

PREFACE TO SECOND EDITION

In the conclusion to the Preface in the first edition it was suggested that what was needed in Australia was a legal centre for the arts. Established in 1982, thanks to modest but courageous funding from the Australia Council, the Arts Law Centre of Australia has become one of the major professional resources nationally available to arts practitioners and administrators. It was also one of the first nationally based legal aid facilities specialising in the particular needs of one sector of the community.

It now employs three in-house lawyers; has panels of volunteer lawyers in every State and Territory, conducts an extensive educational program throughout the country, annually deals with more than 2500 clients and some 3500 arts law problems. Of course it is not alone; many other organisations provide valuable services, in particular, the Australian Copyright Council, the Crafts Councils, the National Association for the Visual Arts and the arts law referral service run by the Victorian Ministry for the Arts.

However, the visual arts remains the only art form without registered union support. In spite of a most inappropriate and unsuccessful attempt to attract artists into the Painters' and Decorators Union, the unregistered (at time of writing) Artworkers Union has continued to be a useful catalyst for change although it is of only sporadic effectiveness, depending upon the energies of too few individuals who are too thinly spread and under-resourced.

One of the biggest changes in the last six years has been the attitude to contracts in the visual arts. Now, it is no longer exceptional for the parties to clearly set out the terms of their deal and their mutual exceptions, in the form of a written agreement. Even some major galleries now use written contracts.

In the first edition, a number of contracts were described as "model contracts" although they had in fact never previously been used in this country. Through their availability and exposure in that edition, some are now in common use in the community and have indeed become "standard contracts". This edition contains a number of new precedents but users should remember that no contract is perfect and none is applicable for every variation of factual circumstance. Slavish adherence to any precedent is not only dull but often negligent. Precedents should only be used as handrails.

The edition also contains many new chapters: these include a number relating to the legal problems specific to particular types of art practitioner such as community artists; photographers (the material for which was contributed by William Morrow, an Adelaide solicitor who has worked for many years with visual art and crafts practitioners); fabric designers; and illustrators. The main body of the book is relevant to most areas of art practice but these special chapters deal with problems that are practice specific.

Other new chapters cover the establishment of arts organisations and the duties of those in positions of responsibility; available business structures; duties of care owed both to and by artists; sponsorship; and finally, the new legislation relating to the international protection of cultural material. (Sales tax has not been dealt with for the Arts Law Centre of Australia has recently produced an excellent booklet on the subject.)

Like the first, this edition attempts to meet the needs of both arts and legal practitioners. Discussions of legal principle are kept as simple and concise as possible. They are intended to provide arts practitioners with an understanding of the legal principles that apply to their professional lives. As for lawyer readers, it is hoped that these chapters will assist them to better appreciate the diverse application of their detailed professional knowledge to particular problems in the arts.

SHANE SIMPSON

Sydney,

March 1989

PREFACE TO FIRST EDITION

The impact of law on the professional life of an artist is insufficiently appreciated by both artists and lawyers. Most artists cannot see the need to bother themselves with such non-creative, formulary, restrictive matters, and most lawyers do not recognise that artists have special legal needs.

The romantic fiction of garret isolation does not serve artists well. It benefits the dealer, the collector, the gallery and the publisher, but for the artist it does little more than provide a means of identifying with aesthetic tradition. Whilst this bond may be important to many artists, it would be perhaps more properly founded on creativity than hardship.

In recent years, artists and their works have become established components of the modern domestic economy of the country. Art is big business. In Australia alone, art employs thousands of people and generates millions of dollars. All too frequently, works are treated by the art system as commodities, the subject of sale, commission, speculation, investment, tax avoidance and last of all, one might suspect, the intimate expressions of their creators. Whilst it may be that artists are virtually powerless to alter this situation, it is certain that wilful blindness to it can only worsen the artist's lot. The ostrich seeks to avoid danger by putting its head in the sand, and in matters of law and business, many artists adopt a similarly dangerous posture.

Like all people, artists face legal problems, and like all professional people, they have legal problems specific to their profession. In Australia, to date, the legal and art communities have assumed that as no area of law is uniquely relevant to artists, the legal needs of that group are adequately met by existing legal services. Experience indicates that this assumption is wrong. The law is of considerable, if surreptitious, importance in the professional lives of artists. For example it may affect: on which premises they may work (leases); what images they may create (defamation and obscenity); how their works may be disposed of (contracts of sale with purchasers, contracts of agency with galleries, contracts for loan, contracts for lease); what use may be made of their work, by themselves and by others (copyright, design copyright); the degree of protection they can demand for their works and their professional reputation (insurance, moral rights, defamation); it even determines how much tax must be paid (personal taxation, sales tax, death duties). Whether or not the artist chooses to acknowledge it, the law is an integral part of the art professional's life.

NATURE OF THE PROBLEM

The problem is twofold: artists are unaware of the extent to which law impinges on their activities, and most artists do not have adequate access to appropriate legal services.

1 The problem of recognition

Artists do not recognise many of their problems as being law-related. Rather, such difficulties are accepted as an inherent "part of the game". As a consequence, artists do not realise that legal solutions to their problems are available. Moreover they often enter professional relationships without a proper knowledge and understanding of their rights and

responsibilities. It is only by often cruel experience that artists learn basic professional survival skills.

At the moment, no organisation assists artists to recognise certain problems as being legal ones, to recognise that legal solutions exist, and to direct artists towards these legal solutions. Colleges of art and design do not provide their students with basic legal information and skills relevant to their professional life. Furthermore, there are no educational facilities outside the college system whereby artists can learn about their legal rights and responsibilities.

2 *The problem of access to expertise*

Even if artists recognise the legal nature of a problem, few have access to the legal expertise that they need. There are four reasons for this:

- (a) *Poverty-expense.* Most artists earn little money and few can support themselves solely by their artwork. In contrast, legal services are expensive and the availability of legal aid is limited.

There do exist legal centres (such as Fitzroy, Marrickville and Redfern) which provide legal assistance to the poor. However, the staff in these centres are not familiar with art-related legal problems. Their speciality lies in areas such as tenancy law, social security, family law, debt recovery and criminal law. Matters such as copyright, or the drafting of an artist-gallery contract, or the protection of an artist whose work is seized for obscenity, are not within their expertise. Certainly, from inquiries made of such centres, it is apparent that almost no artists utilise the existing legal centres.

Artists need expert legal advice, but most simply cannot afford it.

- (b) *The psychological barrier to law.* Many artists do not trust the law. They see it as a formal, rule-bound creature that will restrict their creativity. They have little understanding of its operation and fear involvement with it.
- (c) *Non-availability of expertise*
- (i) Because most artists are poor, their legal difficulties are non-remunerative to most law firms. Lawyers lack the financial incentive to become expert.
 - (ii) The fact that few artists go to law, at the moment, means that few lawyers have artist clients. Therefore lawyers have little need or opportunity to become expert in art-related legal problems. Those that are expert, tend to be so in particular areas (such as copyright and film).
 - (iii) There are no courses or workshops available to those lawyers who would be prepared to familiarise themselves with the problems of artists. No law school in Australia teaches art-law and no post-university facility provides for this need.
- (d) *The absence of a conduit to expertise.* There are no means by which artists can determine which lawyers are expert in their particular problems, and if so, in which area that expertise lies. There exists no source of referral.

REDRESSING THE IMBALANCE

In Australia, the professional rights and needs of artists have for too long been unacknowledged. To a large extent, the responsibility for this rests with artists, for unless

they themselves recognise and speak out for their legal rights and needs, they can hardly expect others to do so.

Arts administrators, too, must play their role. Closer to the ear of Government and removed from the unbalanced pressures of the marketplace, they must assist the arts community by promoting legislative initiatives which will improve the artist's condition, by reflecting a real awareness of the artist's needs and rights in their own internal policies, and by providing infrastructures from which artists can learn to better protect themselves.

As for lawyers, they need to recognise that artists have particular legal needs that demand a certain expertise and, furthermore, be prepared to attain and apply that expertise even though the financial benefit of doing so could never be great.

To assist in these processes, a Legal Centre for the Arts is being established. The numerous intended functions of the centre reflect the multiplicity of art-law needs that are presently unmet:

- (a) the operation of a legal referral panel, so that artists and arts organisations can be directed towards lawyers with relevant expertise at a reasonable or no cost;
- (b) where appropriate, the giving of "in house" legal advice;
- (c) the presentation of lectures and workshops to artists and art students to help educate them in the legal rights and responsibilities relevant to their professional life;
- (d) the presentation of lectures and workshops to lawyers and law students on art-related legal matters so that artists will have a better opportunity to obtain expert legal assistance;
- (e) the provision of resource material, such as pamphlets, monographs and books on art-law issues;
- (f) lobbying for legislative changes in art-law areas (such as moral rights).

Conclusion

At present, artists are in an enormously disadvantaged position: they are generally poor, unaware of their legal rights and responsibilities, not given an opportunity to learn of them, and only marginally assisted by traditional legal services.

This book attempts to palliate some of these handicaps. It does not seek to replace the function of the lawyer. Its purpose is to provide artists with information that is basic to their professional life so that they can better avoid the trauma of legal dispute and better recognise when they need expert legal advice.

Thus the scope of the book is the legal environment of visual artists. It concentrates on the legal problems of the practitioner of the visual arts: the artist and the craftsperson. Inevitably, when a visual artist faces such a problem, another person will also be involved: a dealer, or collector, an art administrator, a gallery owner, etc. It is hoped that these various people will also be assisted by this book. And, on the occasion when professional legal advice is sought by any of these persons, it is hoped that the legal practitioner too will find it useful.

This work does not purport to be comprehensive. For example, it contains no chapter on sales tax, artist-landlord relationships, wills and estates, nor the export of artworks. These

and other matters will be the subject of booklets to be produced by the Legal Centre for the Arts.

Further, some of the chapters, such as those on Contract, Copyright and Freedom of Expression, deal with areas of considerable legal complexity. To some extent, that inherent quality is necessarily reflected in the text for oversimplification is dangerous. Nevertheless, it is hoped that these small legal trees do not block out the all-important wood.

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Sydney,

October 1982