

THE ART LAW
REVIEW

Editors

Lawrence M Kaye and Howard N Spiegler

THE LAWREVIEWS

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PREFACE

We are pleased to introduce you to the very first edition of *The Art Law Review*. The field of art law has developed over many years to become a significant speciality in the law, as collectors, galleries, auction houses, museums and everyone else involved with art have expanded their collections and businesses throughout the world. Besides involving billions of dollars in the trade, art law has become the means by which the diverse cultures of our societies are governed and encouraged to develop.

We have invited leading practitioners in the field of art law around the world to detail the key developments in their respective countries pertaining to this dynamic and growing area of legal expertise. We have also asked that other leaders in the field focus on particular important issues in this area of law. We thank all our distinguished authors for their fine contributions. We hope you will find them informative, instructive and interesting.

By way of introduction, a brief overview of developments in this field during the past 50 years in the United States, where we practise, seems a good place to begin. Considering that English common law, upon which US law is based, originated in the early Middle Ages, the field of art law in the United States can rightly be characterised as a newborn. The roots of art law in the United States began in the form of intermittent cases in the early to mid twentieth century when visual artists began confronting problems in protecting their work – and themselves – particularly in the areas of copyright and obscenity.¹ Indeed, a body of law that could be characterised as art law did not really begin to take hold in the United States until the 1960s, and even then in a most disorganised fashion. The late and renowned Professor John Henry Merryman, who in 1972 offered at Stanford Law School the first formal art law class in a US law school entitled ‘Art and the Law’, wrote a few years later that he started the course partly out of ‘a desire to determine whether “art law” really was a field’ and noted that he ‘took a good deal of ridicule from colleagues who thought the whole enterprise frivolous and insubstantial’.²

We have come a long way since then. A multitude of art law courses are now taught at US and European law schools and other institutions, such as the major auction houses.³ And although in the late 1960s and early 1970s, when we began practising art law, one would have

1 See generally Joan Kee, *Models of Integrity: Art and Law in Post-Sixties America*, Introduction, 1-42 (University of California Press, 2019).

2 John Henry Merryman, ‘Art and the Law, Part I: A Course in Art and the Law’, 34 *Art Journal* 332, No. 4, 332 to 334 (Summer 1975).

3 See, e.g., Center for Art Law, ‘Art Law Courses and Programs Worldwide’, at www.itsartlaw.org (last accessed 29 October 2020).

been hard pressed to find anyone in the Martindale Hubble Law Directory designated as an ‘art lawyer’, today art lawyers proliferate in the directory; and for the New York area alone, where we practise, there are several pages listing lawyers who call themselves art lawyers.

So, what is art law? Professor Merryman observed that a primary reason for creating his new and novel art law curriculum was that ‘the growth of American art and the emergence of the United States as a major art market involved problems and interests that were sufficiently substantial and complex to call for the services of specially attuned and trained practicing lawyers’.⁴ Well, Professor Merryman’s observation was quite prescient, for that is exactly what has happened during the past 45 years in the United States, and indeed throughout the world. Art law became a respected discipline within the law, and more and more practitioners around the globe began to specialise in the field as the nexus between art and law became more clearly defined.⁵

What had previously consisted of random cases involving visual artists and emerging issues affecting the growing art market started to morph into a cogent body of law. Even before Professor Merryman started his course and wrote the textbook to accompany it (*Law, Ethics and the Visual Arts*), in 1966 Scott Hodes published a book on the law of art and antiquities.⁶ Many other texts followed.⁷ Art law seminars and symposia began to proliferate and now take place almost every day somewhere in the world.

As the international art market grew and became more sophisticated, so did the practice of art law and the number of practitioners who began to devote themselves to the field. Today, art law is an amalgam of myriad legal areas that academicians, practitioners, lawmakers and judges have adapted to the specific needs of stakeholders in the art world, and art law specialists have learned how to apply traditional legal principles to art market disputes and transactions as the art world became more prevalent and more complex. The stakeholders in need of special art law expertise range from the poorest artists to the most sophisticated corporations and government entities. Even a partial list is daunting: museums, collectors, importers and exporters, galleries and dealers, auction houses, living artists (and even dead ones), including digital artists, families and family offices, estates, trusts and foundations, insurance companies, appraisers, art advisers, experts, consultants, corporate art collections, and national and state governments. To address the needs of these varied stakeholders, the experts in the field have taken general legal principles and areas of practice and applied them to the unique needs of the art law stakeholders, in addition to creating new specialities uniquely applicable to art law disputes and transactions. Among many others, these include property law, the law of contracts, consignments, torts, intellectual property, tax, trusts and estates, authentication, insurance, cultural property, moral rights, resale rights, free speech, sales and other commercial law, warranties, conflicts of law, private international law, comparative law, customs, criminal law and securities law. And the list goes on.

4 Merryman (footnote 2), at 332 to 333.

5 A practical and informative guide to the development of art law can be found in Kee (footnote 1). The early roots of art law are also explored in James J Fishman, ‘The Emergence of Art Law’, 26 *Clev. St. L. Rev.* 481 (1977).

6 *The Law of Art & Antiques: A Primer for Artists and Collectors* (Oceana Publications, 1966).

7 Notable among the many are Franklin Feldman and Stephen Weill, *Art Works, Law, Policy, Practice* (New York Practising Law Institute 1974); Leonard Duboff, *Deskbook of Art Law* (Washington DC Federal Publications, 1977); and the seminal text on art law, Ralph E Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers & Artists* (Practising Law Institute 1989), which is now in its fifth edition.

We have been practising art law since before it became a field, having started in the early 1970s. We believe our own professional journeys serve to illustrate some of the ways this area of law has grown and developed, so we would like to briefly share some of our experiences.

Larry first entered this field as a summer associate at the firm of Botein, Hays, Sklar and Herzberg in 1969. On reporting for duty at this first legal job, he was introduced to a brilliant attorney, who ended up serving as a revered mentor for both of us for many years to come, Harry Rand. Harry was representing the Weimar Art Museum, located in what was then East Germany, which was seeking to recover two paintings by Albrecht Dürer that were taken during the Second World War by US soldiers from a castle in which the paintings had been placed for safekeeping. East Germany (officially the German Democratic Republic), which owned the museum, sued a negligence lawyer residing in Brooklyn, New York, who had purchased the works from a US soldier who appeared at his door one day in 1946.

As it turned out, this was the first case of a foreign sovereign suing in the United States to recover cultural property. It involved many legal issues that took some 15 years to resolve finally in favour of East Germany, to which the paintings were ordered to be returned. The legal principles established in the *Weimar Museum* case continue to be cited in cases involving the recovery of artwork and other cultural property, especially those relating to the statute of limitations, and *Weimar Museum* stands as one of the iconic cases in this area of law.

During the pendency of the case, Howard joined Botein and started a professional relationship with Larry that has spanned many decades.

Our success in the *Weimar Museum* case and the publicity surrounding it attracted the interest of the Republic of Turkey, which was in a dispute with the Metropolitan Museum of Art (the Met) regarding a remarkable collection of ancient jewellery and other artefacts on display in the Met, which had been looted from caves in Turkey many years before. It turned out to be one of the leading cases involving the restitution of antiquities looted from foreign sovereigns, which led to a worldwide interest in trying to prevent such looting from countries around the world.

We sued the Met on behalf of Turkey and a six-year litigation ensued, largely spent defending dismissal motions brought by the Met on the grounds of the statute of limitations and other technical defences. But after we got past all that time-consuming and expensive motion practice, we then commenced the long discovery process, whereby we obtained information from the Met's own files about its knowledge of the objects' provenance or history, and its conduct in acquiring them. Nonetheless, the case presented significant obstacles for us. It was, after all, one of the first major cases brought against a major museum by a foreign government to reclaim looted cultural property. Indeed, at the time of its inception, most commentators were openly questioning how a previously undiscovered and undocumented collection of antiquities could be identified as having been looted from Turkey, let alone recovered.

However, we did prevail and the antiquities, known as the Lydian Hoard, were returned to Turkey in 1993 and exhibited at one of the great Turkish antiquity museums, the Museum of Anatolian Civilizations in Ankara, where it was greeted with great interest and excitement by Turkish visitors to the museum as well as those from other countries. We were privileged to visit the museum when the objects were displayed there, and we cannot adequately describe the excitement displayed by the Turkish viewers. Once the director revealed to them that we and our colleagues had assisted the government in securing the return of the objects, many people came over to thank us personally for helping to ensure that this important part of their heritage had been returned, to be viewed and appreciated by the Turkish people. The Lydian

Hoard case is considered by many as the starting point for the efforts by art-rich countries to reclaim their cultural property, which have continued and increased to this day.

As that case was ending, Botein closed shop and we joined our current firm, Herrick, Feinstein. We brought what was now a growing caseload of restitution work to Herrick, which until that time was a very successful firm that had no experience with art law. Indeed, there were still only a very few attorneys who regularly practised in this area of law.

By the mid 1990s, we were certainly known as art lawyers, particularly in the area of restituting looted antiquities to their country of origin. But then, for various reasons, the world's attention started to turn back to the Nazi era before and during the Second World War, and it became clear that the Nazis not only committed the most horrendous crimes against humanity, but they also committed the most extensive theft of cultural property in modern human history. As restitution experts, it was a natural fit for us to become involved in cases brought to recover artworks looted by the Nazis so that they could finally be returned to the families of the victims of the Holocaust. We would like to briefly mention two of those cases.

We were retained to handle one of the first important cases involving Nazi-looted art, representing the family of an art dealer who escaped from Austria after having had one of her paintings stolen by a Nazi agent. The painting by Egon Schiele is known as *Portrait of Wally*. The case started when the Wally was seized from the Museum of Modern Art (MoMA) in New York by state and then federal prosecutors after it was brought to the United States as part of an exhibition of work by Schiele in the collection at the Leopold Museum in Vienna.

Even though it took more than 10 years for the *Portrait of Wally* case to be finally resolved, it had an enormous influence from the moment it started. The fact that a loaned artwork at MoMA could be seized by US government authorities sent shock waves throughout the world and was a major factor in causing governments, museums, collectors and families of Holocaust victims to focus their attention on Nazi-looted art. Less than a week before the scheduled trial, the case was settled on three major terms:

- a the Leopold Museum paid the family US\$19 million, reflecting the true current value of the painting, in return for the surrender of their claim;
- b a ceremony and exhibition was held at the Museum of Jewish Heritage in New York for three weeks before *Portrait of Wally* was returned to Austria; and
- c the Leopold Museum agreed that signs would be permanently affixed next to *Portrait of Wally* at the museum and wherever it might be exhibited anywhere in the world, explaining the true facts of the painting's ownership history.

Shortly after the *Portrait of Wally* case commenced, we assisted the sole living heir of the renowned Dutch art collector and dealer, Jacques Goudstikker, to recover an extraordinary collection of Old Master paintings that had been looted during the Second World War by Herman Goering, who was second only to Hitler in the Nazi regime. With the adoption in 1998 of the Washington Principles, a non-binding international convention that for the first time brought together 44 nations in an effort to foster the restitution of property looted during the war, the Netherlands adopted a new restitution regime designed to right the wrongs of the past. To make a very long story very short, we assisted Marei von Saher in her Dutch restitution proceedings, and in 2006 we were able to effect the return of 200 works to her.

We also became involved in major art restitution cases brought against foreign sovereigns, which involved the Foreign Sovereign Immunities Act, a law that has been used in numerous cases since then as the basis for suing foreign sovereigns to recover artworks in their possession.

Over the years, we have also developed a wide-ranging practice in non-restitution art disputes, from simple breach of contract cases to more complex disputes involving dealers, collectors, artists and other art world stakeholders covering a wide range of disputes including trademark and copyright infringement, defamation, moral and visual rights, breach of warranty, misattribution, tax and trust matters, valuations, appraisals, experts and auctions.

We also became involved in the transactional side of art law. This aspect of our practice expanded when our restitution clients began asking us to handle transactions involving the sale and other disposition of major artworks and collections we had recovered for them. The transactional side included not only private treaty sales and auction sales, but also estate planning, providing tax advice, assisting not-for-profit entities, planning nationwide and international loans and exhibitions, and advising banks and collectors on using artworks as collateral for bank loans, among many other cutting-edge art law issues.

A sampling of the varied transactional matters we have been privileged to work on is a microcosm of the range of transactional matters that specialist art lawyers came to handle as the international art market expanded. To name but a few: we represented the Neue Galerie in New York in the acquisition of the famed *Woman in Gold* painting by Gustav Klimt, depicted in the film of that name, which has become the *Mona Lisa* of that museum's collection, regularly attracting huge numbers of visitors; we represented the European Fine Arts Foundation (TEFAF) in the creation of its New York Fall 2016 Art Fair; we represented the Malevich heirs in numerous auction sales during the course of 15 years, including the US\$60 million sale of *Suprematist Composition* (1916), which set a world record for Russian art; we represented the Estate of Frances Lasker Brody in the historic sale of its art collection at Christie's (the highlight of which was a Picasso masterwork, *Nude, Green Leaves and Bust*, which sold for a then auction record of US\$106.5 million); we represented a private art collector in one of the largest transfers of Mesoamerican art to a museum, and advised the collector's foundation dedicated to the study and advancement of Mesoamerican art; and we conducted an internal investigation on behalf of an internationally recognised art gallery concerning the authenticity of certain paintings bought and sold by the gallery.

Turning now to this Review, we open the volume with substantive chapters that present an overview of current and significant issues in some important areas of art law:

- a* cultural property disputes;
- b* the art market;
- c* art authentication;
- d* art and technology;
- e* international copyright issues;
- f* moral rights; and
- g* recent trends in art arbitration and mediation.

We then present reports on recent art law developments in 21 key countries. Each country's report gives a review of hot topics, trends and noteworthy cases and transactions during the past year, then examines in greater depth specific developments in the following areas: art disputes, fakes, forgeries and authentication, art transactions, artist rights, trusts and foundations, and finally offers some insights for the future.

We hope you enjoy reading all of these excellent contributions.

Lawrence M Kaye and Howard N Spiegler

Herrick, Feinstein LLP

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ABOUT THE AUTHORS

LAWRENCE M KAYE

Herrick, Feinstein LLP

Lawrence M Kaye is co-chair of the firm's art law group. Larry has a diverse commercial art practice, advising dealers, collectors, artists, museums and estates in transactional matters, including the acquisition and sale of world-renowned works of art, art loan and exhibition agreements, Section 1031 (of the United States Internal Revenue Code) exchanges, insurance and authentication issues, and financings using art as collateral. Larry also represents a wide range of domestic and international clients in all types of complex art litigation and dispute resolution, including issues about authenticity and authentication, artist/dealer relationships and contractual disputes related to the purchase and sale of artworks. Larry has represented foreign governments, victims of the Holocaust, families of renowned artists and other claimants in the recovery of art and antiquities. Larry also advises and represents foreign governments in matters related to cultural property and, in that regard, among other things, served as legal adviser to the Republic of Turkey's delegation to the diplomatic conference where the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects was adopted. He has written and lectured extensively on mediation and arbitration of art law disputes.

HOWARD N SPIEGLER

Herrick, Feinstein LLP

Howard N Spiegler is a partner and co-chair of Herrick, Feinstein's art law group. He handles all types of art transactions, often with the assistance of other attorneys at Herrick, including counselling its clients on international trade issues, loans, museum and private exhibitions, organising and structuring business entities, trust and estate matters, insurance issues, tax questions and criminal law concerns. Howard has also been involved in several significant cases recovering stolen artwork or other cultural property, including rare books stolen from the Swedish National Library; the full value of a Schiele painting confiscated by a Nazi agent from Lea Bondi Jaray in Austria in the late 1930s; 200 artworks looted by the Nazis from the Jacques Goudstikker Gallery in the Netherlands; numerous antiquities for the Republic of Turkey; and valuable Malevich paintings recovered for the Malevich family from Amsterdam in the Netherlands. Among other commendations, he has received the Award for Lifetime Achievement in the Defence of Art by the Association for Research into Crimes Against Art and the Prix Monique Raynaud-Contamine by the International Association of Lawyers.

He is on the editorial board of the *Journal of Art Crime* and has served as president and vice president of the Art Law Commission of the International Association of Lawyers and chair of the Art Law Committee of the New York City Bar Association.

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