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Christine Steiner
Withers Bergman LLP

Bee-Seon Kim
Withers Bergman LLP

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Art Law: Looking Back, Looking Forward

*By Christine Steiner and Bee-Seon Keum**

I. INTRODUCTION

Consider *The Thomas Crown Affair*, the Hollywood hit about a clever attempt by burglars to break into the Metropolitan Museum of Art in New York City. The movie has all the drama of *Art Law* writ large and, indeed, it seems that the art market is now pure entertainment or spectator sport. Art law has grown into a recognized area of law—taught in many law schools and practiced by a select group of visual arts lawyers who represent artists, collectors, auction houses, museums, galleries, and other players in the "art world."

It should be noted that *Art Law* is a misnomer; it is not a field unto itself, but rather it is a multi-disciplinary practice requiring extensive knowledge of diverse substantive areas of the law—contracts, torts, real property, tax, trusts and estates, criminal law, intellectual property, commercial law, international business transactions, civil procedure, and more—combined with experience in the business practices of the arcane fine arts industry.

This young field is changing rapidly. Even late in the last century, most business was done on a handshake. The few players were known to one another in the art centers of New York, London, or Paris, the transactions were smaller, the stakes were lower, and lawsuits were relatively rare. As we discuss below, the handshake norms of these cozy circles proved outmoded as sales became global, the sophisticated collector base expanded, museums became bigger in size and number, commercial galleries proliferated, and auction houses hammered down record sales.

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* Christine Steiner is of counsel with Withers Bergman LLP, where she represents artists and their estates, collectors, galleries, art advisors, and museums. She previously served as assistant general counsel for Smithsonian Institution and as general counsel for The J. Paul Getty Trust, including the Getty Museum. She teaches Art Law at Loyola Law School. Bee-Seon Keum is an associate with Withers Bergman LLP. Her practice focuses on tax matters and transactions, including purchases, loans, consignments, Section 1031 like-kind exchanges, and charitable donations of art. The authors express their gratitude to Diana Wierbicki, Global Head of Art Law at Withers Bergman LLP, for her guidance in this article.

The legal issues in this area can be vexing, with cross-jurisdictional, multi-party opaque transactions challenging every aspect of a practitioner's creativity and knowledge. The authors are privileged to practice in a firm which built its art law practice with Ralph Lerner and Judith Bresler, authors of *Art Law: A Guide for Collectors, Investors, Dealers and Artists*, the pioneering work in the field, first published in 1989.[1] The work, now in its fourth edition, remains the last word on all aspects of the practice of art law, including gallery sales, private sales, artist-dealer relations, auctions, authenticity, international issues, impairments of title, First Amendment, copyright, moral rights of artists, tax and estate planning for collectors and artists, museum issues, and a host of other legal considerations. The treatise also includes art-related legislation and model agreements.

This field garners great attention from the media and the public, largely because the high-profile cases are intriguing—stolen art, fakes and forgeries, wartime crimes, antitrust conspiracies, archeological riches—indeed the compelling stuff of blockbuster movies. Even yeoman legal issues such as contracts, tax, and copyright are worthy of attention because, quite simply, art matters. This Article will look back to the origins of art law, trace the legislative and regulatory developments of the evolving field, and look forward to the expected maturation of the practice.

II. ORIGINS OF ART LAW AND ITS CURRENT STATE

Much of the body of law that governs commercial transactions developed out of civil litigation involving disputes between artists, dealers, collectors, and other stakeholders in the art industry. As noted above, and as seen through case law, a wide range of preexisting disciplines, including commercial law, contract law, and tort law have provided the foundations for art law related to commercial transactions.

A. The Uniform Commercial Code

The Uniform Commercial Code ("UCC") is the most important collection of statutes that applies to purchases and sales of art.[2] Article 2 of the UCC, which deals with the sale of goods, is the principal source for the rules regarding authenticity and title, two of the most important issues from both a buyer and

1 *See generally* RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, & ARTISTS (4th ed. 2012).

2 *See id.* at 87–88.

a seller's perspective. To date, forty-nine states have adopted Article 2 of the UCC.[3]

Title and authenticity are particular concerns in an art sale because infirmities in either can have detrimental consequences for the marketability of the artwork. The buyer must be assured that the seller is the owner of the work and has the ability to transfer good and marketable title to the work, free and clear of all claims; the buyer must have free and unencumbered right of possession and enjoyment of the work. The buyer must also be assured that the work is authentic and that it is what the seller represents—typically that it is by a particular artist and/or from a particular country of origin, period, or culture. The seller, on the other hand, will want to be very careful about the representations and warranties he or she is making regarding the work so as not to be vulnerable to a breach of warranty claim. Fortunately, Article 2 of the UCC provides the framework for the rules governing authenticity and title transfer.

1. Authenticity

Authenticity is governed by the warranty provisions of Article 2, consisting of the express warranty, the implied warranty of merchantability, and the implied warranty of fitness for a particular purpose.[4] Express warranties arise from affirmative statements made by a seller regarding the goods. UCC Section 2-313 provides that:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be

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3 *See Uniform Commercial Code Locator*, CORNELL L. SCH., https://www.law.cornell.edu/uniform/ucc#a2 [http://perma.cc/7UQF-5SRT]. The State of Louisiana has adopted several Articles of the UCC, but not Article 2. *See* LA. REV. STAT. ANN. §§ 10:1-101 to 10:9-710 (2016).

4 *See* LERNER & BRESLER, *supra* note 1, at 88–101.

> merely the seller's opinion or commendation of the goods does not create a warranty.[5]

Thus, a seller's affirmation of fact or promise that a work is by a particular artist, or the seller's description of the work as being by a particular artist will create an express warranty if such affirmation or description by the seller becomes part of the basis of the bargain. As can be seen in *Weber v. Peck*, an express warranty by a seller's description of the work can include a seller's statements about the provenance of a work if the buyer relies on such statements.[6]

In *Weber*, the plaintiff, Francis Weber, entered into a contract with the defendant, an art dealer, to buy a Jacob van Ruisdael painting for $388,000 plus 5% of the proceeds from the resale of the painting.[7] In the contract, the art dealer agreed to provide original authenticating letters from Ruisdael experts. The parties also signed a bill of sale in which the art dealer warranted that "the above described painting is authentic and as described above."[8] The applicable description of the painting included a reference to the painting's provenance. Although the art dealer did not provide the original authenticating letters at the closing, Weber proceeded with the purchase and subsequently moved forward with placing the painting for sale at an upcoming auction at Sotheby's. In the course of that auction consignment, Weber learned that Sotheby's was unable to verify the provenance of the painting and thus deleted value-enhancing references to seven previous owners and five publications. Weber sued the art dealer after the Sotheby's sale did not go well; a bid was made for $300,000 but payment was never received and Weber retained the work. Weber's suit alleged that, having sold at auction, the painting could not be placed again in the aftermarket and could not be sold for more than $300,000. Citing to New York's UCC 2-313(1)(b), the court ruled in favor of Weber on the breach of warranty issue, concluding that the art dealer had breached his warranty of the accuracy of the provenance.[9]

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5 U.C.C. § 2-313 (AM. LAW INST. & UNIF. LAW COMM'N 2016).

6 *See id.* at 90–91; Weber v. Peck, No. 97 Civ. 7625(JSM), 1999 WL 493383, at *3 (S.D.N.Y. July 9, 1999). The term "provenance" derives from the French *provenire*, meaning "to originate." The provenance of a work of art "is the historical record of its ownership" and is related to but distinguishable from authenticity, which for practical purposes means that a work is by a particular artist; provenance "can bolster claims of a work's authenticity," as records of an object's presence in a particular collection or in the artist's purported workshop can provide strong evidence of a work's authenticity. *Provenance Guide*, INT'L FOUND. ART RES., https://www.ifar.org/provenance_guide.php [http://perma.cc/NQ4A-7XUN].

7 *Weber*, 1999 WL 493383, at *1.

8 *Id.* at *1.

9 *Id.* at *4.

The court did not allow Weber to rescind the entire sale because Weber knew the authenticating letters were not provided at the closing and proceeded anyway with the subsequent Sotheby's sale. However, the court noted that Weber was not precluded from seeking damages for breach of the warranty related to the provenance or the alleged breach of warranty of the authentication letters. Such damages would depend on the extent to which the loss in value was caused by the breach.

In addition to express warranties, authenticity issues can also fall within the ambit of implied warranties, which are warranties that arise from the circumstances or conduct of the sale and not from the express statement of a seller.[10] The two types of implied warranties are that of merchantability and fitness for a particular purpose.[11] The application of implied warranties to artwork seems to be an imperfect fit, because the language of the implied warranties suggests that they are intended to cover the sale of fungible goods.[12] A buyer of a forgery may nevertheless seek to avail himself or herself of these remedies against the art merchant who sold the forgery.[13]

UCC Section 2-314(1) provides that, unless excluded or modified, "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."[14] The term "merchant" is defined as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."[15] In the art context, "merchant" includes commercial art galleries, auction houses, and art dealers, but does not include individual collectors who are not in the business of buying and selling art.[16] The relevant provisions of UCC Section 2-314(2) provide that, to be merchantable, goods must at least "pass without objection in the trade under the contract description," be "fit for the ordinary purposes for which such goods are used," and "conform to the promises or affirmations of fact made on the container or label if any."[17] Thus, arguably, a forgery sold by an art merchant would not pass muster under UCC Section 2-314(2) with regards to the

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10 *See* LERNER & BRESLER, *supra* note 1, at 98.

11 *Id.*

12 *Id.*

13 *Id.*

14 U.C.C. § 2-314(1) (AM. LAW INST. & UNIF. LAW COMM'N 2016). Although the UCC allows implied warranties to be disclaimed, disclaimers are valid only under proscribed circumstances. *See* U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 2016).

15 U.C.C. § 2-104(1) (AM. LAW INST. & UNIF. LAW COMM'N 2016).

16 LERNER & BRESLER, *supra* note 1, at 99.

17 U.C.C. § 2-314(2)(a), (c), (f) (AM. LAW INST. & UNIF. LAW COMM'N 2016).

description of the work specified in the agreement of sale or fitness for the ordinary use for such work.[18]

UCC Section 2-315 provides as follows:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.[19]

Thus, arguably, a forgery would fail to satisfy UCC Section 2-315 if the seller knew of the buyer's purpose in buying the artwork (e.g., to purchase an authentic painting by a particular artist), the seller has knowledge that the buyer is relying on the seller's skill or judgment in furnishing the artwork (e.g., the seller is an art merchant), and the buyer actually relies to his or her detriment on the seller's skill.

2. Title

Article 2 of the UCC provides substantial protections for a buyer against the risk of bad title.[20] UCC Sections 2-312(1) and (2) provide as follows:

> (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that
>
> (a) the title conveyed shall be good, and its transfer rightful; and
>
> (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
>
> (2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.[21]

Thus, unless specifically excluded or modified, every contract for the sale of art includes a warranty stating that the seller is transferring good title, the seller has the right to transfer title, and the works are transferred free of security interests, liens or other encumbrances of which the buyer has no knowledge.[22]

Additionally, UCC Section 2-312(3) provides that if the seller is a merchant, there is an implied warranty that the seller

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18 *See* LERNER & BRESLER, *supra* note 1, at 99.
19 U.C.C. § 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 2016).
20 *See id.* at 103.
21 U.C.C. § 2-312(1) (AM. LAW INST. & UNIF. LAW COMM'N 2016).
22 *Id.*

delivers the goods free from "the rightful claim of any third person by way of infringement."[23]

The case of *Menzel v. List* determined the appropriate amount of damages owed to a purchaser if a seller did not pass good title for the painting to the purchaser.[24] Erna Menzel and her husband had purchased a Chagall painting at auction in Belgium in 1932 for what was then the equivalent of $150. In 1940, the Menzels fled Belgium ahead of the Nazis, leaving the painting in their apartment. When the Menzels returned to their apartment in 1946, they discovered that the painting was confiscated and a receipt was left in its place. The painting resurfaced in 1955 when a Parisian art gallery sold it to the noted New York dealer Klaus Perls for $2800. A few months later, Perls resold the painting to Albert List for $4000. In 1962, Mrs. Menzel recognized the painting in an art book mentioning List as the owner, and she sued List to recover the painting. List, in turn, impleaded Perls for breach of an implied warranty of title.[25] At trial, the jury directed List to return the painting or pay Mrs. Menzel for the painting's then-fair market value of $22,500 and found for List as against Perls in the amount of $22,500.[26] The appellate court reduced the amount of damages to $4000 plus interest, but the Court of Appeals reversed, reinstating the award of $22,500 to List. The Court of Appeals reasoned that List was entitled to his benefit of the bargain, which was the fair market value of the painting at the time of its return to Mrs. Menzel, rather than rescission, which would have given List only his purchase price plus interest. Commentators have noted that, by putting List back in the position he would have been in had Perls not breached the implied warranty of title, the Court of Appeals placed the full burden of investigation

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23 U.C.C. § 2-312(3) (AM. LAW INST. & UNIF. LAW COMM'N 2016).

24 *See id.* at 104–05; Menzel v. List, 246 N.E.2d 742, 745 (N.Y. 1969).

25 LERNER & BRESLER, *supra* note 1, at 104–05. At the time the case was decided, sales in New York were governed by the New York equivalent of the Uniform Sales Act instead of the Uniform Commercial Code. Section 13 of the Uniform Sales Act provided as follows:

> In a contract to sell or a sale, unless contrary intention appears, there is (1) an implied warranty on the part of the seller that . . . he has a right to sell the goods . . . (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

Menzel, 246 N.E. 2d at 744.

26 Although statute of limitations was not at issue in *Menzel v. List*, a buyer with a breach of warranty claim in New York must meet a four-year statute of limitations. *See* Doss, Inc. v. Christie's, Inc., No. 08 Civ. 10577 (LAP), 2009 WL 3053713, at *2 (S.D.N.Y. Sept. 23, 2009) (noting that New York law requires commencement of a buyer's claim for breach of warranty within four years of delivery of the goods).

of title to the painting squarely on the dealer.[27] The result in a breach of warranty of title claim, that a seller bears liability for the increase in value, can indeed be an expensive remedy in the hothouse environment of art valuation.[28]

B. Tort Law

The explosive growth of the art market in recent years and the staggering sums that works of art can command have led to increased concerns about forgeries. In cases of forgery, tort law may provide recourse to the aggrieved buyer in addition to contract law's breach of warranty claims.[29] The injured buyer may claim that the seller committed the tort of fraud, which occurs when the seller has made an intentional or knowing misrepresentation of a material existing fact about the artwork with the intention that the misrepresentation be relied on and the buyer in fact relies on such misrepresentation to his or her detriment.[30] The buyer might also claim that the seller engaged in negligent misrepresentation, which, unlike fraud, does not require the seller's intent or knowledge of the misinterpretation.[31]

The torts of fraud and negligent misrepresentation are not mutually exclusive from breach of warranty claims, and buyers asserting forgery claims against an art dealer may include one or both of the tort claims as well as breach of warranty claims. A recent forgery case in which the plaintiffs asserted a number of claims, including fraud and breach of warranty, is one of several actions filed against Knoedler Gallery and its principals.[32] In 2011, the venerable Knoedler Gallery, New York's then-oldest commercial art gallery, shocked the art world by abruptly closing its doors after 165 years, following allegations that it had sold approximately $80 million worth of forged Abstract Expressionist paintings over the course of a decade, including works attributed to Rothko, de Kooning, Pollock, Motherwell, and other great artists of the mid-twentieth century. Plaintiffs, in a spate of lawsuits, alleged that Knoedler misrepresented material facts in presenting the origin and provenance of the works, that

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27 *See, e.g.*, Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 525 (1988); Deborah A. DeMott, *Artful Good Faith: An Essay on Law, Custom, and Intermediaries in Art Markets*, 62 DUKE L.J. 607, 624 (2012).

28 *See* Gerstenblith, *supra* note 27, at 525–26; DeMott, *supra* note 27, at 619.

29 *See* LERNER & BRESLER, *supra* note 1, at 137.

30 *Id.* The required elements for a claim for fraud consist of "(1) misrepresentation of a material fact; (2) the falsity of that misrepresentation; (3) scienter, or intent to defraud; (4) reasonable reliance on that representation; and (5) damage caused by such reliance." Kottler v. Deutsche Bank, 607 F. Supp. 2d 447, 462 (S.D.N.Y. 2009).

31 *See* LERNER & BRESLER, *supra* note 1, at 138.

32 De Sole v. Knoedler Gallery, 137 F. Supp. 3d 387, 395 (S.D.N.Y. 2015).

Knoedler's statements regarding the origin and provenance of the works were false, that Knoedler had an intent to defraud, that plaintiffs reasonably relied on Knoedler's misrepresentations, and that plaintiffs incurred damage as a result of relying on Knoedler's misrepresentations. The cases against Knoedler ultimately settled out of court without completing trial, resolved by payment of refunds or settlements of enhanced monetary amounts.

The lessons from the Knoedler scandal should be apparent to any reasonable art professional seeking to avoid an authenticity dispute—in an unregulated industry with confidential transactions on behalf of undisclosed principals, due diligence is especially important. But how much diligence is due? At a minimum, an individual seeking to purchase, or a dealer seeking to sell, should obtain expert assurances as to authenticity and explore all "red flags." In the Knoedler cases, these "red flags" included: a secret overseas collector with works that had never been publicly exhibited and had no known provenance; and sales transacted by intermediaries previously unknown in the art world, at prices below-market, and at times with payments in cash. Buyer beware.

C. Art-Specific Legislation

Until the 1960s, the art market remained largely unregulated by any statutory scheme directed solely at the buying and selling of fine art.[33] Artwork was merely treated as personal property, and the few issues dealing with artwork were resolved through litigation in the courts under existing bodies of law.[34] At the state level, the status quo changed in New York in 1965 when a series of public hearings were held to discuss issues unique to the art market, and as a result, several new laws were added in 1966 to the New York General Business Law aimed to address the rights of artists and consumers.[35] Since then, legislation specifically addressing art issues has experienced rapid growth in several states, including New York, California, Massachusetts, and others.[36] At the federal level, there are laws addressing the protection of art of specific classes (such as Native Americans),[37] of certain objects (such as those incorporating parts

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33 *See* Leslie Kaufman Akst, *Regulation of the New York Art Market: Has the Legislature Painted Dealers into a Corner?*, 46 FORDHAM L. REV. 939, 939 (1978).

34 *Id.*

35 *See id.* 939 nn.3 & 5.

36 *See* LERNER & BRESLER, *supra* note 1, at 145; *see, e.g.*, CAL. CIV. CODE §§ 1738, 1738.5–38.9 (West 2016); IOWA CODE ANN. §§ 715B.2–715B.4 (West 2016); MASS. GEN. LAWS ANN. ch. 104A, § 2 (West 2016); MICH. COMP. LAWS ANN. §§ 442.321–42.325 (West 2016); N.Y. ARTS & CULT. AFF. LAW §§ 1.01–61.13 (McKinney 2016).

37 *See, e.g.*, Native American Graves Protection and Repatriation Act ("NAGPRA"),

derived from endangered species, e.g., ivory),[38] or of legal systems (such as international treaties governing cultural property).[39] In totality, state and federal legislation relating to the art market covers a broad spectrum of issues addressing the protection of consumers, artists, the market place, and cultural property in general.

1. Consumer and Artist Protection Laws

As the largest U.S. commercial center of art activity, New York has developed the most significant regulatory body of law governing art. In 1983, the Arts and Cultural Affairs Law ("NYACAL") was enacted, replacing most of the new articles that were added to the New York General Business Law governing the rights of artist and consumers.[40]

Notably, with respect to consumer protection, the NYACAL provides a lay purchaser with stronger warranty protections than those available under Article 2 of the UCC. Section 13.01 of the NYACAL provides:

> 1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it:
>
> (a) Shall be presumed to be part of the basis of the bargain; and
>
> (b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange.[41]

Thus, if an art merchant provides a writing to a purchaser with a description that the artwork was created by a specific artist, such as an invoice, an express warranty is created.[42] Effectively, the provision removes the distinction between objective fact and the art merchant's mere opinion with respect to authenticity.[43] The intention behind this fact/opinion provision was to level the playing field for laypersons dealing with art merchants, acknowledging that dealers may be incentivized to

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25 U.S.C. §§ 3001–13 (2016); Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091–95 (2016).

38 *See* Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* (2016).

39 *See, e.g.*, UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, May 14, 1954; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970; UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972.

40 The Arts and Cultural Affairs Law was enacted as new Chapter 11-C of the Consolidated Laws of New York by Arts & Cultural Affairs Law, ch. 876, 1983 II. N.Y. Laws 2462, effective Dec. 31, 1983.

41 *Id.* at § 13.01.

42 *See* LERNER & BRESLER, *supra* note 1, at 90.

43 *Id.* at 146.

affix a definite attribution to a work in order to inflate the price and, in case of misattribution, to rely on the defense that the attribution was a mere opinion.[44]

The NYACAL also provides strong protections for the artist in artist-dealer relationships. Section 12.01(1)(a) of the NYACAL provides that whenever an artist delivers an artwork to an art merchant for the purpose of exhibition and/or a sale, the delivery to and acceptance of such artwork creates a consignor/consignee relationship.[45] The art merchant will be deemed to be an agent of the consignor-artist with respect to the artwork, the artwork is considered trust property for the benefit of the consignor-artist, and any proceeds from the sale of such artwork are trust funds for the benefit of the consignor-artist. The trust property and trust funds shall be considered property held in statutory trust, and no such trust property or trust funds shall become the property of the consignee or be subject or subordinate to any claims, liens, or security interest of the consignee's creditors. This statute means, among other things, that the artist must be paid first and that the artist's consigned works cannot be attached in a bankruptcy action. Section 12.01(3) provides a strong enforcement mechanism by allowing attorney's fees for plaintiffs who successfully enforce their rights in court. Moreover, any waivers must be clear, conspicuous, and in writing. Notably, much of Section 12.01 was strengthened in direct response to the scandalous collapse in 2007 of the Salander O'Reilly Gallery, another seemingly reputable New York gallery that was charged with fraud for selling works to multiple parties, selling works without disclosing such sales to the consignors, and converting such sales proceeds to pay off existing gallery debts.[46]

2. Object Protection Laws

Various laws protecting goods in commerce have been enacted at the federal level to address the protection of art. For instance, the Native American Graves Protection and Repatriation Act ("NAGPRA") was passed in 1990 to restore tribal ownership of Native American grave goods and human remains.[47] The statute requires federal agencies and museums receiving federal funds and holding Native American remains or objects to publish written summaries of the items and consult

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44 *See* Levin v. Dalva Brothers, Inc., 459 F.3d 68, 77 (1st Cir. 2006).

45 *See* LERNER & BRESLER, *supra* note 1, at 21.

46 NEW YORK CITY BAR ASS'N, REPORT ON LEGISLATION BY THE ART LAW COMMITTEE 2–3 (2012), http://www2.nycbar.org/pdf/report/uploads/20072122-ReportonA7189S4988reNewYorkArtsandCulturalAffairsLawNYACAL.pdf [http://perma.cc/322L-59CL].

47 Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13 (2016).

with the tribe affiliated with the remains or object to determine and agree on the repatriation and disposition of the remains or objects. The statute also protects Native American burial sites and the removal of Native American human remains and imposes criminal penalties for trafficking in Native American human remains.

A federal law that has recently significantly impacted the art and antiquities market is the Endangered Species Act of 1973 ("ESA"),[48] and especially the regulations governing African elephants under the ESA. First, a bit of background: in the United States, the African elephant is primarily protected and managed under the Convention on International Trade of Endangered Species of Wild Fauna and Flora ("CITES") and the ESA.[49] CITES, which took effect on July 1, 1975, is a multilateral treaty signed by 182 parties, including the United States, for the protection of certain listed animal and plant species.[50] CITES regulates commercial and noncommercial international trade in listed species through a system of permits and certificates that must be obtained for import and export.[51] With the exception of certain populations of African elephants that are deemed to be recovering populations, all other African elephants are listed in Appendix I, which lists species that are threatened with extinction and are or may be affected by trade and therefore subject to "particularly strict regulation."[52]

The ESA, which implements CITES in the United States, prohibits the taking, possessing, selling, offering for sale in interstate or foreign commerce, importing, exporting, delivering, carrying, transporting, or shipping in the course of a commercial activity, any ESA species listed as "endangered" or any part thereof.[53] While the ESA does not specify particular prohibitions

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48 16 U.S.C. § 1531 *et seq.* (2016).

49 *See* 16 U.S.C. § 1531 (2016); Convention on International Trade in Endangered Species of Wild Fauna and Flora, July 1, 1975, 27 U.S.T. 1087; 16 U.S.C. §§ 4201–22 (2016) African elephants are also protected under the African Elephant Conservation Act, which was passed in 1988 and imposes a moratorium on the import of African elephant ivory since 1989. This moratorium, still in place, makes it illegal to import raw African elephant ivory into the U.S. from any country unless certain conditions are met. *Id.*

50 Endangered and Threatened Wildlife and Plants, 81 Fed. Reg. 36,388 (June 6, 2016) (to be codified at 50 C.F.R. pt. 17), https://www.federalregister.gov/articles/2016/06/06/2016-13173/endangered-and-threatened-wildlife-and-plants-revision-of-the-section-4d-rule-for-the-african#h-11 [http://perma.cc/HZ4E-4FZU].

51 *Id.* at 36,389.

52 Convention on International Trade in Endangered Species of Wild Fauna and Flora art. II, July 1, 1975, 27 U.S.T. 1087.

53 Endangered and Threatened Wildlife and Plants, 81 Fed. Reg. 36,388 (June 6, 2016) (to be codified at 50 C.F.R. pt. 17), https://www.federalregister.gov/articles/2016/06/06/2016-13173/endangered-and-threatened-wildlife-and-plants-revision-of-the-section-4d-rule-for-the-african#h-11 [http://perma.cc/HZ4E-4FZU].

for ESA species listed as "threatened," the Secretary of the Interior ("Secretary"), acting through the U.S. Fish and Wildlife Service, has the authority to issue protective regulations for species under Section 4(d) of the ESA.[54] The African elephant has been listed as a "threatened" species under the ESA since June 11, 1978, and regulations were issued by the Secretary under Section 4(d) to regulate the import and commerce of African elephant ivory with certain exceptions.[55] Notably, the ESA allows an "antiques exception" for articles that: (a) are not less than 100 years of age; (b) are composed in whole or in part of any endangered species or threatened species; (c) have not been repaired or modified on or after December 28, 1973; and (d) entered at a port designated for the import of ESA antiques.[56]

On July 6, 2016, the U.S. Fish and Wildlife Service issued final regulations increasing protection for African elephants and resulting in a near-total ban on the commercial trade in African elephant ivory in the United States.[57] For commercial purposes, the import of African elephant ivory is prohibited.[58] For noncommercial purposes, the import of worked elephant ivory is allowed if it was legally acquired, removed from the wild prior to February 26, 1976, and is either part of a household move or inheritance, part of a musical instrument, or part of a traveling exhibition.[59] For commercial purposes, only the export of items meeting the ESA antiques exception is allowed. For noncommercial purposes, only the following exports are allowed: (a) items meeting the ESA antiques exception; (b) items legally acquired, removed from the wild prior to February 26, 1976, and are either part of a household move or inheritance, part of a musical instrument, or part of a traveling exhibition; (c) certain worked ivory that qualifies as pre-ESA; and (d) law enforcement and bona fide scientific specimens.[60] Interstate and foreign commerce in African elephant ivory is prohibited except for items that qualify as ESA antiques, and certain manufactured or handcrafted items that contain a small (*de minimis*) amount of ivory and meet certain criteria.[61] Notably, "foreign commerce," i.e. selling ivory outside of the United States—as distinguished from import or export—by persons subject to U.S. jurisdiction is prohibited with limited exceptions for ESA antiques and manufactured or

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54 *Id.*
55 *Id.* at 36,390.
56 *Id.* at 36,388.
57 *Id.* at 36,418.
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*

handcrafted items that contain a *de minimis* amount of ivory.[62] Interstate commerce, i.e. selling across state lines, is only allowed for items meeting the antiques exemption and certain manufactured or handcrafted items that contain a *de minimis* amount of ivory.[63] Intrastate commerce, i.e. selling within a state, is allowed for: (a) ivory lawfully imported prior to January 18, 1990, the date the African elephant was listed in CITES Appendix I, which the seller must demonstrate; or (b) ivory imported under a CITES pre-convention certificate, which the seller must demonstrate.[64] Noncommercial movement within the United States, within and across states, of legally acquired ivory is allowed. The personal possession and noncommercial use of legally acquired ivory is also allowed.

As demonstrated above, laws protecting art in commerce present challenging and complex issues due to the difficulty of balancing freedom of commerce against the need to protect threatened or endangered species or classes of art objects. Interestingly, the response by the U.S. Fish and Wildlife Service to comments received from the U.S. museum community during the comment period for the final regulation on African elephants suggests that there may be further consideration of how museums are treated under the final regulation, and further developments can be expected in this evolving area.[65]

3. Moral Rights Laws

Legislative initiatives to protect artists and their works also took hold in the latter twentieth century. In 1990, Congress passed the Visual Artists' Rights Act ("VARA"),[66] giving artists new rights in their works, rights of attribution, and rights of integrity, that are related to, but distinct from, copyright. VARA protects artistic works from intentional destruction or mutilation and requires that works be properly credited to the creator. Significantly, VARA defines "a work of art" subject to protection for the first time in the definitional section of the Act, which states:

> A "work of visual art" is —
>
> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that

62 *Id.*
63 *Id.*
64 *Id.*
65 *See id.* at 36,397.
66 17 U.S.C. § 106A (2016).

> are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
>
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. [67]

Some states had artists' rights protections in place prior to the passage of VARA—see, e.g., California (1979), New York (1983)—and in some cases these state statutes provide broader rights.[68]

In addition, California recognizes a resale royalty right, and is the only state in the nation to accord a royalty to the artist when an artwork is resold.[69] The royalty right, like the rights of attribution and integrity, derive from the European model of artists' rights. The California Resale Royalty Act ("CRRA"), provides, essentially, that where a sale of fine art for at least $1000 takes place on the secondary market in California, the artist is entitled to receive 5% of the resale price from the seller within ninety days of the sale.[70] The constitutionality of the statute was challenged in a series of lawsuits in 2012 and 2015 and its status is uncertain.[71] As this Article goes to press, the Ninth Circuit is expected to rule shortly on the issue of preemption, i.e. whether the Copyright Act of 1976 preempts the state CRRA statute.

D. Intellectual Property

1. Overview

The field of copyright is an especially active one in the art world because intellectual property rights—particularly copyright and trademark—have a direct bearing on the creation and marketing of fine art. Artists create original works and, at the same time, they often use works created by others; museums own collections, sell products, and license their names for reproductions of objects and images. Those in the arts are concerned about protecting ownership rights, while at the same

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67 17 U.S.C. § 101 (2016).

68 *See* CONN. GEN. STAT. §§ 42-116s–116t (2016) (enacted in 1988); 815 ILL. COMP. STAT. 320/1–8 (2016) (enacted in 1993); LA. REV. STAT. ANN. § 51:2154–5126 (West 2016) (enacted in 1986); ME. REV. STAT. tit. 27 § 303 (2016) (enacted in 1985); MASS. GEN. LAWS ch. 231, § 85S (2016) (enacted in 1984); N.J. STAT. ANN. § 2A:24A-1–8 (West 2016) (enacted in 1986); N.M. STAT. ANN. § 13-4B-1–3 (2016) (enacted in 1978); N.Y. ARTS & CULT. AFF. LAW § 14.01–14.03 (McKinney 2016) (enacted in 1984); 73 PA. CONS. STAT. §§ 2101–10 (2016) (enacted in 1993); R.I. GEN. LAWS § 42-75.2-1–10 (2016) (enacted in 1987).

69 CAL. CIV. CODE § 986 (West 2016).

70 *Id.*

71 *See* Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1322 (9th Cir. 2015).

time concerned about protecting and preserving fair use and access to works in the public domain because creativity thrives in a vibrant and massive public domain. A working knowledge of the basic principles of intellectual property is essential in the field, and the rapid advance of communication technologies and the resulting demand for content have focused even greater attention on intellectual property issues.

Copyright and trademark are different concepts, protecting different types of property through different enforcement mechanisms. Copyright is described as a "bundle of property rights."[72] The law states that copyright protection subsists "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated."[73] It grants exclusive rights to copyright owners and curbs those exclusive rights with certain limitations (most importantly, fair use) that further the public interest. A trademark is the exclusive right to use the objective symbol signifying the goods and services offered in commerce by the owner. Trademark principles raise certain procedural issues—distinctiveness, relevant market, likelihood of confusion, types of marks, prior use—that are peculiar to the commercial arena. This overview will focus on copyright, rather than trademark, because copyright is the more common (and urgent) focus of creative communities.

For a work to be protected by copyright, it must be fixed in a tangible medium of expression, so that the object can be perceived, reproduced, or expressed for more than a brief duration. It must be original and contain an expression of the author's creativity. The amount of originality or creativity needed to pass the threshold is not high; so, for example, a change in color or medium is not enough originality or creativity to pass the threshold, but a change in angle or light might be. Copyright protects expressions, but not ideas, procedures, processes, systems, methods of operations, concepts, principles, or discoveries. Many of the interesting copyright cases are art cases, whether they involve a sculpture based on a photograph;[74] a movie poster based on a magazine cover;[75] a new photograph appropriating the underlying photograph;[76] the ownership of the copyright in a commissioned work;[77] and a host of other art-related cases.

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72 United States v. Craft, 535 U.S. 274, 283 (2002).
73 17 U.S.C. § 102(a) (2016).
74 Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992).
75 Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 708–09 (S.D.N.Y. 1987).
76 Cariou v. Prince, 714 F.3d 694, 700 (2d Cir. 2013).
77 Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

2. Fair Use

Fair use, which is an equitable doctrine that balances the rights of a copyright owner with the rights of society, speaks to specific uses of protected works that are considered "fair." The tension between an owner's financial and security interests and society's legitimate access to intellectual property led Congress to incorporate and codify a growing body of fair use case law when it revised the Copyright Act in 1976.[78] Fair use strives to ensure that an author's exclusive bundle of property rights will not hinder the very creativity the law was designed to foster. The doctrine recognizes that new works draw inspiration from older works and that the productive use of older works promotes the progress of science, art, and literature. Fair use permits certain good-faith uses that, in other contexts, would be infringement. These uses include criticism, comment, new reporting, teaching, scholarship, and research.[79]

The fair use statute lays out the test to determine whether a use is fair. The fair use test is a four-pronged, case-specific analysis. It examines: (1) the purpose and character of the new work's use; (2) the nature of the original work; (3) the amount and substantiality of the portion used in relation to the original work as a whole; and (4) the economic effect on the original work's actual and potential markets.[80] These prongs cannot be evaluated in isolation as a mathematical formulation, but rather the test is a "totality of the circumstances" analysis. The flexibility inherent in the test often leaves users unsure whether the contemplated use is a fair use. The lawyer's classic answer, "it depends," is particularly unhelpful to those seeking certainty in assessing these fine-line distinctions.

Art-related decisions dominate the fair use case law, and with good reason, because artists are entitled to fair use of the copyrighted work of others, and equally entitled to vigorously enforce their exclusive rights to exploit their properties by license or other means. Fair use in the context of objects and images is often in the eye of the beholder; one must determine and apply the fair use test, with all its nuances and inconsistencies. The one overriding question in the fair use assessment is whether a use is transformative or productive; does the new work encompass valuable creativity in and of itself? When a work has been transformed, there is less likelihood of market substitution and more likelihood of a fair use finding. This was illustrated in

78 *See generally* The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).
79 17 U.S.C. § 107 (2016).
80 *Id.*

the 1994 case *Campbell v. Acuff-Rose Music Inc.,*[81] where the alteration of the lyrics from "Pretty Woman" was held to be possible fair use because the new song, by 2 Live Crew, featured lyrics that were substantially different from the original Roy Orbison song, targeted a different audience, and posed little risk of market substitution. Likening the song to a modern-day parody that made commentary on the original, the Supreme Court found that the use was productive and offered a separate new value.

While a new work is more likely to pass the fair use test if the new work's composition, message, and use differ from those of the copyrighted work, it can be difficult in the realm of images to assess the degree of transformation or productivity needed to satisfy the fair use test. In *Rogers v. Koons,* the court found that a Jeff Koons sculpture, which reproduced in sculptural form a copyrighted photograph by Ed Rogers, was not a fair or transformative use because it added no separate creativity and affected the market for the photograph.[82] In *Hart v. Sampley*, the sale of items containing the copyrighted image of the Three Servicemen statue at the Vietnam Veterans Memorial was found not to be a fair use.[83] However, in *Wojnarowicz v. American Family Association,* the publication of fragments of a work in an anti-National Endowment for the Arts pamphlet was found to be a fair use because the portion used was insubstantial, and the free speech implications were significant (note, though, that the artist prevailed under an integrity clause of the New York moral rights statute, the Artists' Authorship Rights Act).[84]

Fair use has inherent drawbacks; it is expensive and time consuming to make individualized decisions on a case-by-case reading of the facts, and it is risky because the analysis might be incorrect. Fortunately, fair use is not an either/or proposition; rights management systems exist for situations where fair use is inapplicable or impractical, for large-scale projects, and for peace of mind.

3. Online Issues

The growth of the internet has been accompanied by a liberal interpretation of both freedom of speech and of the fair use

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81 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 589–600 (1994). Though the Court held that 2 Live Crew "departed markedly from the Orbison lyrics and produced otherwise distinctive music," the Court did not make a determination on the issue of whether the use of the original song's bass riff was "excessive copying"; instead, the case was remanded "to permit evaluation of the amount taken." *Id.* at 570.

82 *See* Rogers v. Koons, 960 F.2d 301, 313 (2d Cir. 1992).

83 Hart v. Sampley, No. 91-3068, 1992 WL 100135, at *2–3 (D.D.C. Feb. 4, 1992).

84 *See* Wojnarowicz v. Am. Family Ass'n, 745 F. Supp. 130, 141 (S.D.N.Y. 1990).

exception. The ease and speed of downloading and manipulating images, and the mass of unrestricted images on the internet, have lulled many users into assuming implied licenses to copy, print, and distribute internet materials. Uploading an image implicates the rights of reproduction and distribution; downloading and printing an image represent two acts of reproduction; and modifying an image implicates the rights of reproduction, distribution, and adaptation. If the use is a fair use, these activities will not infringe the copyright owner's exclusive rights. But if these uses are deemed not to be fair, then each separate act is a separate (presumably compensable) infringement.[85] Interesting issues in the online environment include whether a digital image differs enough from an original image to garner its own copyright; whether a reproduction of a work in the public domain is eligible for copyright when it is digitized; how to deconstruct the separate copyright components of a multimedia project; and who is liable for third-party infringement. It can be expected that there will be many developments in this area in the future.

E. Tax

As art escalates in value, collectors increasingly treat their art collections as investments. The art collection as investment property presents unique and challenging issues from various tax perspectives, including income tax and gift and estate taxes.

1. Income Tax Treatment of Art

The rising value of art has led to the necessity of tax planning from an income tax perspective. The income tax treatment related to artwork will have different income tax results depending on whether the owner of the artwork is treated as a dealer, investor, or collector.[86] A dealer is someone who is engaged in the trade or business of selling art to customers. Although the term "trade or business" is not defined in the Internal Revenue Code ("IRC"), case law has stated that the taxpayer must be involved in the activity with continuity and regularity, and the taxpayer's primary purpose for engaging in the activity must be for income or profit.[87] A sporadic activity, which the Internal Revenue Service ("IRS") classifies as a hobby,

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85 *See* 17 U.S.C. § 504(c)(1) (West 2016); *see also FAQs: Copyright and Digital Files,* COPYRIGHT, https://www.copyright.gov/help/faq/faq-digital.html#backup [http://perma.cc/D9G9-C5SG].

86 *See* LERNER & BRESLER, *supra* note 1, at 1169–71.

87 Comm'r v. Groetzinger, 480 U.S. 23, 35 (1987).

amusement, or diversion, does not qualify.[88] Dealers are taxed on the gain from the sale of art held as inventory at ordinary income tax rates and may take income tax deductions for ordinary and necessary expenses incurred in the trade or business of being a dealer.[89] An investor is someone who buys and sells art *primarily* for investment purposes, rather than for personal use and enjoyment or as a trade or business. As distinguished from a dealer who holds art as inventory in a business, an investor holds art for the primary objective of making a profit from the appreciation in value of the art over a period of time.[90] Investors are taxed on the gain from the sale of art held for more than one year at the federal long-term capital gains rate for collectibles, which is currently 28%.[91] Investors are much more restricted than dealers in their ability to take deductions for investment-related expenses, as they can only deduct expenses incurred in connection with holding property for the production of income.[92] A collector is someone who buys and sells art primarily for personal pleasure and is not a dealer or investor. Collectors, like investors, are taxed on the gain from the sale of art held for more than one year at the current federal long-term capital gains rate for collectibles of 28%.[93] Collectors have even more limitations on their ability to deduct collection-related expenses than investors.[94]

Distinguishing between dealers, investors, and collectors is often not an easy task because of the element of personal enjoyment inherent in any artwork and the facts and circumstances of the inquiry. Investors face a particularly difficult task in proving that they are holding artwork primarily for investment purposes and not for personal use and enjoyment. While deriving pleasure may not in and of itself preclude finding that a collection is investment property, the collector will find it a challenge to convince the IRS of his or her investor status if the activities and circumstances indicate that there is too much enjoyment of the collection without the requisite demonstrated intent to treat the collection as investment property.[95]

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88 *Id.*

89 *See* I.R.C. §§ 1(a)(2), 64, 162 (2016). The top ordinary income tax rate is currently 39.6%. *Id.*

90 *See* Drummond v. Comm'r, 73 T.C.M. (CCH) 1959, at *10–11 (1997).

91 I.R.C. § 1(h)(1) (2016). Art held for one year or less is taxed at ordinary income rates. *Id.*

92 Examples of investment-related expenses that an art investor may choose to deduct include insurance premiums, storage fees, and subscriptions to trade publications. *See* Wrightsman v. United States, 428 F.2d. 1316, 1319 (Ct. Cl. 1970).

93 I.R.C. § 1(h)(4) (2016).

94 *See* I.R.C. §§ 68(a) & 183(b) (2016).

95 *See* LERNER & BRESLER, *supra* note 1, at 1172–73; *Wrightsman*, 428 F.2d. at 1320.

2. Section 1031 Like-Kind Exchanges

For art owners who do qualify as investors for income tax purposes, like-kind exchanges under IRC Section 1031 may provide a capital gains tax deferral opportunity (we refer to such exchange as a "Section 1031 like-kind exchange").[96] IRC Section 1031 allows owners of investment properties to defer payment of capital gains taxes by reinvesting proceeds from the sale of a currently owned property into the purchase of a new like-kind property.[97] The property exchanged must be property held for productive use in a trade or investment that is exchanged solely for property of a "like kind" to be held for productive use in a trade or business or for investment.[98] The property exchanged cannot be stock in trade or other property held primarily for sale (i.e. inventory).[99] Therefore, generally with regard to artwork, taxpayers who are eligible to take advantage of Section 1031 like-kind exchanges will be investors who hold artwork primarily for investment, as opposed to collectors who collect artwork for personal enjoyment.

Section 1031 like-kind exchanges involving artwork present an interesting mix of issues because there are gray areas alongside clear-cut rules. On the one hand, the rules are highly technical. For instance, the Treasury Regulations for IRC Section 1031 provide detailed rules for certain specific timing requirements in so-called "deferred exchanges."[100] On the other hand, much is unsettled, such as what constitutes like-kind property in the context of art. The Treasury Regulations provide the following interpretation of the term "like-kind":

> As used in section 1031(a), the words "like kind" have reference to the nature or character of the property and not to its grade or quality. One kind or class of property may not, under that section, be exchanged for property of a different kind or class. The fact that any real estate involved is improved or unimproved is not material, for that fact relates only to the grade or quality of the property and not to its kind or class.[101]

How to distinguish between the "nature or character" of one kind of artwork for another is a question that remains a gray area. On the one hand, the IRS rulings on coins held for investment seem to focus on the function of the property held rather than the makeup of the property, as discussed below:

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96 *See* LERNER & BRESLER, *supra* note 1, at 1187–90.
97 *See* I.R.C. § 1031 (2016).
98 *Id.*
99 *Id.*
100 *See* Treas. Reg. § 1.1031(k)-1 (2008).
101 *See* Treas. Reg. § 1.1031(a)-1(b) (1991).

- In Revenue Ruling 76-214, the IRS ruled that the exchange of Mexican 50-peso bullion-type gold coins for Austrian 100-corona bullion-type gold coins qualified for nonrecognition of gain under IRC Section 1031.[102] Since such coins were not circulating mediums of exchange in their respective countries, their nature or character were the same for purposes of IRC Section 1031 as being gold coins.
- In Revenue Ruling 82-96, the IRS ruled that gold bullion was like-kind to Canadian Maple Leaf gold coins for purposes of IRC Section 1031.[103] The Maple Leaf coins were traded for their gold content. Therefore, they were bullion-type coins whose nature and character were the same and thus of like kind with the gold bullion.
- In Revenue Ruling 79-143, despite the coins appearing similar because they both contain gold, the IRS held that United States $20 gold coins for South African Krugerrand gold coins were not like-kind to each other.[104] The U.S. gold coins were numismatic-type coins, the value of which is determined by their age, number minted, history, art and aesthetics, condition, and metal content, while the South African Krugerrand gold coins were bullion-type coins, the value of which is determined solely on the basis of metal content.
- In Revenue Ruling 82-166, the IRS held that gold bullion coins and silver bullion coins were not like-kind to each other, not because one was gold and the other silver but because silver is essentially an industrial commodity and gold is primarily utilized as an investment in itself.[105]

On the other hand, the IRS has ruled for purposes of IRC Section 1033, which governs the treatment of involuntary conversion of property, that lithographs are not "similar or related in service or use" to artwork in other media such as oil paintings, watercolors, sculptures, and other graphic forms of art.[106] Although we do not know whether the same rationale would apply in the context of a Section 1031 like-kind exchange, the conservative approach would be to select works of the same media for a Section 1031 like-kind exchange.[107]

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102 Rev. Rul. 76-214, 1976-1 C.B. 218.

103 Rev. Rul. 82-96, 1982-1 C.B. 113.

104 Rev. Rul. 79-143, 1979-1 C.B. 264.

105 Rev. Rul. 82-166, 1982-2 C.B. 190.

106 *See* LERNER & BRESLER, *supra* note 1, at 1188; I.R.S. Priv. Ltr. Rul. 81-27-089 (Apr. 10, 1981).

107 In I.R.S. Priv. Ltr. Rul. 81-27-089 (Apr. 10, 1981), a fire damaged an art collection consisting of 3000 lithographs, some oil paintings, pencil drawings, sculptures, masks, wood carvings and block prints. The taxpayers wanted to use the insurance proceeds to

3. Valuation Issues in Tax and Estate Planning with Art

One of the key issues from a tax perspective is how to value artwork in a collection. Art is inherently unique and therefore it is difficult to find precise sale comparisons to determine value. Moreover, there are large information gaps when it comes to comparing the values of other similar artwork in the market. Only 47% of art sales worldwide are conducted through public auctions and the rest are private sales, the terms of which are often confidential and sometimes known only to the intermediaries transacting the sale.[108] As such, the concept of "fair market value," defined in the estate tax regulations as "the price which a willing buyer would pay to a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts," is somewhat of a challenge as applied to art in practice.[109] Nevertheless, the fair market valuation of art is necessary from all areas of tax, including income tax, gift tax, and estate tax.

The IRS has developed comprehensive rules on the valuation of art in the income and gift and estate tax regulations.[110] As contemplated by the IRS' rules and procedures, the practice of valuing art for tax purposes relies heavily on the opinions of appraisers who are demonstrated to be experts in the property being appraised. For instance, to claim an income tax deduction for a charitable donation of artwork with a claimed value exceeding $5000, the taxpayer must obtain a "qualified appraisal" from a "qualified appraiser" for the property contributed.[111] To be a "qualified appraisal," an appraisal must be prepared by a qualified appraiser containing certain specific information about the artwork being contributed, including a detailed description of the property, a detailed description of the qualified appraiser's background and qualifications, the method of valuation used to determine the fair market value, and the fee arrangement between the donor and the appraiser.[112] A "qualified appraiser" is an individual who (i) has earned an appraisal

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purchase replacement works consisting of 63% lithographs and 37% works in other media such as oil paintings, watercolors, sculptures, or other graphic forms of art. The IRS ruled that, for purposes of IRC Section 1033, lithographs may not be replaced with artworks in non-lithograph artistic media and nonrecognition of gain was disallowed to the extent that 36% of the insurance proceeds were reinvested in art works in other artistic media. *Id.*

108 *See* Eileen Kinsella, *What Does TEFAF 2016 Art Market Report Tell Us About The Global Art Trade?*, ARTNET NEWS, (Mar. 9, 2016), https://news.artnet.com/market/tefaf-2016-art-market-report-443615 [http://perma.cc/TZ78-6LWV].

109 Treas. Reg. § 20.2031-6(a) (2011).

110 Treas. Reg. § 20.2031-6 (2011); Treas. Reg. § 25.2512-1 (1992); Treas. Reg. § 1.170A-1(c)(2) (2008).

111 I.R.C. § 170(f)(11) (2016); Treas. Reg. § 1.170A-13(c)(2)(i)(A) (1996).

112 Treas. Reg. § 1.170A-13(c) (1996).

designation from a recognized professional appraiser organization, or has otherwise met minimum education and experience requirements set forth in the regulations; (ii) regularly performs appraisals for pay; and (iii) meets any other requirements prescribed by the IRS.[113] The individual will not be treated as a qualified appraiser for a specific appraisal unless he or she demonstrates verifiable education and experience in valuing the property subject to the appraisal and the individual has not been prohibited from practicing before the IRS at any time for a three-year period ending on the appraisal date.[114] Art valuations submitted to the IRS may be reviewed by the Art Advisory Panel of the Commissioner of Internal Revenue.[115] Created in 1968, the Art Advisory Panel is made up of art experts, including museum curators, dealers and scholars, serving without compensation.[116] As can be seen from recent annual reports, the Art Advisory Panel's valuations often differ from those submitted by taxpayers.[117]

Interesting valuation issues can arise when art is not owned in its entirety but rather in undivided fractional interests, particularly in the estate tax context. Although courts have upheld valuation discounts for the transfer of less than a 100% interest in artwork for estate tax purposes, this remains a developing area, as seen most recently in *Estate of Elkins v. Commissioner*.[118] In *Estate of Elkins*, James Elkins and his children owned percentage interests in sixty-four works of modern and contemporary art as a result of lifetime gifts and transfers made under Mr. Elkins's wife's will.[119] Upon Mr. Elkins's death, the IRS denied the estate's claim of a fractional ownership discount of 44.75% to the artwork, and litigation ensued.[120] Rejecting the IRS's argument that no discount should be allowed for fractional interests in works of art, the Tax Court allowed a nominal 10% fractional ownership discount to account for various "uncertainties" a hypothetical buyer of Mr. Elkins's fractional

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113 I.R.C. § 170(f)(11)(E)(ii) (2016). See Treas. Reg. § 1.170A-13(c)(5) (1996) and I.R.S. Notice 2006-96, 2006-46 I.R.B. 902 for further IRS requirements for qualified appraisers.

114 I.R.C. § 170(f)(11)(E)(iii) (2016).

115 ART ADVISORY PANEL OF THE COMM'R OF INTERNAL REVENUE, ANNUAL SUMMARY REPORT FOR THE FISCAL YEAR 2015 2 (Sept. 2015), https://www.irs.gov/pub/irs-utl/art_adv_panel_annual_summary_report_fy15.pdf [http://perma.cc/G4FX-CJPH].

116 *Id.*

117 For example, in 2015, the Art Advisory Panel recommended acceptance of 35% and recommended adjustments of 65% of the appraisals reviewed. *Id.* at 4.

118 Estate of Elkins v. Comm'r, 140 T.C. 86, 119 (2013), *aff'd*, 767 F.3d 443 (5th Cir. 2014); *see also*, Stone ex rel. Stone Trust Agreement v. United States, No. 07-17068, 2009 WL 766497, at *1 (9th Cir. Mar. 24, 2009) (denying fractional interest discount for estate's interests in paintings, but allowing discount equal to estimated costs of partitioning estate's interest).

119 *Elkins*, 140 T.C. at 87–89.

120 *Id.* at 91–93.

interests in the art may face due to the children's ownership of their fractional interests in the art.[121] The Court of Appeals for the Fifth Circuit went even further in ruling for the estate, holding that because the IRS offered no evidence on the discounted values and nothing in the record supported the nominal 10% discount determined by the Tax Court, the estate's expert opinions on the valuation issue must stand (including steep discounts of up to 80% on some individual pieces).[122] Note that the Fifth Circuit accepted the estate's discounted values based on the lack of evidence presented by the IRS, a mistake the IRS is not likely to repeat.[123] As a final cautionary note, family entity planning with fractional interests in art may invite scrutiny from the IRS not only from an estate tax perspective but also from an income tax perspective, as seen in the recent case of *Allbritton v. Commissioner*, where the IRS asserted a $40.7 million tax assessment on a family company that owned fractional interests in art that was rented out to the family for personal use.[124] These cases illustrate the potential challenges that taxpayers may face with the IRS in cases involving movable and enjoyable assets such as art.[125] It remains to be seen what approach the IRS will take in future cases and whether any methodologies will be proposed to provide guidance on the valuation of fractional interests in art.[126]

III. CHANGING NORMS

As can be seen from the above, the attention from legislative and regulatory bodies to the many aspects of the art world have created a complex web of interrelated and unrelated laws. An art law practitioner must know and employ a deep and wide command of the law, whether representing artists, collectors, galleries, museums, or others in the art market place.

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121 *Id.* at 126, 135.

122 *Elkins*, 767 F.3d at 445.

123 *See* Diana Wierbicki, *Elkins v. Commissioner*, *in* LISI ESTATE PLANNING NEWSLETTER #2085 (Leimberg Information Services, Inc.) Apr. 1, 2013, at 8.

124 Complaint, Allbritton v. United States, No. 4:15-v-00275 (S.D. Tex. 2015). As of the date of this Article's publication, the case has been stayed pending settlement.

125 Diana Wierbicki & Bee-Seon Keum, *Whose Art Is It Anyway?*, WEALTHMANAGEMENT.COM (Apr. 20, 2015), http://www.wealthmanagement.com/estate-planning/whose-art-it-anyway [http://perma.cc/5CX4-AKAH].

126 Proposed Regulations under IRC Section 2704 were issued on August 4, 2016 to limit valuation discounts for fractional interests in certain family-controlled entities for estate, gift, and generation-skipping transfer tax purposes. *See* Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest, 81 Fed. Reg. 51413–25 (proposed Aug. 4, 2016). Public hearings were held on the proposed regulations on December 1, 2016.

Not only are the laws evolving, but the art world itself is evolving. The cozy circle of dealers and collectors, noted in the Introduction, has grown into a mega-industry. Many galleries have expanded globally, operating internationally as one gallery or as separate related subsidiaries. Art fairs now fill the annual calendar and galleries are expected to keep the business going at home while simultaneously setting up shop for a week in other cities, whether foreign or domestic. The time and expense, coupled with the challenges of international transport, assure that only the successful operators can participate. Moreover, collectors who enjoy these social/commercial events and welcome the opportunities to purchase at art fairs must confront a host of legal issues inherent in international purchasing—what is the situs of the sale?; what taxes are owed?; what are the remedies if things go wrong?

Apart from international purchasing in the art fair context, the global nature of the art marketplace assures that these international transactions are becoming commonplace. For example: a lawyer representing a client in one country sells to a collector in another country; a collector/investor purchases a work strictly for investment and stores it indefinitely in a "freeport" such as the Geneva Freeport or Le Freeport in Singapore. Freeports can be generally described as zones allowing the suspension of taxes, customs, and other duties on goods within such zones. Historically, freeports were used as temporary storage facilities for goods on the move, and tax suspensions in these zones were intended to promote trade and commerce by lightening regulatory burdens that may slow down transactions.[127] Today, freeports house—on an indefinite basis, if desired—some of the world's most valuable art collections in state-of-the-art security facilities that employ art professionals and provide opportunities to transact business with the benefits of privacy and limited regulatory oversight.[128] It should be noted that the tax suspension benefits of freeports are temporary, as they only "suspend" the requirement to pay taxes until the goods reach their final destinations, and once the goods leave the freeport, transfer taxes and customs duties may apply depending on the destination country's tax and customs laws. Although regulatory attention has focused on the wealth stored in

127 *See Uber-Warehouses for the Ultra-Rich*, THE ECONOMIST (Nov. 23, 2015), http://www.economist.com/news/briefing/21590353-ever-more-wealth-being-parked-fancy-storage-facilities-some-customers-they-are [http://perma.cc/Y4BK-C8R5].

128 *Id.*

freeports, it remains to be seen whether these "safe havens" will be substantially challenged.[129]

As transactions have become more complex (in value, geography, or otherwise), written agreements have become more standardized. Common terms include representations and warranties, payment and delivery, responsibility for expenses and taxes, insurance, consequences of default, termination, and a host of other clauses, depending on the nature of the transaction. And, as the *Knoedler* matter teaches us, dealers and collectors will exercise more caution in commercial transactions, especially those involving unknown or remote parties.[130]

Perhaps the most significant shift in market practices can be seen in the areas of antiquities and objects of cultural patrimony. The late twentieth century and early twenty-first century saw a series of lawsuits demanding repatriation of cultural objects by nations of origin. These claims asserted that the objects were stolen property because they had been taken in violation of nations' theft laws, or were taken in violation of valid treaties. Indeed, the illicit international trade in objects of cultural property, including archeological and ethnographic objects, has largely shifted as the ethics of collecting have been examined and revised. Gone are the days of wholescale plunder of archeological sites, causing destruction of the site as well as the context and, often, the objects themselves. Galleries and collectors now largely trade in properly documented, legitimately excavated, or acquired objects. Similarly, museums have changed practices and now are bound by ethics codes that prohibit acquisition of archeological materials and ancient art without valid title, evidence of lawful export, and a full history from discovery to the present.[131] These ethical codes govern not only the acquisition, but also the borrowing, displaying, and disposing of such objects. It can be expected that these claims will continue to be prosecuted, and that newly-emerging nations will press repatriation claims for indigenous cultural property or for artistic works taken improperly in times of strife.

At the same time claims were asserted for repatriation of cultural property, the latter twentieth century saw claims asserted by survivors and families of victims of the wholescale expropriation of art by the Nazis during the Holocaust-era. The

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129 *Id.*

130 *See generally* De Sole v. Knoedler Gallery, 137 F. Supp. 3d 387, 395 (S.D.N.Y. 2015).

131 *Guidelines on the Acquisition of Archaeological Material and Ancient Art*, ASS'N OF ART MUSEUM DIRECTORS (Jan. 29, 2013), https://aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf [http://perma.cc/AZP8-GE5E].

Nazis plundered on a scale unique in modern history and the consequences of art displacement continue to be felt today. Numerous cases were decided against private collectors,[132] museums,[133] and nations.[134] One matter, popularized in the 2015 movie *Woman in Gold,* follows the legal efforts of Maria Altmann to gain ownership of a collection of Gustav Klimt paintings owned by her family, looted by the Nazis in Austria during World War II, and repatriated to an Austrian museum, where they remained on display until Altmann's successful recovery.[135] Austria held the works under claim of right and Altmann successfully brought an action in U.S. courts under the Federal Sovereign Immunities Act. The parties eventually settled and the works were turned over to Altmann.[136]

As Holocaust-era claims were filed against museums asserting title to works in their collections (often acquired by gift from collector donors), these museum defendants reacted swiftly to address the crisis and to right the wrongs. Museums acknowledged that holding and displaying stolen goods would be antithetical to the public trust mission of the non-profit institutions. Museums adopted guidelines for handling and resolving claims, undertook research of their collections to identify works with gaps in provenance during the "war years" (generally acknowledged to be 1933–45), resolved these gaps if possible, published such findings, and created easily-accessible online search tools to assist those with repatriation claims.[137]

On the tax side, the value of art continues to climb, and it is not surprising that taxing authorities are increasingly turning their attention to art transactions. With mounting pressures each year to bring in revenue, state revenue departments are being particularly aggressive about enforcing state and local tax laws, and art is not an exception, especially in New York State, home to some of the world's most powerful and prestigious collectors and galleries. In 2016, headlines were made by New York Attorney General Eric T. Schneiderman's announcement

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132 *See, e.g.*, Menzel v. List, 246 N.E.2d 742, 745 (N.Y. 1969).

133 *See, e.g.*, Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1037 (9th Cir. 2010); Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1064 (9th Cir. 2009).

134 *See, e.g.*, Altmann v. Republic of Austria, 317 F.3d 954, 974 (9th Cir. 2002).

135 WOMAN IN GOLD (BBC Films, 2015).

136 *See generally* Arbitral Award, Altmann, et al. v. Republic of Austria (U.S. v. Austria) (Jan. 15, 2006), https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria/arbitral-award-5-klimt-paintings-maria-v-altmann-and-others-v-republic-of-austria-15-january-2004/at_download/file [http://perma.cc/G6A2-5K2F].

137 *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/ World War II Era (1933–1945)*, ASS'N OF ART MUSEUM DIRECTORS (June 4, 1998), https://aamd.org/document/report-of-the-aamd-task-force-on-the-spoliation-of-art-during-the-nazi/world-war-ii-era.

of three high-profile tax settlements with a leading gallery, a prominent collector, and an art sales executive.[138] The settlements surprised many in the art world due to the high-profile nature of the targets and the focus on common industry practices such as the use of fine art shippers. All three settlements are significant as a warning that New York State is watching art transactions closely and is interpreting and enforcing its tax laws in an aggressive manner.[139]

Another area to watch is Section 1031 like-kind exchanges involving artwork, which has remained largely unregulated. In 2016, President Obama presented a budget proposal that would exclude art and collectibles as assets eligible for Section 1031 like-kind exchanges.[140] Although the proposed changes to Section 1031 did not take place, the budget proposal shows that the use of tax deferral transactions involving artwork is on the government's radar. It remains to be seen what direction the next administrations will take, if any, with respect to Section 1031 like-kind exchanges involving art.

IV. WHERE WE ARE GOING

Changing norms foreshadow many of the changes we can expect to see in the future of art law. A dominant theme in this

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138 *See* Press Release, Eric T. Schneiderman, Attorney Gen., N.Y. State Office of the Attorney Gen., A.G. Schneiderman Announces $4.28 Million Settlement With International Art Dealer Gagosian Gallery for Failure to Collect and Remit New York Sales Tax (July 19, 2016), http://ag.ny.gov/press-release/ag-schneiderman-announces-428-million-settlement-international-art-dealer-gagosian [http://perma.cc/V49Y-7HGU]; Press Release, Eric T. Schneiderman, Attorney Gen., N.Y. State Office of the Attorney Gen., A.G. Schneiderman Announces Agreement with Art Sales Executive for Repayment of Taxes on Artwork Acquisitions (May 3, 2016), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-art-sales-executive-re-payment-taxes-artwork (referring in the press release which announces a $4.28 million settlement with Gagosian Gallery) [http://perma.cc/PG48-ZZWM]; Press Release, Eric T. Schneiderman, Attorney Gen., N.Y. State Office of the Attorney Gen., A.G. Schneiderman Announces $7 Million Settlement with Art Collector Aby J. Rosen for Failing to Pay Sales and Use Taxes on Art Acquisitions (May 3, 2016), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-7-million-settlement-art-collector-aby-j-rosen-failing-pay [hereinafter "Press Release, $7 Million Settlement"] [http://perma.cc/VP8Y-WCRN]; Jennifer Smith, *Aby Rosen Settles Tax-Evasion Inquiry for $7 Million*, WALL ST. J. (May 3, 2016), http://www.wsj.com/articles/aby-rosen-settles-tax-evasion-case-for-7-million-1462299474; Kelly Crow, *Art Dealer Larry Gagosian Settles Over Sales Taxes for $4.3 Million,* WALL ST. J. (July 19, 2016), http://www.wsj.com/articles/art-dealer-larry-gagosian-settles-over-sales-taxes-for-4-3-million-1468976952; *see also* GAGOSIAN, http://www.gagosian.com/contact [http://perma.cc/BB3M-TCNF].

139 The tax investigations of the gallery and the collector were made under the New York False Claims Act ("FCA"), a law that was amended in 2010 to specifically include tax liability. It appears that the FCA, which has a ten-year statute of limitations, was used by the Attorney General to impose liability on alleged instances of violation of the New York tax laws on the basis of "knowingly" making a "false statement" or "knowingly" filing a "false record" on tax returns. *See* Press Release, $7 Million Settlement, *supra* note 138.

140 OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016 BUDGET OF THE U.S. GOVERNMENT 129 (2015).

narrative is that the art industry is increasingly becoming a global industry. As of 2015, the art market was a $63.8 billion global business.[141] Sotheby's and Christie's, the world's leading fine art auction houses and long-time competitors, have grown into multinational art businesses with salerooms in major art centers, offices, employees, and representatives in six continents.[142] The presence and influence of China is increasingly felt in the art market. As of 2015, it occupied a close third place, following the United Kingdom in its share of the global art market by value, and many of its collectors are setting record prices for contemporary art at auctions and establishing themselves as market players with connections to high-profile galleries, museums, and foundations.[143] For collectors, dealers, institutions, and industry professionals, there are opportunities to transact business worldwide and year-round at global art fairs such as Art Basel in Switzerland, Miami Beach, and Hong Kong, the Armory Show in New York, and the Foire Internationale d'Art Contemporain in Paris.[144] The top galleries have been aggressively expanding their worldwide presence.[145] Museums continue to join forces with other international museums in traveling exhibitions, and are expanding by establishing international locations, most notably the Guggenheim, with museums in New York, Venice, Bilbao, Abu Dhabi, and Berlin.

The increasing globalization of art mirrors the global expansion of private wealth. Newly wealthy individuals from Asia, Russia, Latin America, and the Middle East are interested in collecting top contemporary art, living in multiple homes around the globe, and exerting influence in the art world, as demonstrated by the recent growth in private museums. More globalization of private wealth means that planning from a multi-jurisdictional perspective is essential for the globally-inclined private collector, artist, art gallery, or museum. The benefits of cross-border tax and wealth planning are clearly

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141 *See* Kinsella, *supra* note 108.

142 *See Locations*, SOTHEBY'S, http://www.sothebys.com/content/sothebys/en/inside/locations-worldwide.html/ [http://perma.cc/GKR9-ALP4]; *Salerooms & Offices*, CHRISTIE'S, http://www.christies.com/locations [http://perma.cc/VB4K-3F6P].

143 *See* Kinsella, *supra* note 108.

144 *Which International Art Fairs Have the Highest Attendance?*, ARTNEWS (Feb. 28, 2015, 9:00 AM), http://www.artnews.com/2015/02/28/which-international-art-fairs-have-the-largest-attendance/ [http://perma.cc/6H56-VBE6].

145 For example, at the time this Article was published, Gagosian Gallery had sixteen locations, *see* GAGOSIAN, https://www.gagosian.com [http://perma.cc/DE2C-P3CU], Pace Gallery had ten locations, *see* PACE, http://www.pacegallery.com [http://perma.cc/P7MD-49SH], David Zwirner Gallery had three locations, *see* DAVID ZWIRNER, www.davidzwirner.com [http://perma.cc/Z8LF-ED4E], and Hauser & Wirth had six locations worldwide, *see* HAUSERWIRTH, http://www.hauserwirth.com/contact/ [http://perma.cc/8TU2-RUE7].

evident for high net-worth private collectors having potential exposure to multiple taxing regimes and wishing to preserve their wealth for future generations. These benefits also extend to art galleries with international outposts that must contend with tax issues that arise from doing business and deriving income internationally, artists who create internationally and maintain studios in multiple locations, as well as museums planning survival and expansion by cultivating international donors. The movement of players in global locations will also continue to necessitate sophisticated legal advice in legal disciplines other than tax, including immigration, cross-border commercial and contract law, import-export law, employment law, and other fields as well.

The art industry is also becoming more of an online industry. Like internet start-ups in other industries, online art auction businesses are fiercely competing for the attention of a younger generation of potential collectors who are social media savvy, appreciate efficient and convenient user-experiences, and may even prefer the anonymity of an internet transaction in some cases.

As art continues to increase in value, art transactions will increase in sophistication and complexity, with more intermediaries in the chain and more art transported across multiple jurisdictions. We may see an increase in transactions among market players joining forces in transacting together and co-investing in artwork. The increasing complexity and dollar amounts of transactions will lead to further regulatory responses and pave the way for additional developments in the law, whether through administrative channels, legislative changes, or litigation.

A fascinating aspect of the growth of the art industry is how the players' behaviors are evolving in response to market and regulatory forces. On one hand, the art industry has been strongly self-regulated. Appraisal organizations such as The Appraisal Foundation have established and are implementing the standards of professional appraisal practice, such as the Uniform Standards of Professional Appraisal Practice.[146] Codes of ethics have been established for the art trade, and are applicable to members of the Association of Professional Art Advisors and the Art Dealers Association of America.[147] Museums are regulated by codes of ethics of the International Council of Museums ("ICOM"), the Association of Art Museum Directors

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146 *See* THE APPRAISAL FOUND., 2016–2017 UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE 6, 8 (2016).

147 *See* THE ASS'N OF PROF. ART ADVISORS, http://www.artadvisors.org/ [http://perma.cc/6VQB-E2NG].

("AAMD"), and the American Alliance of Museums ("AAM").[148] The Art Loss Register maintains the world's largest database of stolen art, allowing potential buyers to perform due diligence and protect themselves against the risk of bad title.[149] On the other hand, industry players are increasingly wearing multiple hats and these interrelated roles can raise questions. For example, ventures such as art dealers putting on museum-quality exhibitions, collectors and art dealers co-partnering on investments, artists and auction platforms collaborating on sales, and museums collaborating with commercial sponsors can confuse the traditional roles of these discrete art fields. Navigating legal and ethical waters in these various roles will continue to present new and interesting challenges.

The field of art-specific education will continue to see growth. There are now advanced university degrees and diplomas from commercial arts institutes such as the Sotheby's Institute of Art being offered in art business management.[150] Coursework includes art law, marketing and strategy, finance and accounting, valuation, collection management, art criticism, and curating. It can be expected that this professionalization of the field will yield standards and best practices in the future.

Growth will continue. It is undisputed that the internet and cheap transportation have aided the globalization of art production and engagement with art. In addition, increased political awareness could fuel numerous claims for repatriation of cultural property against museums, collectors, and market nations. This globalization of market players—creators, purchasers, suppliers, and advisors—will grow in scale and complexity. In addition to the international commercial law aspects of these market transactions, these activities will touch on international intellectual property, immigration, and other international areas of practice.

It is fitting to end this Section with "the art" itself, and it is fair to say that the nature of art is changing. Apart from the market, i.e. the trade in art, the production of art presents new dimensions and new challenges, especially with the growth of technological innovation. The twentieth century blurred the distinction between high art and popular culture, and it is likely that the art of the twenty-first century will combine, recombine,

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148 *See Codes of Ethics,* ASS'N OF ART MUSEUM DIRECTORS, https://www.aamd.org/about/code-of-ethics [http://perma.cc/3A9S-CJA9]; AM. ALLIANCE OF MUSEUMS, www.aam-us.org [http://perma.cc/4GWD-WJ25].

149 *See* THE ART LOSS REG., http://www.artloss.com/en [http://perma.cc/JC8B-B6SN].

150 *See Master's Programs in London, New York, and Los Angeles*, SOTHEBY'S INST. OF ART, http://www.sothebysinstitute.com/masters-programs/ [http://perma.cc/U7LM-BEJL].

and interconnect in new and unexpected ways. Driven by social media, art is coming to be participative, interactive, multi-disciplinary, and accretive. Engaging and entertaining large scale (and often temporary) works such as 3D illusions and light installations, or computer-generated works employing virtual reality or artificial intelligence, raise a host of legal questions—who is the author of these immersive multi-creator works?; how are these works credited?; how are they registered for copyright protection?; how are they recorded and archived?; can these works be restored and recreated? In addition, the marketplace will ask how this art can be owned, appraised, and valued.

V. CONCLUSION

Looking back, art law has made remarkable strides in providing a foundation and structure for the governing rules and norms in this fast-paced industry, one which has evolved into a multi-billion dollar global business. Still a young field, art law is changing rapidly in response to the increased scope, depth, and complexity of a global, interconnected art world. Such trends as the astronomical rise in the value of artwork, mega-galleries, increasing numbers of new entrants to the market, new technologies, and new ways of interacting with art, all point to the future of art law.

Looking forward, art law is certain to continue developing as a dynamic and exciting field that demands deep and wide expertise from its practitioners. With higher values comes more risk to financial investments in valuable art. Risk is not limited solely to financial aspects; collectors, dealers, advisors, appraisers, artists, and museums all operate in an environment which is ripe for increased regulation, new commercial disputes, and changing ethical norms. The well-rounded art lawyer will enjoy a role in the business of art and will be rewarded by helping to shape and navigate the anticipated responses to these changes.