

Owning (up to) the 'Art of the Insane': Re-Claiming Personhood through Copyright Law

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Abstract : From Schumann to Van Gogh, Frida Kahlo, and Ray Charles, the stories narrating the careers of artists with physical or mental disabilities are becoming increasingly popular. From the emergence of 'pathography' at the end of 18th century to cinematographic portrayals, the work and lives of differently-abled creative individuals continue to fascinate readers, spectators and researchers. The achievements of those artists form the tip of the iceberg composed of complex politico-cultural movements which continue to advocate for wider recognition of disabled artists' contribution to western culture. This paper envisages copyright law as a potential tool to such end. It investigates the array of rights available to artists with intellectual disabilities to assert their position as authors of their artwork in the twenty-first-century looking at international and national copyright laws (UK and US). Put simply, this paper questions whether an artist's intellectual disability could be a barrier to assert their intellectual property rights over their creation. From a legal perspective, basic principles of non-discrimination would contradict the representation of artists' disability as an obstacle to authorship as granted by intellectual property laws. Yet empirical studies reveal that artists with intellectual disabilities are often denied the opportunity to exercise their intellectual property rights or any form of agency over their work. In practice, it appears that, unlike other non-disabled artists, the prospect for differently-abled creators to make use of their right is contingent to the context in which the creative process takes place. Often will the management of such rights rest with the institution, art therapist or mediator involved in the artists' work as the latter will have necessitated greater support than their non-disabled peers for a variety of reasons, either medical or practical. Moreover, the financial setbacks suffered by medical institutions and private therapy practices have renewed administrators' and physicians' interest in monetising the artworks produced under their supervision. Adding to those economic incentives, the rise of criminal and civil litigation in psychiatric cases has also encouraged the retention of patients' work by therapists who feel compelled to keep comprehensive medical records to shield themselves from liability in the event of a lawsuit. Unspoken transactions, contracts, implied agreements and consent forms have thus progressively made their way into the relationship between those artists and their therapists or assistants, disregarding any notions of copyright. The question of artists' authorship finds itself caught in an unusually multi-faceted web of issues formed by tightening purse strings, ethical concerns and the fear of civil or criminal liability. Whilst those issues are playing out behind closed doors, the popularity of what was once called the 'Art of the Insane' continues to grow and open new commercial avenues. This socio-economic context exacerbates the need to devise a legal framework able to help practitioners, artists and their advocates navigate through those issues in such a way that neither this minority nor our cultural heritage suffers from the fragmentation of the legal protection available to them.

Keywords : authorship, copyright law, intellectual disabilities, art therapy and mediation

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