
Introduction to the *Research Handbook on Art and Law*

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The role of the artist is to ask questions, not answer them.
Anton Pavlovich Chekhov.

In a book which investigates the intersections between art and law, we found this quote by Chekhov intriguing. It provoked numerous responses. Surely artists – and art – can indeed, answer questions? Even while art asks questions, it usually provides some clues to how we might respond. In curating this book, we spent much time contemplating what art does, and what law does, and more importantly what they do and can do for each other. And we were struck by the sheer number and variety of *questions* that circulate in the chapters of this book. Questions by, about, and of both art and law, and the society and culture they help to form, and which shape them. Both art and law pose, and we would suggest, answer questions. We are particularly interested in the reciprocal questioning and answering that can occur between art and law, and we sought in this book to harness and reveal that dynamic.

This book responds to an increasing interest in the connections between visual art and law, and aims to foster a multi-faceted, international and interdisciplinary dialogue between these two fascinating territories. Traditional approaches to the interface between law and art have tended to focus on substantive areas of law that most directly deal with art, such as copyright and cultural heritage law. Or, they take a generalist area of law and target its specific application to art, such as art and freedom of expression. Sometimes they examine the interface between the law and particular genres of art, such as graffiti, or art in particular legal contexts, such as famous art trials. There is other scholarship engaging generally with the very broad topic of ‘Art and the Law’, however this tends to be jurisdiction-specific, and functions more as descriptions of the numerous laws with potential application to art, and as guides for practitioners or artists.

These different treatments also tend to approach art and law as very separate enquiries. Indeed, these two fields are conventionally seen to be inherently dissonant – one a discipline preoccupied with rationality, the other a creative enterprise ensconced in the imaginary. Art often invites subjective views, leading to multiple, unique interpretations. These diverse interpretations emerge irrespective of the intent of the artist, something which postmodernists have argued should be explicitly disregarded.¹ Law, conversely, is often said to rely on certainty for its authority and acceptance by society and is not intended to be open to multiple interpretations. HLA Hart’s view was that:

¹ See e.g. Roland Barthes, *Image Music Text: Death of the Author* (Stephen Heath tr, Hill and Wang 1977).

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Since the law should strive to balance certainty and reliability against flexibility, it is on the whole wise legal policy to use rules as much as possible for regulating human behaviour because they are more certain than principles and lend themselves more easily to uniform and predictable application.²

This research handbook aims to both bridge the gap between art and law, and push the boundaries of the law-art interface. It challenges the reader to explore the relationship between law and art in all of its potentially vast scope and complexity, presenting law and art not as unconnected or incompatible fields of research (or areas of life) but as subjects with a deep and multifarious interconnectedness.

This collection of 25 chapters presents a panoramic view of the intersection between art and law. It interrogates two broad themes. Parts I to V consider how law ‘sees’ art in different legal regimes, contexts and in different times. Parts VI to X investigate the contrapuntal theme of how art ‘sees’ law, examining how art represents law, how art may function *as* law, and how artists engage with the law, including using law as a medium of expression. These chapters complement existing work exploring the relationship between law and the visual.³

The span between art and law covers a vast terrain, stretching across a host of fields and disciplines, and one of our most important goals was to illuminate this kaleidoscopic range. We were accordingly loathe to set too many limits. This is a book about visual art, but we encouraged authors to conceive of ‘art’ broadly, and the book examines the links not only between fine art and law, but commercial art, street art and photography. Equally, the idea of ‘law’ takes on nuanced meanings, extending past the familiar substantive statute and case law, to broader concepts of regulation, codes, human rights, and a variety of legal fora. We wanted the book to be international, exploring these themes across jurisdictions. We felt it was impossible to explain the breadth of research in this space without acknowledging the interdisciplinary nature of inquiry in this broad domain. The opportunities for interdisciplinary engagement in the area of art and law are indeed manifold. We therefore insisted on diverse voices to ensure the book was wide-ranging and interdisciplinary in character. The chapters are written by legal scholars, legal practitioners, judges, humanities scholars, art theorists, criminologists, philosophers, and legal historians. The book also includes a chapter by a contemporary artist (Harrop), and a chapter written by an artist-academic (Jones). It was important to us that the book gives artists the opportunity to directly speak on how and why they and other artists engage with law, how the law affects them, and how their engagement contributes to our understanding of the law. Conventionally, the works of artists, even those engaging with law, are interpreted by other experts. It is rare to hear directly from the artists themselves on these fascinating issues. These multiple perspectives demonstrate how these authors speak diverse languages and see through different lenses. We also deliberately solicited a range of writing styles. The chapters are a mix of theoretical, analytical, exploratory, sometimes whimsical ponderings, together with other chapters that focus more on the detail of the law.

² HLA Hart, *The Concept of Law* (Oxford, Oxford University Press 1961).

³ Summarised well in Linda Mulcahy, ‘Eyes of the Law: A Visual Turn in Socio-Legal Studies?’ (2017) 44(1) *Journal of Law and Society* 111.

The book is, we hope, an interesting and refreshing melange of new and emerging as well as distinguished and authoritative scholarly voices. In choosing this panoply of authors, we also deliberately sought to entice a very wide audience of readers, rejecting any suggestion that a 'research handbook' must be reserved for the initiated academic elite. We hope the handbook is read for pleasure as much as for academic interest; that researchers and scholars benefit from it, that industry stakeholders dip into it, and that students enjoy the topics and debates.

From such a potentially vast repertoire of stimulating material, we had a frustrating obligation to contain the possibly myriad chapters. We therefore deliberately curated unique chapters which traverse underexplored areas, and ask unfamiliar questions. We concertedly sought to avoid replicating the territories of existing publications. We also sought chapters which engaged in fundamentally intriguing discussions, and examined the outer boundaries of the art-law interface. The result has revealed fascinating, sometimes surprising connections and reflections between the different chapters, despite the deliberately eclectic subject matter. We sought to catalyse an open conversation between law and art, to capture the diverse and variegated nature of contemporary art-law research, while hinting at its potential multivalent directions. In particular, we think the book signals the rich potential for interdisciplinary rendezvous between art and law.

THE TABLEAU

In a book which broadly examines how law 'sees' art, unsurprisingly, a number of chapters engage with copyright law, which most directly has art in its sights. The chapters in Part I of the book focus on the nature of copyright's rights. In 'Making art from words: the picturisation adaptation right in copyright law', Jani McCutcheon investigates a scantily examined adaptation right governing the transformation of words into art. She explains how the picturisation right navigates the intersection between the literary and the visual, and moderates how characters, scenes and stories can be, to borrow from Shakespeare, 'bodied forth' in graphic form. As do a number of chapters, this piece also engages with questions of freedom of expression, in this case the scope of artistic freedom to interpret text.

Reminding us that copyright endures long after an artist's death and that all copyright interests still owned by an author at death will pass to someone else, in 'The fine art of rummaging: successors and the life cycle of copyright', Eva Subotnik explores the special issues that arise when dealing with the unpublished artworks of the deceased. Not only do successors sift through artists' physical artefacts, they may also take stock of the intellectual property rights inhering in them and thereby be encouraged to preserve and disseminate them.

The chapters in Part II acknowledge the difficulty of making artificial distinctions between copyright law and complementary considerations of theory, aesthetic philosophy, social and cultural pressures, and the reality of artistic practice. In 'Copying artistic works: copyright, aesthetics and artistic practice', Jonathan Barrett explores the distinctions and overlaps in how copying in art is perceived through copyright law, aesthetic theory, and artistic practice, arguing for greater coherence between these three important elements of the art world.

Continuing the examination of copying in art, in 'The Prince and the President's daughter: a tale of copyright and contemporary art', Julian Murphy and Nicholas Modrzewski critique contemporary art's most infamous litigant-artist, appropriation artist Richard Prince, a self-proclaimed copier, who nevertheless claims his copies to be originals. Their chapter examines the curious case of Prince's disavowal of his appropriation of Ivanka Trump's Instagram selfie, just days before her father Donald Trump's inauguration. The chapter explains what Prince can tell us about the law's struggle to comprehend contemporary modes of authorship, but also how he illustrates law's deep but subtle influence on our ideas of what an author should be.

Chris Dent takes up this critique of law's influence on artists in his chapter 'Regulating the artist: laws, norms and practices'. He confronts directly the mesh of regulatory pressures that control or delimit the practice of artists. Taking a multi-dimensional theoretical approach, Dent explains how these regimes can be understood as complementary to normative practices derived from artistic disciplines and societal norms.

Part III investigates the outer boundaries of art's place in the law. In 'The curator's copyright', curator-lawyer Alana Kushnir considers the novel question of whether a curator can be considered an author under copyright and moral rights law, arguing that the expanded and increasingly creative role of the contemporary curator has led to curators making stronger authorial claims to their work.

In 'Patentability and fine art', Michael Blakeney considers whether fine art can or should be protected by patent law. This question is pursued through an examination of the history and philosophy of patenting and the arcane concept of 'manner of manufacture' as the touchstone of a patentable invention.

Amanda Scardamaglia investigates an area of law where the presence of art is often overlooked. Examining the relationship between art and trade mark law, in 'Untangling copyright and trade marks in art and advertising', she charts the historical evolution of art in trade mark law, from simple text and classified newspaper advertisements to the graphical and artistic masterpieces in the 19th century. The chapter explains the important role played by lithography in this development, and how the introduction of art into trademarks blurs the categories of intellectual property and the distinction between fine art and commercial artefacts.

Part IV explores art's escape from regulatory constraints. In 'The effectiveness of Australia's legal system in addressing problematic artwork', Dan Mossenson illuminates the inefficacy of Anglo-Australian law in regulating fraudulent, misleading or misattributed art. Through a number of case studies, Mossenson considers both the public and private interests affected by such problematic artwork, particularly in respect of Indigenous artists.

The theme of problematic artwork and fraud continues in criminologist Jade Lindley's chapter 'Preventing art forgery and fraud through emerging technology: application of a regulatory pluralism model'. She explores the global impact of art fraud, which has occurred as long as art has been profitable. Argued from the perspective of regulatory pluralism, the chapter examines emerging technologies and their usefulness in shifting the power against art criminals.

Part V focuses on the intersections between art, law and the public interest. In another context in which art may seem to be an outlier, in 'Classifying art in diverse legal regimes: the function-aesthetic divide and the public interest', Marta Iljadica explores how art is

classified in real property, heritage, tax and ecclesiastical law. The chapter analyses the legal regulation of artistic objects under these different regimes and how courts navigate the difficulties in classifying artworks that blur the boundary between the purely aesthetic and the utilitarian and in which individuals other than the disputing parties have interests.

Enrico Bonadio also explores links between real property, law and art in 'Preserving street art and graffiti: can the law reconcile the (often conflicting) rights of artists, property owners and local communities?'. The chapter highlights issues raised by attempts to preserve street and graffiti art. It explains the rights and interests of the multiple stakeholders in such scenarios – artists, property owners and local communities, focusing on how these conflicts might be resolved under artists' moral rights of integrity or through heritagisation of these forms of art.

The chapters then diverge from considering how law 'sees' art to broadly examine how art 'sees' law, and even how art can *be* law.

This examination commences in Part VI, with 'The exorcist: law's crimes and art's super powers' in which Desmond Manderson explores the fusion of art, law, and politics. The chapter opens with a discussion of Rafael Cauduro's *The Seven Crimes of Justice* in the Supreme Court of the Nation in Mexico City. Manderson sees Cauduro's work – commissioned to represent 'the history of justice' as the most virulent critique of law to be found in a national court building anywhere in the world.

Art's capacity to critique law is then followed by the antipodal capacity of art's potential to maintain the legal system's status quo, as discussed in Ben Wardle's chapter 'Lady injustice: inequality and legal iconography'. Wardle critically examines the role of the iconic 'Lady Justice' in permeating the values necessary for maintaining social stratification. Working on the premise that the legal system functions, and is accepted, due to procedural justice, Wardle argues that Lady Justice materialises a problematic abstract and individualistic conceptualisation of justice. He challenges us to consider what artworks that would contribute to substantive justice might look like.

Similarly, in Part VII, Ruth Herz's chapter 'Thinking through seeing: legal minds and images' reflects on the image of blindfolded Justitia, holding the scales and a sword, an image deeply rooted in our Western culture, representing fair and unbiased justice and legitimising justice and State power. Herz is an academic, former judge at the court of Cologne, Germany (and for a number of years, even played the part of the judge in a daily fictional court series on German television). She contrasts the formal Lady Justice images with informal art, such as those of courtroom scenes secretly produced by a judge while sitting on the bench in France from 1929 to 1969, through which he projects his ideas as well as criticisms of justice. She suggests that recourse to art as an innovative alternative method of challenging the traditional legal way of thinking is increasingly gaining ground.

As noted in our introductory comments, legal certainty is an underlying value of the rule of law. However, the myth of law's certainty is debunked somewhat by Shane Burke in his chapter 'Intellectual property law as artistic medium'. Burke argues that despite the relationship between law and art often being held up in terms of polarity, the two do have many synergies and upon further examination would appear to enjoy an essentially reflexive relationship. He finds that institutional validation is sometimes a valuable referent for the judiciary when deciding hard cases in the context of the determination of artistic subject matter. He charts the impact of this through to art itself wherein legal regulation is manifested, with artists such as Superflex, Carey Young and Jill Magid using the law

as a medium in their works. In so doing, they bring these ‘strange bedfellows’ of art and law into a forced relationship whose offspring include critique of law and regulation and the advancement of broader social and political concerns.

Legal, social and political considerations are also central to the next chapter in Part VII. Jani McCutcheon pays homage to the work of Sharyn Egan, an Aboriginal artist, in ‘On *The Nullians*’ which discusses Egan’s installation as exhibited in ‘When the Sky Fell: Legacies of the 1967 Referendum’ at the Perth Institute of Contemporary Art during July–September 2017. Egan created a sculpture installation: *The Nullians* in Western Australia to mark the 50-year anniversary of the 1967 Australian Constitutional referendum in which 90.77 per cent of Australians voted to change the Constitution to include Aboriginal peoples in the census and allow the Federal Parliament to make laws for them. *The Nullians* piece is an assembly of around 200 wooden vases, lamps and bowls and the title is a play on the Latin phrase *terra nullius*, the basis upon which Australia was claimed by the British. McCutcheon argues that *The Nullians* is a potent example of legal change represented through art. Yet, McCutcheon concludes, we are also reminded of the lack of social and economic change that can sometimes follow even momentous and symbolically pregnant legal change.

The power of art to reflect on, and even advance, social concerns is taken up then in Part VIII, beginning with Sonia Katyal’s chapter ‘The public good in poetic justice: on the art (and law) of Felix Gonzalez-Torres’, wherein she posits that Gonzalez-Torres’ work illuminates the concept of a public good by presenting the kind of utopian terrain that law often strives to achieve. She also suggests that the artist’s work underscored and challenged the legal notion of a singular intellectual property. Katyal concludes that Gonzalez-Torres’ art has a contemporary message, not just about social justice and conceptual art, but also about the opportunities for multiplicity of interpretations, particularly in the age of new media.

Multiplicity of interpretations, and associated impacts, features in the chapter by artist Lee Harrop in ‘The decommissioning of *I See Red*: a case study in the relations between art and law’, co-authored with aesthetic philosopher Nicolas J Bullot. The chapter employs a case study of a 2015 site-specific public artwork commissioned to the first author by the City of Perth, Western Australia. Harrop explains the proposal to install a red neon sculpture with the words ‘Sacred Scared Scarred’ on the Old Court House Law Museum, which had a chequered history as a court house, church, school, immigration depot, store, meeting hall and concert hall. The artwork was initially approved but then later decommissioned, apparently due to differing interpretations of the artwork by stakeholders, including the judiciary. The authors use the case study to present some principles that could serve as ethical guidelines for developing equitable decisions and compromises among stakeholders of public art.

Polarised perspectives on art are further exposed in Part IX. In ‘A law unto themselves: murals in the Northern Ireland conflict’, Fiona McGaughey reflects on the use of murals during the 30-year conflict in Northern Ireland from 1968–98 (‘the Troubles’) wherein urban landscapes were peppered, some dominated, by murals. Exploring the relationship between the murals and the law, she questions whether in fact they might accurately be described as ‘law’, for example due to their normative effect in marking conflicting territories. These territories were often associated with specific paramilitary groups. Drawing on the term ‘paramilitary’, the chapter proposes that the murals were

‘paralaw’. It finds that the murals exacerbated the conflict and that the legal system failed to address them.

Contentious art, violence and the question of whether images can ‘police’ behaviour are themes then continued in Natalie Linda Jones’ chapter ‘Breaking the frame: abortion under arrest in contemporary visual art?’. She questions whether the legality of abortion is too ‘abstract’ a principle to be ‘translated’ into concrete visual art without inevitable symbolic violence. Jones discusses representations of abortion in art across several jurisdictions by artists such as Helen Chadwick, Judith Gait, Aliza Shvarts and Paula Rego. She discusses the awareness-raising art of artist Paula Rego following Portugal’s first (failed) referendum to legalise abortion. Following the second (successful) referendum, Rego commented: ‘. . . at least it’s law, it’s law, it’s not illegal, people don’t get arrested, you know, ‘cause they used to arrest, not only the nurses who performed, but the girls who had it’.⁴ Throughout, the chapter explores the law-art interface including the question of whether increasing recognition of abortion rights in law might (or indeed should) counter-balance abortion’s negative visual culture.

Gregory Dale’s chapter also takes up the theme of art and violence by discussing public responses to artists – and their art – when artists’ criminal acts come to light. In ‘The artist turned criminal: emotional obstacles to severing the body from the body of work’ he examines the work of artists Michelangelo Merisi da Caravaggio, Rolf Harris and Dennis Nona. Dale argues that the societal and economic depreciation of the criminals’ art is due to the emotions of guilt and disgust.

Finally, the last two chapters in Part X examine art in areas of international law. In the penultimate chapter, Sarah Joseph pushes us to consider the relationship between art and justice in relation to international human rights law. In ‘Art and human rights law’, she examines the right to freedom of expression as enshrined in international treaties and discusses it with reference to the bulk of the jurisprudence on the topic, which is from the European Court of Human Rights. Art, she argues, is unique and anarchic as a medium and as such more robust application of the right to freedom of expression, or freedom of artistic expression in this case, is required. Like Wardle’s critique of Lady Justice’s role in maintaining the status quo, Joseph quotes the Special Rapporteur in the Field of Cultural Rights:

Artists may entertain people, but they also contribute to social debates, sometimes bringing counter-discourses and potential counterweights to existing power centres . . . The crucial task of implementation of universal human rights norms is to prevent the arbitrary privileging of certain perspectives on account of their traditional authority, institutional or economic power, or demographic supremacy in society.⁵

The final chapter also engages with international law. Alice Palmer shines a light on the use of photographs in the International Court of Justice case of *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* [2014]. In her chapter ‘Image and art in the *Whaling in the Antarctic* case’, she makes a strong argument that the evocative

⁴ Ibid.

⁵ Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: ‘The right to freedom of artistic expression and creativity’ (Special Rapporteur), UN doc A/HRC/23/34, para 3.

photographs used in the case went beyond their evidentiary purpose but yet, received scant comment. Palmer suggests that international law fails to engage with aesthetic scholarship which elucidates what photographs can do and say in legal proceedings. In particular, aesthetic theory reveals photographs as representational images to which meanings and significance can be ascribed.

REFLECTIONS AND CONCLUSIONS

As we worked on the book, it struck us how it resembles a walk through a gallery. The reader is taken through a number of thought-provoking and very different intellectual journeys, in which questions are posed, perspectives are challenged, and new vistas are suggested. As such, each reader will have their own interpretations and perspectives on the oeuvre. As editors, the following are some of our reflections.

First, the law-art nexus is both temporal and situational (both in terms of being dependent on a set of circumstances or state of affairs, and relating to the location and surroundings of a place). Manderson engages with this theme in relation to Rafael Cauduro's *The Seven Crimes of Justice*, which is both situational (the location – the Supreme Court of the Nation in Mexico City – is highly significant) and temporal. However, rather than being bound by temporality, Cauduro's work connects past events to present responsibility, illustrating art's capacity to bridge the gap between a terrible experience or memory, and the physical world we live in.

Bonadio's and Iljadica's chapters deal with issues concerning art in which the public has a deep interest, specifically intended for a particular space and time. Similarly, artist Harrop and co-author Bullock discuss the significance of place in relation to the Old Court House site in Perth, Western Australia and the public art installation that was intended to transverse temporal boundaries but was ultimately rejected for situational reasons. Manderson engages with a socio-legal and socio-political reflection on art in Mexico; McCutcheon discusses Sharyn Egan's artwork in Western Australia, which relates to the 1967 Australian referendum on the inclusion of Aboriginal peoples in the census; and Jones analyses the work of artist Paula Rego following Portugal's first referendum to legalise abortion. The ability to take account of temporal and situational considerations is arguably accommodated through the principle of the 'margin of appreciation' employed by the European Court of Human Rights, including with regard to artwork and cases on freedom of expression/hate speech as discussed by Joseph in her chapter.

The temporal – contemporary – nature of some art and its associated legal complexities is evident from a number of chapters, even reflected in the neologisms employed. For example, Murphy and Modrzewski's discussion of Prince's disavowal of his appropriation of Ivanka Trump's 'Instagram selfie'. So in some ways, even this chapter is dealing with perennial socio-legal issues; Prince's artwork was situationally and temporally specific, which means that further manifestations and iterations of these art-law interfaces are not only possible but inevitable.

Second, art and artists are often understood as contributing to the public good, such as the work of Gonzalez-Torres discussed by Katyal, or at least as benign, even if provoking and controversial such as the artwork on abortion in Jones' chapter. However, other chapters confront us with the malign underbelly to art and artists. Both Mossenson and

Lindley introduce us to this more nefarious side of art in their chapters on misleading and fraudulent art, with Lindley exploring the developments in technology to address the issue. McGaughey explains how the murals exacerbated the conflict in Northern Ireland, Jones touches on some of the shocking and disturbing images used by pro-life campaigners, and Dale discusses artists turned criminals whose artwork is implicated as a result, including artist and television personality Rolf Harris, who was convicted of indecent assault of minors. Manderson's chapter discusses the graphic representation of violence in Cauduro's murals where, for example, torture and kidnapping take place with the connivance of the legal system.

Finally, the art-law nexus is multivalent. This means it will remain a dynamic field of research, with many points of connection between diverse disciplines and perspectives. It will continue to be a fertile source for study within discrete disciplines, and across disciplines, because there will always be more to say and more questions to be posed. Indeed, there remains further scope for deliberately novel and interdisciplinary collections like this, which could be achieved without repetition of existing scholarship. The opportunity for further exploration explodes if it moves beyond the focus of this collection on visual art, to other forms of the arts and creative expression. We also predict that the somewhat artificial distinctions between law and art will continue to be dissolved in future scholarship.

To conclude, we hope, like art itself, this book encourages a new appreciation of how art can challenge, enrich and explain the law in unforeseen ways, and the diverse and complex ways in which the law regulates, interprets and imagines art. We wish for the holistic result of this exploration to reveal the potential heft and flex of this vast subject area, and signal the unbounded potential of further discovery within the broad domain of art and law.