

# LEGAL RIGHTS IN THE ART AND COLLECTORS' WORLD

by SCOTT HODES

Legal Almanac Series No. 56

# **LEGAL RIGHTS IN THE ART AND COLLECTORS' WORLD**

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*General Editor*  
**Irving J. Sloan**

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## EDITOR'S NOTE

This book is an invitation to the artist and the collector to consider some of the legal ramifications involved in being an artist or being a collector. This discussion is designed for the layman, but it is not intended as a guide to being your own lawyer. Rather the book is intended to help the reader recognize when he has a legal problem and to communicate enough of the flavor of the law that he will be able to understand and work effectively with legal counsel. The author recognizes that the law, like art itself, may elude and confuse the uninitiated. If the flavor of the law has been lost or distorted in translation, the author must take full responsibility.

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## FOREWORD

This concise volume, growing out of years of work, is a most welcome and timely herald of awakening American interest in the fine arts. It must be a truism that any really serious human undertaking is soon codified and then relies on law to define its scope and defend its rights. As art bulks larger in the American consciousness, it progressively loses the frivolous mein imposed on it by our Puritan heritage and acquires dignity and honor that demands for it full and equal rights with other life-enhancing activity.

A review of the interrelations of art and the law over the centuries would show that commitments to produce art, to acquire art, to donate art, and to establish property rights in art often have led to legal action. The accounts of that action have contributed extensively to our knowledge of art history. Indeed, one may assume that most major works of art become a matter of public record through transactions of a legal nature that bring them into being. And while there are some hilarious pages in the record when artist and critic, or artist and patron, have clashed in court, and some humiliating passages when blundering officials attempted unsuccessfully to distinguish works of fine art from mundane materials, most of the record is solid and constructive. It provides a sound basis for resolving present and future problems.

One may take for granted that when millionaire dealers and patrons transact business in art their legal interests and problems are cared for adequately. One cannot safely assume as much for the artist, however, for his knowledge and resources ordinarily are meager. Too often he is the victim of his own special combination of ignorance of the law, generosity, and pride. This book is a shield for him.

The collector also needs guidance along the pitfall-

paths of purchasing, importing, lending, and giving works of art, lest his innocent largesse reap troubles with tax collectors and customs officials. This book may be his salvation.

It is a mistake to think that anything about fine art is trivial. So great is popular esteem for art, if not for artists, that even worthless art is capable of exploitation. The painter or sculptor working at his trade may have no thought except for the sheer joy of creation, yet in effect he is creating his estate and its value to him and his heirs will depend upon how clearly he understands, or even senses, his rights and responsibilities. If he no more than senses them, in all probability he can find competent counsel, for I have noticed how the prestige and public status of art, together with its highly personal complications of taste and judgment, attract the best legal minds.

Although the author has confined himself in this book to the most general problems arising from sales, commissions, copyright, taxes, customs, and insurance, he has regularly summarized and interpreted the law to reveal its nature and intention. Accordingly, the imaginative reader will have no difficulty in seeing beyond usual horizons prescribed by habit and everyday experience. In a world of expanding media of communication, art remains the best all-around means of communication, therefore, it behooves the artist, and the collector of his work, to look over the horizon to future opportunities and hazards.

But, whatever the future may bring, the present holds problems enough in which this book can prove its usefulness. The traditional stereotype of the artist who is quite incompetent in business matters belongs to the present as well as to the past. How grateful this one is to the disreputable dealer who robs him; how angry and helpless that one who worked months on a portrait only

to have it refused without payment; how stricken that other when costs of a commission ran higher than his fee! Too often the artist finds that he has traded his work for a puff of fame, yet even that satisfaction can be combined with tangible rewards if the artist knows his legal rights.

Nor is the art collector, although a businessman, likely to foresee in the specialized world of art all contingencies of acquiring, protecting, and conveying to others his artistic treasures. This book can aid him too. Here is one unhappily trying to satisfy the tax collector who thinks all of a painter's work must be of equal value regardless of date. There is another caught in the mills of customs and import regulations. This one learned too late of an advantageous way of giving his collection to the public. And that one paid for a forgery before seeking authentication.

To these beleaguered artists and collectors, and even more to their able associates whose common sense is often a reliable guide, this book is addressed. It is comprehensive and imaginative enough to contain some fresh facts, insights, or suggestions for everyone. Its great charm is that it discusses the law in layman's language, is not cluttered with references to cases, and frequently points out that some matters are so special in their circumstances and so complex in their ramifications that professional legal counsel should be sought. This is not a sue-them-yourself lawbook but is, instead, the lucid exposition by a good legal mind of common or typical problems created by conflicting interests in the field of art, together with possible remedies.

Possibly the greatest contribution the book can make is in the training of young artists in the art schools of America. I recall that not so long ago students, in their search for expression, were allowed to neglect basic technique until their disintegrating pictures literally

became a scandal. Now the schools are teaching the fundamentals of sound technique. Yet, in my judgment it is far more scandalous to send young artists into the professional world with only the sketchiest knowledge of the ethics and business practices of art. I hope that our schools everywhere will require the study of the legal aspects of the artist's profession. A book such as this, therefore, is an essential resource.

Scott Hodes, the author and graduate of the University of Chicago, has had a personal interest in art since his undergraduate days and had an exceptional opportunity to live with and abet the growth of a private art collection. His efforts will be especially welcomed by all those artists who have been striving to give status to their profession through codes of ethics, standard contract forms, and similar instruments, some of which are reproduced in the Appendices. Equally, collectors will applaud and benefit from up-to-date information on government regulations as well as basic law affecting purchasing, customs, taxes, and insurance in the field of art. Indeed, anyone interested in the arts and their coming of age will find this valuable little book both fascinating and instructive.

The University of Chicago

Harold Haydon

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## **Chapter 1**

### **COMMERCIAL ART TRANSACTIONS**

#### **I. The Artist**

I suppose that every serious artist expects to earn a decent living from his work. This is nothing to be ashamed of. An artist does not have to work in a drafty attic just to prove to the world that he is dedicated to his art. This does not mean, however, that an artist may not have to forego certain economic benefits while awaiting public acceptance. But every artist has a right, and even a duty to himself and his art, to attempt to sell his creations.

For better or for worse, selling a work of art projects the artist into the realm of business and law. A sale may be consummated in a variety of ways. The artist may choose to sell his work directly to a purchaser who intends to put the object in his own home; he may sell through a dealer or gallery; he may sell a finished work, or he may produce a work to meet certain specifications or tastes. But every arrangement presents different legal problems. The purpose of this chapter is to examine types of transactions artists are likely to enter and to warn against possible pitfalls.

#### **Commissions to Produce**

A commission is an agreement to purchase a work of art that does not yet exist but which the artist promises to bring into being. It is generally negotiated by the artist directly with his patron. The fact that the work does not exist when the agreement is reached causes most of the legal problems an artist is likely to encounter in accepting a commission. What if his patron is not satisfied and refuses to pay?

If the patron is not to be satisfied, his pronouncement

is not likely to come until the artist has almost completed his work. But what happens at this point will depend on the original agreement or contract. The die was cast long before.

Operationally, a contract may be defined as an agreement that will be enforced by a court of law. To be enforceable a contract must be founded on "consideration" (something of value to be given or done in exchange for something of value to be given or done by another). The law does not ordinarily force a person to keep a promise if he does not receive something in return. The theory is that there must be an exchange to support a contract. Illustratively, a promise to paint a picture for a person is not binding unless that person promises something of value (money or the like) in return. Generally, two acts are needed to create a contract. The first is an offer—"I will give you this, if you will give me that." The second is an acceptance—"Agreed."

An infinite variety of conditions or qualifications may be made a part of any contract. "This agreement is void in the event of a strike," or "if delivery is not made within thirty days," or "if I am not satisfied with the product," are terms frequently used. Satisfaction of the patron is a clause common to many artistic commissions, and it can be a very troublesome one for the artist.

The general policy of the law is to allow people to make any kind of contract they want, and to enforce that contract as written. This policy goes so far as to permit the making of contracts by which the duty of a party to perform his part of the bargain depends solely upon the state of his own mind—his own satisfaction. Therefore, if an artist enters a contract by the terms of which it is clear that the patron is to pay only if he is satisfied, the artist can collect only if he is able to achieve satisfaction on the part of his patron.

A person's state of mind is, of course, very hard to prove. Satisfaction is a state of mind. It is possible that a patron, having suffered a loss in the stock market, will decide that he wants to breach a contract and that he will feign dissatisfaction to avoid the appearance of a breach. It may be possible to convince a court that the dissatisfaction is feigned, but it will not be easy to do. If an artist makes this type of contract, he should be aware of the possible consequences.

Whether the artist finds himself completely at the mercy of his patron's whim may depend upon how the personal taste and satisfaction clause is written. If the contract says the artist shall be paid if he produces a "satisfactory" picture, the effect may be different than if the contract recites that the patron need pay only "if he is satisfied." Some courts may hold that a satisfactory picture is one that is objectively satisfactory; that is, one that would satisfy a reasonable man. In that event, proof of quality might be made by the expert testimony of other artists or of art dealers. However, most courts will interpret satisfaction clauses to require that the product satisfy the purchaser, unless it is completely unambiguous that the standard intended was the satisfaction of a reasonable man. The assumption is made, on the basis of general observations about human nature, that satisfaction of the purchaser is probably what was intended.

When working under a personal satisfaction contract, the artist should specify that his patron pay specified portions of the contract price at various stages of the creative process. Where this is not acceptable, the artist may gain some protection by having the patron put his initials on drafts, designs and preliminary sketches indicating that he is satisfied at various steps of the creative process. Then should the patron show reluctance to accept the final product, there is at least some evidence

available from which it may be argued that the patron's dissatisfaction is not genuine.

If a dissatisfied patron cancels his contract, the artist will usually be entitled to dispose of the work elsewhere, unless it is a mural in the patron's house, of course. A portrait, however, presents a special problem. It may be an invasion of the patron's privacy, or even a form of libel if the subject is portrayed in a derogatory light, to sell or exhibit a portrait without authorization. If a portrait just cannot be completed to the patron's satisfaction, the artist may choose to hide or destroy his work, or he may swallow his pride and renegotiate the contract at a lower price. The only other possible choice is to obtain a written release from the subject permitting exhibition or sale.

If the reader will refer back to the sample "satisfaction" clauses discussed earlier, he will note that they were so phrased that they made the patron's duty to pay contingent on satisfaction. They did not promise satisfaction. If the artist says, "I will paint a satisfactory picture in return for so much money," he has promised to satisfy. Where that is true, a failure to satisfy will be a breach of contract by the artist, though geneally one with only minor consequences. Little damage has been done the patron except perhaps to waste some of his time. However, there may be fairly serious damage if the work of art is attached to the property of the patron. The patron may sustain costs in removing the unsatisfactory work, and to get what he wanted he may be required to hire another artist at a higher price. In that case, damage may be assessable to the artist if he promised to satisfy. If the work of art will be affixed to the patron's property, it is especially important for the artist to use the contingent form, rather than the promissory form.

Where the work of art is a mural or becomes affixed in the house of the patron, the patron cannot retain the

benefits of the artist's work, while at the same time refusing to pay. This is true even if the patron is not satisfied. There is a rule of law against unjust enrichment. In a situation of this nature, the artist is not entitled to receive his contract price because he did not fulfill his end of the bargain; however, he is entitled to a sum of money which adequately represents the value of his work. Theoretically, and as a practical matter too, the value of the artist's work should be less than the contract price since the original contract contemplated not only a work of a certain value, but one that corresponded exactly to what the patron wanted. That satisfaction should have some monetary equivalent over and above the value of the work on the open market.

### **Death of Patron or Artist**

The contract between an artist and his patron is called a personal service contract. The patron is contracting for the services of a particular artist, and substitutes are not acceptable. This type of contract must be distinguished from one in which A contracts to give B's house a coat of paint. If A gets sick and cannot do the work himself, he may elect to find another painter to finish the job. B has no right to object because it makes little difference who does house painting so long as he is reasonably competent. But a man who hires Jackson Pollack is not likely to be satisfied if he gets a Norman Rockwell. And generally, the rights and duties under a personal service contract terminate with death or disability of either party, as would be expected.

In the absence of any language to the contrary in the contract, if performance by the promisor (artist) becomes impossible by virtue of death, insanity, or disabling illness, the contract is discharged, and the artist or his estate will be under no obligation. Likewise, if the work

of art is a portrait, the patron or his estate will be under no obligation if the subject-either the patron or a third person-dies before there have been any sittings. If sittings are completed so that the artist can finish the painting without the subject, however, the patron or his estate would be liable for the agreed price. The result would probably be different if the artist had promised to "satisfy" the person who died. In this case, the contract would most likely be discharged for failure of consideration.

The rules discussed in this section are those that would be applied where the contract makes no provision for a contingency such as death, because that contingency was not contemplated when they entered the contract. Courts have rules, based on common sense, to help them guess what the parties to a contract would have wanted in a specific situation had they foreseen that such a situation might arise. Probably the main function of an attorney in the writing of a contract is to help his client to explore possibilities that would not ordinarily occur to the client, to advise the client to decide in advance how these possibilities should be dealt with, and to express the client's position in a manner that will be both clear and legally binding. When that is done, questions are less likely to arise in the first place. When they do, courts will not have to guess the intentions of the parties. Of course, the parties to a contract may decide to do exactly the opposite of what a court, shooting in the dark, would guess they would want done. As long as the result is not illegal or against public policy, the courts will go along. After all, one of the main doctrines of contract law is that the parties should be free to contract as they choose.



## **Sale through a Dealer**

Probably the most popular method of selling art is to locate a dealer who will undertake to publicize and sell the artist's works. The dealer generally sells through gallery showings or exhibitions. In this way, art critics and the public are given an opportunity to see, evaluate, and purchase, the artist's works.

The artist and the art dealer may enter into one of two general arrangements, either of which may be varied in an infinite number of details. Basically, the dealer may purchase art and resell it, or serve as the artist's agent, selling on a commission or fee basis works that are owned, until sale, by the artist. As an example of variations within these two general classes, when the dealer buys he may agree to buy, and the artist promises to sell, the artist's entire output; the dealer may take a certain specified portion; he may have a right of first refusal; or he may just buy an occasional work. Where the dealer contracts to purchase all of the artist's output, the artist is bound by law to sell to the dealer every work he produces. Where the dealer has the right of first refusal only, and if the dealer decides not to purchase, the artist is free to sell to a third party.

If the paintings continue to belong to the artist while in the hands of the dealer, the dealer is an agent for the artist. In consideration of the dealer's services, the artist generally agrees that the dealer is to receive a commission or a fee. Such agency agreements may stipulate that the dealer is to have the exclusive right to sell the artist's works or that the artist is free to sell either on his own or through others. The agency relationship is subject to certain fixed legal rules, but an agency is set up by contract, so many of its terms may vary at the will of the parties.