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Review of "Law, Ethics and the Visual Arts" by J.H. Merryman and A. Elsen and "Art Law: Rights and Liabilities of Creators and Collectors" by F. Feldman, S. Weil, and S. Duke-Biederman

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Book Review

Law, Ethics, and the Visual Arts

By J. H. Merryman and A. Elsen

Art Law: Rights and Liabilities of Creators and Collectors

By F. Feldman, S. Weil, and S. Duke-Biederman

Reviewed by James J. Fishman†

In 1987, the auction house Sotheby's had international sales of \$1.3 billion, an eighty-five percent increase over the previous year. Christie's, its arch competitor, had sales of \$900 million.¹ For the first four months of 1987-1988, Sotheby's sales totalled \$609 million, up from \$470 million in the previous year. Christie's sales totalled \$424 million, compared with \$279 million in the previous fiscal year. Extraordinary prices for art, books, manuscripts, and jewelry fueled the increases.² In November of 1987, a painting by Vincent Van Gogh, "Irises," sold for \$49 million plus a ten percent buyer's premium.³ Clearly, the sale of art is a big business.

Is art like any other commodity? Can the legal problems which arise from the sale and purchase of art repose within a generalized body of law? At one time, the answer probably would have been yes:

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1. Reif, *Sotheby's Sets Record Sales: \$1.3 Billion*, N.Y. Times, Sept. 10, 1987, at C16, col. 4.

2. Reif, *Auctions*, N.Y. Times, Dec. 18, 1987, at C37, col. 1.

3. Walker, *The Flowering of 'Irises'*, ARTNEWS 19 (Jan. 1988).

A generation ago, most legal problems involving art works were resolved by recourse to some generalized body of law. The rules regulating the sale of an etching by Picasso were largely the same as those covering a sack of potatoes by a farmer. A museum might dispose of a painting from its collection with as little question as a hospital selling a used bed.

Today, American law as it relates to art works is in the course of becoming particular. At every level — from international treaty to local ordinance — works of fine art and those who make, sell and collect them, are singled out for special legal treatment.⁴

That the size of the art market should have led to attorneys who specialize in legal problems relating to the sale of art should not surprise. However, the sale of art creates some legal problems that are unique to this commodity. For instance, most nations prohibit the export of works of art that are important to a nation's heritage or culture, meaning that many of the most valuable examples of this commodity cannot be sold and exported.⁵ There is a broad and sophisticated market that deals with illegal export of art works.⁶ There are highly organized international rings which steal art. Because of the ease of hiding works of art and the lack of a central registry, doctrines of adverse possession and the normal rules of statutes of limitations do not apply easily.

The creator of the commodity of art, the artist, has different needs from creators of other commodities. Enacted in several states and currently pending in Congress is legislation giving artists a moral right in their art even after it has been sold.⁷ The moral right, adopted from European concepts, allows the artist to protect his/her work from mutilation, sometimes from destruction, and gives the artist an ongoing right to prevent the

4. F. FELDMAN & S. WEIL, *ART WORKS: LAW, POLICY, PRACTICE* v (1974).

5. For a listing of export control legislation, see B. BURNBAUM, *THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATURAL LEGISLATION* (1974). The United States is one of the few countries in the world that has no prohibitions on the export of works of art.

6. See P. BATOR, *THE INTERNATIONAL TRADE IN ART* (1983).

7. See S. 1619, 100th Cong., 1st Sess. (1987), H.R. 3221, 100th Cong., 1st Sess. (1987) (*Visual Artists Rights Act of 1987*); MASS. GEN. LAWS ANN. ch. 231, § 85S, ch. 260, § 2C (West Supp. 1987); CAL. CIV. CODE §§ 987, 989 (West Supp. 1988); N.Y. ARTS. & CULT. AFF. LAW §§ 11.01, 14.03 (McKinney's 1984 & Supp. 1988).

owner of the work of art from doing anything to it that would damage the artist's reputation. The moral right, which is a personal right as opposed to a property right, sometimes extends beyond the life of the artist.⁸ California has enacted a law pertaining to resale royalties proceeds which enables the creator of a work of art to receive a percentage of the increment in value of a work of art when it is resold by the original or subsequent purchasers.⁹ Clearly, no other commodity benefits its creators as a matter of law in the same way.

As a result of such developments, the legal problems of those who deal with art have become sufficiently unique and complex to create a legal specialty called "art law." Happily, two excellent reference works, *Art Law: Rights and Liabilities of Creators and Collectors*¹⁰ and *Law, Ethics, and the Visual Arts*,¹¹ have been published which will aid lawyers, collectors, dealers, and others who deal with legal issues in the visual arts. Though these volumes are very different in scope, depth, and focus, an unresolvable tension between the work of art, the artist, and the art market courses throughout both books.

That art reflects the highest achievements of human endeavor and may be the greatest expression of basic oneness between epochs and cultures is widely agreed. Perhaps more surprising is that the law, too, has long recognized the uniqueness and importance of art. During the War of 1812, the British seized an American flag ship, the *Marquis de Somereules*.¹² The cargo, which included twenty-one paintings and fifty-two prints destined for the Pennsylvania Academy of Fine Arts, was brought to Halifax, Nova Scotia. A petition for their release was submitted to the Court of Vice Admiralty in Halifax. The court ordered the art released to the Pennsylvania Academy. A Justice Croke wrote:

The same law of nations which prescribes that all property be-

8. See CAL. CIV. CODE § 987(g)(1) (West Supp. 1988).

9. CAL. CIV. CODE § 986 (West 1982 & Supp. 1988). The resale proceeds right or droit de suite, in French, derives from European concepts.

10. F. FELDMAN, S. WEIL, & S. DUKE-BIEDERMAN, *ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS* (1986) [hereinafter cited as *ART LAW*].

11. J.H. MERRYMAN & A. ELSÉN, *LAW, ETHICS, AND THE VISUAL ARTS*, (2d ed. 1987) [hereinafter cited as *LEVA*].

12. *The Marquis de Somereules*, Stewart's Vice-Admiralty Reports 482 (N.S. 1813).

longing to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.¹³

More recent has been artists' demands for special treatment because of their special ability and role as creator of the reflection of the highest ideals of our culture. This exalted image of the creator and the demands for artistic freedom are relatively recent — from the late eighteenth and nineteenth centuries. Throughout most of recorded history, the artist was merely an employee whose creations were treated as works for hire. The artist's traditional role was best expressed by Leonardo Da Vinci, who said, "I serve the one who pays me."¹⁴ Michaelangelo, the first artist ascribed as a genius in his lifetime, was subject to censorship of his great work in the Sistine Chapel, *The Last Judgment*.¹⁵

Today, the artist makes demands to control the patron. A world renowned sculptor claims that his work is site specific and cannot be removed despite its unsuitability for a site, the artist's lack of ownership, and the vociferous objection of the community in which the art is located.¹⁶ Artists have demanded moral and resale rights in their work. Though the movement of tax reform has been toward simplifying the system and removing special privileges, artists have demanded the right to deduct the market value of their works when contributed to tax exempt institutions instead of taking a deduction limited to the costs of creating the work.¹⁷

13. *Id.* at 483.

14. 1 LEVA, *supra* note 11, at 240.

15. *Id.*

16. The artist is Richard Serra, the disputed work is the "tilted arc." See *Serra v. United States Gen. Services Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987).

17. Prior to the Tax Reform Act of 1969, creators could receive a charitable deduction for the market value of a work of art contributed to a nonprofit institution. Since then, under I.R.C. § 170(e)(1)(A), creators are limited to the cost rather than fair market value. The law was changed because President Nixon deducted the donation of his papers to a charitable institution. One result of the change in the law is that artists have reduced the donation of their works to museums. See Anthoine, *Deductions for Charita-*

One must admit that artists are special to our culture and society and often are taken advantage of when they sell their works. Unfortunately, many of the special privileges they demand will have a deleterious impact upon the art market and will diminish the negotiability and investment potential of art works, as well as the unimaginable prices some paintings bring. For instance, the art proceeds right will function as a tax.¹⁸ Investors may look for other investment vehicles in other commodities: pork bellies, Chinese porcelains, or old masters. This could affect the health of the art market as a whole. The books under review highlight the above mentioned tensions between art, the artist, the market, and society.

In *Law, Ethics, and the Visual Arts*, Albert E. Elsen, a distinguished Rodin scholar and Walter A. Haas Professor of Art History at Stanford University, and John Henry Merryman, Sweitzer Professor of Law, Stanford Law School, examine the ethical, public policy, and legal issues relevant to the visual arts. This work offers a broad survey of the field ranging from legal and ethical issues relating to plunder, destruction, and reparation of art; to the illicit international art trade; and to the artist; the collector; and the museum. Their focus ranges from abstract questions: What is art and why do we care about it,¹⁹ to more mundane concerns such as the toxicity of art materials²⁰ and artists' living and working space.

Law, Ethics, and the Visual Arts is divided into seven chapters. The first examines the destruction and theft of works of art in times of war and occupation, as well as the development of legal norms relating to art works, their ownership, and possession.²¹ Chapter two examines the surprisingly vast illegal trade in art and discusses national retention policies of culturally rich countries and the control of the illegal movement of art works.²² In chapter three, the authors turn to the artist's rights

ble Contributions of Appreciated Property: The Art World, 35 TAX L. REV. 239 (1980).

18. See S. WEIL, BEAUTY AND THE BEASTS 216-17 (1983). Two results of the California legislation are: 1) widespread evasion of the statute; 2) works of major living artists are not auctioned in the state.

19. 1 LEVA, *supra* note 11, at xv, xvi.

20. 2 LEVA, *supra* note 11, at 421.

21. 1 LEVA, *supra* note 11, at 3-43.

22. *Id.* at 46-139.

in the works of art: copyrights, moral rights, and the art proceeds right.²³ Chapter four discusses artistic freedom and its limitation, and looks at censorship from the time of the eighth century Byzantine iconoclasts through the twentieth.²⁴ Lest we become too sanctimonious, we are reminded of censorship of art and artists during the McCarthy period and more recently, the controversies over public art and the inherent conflict between government patronage and artistic freedom.²⁵ The "Artist and the Real World" (chapter five) surveys some of the practical sides of artists' lives: their relationship to dealers, museums, and commissioned art.²⁶ Then the authors look at collectors and their relationship to dealers and the Internal Revenue Code.²⁷ The final chapter discusses art museums: their history, purpose, the fiduciary duties of trustees, as well as some well-known ethical abuses.²⁸

What makes *Law, Ethics, and the Visual Arts* consistently interesting to read is the authors' use of materials beyond the usual statutes and judicial decisions: excerpts from art-historical sources, professional and art journals, periodicals, and newspapers. The authors provide textual commentaries, thoughtful questions, and refreshingly, their opinions, at the beginning and end of the materials. There are also illustrations of the works of art which have been subject to litigation or cause célèbre.

The chapters on plunder and the illegal international trade in art are particularly good. Less successful are the sections dealing with income taxation, in part because the chapters were completed before the most recent Tax Reform Act. Proportionally, *Law, Ethics, and the Visual Arts* spends too much space on the issue of posthumous and unauthorized sculptural reproductions. This may reflect the authors' role in bringing attention to this problem. The section on auctions is out of date because of changes in New York City's Administrative Code which have forced changes in Sotheby's and Christie's disclosure statements

23. *Id.* at 143-238.

24. *Id.* at 240-347.

25. *Id.*

26. 2 LEVA, *supra* note 11, at 379-476.

27. *Id.* at 478-637.

28. *Id.* at 640-745.

in catalogs.²⁹ More space could have been allocated to the ethical issues relating to auction houses. Sotheby's offers so many diversified financial services that it has moved quite far from the typical conception of the auctioneer as agent for the seller. Ironically, Feldman, Weil and Duke-Biederman discuss these ethical issues in great and interesting detail.

Art Law: Rights and Liabilities of Creators and Collectors is not so broad a work. It does not cover the international market of art works, save as it relates to issues of rights of third parties, questions of adverse possession, and statutes of limitation. Nor does it deal with museums or trustees except for the question of bailments (chapter twelve)³⁰ and loans or immunity of art works on display from seizure (chapter eleven).³¹ What it lacks in breadth, it surely makes up in depth of coverage. This work is for either the lawyer who is faced with an art law problem for the first time, or the practitioner knowledgeable in the field. The cases are all there, and they are interspersed with relevant law review articles on the subject. The authors' comments on the cases and the issues are always sagacious and helpful, sometimes leading one to wonder whether the case discussed needed to be included.

Copyright in the visual arts traditionally has been one of the most difficult and complex problems one could face, particularly if the attorney has no background in the subject matter. The authors open their chapter on "Reproduction Rights" with an overview of major copyright subjects such as notice, divisibility, and publication.³² Then they present an excellent article on copyright and the visual arts,³³ followed by the major copyright cases involving the visual arts.³⁴ There is enough in that chapter to answer most questions one should ever have about copyright involving a work of fine art. The chapter also has sections on

29. See CITY OF NEW YORK ADMIN. CODE tit. 20, ch. 2.13 (1987).

30. II ART LAW, *supra* note 10, §§ 12.1-12.4.7, at 453-547.

31. *Id.* §§ 11.1-11.3.5, at 273-452. Both works devote only a small amount of space to museums. For a full treatment, see M. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS (1985).

32. I ART LAW, *supra* note 10, §§ 2.1.3-2.1.5, at 113-18.

33. Berkowitz & Leaffer, *Copyright and the Art Museum*, 8 ART § L. 249 (1984), reprinted in I ART LAW, *supra* note 10, § 2.2, at 124.

34. I ART LAW, *supra* note 10, §§ 2.3-2.10.5, at 186-335.

applied art and a comment on the use of patents.³⁵ Less successful is the chapter on the right of expression which could have been abridged and in which many of the legal issues cannot be separated from the general body of law on the subject.³⁶

Art Law is divided into two volumes. The first deals with the rights of the artist; the second focuses on the rights of collectors and institutions. The authors are not just attorneys. Franklin Feldman is an accomplished artist in his own right who was an artist in residence at Yaddo in Saratoga Springs, New York. Stephen Weil is the Deputy Director of the Hirshhorn Museum and Sculpture Garden and a regular contributor to art journals. Susan Duke-Biederman is an attorney specializing in art law who has lectured widely on law and the visual arts.

Particularly helpful to the practitioner will be the forms and checklists in the chapters on relationships with art dealers and commissioned works (chapters three and four).³⁷ There is also detailed discussion of moral rights (chapter five),³⁸ resale rights (chapter six),³⁹ other legislation protective of artists (chapter seven),⁴⁰ and legal problems surrounding the artist's estate (chapter eight).⁴¹ The chapters on private sales of art — particularly issues of the Uniform Commercial Code — and on public sales are inclusive and particularly well done. Chapters eleven⁴² and twelve⁴³ on "Claims by Third Parties" and "Claims Against Third Parties" are grab bags. The former deals with the problems of theft, title, and adverse possession. The latter deals with lending problems, old loans, and appraisers. There should have been a better unifying thread or the subjects could have been treated as discrete chapters. Tax issues are dealt with in chapter thirteen,⁴⁴ "Charitable Contributions," which also looks at the ongoing scandal of valuation of

35. *Id.* § 2.11, at 336.

36. *Id.* §§ 1.1-1.3.3, at 1-107.

37. *Id.* §§ 3.1-3.2.4, at 341-70, §§ 4.1-4.2.7, at 371-424.

38. *Id.* §§ 5.1-5.5, at 425-554.

39. *Id.* §§ 6.1-6.5.1, at 555-605.

40. *Id.* §§ 7.1-7.2.2, at 607-31.

41. *Id.* §§ 8.1-8.25, at 633-77.

42. *Id.* §§ 11.1-11.3.5, at 273-452.

43. *Id.* §§ 12.1-12.4.7, at 453-547.

44. *Id.* §§ 13.1-13.7.2, at 549-634.

works of art, and chapter fourteen,⁴⁵ "Art as a 'Collectible' Asset," which mostly discusses the impact of the Internal Revenue Code on collectors.

It's all there, sometimes too much so. Occasionally, a case seems to be included solely because it happened to involve a visual artist.⁴⁶ Sometimes the inclusion confuses the legal rule of the particular example.⁴⁷ There could have been better pruning of individual cases.⁴⁸ It may well be that full text was included because expected purchasers of these volumes would not have access to the full text. *Art Law* will have regular supplements to keep the work up to date.

Both works are handsomely produced. The quality of design and typography of *Art Law* is what one has come to expect from Little Brown and Company. *Law, Ethics, and the Visual Arts* is printed on heavy paper more typically found in an art book. Its illustrations are reproduced clearly. Both works cost art book prices which will put these books out of the reach of students and unfortunately many in the visual arts.⁴⁹ Hopefully, the publishers will see fit to issue paperback versions. One annoying as-

45. *Id.* §§ 14.1-14.7, at 635-706.

46. *See* O'Keeffe v. Bry, 456 F. Supp. 822 (S.D.N.Y. 1978); *ART LAW*, *supra* note 10, at 350.

47. The authors state that "if the terms of a commission are that the patron must be satisfied, then the fact that her dissatisfaction is wholly unreasonable is totally beside the point." I *ART LAW*, *supra* note 10, at 380. It is true that if the contract for painting a portrait specified "personal satisfaction" as a condition to payment, then an objective test of satisfaction would be impracticable and the rule stated by the authors is correct. RESTATEMENT (SECOND) OF CONTRACTS § 228 comment b (1979). However, courts do not favor forfeitures, and if the agreement does not make it clear that honest satisfaction as opposed to reasonable satisfaction is meant, a court will utilize the latter standard. *Id.* Even if the individual had demanded "personal satisfaction" in the contract, if the artist could prove "bad faith" in the refusal to accept the painting, the artist would prevail. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

48. For instance, chapter one, section one: "The Artist's Right of Expression" contains both the New York Court of Appeals decision in *People v. Radich*, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970) *aff'd by an equally divided Court*, 401 U.S. 531 (1971), and the application for habeas corpus, *United States ex rel. Radich v. Criminal Court*, 385 F. Supp. 165 (S.D.N.Y. 1974). Both decisions list the allegations in full in the footnotes — which may be unnecessary in one of the reprinted cases, let alone two. *See* I *ART LAW*, *supra* note 10, at 4 n.1, 16 n.6.

49. *ART LAW* retails for \$160, *LEVA* for \$89.95. Educators may photocopy part of *ART LAW* upon payment of a copyright fee based on the number of pages photocopied multiplied by the number of copies made. The University of Pennsylvania Press offers discounts if fifteen copies are purchased in one order.

pect of *Law, Ethics, and the Visual Arts*' design is that save for the authors' commentary, the text is printed in two columns of small print per page. Any reader who remembers when West Publishing Company casebooks used the two column format will know how hard the book is visually to read.

A few quibbles aside, both of these works are highly recommended and are required for any practitioner or arts administrator. Anyone who wants to know the law, the issues, the ethics, and where the field of law and the visual arts is headed, should purchase both of these fine works.