The General Practice of Art Law

Ira M. Lowe* Paul A. Mahon†

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Abstract

Art law is a general specialty since what we call art law is always some other type of law in the first instance - contract law, copyright law, tax law, estate and trust law, constitutional law - which happens to involve artists or art work.
of symbolic expression in the form of flag desecration, thus insuring the protection of flag art.

Jeffrey N. Schwartz

The Business of Art

The General Practice of Art Law

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What Is Art Law?

Art law is a general specialty since what we call art law is always some other type of law in the first instance—contract law, copyright law, tax law, estate and trust law, constitutional law—which happens to involve artists or art work.¹ The field of art law has achieved recognition as a specialized practice only within the past twenty years² and is sufficiently outside the mainstream practice of law to be considered a

¹ Mr. Lowe and Mr. Mahon are partners in the law firm Lowe and Mahon in Washington, D.C., and members of the District of Columbia, New York and Massachusetts bars. The firm represents visual artists, authors, poets, entertainers, and other individuals and organizations involved in creative endeavors.

"boutique practice." But unlike boutique firms focused on the minutiae of relatively obscure areas of the law, art lawyers generally pursue the varied demands involved in representing individuals and entities involved in artistic creation.

While art lawyers must be expert in negotiating and drafting contracts for the protection and advancement of their clients' artistic properties, the practice of art law extends considerably beyond mere transactional representation of the art work. After all, the artist who trusts an attorney with his art also wants that attorney to represent him in his divorce or if he is arrested, to deal with his landlord or review his real estate transactions as well as to advise him on his will, estate, insurance, and financial planning, to handle tax and other regulatory inquiries, and to be a sounding board for strategic business planning as well as personal decision-making. Similarly, the attorney representing a company or institution involved in the arts will frequently be called upon to advise that client on all aspects of its business operations, including litigation, corporate, tax, bankruptcy, and employment issues. Throughout, art lawyers must be sympathetic to the energies and frustrations of the creative process; and, since an individual has created something of value with her hands from her vision, it is almost impossible to separate the artist from the art work. Art work and its creators are not fungible, and the art lawyer must recognize his clients' unique circumstances in even the most routine task.

Probably the best way to describe what the art lawyer does is to review a sampling of varied matters requiring an art lawyer's involvement. Where mandated by settlement agreements or client obligations, confidential details have been maintained unless disclosure has been permitted by the artist or persons involved.

I. Negotiation of Commission Agreements*

One of the primary tasks an art lawyer handles is the negotiation and drafting of contracts for the commission of fine art.

William Woodward was commissioned by Ringling Bros. and Barnum & Bailey Circus to depict the circus in one of the largest murals of the century (22' X 42') for the entrance foyer of its new International Headquarters. (See Illus. 1). Woodward, who is the first individual to design both sides of a United States coin with his Bicentennial of the Congress Silver Dollar minted last year, has created other large murals.

The agreement referenced the circus' obligations to provide satisfactory site construction, foundation and support for the mural. Copyright ownership, reproduction and display rights were carefully negotiated in light of the importance of the image of the circus and the valuable reproduction rights for depicting the mural on a variety of publications, displays and products. As with any important work of art requiring considerable time to create and involving staggered payments, the possibility of the artist's death or disability prior to completion of the mural was also addressed.

There are often desirable spinoffs from the main objective of a commission contract, and the opportunity arises to promote the artist in unusual creative ways as part of the overall deal. In this agreement, to maximize the benefit to the artist of such a monumental work, a provision was negotiated requiring the circus to provide Woodward with a special exhibition in conjunction with the circus' dedication ceremonies. This exhibition will promote the sale of Woodward's preliminary studies, drawings, sketches, and similar artistic property prepared in connection with creation of the mural and will feature various circus attractions at the opening.

Since sufficient moral rights protection for the artist's work must be by contract in the United States, a number of provisions for maintaining the integrity of the mural were obtained. The circus agreed to:

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4. There are a number of state statutes providing some form of moral rights protection, but complete protection, and protection in those states lacking moral rights legislation, must be by contract (if the commissioning party will agree). For a thorough discussion of state moral rights law, see generally, Damisch, State "Moral Rights" Statutes: An Analysis and Critique, 13 J.L. & ARTS, 291-347 (1989); Note, Moral Rights: The Long and Winding Road Toward Recognition, 14 Nova L. Rev. 435 (1990).
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A. Mural Commission

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* reasonably maintain and protect the mural on a regular basis;

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* not alter or modify the mural without the artist's permission;
* alert the artist to any proposed disruption to the site of the mural which would affect the intended character and appearance of the mural;
* give the artist, in the event repairs or restoration are required, the right to approve the repairs and to supervise the restoration for a negotiated fee;
* discuss with the artist all intended publications, reproductions and displays of the mural; and
* give credit to the author in publications, reproductions and displays.

B. Purchasing Art Multiples: Award Sculpture

Where a purchaser desires exclusive ownership of an existing sculpture and control of its reproduction rights, she may either acquire the copyright or obtain an exclusive purchase arrangement. When a prominent institution sought a sculpture for use as an award to honor individuals at an annual presentation ceremony, it selected a sculptor's work and for two years purchased the required number of bronze sculptures for award recipients. Prior to ordering sculptures for the third annual awards ceremony, the institution realized it had no exclusive understanding with the sculptor and presented her with a one-sided contract which, among other things, called for transfer of the artist's copyright to the institution upon the artist's death. Before presenting the contract, and without the artist's approval, the institution had printed and sold a large number of posters of the sculpture touting the awards ceremony. The institution had acted with complete disregard for copyright ownership, incorrectly believing that its prior use of the sculpture as an award in its ceremony somehow gave it rights superior to the copyright owner.

Rather than negotiate the proffered contract, two new agreements were drafted on behalf of the artist for the institution to consider: one transferring the copyright for a large lump sum and the other providing for an exclusive annual purchase arrangement. The in-house lawyer handling the negotiations for the institution was expert in those areas in which the institution was involved, but was unfamiliar with the types of copyright and art law concerns at issue, and a great deal of effort was spent alerting him and his client to the artist's legal rights and concerns. An agreement for annual purchases was eventually concluded, requiring credit to the artist to be printed adjacent to two-dimensional reproductions and, requiring in certain reproductions, that a statement from the artist about her work also be printed.

It would have been in the institution's interest to have attempted purchase of the reproduction rights to the sculpture prior to using it at the first annual award ceremony. Having identified the unique sculpture as its official award, though, the institution was in a poor bargaining position with respect to its asserted argument that it could choose another sculpture.

C. Interpretation of Commission Agreements

Some commission agreements are unclear and need to be scrutinized for contract sufficiency, as was the case with a national organization seeking to place a memorial on the Mall in Washington, D.C. During the early days of the organization, it had entered into an agreement for the creation of a figurative sculpture advancing the organization's interests. The Board of Directors negotiated the contract without the benefit of counsel and the parties did not contemplate requirements beyond their control. For example, although the agreement called for the sculpture to become a national memorial on the Mall, the agreement did not cover those requirements for regulatory review and approval beyond the control of the parties and the possibility that the sculpture would not be approved for the space. What is more, the National Capital Memorials and Commemorative Works Act was passed by Congress a year and six months after the agreement was signed, creating an arduous and exacting approval process unanticipated at the time the contract was entered into. The dispositive impact of the unforeseen regulatory process made performance of the agreement impossible and its very purpose frustrated.

D. Breach of Commission Agreements

Even in cases where there exists an enforceable commission agreement, the commissioning party may desire to avoid its obligation, as seen in the following cases involving rejected sculpture commissions.

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1. Failure to Honor Commission: Cancellation

When a sculpture competition was announced for a memorial at the harbor of a large Eastern city, a sculptor prepared a model and submitted his proposal. He was then notified that his design had won the competition and his commission was announced at a press conference. For two months the artist developed an enhanced model, evaluated technical considerations, and obtained estimates for enlarging, casting, insurance and installation expenses. He rented a larger studio solely for preparation of the memorial. Notwithstanding his selection and the two month's effort in reliance on the commission, the artist was later notified that the commission had been cancelled and no compensation for his sizeable lost commission fee and expenses was offered.

The commissioning organization was contacted in an effort to explore alternate placement of the sculpture in a public space with equivalent exposure. Although these efforts were unsuccessful, a satisfactory cash settlement and a brief favorable press release were ultimately achieved in light of the difficulties in establishing the speculative nature of damages from lost professional exposure.

2. Failure to Honor Commission: Removal of Sculpture

Sculptor Ella Tulin was commissioned by a Washington, D.C. real estate developer to produce an enlarged version of her work Adam and Eve for the lobby of a new office building in Northern Virginia. The bronze sculpture selected by the developer's art advisors features a naked man and women in bas-relief and, upon request by the developer, Tulin agreed to place a dancer's skirt on Eve and tightens on Adam. (See Illus. 2.)

Tulin made the changes at her foundry and the sculpture was delivered and installed. The day after installation, the sculpture was shrouded with a tarp and was then removed from the lobby. Upon inquiry, the developer indicated that several tenants planning to move into the building had objected to the ample proportions of Adam's groin bulge.

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II. Other Art Law Contracts

In addition to the commission agreement, there are a wide variety of contracts required by artists arising from the creation of their art work and dealer representation. But the nature of any agreement depends on the relationship between the parties, and many artists are comfortable without a written contract since they are satisfied that the relationship, personal friendship or mutual trust will be sufficient guarantee of performance. Lengthy contracts may kill some transactions, but are mandatory for others, and the art lawyer must ascertain the psychology of the players, as well as the terms. An effective way to memorialize the agreement is to reduce the agreement to a concise “memorandum of understanding” which minimizes the formality of the agreement but is still legally binding.

A. Gallery Contracts

One of the areas of frequent advice is that of responding to a dealer’s initial proposed representation agreement after determining which party is more anxious to consummate an agreement. Many of these contracts are straightforward, and a number are oral based on

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successful past dealings.

B. Miscellaneous Agreements

There is tremendous diversity in the variety of contracts used for the commercial sale of art work. A stock photo agency recently desired to license photographic images for use in high-tech electronic media products for electronic printing, publishing and advertising. With technology-driven products, the licensing agreements must contemplate what the technology is capable of doing in order to protect the underlying rights to the images. In this case, both a detailed joint venture agreement with the manufacturer and a license agreement for purchasers were negotiated.

Similarly, a partnership agreement was drawn up between a painter, who had created a number of fabric designs, and an apparel industry promoter to license her designs for reproduction on fabrics and textiles. The deal was simple in that the painter would provide the designs and the other party the cash, management and expertise.

C. Financial Agreements

Where it is expensive for an artist to create her art, bank loans may not always be available to finance creation of inventory for a show or satisfy an unexpected obligation. It is often necessary to devise innovative financing alternatives to enable the artist to raise capital.

1. Sculpture Casting—Investment Corporation

When a sculptor required cash to cover her considerable casting expenses for upcoming shows, and assist her with living expenses, an agreement was negotiated with a group of individual investors to provide the needed funds. The investors formed a corporation to provide a substantial line of credit to the sculptor enabling her to create life size and pedestal size castings, and providing for transportation and other expenses related to the production of bronzes. It was anticipated that the investors might also assist in selling the sculptures for a favorable commission. Seventy percent of the investment funds was allocated to paying costs associated with producing sculptures and the remaining

thirty percent was allocated to providing the artist with a monthly stipend for personal expenses. When a sculpture financed by the corporation’s funds was sold, the adjusted cost (including casting expenses, interest and stipend) was to be deducted from the sales price to determine profit from the sale. This profit was then to be distributed in different ways depending on the identity of the party responsible for selling the sculpture (artist, investor or gallery). The expenses to prepare for a cast sculpture one-person exhibition are staggering, and this arrangement makes possible the development, casting, and exhibition of the sculpture with artist and investor sharing in resulting profits.

2. Dealer Loan

An artist faced a pressing financial obligation which he was unable to satisfy, having spent considerable funds preparing for an upcoming show of his unique, large paintings. In order to raise the necessary money, a sizeable loan was obtained from his dealer and two investors with repayment designated in percentages from the sale of his work. The investors received favorable terms and the dealer was assured that the painter would be financially able to continue his work without financial concerns disrupting his creative energies. The arrangement was recited in a simple two page memorandum of understanding.

III. Ownership of Art Work

Works of art sometimes end up in the possession of individuals other than the owner. It is often impossible to determine the exact manner in which the art and the owner were separated, given the uncertain and complicated trail often over many years. The following are two cases involving fine art ownership and possession issues.

A. Stamford High School Daugherty Murals

In 1934 James Daugherty, under the Works Progress Administration (W.P.A.) Art Project, painted a 100’ x 8’ mural on the octagonal walls of the Stamford High School auditorium (See Illus. 3). The mural depicts scenes of New England traditions in the powerful expressionist style for which many W.P.A. painters, and Daugherty in partic-

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ular, are now well-regarded. When the city decided to renovate the school in the late 1960s, the mural was taken down to permit necessary work to be performed during the 1970 summer vacation. Thereafter, it disappeared.28

In reconstructing what happened nineteen years before, it became apparent that a former graduate of Stamford High passing through school grounds in the summer of 1970 found the mural cut into approximately 30 pieces and placed outside the auditorium, either on top of a heap of construction trash or next to a dumpster overflowing with construction debris. Appreciating the importance of the mural, the former student managed to get the pieces into his car and drove them to his home where he stored them in his garage.29

More than a year later, the former student read an article about the efforts of the Fine Arts Inventory Project, a part of the United States General Services Administration, which was supervising restoration and relocation of W.P.A. art work. The student wrote to the director of the Project, Karel Yasko, describing how the mural came into his possession and inviting Mr. Yasko to consider restoration and placement of the mural. Mr. Yasko commended the student for rescuing the mural and suggested that his summer intern, who resided in Stamford, should inspect the mural. At Mr. Yasko’s direction, the intern took the mural in October 1971 and delivered it to the home of an art conservator in Armonk, New York, who had previously restored W.P.A. art for the Fine Arts Inventory Project. The intern recalled that he delivered the mural pieces to the conservator on behalf of the United States government with the understanding that they would be stabilized and the mural restored when funds became available.30

The conservator brought the mural to his studio and workshop in Manhattan and in April 1972 sent Mr. Yasko a letter outlining the deteriorated condition of the mural and providing a proposal for restoration services in the amount of $6,400. Notwithstanding prior communications, the conservator was never directed how to proceed by the General Services Administration and he retained the mural at his studio. Although the Stamford Public School System subsequently became alerted to the fact that the mural was still in existence and was located at the conservator’s studio, neither the School System nor the City con-

19. Id. at 1107.
20. Id. at 1107-8.
21. Id. at 1108.

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22. Id.
23. Id. at 1110.
24. Id.
25. Id.; See also, Once Moldy, Now Worth $1 Million, a Mural Starts a Fight, N.Y. Times, Feb. 13, 1989, at B1.
27. Id.
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tacted the conservator concerning return of the mural.  

During the Summer of 1986, the conservator, believing the G.S.A.
to be the owner of the mural, asked the agency to disclaim ownership
of the mural. The G.S.A. replied by providing the conservator with a
copy of the W.P.A. 1934 policy memorandum providing that all works of
art executed with the intent that they occupy a particular place in a
public building are to be treated as a part of that building. The General
Services Administration concluded that since the mural fell within
this category, the Federal Government lacked a claim to ownership and
that the restorer should resolve the matter directly with the City.  

In September 1986, the city's Corporation Counsel wrote to the
conservator indicating that the city had learned the murals were in his
possession and that as owner, the city was anxious for their return. The
conservator replied that because the murals had been "knowingly
trashed" by the city more than fifteen years earlier, the city had no
valid claim, and that the murals belonged to him. After suit was filed,
the conservator indicated that Sotheby's had appraised the mural's
value in 1987 at $1,250,000 and that he was claiming their 1988 value
at $1,400,000.  

The ensuing litigation in the United States District Court for the
Southern District of New York focused on the issue of abandonment
and, as is common with cases involving stolen art, on whether the city's
claim of ownership is barred by the statute of limitations.  

The conservator's abandonment claim was based on both the mu-
rals' placement in the proximity of construction trash and the city's
alleged failure to investigate the location of the mural since it disap-
ppeared. But the conservator was unable to establish the requisite volun-
tary and positive intention by the city to part with ownership of the
mural at the time of the physical action by which the mural pieces
were placed outside the school. Accordingly, the court held that the
mural had not been abandoned by the city during the 1970 recess.  

The court pointed to the last known intent of the city contained in a
1967 letter from the Superintendent of Schools stating that the Board

19. Id. at 1107.
20. Id. at 1107-8.
21. Id. at 1108.
of Education wanted the architects to remove the mural from the wall and roll it for proper storage. 28 That this intent was not fulfilled by the construction crew does not establish that the city intended to part with ownership of the mural. With respect to the city's failure to investigate the missing mural, the court concluded that the city merely believed the mural was in storage per its instructions, and neither the former student who found the mural, Mr. Yasko, nor the conservator had asked the city whether it had any interest in the mural.29

Since the city is entitled to the mural only if it brought its claim within the relevant statute of limitations, the court determined that New York's three year statute for the recovery of chattels applied and that the statute runs from the owner's demand for return of the property, which demand cannot be unreasonably delayed. The court distinguished the case law requiring an owner to apply reasonable diligence in attempting to locate missing works of art by noting that the conservator does not fall into the category of a good faith purchaser whom the cases protect from the penalty of having to return work which had been purchased for value. The conservator did not give value for the mural expecting to own it, but rather he expected to return it to the appropriate owner at a future time.30

The court also found that the city did not act with unreasonable delay since its knowledge that an art conservator had possession of the mural was consistent with its belief that the mural was in storage. The court noted that the conservator had made a number of statements before 1986 as a custodian and not as an owner, and he had failed to alert the city to his adverse claim before rejecting the city's request to return the mural in 1986. Given his silence, it was therefore reasonable for the city to believe that the conservator held the mural as a custodian or bailee. This decision has been appealed by the conservator. In the event the trial court decision is upheld, the only pending issue in the case will be resolution of the conservator's quantum meruit claim for the reasonable value of his services in preserving and restoring the mural while in his possession.31

Although complicated and uncertain, the case was decided on fundamental legal rules, and the art lawyer must be familiar with the requirements of black letter law as well as creative in its application.

B. World War II Confiscated Art

A German art collector established a collection of approximately fifty-eight important works of art during the period from 1909 to 1931. When the collector and his wife left Germany in 1938, the collection was placed with a storage and freight firm. According to German archive records, in December, 1941, the firm transferred forty-one paintings from the collection to Nazi Culture Leader Rosenberg at the Art Bureau of the NSDAP (Nazi Party). These paintings were considered to be "non-art," were not allowed to be exhibited in public, and narrowly avoided intentional destruction on at least one occasion.

After the war, the collector attempted to regain possession of the confiscated art work and was told by different sources alternatively that the warehouse had been bombed, that the paintings had been sold, or that shipments of the art work had been sent to the Tyrol. Without any successful leads, the collector accepted a restitution payment from the West German government with the understanding that if any works of art were located, the collector would own them subject to repayment of a pro rata share of the restitution proceeds.

In May 1989, one of the 41 paintings was identified by the collector's heirs as hanging in an East German art museum, and they sought return of the painting through correspondence with the German Democratic Republic Ministry of Culture. In September, the heirs were informed that the museum had purchased the painting in 1926 and that it therefore could not be the same painting as the heirs claim had been confiscated in 1941. The Ministry of Culture enclosed a copy of the museum's inventory book as documentation of the acquisition.

The heirs contend that the painting presently in East Germany was in the collection through 1938. The factual conflicts concerning the identity and attribution of the painting and the authenticity of the museum's purchase record are made more complicated by the deaths of the principals, and more information is required to develop a compelling evidentiary showing as to the heirs' ownership of the painting and perhaps locate the other paintings.

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IV. Damage to Art Work

A. Museum Liability—Sculpture

Liliane Lijn's sculpture often integrates high technology to effect its expression. One installation, Woman of War and Lady of the Wild Things, (See Illus. 4) features two eight foot performing sculptures which, when activated by the presence of a spectator, confront each other in a six minute interactive ritual dance to a song of the artist's synthesized voice. As the ritual begins, the wings of one of the sculptures unfold and the song activates a series of lights within the colored fibers of the other sculpture. As the song progresses, a laser beam, reflected against a cloud of smoke, shoots from the head of one dancing sculpture to the prism-head of the other.\textsuperscript{33} The installation was painstakingly fabricated by hand from painted metal alloys woven with synthetic fibers, electronic and mechanical systems, as well as sophisticated audio and electronic sound-to-light systems, and a helium laser and smoke machine, all coordinated by a computer. This installation was featured in the 1986 Venice Biennale.

The artist accepted an opportunity to exhibit the installation at a museum in Canada during 1988.\textsuperscript{34} Given the delicacy of the work, she dismantled the sculptures and shipped their parts in crates specially designed to prevent movement, pressure or shock to the work. She also travelled to the museum to install the sculptures. Since the work would be shipped back to her London studio at the end of the show, she provided carefully-detailed installation and packing instructions, and even attached photographs to the inside of the crates depicting the manner in which the pieces were to be packed. During the exhibition, a second Canadian museum expressed interest in the work for exhibition at the end of the current show.

A short time later, the artist was notified that an accident had occurred and that one of the sculptures had been damaged when an attendant knocked it over. The artist was surprised to hear this since the sculpture was firmly mounted and very difficult to knock down without tremendous force. The museum's director assured her that the work was not badly damaged, although he stated that a metal breastplate had been replaced by a prominent conservator. He indicated that

33. For a detailed description of these performing sculptures, see Lijn, Imagine the Goddess! A Rebirth of the Female Archetype in Sculpture, 20 Leonardo 127-29 (1987).

https://nsuworks.nova.edu/nlr/vol14/iss2/17

the sculpture operated as usual after this work had been performed. The artist was concerned and requested that the sculptures not be packed or shipped to the second museum until she arrived in two weeks to supervise the transfer. The director agreed to retain the sculptures until that time.

Notwithstanding this understanding, when she arrived at the first museum, the artist learned that the works had been packed and shipped to the second museum, apparently because the institution's insurance was about to expire. The artist was assured that the dismantling and packing had been done very carefully. When the crates were opened at the second museum, she was horrified to see that the fragile components of the sculptures had been indiscriminately jammed into the containers. Coarse rope had been tied around the wings to pull them tightly against the body in order to force the entire sculpture to fit into one case, rather than the separate cases designed for the dismantled components. The wings had protruded from the crate, which had been forced shut bending the alloy surface of the wings and the mechanical systems. Several fiber plates had simply been torn off since the packers had not understood how to properly remove them. It also became apparent that the earlier damage to the sculpture—when it had been knocked over—had resulted in broken switching mechanisms in the wings which had not been properly corrected. As a result, the sculptures had been operating for more than a month with uncontrolled wing movement, further damaging the bodywork, the motors and the mechanical systems. The artist carefully documented the sculpture's condition during the unpacking.

The sculptures cannot be restored, given their precise engineering and assembly and the tremendous trauma which they incurred; nor can they be replaced since the works are unique and, unlike cast sculpture, there are no molds with which to create a new copy. Further, the artist had obtained spare materials from craftsmen which would be cost prohibitive if ordered in minimal quantities, and the specialized craftsmen themselves are no longer available to devote the time to remanufacture the numerous parts.

Negotiations are continuing with the museum's insurance carrier for damages resulting from the museum's negligence which include the value of the sculptures, lost revenue from the cancelled museum exhibition, and lost exhibition opportunities and likely resulting sales. The sculptures took tremendous time to create and the artist's inability to exhibit the works and sell them has hurt her business. The insurance company has recently sent its expert to the artist's London studio to
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34. Id. at 130, n.14.
inspect the damaged sculpture, and discussions over the value of the work are in progress. The sculpture is so unique that the artist's past reputation and sales history will be particularly important in determining value.

B. **Purchaser Liability—Painting on Approval**

An art dealer was sued for breach of contract and fraud resulting from the sale of a painting he attributed to a highly-regarded seventeenth Century Dutch painter. According to the complaint, the dealer indicated he would accept return of the painting and reimburse the purchaser for the full purchase price if the painting was found not to have been painted by the attributed artist. The complaint recited that the purchaser took the painting to France where he ascertained that the painting had been improperly ascribed and that the dealer then refused reimbursement upon demand.

What the complaint overlooked is that the purchaser, while ostensibly verifying attribution, had the painting's glossy varnish removed and replaced with a matte varnish which he believed was more attractive to the European market. Removing varnish on an old painting is particularly hazardous since underlying paint may be inadvertently removed. This is especially true where, as in this case, the work was thinly painted. When the painting was returned to the dealer, he was appalled to see that the painting had been ruined by the application of varnish and that a crack had appeared in the top portion of the panel as well. The dealer objected to the return of a work which had been altered while on approval, while the purchaser was adamant that he had been misled as to the painting's attribution.

In an effort to avoid the expense and delay of litigation, counsel for the purchaser was agreeable to attempting a creative alternative dispute resolution exercise. An agreement was negotiated calling for a neutral expert art conservator to examine the painting and, after hearing presentations from the purchaser and dealer, to determine whether any damage occurred to the painting while in the purchaser's possession which adversely affected its value.

The conservator concluded that the painting's value had been adversely affected while in the purchaser's possession. Notwithstanding this determination, but perhaps because they were brought together in a less formal effort to resolve the matter, the parties agreed to settle

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36. This matter is not in litigation and the authors are unable to disclose confidential information beyond what is included here.
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C. Landlord Liability—Destruction of Inventory

For over twenty years an artist had used a large space in the basement of an apartment building as his studio and storage area for his archival paintings and sculptures. The artist was a close friend of one of the building’s owners and would, from time to time, give him a work of art in lieu of rent. Although in the past few years the artist had primarily worked in another city, he retained his archival works of art in storage and permitted other artists to share the studio space.

He received a call one day from the owner’s secretary asking him to remove his property from the studio. The artist agreed to visit the studio that weekend to evaluate how to undertake the removal, considering the tremendous amount of art, supplies and furniture which had to be packed, crated, and transported. Three days later, he visited the studio and discovered that his art work, which had been stored in the shelves over the years, had been removed and thrown into a huge pile with debris from the building, including abandoned furniture, construction materials, maintenance supplies, and other garbage. (See Illus. 3). Most of the art work had been damaged or destroyed. The artist spoke with one of the building’s maintenance staff who indicated he had been given instructions to throw the art work into a pile in the middle of the room. He was apparently unaware of the work’s value.

It is hard to comprehend the loss associated with the sudden destruction of twenty years’ inventory. Examples of these works are represented in museums and important private collections. The artist carefully recorded the destruction of his work, taking numerous photographs of the pile as it was reduced. All told, fifty-two works were damaged with a value of over $300,000.

The artist has carefully prepared documentation for each of the damaged works outlining its specifications, a description of damage, its appraised value, and identifying any important factors relevant to its valuation. This completed claim and supporting documentation (over four inches thick) has been presented to the building’s management company as proof of loss on the claim. Ideally, a settlement will be

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concluded without recourse to litigation.

V. Copyright Issues

A. In General

Considerable time is spent advising clients on all aspects of copyright law, including work made for hire in the context of graphic art and commission agreements. Pursuing copyright infringement is also a frequent practice area and it is necessary to initially determine if and when the artist registered her copyright for the infringed work.

Where the artist whose work has been infringed failed to secure registration prior to the date of infringement, it can be difficult in most cases to achieve a satisfactory recovery, since only actual damages and the profits of the infringer attributable to the infringement—if any—are recoverable. This is particularly true where the infringer is a poor businessman and lost money—there being no profits to disgorge—or is a low-profit or no-profit enterprise such as a local newspaper. And it is often difficult to quantify profits given the large array of expense items and apportioned overhead which is deducted from gross revenues to determine profit. Even where it is possible to establish that the infringer made a profit, the artist’s recovery is limited to the proportion of the infringing work to the overall product. Thus the use of one illustration in a 200-page magazine represents only a tiny portion of overall profits.

While most artists are aware that registration is not required for copyright to exist in a work, they are unaware of the benefits registration provides the copyright plaintiff, including the availability of statutory damages and payment of attorney’s fees. Artists are well advised to register any work which will be widely distributed or which has a particular commercial appeal.

One pending matter involves an artist whose art work was infringed several times in a book by a large New York publisher. The artist had previously registered his copyrights, and statutory damages are therefore available. The publisher blames the author and the author blames a “reputable, independent artist” who provided the art work, and both claim they were innocent infringers under the copyright law. The infringements were copied from both a national magazine and a best-selling book.

If it is demonstrated that the infringement was willful, then substantial damages would be available at the discretion of the court. Counsel for the infringers argues that a willful infringement requires more than a defendant’s knowledge that he is copying, but also knowledge that what he is doing in fact constitutes copyright infringement. The case would be brought in New York, though, and the Second Circuit has expanded culpability for willful infringements. While it is true that a defendant’s knowledge that his actions constitute an infringement establishes willfulness, “several district courts have held that something less than proof of actual knowledge will suffice to establish knowledge, and hence willfulness” for the purposes of awarding statutory damages.

38. 17 U.S.C. § 504(b) and 17 U.S.C. § 412 (1988). Actual damages are defined as "the extent to which the market value of a copyrighted work has been injured or destroyed." Frank Music Corp. v. Metro-Goldwyn-Mayer, 772 F.2d 505, 515 (9th Cir. 1985).
40. Recoverable profits of an infringer are limited to those "attributable" to the infringing material, 17 U.S.C. § 504(b) (1988). See Cream Records, Inc. v. Joseph Schlitz Brewing Co., 754 F.2d 826, 828-29 (9th Cir. 1985). This case was subsequently remanded to the district court which awarded the copyright owner one percent of the profits derived from the infringement. This award was vacated and again remanded to the lower court. Cream Record v. Joseph Schlitz Brewing Co., 864 F.2d 668 (9th Cir. 1989).
41. 17 U.S.C. § 412 (1988). The authors are required to maintain the confidentiality of the paintings.
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44. See 17 U.S.C. § 504(c)(2) (1988); 3 NIMMER ON COPYRIGHT § 14.04 [B][2] (1988). If an infringer is able to establish that he was not aware and had no reason to believe his acts constituted an infringement of copyright, then statutory damages could be limited to only $200 per infringement occurring after March 1, 1989, or $100 per infringement prior to March 1, 1989.
46. "Flexibility when fashioning an appropriate award ... is entirely consonant with the broader goal of providing the copyright owner with a potent arsenal of remedies against the infringer." Engel v. Wild Oaks, Inc., 644 F. Supp. 1089, 1091 (S.D.N.Y. 1986) (quoting Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984)).
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tory damages. The Southern District found willful infringement where defendant acted with reckless disregard for the copyright owner’s rights. The Southern District has also found a prima facie case of willful infringement where the defendant publisher of a copyrighted newspaper “was or should have been aware” that its activities were infringing.

A good example of the extension of the willfulness standard in the visual arts—and a case with remarkable similarities to the one described here—is Engel v. Wild Oats, Inc. In Engel, the daughter of a prominent photographer brought suit against a garment manufacturer and its retailer for printing a copyrighted photograph on T-shirts without authorization. Defendants conceded liability and left the issue of damages before the court. There was testimony that the defendant’s art director “admitted to having produced the design from a photograph, explaining that he had found a photograph in a book.” The court concluded that the infringement was willful:

The art director knew or should have known that the unauthorized reprinting of a photograph from the book was a copyright violation. Although the court finds no direct proof of the art director’s actual knowledge of the copyright infringement, the compelling circumstantial evidence of his reckless disregard for, if not actual knowledge of, plaintiff’s rights in the photograph is sufficient to establish willfulness.

Reckless disregard and constructive knowledge are sufficient bases to establish willfulness in the Southern District, in the event actual knowledge is not established at trial.

48. Lauratex Textile Corp. v. Allon Knitting Mills, 519 F. Supp. 730, 733 (S.D.N.Y. 1981) (fabric design); accord, Wow & Flutter Music v. Len’s Tom Jones Tavern, Inc., 606 F. Supp. 554, 556 (W.D.N.Y. 1985) (plaintiff’s burden to establish willfulness met by “showing that defendants should have known their conduct was infringing or acted in reckless disregard of plaintiff’s rights.”).
51. Id. at 1090.
52. Id. at 1092 (citations omitted).

VI. Estate Planning

Art lawyers direct their client’s estate planning and must provide for smooth transfer of assets according to the artist’s wishes with the least diminution in value to beneficiaries. Such favored estate planning approaches as annual gift-giving, trusts, life insurance and charitable donations are used to provide for and protect the client’s intentions and estate assets. With the artist’s estate, though, the attorney must specifically provide for the treatment of art work and copyrights as well.

In order to plan the artist’s estate, it is necessary to acquire an accurate inventory of the artist’s work and a familiarity with the artist’s pricing structure. Too often artists fail to consider the potential value of art in the studio or in storage, or fail to realize the appreciating value of forgotten, rejected or even unfinished works. It is often the case that only a small portion of an artist’s inventory has been sold prior to death, followed by startling appreciation in value thereafter. Ideally, for both general business and estate planning purposes, the artist should clearly identify, sign, and date each work, and keep an inventory with accurate descriptions as to size, media, date, exhibitions, insurance value, sales price, current location, awards and any facts relating to provenance. Photographs of the art work facilitate identification and are a valuable part of the inventory record.

Having identified the artistic assets in the estate, it is necessary to value them in order to advise on overall estate planning and to minimize the impact of federal estate and gift taxes. In some cases, the art work may be the bulk of the estate. The problem of how to value these works has plagued artists, dealers, appraisers, insurance agents, lawyers, judges, and tax collectors, and each may claim a different value, depending on the objective of the valuation. The quality and period of the work, recent comparable sales, costs of selling, preparation for exhibition, framing, shipping and transportation, terms of sale, time and place of sale, and any unusual circumstances which affect price all should be considered in reaching an appraisal of fair market value. Any sudden increase or decrease in valuing of a work requires justification. The personal representative of the estate bears the burden of supporting the estate’s valuation and will be assisted by records kept by the artist prior to death. Simply by distinguishing between “finished” and “unfinished” works, for example, an artist can greatly assist his executor in making these valuations. In some instances, the Internal Revenue Service has actually accepted the artist’s own valuations.

In drafting wills, special provisions for the transfer of art work and
tory damages. The Southern District found willful infringement where defendant acted with reckless disregard for the copyright owner’s rights. The Southern District has also found a prima facie case of willful infringement where the defendant publisher of a copyrighted newspaper “was or should have been aware” that its activities were infringing.

A good example of the extension of the willfulness standard in the visual arts—and a case with remarkable similarities to the one described here—is Engel v. Wild Oats, Inc. In Engel, the daughter of a prominent photographer brought suit against a garment manufacturer and its retailer for printing a copyrighted photograph on T-shirts without authorization. Defendants conceded liability and left the issue of damages before the court. There was testimony that the defendant’s art director “admitted to having produced the design from a photograph, explaining that he had found a photograph in a book.” The court concluded that the infringement was willful:

> The art director knew or should have known that the unauthorized reprinting of a photograph from the book was a copyright violation. Although the court finds no direct proof of the art director’s actual knowledge of the copyright infringement, the compelling circumstantial evidence of his reckless disregard for, if not actual knowledge of, plaintiff’s rights in the photograph is sufficient to establish willfulness.

Reckless disregard and constructive knowledge are sufficient bases to establish willfulness in the Southern District, in the event actual knowledge is not established at trial.

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48. Lauratek Textile Corp. v. Allton Knitting Mills, 519 F. Supp. 730, 733 (S.D.N.Y. 1981) (fabric design); accord, Wow & Flutter Music v. Len’s Tom Jones Tavern, Inc., 606 F. Supp. 554, 556 (W.D.N.Y. 1985) (plaintiff’s burden to establish willfulness met by “showing that defendants should have known their conduct was infringing or acted in reckless disregard of plaintiff’s rights.”).
51. Id. at 1090.
52. Id. at 1092 (citations omitted).
copyrights must be addressed. For example, artists frequently designate one or more individuals familiar with their work to be art advisors for their estate and the personal representative is directed to consult with them concerning timing and prices for the sale and/or placement of art work, as well as other decisions benefitting from a detailed knowledge of inventory and sales history. Or the individual close to the artist who is familiar with the work may simply be named outright as the personal representative.

Many clients prefer that their personal representative have the discretion to place a certain portion of the estate's art work, whether by sale or donation, in such museums or institutions as will enhance and perpetuate the artist's reputation and provide tax benefits to the estate. This provides tremendous flexibility for the estate in terms of making charitable transfers and is an effective post mortem estate planning tool. Such a transfer may also be made during lifetime.

For donations to museums, though, the artist should select the institution with care. The museum will also be exercising care in selecting the artist: many institutions have wall space for as little as five percent of their collection. The artist should, therefore, be realistic. A consultation should be held with an appropriate staff member before the will is drafted to determine whether the bequest will be accepted and whether conditions or restrictions concerning exhibition, reproduction, insurance, loan of the work, deaccessioning or any other special concern may be stipulated. A separate agreement with the institution should be prepared to recite the understanding, particularly regarding displays of the work, and alternate organizations should be specified in the will in the event circumstances change and the preferred institution is unable to receive the bequest.

Artists may desire to establish their own non-profit corporation or foundation set up for their special purposes, either during their lifetime or in the will. For example, Andy Warhol left his entire estate to a foundation for "the advancement of the visual arts" and gave the foundation's board complete discretion to disburse funds.

The relationship with a dealer is another estate planning consideration. Unless the dealer's contract specifically extends his "agency" status beyond the lifetime of the artist, then the contract terminates immediately on the date of death of either party. The dealer cannot negotiate sales or continue to represent the artist's estate without specific authorization in writing, either by the original contract or by subsequent agreement with the executor. A provision in the dealer's contract which may greatly facilitate estate matters, as well as meet the need for immediate liquidity, is one obligating the dealer to advance an amount of cash to the estate while continuing to hold certain art work for sale. Where the artist has a long-standing dealer relationship and profitable sales record, it may be possible to include a buy-out agreement in case of the artist's death. In exchange for a favorable bulk price as specified by the artist, the dealer would agree to purchase within a limited period of time a certain number of works consigned to the gallery. The cash received by the estate would be available for administrative costs, taxes, and immediate family needs. This has the advantage of liquidating part of the estate without necessarily forcing public sale of art work under unfavorable conditions to meet such large obligations as estate tax payments.

The dealer may agree to purchase life insurance on the artist's life payable to the gallery in order to provide liquidity for the purchase of a specified number of works on his death. This could be a term policy, renewable as long as the artist and dealer continue their relationship. The insurance policy should be structured so that it is not taxable in the artist's estate at death.

Just as the artist is intuitive in the creation of work, the art lawyer should be intuitive in protecting it. In one instance, prior to a determination in the David Smith estate tax valuation case, it became apparent in chambers that the judge was likely to support the position of the Internal Revenue Service that the value of the 425 sculptures in the estate was $4,284,000. Providentially, the estate's attorney, who was also one of the executors, immediately requested hearing by the court en banc. As it turned out, the initial judge was the only one of the twelve members of the Tax Court to adopt the government's position, but the full court concluded that the valuation of the works at the time of Smith's death was only $2,700,000.

The artist should be encouraged to approach estate planning with the same creative thinking that she expresses in her work; and for the artist's estate, the attorney must be prepared to resolve fine art valuation, preservation and distribution issues.

54. Id. at 662.
55. Estate of David Smith, 57 T.C. at 655. The court considered the decision to be a "Solomon-like pronouncement." Id. The resulting deficiency was determined to be only $68,944.50 in contrast to the nearly $26 million claimed by the government plus interest of about three quarters of a million dollars.
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VII. Sales of Art Work

From time to time, clients may express an interest in purchasing and selling art work and it is natural for them to discuss such transactions with their attorney. In some cases, the art lawyer may be able to both arrange for a sale and legally protect the client in the transaction. This is particularly true with important paintings whose value requires discrete efforts to establish provenance and arrive at clear understandings between parties. Efforts to establish authenticity and attribution may be directed by the art lawyer.

In one matter, a client had received a painting in the late 1950s as payment of a debt and hung it on his wall. He only recently noticed that it was signed "Johns' 57." The style and color of the painting was not inconsistent with works created by Jasper Johns during that important transitional period in the development of his art. An inquiry was made into the manner in which the painting had been received and into Jasper Johns' work at that time. Various authorities were consulted on whether the painting was a Jasper Johns, with a number expressing their belief that it was unlikely. After considerable investigation, and over 30 years after it was painted, the other Johns was located and confirmed that it was his work and not the Jasper Johns.

Art dealers, whether with galleries or acting privately, seek legal advice in furtherance of their art sales and for their general business operations (from contracts with artists to worker's compensation and other routine business matters). The intricacies of deals for important works of art do not always go as planned and often involve a number of individuals who, having helped put buyer and seller together, expect to share in any resulting commissions. The opportunity for disgruntled parties or middlemen is tremendous, especially given the discrete nature of such transactions and the art lawyer may be called upon to assist in resolving claims and misunderstandings.

VIII. Other Practice Areas

Every legal concern of the artist and arts organization is brought to the art lawyer first. Artists trust their attorney and, since he knows their work and personal circumstances, he is often the only one they want for the legal job, whatever it may involve.

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Illustration 2. Ella Tulin's original *Adam and Eve* sculpture (left). For the commission, she included tights for Adam and a dancer skirt on Eve (right).

Illustration 3. Li Hone Ljin's performing sculptures *Woman of War* and *Lady of The Wild Things* before they were irreparably damaged.

Illustration 4. The artist's work as it appeared in the pile of debris.
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