Volume 85
Issue 4 *Dickinson Law Review - Volume 85, 1980-1981*

6-1-1981

Introduction: Some Thoughts on "Art Law"

Stephen E. Weil

Introduction: Some Thoughts on "Art Law"

Stephen E. Weil*

Within the past two decades, there has been a remarkable surge of interest in an interdisciplinary cluster of legal concerns generally referred to in the aggregate as "art law." Young lawyers seem to find it particularly attractive. Scarcely a month goes by that I am not called for employment advice by a law school senior or recent graduate eager to become its practitioner. Sadly, I find myself explaining that there really isn't any such specific discipline, and even less of a demand for anyone to practice it more than occasionally.

To be sure, an artist might now and again run up against an unusual copyright problem or be in need of guidance through some fascinating by-way of the *droit moral.*[1] Most often, though, the disputes in which artists—like other human beings—are apt to find themselves tend to involve their landlords, spouses or local dry cleaners. What they don't need in those circumstances, I tell my callers, is a lawyer whose chief qualification is a sensitivity to art. What they *do* need is a first class and well-rounded attorney.

Albeit crestfallen, my callers generally persist . . . Well, then, what about working for an art museum? Surely, things there must be different. To begin with, I have to say, there are but a few American art museums—perhaps half-a-dozen—that can even afford to hire their own staff counsel. Beyond that, museum counsel only rarely get to deal with "art law." Their daily concerns are far more

* A.B. 1949 Brown University; L.L.B. 1956 Columbia University; Deputy Director, Hirshhorn Museum and Sculpture Garden, Smithsonian Institution; Vice-President, American Association of Museums.

1. The doctrine of "droit moral" or "moral rights" provides that an artist has, inter alia, the right to have his or her name associated with his work, the right to modify and correct the work even if it is in the hands of a purchaser, the right to withdraw work after publication or display, the right to prevent others from claiming credit for the work, and the right to prevent distortion, mutilation or other alteration of his or her work. Many of these rights have not received general recognition in the United States and must be secured by contractual agreement. *See generally*, Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Comment, *Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus,* 9 PACIFIC L.J. 855 (1978); Comment, *The Doctrine of Moral Right: A Study of the Law of Artists, Authors and Creators,* 53 HARV. L. REV. 554 (1946).

likely to revolve about matters such as unrelated business income, slip and fall cases, collective bargaining agreements, and compliance with a broad range of equal opportunity regulations. What a museum needs when it hires in-house counsel is a strong generalist. The bottom line is the same. The young attorney hoping to be helpful to artists or museums would best be advised to spend his or her first precious years at the bar gaining a broad experience and not confined within so odd and only obscurely defined a specialty.

Only rarely has this advice been accepted with anything like cheer. My callers still want to be "art lawyers."

When did the contours of "art law" begin to emerge, and what might underlie its growing appeal? While stirrings of interest can be traced back to the late 1950's (and even earlier in Europe), and while the 1960's saw a sharp increase in both scholarly and legislative attention to the special problems of the art world, it was not until 1971 that the American activity in this field began in earnest.

In the East, 1971 saw the publication of *The Visual Artist and the Law,* a joint project of the Associated Councils of the Arts, the Association of the Bar of the City of New York and the Volunteer Lawyers for the Arts. Almost concurrently, across the country, Professors John Merryman and Albert Elsen of Stanford initiated a graduate level course (open to both law students and art historians) that dealt with art-related legal and ethical questions. This course, the first of its kind to be offered at an American university, proved extremely popular and has been continuously offered ever since.

An event that was to prove seminal occurred in July 1972: the presentation in New York City of the two-and-a-half day workshop *Legal and Business Problems of Art Galleries and Museums* sponsored by the Practicing Law Institute (PLI) and directed (in the face of considerable adversity) by Hedy Voigt. The faculty and participants included a wide range of attorneys, many of whom had theretofore been involved individually with the visual arts but who had not until then had a forum in which to share this common interest. Crippled at the start by the sudden illness of Dino D'Angelo, its Chairman, the workshop nonetheless indicated that there were broad areas of law impinging on both the visual arts and museums that were in need of further exploration.

This first PLI workshop quickly engendered a series of successors. One of those in attendance was Peter Powers, the General Counsel of the Smithsonian Institution. Convinced that the growing legal entanglements in which museums were becoming enmeshed were such as to justify a separate program of their own, he went to work to establish one. The first course of study on *Legal Problems of Museum Administration* was given at the Freer Gallery in Washing-

ton in March 1973. Presented by the American Law Institute-American Bar Association (ALI-ABA) Joint Committee on Continuing Legal Education, it was co-sponsored by the Smithsonian Institution with the cooperation of the American Association of Museums. Since then, this course of study has been repeated annually and in many cities throughout the country. Most recently, it was presented at The University Museum in Philadelphia in March 1981 with more than two hundred participants in attendance. The two articles in this issue are by authors who have served as ALI-ABA faculty members.

Meanwhile, encouraged by the success of its first effort, PLI organized a second workshop that was presented in New York in January 1973 and repeated the following month (to the accompaniment of an earthquake) in Los Angeles. Franklin Feldman and I were asked to serve as co-chairmen. The source materials we put together for this second workshop were initially published as a course handbook, then later expanded and supplemented into the volume *Art Works: Law, Policy and Practice*, which PLI published in 1974.

As the 1970's proceeded, the hitherto sparse "art law" bookshelf began to fill at an extraordinary rate. In 1974, Scott Hodes, who in 1966 had published one of the earliest books in the field, returned with *What Every Artist and Collector Should Know About the Law.* That same year, *The Visual Artist and the Law* was republished in a revised edition, this time under the imprint of a commercial publisher. Leonard DuBoff—who had been an enthusiastic participant at the 1973 PLI workshop in Los Angeles—brought out *Art Law: Domestic and International* in 1975. His *Deskbook of Art Law* was published two years later. Tad Crawford's *Legal Guide for the Visual Artist* also appeared in 1977 as did Robert E. Duffy's *Art Law: Representing Artists, Dealers and Collectors.* In 1979 came the long-awaited *Law, Ethics and the Visual Arts* by Professors Merryman and Elsen. This past year, Aaron Milrad—also a participant in one of PLI's 1973 workshops—joined with Ella Agnew to publish *The Art World: Law, Business and Practice in Canada,* the first comprehensive survey of the Canadian law in this field.

Supplementing these texts has been a rising tide of periodical literature. Notable issues of *The Hastings Law Journal*[2] and the *Connecticut Law Review*[3] were devoted to both the problems of nonprofit arts institutions and those involving objects themselves. *Art & the Law,* a quarterly publication of Volunteer Lawyers for the Arts, has evolved since mid-decade from a casual newsletter to a serious journal publishing some of the best writing to be found today on current

2. 27 HASTINGS L.J. 951 (1976).
3. 78 CONN. L. REV. 545 (1978).

art-related issues. A number of general art world publications such as the *Art Letter,* the *ARTnewsletter* and the *Stolen Art Alert* are now routinely providing up-to-date reports on legal matters. Meanwhile, workshops and symposia continue to multiply. In November 1980, the National Association of College and University Attorneys established a new section to deal with the special problems of university museums and their collections. The first meeting of this section was held in Salt Lake City this past June.

What has spurred this extraordinary growth of interest over so short a span? The conventional answer is that the explosion of values in the art market, the advent of blockbuster museum exhibitions, and the increased media attention focused on such matters as the Rothko Estate[4] and the Metropolitan Museum of Art's early 1970's deaccessioning[5] have combined to create an expanded public awareness both of art and of art-related problems. While this is probably so, I think there are several additional reasons.

To begin with, there is the art world itself—fascinating not only for the objects at its center, but also for the extraordinary *dramatis personae* by which they are surrounded. By contrast with such shopworn dyads as the vendor and the vendee or the landlord and the tenant, in the richness and variety of its characters the art world more closely resembles the *commedia dell'arte.* For Harlequin, Columbine, Pierrot, and their companions it substitutes instead such archetypes as the True Collector, the Philistine Investor, the Dedicated Artist, the Inauthentic Hack and such supporting players as the Dealer, the Auctioneer, the Curator, the Scholar, the Critic, the Trustee, and the Archaeologist. Finally, lurking in the wings and always ready to pounce, is the Tax Man.

Each of these characters is perceived as embodying certain distinctive qualities. The interweaving of their conflicting interests is in itself dramatic. The manner in which, as their conflicts unfold, they

---

4. *In re* Estate of Rothko, 43 N.Y.2d 305, 372 N.E.2d 305, 401 N.Y.S.2d 449 (1977). At his death, abstract expressionist painter Mark Rothko left a considerable number of paintings in his estate. One of the executors of the artist's estate was an officer of the gallery to which the paintings were sold. A second executor, who acquiesced in the transactions, was himself an artist and stood to gain some special advantage from the gallery. The third executor was charged with failure to exercise his duty of reasonable care in the disposition of the works when he suspected the personal and financial interests of his co-executors. The three were surcharged for breach of trust, and the galleries that took with notice of the breach was chargeable with the value of the unreturned paintings at the time of the court's decree.

For an account of the case by a journalist who covered the litigation, see SELDES, THE LEGACY OF MARK ROTHKO (1978).

5. "Deaccessioning" refers to the removal of a work of art from the official collection of an institution. For an account of the Metropolitan's deaccessioning activities, *see* Bator, *Letter to the Editor*, N.Y. Times, Jan. 23, 1973; Cunningham, *Letter to the Editor*, N.Y. Times, Feb. 3, 1973; Metropolitan Museum of Art, Report on Art Transactions 1971-73 (June 20, 1973), *reprinted in* J. MERRYMAN & A. ELSEN, 2 LAW, ETHICS AND THE VISUAL ARTS 7-111, 7-712, & 7-114 (1979).

will sometimes resort to disguises may approach the comic. And the struggle of all (the Tax Man possibly excepted) to accommodate to a system of laws not always well attuned to their special needs can often produce the most ironic of denouements.

Consider, for example, the case of the True Collector seeking to prove to the Tax Man that his activities are motivated primarily by investment purposes and that therefore he ought to be allowed to deduct the expenses of caring for his collection.[6] On the basis of *Wrightsman v. United States,*[7] he would be well advised to mask himself as the Philistine Investor and to play the public boor. Ideally, his collection should be left crated in a distant warehouse. Short of that, every indication of personal pleasure or enjoyment should be forcibly suppressed. He ought to sneer at art on every possible occasion, berate himself as a fool for ever buying "such junk", and ridicule the still greater fools who will one day take it off his hands at a profit. Above all, he should badger the Dealer almost daily for the latest quotations from the market. The world—or at least the Tax Man—must never discover that he is actually a True Collector.

Should the True Collector (or even the Philistine Investor) aspire to a still higher state of tax grace—one in which he might also claim deductions for depreciating his collection—he must turn things even more topsy-turvy still. He would be best off by showing that the objects in his collection were not works of art at all but simply decorations (wall or table-top, as the case might be) which, at the time of their acquisition, could have been anticipated to become obsolete after some determinable period. Taboo, under Revenue Ruling 68-232,[8] would be the ownership of anything so admirable as a "valuable and treasured art piece."[9] Required under *D. Joseph Judge v. Commissioner*[10]—the case that dared to say that not every framed rectangular piece of canvas covered with painted marks was necessarily a work of art—would be proof of the useful life and salvage value of each of the accumulated bits of decor that constitute

---

6. IRC § 212 entitles the taxpayer to deductions for "ordinary and necessary expenses" incurred "for the production . . . of income" or for the management, conservation, or maintenance of property held for the production of income."

7. 428 F.2d 1316 (Ct. Cl. 1970). In *Wrightsman,* the court denied the deduction of expenses incurred by the taxpayers in maintaining their collection, finding that although investment was a prominent purpose, it was not the *primary* motivation. *Id.* at 1222.

8. Rev. Rul. 68-232, 1968-1 C.B. 79.

9. The official position of the Internal Revenue Service regarding the depreciation of art work as set forth in Revenue Ruling 68-232 is as follows:

> A valuable and treasured art piece does not have a determinable useful life. While the actual physical condition of the property may influence the value placed on the object, it will not ordinarily limit or determine the useful life. Accordingly, depreciation of works of art generally is not allowable.

Id.

10. 38 T.C.M. (CCH) 1264 (1976).

his collection.[11]

It should not be supposed that the advantage to the True Collector of denigrating his collection is restricted to situations that involve the Tax Man. Under California's recently enacted Art Preservation Act,[12] for example, the True Collector from whom a Dedicated Artist is seeking damages because a work of his creation has been intentionally mutilated would not be liable unless it could be proven that the work was of "recognized quality."[13] Whatever the True Collector could do to offset such proof ("Me a connoisseur? You're loco. In art, I'm just an ignoramus. I would only buy stuff by Inauthentic Hacks. And I got the witnesses to prove it.") would assist his defense. In a more extreme case, the Dealer charged in New York with larcenously converting the property of an Inauthentic Hack might have a complete defense by showing that the objects in which he deals are not "works of fine art" at all but merely items of wall decor. By so doing, he could take himself beyond the reach of the General Business Law provisions that specially define the artist-dealer relationship as one of principal and agent.[14]

The Dedicated Artist as well may sometimes have to put on a different mask in order to secure a particular legal advantage. Counterpoised against our conventional expectations of what might give meaning to his life—unswerving vision, fierce integrity and even some carelessness of worldly things—*Churchman v. Commissioner*[15] suggests that a different set of values might serve him better if the still struggling Dedicated Artist's art-related expenses are to be deductible for federal income tax purposes. Paramount must be a craving for profit, regardless of whether the same is sought as a symbol of success (museum exhibitions and good reviews, without profitable sales, are less useful symbols), or as "the pathway to material wealth."[16] Important too is that his creative (or "recreational") activities not absorb too much of his day but that some substantial time be devoted to marketing, an activity "where the recreational element

11. *Id.* at 1273.

12. The California Art Preservation Act, 1979 CAL. STAT. ch. 409, § 1 (codified at CAL. CIV. CODE § 987 (Deering Supp. 1981)).

13. The California Art Preservation Act defines "fine art" as "an original painting, sculpture, or drawing of recognized quality," but excludes "work prepared under contract for commercial use by its purchaser." CAL. CIV. CODE § 967(b)(2) (Deering Supp. 1981).

14. N.Y. GEN. BUS. LAW § 219-a (McKinney Supp. 1980-81).

15. 68 T.C. 696 (1977). In *Churchmen,* the Commissioner argued that the taxpayer-artist was a "hobbyist," that she did not engage in her artistic endeavors for profit, and that therefore IRC § 183 applied. Section 183 allows deductions for ordinary and necessary expenses arising from an activity not engaged in for profit only to the extent of the gross income derived from the activity less the amount of those deductions, such as taxes and interest, that are allowable regardless of whether or not the activity is engaged in for profit. The court held for the taxpayer, however, and allowed the deduction in full of her art-related expenses under sections 162 and 165.

16. Churchman v. Comm'r, 68 T.C. 696, 703 (1977).

is minimal."[17] To stubbornly persist in a medium or technique despite the rebuffs of the market would not be a positive sign of profit-seeking. Far better, apparently, would be an annual change in style, preferably one based on a current survey of what is then "hottest" in the art market.

Here, again, is that awkward "fit" between the concerns of two systems—art and the law—that gives a peculiar twist to so much in this field. As a way of safeguarding the fisc against underwriting the costs of what might be only a hobby, the *Churchman* approach makes eminently good sense. To propose some alternative that the Dedicated Artist might find more appropriate—simply, for example, to put his painting or sculpture itself before a body of Critics, Curators, or peers that might pass on its merits—would be to misapprehend the issue. The Internal Revenue Code is indifferent to the quality of art. Its concern in such situations is whether expenses are merely personal or have been incurred in a quest for profit. The tilt, unfortunately, is toward the Inauthentic Hack.

Another aspect of "art law," and one that often adds to its piquancy, is the odd way in which it sometimes precipitates the courts into unaccustomed questions of artistic quality or historical authenticity. We have come a long way since Mr. Justice Holmes' familiar caution, in *Bleistein v. Donaldson Lithographing Co.,*[18] that it would be "a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations outside of the narrowest and most obvious limits."[19] We have even come a considerable way since the days of *Brancusi v. United States,*[20] and other customs cases when the statutory question the courts had to answer was simply "Is it art?"

In *Furstenberg v. United States,*[21] for example, the United States Court of Claims found itself inescapably saddled with the task of distinguishing between the artistic merits of two paintings by Corot—one the subject (in a charitable deduction contest) of a disputed valuation and the other the "comparable" that the taxpayer had proffered in support of her claim. Undaunted, the Court seized the critical gauntlet. Per curiam, it pronounced: "From the standpoint of artistic quality, however, *Girl in Red with Mandolin* is substantially superior to *La Meditation,* as the former is one of Corot's finest works whereas *La Meditation* . . . is near the average in artistic

17. "While petitioner's artwork involved recreational and personal elements, her work did not stop at the creative stage but went into the marketing phase of the art business where the recreational element is minimal." *Id.* at 702.

18. 188 U.S. 239 (1903) (application of copyright laws to three chromolithographic circus advertisements).

19. *Id.* at 251.

20. T.D. 43063, 54 Treas. Doc. 428 (1928).

21. 595 F.2d 603 (Ct. Cl. 1979).

quality among the entire group of Corot's figure paintings."[22]

In *Dawson v. G. Malin, Inc.*,[23] a Federal District Judge found himself confronted with the demand that, as the trier of facts, he undertake the task of attributing a group of Chinese antiquities—the subject of an action by a True Collector against a Dealer for breach of warranty under one of New York's special art statutes—to their precise dynastic origins. Sidestepping any such attribution as "by its very nature an inexact science" and "necessarily . . . imprecise,"[24] the Judge arrived at a more manageable approach: whether there had been a reasonable basis in fact at the time they were made for the Dealer's representations as to the origin of these antiquities, "with the question of whether there was such a reasonable basis in fact being measured by the expert testimony provided at the trial."[25] There ensued a classic battle of experts—in this instance, of Scholars—and a delightful excursion into the arcane. In the footnotes appeared such lyric poetry as:

> The fair sky is enlightened by a
> distant sail,
> The bright moon is illuminated by
> a pureness of the willows and clouds,
> People drift away with the flowing
> waters but nature remains forever,
> Splashing waves play harmonious songs as
> the water's vapor rise from the lake
> like puffs of smoke.[26]

Such are some of "art law's" many pleasures. That it can sometimes be so diverting a field should not, however, mislead us as to the importance of what its practitioners have accomplished or what remains to be done. At the market level, special legislation adopted over the past fifteen years in such major art market states as New York,[27] Illinois,[28] and California[29] has substantially changed the relationships among artists, dealers and collectors, largely for the better. Imbalances have been corrected, more stringent disclosure standards have been imposed, and the market (despite occasional dire predictions) has been no less robust for these changes.

At the institutional level, enormous progress has been made in better defining the responsibilities of trustees and in adding legal force to standards (applicable to trustees and staff alike) that were hitherto considered, when they were considered at all, as no more

22. *Id.* at 608.
23. 463 F. Supp. 461 (S.D.N.Y. 1978).
24. *Id.* at 467.
25. *Id.*
26. *Id.* at 470 n.10.
27. *See, e.g.*, N.Y. GEN. BUS. LAW §§ 219 & 219-a (McKinney Supp. 1980-81).
28. *See, e.g.*, ILL. ANN. STAT. ch. 121½, § 361-69 (Smith-Hurd Supp. 1981-82).
29. *See, e.g.*, CAL. CIV. CODE § 1740-45 (Deering 1972).

than ethical. That museums hold their collections in what is essentially a public trust is today a widely-shared perception from which both they and their users have benefited enormously.[30]

By contrast, the problems of balancing competing interests in such federally dominated areas of the law as copyright and taxation[31] seem far from any satisfactory resolution. Thorny too are questions that concern the international movement of art and the protection of archaeological sites.[32] As to these, the art world itself has thus far resisted any consensus solution. A wider concern is whether the arts should receive public funding and, if so, by what means.[33] To many of these issues, the art world's diverse cast of characters (as well as the general public) brings strong and often opposing views. A major contribution of "art law" has been to help focus the terms of their debate and define the issues that must be addressed.

The arts and the institutions that embody them are too vital to our national life to be left adrift in a legal system that often treats them in too general a fashion. Attention should be paid to their special needs and even peculiarities. By assembling this special issue, the editors of the *Dickinson Law Review* have contributed toward that end.[34] Hopefully, their efforts will serve to introduce a still broader public to a field of the law that—if yet too diffuse to constitute a distinct specialty and still far from able to furnish remunerative employment to my monthly callers—should long continue to provide a variety of both pleasures and worthwhile tasks for those who pursue it.

---

30. *See* Marsh, *Governance of Non-Profit Organizations: An Appropriate Standard of Conduct For Trustees and Directors of Museums and Other Cultural Institutions,* 85 DICK. L. REV. 607 (1981).

31. *See* Comment, *Tax Incentives for the Support of the Arts: In Defense of the Charitable Deduction,* 85 DICK. L. REV. 663 (1981).

32. *See* McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art into the United States,* 85 DICK. L. REV. 565 (1981).

33. *See* Comment, *Mechanisms for Control and Distribution of Public Funds to the Art Community,* 85 DICK. L. REV. 629 (1981).

34. The editors wish to thank the members of the Law and the Arts Seminar, conducted by Professor Geoffrey Scott, for their interest and support. In particular, the following students deserve recognition for their assistance: Jeffrey Bitzer, Rita Frealing, Katherine Graham, and Peter Kramer.