

CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL

VOLUME 17

SUMMER 1987

NUMBER 2

CONFERENCE ON THE LAW AND THE ARTS*

INTRODUCTION

On November 22, 1986, the *California Western International Law Journal* sponsored a conference on the Law and the Arts. The purpose of the conference was to provide artists, art collectors, museum personnel and lawyers with a broad understanding of the many legal issues which concern the arts. This introduction is written with the hope that it can provide an overview of current legal problems in the art world. It is followed by opinions of professionals on specific art law issues taken primarily from transcripts of the speeches delivered at the conference.

The term "artist" is used here to designate painters, sculptors, printmakers, etc., dealing with the visual arts. This introduction begins with the creation of a work of art and traces it through the various legal issues which may develop as a work travels the road from studio to gallery to museum or to "home."

I. DEFINING ART

Perhaps the first issue which arises in art law is the question: What is art? The definition, one finds, depends largely on the context in which the question is raised. Definitions vary for customs, copyright and international treaty purposes. Once it is decided what art is, the inquiry can turn to the legal implications which arise after the creation of the work. For purposes of this introduc-

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tion, "art" or "work" will be considered the work product of an "artist."

II. PROTECTING THE ARTIST'S RIGHTS

One of the first legal implications one encounters is the question of *droit moral*¹ or "moral right."² Although there are many aspects of *droit moral*, the basic philosophy which underlies it is a belief that an artist should have a right to decide whether or not to publish the work;³ to maintain the work's integrity; and to ensure that the work carries his name.⁴ Although the United States federal statutes do not expressly accept the concept of *droit moral*, a few individual states have legislation which provides essentially the same protection.⁵ Other relief may be available under copyright law.⁶

Economic rights, or *droits de suite*, also pose a problem for the artist. Does an artist have a right to receive a royalty on the resale of his work of art? In several countries, the answer is yes. However, in the United States, only California grants artists such a royalty.⁷ The California law, however, applies only when the seller lives in California or when the sale takes place in that state. This leaves the door open for potential extraterritorial problems⁸ and illustrates the need for an international policy regarding *droit de suite*.

1. The modern concept of *droit moral* was first conceived in France in the mid-1950's. The French law is one of the first to be codified and, due to the fact it has been well litigated, provides a good reference for comparing other laws. Law of Mar. 1957, law no. 57-296 [1957].

2. Other rights, which are beyond the scope of this introduction, include the right to withdraw one's name as artist if the work has been "changed" and the right against suffering excessive criticism.

3. This question arises when a commissioned work is not up to the artist's standards, but the person who commissioned it likes it and wants to have it completed. Under French moral rights law, and in the United States under the theory of contracts for personal services, the law cannot force an artist to complete a commissioned work.

4. In France, the law extends to the artist the right not to have his name on work that he considers not to be his own.

5. Currently, the states which have these provisions are New York, Artists' Authorship Rights Act, N.Y. GEN. BUS. LAW. §§ 228m-228q. (McKinney Supp. 1987) and California, CAL. CIV. CODE § 987 (West Supp. 1987). Other states which have considered, or are presently considering, such legislation are Iowa, Massachusetts, Oregon, Tennessee and Washington. Senator Kennedy has brought legislation before Congress on this issue as well. The philosophy behind allowing an artist to sue if his works have been changed without his consent rests on the theory that such changes affect the artist's reputation. Thus, in an effort to acquire the same result, a "false light" analogy can be raised in states which do not have *droit moral* statutes.

6. The United States is a member of the Universal Copyright Convention.

7. See CAL. CIV. CODE § 987.

8. For example, the question becomes if a California artist has a work subsequently sold in Arizona, can that state be compelled to uphold California law?

Although protecting economic rights, as does the California law, may put artists on a more equal footing with authors by giving a financial interest in the resale of their work, the law may also discourage possible resales. The burden of record keeping for small galleries in maintaining up to date addresses for the artist-exhibitors and the increase of the price of art by essentially adding a "tax" are likely to discourage the smaller galleries and museums.⁹ Censorship may also pose legal concerns for the artist or museum. Because art can be used to express ideas that are politically and socially controversial, many attempts have been made to curtail or stifle the artist. Modern thought, as expressed in the first amendment of the United States Constitution, has by and large eliminated this problem. The artist, however, remains economically tied to the restraints of popular opinion. Museums, ever fearful of being sued, may choose to avoid exhibitions which the public would consider offensive.¹⁰

III. PROTECTING ART

Art can play a significant role in international relations. It serves to broaden understanding across cultural lines and has historically been considered a "goodwill ambassador." Yet, at the same time, art's movement from country to country can cause international tensions. People often regard art in a patriotic sense. As art reflects the cultural heritage of a people, older works of art are thought to be a form of national "history" which ought not be removed from the country in which it was produced. In light of these concerns, many countries have enacted legislation which puts restrictions on the international art trade.

Drafting legislation or treaties that can both protect art and promote goodwill between nations is not an easy task. Laws which are too strict can promote black market sales and interfere with international accord. Yet failure to write laws which limit the international movement of national treasures can create a permanent and severe result. For years, Indian and pre-Columbian artifacts were removed from their original sites in Central and South America without any regard for the legitimate concerns of archeologists and

9. For example, the Parke Bernet offices in Los Angeles were closed after the California Act, *supra* note 5, was enacted. See also *infra* comments by Professor Merryman and Peter Karlen.

10. This is not an unreasonable concern given courts' willingness to entertain suits by parents objecting to the contents of books used in public schools.

anthropologists. Since much of the significance of many of these works of art lies not in their "visual qualities," but as a means of reconstructing extinct societies, the removal of the art creates irreparable harm.

While well drafted legislation may work to prevent future problems, it cannot solve many of the current dilemmas. Policing and conserving archaeological sites are often more expensive than most countries can afford; moreover, the return of pillaged art may be impossible if these works have become increasingly more frail over time. Attempting to return them may very well result in their complete destruction.

Works of art which have no anthropological concerns also need protection. Italy, for example, estimates that thousands of dollars worth of art are stolen each year from churches and other buildings. Yet, providing proper security is just too expensive. Museums, the most likely candidates for purchasing stolen works, are faced with legitimate concerns whether these possible new acquisitions are "stolen," and are therefore are hesitant to purchase them. As a result, many of these stolen goods may remain in private homes where discovery of them is difficult.

Immoveable art suffers as well: Modern realities such as smog can have severe effects on a country's cultural heritage. Greece admits that its monuments have suffered more damage from pollution than from four hundred years of weathering. War also takes its toll in terms of loss of art. Art has been seized for its dollar value or for a show of strength; it has been destroyed for representing a hostile view of the world; it has been damaged or destroyed by the actual elements of war, for example, bullets, bombs or fire; or it has been converted for use in the war, for example, melting down metallic objects to build machinery. Although there were some attempts to remedy the destruction of art by war in early American history,¹¹ there was no international remedy until the Hague Conventions of 1899 and 1907. Although these regulations protect certain kinds of property, enforcement during the World Wars proved ineffectual. After World War I, Germany accepted full responsibility for damages, but the government's financial shortcomings required that recovery be limited to the civilian population.¹²

Questions of who owns art which was lost or stolen during war is

11. The liber code contained in the U.S. Army filed regulations is one example.

12. The agreements were worked out by a Mixed Claims Commission under the Treaty of Berlin and by a Mixed Arbitral Commission under the Treaty of Versailles.

another issue. A constant question that comes up in these cases is whether a gallery which purchases one of these "missing works" can be said to buy in good faith. If so, there is no recovery for the owner, at least in American courts. On the other hand, lack of good faith on the part of the purchaser will result in liability.¹³

Recently, some nonjudicial attempts to solve the problem of war with regard to art have been made in the form of "peer pressure" plans¹⁴ and treaties. The long-term effect of such efforts have not yet been tested.

IV. PURCHASING ART

Traditionally, there have been two reasons for buying art: for enjoyment and for financial gain. Although most artists do not have much of a resale market, works of well-known artists may prove to be a good investment. Historically, art increases in value when stocks on the open market fall.¹⁵ The art market is unregulated for the most part and art may be bought easily through galleries or auctions or from the artist directly. Investors for profit generally need to be aware of potential market changes, forgery problems and the like. By contrast, one who buys for pleasure risks only that his tastes will change.

If there are no disputes concerning the creation of a work of art and title is not contested, the next legal difficulty a work may encounter will arise is at its sale. What the respective rights and duties of the buyer and seller are may not be clear. Parties to the sale may have to resort to the law to solve their disputes.

13. *Compare* *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *aff'd and modified per curiam*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), which held that the Nazis were thieves and the gallery could receive no title from them, with *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718, which held that Russia's acts of taking the art were acts of State, the validity of which an English court had no power to decide.

Many cases will be dismissed before any resolution on the facts can be made because the court lacks jurisdiction. Further, some states grant immunity from seizure of art for the purposes of acquiring jurisdiction if the works are brought into the country for a cultural exhibit. Without such provisions, the willingness of nations to loan works for exhibits would greatly diminish for obvious reasons. The choice of which state's domestic law should be applied to the question poses another tricky problem for the courts.

14. For example, after World War II, catalogues of lost or stolen works of art were circulated among the art centers in the hopes that political pressure would encourage the return of stolen art to their rightful owners.

15. See PICK'S WORLD CURRENCY REPORT (1975).

A. Selling by Auction

Auctions are one of the most popular means of buying and selling art.¹⁶ Auctions are popular with artists because an auction draws a large number of interested buyers thus increasing the likelihood of getting a fair price. The number of art works and buyers at one location makes auctions popular with collectors as well since the value of art is determined not only by the work's "ingredients" and its overall esthetic "success," but also by the artist's current status¹⁷ and by the number of similar works currently available.¹⁸ Aside from auctions' marketing function, they are also helpful for establishing the dollar value of art for such purposes as insurance.

Legal concerns may arise under state laws which require auction houses to be licensed.¹⁹ As in other types of sales, the purchase and sale of works of art create potential problems under the Uniform Commercial Code.

B. Authenticating the Work

Another difficulty one faces in the realm of auctions, or other sales, is authentication. As art becomes more valuable as an investment, the temptation to forge it grows. Although signatures and "styles" are means of authentication, even these can be forged with great precision. If one's sole purpose in acquiring art is for its aesthetic value, then the question of authentication is not as significant, but for museums and investors, the issue is crucial.

If the artist is alive, authentication is less difficult to resolve.²⁰ Once the forgery has been established, a new problem is often created with respect to what should be done with the work. One artist/forgery had a very successful sale of his forgeries while in prison,

16. Other means of selling art include a fixed price system (as is often found in galleries), where the purchaser either pays the price or refrains from purchasing the piece. Another means of selling a work of art is through a negotiation process, where the parties discuss the cost until they come to a mutually agreeable price.

17. The artist's current status may be indicated by the number of bidders and the price of the work.

18. The number of other similar works available may be evidenced by assessing the other works available at auction.

19. Licensing requirements are generally enacted to ensure the proper reporting of revenue for tax purposes. Exactly what is an auction poses another problem. See *Hawaii Jewelers Assoc. v. Fine Arts Gallery, Inc.*, 51 Hawaii 502, 463 P.2d 914 (1970).

20. Although asking an artist if a particular work is his own may seem simple on its face, when the question is posed in an international arena, it can become more complex. Language difficulties are fairly readily coped with, but if the work is of a dissident artist of a repressive government and the work has been secreted out of the country, an artist may be unwilling or unavailable to claim a particular work.

despite the New York Attorney General's attempt to block the sale.²¹ Other legal problems arise when an investor hires an expert to authenticate a work and the expert's judgment is found to be erroneous after the work is purchased. In resulting lawsuits, courts are usually asked to answer such questions as: Did the expert use due care in making his assessment? Did the investor or the expert assume the risk of mistake?²² The fear of lawsuits has resulted in most experts and museums hesitating to give their opinion about the authenticity of a particular piece of art.

The artist himself may have a cause of action with respect to a sale of a forged work bearing "his name." These suits can arise under a number of legal theories, but often they are based on the right of privacy or trademark.²³ Unfortunately, the buyer of a forgery does not have the same remedies available to him. Although some states have enacted legislation in light of this problem, an investor is often left only a remedy in contract or tort. These remedies, however, may be limited by the doctrine of *caveat emptor*—let the buyer beware—or by disclaimer provisions included in the contract.²⁴

C. Consignment Contracts

Issues of contract law appear in several ways in the art field.²⁵ Consignment contracts are common examples.²⁶ Although written contracts can help parties anticipate problems and achieve a mutual understanding of what is expected from one another, artists

21. *State v. Wright Hepburn Webster Gallery, Ltd.*, 64 Misc. 2d 423, 314 N.Y.S.2d 661 (Sup. Ct. 1970), *aff'd*, 37 A.D.2d 698, 323 N.Y.S.2d 389 (1971).

22. *Hahn v. Duvean*, 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. 1929) (settled out of court for \$60,000); *Heer v. Mongeon*, No. A7906 02578 (Multnomah Atty. Or. Cir. Ct. 1980); *Travis v. Sotheby Parke Bernet*, Index No. 4290/79, (Sup. Ct. N.Y., Nassau County 1982).

23. There are several other legal theories under which suits can be brought. A description of all of these is not possible in an introductory paper. *See, e.g.*, 15 U.S.C. § 1125(a) (1982); MICH. COMP. LAWS ANN. §§ 442.321-442.324 (West Supp. 1986).

24. *See, e.g.*, U.C.C. § 2-316.

25. A contract has been defined as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *RESTATEMENT (SECOND) OF CONTRACTS* § 1 (1979). Although contracts may be oral or written, to be legally binding most states require a writing signed by the party being sued. *See* U.C.C. § 2-201 and official comments.

26. In a consignment contract, one person (the consignor, such as an artist) sends property to another person (the consignee, such as an art gallery). The person or gallery receiving the work holds the property for the owner or artist until the work is sold in the manner agreed to, or returns it to the owner. Wilson, *Visual Arts and the Law*, in *LAW AND THE ARTS*, 101-02 (T. Horwitz ed. 1979).

often shy away from them.²⁷ One commentator has suggested that "[t]radition, unequal bargaining power, and ignorance of the Law, is the cause of such avoidance."²⁸

A written contract can provide both artists and galleries with many advantages.²⁹ Contracts can provide for the guarding of an artist's work from a gallery's creditors;³⁰ the duration of a consignment agreement;³¹ the establishment or prevention of a gallery's ability to assign its rights under the contract to another gallery;³² and the fixing of copyright ownership. These protections are in addition to the more common clauses pertaining to price, liability³³ and accounting procedures.³⁴

Artists and galleries alike would be well advised to discuss their agreements with each other and then write them out, so that what they agreed to is clear.³⁵ This is especially true when the artist-gallery relationship arises across international borders. Not only do languages change from country to country, but basic legal philosophies do as well.³⁶

V. COPYRIGHT

Copyright issues are another legal concern which face the artist, collector and museum. Many artists feel that placing the copyright mark on their own work defaces or commercializes it.³⁷ Yet many protections and rights are created under the copyright law—protections and rights that are carried across international

27. *Id.*

28. *Id.*

29. See, e.g., Lynes, *The Artist as Uneconomic Man*, SATURDAY REVIEW, Feb. 28, 1970; *Artist-Gallery Contracts—Scenes from a Marriage*, 65 ART IN AMERICA 10 (July/Aug. 1977).

30. U.C.C. § 2-326 and official comments.

31. *Id.* Either party may want to include a clause allowing it the right to withdraw from the contract at an earlier date on certain conditions.

32. *Id.* § 2-210.

33. Issues may arise, for example, regarding who is responsible when losses occur due to fire or theft. See generally *id.* § 2-613 and official comments. A full discussion of the question of liability is outside the scope of this introduction.

34. There are significantly more protections which a written contract can provide for the parties. A full discussion of these issues is outside the scope of this introduction.

35. Standardized or form contracts may be available but because artists and galleries may not be familiar with the terminology involved, such forms should be used with caution. See, e.g., F. FELDMAN & S. WEIL, *LEGAL AND BUSINESS PROBLEMS OF ARTISTS, ART GALLERIES, AND MUSEUMS* 463 (1973); Weiner, *The Artist and His Gallery*, 2 PERFORMING ARTS REV. 91, 117 (1971).

36. For example, there are countries which follow a civil law system and others that follow a common law system.

37. The United States is one of the only countries that still maintains this notice requirement.

borders.

The origins of American copyright law³⁸ can be found in the common law and in article I, section 8 of the United States Constitution. States may provide further benefits than those secured by the federal law. In very simple terms, a copyright grants the holder the right to reproduce, to make derivative works, to distribute copies, to preform or to display the copyrighted work.³⁹ The holder of the copyright may sell any part or all of his rights.

The copyright, as now defined, lasts for the lifetime of the creator plus fifty years.⁴⁰ Generally, any work which is an original, that is, "not copied," can be copyrighted.⁴¹ It is necessary that the work be expressed in some tangible form.⁴² The work sought to be copyrighted must not be entirely utilitarian in purpose. The design, or visual element of the piece, must be separable or independent from any utilitarian purpose the art might also otherwise serve. Failure to "publish" the work under the terms of the copyright will not invalidate the copyright; however, to take advantage of one's copyright benefits, the work must be "registered."⁴³

For museums and artists who supplement their income through the sale of postcard or poster reprints of their works, copyright questions can be substantial.

VI. MUSEUMS

Museums themselves pose another set of legal problems. Most museums are set up under state law as nonprofit corporations or as trusts.⁴⁴ Therefore, many legal questions relating to museums will

38. See Copyright Revision Act of 1976, 17 U.S.C. §§ 101-810 (1982 & Supp. III 1985).

39. Section 106 of the Copyright Revision Act sets forth the five exclusive rights of the holder of the copyright: to reproduce the work by any means; to prepare derivative works of the piece; to sell or otherwise distribute copies of the work; to perform the work (if performable); and to display the work publicly.

40. Works created prior to the new law are not included in its benefits.

41. The work need not be novel as is required for patents. In other words, it is the expression of ideas which a person can copyright—not the ideas themselves.

42. It must be such that the copyright protections have some meaning. If the idea is still in the conception stage, it can neither be perceived by another nor copied and as such cannot be copyrighted.

43. The exact requirements under the Copyright Act are beyond the scope of this introduction.

44. The Frick Collection is an example of a museum set up by a trust. These situations can pose unique, but interesting, problems. For example, in *Frick Collection v. Goldstein*, 83 N.Y.S.2d 142 (Sup. Ct. 1948), *aff'd*, 274 A.D. 1053, 86 N.Y.S.2d 464 (1949), *appeal denied*, 275 A.D. 709, 88 N.Y.S.2d 249 (1949), the court had to decide if the museum was allowed to accept works of art as a gift.

vary from state to state.⁴⁵ Because of the unique position museums have as collectors of art, concerns over the protection of cultural properties and over the displaying of forged works can often arise. In response to this issue, "The Resolution Concerning the Acquisition of Cultural Properties Originating in Foreign Countries" was created.⁴⁶ The resolution calls for museums to practice the policies set out in the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁴⁷

Another legal concern emerges in the context of loaning works of art to or receiving art from other museums or private collectors. Issues of who has title can be difficult to resolve when there has been a long-term loan and the proper paperwork is lost or was never satisfactorily made. Although the use of modern computers may simplify record keeping, computers cannot resolve questions of liability when loaned art is damaged or lost in the transportation or display process.

Museums may face legal difficulties when they decide to sell certain pieces of the collection. Collections are sometimes given with the stipulation that the works remain together or on display. When insurance costs or storage problems arise, the museum often desires to sell certain pieces. Its ability to do so may create problems if the donor or heirs of the donor protest.⁴⁸

CONCLUSION

Art law, like other branches of law, is comprised of legal issues that range from the exceedingly simple to the extensively complex and may even pose serious international relations problems. Modern laws and regulations have brought new protections, but also new issues. Obviously, one symposium cannot answer all of the le-

45. Generally, issues of taxation, both with respect to artists and museums, are not considered in this introduction, but should not be ignored in practice. Although legal questions can and do surface in the "business" aspect of museums, these issues are not considered here. Such issues can include, for example, employer/employee relationships, or negligence suits against museums resulting from falls or the like.

46. Also known as the "Joint Professional Policy on Museum Acquisitions," the agreement was formulated jointly by the Association of Art Museums Directors and the International Council of Museums.

47. Nov. 14, 1970, 823 U.S.T. 231. The United States became a signatory to the convention in 1983.

48. Although there is not a lot of case law in this area, these deaccessioning questions often turn into public scandals. Such was the case when the St. Louis Mercantile Library sought to sell some of the George Bingham drawings donated by Mayor John How. L.D. DuBOFF, *ART LAW IN A NUTSHELL* 290-95 (1984).

gal questions involved, but through increased knowledge and understanding many problems can be avoided. The following article and speeches, therefore, are printed with the hope that they will bring a basis of understanding to both the artist and the lawyer.