

Art as Commodities

Trading in art is similar in some ways to dealing in other commodities; one is subject to the market pressures of supply and demand. Although art prices often vary more than commodities according to arbitrary, factors such as aesthetics, authenticity, condition, rarity and provenance.¹ Yet even with such variances in value the popularity of art as a commodity remains. In all realms whether it is the artists, the dealers, the auction house or the collector's the art market is clearly flourishing. From 1987 through 1991, Japanese buyers alone spent more than \$8.7 billion on art, and these are only the official trade figures.² Nevertheless even with such vast amounts being spent on art there remains an uneasy relationship between art and money. The controversy laying in the question of what makes one piece more valuable than another and who decides such a value.

This insistent need to reconcile both art and money is made apparent by Paul Alexander in his article *Murky Image: The Question of Warhol's Photographs*. The author describes a battle between two parties each placing their own value on artistic pieces of works. The works in question include over 60,000 photographs produced by Andy Warhol, considered by many to be one of the most influential artists of the twentieth century. The two parties involved in this legal dispute include the Andy Warhol Foundation and Edward W. Hayes the former attorney for both the foundation and the estate of Andy Warhol. Hayes is entitled to 2% of the Warhol estate according to a legal contract between Hayes and Warhol's business manager and executor. The two opposing sides agree on the value of non-art assets but differ on the value of Andy's art in specific Andy's vast collection of photographs. The foundation assessed the works at a price of \$4 million based on a Christie's appraisal, the defendant using an independent dealer placed the value at over \$80 million. Christies

¹ Robbie Woliver, "Investing in Art Takes Taste and Business Savvy" <http://www.bankrate.com> (21 October, 2002).

² Woliver p.1.

applied a substantial blockage discount but even that discount doesn't explain the discrepancy of \$76 million. The question of what makes one piece of art worth more than others has now fallen into the hands of Eve Preminger, the Surrogate of the County of New York.

While Andy Warhol was alive he produced paintings, sculptures, prints and photographs. Warhol had pursued photography enthusiastically before his death even going so far as publishing three photography books. The one photography show Andy did have while he was alive was an enormous success with many celebrities in attendance. The show resulted in Warhol selling 98 photographs which carried price tags of \$5000 to \$8500. Cognizant of this fact, the Warhol Foundation still supported its low price tag on Andy's photographs citing that Andy was not widely known to be a fine arts photographer causing little market demand for his photographs. The foundation consciously forgot to take into account that even Andy's photographs warrant artist merit and a hefty price tag due to the fact they were taken by Andy Warhol a man who himself had a sense of celebrity. The author of this article implicitly paints the Warhol Foundation as being an irresponsible and shady organization by stating that "the foundation who placed so little value on Warhol's photographs themselves sold 55 Polaroid at \$4,500 apiece to an outside party".³ This one fact alone tarnishes the credibility of Warhol's own organization. In the end the Judge agreed with Edward W. Hayes and the arguments he put forward. The Warhol Foundations underestimations of the photographs were not warranted as Warhol's continued to be popular even after his death. The Foundation low estimate was merely a means to avoid paying the potentially enormous fees owed to Hayes. The judge endorsed the price of \$80 million applying a 20 percent blockage fee arriving at a final value of \$64 million. The author of this article could have closed his article with the defeat of the Warhol Foundation yet Paul Alexander chooses to play devils advocate by making the reader ponder the justness of the ruling. The author brings into the question whether a judge has the credentials to act as an art appraiser. Although the value a piece holds is governed by market pressures it is also governed by the value placed upon it by the individual. One person's masterpiece

³ Alexander p.103.

may have a value of nothing to another depending on their perception of the piece. In the end the reader is left feeling that although justice may have been served the reconciliation between art and money often lies in the hands of those not in the best of positions to make such judgements.

Nevertheless, there are certain artists that capture the public's imagination regardless of what they produce. These artists are the ones who have the ability to effectively reconcile art and money. One such great master is the late Pablo Picasso. There remains a constant public demand for Picasso related products. Picasso continues to be the most coveted by collectors, the most frequently forged artist, and his images are also favourites among art thieves.⁴ Most striking about the demand for Picasso's art is not simply the high prices his pieces are able to fetch but the sheer volume that collectors are willing to snap up. In the article *Picasso, Inc. Pain & Profit* the authors Sharon Waxman & Andrew Decker examine the legacy of Picasso and his heirs. They delve into a world where great wealth, pain and suffering are all synonymous elements of bearing the Picasso name. Picasso died 29 years ago since his death his heirs have divided his estate and works between themselves and the French government. At the time that this article was written the family was underway with a proposal through SPADEM that would bring a new wave of merchandising generating millions of dollars for both the Picasso heirs and SPADEM. This new agreement would allow Picasso's name and images to be produced commercially resulting in the market being flooded with Picasso products. SPADEM states that counterfeiters will continue producing Picasso products but with this licensing agreement at least the heirs will take over and ensure quality products. The family has been registering Picasso trademarks around the world and filing lawsuits halting unauthorized use of Picasso name and imagery in order to gain better control over their father's work. Unfortunately though SPADEM is an organization known for its liberal attitude in granting commercial use of artist's images. Even more interesting is the fact that there is an apparent conflict of interest having SPADEM broker the licensing agreement as the organization works on

⁴ Waxman, Sharon & Decker, Andrew, "Picasso, Inc. Pain and Profit," ArtNews, Vol. 94, No.7, September 1995, pp.117.

commission. As well it was the debt ridden SPADEM who initially convinced Claude to pursue this aggressive marketing venture so it is clear they have certain vested interests. Could these vested interests include the fact that SPADEM would be filling its own coffers with much needed cash instead of for the interests of the heirs who are already wealthy?

Regardless of SPADEM's motivation it still takes two to tango. The responsibility to protect the integrity of their fathers name lies in the hands of the Picasso heirs. They could easily have vetoed the licensing agreement yet they chose not to. The heirs themselves are a dysfunctional group of individuals. Picasso's children and grandchildren may be united by their blood ties but they are more importantly united to Picasso by the money and art he left behind. They all are exploiting his artistic legacy in way or another. Some more implicitly such as Paloma with her line of luxury goods and others more overtly like Marina with her reproduction rights. When examining the family history one is confronted with a tale of suicide, bitterness, and angst. Perhaps their troubled past explains the heirs inability to agree on anything. One of the children was even heard saying that, "it is impossible we have the same father".⁵ It's funny then to think that these six heirs are endowed with so much power over their fathers work. The heirs acting unanimously have the legal right in France to denounce works that they believe to be forgeries. It is this right that gives them the power to destroy a work's market value. It is Maya Picasso who oversees the responsibility of authenticating Picasso's work. Yet even she admits she may not be as well qualified as a professional to recognize her father's works. The lack of any recognized body that can authenticate art work makes life complicated and problematic for collectors yet such a body is not impossible as illustrated by the Matisse estate that effectively authenticates his work. The heirs have been unable to bring order to the running of their father's estate. This is an estate that has only increased in value since 1973 when it was valued at \$312 million. The increase in value is directly correlated to the fact that the market continues to crave the wares of Picasso even 29 years after his death. Yet even though there is demand for Picasso goods

⁵ Sharon Waxman& Andrew Decker pp.117.

under the licensing agreement the onslaught of everyday goods such as porcelain and towels emblazoned with the artist's images will only reduce the value and integrity of the artist. Picasso's art will become an everyday commodity. Even Maya and Marina Picasso say merchandising is vulgar and cheapens Picasso name yet neither of these woman blocked the agreement. This lack of action may partially be contributed due to fatigue and reluctance to stir up conflict. It then becomes clear that the troubled Picasso heirs lack the stability required to uphold the integrity of their trustee responsibility. In order to protect the value of something you must first understand and appreciate that which you protect. The art that Picasso produced is an extension of the man that caused so much pain among his heirs and their families. The heirs may accept the wealth bestowed upon them since Picasso's death, but the true price they pay for such wealth is that of lost childhood innocence.

In order to protect the world of artistic expression certain laws have been enacted ensuring that artistic work be protected from being copied, mutilated, or modified. Under such laws an artists work, logo, signature, and persona can be protected. Through the publics increased association between popular celebrities and consumer products, services, businesses or institutions character merchandising has become very popular.⁶ For example the estates of Warhol and Picasso could market products under their personas due to their celebrity status. The article *Character Merchandising: The Marketing Potential Attaching to a Name, Image, Persona or Copyright* by Robert G. Howell narrates the detailed means of protection available to a celebrity in protecting their persona from being exploited unjustly. Such laws include copyright law which protect the celebrity. The aspects of a celebrity's persona that are covered under the law are human, non-fictitious persons, human fictitious characters, and non-human fictitious characters The term celebrity in this context consists of athletes, actors, entertainers and other well known figures in the public sphere.⁷ The only individuals who are excluded from protection under copyright law are political celebrities as they raise their own special considerations. Howell's article uses the term celebrity broadly encompassing

⁶ Robert Howell, "Character Merchandising: The Marketing Potential attaching to a Name, Image, Persona or Copyright," Intellectual Property Journal, Vol.6, June 1991, pp.197.

⁷ Robert Howell 198.

all the figures mentioned above but we will use the term celebrity and artist interchangeably as this will provide a better illustration of the concepts and arguments already presented in this essay. Under copyright law if an artist's work is used without permission relief can be sought under the law. Ultimately the artist has a moral right to the integrity of their work. Such a right is infringed if there is damage to the honour or reputation of the artist. Such an infringement may include distorted, mutilated, or other modified versions of the artists work, and/or the work being used in association with a product, service, cause or institution without the artist's permission.⁸ Such an infringement of the integrity of the artists work could have been cited by Picasso's heirs against the boutique at the Guggenheim Museum. The boutique had for sale products derived from the artist that didn't respect his original work. In particular the object in question was a gold brooch based on Picasso's *Woman with Yellow Hair*. This brooch might be considered an infringement of the artist's rights as it represents a modified version of Picasso's work. The original work by Picasso was not monochromatic yet the brooch being sold was monochromatic. The period for which such protection of moral rights exists is the life of the artist plus 50 years. Moral rights can't be sold given or otherwise assigned but they may be waived in the sense of giving permission to another to do what would otherwise be an infringement of these rights. Such a waiver could have been granted by the Picasso heirs to the Guggenheim had they asked for it.

Yet what happens in circumstances where the work is not copyrighted? Well there are still a few possible legal recourses that may be sought outside the law of copyright. Such relief measures include the *tort of passing off*, the *tort of appropriation of personality*, an action for *breach of privacy*, an action for *infringement of a registered trademark*, and action under *defamation or breach of contract*. The first remedy the *tort of passing off* attempts to remedy situations in which one individual attempts to pass their product or service off for another's. This is usually done in order to take advantage of the good reputation or goodwill of another product.⁹ The product or services are misrepresented as to confuse the public. The key to this remedy must be that misrepresentation must

⁸ Robert Howell pp. 201.

⁹ Robert Howell pp. 205.

cause public deception and confusion. If no such misrepresentation causing public confusion is evident there is no base for recovery. Usually this tort tends to be interpreted too narrowly for remedy in regards to character merchandising. This may also be the tort that Holly Solomon's lawyers cited when they sued the Warhol estate on her behalf. Warhol took Holly to a public photo booth and left her there instructing her to take pictures of herself. Holly did so using her own money. As Holly took these pictures herself and paid for them she has ownership over them. Years later these photo booth pictures were included in one of Warhol's posthumous shows without Holly's permission. As these pictures were taken by Holly her defence could have been that the Warhol Foundation was attempting to pass off her work as Warhol's. As the public would not know who actually took the pictures the requirement of public confusion caused by misrepresentation would be fulfilled. The second means of recovery outside the law of copyright is the *appropriation of personality*. This action stipulates that once it is has been shown that the celebrities/artists identity has been taken, converted or usurped, the usurper can be held liable.¹⁰ This remedy eliminates the requirement of proving that the public has been confused as to the association to the two parties as a requirement for the tort of passing off. The taking of appropriation of a personality must involve an exploitation of the plaintiff's reputation. The third remedy is called *privacy protection*. This involves the unauthorized use of a persona that violates an individual's solitude or seclusion. When such a violation occurs the result is usually emotional injury. In Canada a claim for violation of privacy is severely limited as there are only provisions for privacy statues in the four provinces of British Columbia, Saskatchewan, Manitoba, and Newfoundland.¹¹ The fourth remedy is called the infringement of *registered trademark*; it provides a means to protect trademarks that are registered under the federal Trade-marks Act. Most businesses who have valuable trademarks usually register them under this Act. This allows the owners a monopoly in the use of this mark, and infringements on this monopoly can be brought to the Federal Court of Canada.¹² Such a monopoly is available for renewable periods of 15 years. This remedy has the broadest applications in comparison to the other available remedies. The fourth

¹⁰Robert Howell pp.209.

¹¹ Robert Howell pp.211.

¹² Robert Howell pp.213.

remedy involves *defamation and breach of contract*. Reputation is protected under the law of defamation and is an alternative to tort of passing off, and appropriation of personality. It involves any form of libel or slander.¹³ Breach of contract is dependent upon two parties having entered into a contract which was later breached. This article by Howell has essentially described the wide gamut of the law that relates to character merchandising and copyright law. It's interesting them to think how these laws came to be.

Trademark and copyright law are a response to our evolving social context. The article *Marking Difference in American Commerce: Trademarks and Alterity at Century's Ends* by Rosemary J. Coombe explores the evolution of trademarks and their context in society. The author believes that trademarks politics of ownership are sustained in order to protect commoditized signs as part of our culture.¹⁴ In essence then copyright and trademark laws help to maintain the exchange value of the work by authorizing both a generative and a prohibitive condition. These laws are then merely organized control methods for capitalist societies such as our own. In the past trademarks entered the public sphere as signs of mass media culture. Trademarks were used as a common discourse to bind the subject to the nation and its markets. In America during the late 19th century this was necessary due to the vastness of the nation and the distances between populations. Manufacturers had to have a common language that would be used to construct identities, and communities. Yet in reality the use of trademarks resulted in emphasizing or denying certain cultural and ethnic differences. Aspects of the African-American, Native American, and the Hispanic culture were exploited and projected on a national scale through the medium of trademarks.¹⁵ One such trademark was the Nigger-Hair smoking tobacco. The trademark of this product was the head of a Negro surmounted with a copious crop of wool, and having a large ring pending from the nose and another

¹³ Robert Howell pp.217.

¹⁴ Rosemary J Coombe, "Marking Difference in American Commerce: Trademarks and Alterity at Century's Ends," Canadian Journal of Law and Society, Vol. 10, No. 2, Fall 1995, pp.119-128

¹⁵ Rosemary J. Coombe pp.p.126.

from the ear.¹⁶ It was trademarks such as these that were advertised in magazines, streetcar advertising, trade cards, and billboards that progressed and legitimized the concepts of savagery and primitivism. At this time trademarks had to be distinctive they usually did not include the name of the product itself. It was the trademark that differentiated your product from others in the market. Great care was taken in choosing a promising and recognizable trademark. Exotics words from across the words were considered a good source for trademarks. Manufactures established their own identities through stealing identities of others. In short the trademark a manufacturer might claim to be his were not likely to be his own. Manufacturers were able to claim such trademarks against the appropriations of others by virtue of the distinction they could claim in the market which was supported by the law. The best remedy that the offended parties had was to claim these stereotypes as their own. It is sad to see that these individuals are often still identified with these stereotypes causing their current social and political needs from being met. Nevertheless the mass commodity form offered by late capitalism offers hope to these individuals for there bodies need no longer to be marked by commoditisation.

In conclusion then the common themes prevalent in these four articles are: the value of art, ownership of art, and protection of art. As art has become a commodity it is to be governed by the rules of this realm. The Warhol article examines the problems associated with putting a price tag on art. As the art world is far less regulated than are investment in securities and real estate, there is often no resource in the event of misrepresentation. Due diligence is required when attempting to place value on a piece of art. Such diligence might include careful research in regards to market information, or perhaps talking to experts in the art world .A works value can be effected by it's scarcity as well. Scarcity increases value, so a limited series will go up in price when the final piece is sold, and obviously, once an artist dies. Limiting the availability of works of an artist is often in the hands of the heirs. The Picasso heirs by making his works so readily accessible are inherently decreasing his value. The flood of Picasso related products will make his work available to the common person decreasing the value and popularity. The estates of such influential artists such as

¹⁶ Ibid 126.

Picasso should be guided by experts instead of being left in the hands of novices. Such individuals in the attempt to uphold the traditional of the art will end up destroying it. Protection of art is overseen by copyright law which upholds the artist's integrity to his work. This protects work from being copied and provides a remedy if such a thing occurs. Sometimes though copyright protects thieves as it did in the late 19th century in America. It was here that trademarks were stolen from the identities of others and claimed by manufacturers as their own. Throughout these four articles you see how art has become a business. Art is no longer merely for aesthetic beauty instead there are now legal and financial elements to consider alongside the beauty or originality of a work. Art has joined a marketplace where stealing, undervaluation, overvaluation are common occurrences. This is the world of art as a commodity. In closing I leave you with this expert taken from Walter Benjamin's essay *The Work of Art in the Age of Mechanical Reproduction* which best captures the essence of this argument.

If the concept of 'work of art' can no longer be applied to the thing that emerges once the work is transformed into a commodity, we have to eliminate this concept with cautious care but without fear, lest we liquidate the function of the very thing as well. For it has to go through this phase without mental reservation, and not as noncommittal deviation from the straight path; rather, what happens here with the work of art will change it fundamentally and erase its past to such an extent that should the old concept be taken up again - and it will, why not? - It will no longer stir any memory of the thing it once designated.

-Walter Benjamin

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