

RIVERSIDE LAWYER

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MAGAZINE

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RIVERSIDE LAWYER

MAGAZINE

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MISSION STATEMENT

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is:
To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, and the RCBA - Riverside Superior Court New Attorney Academy.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication, and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

The Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are \$25.00 and single copies are \$3.50.

Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in the Riverside Lawyer.

The material printed in the Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.

CALENDAR

September

- 3 Labor Day Holiday – RCBA Office Closed**
- 11 Civil Litigation Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Judge Randall Stamen
Topic: “What I Wish I’d Known as an Attorney: A Judicial Perspective”
MCLE – 1 hour General
- 18 Family Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Laurel Starks
Topic: “The Enforcement of Family Law Orders in Real Estate”
MCLE – 1 hour General
- 27 RCBA Annual Installation of Officers Dinner**
Mission Inn – Grand Parisian Ballroom
Social Hour – 5:30 p.m.
Dinner – 6:30 p.m.
- 28 Enrobement Ceremony**
Judge Dorothy McLaughlin
4:00 p.m.
HHistoric Courthouse, Dept. 1

October

- 2 28th Annual Red Mass – 6:15 p.m.**
Saint Francis de Sales Catholic Church
Riverside

EVENTS SUBJECT TO CHANGE.

For the latest calendar information please visit the RCBA's website at riversidecountybar.com.



* ATTENTION RCBA MEMBERS *

How would you like to receive (or read) the *Riverside Lawyer* magazine?

Some members have told us they prefer reading the online version of the *Riverside Lawyer* (available on our website at www.riversidecountybar.com) and no longer wish to receive a hard copy in the mail.

OPT-OUT: If you would prefer not to receive hard copies of future magazines, please let our office know by telephone (951-682-1015) or email (rcba@riversidecountybar.com).

Thank you.

ON THE COVER: David Porras practicing his art. Please see his profile on page 10.

Photo courtesy of Larry Rose who can be reached at larry@rosefoto.com.



by Jeff Van Wagenen

When some lawyers think about “Art and the Law,” their minds will naturally wander to the issues that cause headaches for artists and patrons, fans and critics, sellers and collectors. And, why not? History is full of controversies in this area, large and small, that test the boundaries of critical thinking. Other lawyers will think of the ways in which they aspire to evolve from a mere practitioner of the law to a true artist of the craft. (Anyone want to borrow my copy of Francis Wellman’s *The Art of Cross Examination*?)

But, not me. When I think about this topic, I think about the way our profession is represented in various art forms. This will not come as a surprise to anyone who has visited my office at any time in the last twenty years. From a sophisticated abstract piece struggling to show the delicate line between *actus reus* and *mens rea* to an unsophisticated print of two sharks swimming as they “approach the bench,” I have been a consumer of a wide variety (and quality) of legal art. And, while my tastes in this area are broad and extend from the canvas and the page to the screen and the stage, my favorite subject is the treatment of our adversarial system in pop culture. Old or new, drama or comedy, realistic or stylized, it makes no difference – I am literally surrounded by images of lawyers as depicted on film in movies and on television. On my best days, I look up to my poster of Gregory Peck as Atticus Finch in *To Kill a Mockingbird* or down to my pewter die cast model of Clarence Darrow arguing in the Scopes “Monkey Trial.” On my worst, I comfort myself with the realization that at least I am not Saul Goodman or Lionel Hutz. I have learned a lot from fake lawyers. While it is obviously important to be well trained in statutes and precedents, is it wrong that I look to the likes of Jimmy Stewart in *Anatomy of a Murder* or Leo McKern in *Rumpole of the Bailey* for guidance from time to time?

I have always wanted to be an attorney. When I stop to think about why, I realize it is because

of the lawyer movies and television shows of my youth. Those advocates sat on all sides of the moral compass, but I loved them because they gave me drama, action, and suspense. They also taught me what it was to be human, to fight against the odds, and to stick up for what is right. Today, those same stories, and countless new ones, remind me of the collective good that we can accomplish. Maybe we can all learn something from fake lawyers.

Given the role that art and the law has played in shaping my professional life, I feel lucky that my first opportunity to communicate with you comes in this issue of the *Riverside Lawyer*. As I struggled to prepare my message to you, Charlene Nelson (our Executive Director and the engine that keeps us all going) shared with me some of the “firsts” from our past presidents. Reading more than twenty years of columns from some of my heroes, mentors, and friends was humbling. It also reminded me that the challenges we face are not new. But, in looking at columns from the likes of Aurora Hughes, Steve Harmon, and David Bristow, as well as the presidents with whom I had the opportunity to serve like Robyn Lewis, Judge Harmon, Judge Firetag, and Judge Klatchko, I am comforted by the fact that we, the members of this association, remain the best hope to solve those challenges. The common theme discerned from this unique reading list was that we play a critical role in the communities we serve and that the future success of those communities stems from our acceptance of that responsibility.

As we start a new program year with our Bar Association, please look for opportunities to celebrate the past contributions of our profession to the greater good. For example, on Monday, September 17, from 5:30 pm to 7:30 pm, the Riverside Metropolitan Museum will be celebrating the 100th Anniversary of the landmark Harada House case. This event will take place at the actual Harada House, located at 3356 Lemon Street in Downtown Riverside. This National Historic Landmark commemorates the battle to allow children of immigrants to buy property and is a constant physical reminder of what we can accomplish.

Additionally, please seek out ways in which you can make the world a better place. Feel free to share those opportunities with all of us. I will commit to share them with you. Maybe a year from now, we will all have learned a lot from some real lawyers.

Jeff Van Wagenen is the Assistant County Executive Officer for Public Safety, working with, among others, the District Attorney’s Office, the Law Offices of the Public Defender, and the Courts.



NOTICE TO ALL ATTORNEYS

Proposal to Form the Inland Empire Hispanic Bar Association

Please consider attending this exploratory meeting to gauge interest in the formation of an Inland Empire Hispanic Bar Association. Attendees will discuss foundational issues including name, mission, and founding board.

Tuesday, September 18, 2018 at 2:00 p.m.

La Casa Ortega Restaurant, 1690 Spruce St, Riverside 92507

For more information or to confirm attendance, please contact either Mario Alfaro of Stream Kim Hicks Wrage & Alfaro at (951) 783-9470, or Joseph Ortiz of Best Best & Krieger LLP at (951) 826-8291 or joseph.ortiz@bbklaw.com.

BARRISTERS PRESIDENT'S MESSAGE

by Megan G. Demshki



There is something special about walking through the doors of the Riverside Historic Courthouse. That unique combination of breathtaking architecture, history, and a tale of preservation and restoration causes me to pause in the middle of a busy workweek. Without fail, a friendly face or two can be seen in the corridors, reminding me of the interconnectedness and small

town feel of our legal community. In these moments, I am reminded of our duties and responsibilities to our clients, to our profession, and to each other.

For me, the Riverside Historic Courthouse serves as a reminder of why I entered this noble profession in the first place and how I have learned that being an attorney is so much more than just a "job." Riverside has a unique legal community and I am proud to call Riverside my home.

This legal community has played a significant role in shaping me into the attorney and person that I am today. In fact, the Barristers introduced me to our legal community, and those friendly faces that welcomed me in the beginning are now some of my truest friends. I am humbled to now serve as president of the Barristers as I truly believe in the value of this organization to new and young attorneys.

I hope that Barristers can serve as a warm place for you to come relax at the end of a busy work week at a Happy Hour, or cause you to forget those motions you still need to draft during an intense game of bowling. I hope you will learn how to be a better advocate at MCLE events and be introduced to your mentors, your peers, and some new friends at the annual judicial reception. I hope you will be reminded of how fortunate we are while wrapping holiday gifts in December with the Elves program or volunteering together at a local food bank. I hope Barristers will serve as your reminder of why you took on this noble profession. I hope we can challenge and support each other along the way.

I know that the incoming Barristers board and I are passionate about connecting new and young attorneys to the many facets of what makes this organization and our legal community truly one of a kind. For those new and young attorneys we have yet to meet, we want you to know how eager we are to welcome you into this organization.



(l-r) Patricia Mejia, Braden Holly, Shumika Sookdeo, Taylor DeRosa, Megan Demshki, Paul Lin, Rabia Chaudhry, Michael Ortiz, Goushia Farook

The Barristers are busy gearing up for an exciting and event packed year. We look forward to seeing you at an upcoming event!

Who is a Barrister?

A Barrister is any attorney member of the Riverside County Bar Association who is under 37 years of age or within their first 7 years of practice. However, law students, community members, and attorneys of all ages are welcome at our events!

Big Thank You Shumika:

The Barristers all owe Shumika T.R. Sookdeo a huge thank you for her service to the Barristers as the 2017-2018 president. With Shumika at the helm, the Barristers had an incredible and memorable year. Shumika made the role of president look like a breeze, all while juggling her practice and the newest addition to her family. Shumika was especially skilled with empowering the board members to harness their unique skills and talents for the betterment of the organization. We are so grateful to Shumika for all the hours she put into Barristers as president, and we are thankful for her guidance as she continues to serve on the Barristers board as the immediate past president.

Upcoming Events:

- Happy Hour at ProAbition on **Friday, September 14th** at 5:30 pm.
- Happy Hour at W. Wolfskill on **Friday, October 12th** at 5:30 pm. We look forward to welcoming Barristers and members of the New Attorney Academy at this Happy Hour following their first session!
- Barristers and JAMS are teaming up to offer an educational MCLE event at JAMS Ontario office (3800 Concours St., Suite 320, Ontario, CA 91764) on **Thursday, October 25th** at 5:30 pm. Hon. Joseph Brisco (Ret.) will be speaking on Elimination of Bias in the Legal Profession. Food, drinks and 1 Elimination of Bias MCLE credit will be offered.
- Learn more about upcoming events by following @RCBABarristers on Facebook or visiting our website, www.riversidebarristers.org.

Looking to get involved?

Whether you are eager to start planning the next great Barristers gathering or just looking to attend your first event, please feel free to reach out to me. I would love to meet you at the door of a Happy Hour, so you don't have to walk in alone or grab coffee to learn more about how you want to get involved. The easiest ways to get ahold of me are by email at Megan@aikenlaw.com or by phone at (951) 534-4006.

Megan G. Demshki is an attorney at Aitken Aitken Cohn in Riverside where she specializes in traumatic personal injury, wrongful death, and insurance bad faith matters.



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ART, SCIENCE, INNOVATION AND “THE LAW” — AMUSEMENT RIDES & ATTRACTIONS

by Boyd F. Jensen II

There is no other commercial enterprise, which generates a broader interconnection with artistry and the law, than the amusement industry. Amusement rides and attractions accelerate patrons hundreds of feet into the air; accelerate at speeds approaching 150 miles an hour;¹ and all this to a general public of broadly diverse sizes and physical capacities. Every year, new rides are publically presented with original technology enhanced by artistic creativity, exciting, and thrilling patrons the world over. Besides the conventional nexus with contract, civil procedure, torts, evidence, and constitutional law related to the diverse federal and state regulatory agencies; the United States Patent and Trademark office is replete with concomitant filings. There is also significant interaction in the fields of civil rights, environmental, entertainment, health, immigration, intellectual property, labor, and even admiralty law.



While one expects pervasive legal activity from operators such as Disney and Universal, less known organizations are also involved. The photograph above is at the instant these patrons are about to go upside down – note the ground below them. Also note there is no over-the-shoulder restraint or belt harness system. How can that be done? It is accomplished (see next photo) by careful engineering coupled with keen legal oversight, in order to comply with applicable safety laws and regulations.²

1 Formula Rossa is the fastest roller coaster in the world accelerating from zero to 150 miles per hour in five seconds. Such blazing acceleration is 4.8 times faster than free fall! The Formula Rossa track is 2.2 kilometers in length and is located in Ferrari World, Abu Dhabi. See ferrariworldabudhabi.com.

2 Utah's Lagoon Amusement Park's Cannibal Ride features the steepest drop in North America, and fourth-steepest in the world. It holds the world record for tallest beyond-vertical drop on a roller coaster. The restraint system patent was published last year (US Patent 9,827,503.) See Lagoonpark.com.



Almost all states in the United States have regulations and laws specifically pertaining to amusement rides and attractions. Most arose from the agricultural environment of historic fairs and rodeos. Their jurisdiction takes into account both mobile and permanent attractions. Since 1978, the American Society for Testing and Materials International's Committee – F-24 Amusement Rides and Devices, has grown into one of the largest standard setting bodies in the world. This committee has developed standards to test performance specifications, standardize definitions, and create high quality design, manufacturing, maintenance operation, and oversight standards such as auditing. The committee has developed standards from how to durometrically test the type of ride vehicle cushions to appropriate vehicle accelerations. Senior safety leaders in almost all parts of the amusement industry and the world, as well as consumer advocates, come together multiple times a year for the purposes of creating new, and revising existing, standards.³

Recent California cases involving amusement attractions include a motion to transfer the case. In *Oertell v. Six Flags Entertainment Corporation* (2017 WL 491165), a motion to transfer was granted by the United States District Court for the Northern District of California, so that the Americans with Disability Act (ADA) claims could be heard by the the Eastern District of California, which already had another Six Flags case. This case is still being litigated

3 ASTMI Committee F24 on Amusement Rides and Devices was formed in 1978. The Committee, with current membership of approximately 800, has jurisdiction of 19 standards, published in the *Annual Book of ASTM Standards*, Volume 15.07. See ASTM.org.

with a trial date scheduled on April 16, 2019. Forty developmentally disabled plaintiffs also sued Walt Disney Parks and Resorts for alleged ADA violations.⁴ Plaintiffs' objected to changes made by Disney in 2013 to policies of providing access to rides to persons with cognitive disabilities. Disney has been largely successful in defending these ADA cases.

Newer cases testing the doctrine of assumption of the risk, which is so much a part of the amusement and outdoor California recreation environment, include an errant golf ball, which struck pedestrians who were outside a golf course. In *Garcia v. American Golf Corporation* (2017) 11 Cal.App.5th 532, California Government Code section 831.4 provided immunity for the dangerous conditions of trails, but the code section did not provide immunity for the dangerous conditions of an adjacent property next to golf courses. In *Swigart v. Bruno* 2017 WL 3016756, plaintiff was injured in an equestrian endurance event held in Perris, California. Judge John W. Vineyard granted

⁴ *S. G. v. Walt Disney Parks and Resorts US, Inc.* 2017 WL 3065212; *J. B. v. Walt Disney Parks and Resorts US, Inc.* 2017 WL 3065119; *M. D. B. v. Walt Disney Parks and Resorts US, Inc.* 2017 WL 3065146; *D. M. v. Walt Disney Parks and Resorts US, Inc.* 2017 WL 3034066... there were many others but for purposes of this footnote in the space allotted, readers can refer to this authority for further study.

defendant's motion for summary judgment. The Court of Appeal agreed that primary assumption of risk barred plaintiff's claims, citing *Knight v. Jewitt* (1992) 3 Cal.4th 296 and *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148. Being struck by a horse at an equestrian event is as inherent of a risk, as car accidents are at a raceway. In another Judge Vineyard case, *Groutheer v. Escape Adventures, Inc.* 2017 WL 3772580, plaintiff claimed injury from a bad landing after a hot air balloon ride. Judge Vineyard granted defendants' motion for summary judgment, ruling that the plaintiff had assumed the risk of her injury under the primary assumption of risk doctrine. As ballooning is inherently dangerous, the doctrine of primary assumption of risk applied. The appellate court agreed.

From hot air balloons to 150 miles an hour roller coasters, laws and lawyers are consistently called upon to direct, draft, and defend the amusement rides and attractions, testing the recreational limits of us all.

Boyd Jensen, a member of the Bar Publications Committee, is with the firm of Jensen & Garrett in Riverside.



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ART VALUATION AND THE INTERNAL REVENUE SERVICE

by Andrew Gilliland

It is often said that the value of art is in the eye of the beholder. In a free market with arm's length transactions, the value is established by the ultimate sales price of the art. In such cases the tax implications for the seller are established by the sales price and the seller's basis. Not all art, however, is transferred on the open market in an arm's length transaction as the owner may want to keep the art in the family or establish a legacy through donating the art to a museum or other non-profit organization. Valuing art in such situations can be problematic for the taxpayer as well as the recipient. The Internal Revenue Service ("IRS") can audit any such valuation and impose stiff penalties should the valuation be incorrect. To assist the taxpayer in avoiding these penalties (and presumably to make the process understandable), the IRS has set forth standards to establish the value of art through a qualified appraisal by a qualified appraiser and provided a process whereby the IRS will issue a Statement of Value for the art. This article will cover the basics of the process created by the IRS for the taxpayer.

As indicated above, there typically are three types of situations that a valuation of art would be necessary for the taxpayer. The first situation occurs when the taxpayer is seeking a charitable deduction for the value of the art in which case a high valuation of the art would be beneficial to the taxpayer because it would increase the taxpayer's deduction. A valuation also is necessary when the art is part of a decedent's estate to determine whether any estate tax is due or to establish the heir's tax basis in the art. This situation could potentially lead to competing desires for valuation of the art as a lower valuation may prevent estate taxation and a higher valuation would set a higher basis for the heir. The third situation is when there is an *inter vivos* gift of the art and the gift tax consequences need to be determined. Because of the fluctuations on the valuation of art as well as the potential for differing motives, the IRS process can be beneficial to the taxpayer(s) involved.

Created in 1968, the IRS Office of Art Appraisal Services mandate is to review appraisals and valuations of art submitted by taxpayers and provide valuation recommendations to the IRS, so that the tax implications of the transfer of the art can be determined. Specifically, the Office of Art Appraisal Services comes into play when there is an audit of the taxpayer or the taxpayer seeks a Statement of Value for the art.

So what is art? The determination of a definition of "art" can often lead to heated discussions in social settings, but the IRS has provided in Rev. Proc. 96-15 a definition that in applicability is very broad:

"[P]aintings, sculpture, watercolors, drawings, ceramics, antique furniture, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, and other similar objects."

The catchall of "other similar objects" has been determined to include cultural properties. With a broad description of art, many objects could fall within the art valuation structure of the IRS. When in doubt, it may be prudent to advise the client to determine the value of the art through a qualified appraisal or a Statement of Value before the taxpayer files their tax return. Also, when there is a high value for the art claimed by the taxpayer an audit is possible and there are additional steps necessary to establish the value of the art being donated, gifted, or transferred at death.

IRS Publication 561 provides valuation guidance to the taxpayer for (as its title states) "Determining the Value of Donated Property." The first critical step in determining the value of art is to obtain a qualified appraisal when the claimed value of the art exceeds \$5,000, which also triggers the requirement for Section B of IRS Form 8283 to be completed and attached to the taxpayer's return.

So what is a qualified appraisal? According to IRS Publication 561, the criteria set forth below must be met to satisfy the qualified appraisal requirement. The qualified appraisal must:

- Be made, signed, and dated by a qualified appraiser using USPAP (Uniform Standards of Professional Appraisal Practice).
- Be made within 60 days before the date of valuation.
- Contain a complete description of the art indicating size, title or subject matter, medium, name of the artist or culture, physical condition, any marks on the item and the approximate date created.
- Provide a statement of the cost, date and manner of acquisition as well as the history of the art.
- Include a proof of authenticity.
- Provide a professional quality image such as color photographs or high resolution images of the art.
- Contain a statement setting forth the basis of the appraisal such as sales analysis for similar works or artists, any quoted prices in dealer catalogues, a record of any exhibitions where the art was displayed, the general economic state of the art market at the time of valuation, and the notoriety of the artist including the particular school of the artist.

- Provide the date and terms of the donation if a donation, the date of death (or Alternate Valuation Date¹ where applicable) if part of a decedent's estate, or the date of the gift (or Alternate Valuation Date where applicable) if a gift.
- Set forth the name, address, and identification number of the qualified appraiser.
- Provide the date and purpose (for charitable deduction, gift or estate tax purposes) of the appraisal.
- Set forth the amount of appraisal fee, which cannot be based on a percentage of the amount appraised.
- Indicate the fair market value of the art and the method used to determine such value.

In addition to the above requirements, the appraisal must be completed by a qualified appraiser.

So who is a qualified appraiser? A qualified appraiser is defined as an individual who has successfully completed college or professional level course work, has at least two years' experience in buying, selling, or valuing art, and has received appraisal designation from a recognized art appraisal organization. A qualified appraiser must also regularly prepare art appraisals and cannot be prohibited to practice before the IRS or be an excluded individual such as the donor, the taxpayer, the donee, or basically anyone who would receive a benefit from the appraisal of the art. Relying on an appraisal by a probate referee in the case of a decedent's estate will likely not be a qualified appraisal unless the probate referee meets the definition of a qualified appraiser and an appraisal satisfies the requirements of a qualified appraisal.

If the value of the art is over \$50,000, the taxpayer can seek for a Statement of Value from the IRS as set forth in Rev. Proc. 96-15. The taxpayer, however, must submit a request for the Statement of Value to the IRS prior to the filing of the taxpayer's income tax return. The request for a Statement of Value must include a copy of a qualified appraisal, a check for \$2,500 for up to 3 items of art (with each additional item requiring an additional \$250 payment), a completed Section B of IRS Form 8283, and the location of the district office that has examination jurisdiction. The taxpayer may include any other relevant information with the request. Each request requires a taxpayer statement certifying that the facts in the request "are true, correct, and complete."

Once received in the correct form with the correct submissions, the Commissioner's Art Advisory Panel will review the qualified appraisal and make its own valuation. This Panel consists of 25 non-compensated art experts, which may or may not have subcommittees, and meets

¹ The Alternative Valuation Date concept permits a revaluing of a piece of art if there a sale or other arm's length transaction of the art in the six-month period following the original date of valuation that results in a different valuation of the art.

two times per year at closed meetings (no arguments from counsel). Before each meeting, the Panel members are sent photographs and written materials of the art under its review. This process allows the Panel members to conduct their own review and research prior to each meeting. The members of the advisory panel, however, are not informed of any of the taxpayer's information or the tax consequences to the taxpayer. The Panel has wide latitude in reviewing the submitted appraisals and will generally rely on publically available information and personal knowledge of private sales involving the artist or similar art pieces, as well as other information obtained from other members of industry. The end result of the review is that the Panel comes to a consensus on the valuation or recommends additional research when there is disagreement. The written results are provided in a written report to the IRS with a copy to the taxpayer. While such reports are advisory in nature, it should be noted that in 2016 the Panel reviewed 555 cases and accepted the value on only 222 items. The Panel increased the value on 202 items and decreased the value on 131 items. If the taxpayer disagrees with the Panel's recommendations, the taxpayer may only request reconsideration if there is additional information that was not available at the time of the qualified appraisal or to the Panel.

Typical reasons to be aware of for disagreement with the qualified appraisal include market volatility, questions of authenticity, dubious title, and the number of similar items of art on the market at the same time, which may drive the valuation down. A request for a Statement of Value should provide (if available) clear documentation to counter these typical areas of dispute or at a minimum address them in the request to provide guidance or direction on these issues to the Panel. As with most dealings with the IRS, there are penalties involved if the IRS determines that the qualified appraisal is incorrect, which are set forth in IRC Section 6662. These penalties should be clearly pointed out to the client in writing.

The valuation of art can be a moving target when there is no arm's length transaction to establish the value. Hiring a qualified appraiser to complete a qualified appraisal is the first step the taxpayer should take if the value of the art is likely \$5,000 or more. The IRS process for a Statement of Value for art exceeding \$50,000 in value can be beneficial to the taxpayer as well as the attorney advising the taxpayer. At a minimum, you should consider advising the taxpayer in writing of the need for a qualified appraisal and the benefits of seeking a Statement of Value.

Andrew Gilliland is a solo practitioner and the owner of Andrew W. Gilliland Attorney-at-Law with offices in Riverside and Temecula. Andrew is the co-chair of the RCBA's Solo & Small Firm Section and a member of the RCBA's Publications Committee.



OPPOSING COUNSEL: DAVID PORRAS

by Michelle Wolfe

Riverside Litigator is Not Afraid to Get His Hands Dirty

We have a talented artist in our legal community! You may have had civil cases with David Porras, a 30-year civil trial attorney, skillful litigator, and a partner with Varner & Brandt LLP in Riverside. However, you may not know that he is also a recognized master at the potter's wheel.

David finds similarities between preparing a case for trial and creating ceramic pieces. Like preparing a case for trial, creating a one of a kind ceramic form entails a lot of planning, patience, attention to detail, follow through, and a goal. However, with pottery he is rewarded with a tangible object of art and is an antidote to the sometime chaos of our modern society.

David's love for pottery began 46 years ago while he was a student at Loyola University pursuing a degree in economics. He required an elective course and found himself in a pottery class getting his hands dirty - he was hooked. David continued to study under the excellent craftsmanship of Robert Karlinsky and later under Neil Moss at El Camino College. Thereafter, he became a production potter in a factory making piecework pottery. He continued to pursue hand thrown pottery and opened a successful retail pottery studio in Playa Del Rey, making and selling functional stoneware.

The completion of law school did not diminish David's passion for clay as he continued to maintain a pottery home studio while practicing law. There, David creates beautiful hand thrown, one of a kind pottery which he sells in juried art shows, and he creates commissioned pieces. His glaze work is unique, strikingly colorful, and brilliant. He has developed special glazing and surface techniques over the last 46 years that enhance his porcelain pottery. David mostly creates functional items for the kitchen and decorative pieces.

David resides in Yucaipa with his wife, Nanette, who is also enjoying getting her hands dirty. David works at his home studio



David Porras



that has developed into a destination for other potters. The studio has eight potter's wheels in the throwing area where 12 other potters join him for a pottery workshop multiple times weekly. There is a separate glaze studio and an exterior kiln area with three gas kilns. The development of the studio has resulted in an invigoration of creative energy and everyone's "happy place." He is currently exploring the world of wood firing. He recently attended an intense three-week wood kiln workshop in North Carolina.

I was fortunate to be invited to visit the home studio for a wine and cheese kiln opening party where the magic happens. Two to three times every month, artists gather for the opening of the kiln. The excitement mounts as the door of the kiln is opened. Everyone holds their breath and line up close to one another, shoulder to shoulder. David then gently hands out each piece of pottery. The pieces are passed to each other with excited exclamations, as the artists do not know until that moment how the pieces will turn out and what colors the glazes will shine. Admiration for each other's efforts are then toasted with wine, cheese, and laughter. It was a delightful gathering.

David's work can be enjoyed on his website at: www.davidporraspottery.com/

I also encourage you to visit David at the art festival, **Art For Heaven's Sake**, in Redlands where he is a featured artist. He brings his works and potter's wheel, so that you can watch him create. You are invited to meet, see, and purchase David's work. This fun event is being held from October 12 - 14, 2018. Visit <http://artforheavenssake.org/event-schedule/> for more information.

Michelle McCoy Wolfe is senior counsel at Varner & Brandt in Riverside. Her practice focuses on representation of employers and management on labor and employment matters. She is a member of the executive committee, litigation section of the California Lawyers Association.



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THE RIVERSIDE ART MUSEUM

Mission Statement

The Riverside Art Museum strives to integrate art into the lives of people in a way that engages, inspires, and builds community by presenting thought-provoking exhibits and providing quality art classes that instill a lifelong love of the arts.

History of the Riverside Art Museum

In the early 1950s, a loosely knit group of artists formed the Riverside Art Association to encourage the study and appreciation of the arts. Their first home, the Riverside Art Center, was a recently abandoned Municipal Dog Pound, which City of Riverside officials leased to the Art Association for \$1 a year.

By 1960, the growing Association clearly needed more space for its studio classes and numerous exhibitions. When architect Julia Morgan's 1929 Riverside YWCA building became available for sale, the Association purchased it for \$250,000. A successful fund drive followed and on July 5, 1967, YWCA officials formally turned over Morgan's building. The transition from a YWCA building to the existing art museum was soon underway. In 1982, the building was placed on the National Register of Historic Places and was designated a Historic Landmark by the City of Riverside.

In 1990, museum trustees began a campaign to obtain funds for capital improvements. With generous assistance from the City of Riverside, the goal of \$1,250,000 was attained in 1991. The following year, extensive renovations produced a sophisticated climate control system, increased exhibition space, collection storage, and an office at the back entry of the building. The garden atrium was weatherproofed with the addition of a glass roof and the kitchen area was extended. An upstairs library was made out of an unused bathroom space.

Community support for additional improvements came in 1993 when a City Block Grant and a grant from the Riverside Community Foundation funded the addition of a wheelchair ramp at the rear entrance. In 1994, a landscape renovation took place that was made possible entirely through donations of materials and labor. And in 1995, the generosity of a museum member funded the completion of the R.E. Olds Conference Room on the second floor. The 2000s saw more renovations and repairs to maintain the functionality and beauty of our historic building.

Make Art. Make Community.

The building is now home to artists and art lovers as a place to quietly roam and experience the world of art.



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- United States District Court, Panel Mediator

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Discover a wealth of opportunities to learn and be inspired in our galleries where there's something to pique everyone's interests and to challenge their perceptions of what art is. Showing a mix of solo, group, and permanent collection exhibits featuring traditional and contemporary/modern art, the Riverside Art Museum regularly displays the work of some of the best artists in the world, including Robert Williams, Takashi Murakami, Shag, Kathe Kollwitz, James Gurney, Marc Chagall, Millard Sheets, Shepard Fairey, Corita Kent, and Don O'Neill, as well as exhibits highlighting the works of our talented local members and aspiring high school students.

Join us for art classes for the young and young at heart alike that teach art history and technique, free family activities, lectures, book readings and signing, film screenings, and our The Blue Door Museum Store filled with items you won't find elsewhere (family level members and above receive a 10% discount). Be inspired. Make art. Go home instilled with a lifelong love of the arts.

Currently, the art museum boasts two spacious first floor galleries, two smaller second floor galleries, the R.E. Olds Conference room which houses our printmaking presses, and a second floor Mezzanine exhibition space. A Children's Gallery and Studio Art Classroom are also located on the second floor along with administrative offices. Although the original function of Julia Morgan's building has changed, the spirit of its precedent-setting architect will be forever preserved in the timeless quality and beautiful design of the building. Morgan's architecture truly stands as a testimony to her fortitude, her skill, and her brilliantly enduring sensibilities.

Here is a list of our current exhibitions: <http://www.riversideartmuseum.org/exhibits/>

We have two exhibits opening September: <http://www.riversideartmuseum.org/exhibits/coming-soon/>

We have two other exhibits and our "Off the Wall" art sale opening a little later in the fall. Information on the exhibits and art sale can also be found on our website.

Information courtesy of the Riverside Art Museum.



Inland Counties Legal Services Positions Available

Litigation Director

Inland Counties Legal Services, Inc. (ICLS) is a nonprofit organization providing legal services to low-income persons residing in Riverside and San Bernardino Counties.

We are currently seeking a Litigation Director, who will work under the direction of the Executive Director. The selected candidate will supervise all advocate legal work throughout the program in conjunction with the Practice Group Directors. Will assist in case development, strategy and will serve as co-counsel as needed. The Litigation Director will be responsible for advocate trainings within the program and will approve trainings with outside resources.

Must possess the desire to serve our client population and have excellent interpersonal skills.

The selected candidate must be a California licensed attorney. A minimum of 10 years of litigation experience, including complex cases, trial and appellate work is desired. Must have substantial attorney supervisory experience.

To apply, please submit resume, a very detailed letter of interest, writing sample and three job related references to ICLS-HR via fax (951) 774-4429 or email:

HRManager@icls.org

MWD/EOE.

~ ~ ~ ~ ~

Deputy Director

Inland Counties Legal Services, Inc. (ICLS) is a nonprofit organization providing legal services to low-income persons residing in Riverside and San Bernardino Counties.

We are currently seeking a Deputy Director, who will work under the direction of the Executive Director. The selected candidate will be responsible for the program's grant compliance, staff training, program administration and technology. This individual will also work closely with the Board of Directors.

Must possess the desire to serve our client population and have excellent interpersonal skills.

The selected candidate must be a California licensed attorney with a minimum of 10 years experience, having a majority of those years in a supervisory/management capacity.

To apply, please submit resume, a very detailed letter of interest, writing sample and three job related references to ICLS-HR via fax (951) 774-4429 or email:

HRManager@icls.org

MWD/EOE.

LESSONS FROM HISTORY: PROTECTING ARTISTS AND ART OWNERS FROM LOSING THEIR ART

by Cathy Ta and Alexander Brand

Artists and art owners (“Owners”) commonly exhibit artwork through consignment agreements with art galleries. However, when Owners fail to perfect their interests in consigned pieces, they stand to lose all of their interests as well as all of their entitlement to their own artwork, particularly in the event the gallery files for bankruptcy. Accordingly, it is imperative that Owners understand the risks associated with consignment agreements and the steps Owners can take to protect their interests.

A Case Study: The Salander-O’Reilly Galleries Bankruptcy

In April 2006, Salander-O’Reilly Galleries (“Gallery”) entered into a loan agreement with First Republic Bank (“Bank”), whereby the Gallery granted the Bank a security interest in the Gallery’s personal property, including its art inventory.¹ The Gallery specifically represented and warranted that it was the sole owner of such personal property, which was free and clear of all liens and claims, and that it was authorized to pledge it as collateral.² The Bank perfected its security interest in the collateral by filing a UCC-1 financing statement.³

A few weeks later, the Gallery and Kraken Investments Limited (“Kraken”) entered into a consignment agreement, whereby Kraken delivered to the Gallery a Botticelli called “Madonna and Child,” which was worth at least \$8.5 million. Under the consignment agreement, the Gallery would have a term of years to sell the painting.⁴ Unlike the Bank, Kraken failed to file a UCC-1 financing statement and failed to perfect its security interest.⁵ When the consignment agreement expired, the Gallery refused to return the painting.⁶

Ultimately, the Gallery encountered financial difficulties and was forced into bankruptcy. Later, the bankruptcy court approved a plan to liquidate the Gallery’s assets including the Botticelli.⁷ Kraken then engaged in a series of legal maneuvers to try and remove the Botticelli from

the sale of the Gallery’s assets.⁸ On appeal, the district court found that each of Kraken’s legal maneuvers was improper and affirmed the bankruptcy court’s decision in including the Botticelli in the asset sale.⁹ A key reason why the bankruptcy court’s decision was upheld was because Kraken had failed to perfect its security interest in the Botticelli.¹⁰ As a result, Kraken lost all of its interest and entitlement to the Botticelli.

Steps Owners Can Take to Avoid Becoming the Next Kraken in a Gallery Bankruptcy

The Salander-O’Reilly Galleries bankruptcy case illustrates an Owner’s worst consignment nightmare – losing a piece of art as a result of failing to understand consignor rights and how to protect them, particularly in the event of a gallery bankruptcy. Two major ways in which Owners can protect their rights and avoid being the next Kraken in the event of a gallery bankruptcy are by: (a) timely filing a UCC-1 financing statement when consigning a piece of art; and (b) entering into consignment agreements under state laws that provide automatic protections for consigned pieces of art.

UCC-1 Financing Statement

When an Owner consigns a piece of art to a gallery, the law affords the Owner a consignor’s security interest in the piece of art.¹¹ However, this interest is not automatically protected. Rather, the Owner must perfect their interest by filing a UCC-1 financing statement describing the piece (before delivering the piece to the gallery), and by sending a notice to the gallery’s secured creditors describing the piece as well as stating the Owner’s intention of retaining a security interest in the piece.¹² If an Owner fails to take the requisite steps to perfect their interest, they will stand to lose their interest in the piece of art to any creditor who is earlier in time in perfecting their own security interest in the piece and particularly in the event the gallery files for bankruptcy.¹³

In an environment where galleries are filing bankruptcy at an unprecedented rate, Owners can avoid

1 *In re Salander-O’Reilly Galleries, LLC*, 475 B.R. 9, 15 (S.D.N.Y. 2012).

2 *Id.* at 15-16.

3 *Id.* at 16.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 18.

8 *Id.* at 18-19.

9 *Id.* at 20-25, 33-34.

10 *Id.*

11 UCC § 9-103(d).

12 UCC § 9-324(b).

13 *Id.*

Kraken's fate by taking the above-described steps to perfect their security interest in consigned pieces of art and they should do so where appropriate as soon as possible.¹⁴ By perfecting their security interest, Owners make it more likely that they will protect their rights to consigned pieces of art in the event that the gallery files for bankruptcy.

State Laws That Protect Owner-Consignors

In addition to UCC-1 financing statements, Owners can also protect their interests in consigned pieces of art by consigning them under state laws that automatically protect art exhibited with consignment agreements. For example, states like New York and California have enacted statutes that automatically protect an Owner's interest in consigned art. Specifically, New York amended its consignment statute so that now, when an Owner consigns a piece of art to a gallery, the gallery holds the piece in trust for the benefit of the Owner.¹⁵ Similarly, California passed a statute that declares that a piece of art consigned to a gallery is held in trust by the gallery for the benefit of

¹⁴ Jori Finkel, "Artists Fight to Get Works Back From Ace Gallery," *New York Times* (April 20, 2016), <https://www.nytimes.com/2016/04/21/arts/design/artists-fight-to-get-works-back-amid-ace-galleriesbankruptcy-case.html> (describing the issue against the Los Angeles Art Gallery, Ace Gallery).

¹⁵ N.Y. Arts & Cult. Aff. Law § 12.01(a).

their Owner.¹⁶ Additionally, California expressly provided that the trust relationship between a consignor and consignee "shall not be subject to claim by a creditor of the consignee."¹⁷

Statutes like these automatically protect Owners and their interest in consigned pieces of art, by categorically defining consigned pieces as property held in trust by galleries for the benefit of their Owners. Consigned pieces are thus never property of galleries and therefore not subject to claims of creditors of galleries – even in the event of their bankruptcy.

Owners must take caution when consigning pieces of art to galleries. Owners should be prepared to file UCC-1 financing statements to perfect their consignor's security interests. Owners should also take advantage of entering into consignment agreements under state laws like those in New York and California that automatically protect consigned pieces of art by holding them in trust for their benefit.

Cathy Ta is Of Counsel at Best Best & Krieger LLP. She practices in the areas of insolvency, bankruptcy and business litigation. Alexander Brand is a litigation associate at Best Best & Krieger LLP.



¹⁶ Cal. Civ. Code §§ 1738.5 and 1738.6(d).

¹⁷ Cal. Civ. Code § 1738.5.

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COLLECTING ART IN RIVERSIDE: A FEW THOUGHTS

by Abram S. Feuerstein

A few collected thoughts on the subject of collecting art:

1. Money and art go together. The commercial art market exceeds \$30 billion in annual sales, not including private sales that go un-tabulated. It feeds an industry that includes galleries and auction houses, art collectors, art consultants, and artists. It operates in a stratosphere separate and above the world in which most people earn their weekly envelope. It is global. While headline-generating art sales are interesting, they mostly are irrelevant to the ordinary collector.
2. We are not in New York. We are not even in Los Angeles. Although only 50 miles away from Los Angeles, in art miles, Riverside, and the Inland Empire in general, are more like 500 miles away from the closest coast. The world's art centers are located in major cities. This "distance" does not mean that some fine artists here are not working their craft and producing – to use one of the most overused terms in the art world – "important" art. They are. And, to be sure there are some exciting things happening in Riverside – including the opening of the Cheech Marin Center for Chicano Art in 2020. But, unless you frequent major art shows, visit great galleries, or rub elbows with the rich and famous at exhibit openings, you likely will have no clue about what is trending in contemporary art, or the artists that you "should" be collecting.

3. Many art collectors start collecting because of the need to find something that looks good to hang above the sofa. I did. After that, other spaces in the house and the office need attention. People turn to garage sales, antique stores, and local art fairs to find decorating treasures. Also, online sources. For most, that is the end of the collecting urge at least until they buy different furniture or move. However, others become more passionate. Tastes develop. Pieces get switched out and exchanged. We learn about ourselves through art. Friends and colleagues react to our art purchases. Sometimes strongly. These budding collectors look to bring home art from their travels, and even select travel destinations in part to seek out art.
4. Locating emerging artists is easy. Locating good emerging artists, less so. And locating emerging

A Port In Italy



The Picnic



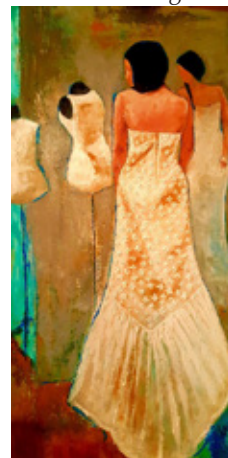
Three Girls



Girl with Two Dolls



The Fitting



Girl with Bird and Dog



great artists, near impossible. In every age, only a handful of artists survive the test of time much less enter art history. There likely are more artists in New York City than attorneys, and most of them are starving for a reason. Notwithstanding our enjoyment of an artist's work, art should not be purchased with a belief that a favorite artist will be the next Rembrandt, Van Gogh, or Picasso. If you want to gamble, there are plenty of casinos and they offer better odds than the emerging artist marketplace. If you want to purchase art from an emerging artist, your personal enjoyment of the work must be the guiding principle.

- At a Riverside Art Museum art market event two years ago, I encountered a local painter named Yolanda Terrell, known as "Landy." An African-American woman now in her mid-50s, she has been painting since she was a child growing up in Philadelphia. She largely is "self-taught," and uses a palette knife, instead of brushes, for most of her work. Difficult to classify, Landy is certainly an American modernist, with both impressionist and folk art influences. At a price point that still is digestible, I have purchased many of her paintings. They have transformed the government work space I supervise, replacing GSA poster art that exhorts office workers to cooperate with each other to accomplish work-goals but which cannot help, but achieve the opposite effect. And, because she is

Girl with Flower



The Artist



local, I can take a good look at a piece before buying it, while enjoying speaking to her about her creative processes. More information about her work can be located at artbylandy.com.

In my "Landy collection" are folk or naïve art paintings such as *Three Girls*, two of whom hold ragdolls at their sides, and *The Picnic*, an imagined plantation "off day" where these dignified, possibly enslaved individuals can enjoy a coming together centered around family and food. *Cade Cod* is a classic, harbor impressionist scene, the application and scraping of paint creating luminescent effects on canvas, and is one of several boat scenes that I have purchased from the painter. I am struck by the *Girl in the White Nightgown*, a young lost soul, possibly awakened in the middle of the night, who attains an otherworldly quality. The whimsical long-necked Bird Man, who twirls a blue-winged and feathered bird on one hand while holding a pigeon in the other, hangs over my office computer to remind me not to take work too seriously. These works do what collected art does best – they surround us with beauty, while changing the way we see and interact with the world.

The author is employed by the United States Department of Justice as an Assistant United States Trustee in the Riverside Office of the United States Trustee Program (USTP). The mission of the USTP is to protect the integrity of the nation's bankruptcy system and laws. The views expressed in the article belong solely to the author, and do not represent in any way the views of the United States Trustee, the USTP, or the United States Department of Justice.



The Conversation



Washing Day



The Dance



The Village



Dinkelsbuhl



ART AT A U.S. PENITENTIARY

by Ruthie Heavrin Orozco

On Tuesday, July 31, members and interns of various legal and criminal justice programs from the Riverside area visited the U.S. Penitentiary in Victorville. The trip began with an extensive check-in where pockets were emptied, and phones were surrendered and left with the security station up front.

After checking in, the group meandered into the polished, empty halls of the penitentiary where we had opportunities to meet education, recreation, psychological, and religious program leaders and ask questions. The arts and recreation programs had the most significant impact.

An ironic mural of Lady Liberty, cast in black and white and donning a red crown, sprawled across the brick wall of the art room. Another mural of Warner Brother's characters spanned an adjacent wall, and medium sized paintings of favorite cartoons sat atop the storage cabinets. In fact, there were mostly cartoonish depictions and only one naturalistic painting on display. That could have been because the artists paint from memory, their only natural inspiration coming from the barred windows and desolate desert landscape.

Sandy dirt made up the unpaved landscape. Inmates combed the dirt into a cubic, swirling pattern with perfect hedges of dirt, one-inch high, every foot, which started from the sidewalk, until they met in the middle. Officer Rodriguez* said inmates at other penitentiaries comb the dirt into more intricate patterns, like the California flag – an artistic display within the confines of concrete slabs and strict schedules. The pattern reflected that of a Buddhist meditation garden where sand is raked into flawless, infinite waves.

Religious ritual offers another form of artistic activity. On Tuesdays, the Native American inmates can practice their sacred sweat lodge ritual. The warden allows for this sacred space. As a fire pit burns in the Mojave Desert sand, the practitioners wave smoking fragments of wood in their make shift tent. This small, caged off area is the only location on the penitentiary grounds with trees and grass. They are watered by a ring of stagnant, shallow water. "It's up to the inmates to maintain the area," Officer Rodriguez says. "If the inmates let it go, it goes," he adds. According to Amanda Gardner, Ph.D., and



Agencies represented were the U.S. Attorney's Office, the District Court of the Central District of California, Eastern Division, the Office of the Federal Public Defender, and the U.S. Trustee's Office, as well as the FBI.

author of *Prison Arts Resource Project*, religious practices and choirs made up the initial arts programs in American prisons which have gradually grown to include painting/drawing, other forms of music, and writing.¹

Outside of work, chow, and "yard" time, the inmates have access to a recreation room and educational opportunities. Many choose to earn their GED. Class instructor, Officer Hernandez*, says, "It's not the fact that they're

getting their GED that makes a difference. Once they're on the outside, it's the process of earning the GED that changes them." Learning how to focus on a goal and work toward it is more valuable than the degree itself.

Other available artistic classes are cosmology, creative writing, and poetry. In the library, there are sign-up sheets for available classes. The sign-ups for the creative writing and poetry classes have so many interested parties, names are hand written in the margin and are numbered far beyond the allowable 20 students. Hernandez said Tupac's stepfather, Mutulu Shakur, an inmate at the penitentiary, teaches the creative writing and poetry classes – that could explain the popularity of the classes. Or perhaps it's the introspective experience gained from the class.

A study by Emerson College reviewed the Writing for Our Lives program. Their study revealed that daily or weekly writing assignments and class discussions helped shift the inmates' perspective from "pro-criminal to pro-social" because they were able to internalize and empathize with the character's struggles and development.²

Besides an art studio, the recreation room features a music room. It is padded with egg crate foam for a better sound and it houses a full drum set, a wall of guitars, and hand-held percussion instruments in a locked cage on the wall. "They [the inmates] know that once they break something, that's it," Officer Rodriguez says about the instruments. The recreation room manager says the

1 Amanda Gardner; Lori L. Hager; Grady Hillman, *Prison Arts Resource Project: An Annotated Bibliography 6* (National Endowment for the Arts, May 2014).

2 C. Blinn, "Teaching Cognitive Skills to Effect Behavioral Change Through a Writing Program 147" (*Journal of Correctional Education*, 1995).

inmates spend most of their free time in the recreation room playing music, practicing yoga, or painting.

A 2010 study through the University of San Francisco shows that the inmates who participate in the Arts-In-Corrections program (AIC) have an increased self-esteem, sense of purpose, and self-discipline.³ The study also revealed a decrease in racial tension.⁴

Art programs in prison help keep inmates out of solitary confinement and out of trouble. In fact, the lives of inmates can literally be saved. In one case, Rhode Island state prison inmates and an activist group sued the state and prison officials for the unacceptable living conditions of the prison. Chief Judge Pettine ruled that educational and recreational programs were necessary for the health and safety of the inmates. (*See Palmigiano v. Garrahy* (D.R.I. 1977) 443 F.Supp. 956, 968 [stating, "It [idleness] breeds boredom and a quest for excitement, and the defendants conceded that it is a major cause of the violence which has plagued the institution for years."]). Chief Judge Pettine found the violations of the prison against the inmates, including the lack of available education and recreation programs, a constitutional violation. He cited Chief Judge Johnson in *Pugh v. Locke* who found extreme idleness in the Alabama prison system violated the Eighth Amendment because it resulted in cruel and unusual punishment.⁵

A darker time in California prison history is revealed in the 2011 U.S. Supreme Court case *Brown v. Plata*. In this case, recreational space was swapped out for bunk space at the state prison.⁶ The over-crowding led to increased suicide and health related deaths with some inmates standing in their own urine, and others placed and left in closet size spaces.⁷ Justice Kennedy delivered the opinion highlighting the need to reduce California prison population to a still overcrowded yet realistic 137% capacity.⁸ The lack of access to health care, livable conditions, and mental stimulation violated the Eighth Amendment.⁹

The U.S. Supreme Court's decision in *Brown v. Plata* helped renew interest and support in prison art initiatives such as the California Arts Counsel's Arts-in-Corrections program and the Prison Arts Coalition. The Prison Arts Coalition is an advisory project providing resources and guidance to prison personnel.¹⁰

3 L. Brewster, The California Arts-in-Corrections Music Programme: A qualitative Study 33-46. (*International Journal of Community Music*, 3(1), 2010).

4 *Id.* at 44.

5 *Pugh v. Locke*, 406 F. Supp. 318, 331 (M.D. Ala. 1976).

6 *Brown v. Plata*, 563 U.S. 493, 504 (2011).

7 *Brown*, 563 U.S. at 504 506.

8 *Id.* at 544

9 *Id.* at 545

10 "About" *The Prison Arts Coalition*, <https://thepisonartscoalition.com/about/>.

Many inmates are creative individuals which is often why they end up in trouble in the first place. Case in point is the variety of weapons crafted by the inmates. At the end of our tour, Officer Rodriguez dumped a box full of handmade weapons and spread them across the conference table. "They'll use anything they can get their hands on," he said. Shivs were made from a melted plastic dining hall cup, toothbrushes sharpened on the cell floors, and jagged shards of sharp plastic broken off a food tray or the arm of a plastic chair. The art classes, religious rituals, and intensive work time help channel this artistic energy by having the inmates focus on something within themselves that strives for an element that cannot be touched by the darkness of incarcerated life.

As one intern from the Federal Public Defender's said, "If someone does prison right, they can come out a really well-rounded person." That is, if they allow themselves to change and if their gang allows it. Officer Rodriguez said some of the inmates do not take advantage of the classes and programs because their gang or unit leaders won't allow them. Surviving as an inmate is on a different plane than that of growing as an individual – they are often unreconcilable. But hope remains as the class sign-up sheets are filled, the instruments are kept in good shape, and the inmates remain excited about the available programs. Art can save lives and rehabilitate in a manner more powerful than bars and loss of freedom. As the popular saying goes, honey attracts more bees than vinegar. For the betterment of society, let's make sure our incarcerated communities continue to have access to art because the "vinegar" of overcrowded facilities and idle inmates creates permanent damage rather than a lasting, rehabilitative experience.

**Names of Officers have been changed for their privacy.*

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ROTHKO'S LITIGATION LEGACY

by Abram S. Feuerstein

Hippocrates only partially was right when he said that art is long, and life is short; what he failed to mention is that while art may be long, litigation is longer – and sometimes interminable. And, so it was in the 1970s, when years of litigation followed upon the heels of the suicide death of Mark Rothko, one of America's greatest 20th Century painters, and Rothko's children battled the executors of Rothko's estate to determine the fate of hundreds of Rothko paintings.

In February 1970, the 66 year-old Rothko, known for his large, expansive canvasses of colorful floating rectangular shapes, had been found in his Manhattan, East 69th Street studio, in a pool of blood, wrists slashed, a razor blade nearby wrapped in tissue, but with no note to explain the artist's life-ending decision.¹ To an admiring public, the suicide made no sense. After almost 40 years as a painter, finally he had achieved financial independence; his paintings were fetching record prices at galleries and auctions; Yale, recognizing Rothko's work the prior year, awarded him an honorary degree;² and just a few years before, he had completed the most significant commission of his career, a series of interior mural paintings to adorn a Houston chapel at the behest of a Texas billionaire family.³

Yet, Rothko had grown despondent over his significant health issues (cardiac),⁴ and he began consuming heavy quantities of alcohol and prescription drugs, including Valium and Sinequan,⁵ an anti-depressant. His wife of 25 years, Mary Alice ("Mell"), matched his drinking, and their drunken brawling eventually resulted in the couple separating a year before Rothko's death.⁶ Adding to the emotional roller coaster, Rothko started to have great self-doubts and insecurities about his work, apparently needing constant reassurance from his friends even as he feared abandonment by them.⁷ In

the end, Rothko, who believed art should be rooted in tragic experience,⁸ and whose paintings explored the contours and edges of the near abyss confronting the human condition, fell into that abyss himself.

On Becoming Rothko, the "Color Field" Painter

Rothko's given name was Marcus Rothkovich, and he had been born in 1903 in Dvinsk, Russia, a city in which half of the 90,000 residents, including Rothko's family, were Jewish.⁹ Outbreaks of violence against the Jewish population, particularly by the Czar's Cossacks, were common.¹⁰ Rothko's father, a pharmacist, emigrated to the United States in 1910, and within the next three years the rest of his family joined him.¹¹ They traveled to Portland where they had relatives who were somewhat established in various businesses and trades, but Rothko's father died six months later.¹² Rothko did well in school, and received a scholarship to attend Yale.¹³ Notwithstanding decent grades, after a couple of years, in 1923, he dropped out in order to "wander around, bum about, starve a bit."¹⁴

Rothko went to New York and rented a small apartment. One evening, he joined a friend who was enrolled in a life drawing class at the Art Students League and by that coincidence discovered painting.¹⁵ "I knew then that this would be my life," he later said.¹⁶ He enrolled in some art classes at the League, which would be the extent of his formal training.¹⁷ By the late twenties, he had several odd-paying art jobs and also became a part-time art teacher.¹⁸ In the 1930s, the Federal Art Project under the WPA helped Rothko pay the bills.¹⁹ He had his first one-man shows in 1932-33. In New York he met several individuals who would become central to post-war modernist American painting, including Jackson Pollock and Willem de Kooning.²⁰ Representatives of New York's emerg-

1 Lee Seldes, *The Legacy of Mark Rothko: An Expose of the Greatest Art Scandal of Our Century* (Holt Rinehart Winston 1978) (hereafter, "Seldes"), p. 2. The author of this article has relied heavily on Seldes. In addition to providing a definitive account of the litigation proceedings, the Seldes volume provides a comprehensive and highly readable description of Rothko's personal life and his artistic career.

2 Seldes, p. 91.

3 Seldes, pp. 62-64. The patrons were, John de Menil, who served on the Board of New York's Museum of Modern Art, and his wife, Dominique de Menil, the heiress of the oil service company, Schlumberger. *Id.*, at p. 5. Today the chapel is known as the Rothko Chapel.

4 Seldes, p. 71.

5 Seldes, pp. 97, 99.

6 Seldes, pp. 72, 77-78; Mell, nearly 20 years younger than her husband, died six months after Rothko's death.

7 Seldes, pp. 89-90, 101.

8 Jacob Baal-Teshuva, *Rothko* (Taschen (No Publication Year)) (hereinafter, "*Baal-Teshuva*"), p. 17 quoting Rothko: "tragic experience is the only source book for art."

9 Baal-Teshuva, p. 19.

10 *Id.*

11 Seldes, p. 11; Baal-Teshuva, p. 20.

12 Seldes, p. 12; Baal-Teshuva, p. 20.

13 Baal-Teshuva, p. 22.

14 Rothko's words, quoted at Seldes, p. 14.

15 Seldes, pp. 14-15; Baal-Teshuva, p. 23.

16 Quoted by Baal-Teshuva, p. 23.

17 Seldes, p. 15. According to Seldes, Rothko always referred to himself as a self-taught artist.

18 Seldes, p. 15.

19 Seldes, p. 16.

20 Seldes, p. 17.

ing Museum of Modern Art quickly identified Rothko as a promising young artist.²¹ The influential Peggy Guggenheim highlighted and promoted his work at her famous Art of this Century salon.²²

Rothko's pre-1940 work was realist in nature, depicting bathing nudes, interiors, and urban scenes (including several haunting paintings of the New York subway which, when viewed today, point unequivocally to the direction of his future work). By the early 1940s, as the European art scene and its artists fled Paris in the face of World War II and reconvened in New York, Rothko's realism gave way to European-influenced surrealism, and then to paintings characterized by symbolic, mythological imagery.²⁴

Abstract Expressionism

Within a short period of time, Rothko started down the path of eliminating all representational or figurative elements from his work. At first he appeared to "liquidize"²⁵ the images, replacing humans and landscapes with "multi-forms" of color seemingly suspended in space.²⁶ But to the intellectual, philosophically-minded Rothko, this was not enough. He needed to ensure that all prior forms were stripped away — if not destroyed — so that no obstacles would remain between the painting and the onlooker. Indeed, he even ceased giving titles to his paintings, lest they suggested an interpretation (*i.e.*, erected a barrier) for the viewer.²⁷ "I'm not interested in the relationship of color or form or anything else. I am interested only in expressing basic human emotions," he declared.²⁸

By 1950, Rothko's transition was complete, manifesting itself in a style of painting that became coterminous with Rothko's name (brand?). As described by Janet Bishop, the curator of painting and sculpture at the San Francisco Museum of Modern Art, in these Rothko "classical period" paintings, "two or three, or sometimes four, rectangles appear one above the next on a vertical support. Painted with virtually immaterial brushstrokes that feather out at the edges,

the loose geometric shapes hover almost atmospherically in front of their backgrounds, at once emphasizing the flatness of the picture plan, or skin, and its depth, as a portal into a deeper space."²⁹

By contrast with "action painters" like Jackson Pollock, who elevated the physical "act" of art by spontaneously dripping, spilling and splotching canvasses, color field painters like Rothko sought to reach to the deepest feelings of the viewers of his pictures. Rothko hoped to touch people "where they lived" in order to get at "raw feelings, expressed honestly and directly" albeit non-verbally.³⁰ He believed that if a viewer worked hard enough, he could have a near religious experience akin to the experience Rothko said he had in creating the work.³¹ At one point he told a fellow artist of his dream of having small roadside chapels throughout the country so that travelers could stop and commune with his paintings.³²

Whether Rothko's paintings evoke a religious experience successfully, or are mere wall decoration that museum-goers walk past, quickly, along with the other oversized objects in the modern wing, does not need answering here. The marketplace answered it, and, in a resounding fashion. The market recognized Rothko as a leader of a new, fresh American movement known as the New York School, or Abstract Expressionism. His prices climbed. Rothko continued to paint in his "classical" style for almost twenty years.³³ At his death, a classic Rothko might set a collector back \$50,000 in 1969 dollars³⁴ or \$325,000 in today's dollars. And, since his death, market prices for Rothkos have continued to escalate: one of the 1961 color-field paintings sold at Christie's for almost \$87 million in 2012, a record at that time for an auction sale of post-war contemporary art.³⁵

21 *Id.*

22 *Seldes*, pp. 18-19; *Baal-Teshuva*, p. 38.

23 One of these, *Untitled (Subway)*, c. 1937, is owned by the National Gallery of Art in Washington, D.C. Although clearly a subway scene, it is dominated by horizontal blocks of color, verging on the rectangular, with the human shapes elongated and blending into the subway columns. A photograph of the painting is reproduced at *Baal-Teshuva*, p. 27.

24 *Baal-Teshuva*, pp. 31-42.

25 Janet Bishop, "Mark Rothko: Slow Looking," published as an introductory essay in *Rothko: The Color Field Paintings*, p. 11 (Chronicle Books 2017) (hereafter, "*Rothko: The Color Field Paintings*"). In describing Rothko's work at this time, Bishop attributes the term "liquidize" to David Anfam, a well-regarded art critic and curator.

26 The term "multi-forms" describes a transitional period in Rothko's work, from 1947-1949, prior to the emergence of his more mature or "classical" paintings. See *Baal-Teshuva*, p. 17.

27 For tracking purposes, the paintings typically were referenced by a year and number, such as *No. 14 (Untitled) 1953*.

28 Quotation appears at *Baal-Teshuva*, inside front book jacket.

29 *Rothko: The Color Field Paintings*, p. 12.

30 Christopher Rothko, "Color, Form, and Drama," printed as the foreword to *Rothko: The Color Field Paintings*, p. 7.

31 See <https://www.brainpickings.org/2014/02/19/mark-rothko-on-art-selden-rodman/>.

32 Randy Kennedy, "In 'Mark Rothko: From the Inside Out,' a Son Writes About his Father," *New York Times*, December 11, 2015, retrieved at <https://www.nytimes.com/2015/12/12/arts/design/in-mark-rothko-from-the-inside-out-a-son-writes-about-his-father.html>.

33 Of note, in the 1960s towards the end of Rothko's life, his palette darkened — the glowing reds and yellows giving way to blacks and grays. However, the easy temptation to associate that darkness with Rothko's increasing depression should be resisted; those near Rothko see the black and gray canvasses as a period of renewal in Rothko's work. See Kate Rothko's comments in: Rachel Cooke, "The art cheats who betrayed my father," *Guardian*, September 13, 2008, retrieved at <https://www.theguardian.com/artanddesign/2008/sep/14/art1>.

34 *Seldes*, pp. 91-92.

35 See Carol Vogel, "Record Sales for a Rothko and Other Art at Christie's," *New York Times*, May 8, 2012, retrieved at <https://www.nytimes.com/2012/05/09/arts/design/rothko-painting-sells-for-record-nearly-87-million-at-christies.html>.

The Root of All Evil: Art as a Commodity

Today's global art market accounts for nearly \$30 billion in sales, and over the past forty years a substantial body of legislation has been enacted to regulate transactions involving the creation, and purchase and sale of art.³⁶ But, at the time of Rothko's death, a largely unregulated "bull market in art" was just underway.³⁷ Rothko left a two-page will.³⁸ He intended to create a foundation that would enable groups of his paintings to be viewed in public venues, and named several close friends and associates as executors.³⁹ These included a fellow artist, Theodoros Stamos, his business advisor and accountant, Bernard J. Reis (who also drafted the will), and an anthropologist, Dr. Morton Levine.⁴⁰ Rothko had entrusted them to be faithful custodians of the bulk of his estate, some 800 warehoused paintings.⁴¹

What Bernard Reis did not disclose to Rothko was that while he advised Rothko, he wore another hat as a tax adviser, accountant, and agent to Marlborough Gallery,⁴² an international art dealer who represented Rothko before his death along with other top shelf artists. Indeed, the Gallery had also entered into a contract to represent artist Stamos, another Rothko executor.⁴³ Purportedly to raise cash for the would-be Foundation, Rothko's executors quickly sold an initial, select group of 100 paintings to Marlborough for \$1.8 million, a fraction of their estimated value.⁴⁴ Moreover, the purchase price was to be paid over 12 years, with no interest, and a down payment of only \$200,000.⁴⁵ The executors also agreed that the remaining 698 works would be consigned to the gallery at a fixed commission of 50 percent.⁴⁶

The Rothko family smelled a swindle. With the death of Rothko's wife Mell shortly after his own death, it was left to Rothko's 19-year-old daughter, Kate, to vindicate Rothko's wishes and protect his artistic legacy. On behalf of herself and her six year old brother, she sued the executors and Marlborough, asserting they had defrauded them and wasted the estate.⁴⁷ The case worked its way through the New York courts for years. Six years. By far the largest case to that date concerning fraudulent dealings in art, it divided the New

York art world. The case exposed the incestuous nature of and greed in the art world, and the way paintings were merchandised. The litigants spent millions on attorney's fees. When asked how it felt to owe several million for attorney's fees, Ilya Prizel, who married Kate Rothko during the course of the litigation, replied on the couple's behalf: "We decided long ago that the first ten thousand dollars was overwhelming: after that it doesn't seem like money anymore."⁴⁸

Ultimately, the three Rothko executors were ordered removed based on their self-dealing, and for their "improvidence and waste verging on gross negligence."⁴⁹ The probate court, known as the surrogate court in New York, voided the contracts between the estate and Marlborough Gallery based on the executors' conflicts of interest in negotiating the deals while they were on the gallery's payroll, and some 658 paintings were returned to the estate.⁵⁰ The court also ordered the defendants to pay \$9.2 million in damages.⁵¹ Appeals followed, but in November 1977, the seven judges of the New York State Court of Appeals – New York's highest court – unanimously upheld the surrogate court decision, noting that the executors' conduct had been "manifestly wrong and indeed shocking."⁵²

After the trial, Kate Rothko restructured the Rothko foundation.⁵³ And, in the five decades since Rothko's death, she and her brother have served as custodians of their father's legacy by their stewardship of his paintings, and their scholarship involving his art.⁵⁴ According to Christopher Rothko, his father referred to his paintings as "dramas," mostly for the way that the viewer interacts with the pictures.⁵⁵ As museums likely mount retrospectives of Rothko's work over the next couple of years to commemorate the 50th anniversary of the artist's death, it will be difficult to separate the drama expressed by the paintings from the courtroom drama linked with Rothko's name.

The author is employed by the United States Department of Justice as an Assistant United States Trustee in the Riverside Office of the United States Trustee Program (USTP). The mission of the USTP is to protect the integrity of the nation's bankruptcy system and laws. The views expressed in the article belong solely to the author, and do not represent in any way the views of the United States Trustee, the USTP, or the United States Department of Justice.



36 *Artdaily.org*, April 27, 2018, <http://artdaily.com/news/15418/Art-Law—The Guide for Collectors—Investors—Dealers—#WuNcOkxFxHU>.

37 *Seldes*, p. 4.

38 See generally, https://en.wikipedia.org/wiki/Rothko_case.

39 *Seldes*, p. 72.

40 *Id.*; see also *Baal-Teshuva*, p. 83.

41 *Seldes*, pp. 72, 115.

42 *Baal-Teshuva*, p. 86.

43 *Seldes*, p. 125.

44 Cooke, "The art cheats who betrayed my father," *Guardian*, September 13, 2008.

45 *Id.*

46 Patricia Burstein and Harriet Shapiro, "The Rothko Case: a Suicide, \$32 Million in Paintings and An Angry Daughter," *People*, December 12, 1977, retrieved at <https://people.com/archive/the-rothko-case-a-suicide-32-million-in-paintings-and-an-angry-daughter-vol-8-no-24/>.

47 *Id.*

48 *Seldes*, p. 328.

49 Burstein and Shapiro, "The Rothko Case: a Suicide, \$32 Million in Paintings and An Angry Daughter," *People*, December 12, 1977.

50 *Baal-Teshuva*, p. 86.

51 Burstein and Shapiro, "The Rothko Case: a Suicide, \$32 Million in Paintings and An Angry Daughter," *People*, December 12, 1977.

52 *Seldes*, p. 338.

53 *Baal-Teshuva*, p. 86.

54 In particular, Christopher Rothko, a psychologist by training, has edited and published his father's writings, and written numerous essays concerning how to understand his father's paintings, including the insightful *Mark Rothko: From the Inside Out* (Yale University Press 2015).

55 *Rothko: The Color Field Paintings*, p. 7.



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STOLEN TREASURES: AN INQUIRY INTO THE REPATRIATION OF CULTURAL PROPERTY

by Hollie Che

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict defined cultural property as “movable or immovable property of great importance to the cultural heritage of every people.” Monuments, arts, and artifacts are crucial to the study of human history and help us understand the achievements of human societies. As a result of their intrinsic value, culturally significant objects have been looted and trafficked throughout history. In the late 19th century, private collectors and museums competed to acquire artifacts and human remains seized from Native American tribal lands. More recently, the prolonged conflict in the Middle East has created a booming international market for looted antiquities from war-torn countries such as Iraq and Syria.

Hobby Lobby, a popular arts and crafts retailer, recently became embroiled in an international smuggling scandal involving Iraqi artifacts. On July 5, 2017, the U.S. government brought a civil in rem action alleging that Hobby Lobby smuggled thousands of artifacts likely stolen from Iraqi archeological sites.¹ Owned by evangelical Christians known for their interest in the biblical Middle East, Hobby Lobby began acquiring biblical manuscripts and antiquities in the late 2000s.² In 2010, Hobby Lobby purchased over 3,000 ancient Mesopotamian artifacts, including clay cuneiform tablets, clay bullae, and cylinder seals from UAE and Israeli dealers.³ Even though the company’s own expert on cultural property law warned that the artifacts may have been looted from Iraqi archaeological sites, Hobby Lobby worked with a UAE-based supplier to ship the artifacts to the United States in numerous small packages.⁴ Some of the packages were detained by the U.S. Customs and Border Protection.⁵ All of the detained packages lacked proper customs documentation and displayed shipping labels that falsely identified clay cuneiform tablets as “ceramic tiles” or “clay tiles.”⁶ Hobby Lobby settled the civil action by agreeing to forfeit the smuggled artifacts and pay \$3 million to the Department of Justice.⁷

Members of the archeological community have criticized the government’s decision to file a civil action instead of pursuing tougher criminal penalties against the Hobby Lobby executives responsible for the purchase of the artifacts. When an artifact is illegally exported from its country of origin and brought to the United States, the government can seek criminal penalties under the National Stolen Property Act or under general customs provisions such as 18 U.S.C. §§ 542 and 545. In the Hobby Lobby case, the government likely decided to file a civil forfeiture action under 19 U.S.C. § 1595a(c)(1)(A), due to the difficulties involved in determining the true provenance of the thousands of clay tablets, bullae, and seals.⁸ Although the smuggled artifacts date back to the dawn of writing and include objects from the “lost city” of Irisagrig, they are regarded as relatively ordinary and inexpensive pieces in the antiquities market.⁹ The artifacts’ commonplace nature makes it almost impossible for the government to accurately trace their provenance and establish their illicit status. The government is more likely to devote its limited resources towards prosecuting cases that involve more valuable and distinctive artifacts. For instance, in *United States v. Schultz*, the government sought criminal penalties against a prominent New York arts dealer who sold several pieces of high-priced Egyptian antiquities including a black vase and a stone head said to depict the Pharaoh Amenhotep III.¹⁰ Due to a likely strategic decision by the government to avoid a protracted and costly litigation of uncertain outcome, Hobby Lobby executives managed to avoid the possibility of jail time. Nevertheless, the civil settlement is still a win for those invested in the protection of cultural property since it guaranteed a speedy repatriation of the artifacts to Iraq.

Repatriation, or restoring a piece of artwork or artifact to its point of origin, is a complicated and unpleasant pro-

1 Complaint at 1, *United States of America v. Approximately Four Hundred Fifty Ancient Cuneiform Tablets; and Approximately Three Thousand Ancient Clay Bullae*, No. CV17- 3980 (E.D.N.Y. 2017).

2 *Id.* at 8.

3 *Id.* at 8-11.

4 *Id.*

5 *Id.* at 15-18.

6 *Id.*

7 “United States Files Civil Action To Forfeit Thousands Of Ancient

Iraqi Artifacts Imported By Hobby Lobby.” The United States Department of Justice, 5 July 2017, www.justice.gov/usao-edny/pr/united-states-files-civil-action-forfeit-thousands-ancient-iraqi-artifacts-imported.

8 Complaint at 3, *United States of America v. Approximately Four Hundred Fifty Ancient Cuneiform Tablets; and Approximately Three Thousand Ancient Clay Bullae*, No. CV17- 3980 (E.D.N.Y. 2017).

9 McGlone, Peggy. “Hobby Lobby Forced to Return Artifacts to Iraq.” *Chicago Tribune*, 3 May 2018, www.chicagotribune.com/news/nationworld/ct-hobby-lobby-artifacts-iraq-20180502-story.html.

10 *United States v. Schultz*, 333 F. 3d 393, 395-97(2d Cir. 2003).

cess that often takes years, if not decades, to complete.¹¹ The J. Paul Getty museum repatriated a 2,400-year-old statue of Aphrodite, the Greek goddess of love, to Italy in 2010, almost fifteen years after Italian officials first began negotiating for the statute's return in 1996.¹² Domestically, the repatriation of Native American objects often involves an equally arduous process. In recent years, museums across the country have initiated the process of repatriating Native American artifacts and grave items in an effort to comply with the Native American Graves Protection and Repatriation Act (NAGPRA). NAGPRA was passed in 1990 to address long-standing claims by federally recognized tribes for the return of human remains and cultural objects unlawfully obtained from Native American homelands, the act requires federally funded institutes to identify and return Native American objects.¹³ In practice, few artifacts and grave items have been successfully returned to the tribes.¹⁴ The Riverside Metropolitan Museum (RMM) houses a large collection of Native American artifacts donated by the widow of Cornelius

Earle Rumsey.¹⁵ In 1995, RMM began the process of identifying human remains and cultural objects unlawfully obtained from Native American tribes.¹⁶ Museum staff have identified objects from eleven tribal or cultural organizations for repatriation.¹⁷ As of June 13, 2018, the repatriation process has been completed for only two of the tribes/cultural organizations.¹⁸

Countless precious artifacts with questionable provenance are kept in the guarded hands of private collectors, arts dealers, and museums curators from around the world. The repatriation of those objects is crucial for our society because when an artifact is removed from its point of origin, it becomes separated from its historical context and loses a part of its larger meaning. As developing countries and Native American tribes begin to gain more economic and political capital, we should expect to see a rise in the number of repatriation claims. Moreover, the strong public outcry that followed the Hobby Lobby scandal demonstrates the public's increasing awareness and support for the preservation of cultural property. Ideally, this heightened awareness and support will prompt private collectors such as Hobby Lobby to exercise more caution in verifying the history of their purchases and motivate museums to take a more active role in identifying and repatriating objects without a verifiable provenance.

Hollie Che is a 2L at UCLA School of Law and she interned at the Riverside Office of the United States Trustee Program (USTP) during the summer of 2018.



11 Franzen, Carl. "Ill-Gotten Gains: How Many Museums Have Stolen Objects in Their Collections?" *The Verge*, 13 May 2013, www.theverge.com/2013/5/13/4326306/museum-artifacts-looted-repatriation.

12 "The Goddess Goes Home." *Smithsonian Institution*, 1 November 2011, www.smithsonianmag.com/history/the-goddess-goes-home-107810041/.

13 Fennell, Anne-Marie Lasowski. "Native American Graves Protection And Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act." U.S. Government Accountability Office, 28 July 2010, www.gao.gov/assets/310/307856.pdf.

14 *Id.*

15 Summons, Trevor. "Visiting the Riverside Metropolitan Museum." *Daily Bulletin*, 19 April 2014, www.dailybulletin.com/2014/04/19/visiting-the-riverside-metropolitan-museum/.

16 Metropolitan Museum Board, Metropolitan Museum Board Meeting: Deaccession of American Indian Collection Items from Six Tribal or Cultural Organizations, 13 July 2018.

17 *Id.*

18 Ione Band of Miwok Indians of California (repatriated on 4/23/2010) and Mesa Verde National Park (repatriated on 6/13/2007).

MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective September 30, 2018.

Mirwais Mohammad Asef – Solo Practitioner, Corona

Lorelee C. Ishida – Inland Counties Legal Services, San Bernardino

Cindy L. Lomeli – Solo Practitioner, Yucaipa

Anne C. Lynch – Sohagi Law Group, Los Angeles

Leila Parviz – Immigration Law Offices of Hadley Bajramovic, Riverside

Adam Cameron Reed – Law Office of Tecla M. Lunak, Rancho Mirage

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PERSONAL PHOTOS: PRIVATE OR FOR PUBLIC AUCTION?

by Steven Lockhart

Factors of Fair Use

A family is on vacation and after taking several photos on their trip, they decide to post their photos onto Instagram. Over the next few weeks a major news article comes out with some of the family's photos on the main cover with the caption "the multimillion-dollar photo." The photo is a personal photo that one of the family members would not have wanted the world to see. Frantically, the family calls the magazine publisher, only to have the publisher's legal team tell them that the photo is now legally their artwork. The upset family member comes to a local Riverside law firm and asks whether what the magazine publisher did was truly legal or not. Unsurprisingly, the attorney answers by simply stating that it depends. It depends on factors defined under the fair use doctrine.²

Fair use is a doctrine that outlines non-exclusive factors that are used to determine whether a copyright violation has occurred.³ Case law has further defined these factors as they relate to appropriation artwork. These additional factors will be discussed in the following paragraphs, along with examples from various court cases including a few illustrative photo examples. If these four factors are met, then one's personal Instagram photos may be turned into another's work of art legally.

1. Was the use of the taken artwork transformative?

Taken Instagram photos are considered transformative if the new work "adds something new, with a further purpose of different character, altering the first with new expression, meaning, or message."⁴ The prime example of someone taking several Instagram photos and then transforming them both legally and illegally as his own artistic work would be the artist, Richard Prince. Mr. Prince is a New York-based artist that in 2014 held an art installation called "New Portraits"⁵ where he showcased several artistic



Prince's "fair use" artwork on the left, comments by original Instagram photo owner on the right.

Instagram photos. Mr. Prince added comments to several photos from other Instagram accounts. One of those photos was taken from Donald Graham's Instagram account entitled *Rastafarian Smoking a Joint*.⁶ Mr. Graham filed a cease-and-desist order against Mr. Prince's use of it in his artwork named *Untitled*⁷ in 2015.⁸ The district court hearing Mr. Graham's case held that Mr. Prince could not use the fair use defense for the copyright infringement. The court reasoned that when weighing the statutory fair use factors alleged against Mr. Prince's use of Mr. Graham's photo that "because Prince has reproduced Graham's portrait without significant aesthetic alterations, *Untitled* is a work made with a distinctly commercial purpose."



1 Giuliaia Alborghetti, Richard Prince's New Portraits. Nssmag.com, <https://www.nssmag.com/en/art-design/7218/richard-prince-s-new-portraits/image:62801> (Last visited June 27, 2018). One of three photos in slideshow.

2 17 U.S.C.S. § 107 (LexisNexis, Lexis Advance through PL 115-182, approved 6/6/18).

3 *Id.*

4 *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013).

5 Andrew Chow, Copyright Case Over Richard Prince Instagram Show to Go Forward. *NyTimes.com*, <https://www.nytimes.com/2017/07/20/arts/design/richard-prince-instagram-copyright-lawsuit.html> (last visited June 25, 2018).

6 *Graham v. Prince*, 265 F. Supp. 3d 366, 390 (S.D.N.Y. 2017).

7 *Id.*

8 *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013).

9 Michael L. Nepple, United States: Update: Court Finds Transformative Nature Of Alleged Infringing Work Can't Be Decided By Side-By-Side Comparison. *Mondaq.com*, <http://www.mondaq.com/unitedstates/x/621522/Copyright/Update+Court+Fin ds+Transformative+Nature+Of+Alleged+Infringing+Work+Cant+Be +Decided+By+SideBySide+Comparison> (Last visited June 27, 2018).



“Cariou’s original photo on the left, and Prince’s ‘fair use’ artwork on the right.” ¹²

This isn’t the first time that Mr. Prince has faced a lawsuit as the result of his artwork. In 2013, a photographer named Patrick Cariou brought a lawsuit against Mr. Prince for his use of 30 photos of Rastafarians and Jamaican landscape in paintings that were marketed and sold by the gallery and owner.¹⁰ Initially, the district court granted the photographer’s motion for summary judgment and entered a permanent injunction. Mr. Prince then appealed the judgment. The United States Court of Appeals for the Second Circuit ultimately held that 25 of the 30 photos were transformative in nature and did not infringe on Mr. Cariou’s copyrights.¹¹ These two cases against Mr. Prince illustrate where the line may be in determining what is needed for a taken Instagram photo to satisfy the transformative factor.

2. Was the use of the appropriated artwork taken from the heart of the artwork?

Another’s work, such as an Instagram photo, may be taken so long as the new work does not take from the “heart”¹³ of the previous work. For example, Warren Publishing Company, a magazine publisher, brought a copyright suit against book producer David Spurlock in 2009. Mr. Spurlock had used several magazine covers for use in a biography about an artist named Basil Gogos.¹⁴



Thumbnail of link to Amazon.com, of Famous Monster Movie Art of Basil Gogos.¹⁸

¹⁰ *Id.*

¹¹ *Id.*

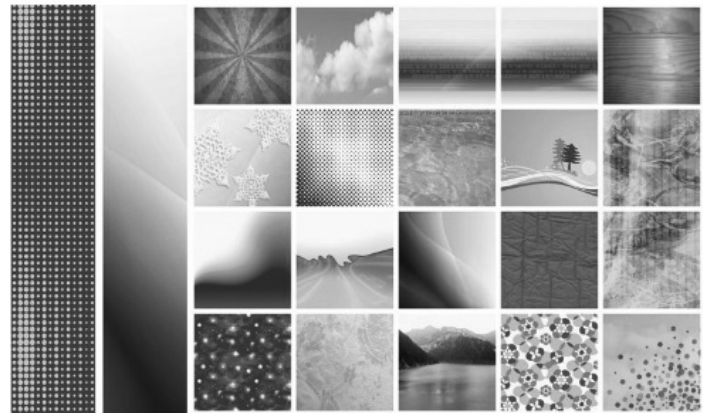
¹² Michael Zhang, Andy Warhol Estate Sues Photog Over Prince Photo Copyright Fight. Petapixel.com, <https://petapixel.com/2017/04/15/andy-warhol-estate-sues-photog-prince-photo-copyright-fight/> (Last visited June 27, 2018). Caption included.

¹³ *Warren Publ’g Co. v. Spurlock*, 645 F. Supp. 2d 402, 423 (E.D. Pa. 2009).

¹⁴ *Id.* at 417.

Warren Publishing Company argued that Mr. Spurlock’s use of the magazine covers were at “the heart” of the magazine’s content.¹⁵ To determine whether the use of the magazine covers were taken from the heart of the original works, the court weighed the quantity and value of the materials used and their reasonable relation to the purpose of copying.¹⁶ The court found that the magazine covers were not at the heart of the original work, ultimately holding that Mr. Spurlock’s use of the magazine covers constituted fair use under copyright law.¹⁷ Because Mr. Spurlock’s use of the magazine covers in a biography did not take the heart of the magazine’s content he was not held to have violated any copyright laws.

3. Was the use of the taken artwork derivative of the copyright owners revenue?



Picture example of a thumbnails of images.²³

If the taken work affects the original owner’s revenue negatively, then the taken work will likely be found to be a violation of fair use copyright laws.¹⁹ For example, Leslie Kelly, a photographer, brought a suit against Arriba Soft Corporation’s search engine for copyright infringement. The photographer argued that the search engines conversion of his work to thumbnails violated copyright law.²⁰ The California district court judge held that thumbnails were considered fair use because they did not affect the amount of revenue received by the photographer.²¹ The issue surrounding the thumbnails was appealed with the original judgment being affirmed.²² Therefore, because the search engines use of thumbnails did not affect the revenue of the

¹⁵ *Id.* at 424.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Horropeedia, Basil Gogos – artist and illustrator. Horrorpedia.com, <https://horropeedia.com/2013/06/21/basil-gogos-artist-illustrator-horror/> (Last visited June 27, 2018). Thumbnail of link to Amazon.com, of Famous Monster Movie Art of Basil Gogos.

¹⁹ *Universal City Studios v. Sony Corp.*, 464 U.S. 417 (1984).

²⁰ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003).

²¹ *Id.* at 822.

²² *Id.*

photographer's photo, the search engine's company was protected under fair use laws.²³

4. Was the use of the taken artwork used for a commercial purposes?



27

Taking another's work for commercial use will affect whether there has been a fair use violation. For example, Los Angeles News Service filed a lawsuit against KCAL-TV Channel 9 for commercial²⁴ use of a video clip they had rebroadcasted. KCAL-TV Channel 9 rebroadcasted 30 seconds of a 4-minute clip of Reginald Denny being beaten during the 1992 riots following the Rodney King verdict.²⁵ The court explained in

its holding that because KCAL's use was commercial taking from the heart of the taken video that a fair use defense could

not be considered reasonable.²⁶ Because the taken work was commercial in use taking from the main parts of the video, KCAL was not protected under fair use copyright laws.

Conclusion

In addition to applying the fair use doctrine's statutory non-exclusive factors, four additional case law factors may be used to further determine whether one may take another's artwork, such as Instagram photos, by converting them to one's personal work legally. Therefore, the next time one takes family photos, it may be worth taking that extra second to think whether one would want to share that photo on Instagram, because it could end up being blown up as "the multimillion-dollar photo" for the world to see, whether one likes it or not.

Steven Lockhart was a Summer Extern for 2018 with Judge Angel Bermudez at the Southwest Justice Center. He hails from Lake Elsinore and is a rising 3L at Brigham Young University's J. Reuben Clark Law School. He plans on working with his brother at Lockhart Law Firm, APC located in Murrieta.



23 Adam Garson, Thumbnail Images – Infringement or Fair Use?, Garson-law.com, <https://garson-law.com/thumbnail-images-infringement-or-fair-use/> (Last visited June 27, 2018). Picture example of a thumbnails of images.

24 *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).

25 *Id.* at 1120.

26 *Id.* at 1123.

27 The Daily Beast, L.A. Riots' Key Figures: Rodney King, Reginald Denny & More (Photos), [thedailybeast.com](https://www.thedailybeast.com/la-riots-key-figures-rodney-king-reginald-denny-and-more-photos), <https://www.thedailybeast.com/la-riots-key-figures-rodney-king-reginald-denny-and-more-photos> (Last visited June 27, 2018). Photo by Alan Levenson, TIME LIFE PICTURES / GETTY IMAGES, picture of the beating of Reginald Denny.

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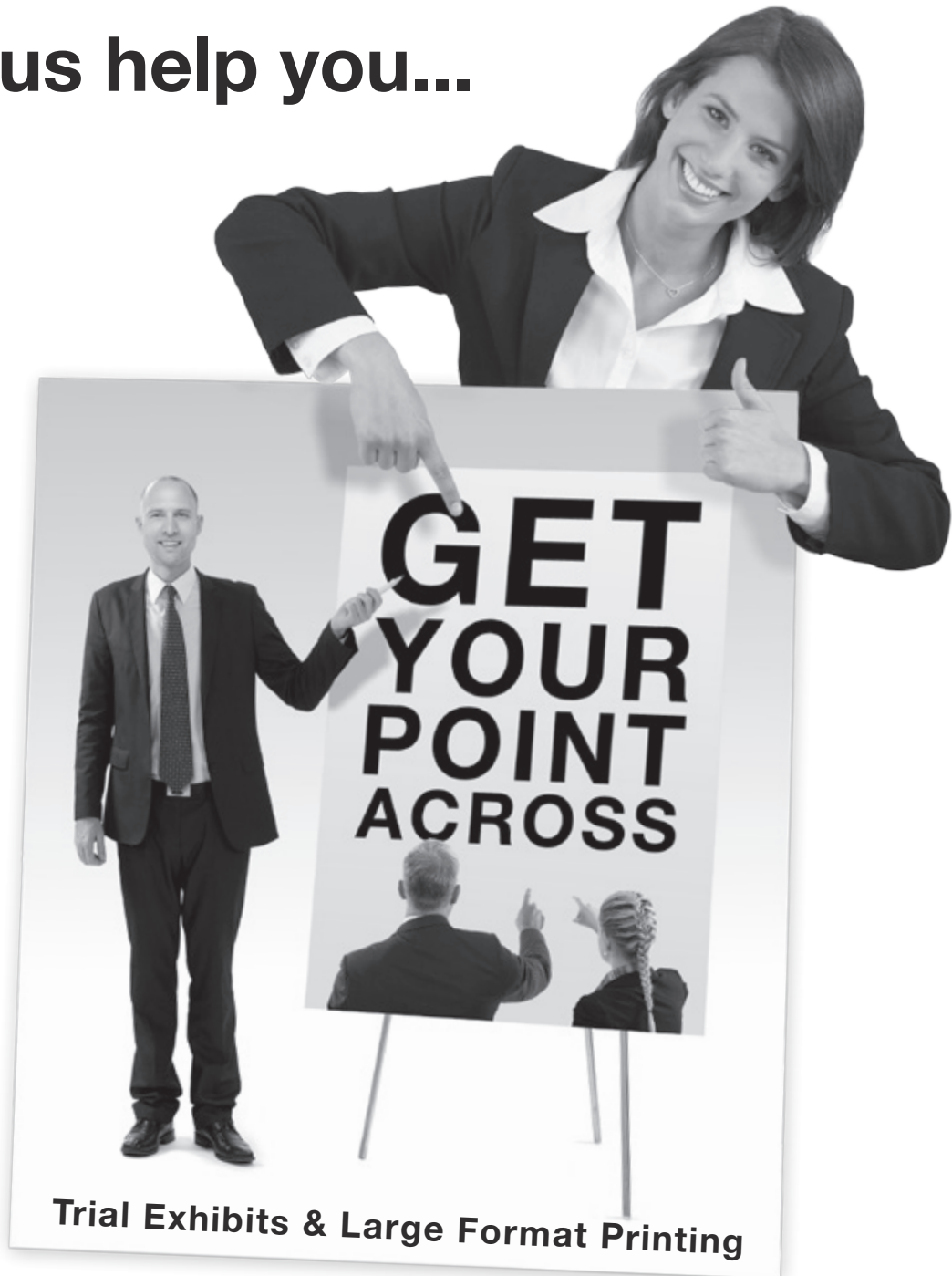
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COPYRIGHT AND COUNSELING THE ARTIST

by Gregory T. Meath

Artists are wonderful clients, I enjoy their creative energy and independent spirits, and I wonder at their creativity and skills. Their livelihood is their art, which they produce through personal investment of their time, money, effort, and even their hearts and souls. Legally, beyond the simple sale of goods (physical embodiments of their work), their works represent what the law refers to as intellectual property, specifically copyright. Any lawyer who works with artists in just about any field of legal practice, would be well-served to understand a few basics about the nature of the legal protections copyright provides and be able to have a basic conversation about these with an artist, the same way you might with a client in any other business.

Protecting the Artist

The foundation of copyright law is that it protects the artist's work against use by others without permission, and thereby allows the artist to get paid for their work. Copyright gives the visual artist the exclusive right to reproduce or copy their work, publish the work in a book, magazine or newspaper, and to distribute the work (for example, putting the artwork on the Internet.) Any person, other than the artist, who wishes to undertake any of these will need the permission of the artist.

A threshold issue is who owns the copyright. The artist is not always the owner. Copyright in works created by the artist on his or her own behalf, or as an independent contractor, are owned by the artist. But, if the artist created the artwork as an employee, such works are referred to as "works made for hire" and the work actually belongs to the employer and not the artist (unless an agreement states otherwise).

To Register, or Not to Register

Next is understanding a few basic things about copyright registration. The artist does not need to register the work with the U.S. Copyright Office in order to have the copyright to an artwork. Rather, a work is protected by copyright the moment the work is fixed in a tangible medium of expression, so a painting is protected the moment it's painted, and a photograph is protected the moment it's taken.

Nevertheless, there are some significant benefits to registering the work. It puts the public on notice that the work is protected and provides proof of the artist's ownership. A copyright holder with a timely registration

may be eligible for statutory damages of up to \$150,000 per infringement (for willful infringements), plus attorneys' fees. Otherwise, damages may be limited to actual damages for infringement, which can be nominal and/or difficult to prove. Significantly, without registration, a copyright holder cannot bring a lawsuit for copyright infringement in the federal courts, whose jurisdiction is based on having a valid federal copyright registration. The typical filing fee for a copyright registration is either \$35 or \$55, depending upon the circumstances is a small price to pay for the protection granted.

This does not mean that all artists should register every single work of art they create. In fact, few artists are truly at risk. The artists who must be most concerned about infringement are those whose work has some mass or commercial appeal and are easy to copy — particularly onto other mediums such as T-shirts, coffee mugs, shoes, bags, skateboards, or similar types of mass-produced merchandise that have the potential to be salable across wide ranges of the population. Having a large online following may be a significant factor, too. Also vulnerable is art with creatures, characters or settings that could conceivably be "borrowed" and replicated in the work of other artists. If the artist has a respectable fan base and makes art with any of these characteristics or components, registering the copyrights is generally recommended.

Although it is no longer legally required, all artists should put a copyright notice on their works, for example: © Name Surname 2018. (A good place for this is on the back of an artwork). This will dilute any defense of innocent infringement.

Limits to Copyright Protection

Copyrights do not last forever, and they do not die when the artist dies. With or without registration, a work created after January 1, 1978, gets copyright protection for the life of the author, plus 70 years. Subject to this term, copyrights are considered intangible property that can be licensed or sold, and can be devised in the artist's last will and testament, or pursuant to a trust. Copyrights are considered assets in bankruptcy proceedings.

However, there are some significant limits to the exclusive rights afforded to the artist, of which they should be made aware. These are *de minimis* copying, and the defense of fair use. *De minimis* is a shortened version of the phrase "*de minimis non curat lex*," which

translated means “the law does not concern itself with trifles.” The doctrine refers to a use of a copyrighted work that might otherwise be deemed to be an infringement, except that in the given instance the amount of use is so small that the courts hold that such use does not even reach the level of being an infringement.

By far the most common defense to copyright infringement is fair use, which comprises the right to use a work, under certain conditions, without permission of the copyright owner. It’s intended to prevent an unyielding application of copyright law that would throttle the very creativity the law is designed to foster. It allows one to use and build upon prior works in a manner that does not unfairly divest prior copyright owners of the right to control and benefit from their works. In its most general sense, a fair use is any copying of copyrighted material done for limited and “transformative” purposes, which include, but are not limited to criticism, news reporting, teaching, scholarship, research, and creation of parodies of a work.

Moral Rights

In addition to rights that deal strictly with copying and distribution of a work, federal and California laws give visual artists some of the rights that are similar to the “*droit moral*” or “moral rights” recognized for all artists in Europe. The federal law is called the Visual Artists Rights Act, which is codified as part of the U.S. Copyright Act, 17 USC Sec. 106A. In California, it’s the California Artists Rights Act, Cal. Civil Code Sec. 987. These statutes grant significant rights to authors of visual works (paintings, drawings, prints, sculptures, and photographs, existing in a single copy or a limited edition of 200 signed and numbered copies or fewer): First is the right of “attribution” of the work — the artists right to be named as the creator of the work, or to have their name removed from altered or damaged works. The second is the right to “integrity” of the work — the artist’s rights to prevent the work from being intentionally modified, distorted, mutilated, or damaged in a manner, which would be prejudicial to the artist’s honor or reputation, and, for works of “recognized stature,” to prevent the work from being destroyed.

There are some exceptions to moral rights, including for murals and other works that cannot be removed from structures without damage, and modifications caused by framing or restoration are exempt unless done with gross negligence. Under federal law, moral rights last for the life of the artist. Under California law, moral rights last for 50 years following the death of the artist. Under both statutes, these rights cannot be assigned away, but they can be waived. Unfortunately, it is becoming common

practice to include waiver of moral rights in contracts which commission works of fine art, many times without the artist really understanding what it is they are waiving.

Rights of Art Purchasers

Finally, while many artists make their living selling their original artworks, they, and their patrons are unaware as to whether any copyrights are transferred when a work of art is purchased. Nevertheless, questions surrounding this issue are not uncommon. Purchasers often want to reproduce the artworks they own, perhaps to feature their painting on greeting cards, or use a photo of the work on their webpage, or on the cover of a brochure for their business, or on prints, posters, t-shirts, etc. But, when a person buys an original work of art, they own the physical object to have and enjoy, but in most circumstances, they do not own any copyright to it, and will need the permission of the artist to reproduce it. The copyright remains with the artist unless: (1) The artist specifically signed over their copyright to the buyer; (2) The work was created as work for hire, or (3) The copyright has expired. As with all copyrights, there are exceptions for “fair use” purposes. For example, the owner of the work can use a picture of the artwork in order to offer it for sale, or if they lend or sell the work to a gallery, museum, or auction house. Those entities can include a picture in their catalog or other publications related to selling or showing the work.

This article can only hope to impart a cursory understanding of the basics of the copyrights of artists; the term of protection, benefits of registration, limitations such as de minimis copying and the fair use doctrine, the artist’s moral rights; and understanding what rights a purchaser of art acquires, and which the artist retains. Of course, any significant matter involving copyrights should be referred to an attorney with experience in the field. Still, this cursory understanding can be of great assistance in not only understanding the nature of the artist’s business, but in helping artists themselves become aware of laws that protect their work, their income, and their artistic reputation.

Gregory T. Meath J.D., LL.M is an Adjunct Professor of Law at Pacific McGeorge School of Law in Sacramento, where he teaches Computer & Internet Law, and at Humphreys College Laurence Drivon School of Law in Stockton, where he teaches Intellectual Property, Business Associations, and International Law. His law practice focuses on intellectual property, winery law, and domestic and international business transactions.





28th ANNUAL RED MASS

Tuesday, October 2, 2018, at 6:15 p.m.

Saint Francis de Sales Catholic Church
4268 Lime Street, Riverside, California 92501

The entire legal community and persons of all faiths are invited to attend the 28th Annual Red Mass on Tuesday, October 2, 2018, at 6:15 p.m. The mass will be held at Saint Francis de Sales Catholic Church, which is located at 4268 Lime Street, in downtown Riverside, across from the Court of Appeal. We are pleased to announce that the chief celebrant will be The Most Reverend Gerald Barnes, who serves as the bishop of the Diocese of San Bernardino. A dinner reception in the parish hall hosted by the Red Mass Steering Committee will follow the mass.

The Red Mass is a religious celebration in which members of the legal community of all faiths invoke God's blessing and guidance in the administration of justice. All who are involved in the judicial system, including lawyers, judges, legal assistants, court personnel, court reporters, court security officers, and peace officers, are encouraged to attend the Red Mass.

**Brian C. Unitt will be presented with the
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and**

**Honorable Ingrid A. Uhler will be
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At the complimentary dinner following the mass, the Red Mass Steering Committee will present Brian C. Unitt with the Saint Thomas More Award and Honorable Ingrid A. Uhler with the Saint Mother Teresa of Calcutta Award. The Saint Thomas More Award is given to a lawyer or judge who gives hope to those in need, is kind and generous in spirit, and is an overall exemplary human being. The Saint Mother Teresa of Calcutta Award is given to anyone with those attributes who is a member of the legal community or who has made contributions to the legal community. For further information about this event, please contact Jacqueline Carey-Wilson at (909) 387-4334 or Mitchell Norton at (909) 387-5444.



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Superior Court of California, County of Riverside

The Riverside Superior Court is developing a list of volunteer attorneys who would be willing to occasionally assist in cases involving the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. Section 3901-4043. While this list will be used in the future, there is at least one currently pending civil case with a defendant in need of representation under the SCRA, so the Court is hoping to generate a list of volunteers as soon as possible.

If you are willing to provide legal assistance under the Servicemembers Civil Relief Act, please let Charlene Nelson at the RCBA know so this information can be relayed to the Court.





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