

A Few Legal and Economic Questions

Egbert Dommering

Egbert Dommering is a professor in theory of information law at the University of Amsterdam and an authority in telecoms, privacy, media, and entertainment law. He writes a blog on visual arts, and his book *The Difference of Opinion: The History of a Misunderstood Idea* was recently published. With his wife Loes van Rongen, he is one of the biggest private collectors of video art in the Netherlands.

Time-Based Performance Versus the Object

Video art¹, as it is still called, after the first video recorder, emerged in the 1960s from several, some of them older, initiatives. With the advent of the “happening,” later called “performance,” symbolic acts were introduced in museums and cinemas, often in combination with filmed images. Performance drew on ballet and religious and magical rituals, and it was reminiscent of the Dada tradition. Later developments demonstrate how film tried to break out of the walls of cinema. I tend to understand what emerged afterward through the notion of the *locus classicus*, as in the well-known essay “Laocoön” (1766, after the Greek sculptural group) by the German writer Gotthold Ephraim Lessing. In this essay, Lessing refutes Horace’s phrase *ut pictura poesis* (“as with visual art, so with poetry”). Accordingly, visual art can only *show* a mental or physical reality at a single glance. Poetry and literature instead *tell* us about the action in a sequential time sequence. Lessing explains the essential difference in chapter 16:

My conclusion reads as follows. If it be true that the art of painting uses completely different means or signs from poetry for its imitations—namely, the first uses figures and colors in space, the second however uses articulate sounds in time; and if it is indisputable that the signs must have a convenient relation to what is designated, then signs arranged side by side can only have subjects that also exist side by side, or whose parts exist side by side while consecutive signs can only designate consecutive subjects or subjects whose parts succeed each other.

In German: *neben einander* (“side by side”) and *nach einander* (“one after the other”). The art of painting has always struggled with this lack of action. Film has set the “juxtaposed signs” in motion. (Digital) video art added a temporal element to the representation of reality, mostly by applying small changes over time to a seemingly motionless situation, or by “slowing down” film’s traditional narrative with the insertion of “frozen” visual elements. Similar developments can be observed in traditional film (for instance the “sealed time” of Andrei Tarkovsky). Video artists often mix “one after the other” with “side by side.” When doing so, either they create

On Collecting Video Art

¹ I also base my view on the analyses by Andrew V. Uroskie, *Between the Black Box and the White Cube, Expanded Cinema and Post War Art* (Chicago: University of Chicago Press, 2014) and Erika Balsom, *Exhibiting Cinema in Contemporary Art* (Amsterdam: Amsterdam University Press, 2013) and her introduction “Editing the Moving Image: Old Problems and New Possibilities” given at LOOP 2015.

spatial interventions such as installations, where three-dimensional objects host the projection of moving images, or they place contrasting and chronologically manipulated images side by side or opposite each other.

The museum model is also referred to as the white cube, whereas we tend to identify cinemas as “black boxes.” In my view, the inevitable fusion of the white cube with the black box, which should be an answer to this new art form, has still not taken place, in spite of much theorizing about it. For instance, among the biggest public collectors of film and video art, the Museum of Modern Art in New York still sticks to the dichotomies film/video art and visual/video art. This has also had important economic and legal consequences for the art business and collecting practices. I would now like to discuss some of these aspects, which in my view are neglected both in theory and in practice.

The Regime of Trade in (Relative) Unique Objects Without Further Thought Applied to Video Editions

Usually, art is traded as a unique object. The collector becomes the owner of that unique piece. In visual art, the object once used to be a painting or a drawing. It was graphic art that introduced a limited series of relatively unique objects: the numbered series of an edition of prints, each of which was often signed. Artists would keep a few prints for themselves (the so-called *épreuve d'artiste* or artist's proof, EP or AP); this would oblige them not to put these pieces on the market during their lifetime, and not to increase the size of the edition that was to be traded. However, it happened that artists did not live up to this standard (for example when a plate was used to print a second edition). In photography, the principle of a numbered edition was abandoned, while the relation with the original negative of the photograph was maintained by introducing the notion of “vintage.” Only original prints made from the original negative were to be considered “vintage.” Nevertheless, film chose a different path from the very beginning. Films were seen as performances for mass audiences: they were shown in cinemas, and if the film reel was worn due to the high number of projections, a new print was made. If that was not the case, the film would pass into oblivion. As a consequence, there was no trade in original film reels. In the 1930s an attempt was made to set up an art

circuit for rare film reels, but it failed. Those film reels, however, obtained a scarcity value over time: either there were a very few existing copies, or they were lost once withdrawn from public circulation. Museums started to take care of them. Here as well, the object, the film reel itself, continued to be pivotal.

When video was first developed in the 1970s, artists would sell videotapes in large editions for a low price. Buyers would receive a tape they could watch by themselves, but that was it. Devotees would purchase those tapes. When the makers of those tapes became famous artists, the art business started to digitize the VHS tapes, which had become technically obsolete, and their quality often abominable. They started to sell the digital carriers for a lot of money because of the celebrity of the artist. From a copyright perspective, all of this is based on the property of material objects or their reproductions, as with graphics.

Then, the digital technique arrived: first the DVD, later the HD quality, the Blu-ray, the memory sticks, and media players. Soon enough, this also started to become a business in the art circuit. By far the greater part of the business (galleries in the primary market, auction houses in the secondary market) still thinks that this is a trade in goods. The “graphics model” is maintained, and signed carriers are sold in small editions on the primary market or auctioned at exorbitant prices. Artists have tried to overcome this issue by mixing “one after the other” with “side by side,” and by adding objectlike elements to cinematographic works. However, film is based on a fundamentally different property model, namely on *communicating* the work *to the public*, so not on the reproduction of the material object but on the communication of immaterial information.

Legally a Video Is Not an Object; the Trouble with Different Selling Circuits

How do you become the owner of a film, and what does that mean? Generally the producer obtains the copyrights of all the contributors to the film work, grants the licensing rights (rights of use) with accurately specified exhibition rights to users (for example cinema operators), and distributes the royalties from use among those who worked on the film. But how do you do that with a film that circulates as part of a limited edition? The buyers of a film circulated in a

limited edition usually want a property right just like the right they have to a painting, but the maker of the film wants to keep the copyrights. You cannot solve this by providing the buyer with a signed carrier that will be “used up” or out of date in a few years. You have to agree on the exhibition rights the buyer obtains and on the legal status of those agreements on the future secondary market. Will it later be possible to sell those relatively unique exhibition rights as (quasi) property rights, like a painting by a famous painter? This question is still unanswered.

What is needed is that the art business creates a legal form to make sure that the edition rights the maker of the video work sells are quasi-property performance rights that are transferable and tradable. Therefore, this is no longer a trade in *objects* but in *rights*. A related problem concerns the self-imposed limits by the artist when it comes to selling a limited number of performance rights against high edition prices in the art circuit and to the distribution of the same film in the popular circuit. The art circuit consists of private viewings and exhibitions in museums. A related circuit of limited performances consists of a small number of screenings for selected publics in art houses, and at independent festivals promoting art films, documentaries, and other “fringe” products. Nowadays, many festivals such as the International Documentary Film Festival in Amsterdam, the International Film Festival in Rotterdam, or the International Short Film Festival in Oberhausen create a space for video art. Generally access to the big commercial circuit of popular cinemas is denied to video art because of its complex, or even absent, narrative or because a three-dimensional installation is required. But some video artists, such as Steve McQueen, have made a successful transition to the popular circuit.

In my opinion, the commercial licensing model of popular films is incompatible with the editioning system typical of video art, yet we can observe the boundaries blurring. Established video artists want to produce ever bigger films with high production costs, which are pre-financed not only by public or private art funds, but also more and more often by the artists’ gallery or future owners of the piece. This creates an economic and social pressure to make the films more accessible and available to the popular circuit, while limited editions are offered for ever-increasing prices to recover the higher production costs more quickly. Moreover, artists show their films

more and more often on a variety of different platforms, such as YouTube, Vimeo, and/or a website of their own (in full, in part, or in a lower resolution). There is no doubt that wide distribution can make an artist famous and thus can increase the value of the limited edition, but it may as well turn out otherwise: the limited edition may lose its uniqueness.

The response of many video artists is that they oppose copyrighting digital works for ideological reasons, because they consider it a form of exploitation by the large-scale industry (music and/or film). Appropriation (reuse of commercially exploited work) is considered an admissible act of resistance.² So why claim copyright on your own work? In my view, things are mixed up here. If the different circuits are not well attuned to one another this will end up damaging the market for, notably, medium-size private collectors and less-famous artists. It will enhance a new capitalist market structure in which a few big private collectors, a few big publicly funded or privately sponsored museums, and a few big galleries determine production and demand on the market, a movement that is therefore similar to the one currently taking place in the art market of material objects. This will not be at the expense of the single video artist who becomes famous on the world market, but of those artists who are good but do not become famous or who become famous too late.

As a matter of fact, the maxim stating that a market in which property rights are not well protected will ultimately fail is all too valid. And this concerns a sector of the visual arts that can be counted among the most innovative today. The issue of property rights in limited editions of video art ought to be a matter of serious concern for the art business. Yet it seems not to be so. It sometimes occurs to me that the business does not understand or denies the problem in its own interest. If the buyer is an important museum (which plays in this respect a dubious role) some galleries easily sell artist proofs when they have run out of the limited edition, or split up performance rights to sell one edition to more museums, if the museums require it. Just to mention a few of the practices that spoil the market.