection.

²⁴ *De Balkany v Christie Manson and Woods Ltd* [1997] Tr L 163, *The Independent*, 19 January 1995.

²⁵ [2006] NSWSC 577.

It may seem strange that a court of law (or equity) should pass judgment upon the result of an art competition. However, that is not in fact what is occurring. The Court is in no way concerned with the merits of the portrait (which are generally agreed to be high, unlike the subject of at least one earlier set of proceedings involving the Archibald Prize). The sole issue for the Court as a court of equity is whether the award was in breach of the terms of the charitable trust in the execution of which the first defendant awarded the prize.²⁶

Fair enough. They are simply reiterating and relying on the assertion of Holmes J in the US copyright case of *Bleistein v Donaldson Lithography Co*,²⁷ and the common law approach generally: that courts ‘stay out’ of decision-making about art, culture and aesthetics.²⁸ Holmes J, the great pragmatist, took the view that judges are ill-qualified to make such decisions. At one level, as the snapshot cases suggest, it is not hard to see some very good reasons to adopt this position, but it does not assure the ‘safety’ of decisions made about art. This position was reiterated by Kirby J in an extra-judicial article about the approaches adopted by the courts when judging art in the context of a dispute over the Archibald Prize, a case to which I will return later in this article.²⁹

The snapshot cases are exceptions in one sense alone. The courts actually said what was going on in their minds. It is plain that the courts must make decisions about art, whatever the situation or area of law, and make choices about the image in question. I suggest that they hope that the (stated) employment of a robust commonsense, rather than aesthetics, in their decision-making will immunise them from the criticism that they have been actively involved in an aesthetic or connoisseurial exercise. But, rather than avoiding connoisseurship, the courts are actively engaged in making aesthetic and connoisseurial decisions.³⁰ They are doing exactly what the courts did in the ‘snapshot’ cases, but fail to expressly acknowledge

²⁶ *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [3].

²⁷ 188 US 239 (1903).

²⁸ Norman Palmer, ‘Misattribution and the Meaning of Forgery: The *De Balkany* Litigation’ (1996) 1 *Art Antiquity and Law* 49.

²⁹ The Hon Justice Michael Kirby, ‘Hanging Judges and the Archibald Prize’ (2006) 11 *Media and Arts Law Review* 300; *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577.

³⁰ Compare Paul Kearns, *The Legal Concept of Art*, Hart Publishing, Oxford, 1998, Chapter One generally; Simon Stokes, *Art & Copyright*, Hart Publishing, Oxford, 2003, 31.

their use of ‘taste’ or ‘eye’ to look at what they want to, and not look at what they do not want to see.

The facts, as the critics and Jerome Frank would have it, are always malleable and will always be used to achieve an end. But ‘facts’ are far from anodyne; the way the law ‘sees’ art fundamentally affects the interpretation and construction of the law.³¹ And more particularly, what the courts ‘see’ has the potential to reinscribe the object or image under its gaze. And its way of ‘seeing’ art influences the interpretation and construction of the law. Because of the nature of legal method, these readings of images and objects will feed into the relevant area of law, which can go on to affect the content of the law itself. The problem comes when the choices made are based in and around what Fiona Macmillan would call ‘philistinism’³² – an intentional disregard of the ‘quality’ or ‘merit’ (to use conventional terms); of looking without seeing; or what I will suggest is a fundamental restructuring of the object or image to avoid giving it a factual basis on which the law might be grounded. In other words, the courts pick and choose what they ‘see’, and occlude or embellish what they want. Indeed, the choices made by the courts about what to see and what not to see when confronted with art objects and images, is fundamental to the development of the law in areas as disparate as copyright and contracts, heritage law and sale of goods.

The choices made by the courts to shift one way or another in the finding of ‘facts’ will, even though concealed through the veil of denial and avoidance, actively contribute to the decision-making in these cases through choices about what is or is not ‘seen’.³³ By occluding inconvenient features of art objects and images, or by reconstructing and reconstituting the means by which art objects and images are created or constructed, the courts make active choices, even when they assert a passive indifference to the character or quality of the images or objects with which they must engage. The *discomfit* and *discomfort* of the courts (whether feigned and genuine – sometimes, it seems, judges do protest too much!) when dealing with art belies their active use of either aesthetics or connoisseurship. In short, assertions that they

³¹ Compare Leonard Duboff, ‘What is Art? Toward a Legal Definition’, (1990) 12 *Hastings Comm/Ent Law Journal* 303; Peter Anderson, ‘On the Legal Limits of Art’ (1994) *Arts and Entertainment Law Review* 70; Ronald Spencer, *The Expert versus the Object: Judging Fakes and False Attributions in the Visual Arts*, Oxford University Press, New York, 2004.

³² Fiona Macmillan, ‘Is copyright blind to the visual?’ (2008) 7 *Visual Communication* 97, 112.

³³ See generally Lionel Bently and Leo Flynn (eds), *Law and the Senses: Sensational Jurisprudence*, Pluto Press, London, 1996.

do not engage in matters of taste belie their active involvement in choices about the ‘facts’ of art.³⁴

Rather than being a mere side show to the important business of interpreting the law, how the courts see the objects and images in front of them is central to the development of doctrine, as well as the decision-making process applicable to the case at hand, as the decision in *Re Pinion* makes amply clear. But more problematically, through the denial of any engagement in aesthetics, I suggest that the courts potentially undertake a textual ‘recreation’ of the object or image, which will result in its reinscription – far from an outcome based in disinterest or disengagement. In other words, the act of judging imposes a reading of an object by the very act of not reading, and in doing so fundamentally rewrites the object as a text. In doing so, I suggest that the courts, rather than acting in a disinterested fashion, are doing far more than they claim.

Creation and recreation

So what kind of reconstruction or re-reading can occur? Anne Barron suggests that a Neo-Platonic ideal or the adoption of the aesthetics of formalism inhabit the decisions of the courts in copyright cases, which will affect what the courts ‘see’.³⁵ As I have already suggested, the courts pick and choose what they will look at, depending on the outcome they choose – this means that they adopt a style of connoisseurship that may be characterised as a form of *arch-empiricism*,³⁶ breaking down the elements of what they see into such minute facets that the object of their attention can be construed at will. Perhaps rather than being ‘blind to the visual’, as Macmillan suggests, the courts *remake* the image or object. Before considering what this means, I will show you what I mean through two examples.

A pretty picture of a cathedral

³⁴ Marett Leiboff, ‘clashing things’ (2001) 10 *Griffith Law Review* 294.

³⁵ Anne Barron, ‘Copyright, Art, and Objecthood’, in McClean and Schubert K (eds), *Dear Images: Art, Copyright and Culture*, above n 23; Anne Barron, ‘Copyright Law’s Musical Work’ (2006) 15 *Social and Legal Studies*, 101.

³⁶ Leiboff, above n 15.

In *Leaf v International Galleries*³⁷ Denning LJ said this about a picture of Salisbury Cathedral:

This was a contract for the sale of goods. There was a mistake about the quality of the subject-matter, because both parties believed the picture to be a Constable, and that mistake was in one sense essential or fundamental. Such a mistake, however, does not avoid the contract. There was no mistake about the subject-matter of the sale. It was a specific picture of ‘Salisbury Cathedral’. The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract

In this case, the painting, thought to be by Constable turned out to be a fake. John Constable, a key figure in the emergence of a particular type of British landscape painting, is known for his use of light and shade, sky, and an early type of impressionism. The *subject matter*, what Denning LJ chose to look at, did not make the painting, though the image of the cathedral made it the painting on which the bargain was struck.



Figure 1 John Constable, *Salisbury Cathedral from the Bishop's Ground*, 1823

By recasting the image into what it *depicts*, it was possible to avoid any question of a potential mistake about the contract. Instead, it was recast as a pleasing picture of an image of a cathedral rather than reading the text of the painting within its wider parameters as containing the hand of the master painter (or in this case, to contain the hand of the faker).

³⁷ [1950] 2 KB 86

Yet its fame is based in part on its creator – Constable – and the purchaser and seller did not think they were buying a picture of a pleasing image. They thought they were buying ‘a Constable’. The visual object was foregrounded, but in this case, it was not vital in the minds of the people involved in the transaction. The court ‘re-read’ the object, this time to make it more important than the other factors involved in the sale, namely, the artist who painted the picture.

Two lines and a face a painting does not make

In the UK copyright case of *Merchandising Corp of America Inc v Harbond Ltd*,³⁸ the ‘Adam Ant case’, Lawton LJ refused to give copyright protection to Adam Ant’s face paint, because it was not ‘a painting’; instead, a painting ‘is an object; and paint without a surface is not a painting’.³⁹ Rather than look at the totality of image or face and the two lines, the court extracted the two lines of paint from the overall text of the image ie Adam Ant with face paint. This time, the court ‘reconstructed’ the visual image so that it was divorced from the context of the face on which the lines were painted, rather than the *whole* composition of two lines on Adam Ant’s face. It was not hard to then find that the two lines on the face were simply ‘ideas’ and failed to meet the expectation of a copyright work that it constituted expression.

Both of these cases are characterised by their reinscription of the image – on the one hand as subject-matter alone and on the other as element or idea alone. I suggest in doing so they recreate or re-render the object or image through the choice of elements on which the eye lingered – the cathedral in the former case, the lines in the latter. In Panofsky’s terms,⁴⁰ the courts have misinterpreted the basic premise on which the work must be read, by reinstating the image in question. They have then, in both iconographic and iconological terms, denuded the images of any meaning. It is by denying anything other than those elements of the image on which the court chooses to focus that the image will be remade to achieve the desired outcome in the case – in this case, to avoid a breach of contract or copyright protection.

³⁸ [1983] FSR 32.

³⁹ [1983] FSR 32, 46.

⁴⁰ Erwin Panofsky, *Studies in Iconology: Humanistic Themes in the Art of the Renaissance*, Harper & Row, New York, 1972, 5-9.

The Monkey with the Magnifying Glass?

In Harry Mount's wonderful article (from which I have taken this heading), Mount explores the use of images of magnifying glasses in depictions of connoisseurs in 18th century caricatures. The most infamous of these is one by William Hogarth, which depicts a monkey peering at an image through a magnifying glass. The caricature operates as a criticism of 18th century connoisseurial techniques of looking at art. But my purpose in drawing on Mount's account is to ask if the courts, in the cases to which I have referred in this article, behave like those connoisseurs of the 18th century, who were criticised for placing their emphasis on reading the 'detail' of paintings. As a result they would misread paintings, and through their preference for old masters and a particular style of painting which they liked, would adversely affect living artists, whose creations failed to meet the barriers imposed by the connoisseurs. Surprising as it may seem now, connoisseurial technique would be responsible for the early disregard of John Constable's work in the late 18th and early 19th centuries, and for the hostility towards the Impressionists.

The connoisseurial technique of a kind no longer adopted in the 'art world', however, still resides in the hands of the courts in one form or another. In the examples which I have used in this article the courts adhere to ideas about art that had their genesis in the 18th century even though connoisseurial techniques of the kind appreciated by the court in *Re Pinion* (in particular), were actually considered problematic by the courts themselves at the time connoisseurial methods were taking form during the 18th century. There is more to the story of the 18th century connoisseurs than their vexed relationship with artists. They also had a particularly troublesome association with the law. David Phillips recounts the frustrations experienced by Lord Kenyon in his dealings with connoisseurial experts in *Jendwine v Slade*,⁴¹ which resulted in the establishment of the test that effectively disregarded the views of connoisseurs as mere opinion⁴² and led to law's focus on facts alone in art cases. For the courts, they could provide no hard evidence, but mere opinion about works. For artists, they

⁴¹ David Phillips, *Exhibiting Authenticity*, Manchester University Press, Manchester, 1997, 73-74.

⁴² (1797) 170 ER 459.

stymied creativity and imposed a particular set of values about art, and what constituted acceptable styles of art.

The 18th century British connoisseur was seen as being ‘primarily concerned with the assessment of absolute aesthetic quality in the light of a particular set of rules’.⁴³ The artists engaged in a campaign against their methods and their limitations. Artists attacked the critics through:

disagreements which, ultimately, came down to the question of how one should, and should not, look at paintings. In this respect the most revealing of all the critiques of the connoisseurs to emerge from the 1761 Society of Artists exhibition was the famous and widely disseminated ‘Tailpiece’, which Hogarth designed for the exhibition’s catalogue ... the connoisseurs are personified by a monkey whose simian form and modish dress show him to be an ‘ape’ of fashion rather than a follower of his own good sense, while the dead trees he waters represent the old master paintings that the connoisseurs were notorious for preferring to the fresh growth of modern British art.⁴⁴

There is something rather familiar about this refrain, not least how to look at paintings. The past is safe and able to be ‘watered’ – much like an existing ‘canon of taste’ and the old paintings of Sydney – and connoisseurship is, in the 18th century at least, the comfortable method of law, in its acceptable mode. But moreover, what Mount makes clear, and helps illuminate the way the courts ‘read’ and ‘see’ art, is the concern with *detail* over intention. The primary role of the satirical device of the eyeglass or magnifying glass is to focus attention on this practice:

their primary role seems to have been that of signalling the defective vision of the connoisseurs, so distorted by foolishness and fashion that they could not see, for example, that the picture ... the ‘Dark Night Piece’ was entirely black.

⁴³ Harry Mount, ‘The Monkey with the Magnifying Glass: Constructions of the Connoisseur in Eighteenth-Century Britain’ (2006) 29 *Oxford Art Journal* 167, 167.

⁴⁴ *Ibid* p 171.

...That the connoisseurs are always shown looking through some form of magnifying glass would, however, seem to indicate something more specific than a general defectiveness of vision. There may have been an allusion here to the long-standing use of magnifying devices, in particular microscopes, *to signify a form of attention that was so obsessed with petty details that it failed to see the beauty or meaning of the whole*. According to Locke, *microscopic vision would render a man unable to understand the real world* ... What really alarmed the critics of the connoisseurs seems, however, to have been less their metaphorical myopia than the *short-sighted, over-proximate way in which they actually looked at paintings*.⁴⁵ (*my emphasis*)

And this is my point about the courts and their approach with respect to a re-reading and re-rendering of images and objects by focusing in on some facets of the image, while disregarding others. But what is more extraordinary about the criticisms of the connoisseurs is found in the reference to Locke's mistrust of the microscopic vision as a fetter on understanding the real world. Treating the image alone – say the pictorial content of Salisbury Cathedral without more – disregards the iconography and iconology of the painting and its context as a whole. In the case of the image of Adam Ant the emphasis on the 'lines' rather than the whole, rewrites or re-renders the image into something meaningless and valueless. By engaging in this style of seeing (especially in the guise of commonsense or dispassion) the court is actively involved in the reading and making of images. In short, the courts are engaging in connoisseurship – of the 18th century kind.

Painting or drawing: the 2004 Archibald Prize

But is this always the case? In those rare situations where art is put 'on trial', or art is seen for art's sake, rather than some other engagement with commerce or transactional issues, the courts may break with 18th century connoisseurship, but cannot avoid engaging with art as an

⁴⁵ Ibid p 173.

aesthetic concept. The references to the Brancusi sculpture⁴⁶ and the *Piss Christ*⁴⁷ blasphemy case are two examples of the courts positively engaging with art, without adopting the language or tone of connoisseurship. In the former, an aesthetic sensibility was relied upon, and in the latter, the issue of the artistic value of the image was avoided altogether. I will suggest that the approach adopted by Hamilton J in *Johansen v Art Gallery of NSW* was fundamentally an aesthetic judgment, not a connoisseurial judgment of the kind based in a louche, untutored critical judge of art or taste which characterised the approaches adopted in *Re Pinion*.

Instead, Hamilton J overtly explored the merits of the image and its manner of creation, through its characterisation as a painting. In the process of working through the merits of the image, the judgment became ‘judgement’ about the work as a whole, involving an exploration of fundamental questions about what made the image and its creation a painting. In doing so, the judgment came face to face with the way in which art is created and the nature of its practice. Rather than treating the image and its creation as ‘good’ or ‘bad’ – the approach used in *Re Pinion*, for instance, Hamilton J explored the modes of creation and consequence for the viewer of the image of David Gulpilil; in short, a judg/e/ment of the aesthetics of the picture.⁴⁸ The aesthetics involved, however, are limited to the register of fact, based in part on expert evidence, but more especially framed through the language and approach used in the judge's reasoning.

So, as in the other cases, my focus is again on ‘facts’, but this time acting as a prelude to their use in establishing the framework and groundwork for the law. And what a very surprising result emerged from this mix of judgement, judgment, and reasoning.

Controversies

It almost could not be an Archibald Prize without some kind of controversy occurring. In 2004, the controversy surrounded the award of the Prize to an image that may or may not

⁴⁶ *Brancusi v. United States* 54 Treas. Dec. 428 (Cust Ct 1928) see n 23.

⁴⁷ *Pell, Archbishop of Melbourne v Council of Trustees of the National Gallery* [1998] 2 VR 39.

⁴⁸ See also Sheldon Nahmod, ‘Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment’ (1987) *Wisconsin Law Review* 221.

have been 'painted'. Redolent of the infamous Archibald controversy some 60 years earlier, involving the portrait of Joshua Smith by William Dobell (was the elongated image of Joshua Smith a portrait or caricature?),⁴⁹ this new case turned on the question of whether the portrait in question had been 'painted'. The terms of the prize referred to a 'portrait', a 'picture' and 'painted', but not 'painting'. The plaintiff argued that the picture was not painted, but drawn, while the defendants, in summary, argued that the image was a portrait, and that it had, in fact, been painted, at least in part.

The winning portrait in 2004 was an image of the indigenous actor, David Gulpilil, which was created by the artist Craig Ruddy. Hamilton J found himself in a difficult position, however, when attempting to describe the image, and in doing so engaged in an analysis of the image and its mode of creation.⁵⁰ In other words, he was required to do what he said he could not – engage in the merits of the image:

The portrait is not entirely easy to describe in a way relevant to the arguments in these proceedings. The case put forward by the plaintiff was that it is a drawing rather than a painting. The portrait depicts Mr Gulpilil's head, shoulders and upper torso. It appears, from the evidence, that Mr Gulpilil has a mass of tangled hair. This is represented in the portrait by a mass of lines. *It is hard to think how it could be otherwise* (my emphasis). Close examination of the portrait shows the presence of many lines, some appearing almost as line on line, as has been said, in the depiction of Mr Gulpilil's face and body. On the other hand, there are present in the face and parts of the body substantial areas which appear as solid masses of black. The portrait is supported upon wallpaper, which appears to have a yellow pattern on a light background. Despite this colouring in the wallpaper, the principal impression of the portrait is that it is in black or shades

⁴⁹ *Attorney-General v Trustees of National Gallery of Art of NSW* (1944) 62 WN (NSW) 212.

⁵⁰ In comparison, Roper J in the 'Dobell' case did not have to engage with the aesthetics of the case, but rather identified the character of the image as 'portrait' – that it was a pictorial representation of a person, which obviated any need to consider whether the image was or was not a caricature: *Attorney-General v Trustees of National Gallery of Art of NSW* (1944) 62 WN (NSW) 212, 215.

of grey. It is agreed by all parties that black and white are regarded in the art world as colours for the purposes of painting and drawing.⁵¹

By merits, I do not mean whether the image was good or bad, of high quality or low quality, but the character of the art, and the way it had been created, hence my emphasis on the phrase ‘It is hard to think how it could be otherwise.’ Hamilton J is unable to engage in an explanation of the image without accepting the technique and method so fundamental to the creation of an art image – whether it be a painting or some other form of work. This was supplemented by his account of the mode of creation, and how the image was constructed, and he readily accepted Craig Ruddy’s evidence about the way in which he created the work:

he built up layers of pigment, most of which was charcoal, but which also included other materials. He moved it around the surface of the wallpaper with his hands and a damp cloth. He sometimes applied hair spray, varnish and water to the work, which assisted in the manipulation of the pigment and allowed him to smudge and blend the lines he had created ... ‘All of the painting except the hair and the raw wallpaper around the sides, was created by mixing and spreading raw pigment with varnish and/or water.’ In some places, this has resulted in large areas of solid black. In other places he has ‘rubbed back’ the layers of charcoal with his hands and a cloth to expose the wallpaper underneath. He also applied acrylic paint with a thick brush, *the effect of which is discernible in parts of the portrait, particularly around the cheeks* (my emphasis) In the later stages, Mr Ruddy added more sweeping lines with graphite and charcoal. Much of the effect of the hair was created with lines drawn with charcoal sticks and blocks, graphite and pencils.⁵²

It is the observation about the discernable nature of part of the image as paint, and not as drawing, that is striking, as well as the general tone of the description of the process involved. Again, this is not a question of good and bad, but a question of what makes something a work, and the effect that the use of particular materials has on the image and its sense of

⁵¹ *Johansen v Art Gallery of NSW Trust* [2006] NSWSC 577 [6].

⁵² *Ibid* [7].

value, its sense of being art (and not a sense of *not* being art). More unusually, in this case, the value of the experts was discounted:

there are grave doubts as to the extent, if any, to which [their evidence] can be taken into account by the Court ... the words of the bequest are ordinary English words to be construed according to their natural and ordinary meaning and ... not ... by expert evidence.⁵³

Instead, Hamilton J devoted a considerable amount of attention to the meaning of ‘drawing’, ‘paint’, ‘painting’, ‘painted’ in a range of dictionaries, including those in use at the time the bequest was made and contemporary dictionary meanings, before concluding that the meaning had not changed between 1916 (when the will was made) and ‘today’.⁵⁴ He accepted the definition in the Macquarie Dictionary of ‘paint as “a substance composed of solid colouring matter intimately mixed with a liquid vehicle or medium, and applied as a coating.”’⁵⁵ The dictionary definitions become of vital importance, but more interestingly is the use then made of these definitions. At a basic level of construction, Hamilton J is engaging in an analysis of the problem of definitional uncertainty, but in doing so explores fundamental questions about art, and what it is ‘about’.

A number of remarks may be made about these definitions. These include that the terms are wide in import and of uncertain boundaries. The definitions are on their face somewhat overlapping. It is true that the definitions of ‘drawing’ tend to have an emphasis on line or delineation. They also have an emphasis on monochromatic quality. The definitions of ‘painting’ have an emphasis on the application of colour and particularly, it would seem, colour applied en masse or so as to create an impression of mass. There is some emphasis on the picture being produced by the application of ‘paint’, which is, in general terms, pigment intimately mixed with a liquid medium. However, it is interesting that the Macquarie Dictionary definition refers to the application of pigment, apparently

⁵³ Ibid [8], [30].

⁵⁴ Ibid [11] - [16].

⁵⁵ Ibid [17].

without a liquid base. The overlaps in the definitions include references to the creation in each case of a ‘picture’ and a reference to delineation in at least one definition of painting, as well as in definitions of drawing. *I do not think it goes outside the bounds of judicial knowledge, but is common knowledge, that line drawing is among the techniques used by painters in the course of creating paintings in the strictest sense.*⁵⁶

In other words, Hamilton J is, without reference to expert assistance, making a ‘judgement’ about the character of a work, and how it is created. Of course, there are any number of painters who never draw a line, and would never draw a line. But as a way to open the door to protect the Ruddy piece as ‘painted’, it is a master stroke. Hamilton J reached the only conclusion possible:

I have reached the conclusion that minds may well differ as to whether, if the picture must be placed in a single category, that category should be ‘painting’ or ‘drawing’. But, in view of those matters, I find it impossible on any objective basis to exclude the portrait from the category of a work which has been ‘painted’, which is the real issue here.⁵⁷

Thus, the trustees of the Art Gallery of New South Wales, who were responsible for awarding the prize, had acted within the terms of the trust, and had awarded the prize to a portrait that had been ‘painted’. There were no grounds on which to find that they had not properly exercised their duties, so the prize could not be interfered with.⁵⁸

There is one other matter to tidy up, however. As noted earlier, Hamilton J reached this decision without expert assistance to guide him, but like the other cases, acknowledged their input:

⁵⁶ Ibid [18].

⁵⁷ Ibid [29].

⁵⁸ Ibid [31].

I reach this conclusion without reference to the expert evidence given in this case. But to any extent to which I could properly advert to it, that evidence would but fortify my conclusion. ... There could be no clearer demonstration that the picture could be characterised in either way and that, whichever characterisation was made, *it was a matter of judgment or opinion*.⁵⁹ (emphasis added)

What is Hamilton J suggesting here? Is this a reversion to the spirit of the 18th century connoisseur, engaging in exercises of artistic opinion, outside acceptable means of ascertainment? If Hamilton J had not read - or seen - the image of David Gulpilil as he did, without recognising the image as a whole rather than a series of elements made up of parts (in the way of Adam Ant and Salisbury Cathedral) he could not have accepted that the image was 'painted'. The simple fact of the matter was that the *portrait* was not painted, but that the image was. This was a judgment that deeply understood aesthetics, and despite protestations to the contrary, actively engaged in an aesthetic process of analysis of the merits of the image. But, what this was all about was a decision *avoiding* making any finding of fact, as if none of the comments or observations or deductions drawn in the case had anything to do with the 'facts' at all:

I do not intend to proceed to a judicial finding of fact as to whether or not the work is 'painted'. I have already commented that there is a certain appearance of strangeness in courts making determinations concerning the qualities of works of art. *That matter is better left to those involved in the art world* (emphasis added), including the persons involved in the control and administration of the first defendant, or, for that matter to any 'intelligent' viewer, using the word 'intelligent' in the manner in which it was employed by Roper J [in an earlier case about the Archibald Prize]. Since a judicial finding on this subject matter is not necessary for the determination of the proceedings, I think it better not made.

So after reaching conclusions all the way through, an extraction of the 'facts' was, for Hamilton J, 'in fact', unnecessary. But I think it would have been virtually impossible for

⁵⁹ Ibid [30].

him to avoid the inevitable conclusion about the status of the image. *It* – the image - was painted, but the *portrait* wasn't. However, to disavow having made a decision when a decision sat in the text of the judgment was, to put it colloquially, a cop-out. Having come so far in the judgment, Hamilton J had to stop before he tipped over the edge, to overtly make a finding of fact that was, in effect, an aesthetic 'judgement'. At the very tipping point, he stopped the process of judg/e/ing. He chose not to find that the picture was painted, even though he in fact does. He nearly decided to judge the art in question, which would have resulted in a breakthrough for law, where a judge would actually say what the art was, rendering for the courts a stake in judging images aesthetically, not connoisseurially. But he didn't step over the threshold. He kept back on the law's side of the canvas, by not even finding as a fact that the image was painted. If he had had to, he would have had to acknowledge that the *portrait* wasn't painted. He let the image and the portrait off the hook by avoiding looking at the detail of the image. A connoisseurial judge would not have allowed this detail to be overlooked. And ever so quietly, by avoiding finding facts, Hamilton J managed to elude the traps courts can fall into when they subject images to the techniques and prejudices of the monkey with the magnifying glass.