

# Spencer's Art Law Journal

Edited by Ronald D. Spencer

## Editor's Note

This is Volume 3, Issue No. 2 of *Spencer's Art Law Journal*. This Fall issue contains excerpts from a recently published book, and two essays which will become available by posting on Artnet starting November 2012.

This issue opens with an excerpt from Michael Findlay's new book, *The Value of Art: Money, Power, Beauty*. How the art world values art is important because the concept of "value" is at issue in art disputes, often to calculate the measure of damages for lost, stolen or damaged artwork. How value is assessed is also essential when deciding on the information disclosures and representations in art transactions.

The first essay (*Stemming the Tide ...*) discusses a development in federal law that eliminates the option of using the federal Lanham Act to sue experts over statements regarding authorship or authenticity of works of art. While this legal issue was most recently decided in federal court in New York in *Gilbert v. Indiana*, in a lawsuit against the artist Robert Indiana, this decision also benefits experts providing expert opinions about art. Eliminating Lanham Act claims is a particularly important development, and heartening to those who care about preserving the role of scholarship in the art world, because Lanham Act claims expose defendants to liability for up to three times the amount of actual damages plus the plaintiff's attorneys' fees. Such claims were therefore disproportionately likely to place extreme pressure on experts when a disgruntled owner challenges an opinion.

The second essay (*Street Photography ...*) provides an introduction to the individual right of privacy and right of publicity, which is recognized in New York's Civil Rights Law. These rights often come into conflict with those of artists, particularly photographers, when they depict individuals who

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then object to this use of their likeness. These disputes are particularly interesting because under New York law, there is a defense that the work at issue is "art," which by its nature requires courts to decide, as a matter of law, what is "art." By focusing on a recent lawsuit against street photographer Philip-Lorca diCorcia and diCorcia's assertion of the "art" defense, the essay discusses the various ways that courts have attempted this definitional task.

Three times a year, issues of the Journal continue to address legal issues of practical significance for institutions, collectors, scholars, dealers and the general art-minded public. --- RDS

## THE VALUE OF ART: MONEY, POWER, BEAUTY

Prestel, Munich and New York, 2012: Excerpts from Michael Findlay's new book

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Michael Findlay

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*The concept of "value" is at issue in numerous art disputes, often to calculate the measure of damages for lost, stolen or damaged artwork. Understanding how value is determined in the art market is also essential when assessing the relative importance of information disclosures and representations in art transactions. This excerpt from Michael Findlay's new book, *The Value of Art: Money, Power, Beauty*, published this year by Prestel, provides an expert's insight on this issue. It is reprinted with the generous permission of the author and the publisher. --- RDS*

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MICHAEL FINDLAY, a vastly experienced art dealer, is a Director of Acquavella Galleries in New York, known for major exhibitions of nineteenth- and twentieth-century masters including Pablo Picasso, Georges Braque, James Rosenquist, and Lucian Freud. Born in Scotland, Findlay began his career in New York in 1964, where he was a pioneer of SoHo's legendary gallery scene and presented important solo exhibitions of then-unknown artists such as John Baldessari, Stephen Mueller, Sean Scully, and Hannah Wilke. In 1984 he joined Christie's as its Head of Impressionist and Modern Paintings and later was named International Director of Fine Arts while serving on the Board of Directors until 2000.

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### *What Determines the Commercial Value of Art?*

Like currency, the commercial value of art is based on collective intentionality. There is no intrinsic, objective value (no more than that of a hundred-dollar bill). Human stipulation and declaration create and sustain the commercial value.

The reason that many people continue to be astonished or enraged when they hear that a particular work of art has been sold for a large sum of money is that they believe art serves no necessary function. It is neither utilitarian, nor does it seem to be linked to any essential activity. You cannot live in it, drive it, eat, drink, or wear it. Even Plato considered the value of art to be dubious because it was mimesis, an imitation of reality.

If you gave most people \$25 million and the choice to spend it on a six-bedroom house with spectacular views of Aspen or a painting by Mark Rothko of two misty dark-red rectangles, the overwhelming majority would choose the house. We understand the notion of paying for size and location in real estate, but most of us have no criteria (or confidence in the criteria) to judge the price for a work of art. We pay for things that can be lived in, driven, consumed, and worn; and we believe in an empirical ability to judge their relative quality and commercial value. No matter how luxurious, such things also sustain the basic human functions of shelter, food, clothing, and transport.

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A body of new work by any artist is usually consistent in theme, but not necessarily in scale. What makes one painting or sculpture more or less expensive than another in this primary market is usually size. Although the artist's audience has not yet rendered an opinion about which type of work is better or more desirable than any other, and the artist may feel some smaller works are better than some larger ones, usually size wins out, and the smallest works are usually the least expensive. The larger the work, the higher the price, with the exception of paintings and sculptures that may be too large for domestic installation and require the kind of space usually found only in institutions, office buildings, shopping malls, and casinos. Such works may be proportionately less expensive because they are harder to sell.

Depending on the medium used by the artist, there may be a cost of manufacture to consider. In 1895 Auguste Rodin had to pay Le Blanc Barbedienne Foundry in Paris when he cast his *Burghers of Calais* in bronze. Today Richard Serra has to pay Pickhan Unformtechnik in Siegen, Germany for fabricating his vast steel *Torqued Ellipses* [*ed. note: references to the many images reproduced in the book are omitted from this excerpt*]. These costs are passed on to the first buyers of the work. Many artists create sculpture in editions. If there are five or ten copies of a sculpture, the primary market price will be less for each one than for a unique work of similar size, medium, and appearance by that artist.

Aside from these casting expenses, the cost to the artist for materials used in painting and drawing, though perhaps not insignificant, is not a consideration when it comes to pricing the works. Oil on canvas is generally known to be a highly durable medium. Short of direct trauma, it can withstand handling and extremes of temperature and humidity, as well as sun-light. Not so works on paper, which are usually priced lower to account for their greater fragility. This has led to the notion that works on paper are inherently worth less than paintings, despite the fact that the secondary market in some cases has placed a higher value on works on paper than on oils by certain artists, such as Edgar Degas and Mary Cassatt.

Another rule of thumb with the primary market of works on paper is that those with color, be they rendered in oilstick, gouache, watercolor, or crayon, will be priced higher than works that are monochromatic: graphite, charcoal, or sanguine.

When it comes to making lithographs, etchings, silkscreens, and other types of editioned works on paper, costs can be considerable. Printmaking is an art that involves not only the creative talent of the artist who conceives the image, but the skill of master printers using sophisticated and expensive equipment.

### ***The Secondary Market***

Other than the purchase of new work either directly from the artist or the artist's dealer, all art purchases, whether of Dutch Old Masters, nineteenth-century English seascapes, Impressionist paintings, or Cubist masterpieces, are secondary-market transactions.

Once an artist achieves a degree of stature, a secondary market in his or her work is inevitable during the artist's lifetime. How is the commercial value of an art object decided in the secondary market when it is resold by the first owner? Most things we buy are worth less once we have used them. A car usually is, as are clothes we give to charity. In addition, appliances and electronics have less value when succeeded by newer models. When the real-estate market booms, the second owner of a home may pay more for it than the first, but in a stable market the second-hand house is likely to be worth less than a new one of the same size, design, materials, and location.

Once art passes out of the hands of the first buyer, its commercial value is largely determined by the principle of supply and demand, but it can be managed by the artist's primary dealer. When making a primary-market sale, I am sometimes asked if I will resell the work when and if the client so decides. I usually agree. By doing this dealers can participate in the pricing of secondary-market works by artists they represent.

Some art dealers, both those with galleries and "private" dealers, (sometimes operating out of their homes), represent no artists directly but buy and sell work by living artists. They may not have any direct relationship with the artist but may be very knowledgeable about the work, and by promoting it they are usually contributing to the solidity of that artist's market.

Even in the primary market, the relative availability real or imagined, of a particular artist's work is key. The art dealer rarely says, "Andy's studio is packed to the gills with hundreds of paintings just like this one, so take plenty of time to choose the one you want." Rather: "I'm not sure if there will be any more like this; he's painting very slowly, and we've sold the few others we had to very important museums and collectors."

A little history. When I entered the art trade in the mid-1960s, there were only a few living artists whose works regularly appeared in the secondary market. They were mostly modern European masters like Picasso, Joan Miró, Marc Chagall, and Salvador Dalí. Very few midcareer American artists, even those with major reputations, appeared at auction, and virtually no younger contemporary artists did. The postwar American generation of

Abstract Expressionists was well established (Jackson Pollock, Arshile Gorky, and Franz Kline were already dead), and the paintings they did in the late 1940s and 1950s were in demand by the mid-1960s, mostly sold by secondary-market dealers. Only rarely did their works come up at public auction. Exceptions include a 1940 painting by Willem de Kooning that was sold in the Helena Rubinstein auction at ParkeBernet in April 1966 for \$20,000.<sup>1</sup> In October 1965 a group of paintings, including works by Rothko, Franz Kline, Clyfford Still, Barnett Newman, and de Kooning, was consigned to Sotheby Parke Bernet by the taxicab mogul Robert Scull, who with his lean, well-coiffed, and miniskirted wife Ethel had turned his attention to the younger generation of Pop artists, including Jasper Johns, Robert Rauschenberg, Andy Warhol, Tom Wesselmann, and James Rosenquist. The sale of Scull's paintings totaled \$211,450. *Police Gazette* (1955), an abstract landscape by de Kooning painted ten years earlier, in 1955, fetched \$37,000. Forty-one years later the *New York Times* reported that it had sold privately for \$63.5 million. These examples notwithstanding, in those days auction houses generally avoided selling works by living artists with primary gallery representation.

This pattern ended loudly and finally in October 1973 with the second Scull sale at Sotheby Parke Bernet.<sup>2</sup>

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### **Supply**

Veteran art dealer William Acquavella often tells his clients, accurately, "You can remake your money, but you can't remake the painting,"<sup>3</sup> meaning: you can earn the cost back, but if you miss the opportunity to buy the work when it is available, it is likely gone forever.

Real or imagined, rarity is the *ne plus ultra* when art is sold. Not only does it justify the price, it also suggests an exclusive club of ownership: "The only other one like this is in the Metropolitan Museum of Art." Considering the purchase of a work by a living artist, a collector might be told, "She's not going to make any more paintings like this one," although there are numerous instances of aging artists revisiting the themes of their fruitful youth, either out of nostalgia or penury. What can be counted on perhaps is that there will be no more paintings like that one *with today's date*.

Claims of rarity also have to be examined carefully because not only do artists often explore specific themes in a variety of mediums (paint, pastel, pencil, print), but total output varies widely from artist to artist. Monet—who lived until he was eighty-six, painted virtually every day of his life, and produced 2,000 paintings—is considered to be prolific. Van Gogh died at thirty-seven having made 864 paintings, and Pollock died at forty-four having produced just 382 works on canvas. The most useful tool in determining just how many paintings an artist made of any particular type is the comprehensive listing of his or her entire output known as the catalogue raisonné, which translated literally means "critical catalogue."

### **Catalogues Raisonnés**

Until the advent of the camera it was difficult to document and record accurately the full extent of any artist's body of work. Scholars of premodern art have to rely on documentary evidence, such as artists' hand lists and records, bills of sale, letters, known public commissions, and the like.

By the time of the Impressionists the camera was in popular use, and it became standard for artists to have their works photographed, albeit in black and white. This greatly enhanced the creation and use of catalogues raisonnés, which became an essential tool in determining supply. Most indicate the past and (as of the date of publication) present owners of each work listed. Thus, it is possible for the seller of a painting of water lilies by Monet to show a prospective buyer exactly how many of that type, size, and date were painted. A knowledgeable dealer will be able to combine the information in the catalogue raisonné with his or her own knowledge of current ownership and infer how many (or rather, how few) of a particular type of work are ever likely to be sold.

The publication of a catalogue raisonné may have a strong effect on the value of an artist's work because it defines the supply empirically and provides the basis for reasonable assumptions regarding whether any particular work might be available. A painting designated "Art Institute of Chicago" is likely off-limits forever, whereas "Mr. and Mrs. Worthlot, Los Angeles," could be approached with an offer to buy.

Warhol called his studio the Factory and he produced many seemingly identical works (in series, not unlike Monet). When Warhol died in 1987, he was highly celebrated, and paintings of his most publicized subjects (Campbell's soup cans, Marilyn Monroe) commanded high but not spectacular prices. The first two volumes of his catalogue raisonné appeared in 2002 and 2004 and cover just eight years of his work (1961-69).<sup>4</sup> Almost immediately prices increased, in part because it was evident that although there were indeed many images that he used over and over again, he varied color and size so that not only did each work now appear to be genuinely unique, but the actual number of works in any series (Flowers; Elvis; Dollar Signs) turned out to be less than many people supposed.

Art historian and magazine editor Christian Zervos began to catalogue Picasso's work in 1932 with the participation of the artist and died in 1970 having produced twenty-two volumes. Picasso died in 1973, and by 1978 a further eleven volumes were published by Zervos's successors.<sup>5</sup> Catalogues raisonnés themselves are not inexpensive. The complete set of "Zervos" sells for approximately \$50,000. It is virtually indispensable for museums, libraries, and anyone who deals in work by Picasso. Not all artists are so lucky: Renoir died in 1919, and it was fifty-two years before the first volume of his catalogue raisonné was published.<sup>6</sup> This volume lists only his paintings of figures (no landscapes or still lifes) done between 1860 and 1890. No subsequent volumes have yet appeared. Modigliani has been favored with at least five catalogues raisonnés, only one of which is generally accepted as reliable.<sup>7</sup> Unscrupulous authors may, for a consideration, include a work of dubious authenticity thus rendering the entire book suspect.

There is usually a period in every artist's work life that informed opinion considers to be better than the rest. Like the reputation of artists themselves, this opinion can of course change over time. For American buyers of French painting in the middle of the twentieth century the birth of Impressionism was considered to be the best period, and works by virtually any Impressionist artist dating from the early years 1872-74 commanded premium prices. These works are generally discreetly casual in composition, rural in subject matter, and painted with small brushstrokes. Now, forty years on, the "must-haves" by Monet and Camille Pissarro are their later paintings, which have vigorous large brushstrokes in strong colors and include scenes of urban life. Currently, 1982 is considered to be the late American artist Jean-Michel Basquiat's best year. In forty years' time that opinion may change, but the number and nature of the paintings he did in 1982 will remain identified in a catalogue raisonné.

Presently, some of the most popular and expensive of all Impressionist paintings are the canvases Monet painted of his famous water lily garden at Giverny. Between 1904 and 1908 Monet created his highly prized series of seventy-nine paintings of that subject. Of those seventy nine, three have disappeared, and twenty-seven are in museums that are unlikely to ever sell them. That leaves forty-nine in private collections. While some collectors cultivate the reputation that they will never sell, no one is immortal, and in time each of those forty-nine will come on the market. That, however, is a minuscule amount when compared with the considerable number of extremely well-heeled collectors extant and yet to be minted, for whom the ownership of such a work is a top priority.

### ***Institutional Holdings***

All works owned privately, even gifts promised but not yet given to museums, are in fact potentially available. Works that have been formally accessioned by public museums constitute the "Fort Knox" of works by that particular artist and are off the market. The more works by an established artist that are in public museums, the smaller the supply for the market and the higher the value of those that do circulate.

In many countries in Europe and Asia museums are owned or controlled by the national governments and are prohibited from selling. In the United States, with the exception of the National Gallery of Art in Washington, D.C., most museums were founded by private individuals and are run as not-for-profit institutions governed by boards of trustees. The Code of Ethics for the American Association of Museums has stringent guidelines for deaccessioning (selling) works that have been bought by or given to a member institution. An important provision states that "in no event shall they [proceeds from the sale] be used for anything other than acquisition or direct care of collections."<sup>8</sup>

The likeliest candidates for sale are donated works that duplicate what the museum already holds and works of such patent inferiority that they are never likely to be exhibited. Nevertheless, even sales by museums that conform to the guidelines often create controversy, the usual argument being that disposing of works that are currently unpopular may shortchange a future generation with different tastes.

A small number of institutions that might appear to be public are privately owned, and the owners may sell works in the collection. This was the case with the Norton Simon Museum in Pasadena, California, during Simon's lifetime. The vast majority of works in museums, however, are genuinely out of circulation.

The collector Tony Ganz, whose parents owned a legendary collection of twentieth-century art, tells of having a playdate with a school friend at the age of six. On entering the house he said innocently, "Where are your Picassos?" It is fair to say that only a small percentage of art lovers grow up in or around collecting families, and the notion is widespread that most or all art by well-known artists, particularly dead ones, is in museums.

What continues to amaze me is how quickly this sense of limited supply is reversed when collectors find themselves able to afford the great art they once saw only in books and museums. Many then assume that there are plenty of top-quality Monets, Picassos, Pollocks, or Warhols out there and that all it takes is their ability and willingness to put a digit and seven (or even eight) zeros on the table to have a van Gogh, "just like that portrait at the Museum of Fine Arts, Boston."

The next stage in their education is to find out the painful truth, which is that there are only four such portraits in private hands that might equal the one in Boston, all much smaller. Of these, one is in France and unlikely, for tax reasons, to surface; one is in a private collection in Osaka; the third is promised by its owner to a museum; and the fourth just might, if the collector is extremely patient, become available within the next ten years.

Behind the perception that most great works are in museums lies some truth, but with serious qualification. Historically, museums are often slow off the mark to acquire art of the present time, even as gifts. In the twentieth century there were many instances of museums turning down individual works or entire collections of great distinction. French Impressionist painter Gustave Caillebotte died in 1894 and left almost seventy great works by his fellow artists to the French nation with the stipulation that they should, within twenty years, be exhibited. This now famous bequest was refused not only in 1894, but again in 1904 and 1908. Eventually some of the paintings did make it into the Louvre (others went to the Barnes Foundation in Philadelphia). Decades later, in 1944, an extraordinarily diverse collection, including great modern paintings and Marcel Duchamp's most important works, were offered by the Los Angeles collectors Walter and Louise Arensberg to the University of California if they would build a museum to house the collection. The university would not, and after negotiations fell through with other institutions, including the Denver Art Museum, the Art Institute of Chicago, and the National Gallery of Art in Washington, D.C., the Arensberg Collection finally found a home at the Philadelphia Museum of Art in 1954. On the other hand, it is the museum's job to exercise curatorial judgment, and museums cannot afford to warehouse every gift just in case the artist survives the tests of time.

For three decades art-market commentators have been suggesting that the market supply of Impressionist paintings is dwindling. But this is not supported by the facts. Compared to the very considerable number of works that have been bought by private collectors, relatively few have been given to or purchased by museums that acquired most of their Impressionist collections prior to 1980. This means that virtually everything that has been sold, privately and at auction, in the last thirty years is in fact still capable of circulating, along with thousands of Impressionist paintings and drawings, as well as sculpture, still in the hands of families that acquired them forty years ago or more. In fact, there are far fewer post-World War II works of art available than nineteenth- and early twentieth-century works because many of the artists were not prolific and important works by Kline, Rothko, Pollock, and de Kooning were acquired already in the 1950s by American and European museums.

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### ***What Makes a Specific Work of Art Valuable?***

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Auction results are available online in various guises and combinations, one of the most popular sites being Artnet.com. Inexperienced collectors, as well as an increasing number of their advisors, only consult these online statistics to determine the commercial value of what they deem to be somewhat similar works offered to them. Raw numbers, however, are useless unless interpreted with facts exclusive to each work of art, as well as the circumstances of the sale. To arrive at the market value of a work of art, the following five attributes must be known and weighed carefully:

- Provenance
- Condition
- Authenticity
- Exposure
- Quality

#### ***Provenance***

Once a work of art has entered the secondary market, it has achieved a history of ownership, called *provenance*—a French term for the history of ownership of a valuable object.

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The degree to which an appealing provenance may actually increase the value of a work is very difficult to determine accurately, but in my experience former ownership by a celebrated collector, past or present, lends more value to a work of modest or intermediate quality than a great work, which will achieve its value on its own merits. At most the added value might be 15 percent. There are exceptions. Sotheby's sale in May 2007 included Rothko's *Untitled (Yellow, Pink and Lavender on Rose)*, which belonged to David and Peggy Rockefeller. Because the proceeds were destined for charity, David Rockefeller allowed himself to be photographed with the work, and Sotheby's waged an extremely aggressive marketing campaign leaning heavily on the Rockefeller provenance. The painting sold for \$72.84 million. The following evening, Christie's offered a Rothko similar in size and date, possibly less dramatic in color and definitely with a less-exalted provenance. It fetched a mere \$29,920,000.

#### ***Condition***

A condition report is a document itemizing the result of the physical examination of a work of art by a professional in the field, usually someone whose main occupation is the conservation and restoration of works of art similar in medium, period, and style to the work being scrutinized. The stronger the credentials of the professional, the more weight is given to the condition report. Art dealers and auction houses tend to produce succinct condition reports with one-line conclusions such as, "Overall good condition for such a painting of this period." Conservators who work exclusively for or with museums tend to produce eye-swimmingly detailed condition reports, the sheer length of which can alarm the neophyte. Conservators who work in the field, with private clients and galleries, as well as museums, tend to use less technical language and, most important, compare the condition of the object in their hands with the norm for that particular type of object, its age, and authorship, based on their wide experience. A certain amount of wear and tear and prior restoration might be expected with any Impressionist painting over a hundred years old, while similar conditions in a Minimalist painting dating from the 1960s might make it unsalable.

The impact of condition on value is often a function of the culture and changing taste. Fifty years ago American buyers of Impressionist paintings liked them to be bright and shiny, which sometimes led to them being

overcleaned and heavily varnished. Many galleries and even major museums automatically relined these paintings, gluing a second canvas to the back of the original, often using heat and wax in the process. Today buyers of Impressionist works will pay a premium for paintings that are not relined and have only modest restoration.

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### *Quality*

By now it should be apparent that while there are many factors in the creation of the commercial value of a work of art, few are empirical and most are relative. None more so than quality

No two persons looking at the same painting, sculpture, or drawing are having the same experience. Their eyes may receive the same information, but their brains process it in very different ways. Part of what we process in the split second that we lay our eyes on a work of art is what it may remind us of, consciously or subconscious and what we know about the artist if we recognize the hand. If you and I look at a painting of a red dog by Picasso, I may be drawn to it and declare it is top quality because it is a work by an artist I love of a subject that I like in my favorite color. You, on the other hand, say it is truly terrible because of the way you feel the artist treated women, because as a child you were bitten by such a dog, and because red is your least favorite color. Neither you nor I may be judging the quality of the work in any commercial sense; we are bringing our own experiences to bear, and that is not only inevitable but part of the process of experiencing art.

What many people who spend a lot of time looking at art do agree on is what separates a successful work of art from one that may be merely interesting or typical. Mastery of the medium, clarity of execution, and authority of expression are vital criteria applicable to all works of art, regardless of style or subject. Artists themselves are not always the best judges of their own work, and financial need or simple egotism may spur them to offer for sale works of mixed quality. Not everything touched by a well-known artist is a masterpiece; some scraps are worth little more than an autograph. While van Gogh agonized over every painting he made and may have destroyed or painted over as many as he declared finished, Renoir, who painted every day of a much longer life, seems to have happily let his dealers sell even his most modest and unsuccessful daubs, as well as his many acknowledged masterpieces.

While the works of an artist who achieves great popularity may be of the highest quality the body of work of most artists includes a range of quality. Picasso mastered many different methods of expression, and in almost every period or style he produced works of mixed quality from the transcendent to the slapdash. This is often the case.

An eye for quality is easily trained by simply seeing as much as possible, in the flesh, by a particular artist and artists of the same school. Joseph Hirshhorn was self-educated, but he looked at a lot of art, and I took him to the studios of many artists whose work he was seeing for the first time and who had no track record. Time after time he selected, quite swiftly, the four or five best works in the studio.

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**NOTES**

<sup>1</sup> *The Collection of Helena Rubenstein [Princess Gourielli]: Modern Paintings and Sculpture*, two parts, Parke-Bernet Galleries, New York, April 20 and 29, 1966, sales 2428 and 2431. The de Kooning was cat. no. 72 of the first sale.

<sup>2</sup> *A Selection of Fifty Works from the Collection of Robert C. Scull [Post-war and Contemporary Paintings and Sculpture from the Collection of Robert C. Scull]*, Sotheby Parke Bernet, New York, October 18, 1973, sale 3558.

<sup>3</sup> William Acquavella, in conversation with the author, June 2009.

<sup>4</sup> George Frei and Neil Printz, eds. *The Andy Warhol Catalogue Raisonné*, vol. 2, *Paintings and Sculptures, 1964-1969* (London: Phaidon, 2003).

<sup>5</sup> Christian Zervos, *Pablo Picasso: 1895-1973*, 33 vols. (Paris: Éditions Cahier d'art, 1932-78).

<sup>6</sup> François Daulte, *Auguste Renoir: Catalogue raisonné de l'oeuvre peint*, vol. 1, *Figures, 1860-1890* (Lausanne: Éditions Durand-Ruel, 1971).

<sup>7</sup> Arthur Pfannstiel, *Modigliani et son oeuvre: Étude critique et catalogue raisonné* (Paris: Bibliothèque des Arts, 1956); Joseph Lanthemann, *Modigliani, 1984-1920: Catalogue raisonné; Sa vie, son oeuvre complet, son art* (Florence: Ed. Vallecchi, 1970); Ambrogio Ceroni and François Cachin, *Tout l'oeuvre peint de Modigliani* (Paris: Flammarion, 1972); Christian Parisot, *Modigliani: Catalogue raisonné, peintures, dessins, aquarelles*, (Livorno: Ed. Graphis Arte, 1990); Osvaldo Patani, *Amedeo Modigliani: Catalogo generale* Milan: Leonardo, 1991).

<sup>8</sup> American Association of Museums, "Code of Ethics for Museums," <http://www.aam.us.org/museumresources/ethics/coe/cfm> (accessed August 8, 2008).

## STEMMING THE TIDE OF FEDERAL LITIGATION AGAINST ART EXPERTS AND AUTHENTICATION BOARDS FOR OPINIONS ABOUT THE AUTHENTICITY OF ART

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Judith Wallace

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*This essay examines recent court decisions precluding lawsuits under the federal Lanham Act about whether or not a named artist created a work of visual art. --- RDS*

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There has recently been much attention devoted to the potential liability of art experts who are asked for opinions about the authenticity of artwork, and the resulting impact on the market if experts refuse to express their views openly. Experts have been sued for expressing negative opinions that make artwork unmarketable, for expressing positive opinions that are relied on by purchasers but later called into question, for omitting a work from a catalogue raisonné, and even for declining to express an opinion or finding that it cannot determine whether a work is authentic or not. In addition, a number of artist-established foundations have closed down their authentication boards, citing fear of litigation.

### *The Lanham Act Is Limited*

The claims against experts have been varied—product disparagement, negligence, negligent misrepresentation, breach of contract, fraud, and more recently under the federal Lanham Act.

However, there may be one less weapon for disappointed owners who would sue those experts, based on the recent application of the U.S. Supreme Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*<sup>1</sup> to disputes relating to authorship of art by a federal court in New York.

Earlier this year, in the case of *Gilbert v. Indiana*, Judge Katherine B. Forrest of the U.S. District Court for the Southern District of New York found that the federal Lanham Act should not be regarded as authorizing a federal cause of action for a statement of whether a work of visual art is or is not by a named artist.<sup>2</sup> This is significant because the federal Lanham Act allows the prevailing party to recover up to three times its actual damages *and* its attorneys’ fees, and therefore posed a particularly intimidating threat when asserted by angry owners of art. In the U.S. system, parties can usually recover only their actual damages but typically cannot recover attorneys’ fees. In addition, lawsuits asserting violations of federal law are sometimes viewed by the public and the media as more substantial, more legitimate and more worrisome than lawsuits asserting common-law claims filed in state court.

*Gilbert v. Indiana* involved a statement by the artist Robert Indiana about his own work, in a dispute with someone who claimed a contractual right to pass off his own art as Indiana’s. The significance of the decision in *Gilbert v. Indiana*—and the U.S. Supreme Court case that it applies—is important for scholars concerned about expressing opinions about art.

The federal Lanham Act is the primary federal trademark statute, and authorizes claims based on misrepresentations about the “origin” of goods. The term “origin” had been previously read broadly, as had similar provisions concerning misrepresentations about the nature, characteristics, or qualities of an artwork, and there have been a number of cases in which art experts have been sued under the Lanham Act for statements about

the authenticity of art. This was problematic because it allowed owners of physical artwork to use U.S. intellectual property laws to sue, even though they did not own any copyright in the art at issue.<sup>3</sup>

However, in 2003, the U.S. Supreme Court held that “origin” does not mean “authorship,” and seems to eliminate such claims. In *Dastar*, the Supreme Court held that the Lanham Act provision applicable to claims made outside the context of commercial advertising<sup>4</sup> applies only to claims relating to the producer or physical source of goods and not to claims concerning *authorship*.

*Dastar* concerned a television series that adapted, without attribution, portions of an original television series for which the copyright had expired. The series was based on a book by Dwight D. Eisenhower. The plaintiff owned the television rights to General Eisenhower’s book, as well as the exclusive right to distribute the television series on video and to sublicense others to do so.<sup>5</sup> The Supreme Court held:

[A]s used in the Lanham Act, the phrase “origin of goods” is in our view incapable of connoting the person or entity that originated the ideas or communications that “goods” embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.<sup>6</sup>

The court rejected the argument that “origin” denotes something like authorship for “communicative” products in which the purchaser would be primarily interested in “the creator of the content that the physical item conveys,” because construing the Lanham Act in that way would “cause the Lanham Act to conflict with the law of copyright, which addresses that subject specifically.”<sup>7</sup> The Lanham Act “does not have boundless application as a remedy for unfair trade practices.”<sup>8</sup>

#### ***Dastar’s Limitation of Lanham Act to Be Read Broadly***

Other cases decided since *Dastar* confirm that the Supreme Court’s decision should be read broadly to state a basic principle that the Lanham Act does not apply to claims regarding authorship of a creative work, and is not limited to the narrow factual circumstances of the *Dastar* decision, which involved a work that was in the public domain.<sup>9</sup> In 2004, in *Zyla v. Wadsworth*, the First Circuit Court of Appeals affirmed the dismissal of a claim that a publisher falsely credited another author, confirming that under *Dastar*, “[c]laims of false authorship ... should be pursued under the copyright law instead.”<sup>10</sup> In a 2006 case involving the misrepresentation of purported author J.T. Leroy as an actual person,<sup>11</sup> and again in a 2010 dispute between Gary Friedrich and Marvel regarding the “Ghost Rider” characters, courts in the Southern District of New York held that even though *Dastar* analyzed meaning of the word “origin,” which occurs in subsection (A) of the Lanham Act, which concerned statements outside of advertising, *Dastar* also applies to section (B), which concerns commercial advertising, and bars *any* Lanham Act claim concerning authorship.<sup>12</sup>

Finally, the decision in *Gilbert v. Indiana* confirms that *Dastar* should result in dismissal of a Lanham Act lawsuit regarding the accuracy of a statement about the creator of works of visual art. Because *Gilbert v. Indiana* involved an artist who *disclaimed* authorship and was sued for it, the decision confirms that *Dastar* does more than eliminate lawsuits that attempt to do an end run around the limitations of copyright law by raising a claim under the Lanham Act. *Dastar* forecloses any claim under the Lanham Act regarding the authorship of art.

It is important to anyone who cares about accuracy in art historical scholarship, and the security of art market transactions, to ensure that experts—including both scholars and artist-established foundations—are not inhibited from expressing opinions about authorship of art. While historical practice may have been different, present-day scholars, to avoid the appearance of impropriety, generally accept at most a modest fee for reviewing artwork (some accept no fee at all), and their fees are not typically based on either the value of the artwork as they value it or a percentage of the ultimate sale price.

#### ***Legal Defenses Available for Expert Expressions of Opinion***

Experts also have the benefit of legal defenses. Under the New York state constitution, there is a qualified privilege for statements made where one has a legal or moral duty to speak, or in a communication from one person to another upon a subject in which both have an interest.<sup>13</sup> For example, an artist and the author of the

artist's catalogue raisonné would have a shared interest in having the catalogue raisonné accurately describe the artist's work. Moreover, even when a statement about a work of art is regarded as a contractual warranty, New York state and federal courts have applied a forgiving standard set forth in a federal district court opinion, *Dawson v. Malina*,<sup>14</sup> which found that the standard for evaluating a breach of warranty is whether there was a *reasonable basis in fact* for an attribution of a work of art at the time the warranty was made, *not* whether the attribution can be proven to be true or false based on information that came to light after the sale.

Nevertheless, despite some strong legal defenses, experts have little interest in litigating these issues at their own expense, and sellers, auction houses and dealers that benefit financially from art sales have thus far been unwilling to make it a general practice to fully indemnify experts they consult against any claims. Therefore, although experts may care passionately about the accuracy of the record regarding an artist, and their reputations as experts on particular artists, they are reluctant to opine openly and on the record if they stand to gain little and risk litigation from deep-pocketed owners seeking damages or a humiliating retraction of the expert's opinion. Another unfortunate side-effect of the fear of litigation is the potential that some experts will speak only off the record or in coded comments to the effect that they "like" or "don't like" a picture—a situation that is rife with potential for ambiguity and misunderstanding. Thus, while there is still a long way to go toward resolving these issues, the elimination of Lanham Act claims is a step in the right direction toward protecting independent scholarship's role in the art world.

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## NOTES

<sup>1</sup> 539 U.S. 23 (2003).

<sup>2</sup> See *Gilbert v. Indiana*, No. 09-CV-6352, 2012 WL 688811 (S.D.N.Y. March 2, 2012). The author, with Gary D. Sesser and Ronald D. Spencer of Carter Ledyard & Milburn LLP, was counsel for defendant Robert Indiana.

<sup>3</sup> Under U.S. law, the copyright in a work of art does not belong to the owner of the physical artwork unless copyright has been explicitly transferred by the holder of the copyright in a signed writing. See 17 U.S.C. § 204.

<sup>4</sup> Section 43(a)(1)(A). This provision governs statements made outside the context of commercial advertising.

<sup>5</sup> See *Dastar*, 539 U.S. at 26.

<sup>6</sup> *Dastar*, 539 U.S. at 32.

<sup>7</sup> *Dastar*, 539 U.S. at 33.

<sup>8</sup> *Dastar*, 539 U.S. at 29 (quoting *Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974)).

<sup>9</sup> See *Atrium Group de Ediciones y Publicaciones, S.L., v. Harry N. Abrams, Inc.*, 565 F. Supp.2d 505, 512 (S.D.N.Y. 2008) (*Dastar* not limited to claims concerning works in the public domain) (collecting authorities from other courts and circuits).

<sup>10</sup> *Zyla v. Wadsworth*, 360 F.3d 243, 252 (1st Cir. 2004).

<sup>11</sup> *Antidote International Films, Inc. v. Bloomsbury Publishing, PLC*, 467 F. Supp.2d 394, 400 (S.D.N.Y. 2006).

<sup>12</sup> *Gary Friedrich Enterprises LLC v. Marvel Enterprises, Inc.*, 713 F. Supp.2d 215, 234, n. 32 (S.D.N.Y. 2010)

<sup>13</sup> See, e.g., *Chandok v. Kleissig*, 632 F.3d 803 (2d Cir. 2011). A living artist also has the right of attribution and right of integrity under the federal Visual Artists Rights Act, 17 U.S.C. 106A, which allow the artist to prevent the use of his or her name with a work the artist did not create or that is a distortion or modification of the artist's work that is prejudicial to the artist's reputation.

<sup>14</sup> *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461 (S.D.N.Y. 1978).

## STREET PHOTOGRAPHY RUNS INTO NEW YORK LAWS ON THE RIGHT TO PRIVACY: WHEN IS A PHOTOGRAPH OF A PERSON “ART” PROTECTED BY THE FIRST AMENDMENT TO THE U.S. CONSTITUTION?

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Jeffrey L. Loop

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*This essay is about the individual's right to privacy and its collision with street photography. Sorting this collision out often requires courts to decide if the image is art protected by the First Amendment. --- RDS*

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Street photography has a long and storied history and indeed some of the iconic photographs of the last 100 years were candid images of strangers taken by photographers roaming the streets of a city looking for a story, or the essence of the human condition or even art. Images such as *Subway Passenger, New York City* (1941) by Walker Evans, Alfred Eisenstaedt's famous *V-J Day in Times Square* depicting a sailor kissing a swooning nurse, and nearly the entirety of Henri Cartier-Bresson's magnum opus, *The Decisive Moment*, were all shot anonymously in public spaces. They are all unquestionably iconic and instantly recognizable by millions, but are they art? Or more specifically, when is a photograph of a person “art”? And what are the legal implications if that photograph is in fact “art”? These were central questions (although ultimately not the legally dispositive question) in a case involving one of today's most highly-regarded photographers and a collection of images he created on the streets of New York. But the answers to those questions, and more importantly the reasoning undertaken to get to those answers, given by a New York Supreme Court justice in a summary judgment decision<sup>1</sup> and by a Presiding Justice of a panel of New York's Appellate Division in a concurring opinion on appeal illustrated the difficulty of having courts attempt to define “art” as a matter of New York law,<sup>2</sup> especially when it involves taking into account technological advances that are greatly altering how art is created and disseminated or forms of expression that potentially allow courts to distinguish between fine arts and something a court may regard as less worthy of protection.

### *The Street Photography of Philip-Lorca diCorcia*

Philip-Lorca diCorcia is a world-renowned fine art photographer whose work has been exhibited in major museums around the world, including New York's Museum of Modern Art and Whitney Museum of Modern Art, The Tate Modern in London, Paris' Centre National de la Photographie and Bibliothèque Nationale de France, and the Los Angeles County Museum of Art, to name just a few. DiCorcia attended the School of the Museum of Fine Arts in Boston and received his Masters of Fine Arts in Photography from Yale University, where he continues to teach today. While he has a varied portfolio, and has worked in both advertising and fashion photography, diCorcia first rose to prominence as an artist with a series of photographs taken in the late 1980s and early 1990s of male street prostitutes on the West Coast, entitled *Hustlers*. The series that followed, including *Streetworks, A Storybook Life, Heads* and *Lucky 13*, among others, solidified his reputation as “one of the most important and accomplished artists of his generation.”<sup>3</sup> DiCorcia's body of work has, according to one reviewer, “helped to redefine the tradition of street photography.”<sup>4</sup>

It was while shooting the series *Heads* that diCorcia created the photograph that led to the litigation just mentioned. Shot in Times Square in New York from 1999 to 2001, *Heads* is a series of un-staged, candid photographs focusing close-up on the heads and upper bodies of random passersby. A contemporaneous review

of the finished series described diCorcia's technique in taking the photos: "a strobe was affixed to scaffolding in Times Square; Mr. diCorcia stood farther away than before, using a longer lens. The result: crisp and stark portraits picked out of murky blackness—just heads, no longer cityscapes, the surroundings now blocked by the scaffolding."<sup>5</sup> The scaffolding was purpose-built by Mr. diCorcia for this project; another contemporary review provides additional detail:

For more than a year and starting at the end of 1999, diCorcia turned an intersection of Times Square into a studio of sorts, complete with camera and tripod, strobe lights and industrial scaffolding, and an X on the pavement. Every time a pedestrian stepped on it, the stage was set for the strobe lights to initiate the photographer's intervention from a distance. His great ally in this enterprise was, of course, the light which in these photographs looks like natural light but is in fact entirely artificial. DiCorcia's ruse extends to the time of day as well; these photographs look as though they were shot at night because of their dark background, but diCorcia took all of them at rush hour, at that moment when people are most vulnerable to the push and pull of time.<sup>6</sup>

Out of "thousands" of photographs taken in this manner, diCorcia selected only seventeen for inclusion in the *Heads* series. The images are undoubtedly striking: "Picked out against the dark void, cropped to head and shoulders, strangely static although all are in motion, diCorcia's figures are reduced to types or—thanks to the pristine four-by-five-foot prints—elevated to archetypes: the Mailman, the Young Blonde, the Rabbi, the Black Executive, the White Teenager, and so on."<sup>7</sup> Another reviewer commented,

The strobe functions like the light of revelation, a high-beam from heaven, and as usual, by stopping time, the photographs incline us to look at what we see every day but fail to notice, although the longer we stare at these people the more extraordinarily impenetrable they seem.

Unaware of the camera, they are absorbed in thought or gaze absently; they are how we act most of the time, walking down the street, in a crowd, focused on something or nothing. But enlarged and isolated, their expressions become riddles, intensely melodramatic and strangely touching.<sup>8</sup>

The seventeen photographs that comprised *Heads* were each made into large, poster-sized digital color prints measuring forty-eight by sixty inches; diCorcia created approximately ten editioned prints of each image, along with two or three artist's proofs. The *Heads* series was first exhibited to the public at the renowned PaceWildenstein Gallery at its Twenty-Fifth Street location in Manhattan from September 6, 2001 through October 13, 2001. To accompany the exhibition, the Gallery and diCorcia collaborated to create a catalog of the exhibition, which included reproductions of all the images in the *Heads* series. A "substantial" number of these catalogs were printed and distributed to the public.<sup>9</sup> The print editions were all for sale and individual prints were priced between \$20,000 and \$30,000 each. Despite the exhibit running during a chaotic time in New York City, the show was by all measures a success, both critically and financially. The photographs in the *Heads* series continued to be displayed and offered for sale in the PaceWildenstein Gallery for several years after the formal close of the exhibition, and indeed continue to be offered for sale by other galleries and dealers today.

One of those "melodramatic and strangely touching" photographs exhibited as part of *Heads* was of a Mr. Erno Nussenzweig, of Union City, New Jersey. Nussenzweig is a retired diamond merchant and devout Orthodox Hasidic Jew; in fact he is a surviving member of the Klausenburger Sect, which was nearly wiped out by the Nazis during the Holocaust. Nussenzweig was apparently unaware that his photograph had been taken by diCorcia sometime between 1999 and 2001 and was also unaware that his was one of the seventeen images selected for inclusion in the *Heads* series and exhibited at the PaceWildenstein Gallery later in 2001. However, sometime in 2005 Nussenzweig became aware that his image was featured in the catalog published to accompany the *Heads* exhibition and that his likeness was sold as a fine art photographic print for thousands of dollars without his permission. He then retained a lawyer and wrote to PaceWildenstein and to diCorcia demanding that they cease the display and sale of his image. They declined to do so.

### *The Individual Right of Publicity and Right of Privacy*

In recent years, the concepts of a “right of publicity” and a “right of privacy” as regards the use of a person’s image or name have begun to enter the public consciousness, principally through high-profile cases involving celebrities such as Johnny Carson,<sup>10</sup> Bette Midler,<sup>11</sup> Dustin Hoffman,<sup>12</sup> the cast of the television series *The Sopranos*,<sup>13</sup> the estate of John Dillinger,<sup>14</sup> television presenter Vanna White,<sup>15</sup> and even the Times Square personality “The Naked Cowboy.”<sup>16</sup> While those cases involving celebrities or other notables naturally receive the most attention, the right to control the commercial use of one’s image is not limited to the famous or nearly famous. However, the concepts of the “right to privacy” and the “right of publicity” are actually related, but distinct, concepts—the latter growing out of the former over time.

A “right of privacy” action (also called the tort of misappropriation in some jurisdictions) is concerned with the protection of the “dignitary interest” (as opposed to an economic interest) one has in not having one’s image or likeness used without one’s permission. The “right of publicity” is not really a “privacy” tort because it is concerned with the loss in commercial value resulting from an unauthorized use of someone’s likeness, and since it is really only celebrities or other notables who have any significant commercial value in their names or likenesses, one most commonly hears of their claims in this context. Indeed, as will be seen below, because they are in the public eye, celebrities or “public figures” have a lessened “right of privacy,” at least when it comes to news reportage. In any event, the genesis of both of these rights is the idea that individuals should have some say in the way their name or likeness is used by others, a concept that prior to the beginning decades of the last century was unknown in American jurisprudence.<sup>17</sup>

That genesis began with one of the most cited<sup>18</sup> law review articles in American Jurisprudence: *The Right to Privacy*,<sup>19</sup> by future United States Supreme Court Justice Louis Brandeis and his then-law partner Samuel Warren (later a Maine lumber baron). In *The Right to Privacy*, Warren and Brandeis posited that individuals should enjoy a right to privacy not only in the sense that the physical spaces they inhabit should remain inviolate without good cause, but also that they should enjoy a right to privacy in their emotional and intellectual lives, and in particular from the increasing invasions of personal lives occasioned by advancing technology:

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life, and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.” For years, there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons. . . .<sup>20</sup>

Warren and Brandeis concluded “[T]he right to life has come to mean the right to enjoy life,—the right to be let alone . . . .”<sup>21</sup> And it is this “right to be left alone” that lies at the heart of the idea of a right of privacy extending to having some control over the use of one’s image or likeness. Yet it was not for nearly two decades that the idea was codified in a statute: Sections 50 and 51 of the New York Civil Rights Law.

Sections 50 and 51 of the New York Civil Rights law were enacted in 1909 in response to the New York Court of Appeals’ decision in *Roberson v. Rochester Folding Box Co.*<sup>22</sup> In that case, a Miss Roberson, a minor, sued Franklin Mills Flour and the Rochester Folding Box Company for using a photograph of her on some 25,000 advertisements for their bagged “Flour of the Family” product without her consent or knowledge. While Miss Roberson prevailed in the trial court and at the intermediate appellate level, the New York Court of Appeals reversed those decisions, saying:

The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published. . . .

\* \* \* \*

An examination of the authorities leads us to the conclusion that the so-called “right of privacy” has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.<sup>23</sup>

The Court of Appeals expressly mentioned the Warren and Brandeis article in its decision, but said, in essence, that the concept of a right of privacy was too new to form the basis of a lawsuit over the unauthorized use of one's image. However, the court left open the possibility that the unauthorized use of a person's likeness could be a criminal libel violation and also took pains to point out that the legislature was free to create such a right if it wished. In 1909, the New York Legislature responded to the Court's invitation (and to courts in other states that were highly critical of the *Roberson* decision) by amending the Civil Rights Law to add what are now sections 50 and 51. Section 50 of the New York Civil Rights Law is actually a penal statute:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

N.Y. Civ. Rights L. § 50. But reported criminal prosecutions under this section are very rare,<sup>24</sup> and civil lawsuits brought under the companion section 51, which creates a private cause of action for injunctive relief and damages,<sup>25</sup> are much more common. It was pursuant to this civil remedy that Mr. Nussenzweig brought suit against diCorcia and his gallery.

Section 51 also contains several exceptions to the general rule of liability for the unauthorized use of a person's name or likeness, such as permitting the sale of products that might contain a person's photograph so long as the original use was lawful, and of particular interest here, an exception for photographers aimed at protecting photographers and their representatives from liability if they displayed past examples of their work in order to generate new business, or licensed a photograph for a lawful use.<sup>26</sup> However, this exception is only a conditional exception because if a person depicted in such a photo objects, the photographer will be liable if she fails to cease displaying the photograph.

It is possible that diCorcia could have availed himself of this limited exception, by arguing that the gallery, as his agent, was his "establishment" and removing the image of Nussenzweig from display. Instead, diCorcia and PaceWildenstein chose to invoke a different, judicially created exception to liability under the statute, one that is founded upon the First Amendment to the United States Constitution and its guarantees of free expression.

### ***Unresolved Questions About the Scope of the "Art" Exception to New York Civil Rights Law***

It should be apparent that the statute that imposes limitations on speech or other expression, as do sections 50 and 51 of the New York Civil Rights Law, must themselves be limited by the more basic guarantees of free expression found in the First Amendment to the U.S. Constitution. And in fact courts have long recognized this limitation, carving out exceptions for uses of a person's name or likeness that serve a purpose or invoke a right deemed superior to that person's "right to be left alone."

### ***The "Newsworthiness" Exception***

The most well-known of these exceptions, which exists in one form or another in every jurisdiction having a similar statutory or common law right of privacy or publicity, is the so-called "newsworthiness" exception. This exception holds that if a person's name or likeness is used only in conjunction with a news story regarding a matter of public interest, in other words a "newsworthy use," then there can be no liability because the First Amendment protects such usage. This is also the reason that the New York privacy statute provides a cause of action only for commercial uses, what it calls "advertising or trade."<sup>27</sup> New York law takes a very expansive view of what constitutes "newsworthiness," extending it to cover the use of images of persons who are involuntarily public figures,<sup>28</sup> the use of a person's photograph to illustrate a news story if the image is merely topically related to the story—even if the particular individual depicted has no actual connection to it,<sup>29</sup> and even to the use of a person's image in advertising for a newsworthy documentary where the actual image of the person in the advertisement never appears in the film.<sup>30</sup>

But despite this expansive view of “newsworthiness,” this exception was not available to diCorcia or his gallery because his photographs did not “illustrate” anything—his photographs themselves were the story, or perhaps it is better to say, they “told the story” that diCorcia was trying to convey. And while it may be true that a picture is worth a thousand words, in New York at least, the ability of a photograph alone to “tell a story” does not bring it within the newsworthiness exception. And yet it is that same ability to “tell a story,” whether literally, metaphorically or metaphysically, that may bring a photograph within the ambit of another judicially created exception to the right of privacy: the exception for “art.”

The reader may wonder, with good cause, why we enclose the word art in quotation marks, but as will be discussed below, the meaning of this commonplace word, or rather, what kinds of works are legally encompassed by the word, is central to the question of whether the creator of a photograph that depicts another person should enjoy the protection of the First Amendment and avoid liability for depicting that person in the work without first obtaining his or her consent.

### *The “Art” Exception*

Several courts in New York have recognized an exception from liability under the New York Civil Rights Law for depictions of persons that are contained in a work of “art.” Of course, this begs the question, what constitutes “art” as a matter of law. In the case of diCorcia’s photograph of Mr. Nussenzweig, the ultimate dispositive issue in the lawsuit was the running of the statute of limitations, which the Court of Appeals held precluded any recovery.<sup>31</sup> That court declined to address the question of whether there is an exception to liability under the Civil Rights Law for art and thus did not discuss whether the diCorcia photographs would qualify as “art.” Nevertheless, the trial court and a concurring opinion in the Appellate Division directly addressed these questions, providing some insight into how courts may decide these issues in the future.

In the trial court, Justice Judith J. Gische recognized that “[i]n recent years, some New York courts have addressed the issue whether an artistic use of an image is a use exempted from action under New York States Privacy Laws. . . . They have consistently found “art” to be constitutionally protected free speech, that is so exempt. This court agrees.”<sup>32</sup> However, recognizing that this leaves courts with the task of determining what kinds of depictions are entitled to exemption, Justice Gische acknowledged that “the problem of sorting out what may or may not legally be ‘art’ remains a difficult one.”<sup>33</sup>

Notwithstanding the supposed difficulty of the analysis, the trial court appears to have concluded rather easily that the diCorcia photograph of Mr. Nussenzweig was art. The court stated that “[t]his is not a subjective determination, and cannot be based on the personal preferences of either party of the court.”<sup>34</sup> Employing language reminiscent of that used in determining whether a proposed expert is qualified to testify, the trial court based its “objective” finding on the fact that diCorcia “demonstrated his general reputation as a photographic artist in the international artistic community,” that he “described the creative process he used to shoot, edit and finally select the photographs” and that the works “were exhibited and reviewed by the relevant artistic community.”<sup>35</sup>

Justice Gische rejected the argument that the photograph was used in “advertising or trade” simply because copies of the photograph were sold (in diCorcia’s case the entire edition of prints of his photo of Mr. Nussenzweig sold for a total of \$240,000) and that the photograph was featured in advertisements for the *Heads* exhibition, as well as in the exhibition catalog. As to this first contention, the court observed that “first amendment protection of art is not limited to only starving artists,” but it also appears that the court gave a great deal of weight to the fact that only “an extremely *limited* number” of prints of the photograph were sold.<sup>36</sup> There was no discussion of at what number of copies the sale of prints might have crossed from “art” to simply commerce. Regarding the advertisements featuring Mr. Nussenzweig’s likeness, the court noted that since the advertisements were for the exhibition of protected artwork, like advertisements for newsworthy uses of a persons’ image, they did not violate the statute.

Justice Gische's ruling in the case is consistent with the holding in *Simeonov v. Tiegs* a New York case decided in 1993.<sup>37</sup> In that case, the defendant created a plaster cast for a sculpture depicting the model Cheryl Tiegs, using an alginate impression she agreed to pose for as part of a wildlife preservation campaign. The court concluded that the sculpture was art, and thus exempt from liability under the Civil Rights Law. The *Simeonov* court, like Justice Gische, appears to have given great weight to the fact that the defendant sculptor was "internationally known" and that he only intended to create a "limited edition of 10 bronze copies."<sup>38</sup> The court also noted that the potential sale of copies of the sculpture did not render the work ineligible for the art exception, noting that "[t]he dissemination for profit is not the sole determinant of what constitutes trade" under the Civil Rights Law.<sup>39</sup> The court contrasted the limited edition of bronze sculptures with the large-scale production and sale of display mannequins, observing that the latter would likely violate the statute.

But in *Hopeker v. Kruger*,<sup>40</sup> decided a decade after *Simeonov*, Judge Hellerstein of the federal district court for the Southern District of New York took a much more cautious approach to the question of what constitutes art under New York's Civil Rights Law. *Hopeker* involved the use of the plaintiff's photograph by the graphic artist Barbara Kruger, known for her collage art works combining photographs and bold text. In addition to the original work, reproductions of the collage were featured in an exhibition catalog and on a wide variety of merchandise sold through museum gift shops. After reviewing the analysis used in *Simeonov* (and later employed in the trial court in *Nussenzweig*), Judge Hellerstein criticized that decision and cautioned that "[c]ourts should not be asked to draw arbitrary lines between what may be art and what may be prosaic" to determine what is entitled to First Amendment protection. After rejecting the *Simeonov* approach, Judge Hellerstein examined the test used in California, announced in the case *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, which looks at whether the use of a person's likeness is sufficiently "transformative," which the court explained asks whether it is the art or the person being depicted that is being sold.<sup>41</sup> That is, does the alleged artistic work in which the image used have some inherent value or worth independent of the value or worth of the personality depicted. In cases like *Comedy III*, which involved a celebrity whose personality actually has a commercial value that could be exploited through endorsements and the like, this test seems useful—is the alleged artist merely trying to cash-in on the notoriety of the celebrity or is she doing something more? But what about depictions of ordinary people like that at issue in *Nussenzweig*? It would be hard to argue that Mr. Nussenzweig enjoyed notoriety sufficient to monetize his personality via endorsements or other means, which of course is true for the vast majority of people alive today. But if there is no famous personality to sell, all that is left then is the artistic expression of the depiction. In which case, would not the *Comedy III* test necessarily come out in favor of the artist whenever an ordinary, non-famous person is depicted? In *Hopeker*, the court ultimately sidestepped the question of which test should prevail, concluding rather cursorily that the Kruger collage at issue would be considered art under either.<sup>42</sup>

### ***The Courts Attempt to Decide If It's Art***

The Appellate Division affirmed the dismissal of Mr. Nussenzweig's claims on statute of limitations grounds, but Presiding Justice Tom, in a concurring opinion joined by another justice, took pains to analyze whether diCorcia's photographs were constitutionally protected art. Like the trial court, Judge Tom also focused heavily on diCorcia's credentials, such as his Masters in Fine Arts from Yale University and his extensive exhibition history at "prominent museums around the world."<sup>43</sup> The fact that there were only a limited number of prints produced and sold, and that they sold for very high prices, also seemed to weigh heavily in the analysis. But despite the recitation of these supposedly objective indicia of "art", Judge Tom's concurrence also delved into the subjective, albeit haltingly, by discussing with approval the artistic merit and significance of "street photography," and why it is not feasible in that genre to obtain releases from subjects of photographs.<sup>44</sup> In any event, after professing a desire to provide guidance to lower courts examining the question, even Justice Tom ultimately avoided setting forth a red-line test for "art," writing instead:

While it may be problematic to determine whether a particular item should be considered a work of art, no such difficulty presents itself in this case. Quite apart from diCorcia's well-documented reputation as a renowned fine arts photographer and the uncontroverted evidence of the high price commanded by the subject prints, plaintiff concedes on appeal that his photograph is a work of art.<sup>45</sup>

The Court of Appeals, the highest court in New York, affirmed the diCorcia decision on statute of limitations grounds and did not analyze the art issue at all.<sup>46</sup>

### *The Courts Have Difficulty Arriving at a Test*

Where do these decisions leave us? The two lower court decisions in *Nussenzweig* appear to place great, if not dispositive, weight on the artist's ability to establish her bona fides such as an established reputation, exhibitions and a critically reviewed body of work. It is clear that this test, if it be that, is one that the starving artists of Justice Gische's opinion will have trouble meeting. Neither court expressly engaged in a subjective analysis of the artistic merit of the image at issue and it is not at all clear how new and emerging artists, who are not well-established, who may use widely available digital technology to create their art, and may exhibit their work on line, can meet this test.

In the absence of a workable objective test or criteria for determining when a depiction of a person is art are we left then with suggesting that such decisions can only ever be subjective? Curiously, it is a recent case involving adult dancing which may provide some insight into how a court might make a subjective distinction between what it regards as being sufficiently artistic. In *677 New Loudon Corp. v. State of New York Tax Appeals Tribunal*, a so-called "adult juice bar" sought to avoid paying sales tax on lap dances under the exception for "dramatic or musical arts performances."<sup>47</sup> The Court of Appeals decision noted several other categories of comparatively lowbrow or nontraditional dance (such as ice shows) and held that that "women gyrating on a pole to music, however artistic or athletic their practiced moves are" should be subject to the sales tax. Judge Smith's dissent criticized the tax authority and the majority of the court for limiting the tax exemption for "choreographic ... performance" to only " 'highbrow dance' or 'dance worthy of a five-syllable adjective.'" Judge Smith explained that while he was "stuffy" enough to find lap dancing "distasteful" and personally preferred the *New Yorker* to *Hustler* magazine, he would find it unconstitutional to make a legal distinction based on whether a dance performance was sufficiently cultural or artistic.<sup>48</sup> *677 New Loudon Corp* highlights just how messy a subjective analysis of what constitutes "art" would be: likely the very antithesis of disinterested justice since every case would naturally be subject to the artistic tastes of the judge or jury. And yet the alternative suggested by *Nussenzweig* and its predecessors is not attractive either.

It thus appears that, at least for now, for those photographers who do not have easily at hand an impressive list of credentials and/or a stack of exhibition catalogs featuring their work as art, the New York Civil Rights Law's privacy provisions remain an opaque hazard.

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## NOTES

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<sup>1</sup> *Nussenzweig v. DiCorcia*, 11 Misc. 3d 1051(A) (Sup. Ct., N.Y. County 2006) (unreported disposition) (*Nussenzweig I*).

<sup>2</sup> *Nussenzweig v. DiCorcia*, 38 A.D.3d 339 (1st Dep't 2007) (*Nussenzweig II*). Much of the factual narrative that follows is drawn from the opinions in *Nussenzweig I* and *II*. For the sake of readability this essay will only provide citations when quoting directly from those decisions.

<sup>3</sup> *Nussenzweig II*, 38 A.D.3d at 344 (quoting from an affidavit of Peter Galassi, Chief Curator of Photography at the Museum of Modern Art). Examples from diCorcia's various series can be viewed at <http://www.thecollectiveshift.com/show/portfolio/diCorcia> (last visited October 8, 2012) and <http://www.artnet.com/artists/philip-lorca-dicorcia/> (last visited October 8, 2012).

<sup>4</sup> Michael Kimmelman, *Art In Review; Philip-Lorca diCorcia—'Heads'*, N.Y. Times, September 14, 2001, available at <http://www.nytimes.com/2001/09/14/arts/art-in-review-philip-lorca-dicorcia-heads.html> (last visited October 8, 2012).

<sup>5</sup> *Id.*

<sup>6</sup> Taline Voskeritchian, *Philip-Lorca diCorcia's "Intimate Portraits, Anonymous Crowds,"* originally published in artsMedia magazine (now defunct), available at the author's personal blog at <http://talinedv.wordpress.com/2010/07/31/from-my-files-philip-lorca-dicorcias-intimate-portraits-anonymous-crowds-2/> (last visited October 8, 2012).

<sup>7</sup> Peter Galassi, *Philip Lorca diCorcia*, Artforum International, Vol. 39, No. 10 (Summer 2001), at 169.

<sup>8</sup> Kimmelman, *supra* n.4.

<sup>9</sup> *Nussenzweig I*, 11 Misc. 3d 1051(A) at \*3.

<sup>10</sup> *Carson v. Here's Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983).

<sup>11</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

<sup>12</sup> *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999) *rev'd by* 255 F.3d 1180 (9th Cir. 2001).

<sup>13</sup> James Bates, *'Sopranos' Take Shot at Ad in Court*, L.A. Times, February 4, 2003, available at <http://articles.latimes.com/2003/feb/04/business/fi-sopranos4> (last visited October 9, 2012).

<sup>14</sup> *Dillinger, LLC v. Electronic Arts Inc.*, 795 F. Supp. 2d 829 (S.D. Ind. 2011).

<sup>15</sup> *White v. Samsung Electronics Am., Inc.*, 971 F.2d 1395, (9th Cir. 1992).

<sup>16</sup> *Buck v. Mars, Inc.*, 571 F. Supp. 2d 446 (S.D.N.Y. 2008).

<sup>17</sup> It should be noted that the rights of publicity and privacy are wholly distinct from copyright. While copyright protects a copyright holder's property rights in their work (such as a photographer's rights in a photograph she creates) privacy and publicity rights protect personal interests of the people who are represented in, or by, the work. That is, one can have the right to use a particular image without infringing a copyright, but still be liable for use of the image if the person or persons depicted in the image have not consented to the use. Most courts also agree that right of privacy or publicity claims are not preempted by the federal Copyright Act. *See, e.g., Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir 2005) (right of publicity claim was not preempted by the Copyright Act; model's identity was not copyrightable because it was not fixed in a tangible medium of expression, and rights protected by Illinois statute were not "equivalent" to any of the exclusive rights within general scope of copyright).

<sup>18</sup> Fred Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Michigan L. Rev. 1483 (June 2012).

<sup>19</sup> 4 Harv. L. Rev. 193 (1890).

<sup>20</sup> *Id.* at 195.

<sup>21</sup> *Id.* at 193.

<sup>22</sup> 171 N.Y. 538 (1902).

<sup>23</sup> *Id.* at 544 & 556.

<sup>24</sup> Indeed of the 134 notes of decisions to section 50 in McKinney's Consolidated Laws of New York Annotated, only two report criminal prosecutions for the unauthorized use of a person's likeness. Both cases were dismissed. *See People, on Complaint of Stern v. Robert R. McBride & Co.*, 159 Misc. 5 (N.Y.C. Magis. Ct. 1936); *People on Complaint of Maggio v. Charles Scribner's Sons*, 205 Misc. 818 (N.Y.C. Magis. Ct. 1954).

<sup>25</sup> New York Civil Rights Law § 51 provides in pertinent part:

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

<sup>26</sup> The relevant language in section 51 reads:

[N]othing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed. . . .

N.Y. Civ. Rights L. § 51. This provision was added to section 51 in 1983 in response to a New York Court of Appeals decision that imposed liability on a stock photography licensing company, Contact Press Images, and its president, even though the photograph that it had licensed was lawfully used by the New York Times to illustrate a "newsworthy" article, which, as explained below is itself an exception to the statute's prohibitions. *See* Lawrence E. Savell, *Right of Privacy – Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 Albany L. Rev. 1, 28 n.112 (Fall 1983) (discussing the New York Legislature's reaction to *Arrington v. New York Times Co.*, 55 N.Y.2d 433 (1982)). The legislature's purpose in adding the immunizing language was to provide freelance photographers and licensing companies the same protection that a staff photographer employed by a publisher or newspaper would have for lawful uses of a person's likeness in a photograph. *Id.*

<sup>27</sup> *See Messenger v. Gruner + Jahr Printing & Pub.*, 94 N.Y.2d 436, 441 (2000).

<sup>28</sup> *See Friedan v. Friedan*, 414 F. Supp. 77 (S.D.N.Y. 1976) (news story with family photos about ex-husband of famous feminist not actionable because he was considered involuntary public figure).

<sup>29</sup> *See Arrington*, 55 N.Y.2d 433 (use by paper of candid photo of plaintiff taken on street to illustrate story on "black middle class" not actionable because illustration of news story not for "use in trade or advertising"); *Finger v. Omni Publications Int'l*, 77 N.Y.2d 138 (1990) (use of photo of family to illustrate "caffeine sperm" article not tortious because although plaintiffs had no connection to story, the use of the photo was to illustrate a news article, not for "trade of advertising").

<sup>30</sup> *Alfano v. NGHT, Inc.*, 623 F. Supp. 2d 355 (E.D.N.Y. 2009).

<sup>31</sup> New York adheres to the "single publication" rule for sections 50 and 51 of the Civil Rights Law: the one-year statute of limitations begins to run on the first publication of the alleged offending work. *See Nussenzweig v. diCorcia*, 9 N.Y.3d 184, 188 (2007) (*Nussenzweig III*). A potential plaintiff's lack of knowledge of the use of her name or likeness does not toll the running of the limitations period. *Id.*

<sup>32</sup> *Nussenzweig I*, 11 Misc. 3d 1051(A) at \*7, citing *Altbach v. Kulon*, 302 A.D.2d 655 (3rd Dep't 2003); *Simeonov v. Tiegs*, 159 Misc.2d 54 (N.Y. Civ Ct 1993); *Hoepker v. Kruger*, 200 F.Supp.2d 340 (S.D.N.Y. 2002).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (emphasis in original).

<sup>37</sup> 159 Misc.2d 54 (N.Y. Civ. Ct. 1993).

<sup>38</sup> *Id.* at 55 & 59.

<sup>39</sup> *Id.* at 59.

<sup>40</sup> 200 F. Supp. 2d 340 (S.D.N.Y. 2002).

<sup>41</sup> *Id.* at 349 (citing *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4<sup>th</sup> 387 (2002)).

<sup>42</sup> Regarding the exhibition catalog and the merchandise that reproduced the Kruger collage artwork, Judge Hellerstein used an analysis often seen in the newsworthiness context and considered whether the “primary aspect” of the depictions on the merchandise was commercial, and whether the public interest purpose (i.e., newsworthiness or artistic expression) was merely incidental to the commercial use. *Id.* at 350-51.

<sup>43</sup> *Nussenzweig II*, 38 A.D.3d at 344.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 346.

<sup>46</sup> *Nussenzweig III*, 9 N.Y.3d 184.

<sup>47</sup> *677 New Loudon Corp. v. State of New York Tax Appeals Tribunal*, 2012 WL 5199386 (N.Y. Oct. 23, 2012)

<sup>48</sup> *See id.* (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-230 (1987)).

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