

# The Year In Review

***January 6, 2012 by Sheppard Mullin***

The past year was packed with litigation that ranged from broad constitutional questions to the ever present scourge of forgeries. Art Law Gallery presents highlights of some of the most important cases:

*The Walking Dead Copyrights:* Conductor Lawrence Golan's long-running "zombie" copyright case was argued before the Supreme Court in October. The case centers around the fate of millions of pieces of literature, music, and art that were previously in the public domain. A treaty that the US signed (TRIPs: Trade Related Aspects of Intellectual Property Rights) and the resulting congressional legislation restored the copyright on the pieces of work in question. For Golan, a professor and conductor at the University of Denver, this meant that the resulting rental fees put a vast body of work beyond the scope of his and other small orchestras with limited budgets. The case has far-reaching implications for the art world as well and involves the copyright protection of pieces by Picasso, Escher, and many other artists. The case below is *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), granted cert. Mar. 2011, argued before S.Ct. Oct. 5, 2011.

*Rastappropriationist:* Photographer Patrick Cariou sued high-profile artist Richard Prince, his gallery and the book publisher, for copyright infringement. The case is the most closely followed case in the area of appropriation art. It brings to the fore the booming culture of "remixing" old images to make new art. The advent of the Internet and digitization of media has made it easier and easier to practice this craft. This has pushed the genre up against the limits of copyright, which this case will likely define for the near future. In the case at hand, Cariou was successful at trial and won his claim that Prince had infringed on his copyright, ordering that all infringing copies be

impounded and destroyed. The case is *Cariou v. Prince et al*, 784 F.Supp.2d 337 (S.D. NY, 2011), and is currently on appeal.

*Droit de Suite Life*: A group of artists and artists' estates sued Sotheby's and Christie's for failure to pay resale royalties per the California Resale Royalties Act. The law generally allows an artist to collect a 5% royalty on any art that is sold for over \$1000 if the sale takes place in California or the seller resides in California. The class action lawsuits were filed with the intention of compelling the auction houses to reveal if any sales fall under the specifications of the law. The cases are *Estate of Robert Graham v. Sotheby's*, 11- 8604, and *Sam Francis Foundation v. Christie's*, 11-08605 (C.D. Ca. 2011). The following week, in a spate of individual lawsuits, the Sam Francis Foundation sued nine California galleries under the same statute. Stay tuned.

*He that Filches from Me My Good Name*: In June a Canadian art expert, Peter Paul Biro, sued The New Yorker magazine and the author of an article that was critical of him. The lawsuit claims that, "[t]hrough selective omission, innuendo and malicious sarcasm, the article paints a portrait of plaintiff which has no basis in reality, and which has been highly damaging to his reputation." Biro is famous for asserting that he could authenticate a painting through the use of fingerprint analysis. In December, Biro expanded the suit to include news media who reported on the original case and included the allegations. The case is *Peter Paul Biro v. Condé Nast*, 1:11-cv-04442 (S.D. NY 2011).

*Here Today, Gone in 165 years*: In December, Knoedler Gallery abruptly shut its doors after being in business for 165 years. The gallery was the home of many great American artists including Homer, Bellows, Pollock and Stella. The owners claimed it was a "business decision," but the gallery was embroiled in one of the most high-profile forgery cases in years. The gallery had sold financier, Pierre Lagrange, a Jackson Pollock painting and Lagrange subsequently found that he was unable to sell the painting through either Sotheby's or Christie's because of doubts over its authenticity. It was then revealed that the FBI was investigating at least 16 other possible forgeries that had all been sold through Long Island dealer, Glafira Rosales, via Knoedler. The case is *Lagrange v. Knoedler Gallery LLC*, 11-cv-8757 (S.D. NY 2011).

*A Can of Worms, A Bowl of Food*: The U.S. District Court for the Central District of California ruled that a photograph of a bowl of food on the packaging of a Vietnamese culinary dish that translates roughly as “rice stick, egg roll, grilled meat,” was not sufficiently original, not fixed in a tangible medium, and thus the packaging would not be accorded protection under the Copyright Act. The Court also found that the bowl of food did not show sufficient evidence of distinctiveness to protect the photograph of the bowl as trade dress. This modest dish, er, case, may have significant implications for protection of 3-D sculptures and photographs. The case is *Kim Seng Co. v. J&A Importers, Inc.*, CU10-742-CAS-MAN (C.D. Cal. 2011).

The 2012 edition of the Art Law Gallery will bring more news and views.

Happy New Year from Sheppard Mullin Richter & Hampton, LLP.