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The Serpentine Galleries R&D Platform Legal Lab Summit_01

Reader

Contents

Introduction	03
By Ben Vickers	
R&D at the Art Institution: A Historicised Perspective	06
By Victoria Ivanova and Ben Vickers	
Art and Law in Practice – Contracts and Art	14
By David Jenal	
Art and Law in Practice – Legal Avenues for Cross-Disciplinary Collaboration	20
By Alana Kushnir	
Contributor Biographies	30

Introduction

Ben Vickers, CTO, The Serpentine Galleries

Challenging and reshaping the role that technology can play in our culture and society is part of the Serpentine's ongoing commitment to supporting new experiments in art and technology. Over the course of the last six years, we have provided a platform for artists to develop contemporary artworks that can operate beyond the gallery walls. This artist-led programme has driven critical, interdisciplinary perspectives on the complex questions raised by emerging technologies, pushing nascent technologies in unexpected directions.

This ongoing exploration and experimentation has included the creation of a mixed-reality ecological trail through Hyde Park (Jakob Kudsk Steensen, 2019); the development of complex artificial life (Ian Cheng, 2018); an open-source augmented-reality tool for data visualisation and personal testimony (Hito Steyerl, 2019); thoughts and feelings rendered from the human brain with the help of AI (Pierre Huyghe, 2018); a weather prediction model that correlates historic weather data with polling data from major political events such as Brexit (James Bridle, 2015); a mindfulness app that reflects on the human mind's mercurial states of focus, distraction, discipline and the inner impulse to autopilot (Ian Cheng, 2016); and an AI spam bot living inside the Serpentine's website (Cécile B Evans, 2014).

Thanks to these engagements with some of the most advanced technologies of our day, together with artists, the Serpentine has begun to chart a course that tells an alternative story of the role that technologies can play in our collective future, signalling the potential of cultural actors to play a crucial role in shaping narratives and perspectives on the development of technology today. These experiments and the challenges they have presented have been a catalyst for a new thread of enquiry that we are in the first stages of

developing. In order to deepen the foundations of our programme, we have launched a Research & Development Platform that will:

1. provide a reflexive space for nurturing the evolution of organisational capabilities;
2. share knowledge and tools with the cultural sector and other fields as part of the Serpentine Galleries Arts Council designated role as one of the sector convenors on art and technology;
3. take risks;
4. catalyse new infrastructural investments.

One of the modules of the R&D Platform is the lab. The lab has been an important format for testing ideas and initiating conversations about art and its relationship with society for almost a quarter of a century. As a curatorial format it continues to thrive in a range of artist-audience contexts, both within the institution and beyond. The ‘labs’ of the Serpentine Galleries’ R&D Platform have been initiated within the institution, but are designed to function beyond it by adopting a networked approach to generating and sharing knowledge. The Serpentine’s R&D labs are catalysts for identifying under-explored areas that are open to innovation and which present the possibility of high impact on future practices at the intersection of art and technology.

The Legal Lab was one of the first of the Serpentine’s labs to emerge in late 2018. It has focused on investigating current legal practices in collaborations across art, science and technology, with the view of developing open-access tools that would contribute to a more effective and productive deployment of law by all parties. It is also, crucially, a much-needed conversation space for artists, technologists, lawyers, legal designers, art institutions, technology companies, academic research units and funders. Thanks to the efforts of its Principal Investigator, Alana Kushnir of Guest Work Agency, and a constantly growing network of collaborators and supporters, we are pleased to be sharing our progress with you.

The invitation to be part of the Legal Lab's first summit is also an invitation to become part of the Legal Lab's growing community. We hope that you will find this new intersection as exciting and promising as we do.

We would like to express our thanks to the incredible legal support and advice that Weil lawyers provide in our day-to-day work. Their invaluable expertise helps us to realise the ambitions of the artists with whom we work and has been vital to the complex delivery of these technical projects to date.

We also thank Arts Council England for providing an essential contribution towards all of the Galleries' work.

Finally, our thanks to The Serpentine Council, an extraordinary group of individuals that provides ongoing assistance to enable the Galleries to deliver its ambitious programmes.

R&D at the Art Institution: A Historicised Perspective

Victoria Ivanova and Ben Vickers

1. Looking Back

What kind of value do cultural institutions specialising in contemporary art produce, and for whom? On the surface, contemporary art spaces, kunsthallen and museums position presentation, collection and sometimes support for the production of contemporary art for the benefit of the general public at the core of their missions. Such organisations thus see themselves as first and foremost mediators, or facilitators, between art/artists and the general public, typically dealing with issues deemed to be of critical significance to society at large.

If we trace the lineage of this status quo, we find that this central and largely undisputed function of the contemporary art institution relies on a few crucial historical precedents and moments of consolidation. The first is the birth of the public museum in the late eighteenth century, where the cultural ‘wealth of the nation’ was put on display to be accessible not only to the nobility but to also the middle-classes and eventually, the newly urbanised working classes. The museum created a sense of coherence around one’s historical lineage and designated what was worthy of being known. As Tony Bennett captures in *The Birth of the Museum*, the organisational template for the museum as we know it today originally emerged out of a shift in class relations in the former coloniser-nations and their strongholds, accelerated by industrialisation and leading to the formation of a new national sense of identity.¹

The gradual expansion as to who qualified to be part of the general public in the nineteenth and twentieth centuries meant that the museum

¹ Tony Bennett, *The Birth of the Museum: History, Theory, Politics*. London/New York: Routledge, 1995.

became a crucial symbolic site for increasing democratisation. In the meantime, the beating drums of systemic change were finding resonance in the transformations in art practice and the demands that artists dared make on art institutions, as the well-known example of Gustave Courbet's and Édouard Manet's rebellion against the rulebook of the Paris Salon in 1863 attests.²

In many respects, the modernist turn emphasised the artist's role as a commentator on societal change, and sometimes, a social visionary, a risk-taker and an activist. There thus appeared an ineluctable tension between the preservation-oriented outlook of cultural institutions and the break-away ethos of modernist and eventually contemporary art practice. The Museum of Modern Art in New York, founded in 1929, is widely perceived as the first cultural institution to devote itself overtly and entirely to modern art, which somewhat daringly also encompassed the fields of architecture and design. One may speculate that Alfred H. Barr Jr., MoMA's founding director, took his queues from the developments on the other side of the Atlantic, drawing on the Bauhaus as conceived by Walter Gropius in Weimar in the early 1920s, where the need for unity between art, architecture and design in the face of accelerating technological change was recognised and upheld.

At the same time, the organisational models of the Bauhaus and MoMA could not have been further apart. Whereas the emphasis of the Bauhaus was on the processes of collective artistic production and the desire for it to have direct impact on society in a distributed way through the daily use of designed objects, for MoMA, avant-garde art and edgy curatorial vision were married with privately funded Louvre-style ambitions. Perhaps somewhere in between sits the Museum of Art in Łódź, Poland. It was founded in 1930 as a public museum for modern art on the basis of the donated collection by the a.r. group led by artist and theorist Władysław Strzemiński, as well as sculptor Katarzyna Korbros and painter Henryk

² Another prominent example is the establishment of the First International Dada Fair in 1920 in Berlin, which provided a new organisational platform for avant-garde art. While the historical narratives around the various institutional turning points towards modernism in art tend to centre around mostly male figures, female artists such as Hilda af Klint, Emma Kunz and Georgina Houghton often showcased much more radical breakaways from the avant-garde mainstream at the turn of the nineteenth century.

Strażewski, who had been gathering their collection for the benefit of the museum from 1929 and supplemented it until 1938. This may be considered an early prototype of an artist-led space, prompted by the artists' increasing mobility and what would today be called 'networking', an activist political stance and capacity to organise.

If the first half of the twentieth century saw the emergence of new organisational models for art institutions that were either responding to or prompting evolving forms of artistic production and social engagement, then the second half was a period of organisational consolidation. The study of living artists in academic contexts was no longer anathema to art theory. Museums and art spaces focusing on the presentation of living and recently deceased artists mushroomed to the West of the Iron Curtain.³ With the end of the Cold War, the advent of globalisation and the rise of a new transnational financial elite, the model of a publicly accessible art institution as an interface between contemporary art engaged with larger societal issues and the general public obtained global reach.

2. Today's Shifting Ground

To return to our original question, today, it may seem banal to state that the core value of cultural institutions specialising in contemporary art is seen to reside in the historically established ability to provide an interface between art that is relevant to the current moment, while the people inside the galleries' walls (or those interacting with the organisation's digital environment) are its key recipients. Yet it is precisely today, when the pace and impacts of accelerating technological change are comparable to – or even outstrip – those in the period of industrialisation, that it is worth pausing and asking whether a renewed sense of purpose and new beneficiaries may be emerging for cultural institutions in this transformative process.

³ In *Who Paid the Piper? CIA and the Cultural Cold War* (London: Granta Books, 1999), Frances Stonor Saunders reveals his investigation into how the CIA used Abstract Expressionism amongst other forms of contemporary American culture of the post-Second World War era in a covert propaganda war against the Soviet block.

It is no coincidence that in the case of the Serpentine, a possible answer to this question may be gleaned from artistic engagements with advanced technologies that have ultimately taken the shape of new artworks. For the months spent in production mode, the Serpentine becomes a site where technical, critical, curatorial and artistic capabilities are intertwined and augmented in small but highly ambitious teams. Such processes generate copious amounts of both deeply practical and conceptual knowledge, most of which ultimately remains invisible when the final artwork is presented to the public. Something similar may be said about the back-end (i.e code) or collateral tools that have to be devised in order to make such artworks a reality. While general audiences may not require this ‘background information’ in order to appreciate the artwork on the terms set up by the artist, the possibility to export and further develop some of the insights and capabilities developed in prior projects, or to re-engage with an issue that presented a block or a gap, would mean that cultural institutions could be making their programmes matter not only artistically, but also infrastructurally. In fact, within most other industries, building new infrastructural capabilities by leveraging new technologies is a standard practice.

Thus, why shouldn’t the same logic of care that curators are taught to apply to artworks also extend to the operational processes, nascent technologies and especially networks of people that make these artworks possible? If anything, this turn has been prophesied since at least the advance of computational technologies in the 1950s and 1960s. In his 1968 ‘Systems Esthetics’ article-manifesto, curator and theorist Jack Burnham stated that ‘we are now in transition from an object-oriented to a systems-oriented culture [where change] emanates not from things, but from the way things are done’.⁴ Somewhat ironically, Burnham’s now largely obscured vision found more resonance in individual artistic practices than in art-institutional agendas.

Is the time finally ripe for art institutions and cultural organisations to take Burnham’s proposal seriously? Judging by the appearance of new

⁴ Jack Burnham (1968) ‘Systems Esthetics’, in *Artforum* September Issue, p.31, accessed via https://monoskop.org/images/0/03/Burnham_Jack_1968_Systems_Esthetics_Artforum.pdf.

or revamped initiatives in recent years that echo Burhnam's organisational agenda, we may be finding ourselves at a critical juncture in the practice and (self-)perception of cultural institutions.⁵

3. R&D as a Step into the Future?

In the Serpentine's case, such new initiatives take the form of an R&D Platform – a dedicated operational space where care for and development of internal and external infrastructures that support innovative cultural production can consolidate, find new shape and flourish.

The term 'R&D' was first coined by American officials in 1947 and quickly spread across international policy contexts. Referring to company activities that did not need to yield immediate (or even mid-term) returns on investment, research and development (or prior to 1947, just 'research') was seen to be essential to scientific and technological advancement. Thus, within companies or state projects, R&D labs are typically driven by risk-taking and experimentation in pursuit of industry-specific innovation.

One of the most glaring 'problems' with the R&D framework as informed by the last 150 years of corporate and state-funded projects is that in the logic of market competition at a global scale, the ultimate aim of R&D has been to secure a comparative advantage over one's political and economic adversaries, often at grave human (and environmental) cost.⁶ Yet, it would be wrong-headed to equate R&D with one particular ideological formation and historical arch. Although R&D has been formalised as organisational activity with industrialisation, '[informal] R&D has existed at least since the first person experimented with methods of knapping flint to make stone age tools'.⁷

⁵ High-profile examples include New Inc at The New Museum, LACMA Lab, MoMA R&D, The New Normal and Terraforming programmes at the Strelka Institute in Moscow.

⁶ Similarly, there may be a concern around the assumed secrecy of R&D ventures. While this may still be true of military R&D, a lot of other sectors have now shifted towards an open innovation model that prizes exchange of information, sharing of resources and feedback over siloed confidentiality.

⁷ Bronwyn H. Hall (2006), 'Research and Development', contribution to the International *Encyclopedia of the Social Sciences*, 2nd Edition. Available at: https://eml.berkeley.edu/~bhall/papers/BHH06_IESS_R&D.pdf

Approaching R&D from this slightly wider perspective than its specific application in the recent history of commercial industries and geopolitical warfare allows us to address the inherent tensions that this organisational framework poses in a more constructive manner. It also allows us to see more clearly the relationship that R&D may have to contemporary art institutions. Beyond functioning as a resource for internal infrastructural renewal,⁸ targeted investment in R&D within the cultural field could lead to the humanities and social sciences rejoining science and technology in defining what counts as socially valuable innovation.⁹ Art institutional R&D practice could become a vehicle for applying the wealth of critical knowledge generated in the arts in addressing complex contemporary issues in conversation with other fields. And equally, the challenge of having the opportunity to be part of those conversations could lead to more ambitious and productively complex art, which previously could not have been hosted by the art institution.

There is a sense in which the logic of R&D is neither entirely foreign nor new to the art institution. The brief historical overview rendered above clearly shows that despite the conservative nature of institutions, arts organisations have been relatively responsive to artists engaging with challenging new issues in a speculative manner. Those arts organisations that were formed with a 'new media' focus have been particularly conscious of their role as platforms for artistic R&D, although, admittedly, this is not a language they'd ever use.¹⁰ The hesitation is still very much rooted in the suspicion that formats and approaches too closely associated with science and technology might ultimately be corrupted by instrumentalisation, which art, according to popular opinion, should try to evade.

⁸ Between 2012 and 2015, Nesta – UK's innovation foundation, Arts Council England and AHRC (Arts and Humanities Research Council) oversaw a seven million pound Digital R&D Fund supporting digital innovation in the cultural sector.

⁹ Peter Holme Jensen, CEO of Aquaporin, a bio-technology company with headquarters outside Copenhagen, articulated this as a concrete goal when reflecting on the experience of collaborating on Primer – an artistic research project hosted by Aquaporin.

¹⁰ See, for example, Ars Electronica in Austria, ZKM and Transmediale in Germany, WAAG in the Netherlands, FACT in England.

It is thus imperative to stress that the aim for R&D in the arts is not to import ready-made formats into the art field for the sake of narrow commercialisation, but rather to define an art-field specific view on innovation. To this extent, an R&D platform hosted by an arts institution would need to have a different agenda from even the kind of experimental cross-disciplinary R&D ventures that have been historically hosted by corporations such as Bell System and XEROX.

The art-institutional R&D agenda would need to support the evolving nature of art and its role in society. It is clear that today many emerging artistic practices require a much more robust art-institutional infrastructure in order to offer something distinctly valuable and to avoid falling behind those who are directly backed by technology-producing corporations and/or may use the corporate form to organise as a cultural actor.¹¹ While the art field by definition cannot deliver the kind of specialist insight that emerges in scientific and strictly technological settings, and nor is it ever likely to have matching capital to leverage for its production processes, arts institutions can consolidate and further develop their capacity to aggregate, synthesise and distil what is most relevant and critical to the wider societal climate.

The Serpentine's Legal Lab represents an attempt to do that kind of groundwork in an open and cooperative fashion with peers across different fields. In this respect, we see R&D initiatives targeting infrastructural care as one possible response to a broader constellation of needs and uncertainties that arise for cultural institutions with the current wave of technological advancement and economic shifts.

Recognising the crucial role that the law should play in structuring ambitious production processes, the Legal Lab is focused on gathering and sharing knowledge that could enhance and make legal infrastructures more accessible for collaborations across art, science and technology. While

¹¹ A glaring example of what a direct union between a technology producing company such as Epson and an interdisciplinary art-tech collective can yield is the teamLab museum. Using Epson's 3LCD projectors for immersive digital installations, teamLab, a collective of programmers, engineers, CG animators, mathematicians and architects in the hundreds, are setting a very high benchmark for contemporary art institutions in terms of the capacity and technology at their disposal.

building on insights gained through projects realised at the Serpentine, the Legal Lab is an initiative that orients itself towards the construction of a future art ecosystem.

For now, despite the move by individual arts organisations like ours to set up R&D-style projects, there is still nothing resembling an open-source community around arts development.¹² There seems to be a lack of general awareness on the part of museums and cultural organisations that work could be consolidated between them in a way that makes the entire field more resilient. While there may be partnerships and coalitions, we have not yet seen a concerted effort within the cultural sector itself to embrace and establish standards or large-scale projects of cooperation.

Still, the proliferation of ad-hoc cultural initiatives that take the need for arts organisations to evolve past their historically established models as a starting point in experimenting with different ways of organising what and for whom they could produce is one important step in the direction of building a new ecosystem responsive to technological and societal change.

12 A glaring example of what a direct union between a technology producing company such as Epson and an interdisciplinary art-tech collective can yield is the teamLab museum. Using Epson's 3LCD projectors for immersive digital installations, teamLab, a collective of programmers, engineers, CG animators, mathematicians and architects in the hundreds, are setting a very high benchmark for contemporary art institutions in terms of the capacity and technology at their disposal.

Art and Law in Practice – Contracts and Art

David Jenal

With the emergence of ephemeral and dematerialised artistic practices in the late 1960s, Conceptual artists and those involved in exhibiting and selling their works in a newly emerging market began to long for legal frameworks to structure the terms and distribution of such novel art forms. Since then, contracts have become a pivotal medium for a broad variety of artistic practices, though less as a legal tool. Rather, artists have used contracts as creative mediums serving as prisms to observe and evince wider social, economic, cultural and aesthetic conditions. The following text highlights a small selection of examples of such artistic engagements with legal documents from the late 1960s onwards.

This essay will also show how the role of contracts is currently resurfacing as a critical vector of the evolution of artistic practice, a development closely connected to the progressing globalisation, commodification and digitisation of the art world: a deal-making culture defined by intimacy and personal relationships is slowly transforming into a global trade system backed by digital infrastructures such as online viewing rooms, whilst artworks themselves are more frequently of a digital nature.¹ The lack of personal contact combined with the easy reproducibility and distribution of digital files will arguably increase the need for legally binding and transnational solutions. Thus, the role of contracts as part of artworks and their circulation could be strengthened, a development about which artists still seem to be highly

¹ Daniel McClean, 'Collecting Live Art: Performance and the Law', in Teresa Calonge (ed.), *Live Forever, Collecting Live Art* (London: Koenig Books, 2014).

sceptical, as the first contract discussed as part of this paper illustrates only too well.

In 1971, publisher-curator Seth Siegelaub and lawyer Robert Projansky drafted the *Artist's Reserved Rights Transfer and Sale Agreement* (from here on referred to as the *Artist's Contract*), a document that would later be considered a crucial medium for both Conceptual art and artistic engagements with contracts. The *Artist's Contract* was one of the first attempts to stipulate artist's rights over the lives of their works, including, but not limited to, their display, distribution and reproduction. Attached (sometimes even physically) to a work of art, it granted the artist a 15% share in resale profits and was supposed to be binding to every future owner, among other rights.² In this sense, it went far beyond existing copyright laws at that time in the US and thus raised a great deal of attention, including fierce criticism.

Although Siegelaub and Projansky conducted a survey among 500 figures from the art world on their opinion of the contract before publishing it, it was never widely adopted by artists and even feared by collectors.³ The *Artist's Contract* came with a strong political attitude and was arguably a manifesto of Siegelaub's understanding of the art world's most pressing issues, rather than an operative and pragmatic tool. It thereby aimed to overcome a capitalist mode of production in which artists, just like workers, do not benefit from the capital generated through the sale of a commodity valorised by them (at least not in the case of a re-sale of one of their works). The document fitted well with the political atmosphere of its time: in the light of the backlash against the Vietnam War, the articulation of racial and sexist issues and the protests of 1968 in Western Europe, artists felt encouraged to step up against oppressive governance and existing authorities.

Since Siegelaub and Projansky designed the *Artist's Contract* as what today would be described as an 'open-source tool', many artists have consequently used it as a base template for their own contractual arrangements.

² Article Two of the *Artist's Contract*, Seth Siegelaub, Robert Projansky, 1971.

³ Seth Siegelaub, interviewed by Maria Eichhorn, in Gerti Fietzek, (ed.), *Maria Eichhorn: The Artist's Contract* (Cologne: Buchhandlung Walther König, 2009).

Conceptual artist Adrian Piper set up the *Agreement of Original Transfer of Work of Art*, following the *Artist's Contract* legal statutes as well as its visual appearance. For her own version of the document, New York-based artist, filmmaker and educator Alex Strada incorporated a clause that forces collectors to invest in emerging female artists in the case of resale profits, turning the contract into a feminist tool. Rafaël Rozendaal, who is considered one of the first artists to start selling websites as artworks, uses the *Art Website Sales Contract*, a document incorporating the *Artist's Contract's* obligation to keep track of owners and re-sales. The contract drafted by Siegelaub and Projansky also served as a basis for a blockchain-driven smart contract, allowing for both its actual use based on the Ethereum network, as well as a critical reflection on platforms using blockchain technology to establish new (and highly commodifying) ways of selling and collecting art, among them Maecenas, Verisart and Blockchain Art Collective.⁴ Currently, W.A.G.E., an organisation aiming for regulated payment of artists' fees through museum institutions and other nonprofits, is working on a modular and updated version of the *Artist's Contract*, which is intended to be linked to a blockchain protocol as well.

Two years before the *Artist's Contract* was initially published, French Conceptual artist Daniel Buren had already begun to work with a contract named *Avertissement* (which translates as 'Warning'). Drafted in 1969 by lawyer Michel Claura, it was intended to legally frame the sales of Buren's iconic striped paintings, and continues to do so to date. The *Avertissement* stipulates the collector's duty to inform the artist prior to every public sale, exhibition or photographic reproduction of the work, whilst any violation of these duties leads to the withdrawal of Buren's authorship – and thus turns the respective work into a worthless piece of fabric.⁵ Buren, just like Siegelaub, had surveyed, criticised and defined the existing structures and institutions of artistic production and distribution in the mid-1960s. The *Avertissement*,

⁴ The contract can be accessed via <https://studiovisit.app/projansky-contract/#/home>.

⁵ English translation of the *Avertissement*, published in Susan Hapgood, Cornelia Lauf (eds.), *In Deed: Certificates of Authenticity in Art* (Amsterdam: Roma Publications, 2011).

which indeed is a warning, backed by the comparably strong copyright laws of France, reflects Buren's aversion to the art market, and particularly auction houses, which he considers to be highly manipulative.⁶ By virtue of its practicability, which becomes especially obvious in comparison with the *Artist's Contract*, the *Avertissement* evolved into an essential supplement to Buren's striped paintings, to whose critical reception it contributes. Thus, the contract is a prime example of what Jacques Derrida referred to as a 'parergon', an inevitable yet subordinate part of a work of art, 'distinguished from both the ergon (the work) and the milieu; it is distinguished as a figure against a ground'.⁷

Whilst Buren was never particularly interested in the juridical system and its aesthetics, his decision to make a legal document a central element of his practice leads to more recent artistic engagements with the law. British artist Carey Young's interest in 'exploring law as a conceptual, abstract space' is reflected in several of her works, including *Declared Void*.⁸ The installation, which the artist created with the support of lawyers, was first shown in 2005 as part of an exhibition at Midway Contemporary Art, Minneapolis, and consists of a minimalist, black-striped wall drawing forming an enclosed zone. According to an adjacent note, visitors standing within the zone are exempt from the terms of the US constitution. Other works by Young emphasise linguistic and aesthetic peculiarities of contracts and legal arrangements and hence meet with what Benjamin Buchloh has described as a fascination with the 'aesthetic of administration and legal organization and institutional validation' within the work of Conceptual artists.⁹

Whilst Carey Young examines the legal system at large, artist duo Eva and Franco Mattes carry out a reflection on copyright, reproduction and authorship in their works, above all their *Agreements* series. The underlying gesture is the acquisition of ideas, rather than physical art objects, and the

⁶ Daniel Buren, interviewed by Maria Eichhorn, 1998, in Gerti Fietzek, (ed.), *Maria Eichhorn: The Artist's Contract* (Cologne: Buchhandlung Walther König, 2009).

⁷ Jacques Derrida, 'The Parergon', trans. Craig Owens, *October*, Vol. 9 (Summer, 1979).

⁸ Carey Young, as quoted by Martha Buskirk in 'Contract with the Audience', in Carey Young (ed.), *Subject to Contract* (Zurich: Migros Museum für Gegenwartskunst, 2013).

⁹ Benjamin Buchloh, 'Conceptual Art 1962–1969: From the Aesthetic of Administration to the Critique of Institutions', *October*, Vol. 55 (Winter, 1990).

subsequent reproduction of the respective artistic concept. This could be the idea to print photos on deformed plastic, which Eva and Franco Mattes bought from the artist group Alterazioni Video. The series thereby establishes an interrelation between intellectual property and conceptual art: ideas as art. However, since the artists highlight the distinction between idea and expression (their final works do not aim to be 1:1 facsimiles of their archetypes), they fail to do justice to the fact that ideas are not protected by copyright law.

The drafting of the *Artist's Contract* was closely interwoven with the dematerialisation of the art object. Lately, artist Tino Sehgal has been vigorously driving forward the dematerialisation of the contract in art. Sehgal is widely known for his constructed 'situations', by which he refers to the outcome of his practice informed by dance, performance and theatre. The sales of his highly ephemeral works, which only exist for a certain time in a certain space, are recorded solely through an oral agreement, including the name and address of the contractual partners and the rights and obligations of Sehgal and the buyer. This includes a strict interdiction to document the work through video or photographic material. In the presence of a notary, Sehgal's parameters are outlined, and a handshake seals the deal, for which the collector, most likely a museum institution, transfers up to five-digit sums. Glenn Lowry, director of New York's MoMA, once described the sales process 'one of the most elaborate and difficult acquisitions we've ever made'.¹⁰

Sehgal has successfully exiled the written (and thus printed or at least visualised) contract from his artistic practice, which to him is the only way of dematerialising his 'situations'. The artist has simultaneously opened up to what could be the next stage in the evolution of artist's contracts: digital forms of art, which are in their nature non-material, and easy to copy and distribute as well. Egbert Dommering, a professor in theory of information law, refers to the sales of video works as being 'no longer a trade in objects but in rights'.¹¹ His observation can also be applied to all other forms of digital

¹⁰ Katie Kitamura, 'Tino Sehgal', *Frieze*, issue 131, May 2010.

¹¹ Egbert Dommering, 'A Few Legal and Economic Questions', in *I Have a Friend Who Knows Someone Who Bought a Video, Once. On Collecting Video Art* (Barcelona: LOOP Barcelona, Mousse Publishing, 2016).

art, and suggests that the (slowly) progressing digitisation of the art world could give contracts or comparable legal constructs more relevance for the transaction of artworks.

Until then, a striking contradiction persists. Artists have been drawn to the aesthetics of bureaucracy and the underlying principles of the law as artistic gestures and conceptual strategies throughout the past 50 years. However, the use of legally binding contracts to articulate the relationships between artists, institutions and others is often met with apprehension. It might be the right time to not only try to answer why this is, but also to improve the contractual position of artists.

Art and Law in Practice – Legal Avenues for Cross-Disciplinary Collaboration

Alana Kushnir¹

1. Introduction

The grey areas of the law have proved to be a fascinating space for artists to explore as part of their creative practices. The numerous artworks, exhibitions, projects and discussions that have responded to Seth Siegelaub and Bob Projansky's *Artist Reserved Rights Transfer and Sale Agreement* are some examples of this output.² Ironically, the use of legally binding, documented contracts by artists and arts organisations has been met with greater reluctance. This paper seeks to give some introductory insight into the underlying legal structures and tools that support collaborative relationships. A brief contextual introduction to the use of the word 'collaboration' is provided, followed by an analysis of the legal structures and tools used by various industries in collaborative projects. The tools used in 'traditional' creative industries such as art and film are considered in comparison to those used in 'non-traditional' creative industries such as technology, science and academia. The range of legal structures that can support collaborative projects are then outlined and discussed. Ultimately, this paper is written with the intention of encouraging artists to think critically about how the law can better support their participation in cross-disciplinary collaborations.

¹ © Alana Kushnir and Guest Work Agency 2019. The contents of this paper are of a general nature only. They are not and should not be used as legal advice.

² See David Jenal's paper on "Art and Law in Practice – Contracts and Art" on pages 14 - 19 of the Reader for further explanation of such examples.

2. Collaboration in Context

The word ‘collaboration’ dates back to the mid-nineteenth century and stems from the Latin word, *collaborare*, which derives from *com*, meaning ‘with’ and *laborare* meaning ‘to work’ or ‘labour’. On its face, the pairing of ‘to work’ and ‘with’ appears consistent with the general use of the word ‘collaboration’ today, where one must work together with others in order to achieve a common outcome. However, it is interesting to note that in the first half of the twentieth century, ‘collaboration’ tended to be used in the slanderous sense, when the ‘collaborateur’ was similar to the ‘colluder’. For example, the cooperation of the Vichy Government of France with its German enemies during World War II was considered to be an act of political and economic collaboration.³ But today, it is the qualities of unity and togetherness that remain relevant to the use of the word ‘collaboration’, whether in the political, economic or creative use of the term.

The other quality that remains relevant to collaborations today is the implicit role of tension between the parties in the collaborative process. That ‘push and pull’ of tension has been explored in relation to the concept of ‘the curatorial’, a term employed as a noun by curator Maria Lind to describe the praxis of contemporary curating. Lind has explained how ‘the curatorial’, ‘strives to create friction and push new ideas – to do something other than “business as usual”’.⁴ Art-historian Beatrice von Bismark’s has also employed the term, explaining how there are different participants with different positions and different interests within ‘the curatorial’.⁵ Enacting ‘the curatorial’ can therefore be seen as an act of collaboration, where different positions and different interests are instinctively worked with, rather than against.

Today, the role of tension in collaborations, both within and outside of the remit of contemporary curating and the concept of ‘the curatorial’, can also be understood in the form of power relations. In the collaborative process,

³ See, e.g., Fabian Lemmes, ‘Collaboration in Wartime France, 1940–1944’, *European Review of History*, vol. 15, issue 2, 2008, pp. 157–77.

⁴ Maria Lind, ‘Introduction’, in Maria Lind (ed.), *Performing the Curatorial*, Berlin: Sternberg Press, 2012, p. 20.

⁵ *Ibid.*, p. 19.

not all parties contribute in the same manner or form (indeed, that is usually the point of collaborating). One could say that any collaboration requires both labour and capital. One collaborator is often responsible for providing the labour in the relationship (in the form of time, skill or both), while the other provides the capital (in the form of financial capital, cultural capital or both). In other words, each party in a collaboration offers a different form of value to make that relationship beneficial to one another. With different forms of value being provided, power relations between the parties are inherently at play in collaborative processes. As Chantal Mouffe suggests, ‘Every order is the expression of a particular structure of power relations.’⁶ However, this does not mean that all collaborations are doomed to failure. On the contrary, these relations must be supported by adequate structures and tools. The law provides a useful range of such structures and tools.

3. The Role of the Law in Collaboration

In different disciplines, legal structures and tools are used to varying degrees to support the collaborative process, with varying levels of success. This is because within each industry – whether art, science, engineering, technology, academia etc – the attitude and approach to the role of the law is different. The creative industries and the art field in particular tend to shy away from legally onerous forms of arrangement, whereas in the science and engineering fields, collaborative practice tends to be realised in the form legally binding licence contracts and the acquisition, or what is generally described as ‘vertical integration’, of legally recognised entities.

⁶ Chantal Mouffe, ‘The Affects of Democracy’, *Eurozine*, <https://www.eurozine.com/the-affects-of-democracy/>.

A. Instruments for Collaboration in the Traditional Creative Fields – Art, Film Etc.

Participants in the arts and broader creative industries regularly use unwritten or informal ‘soft’ types of quasi-contracts for collaborative projects.⁷ In her article ‘Artists’ Rights in the United States’, Joan Kee refers to this form of operating as a kind of ‘art world law’.⁸ Although the reasons for adopting this type of approach are many and varied, an important one is in relation to the intellectual property created as an outcome of the collaborative process. In common law jurisdictions, intellectual property laws are based on an individualist philosophy of private property. This means that in practice, as Peter Jaszi observes, (US) copyright law ‘refuses to acknowledge the existence of “joint authorship,” or does so grudgingly’.⁹ So while most common law jurisdictions offer some support for joint authorship through joint ownership, it is rarely relied upon by parties to collaborative projects who, as discussed above under Part 2, do not usually contribute to the collaboration in the same manner and form.

Another solution offered by the law beyond specific legislation on joint authorship is the legally binding contract. Collaborators can enter into a ‘hard’ type of contract that spells out the ownership terms of the resultant intellectual property. However, as Anthony J. Casey and Andres Sawicki explain, in the traditional creative industries in practice, a Memorandum of Understanding (MOU), a series of email communications or even a verbal ‘handshake’ deal, is a far more common avenue used in practice.¹⁰ ‘One does not think of the arts and entertainment industries as sectors organized around

⁷ The phrase ‘soft contract’ was coined by Jonathan M. Barnett in his description of Hollywood film industry deals. See Jonathan M. Barnett, ‘Hollywood Deals: Soft Contracts for Hard Markets’, *Duke Law Journal*, vol. 64, no. 4, January 2015, pp. 605–70.

⁸ Joan Kee, ‘Artists’ Rights in the United States; or, A Remembrance of Claims Occasionally Checked’, in D. McClean (ed.), *Artist, Authorship & Legacy: A Reader*, London: Ridinghouse, 2018, p. 38.

⁹ Peter Jaszi, ‘On the Author Effect: Contemporary Copyright and Collective Creativity’, *Cardozo Arts & Entertainment Law Journal*, vol. 10, 1992, p. 315.

¹⁰ Anthony J. Casey and Andres Sawicki, ‘The Problem of Creative Collaboration’, *William & Mary Law Review*, vol. 58, no. 6, 2017, p. 1798. Casey and Sawicki explain how informal rules enforced by reputation and trust affect how creators organise their collaborative activity, at p. 1799.

sophisticated commercial contracts’, observes Richard E. Caves.¹¹ That said, the lack of legal sophistication in these arrangements is not of particular concern to this paper per se. When it comes to supporting collaborative relationships, the real concern of ‘soft’ contracts is the lack of legal intention and uncertainty of key terms. These issues can be particularly challenging to overcome if and when a dispute occurs between the parties and the relationship is not legally enforceable in the eyes of basic contract law.

By way of comparison, the film industry (particularly in Hollywood) also has a tendency to use the ‘soft’ contract.¹² Significant commitments are entered into ‘under various species of incomplete agreements: oral communications, informal correspondence, deal memoranda, and draft agreements that are negotiated throughout a production and often remain unsigned’.¹³ Like the art industry’s MOU, film industry ‘soft’ contracts are ‘supported by an uncertain threat of legal enforcement coupled with some prospect of reputational liability’.¹⁴ Indeed, it is the trust in the other collaborating parties, built upon reputation and ambition, that is usually considered sufficiently effective to regulate the conduct of those involved.

B. Instruments for Collaboration in Non-Traditional Creative Fields – Technology, Science, Academic Industry etc.

Other industries outside of those fields traditionally considered ‘creative’ also produce innovative collaborative projects. As Chris Greer has observed in relation to the science field, ‘Much of global science is already inherently collaborative.’¹⁵ This point has also been discussed by Liza Vertinsky in her article ‘Boundary-Spanning Collaboration and the Limits of Joint Inventorship Doctrine’, where she observes that: ‘The history of science highlights the role of the individual genius in scientific and technological discovery

¹¹ Richard E. Caves, ‘Contracts Between Art and Commerce’, *Journal of Economic Perspectives*, vol. 17, no. 2, Spring 2003, p. 82.

¹² Jonathan M. Barnett, ‘Hollywood Deals: Soft Contracts for Hard Markets’, p. 605–70.

¹³ *Ibid.*, p. 607.

¹⁴ *Ibid.*

¹⁵ C. Greer, ‘The Dynamic Dimensions of Collaboration’, in Brian F. Fitzgerald, Brian F. and Anthony C. Austin, *Streamlining Collaboration in an E-research World*. Project Report, Queensland University of Technology, 2008, p. 105.

... [but] upon closer examination of even the most famous examples of individual discovery, the importance of networks of interactions in producing and improving upon these discoveries becomes evident.’¹⁶

However, what is different from the traditional creative industries is the approach to collaborative projects. In the non-traditional creative fields of science, technology and academia in particular, robust legally binding contracts are drafted. These ‘hard’ contracts provide for the terms of use of the resultant intellectual property. They can issue a licence to use the resultant intellectual property and state the terms on which such a licence is provided. Hard contracts can also be used to provide an assignment or transfer of the intellectual property. In the fields of science and technology in particular, an assignment of a patent is the more common way of dealing with intellectual property where a ‘vertical integration’ takes place.¹⁷ That is, where a company that has created the relevant intellectual property is bought by another company, so that the other company is assigned the intellectual property and becomes the new owner of said intellectual property, to the exclusion of the company that originally created it. This ‘vertical integration’ process demonstrates the capital–labour imbalance between parties to a collaboration. Yet where this process is avoided in favour of a licensing arrangement, the contracts used by the parties in non-traditional creative industries tend to articulate more precisely and in legalese, the parameters of the collaborative relationship.

C. Cross-Discipline Instruments for Collaboration

It is also important to consider that collaborative projects can have greater potential when they operate across industries. As Lisa Vertinsky suggests in her article, ‘Boundary-Spanning Collaboration and the Limits of Joint Inventorship Doctrine’, ‘New ideas often come from cross-overs between

¹⁶ Lisa Vertinsky, ‘Boundary-Spanning Collaboration and the Limits of Joint Inventorship Doctrine’, *Houston Law Review* 55, no. 2, 2017, p. 409.

¹⁷ See Ronald J. Gilson et al., ‘Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration’, 109 *Columbia Law Review*, 2009, p. 435.

different knowledge communities.¹⁸ This view has also been described by Peter Lee in *Innovation and the Firm: A New Synthesis*. In a university context for example, Lee has observed the greater interaction between academic and industrial scientists on consulting arrangements, sponsored research and proof-of-concept centres, while institutional controls including limits on consulting and equity stakes that faculty can take are attempts to preserve academic independence.¹⁹ In such a context, the collaboration takes on a semi-integrational structure. Perhaps this semi-integrational approach can be taken one step further in the context of artists who participate in cross-disciplinary collaborations. Perhaps artists in cross-disciplinary, collaborative relationships can be supported by a combination of a 'soft' and 'hard' contract coming together.

4. Legal Structures for Collaboration

The range of legal structures that can support collaborative projects will now be outlined and discussed. Some of these structures are more conducive to collaborative relationships relating to the production of art, while others are less so. Ultimately, the structure that is appropriate for a particular collaborative relationship is dependent on the specific set of facts relating to that relationship in practice. In other words, this is where obtaining legal advice that takes into account the relevant, jurisdiction-specific laws and the circumstances of the relationship and the parties is essential.

A. Unincorporated Structures

Collaborative relationships relating to the production of art tend to be structured as unincorporated entities in the eyes of the law. This is partly because of the predominant use of the 'soft' contract in traditional creative fields, as

¹⁸ Vertinsky, 'Boundary-Spanning Collaboration', p. 410.

¹⁹ Peter Lee, 'Innovation and the Firm: A New Synthesis', *Stanford Law Review*, vol. 70, May 2018, p. 1487.

discussed in Part 3(a) above. There are three key types of unincorporated entity through which the collaboration can be structured – the individual contractor or sole trader (engaged by another entity for a set purpose), the partnership and the joint venture. The precise nature of these structures varies from jurisdiction to jurisdiction, so a general outline is provided below.

Individual Contractor – Where an artist as individual contractor or sole trader is engaged for a set purpose, the power relations between the parties are particularly present. In this form of arrangement, the artist is responsible for providing the labour, whereas the contractor is responsible for providing the capital. The ability of the artist to reap the benefits of his or her labour tends to be limited, particularly where the contractor has been assigned or given a broad licence to use the intellectual property generated as a result of the relationship.

Partnership – A partnership structure can be useful when all of the parties have a common interest and when it relates to an ongoing relationship, rather than a specific project. What is particular to the partnership structure and is unlike the individual contractor arrangement is the joint control of all of the partners of the enterprise, and the split of the profits equally amongst all of the partners (unless the parties decide, generally by way of a ‘hard’ contract, that the split will not be equal). However, the challenge of the partnership is that each party is responsible for the actions of the other (being jointly and severally liable), which may not be appropriate for a specific collaborative relationship. The partnership structure also imposes fiduciary responsibilities on the parties at law, including the duty of loyalty. This means that the partners are obligated to place the interests of the partnership above their own. This factor may or may not be appropriate where artistic practice is involved.

Unincorporated Joint Venture – While the joint venture has aspects in common with the partnership structure, each party maintains their separate entity while agreeing to share the profits as they choose (and as should be provided for in their ‘hard’ joint venture contract). This structure can be appropriate for collaborative relationships since it allows for a temporary arrangement where the input of each party to be varied while sharing the

profits. However, the downside to an unincorporated joint venture, as is the case with any unincorporated form of operating, is the accountability and exposure to legal risk of each individual or party to the enterprise.

B. Incorporated Structures

A legally binding ‘hard’ contract is generally used to set up incorporated entities and enforce them under (what in most jurisdictions is referred to as) corporations law. Historically, incorporated entity structures – generally known as the ‘corporation’ or ‘company’ structure – have rarely been utilised in the context of project-specific collaborative relationships, particularly those involving artists or otherwise taking place within the art industry. Nonetheless, one more suitable option is discussed below.

Incorporated Joint Venture or Project-Based Enterprise – The ‘project-based enterprise’²⁰ (PBO), which was identified by Robert DeFillippi and Michael Arthur in the context of temporary projects in the film industry in the late 1990s, is a unique company structure. As Michael Hobday explains, for project-based organisations ‘the project is the primary business mechanism for coordinating and integrating all the main business functions of the firm’.²¹ After the specific project ends, then the PBO is dissolved.²² Another description of the PBO is, of course, the incorporated joint venture. Like the unincorporated venture discussed above under Part 4(a), it allows for a temporary arrangement where the input of each party can be varied, while sharing profits. In practice, where it differs is that a separate company is incorporated for the project term, and each party becomes a shareholder in that separate company. Exposure to legal risk of each individual to the enterprise is thus limited (although the legal duties imposed on company directors would apply, such as acting in good faith).

²⁰ Robert DeFillippi and Michael Arthur, ‘Paradox in Project-Based Enterprise: the case of film-making’, *Californian Management Review*, 40, pp. 125–39.

²¹ Michael Hobday, ‘The Project-Based Organisation: An ideal form for managing complex products and systems?’, *Research Policy*, vol. 29, 2000, p. 874.

²² See Joris J. Ebbers and Nachoem M. Wijnberg, ‘Latent Organizations in the Film Industry: Contracts, Rewards and Resources’, *Human Relations*, vol. 62, no. 7, 2009, pp. 992–94.

Nonetheless, as with all incorporated structures, hierarchies of power still operate in the incorporated joint venture or PBO. In the case of a company, it is the shareholders who have the right to appoint the director in control, and those with greater shares or the rights to acquire shares can exert greater influence. The ‘hard’ contract and jurisdiction-specific corporations law are therefore crucial for implementing checks and balances to the benefit of all collaborators involved.

5. Next Steps

Cross-disciplinary collaborations can be a fertile field for legal innovation. Where collaborations involve art, a middle ground between the ‘soft’ and the ‘hard’ contract, and the unincorporated and incorporated structure is needed. A semi-integrated, design-led solution that implements legal structures and tools to advance the aims of each individual project is our proposed next step. This solution relies on building an effective and accessible prototype, but equally so, on the circulation and uptake of the solution within and beyond the Legal Lab’s networks. Without this uptake, even the Legal Lab itself risks becoming just another conceptual gesture in the history of Projansky and Siegelau’s *Artist’s Reserved Rights Transfer and Sale Agreement*. It could be so much more.

Contributor Biographies

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