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Review of "The Desk Book of Art Law" and "Law, Ethics, and the Visual Arts: Cases and Materials"

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The Desk Book of Art Law, by Leonard D. DuBoff: Federal Publications, Washington, D.C., 1978, 1373 pages.

Law, Ethics and the Visual Arts: Cases and Materials, by John H. Merryman and Albert Elsen: Matthew Bender, New York, 1978, two volumes, 1300 pages (approx.).

*Reviewed by James J. Fishman**

There have been several publications on law and the visual arts,¹ but with one exception there has been no synthesizing treatise or casebook.² Happily, with the publication of Leonard D. DuBoff's *The Desk Book of Art Law* and *Law, Ethics and the Visual Arts: Cases and Materials*, by John Henry Merryman and Albert Elsen, this situation has been remedied.

Certainly, the appearance of these two works is timely. As the authors of one of the first reference books on law and the visual arts have noted:

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.³

However, the post-World War II cultural explosion—evidenced by the public's growing awareness of art, by the emergence of government assistance to the arts, and by an increase in the number of artists and collectors—has led to more complex relationships between the law and the visual arts. Both books have done much to define the parameters of these relationships and to persuasively argue for the recognition of art law as a distinct legal specialty.

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1. See T. CRAWFORD, *LAW AND THE VISUAL ARTIST* (1977); S. HODES, *WHAT EVERY ARTIST AND COLLECTOR SHOULD KNOW ABOUT THE LAW* (1974); *VOLUNTEER LAWYERS FOR THE ARTS, THE VISUAL ARTIST AND THE LAW* (1971).

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

3. *Id.*

of Law of Lewis and Clark College, and President of Oregon Volunteer Lawyers for the Arts. His 1300-page treatise, *The Desk Book of Art Law*, is an exhaustive study of the field. The book is extremely well-organized throughout. DuBoff seems to have read every case or statute that relates in any way to the visual arts. Besides a brief introductory section, the book is divided into five major sections: The work of art; governmental and other assistance; art purchases; the artist; and special problems of museums. There is an appendix containing forty-three forms, treaties, sample contracts, legal briefs, and documents. Chapters which are particularly well done concern copyright, income taxation, and the Customs Bureau's difficulties in defining "art" for tariff purposes.⁴ Professor DuBoff is quite opinionated and, because this reviewer often disagrees with him, some chapters, such as "Art as Investment," "Auctions," and "The International Movement of Art," were found to be less successful.

Law, Ethics and the Visual Arts is the result of a collaboration between an art historian and a law professor. Albert Elsen is a Professor of Art History at Stanford University, a Rodin scholar, and former president of the College Art Association. John Henry Merryman, Professor of Law at Stanford University, is an expert on civil law. Together they have produced a most interesting casebook which is organized around the perception that there is a set of functionally related people and institutions (artists, dealers, auctioneers, collectors, museums, critics, historians, and press) that constitute a "visual arts world." The intersection of this world with the legal system is the focus of the book. *Law, Ethics and the Visual Arts* is divided into seven major sections: Plunder, Destruction and Reparations; The National Movement of Stolen and Smuggled Works; Defining Art and the Limits of Artistic Freedom; The Artists' Rights in a Work of Art; The Artist and The Legal World; The Collector; and The Museum. There are some forms and sample contracts throughout the text although not as many as in *The Desk Book of Art Law*.

Considering the scope and length of *Law, Ethics and the Visual Arts*, it contains relatively few cases. Instead, there are excerpts from periodicals, books, and other art sources which frame the legal and ethical problems. These descriptive materials serve as an interesting introduction to the cases and provide a pleasant change from the ordinary casebook.

4. For an analysis of the history and development of tariff classifications of art, see Derenberg & Baum, *Congress Rehabilitates Modern Art*, 34 N.Y.U.L. REV. 1228 (1959).

Both volumes contain all of the major cases. While they overlap in subject matter, the books are very different. DuBoff's approach is that of the traditional legal treatise writer. He offers many related cases and discusses legal issues in the notes, whereas Merryman and Elsen ask questions of a legal and ethical nature and approach their subject more philosophically. For example, Merryman and Elsen open their museum section with a substantial discussion of the history and purpose of museums. They then move into an examination of the legal obligations of a museum, using the *Barnes Foundation* case⁵ for illustrative analysis. DuBoff begins the first of two museum chapters with a discussion of the general legal principles relating to trusts, corporations, and tax-exempt status that concern the formal structure of museums. DuBoff also tends to cut a broader swath. For instance, in his chapter "Art as Investment," he ranges from maintenance costs to investment factors to be considered. Merryman and Elsen present a general discussion of the art market but say little about investment factors. (Although DuBoff devotes a whole chapter to insurance, it is a general introduction to the subject and insufficiently focused. He does not discuss in adequate detail the liabilities and responsibilities of directors of museums in insuring collections.⁶ Unfortunately neither book gives adequate consideration to the most common task for an attorney with an art law problem—estate planning for the collector.⁷ The Tax Reform Act of 1976 has created new problems in estate planning and recordkeeping for collectors and artists,⁸ and neither book offers a discussion of the rules of carryover basis and how they affect the collector.⁹

5. *Commonwealth v. Barnes Foundation*, 398 Pa. 458, 159 A.2d 500 (1960).

6. DuBoff reprints Petition *In re* George I. Davis as Trustee of the Heye Collection Trust, No. 41416/75 (N.Y. Sup. Ct. 1975) in which trustees petitioned the court for a construction of the trust agreement and for permission to discontinue insurance coverage because operating expenses had risen to the point where the continued payment of insurance premiums would jeopardize their ability to provide for proper security to the collection. The court allowed the trustees to discontinue insurance. The case of *Harris v. Attorney Gen. (the Hill-Stead case)*, 31 Conn. Supp. 93, 324 A.2d 279 (1974), which is omitted, is perhaps more important in determining trustees' liability. In the *Hill-Stead* case, the court found that the failure to insure the collection was not mismanagement. But what is the liability of trustees if the museum, unlike the *Hill-Stead*, does not have its origin in a trust instrument? One case cannot establish guidelines for every fact situation. See ALI-ABA, *LEGAL PROBLEMS OF MUSEUM ADMINISTRATION*, vol. III, at 94-97 (1975).

7. See generally *COLLECTORS AND ARTISTS: PLANNING AND PROBATING THE ESTATE* (Lerner ed. 1978).

8. As a result of the carryover provisions of the Tax Reform Act of 1976, I.R.C. § 1023, it has become necessary to determine the cost of the item at the date of purchase.

9. For a discussion of these issues, see Lowin, *The Rules of Carryover Basis and*

Because art law is rapidly changing, instant obsolescence is a problem. The introduction of arts legislation is at flood level. Federal legislation, particularly in the tax area, will have important effects on artists, collectors, and art institutions. Moreover, litigation in the area continues to increase. In several sections *The Desk Book of Art Law* is already outdated. The same will happen to *Law, Ethics and the Visual Arts*.

The two texts are more complementary than competitive. DuBoff's book is, as its title suggests, a "deskbook" and will prove a valuable resource for the arts lawyer or the general practitioner who has infrequent problems in this area. Merryman and Elsen is the better choice for classroom use. Although some may say that an interesting casebook is a contradiction in terms, the introductory notes and questions at the end of each section of *Law, Ethics and the Visual Arts* are superior. Moreover, the book is so interesting that it can be recommended for a broader audience. Both books are invaluable additions to the development of art law and should be on the shelves of anyone interested in the legal problems of the visual arts.

How They Affect the Collector, in COLLECTORS AND ARTISTS: PLANNING AND PROBATING THE ESTATE, *supra* note 7, at 207.