Where Are We Now? Some Thoughts on “Art Law”*

Susan Duke Biederman Esq.*
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Abstract

It was with great pleasure that I accepted the invitation in April of 1989 to write the introduction - a brief overview of “art law” - to this volume of Nova Law Review.
reconstituted the Rothko foundation with directors he chose; ultimately their paintings have been strategically given to museums for the public benefit. All in all, in the seemingly endless Matter of Rothko, and the subsequent criminal case, Gustave Harrow was the conscience of the court.

Afterwards, as our friendship grew, I saw Gus' dedication to artists' rights deepen even further. He was ready to accept any challenge; to title—always with a passionate conviction and often with surprising success—at whatever powerful bureaucracies that aimed to stifle free expression. Richard Serra's Tilted Arc and Westbeth are two other causes he is publicly identified with.

When, in 1976, Walter Annenberg and Thomas Hoving, then respectively Trustee and Director of the Metropolitan Museum of Art, had persuaded the museum's board to create a Communications Center in a huge projected $20 million wing of the museum—with its own board and Hoving as its director—a group of museum-lovers determined to fight this encroachment on our repository of unique and original art. With the help of two board members, memoranda were produced which indicated clear conflicts of interest on the part of Hoving and Annenberg. After several incendiary articles, a public hearing was held, and Gus Harrow took charge behind the scenes to define and clarify the conflicts on the part of the two men. Mr. Annenberg suddenly and without explanation withdrew his $20 million offer. Consequently, with thanks to Gus Harrow, our great museum has not lost its central purpose.

If only Gustave Harrow were well enough to defend the artistic value of the Mapplethorpe exhibit in Cincinnati, I am convinced that he might put an end to yet another of obscene challenges to the First Amendment. Gus is there fighting in spirit, you can count on that.

Lee Seldes
author, The Legacy of Mark Rothko

Where Are We Now? Some Thoughts on "Art Law"*

Susan Duke Biederman, Esq.,**

It was with great pleasure that I accepted the invitation in April of 1989 to write the introduction—a brief overview of “art law”—to this volume of Nova Law Review. Over a year in the making, this issue devoted to the law of the visual arts represents a number of things. They are all good. First, reaffirmation that a discipline of “art law” exists as a separate body of law in the United States today. It is a response of enlightened thinkers—jurists, legislators, lawyers and law students. They recognize that transactions and disputes surrounding the creation and ownership of art objects differ greatly from other activities and objects in our lives.

Twenty or thirty years ago, “art law” was an infant—with only a handful of distinguished thinkers skilled and dedicated enough to shape those crucial early days. In this issue we pay homage to Gustave Harrow. He is a leader among these pioneers. Whether at the center of legislation designed to protect the consumer from art fraud, or a lawsuit designed to protect the artist from those who would abuse him, or a project designed to give shelter and comfort to the creator, or a myriad of other art law or world complexities and problems, Gus has been, in the words of Senator Edward M. Kennedy, a champion. By professors and artists, lawyers and lawmakers, he is hailed here, and rightfully so. The dedications are warm, loving, admiring. They set a wonderful tone with which to begin our view into “art law.”

There were so few in those early days—men who sat and thought and wrote long and hard about “art law,” even though there wasn’t a buck to be made in it. John Henry Merryman and Albert E. Elsen taught us about history, ethics, principles—the “thinking man’s guide” to the new field. Of course, my two favorites are Franklin Feldman and Stephen E. Weil. They, too, sat and thought and wrote long and hard—and, ever the lawyers, laid the groundwork and built the foundation upon which we now base our “art law” jurisprudence, a foundation

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** Mrs. Duke Biederman is a fine arts attorney and is the co-author of Art Law, with Franklin Feldman and Stephen E. Weil (1986, Supp. 1988).
we all now view as so natural and so right.

We are indebted to these pioneers. There is no better way to honor them—and pay special tribute to Gus—than with an issue devoted to "art law."

And where are we now? We are in the same wondrous, exciting and perplexing place one finds himself when faced with the infant who is past the very early years. We see the growth—and the attendant questions this growth raises—in a multitude of places. Consider, for example, the droit moral borrowed from the French. Whereas five years ago only a handful of states had moral right statutes, the summation of which was found wanting, we now have three complicating factors. First, more states have such statutes, making interstate activities truly interesting for those who would alter, deface, mutilate or modify an artwork. Second, we might ask, what happens to these state inconsistencies if we have a federal statute? Third, what role does Berne—and the method of our adherence—add to the discussion?

Legislators are not alone in the current state of affairs. Courts have been previously unable to even comprehend, much less incorporate into their reasoning, expert testimony on such things as current market value. Now as we see in DeWeerth v. Baldinger standing flush against Guggenheim v. Lubell, the courts have advanced to the stage of arguing among themselves! Thus forms precedent. And thus forms a jurisprudence.

This issue of Nova Law Review takes us that many more steps further. We begin with a difficult discussion, that of the NEA and the First Amendment. The articles here are diverse and thought-provoking. Ranging from Senator Jesse Helms to Richard Serra, the writers present a full range of discourse. Nova Law Review is to be commended for presenting the full range. Next, we look at aspects of art law that honor the artist. First, an enlightened discussion of moral rights, followed by copyright in the employment relationship and what the United States Supreme Court has taught us about the creator and the laws protecting him. We then turn to the oft-occurring imbalance of the artist-dealer relationship, and a legislative solution to that inequity. Finally, we consider the American flag. Is it an icon? What shall we do as law-abiding citizens, equally respectful of the sanctity of the artist's image, when faced with the burning of our flag? We look next at business issues and review a bit of history. We then finish with a philosophical view of law and art, ending with "The Lawyer as an Artist." In closing, I quote from the author, Dean Roger I. Abrams:
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The lawyer as an artist. It must seem an oxymoron. People in the two fields dream differently. A lawyer searches for predictability, certainty, logical analysis, and clarity in thought and words. The artist seeks feeling, essence, grace, style and line. They have little in common. Even research on brain specialization suggests different parts of the brain are responsible for skills associated with legal thought and artistic expression. (Footnote omitted). Yet lawyers who are creative and imaginative may steer the law through uncharted waters. These lawyers-as artists drive the law forward.

This special issue of Nova Law Review, dedicated to Gustave Harrow and devoting its pages to “art law,” will do much to drive the law forward, in a creative and imaginative way. May it thank those who have gone before us and inspire those who follow.