

## AUTHENTICATION IN ART

AiA Art News-service

# HYPERRALLERGIC

### How Art and Law Can Work Together Beyond the Marketplace

On the one hand, the role of the art lawyer has been to lubricate the wheels of commerce. But this approach runs the risk of missing the most illuminating contributions to art law itself.



Felix Gonzalez-Torres, “Untitled (billboard of an empty bed)” ([via Jason Eppink on Flickr](#))

Bertolt Brecht famously wrote that “Art is not a mirror held up to reality but a hammer with which to shape it.” The beauty of art is that it can be many things at one time — a way for us to peer into society’s faults and fissures; a device for visual revolution; or simply a fungible commodity,

ripe for investment and trade on the open market. And then there are the institutional economies that emerge from each of these trajectories — auction houses, galleries, museums and the people they employ, including administrative staff, curators, publicists, and critics.

Less visible, but fundamental to all of those institutional economies are the lawyers. For centuries, law has often been inseparable from art, playing an important role in enabling (and disabling) the existence of the latter. Since the dramatic expansion of the commercial art market in the 1960s, and later in the '80s, the need to understand how law works in the art world has been especially urgent. The buying and selling of new kinds of work as well the age-old anxiety among owners regarding questions of authenticity and originality compelled buyers, sellers, and artists to entrust attorneys with the safeguarding of their property interests. Perhaps as a result, the mid-1970s saw the emergence of a new subfield of legal studies colloquially known as “art law” that sought to address these questions as well as other conundrums specific to visual art, including the appropriation of images in the name of creation.

In the 1980s and '90s, watershed moments like the removal of Richard Serra's “Tilted Arc” and the censoring of artists like Robert Mapplethorpe brought real pressure to bear on lawyers in their capacity to mediate between the disparate languages used to respectively describe art and law. As a result, a more complex picture of the relationship between the two realms of art and law began to emerge.

At times, art and constitutional law have appeared at odds with one another. Remember when Rudolph Giuliani tried to slash public funding for the Brooklyn Museum because of its *Sensation* exhibition (featuring the works of Chris Ofili)? Or the time that the Supreme Court upheld the “decency clause” restriction for funding by the National Endowment for the Arts, thus enabling it to effectively censor artworks like that of performance artist Karen Finley? In each of those moments, artistic expression becomes pitted against political and cultural considerations. As a result, the First Amendment is often left to mediate these disputes, at times leaving art deeply misunderstood and the world of law seem particularly hostile to cultural workers than ever before.

Still, at other times, the reverse has happened, where art tries to make sense of the rule of law. Artworks have played important roles in advancing dialogue on social injustice, from David Hammons's unforgettable "Injustice Case" (1970), a body print recalling how Black Panther leader Bobby Seale was bound and gagged in a Chicago courtroom, to Curtis "Talwst" Santiago's "Por qué" (2015) depicting the brutal murder of Eric Garner in a reclaimed ring box. There was also Felix Gonzales-Torres's unmade bed series, where the artist placed his vacant bed in a museum and photographed the bed for public billboards, as a statement about the effect of AIDS and the Supreme Court's decision to uphold sodomy laws. The work made powerful, highly emotional statements about the limits of law's protective reach.

More recently, lawyers and artists alike have struggled over competing claims to freedom of artistic expression and those made in the name of defending intellectual property rights. These debates prominently come up in cases of "fair use," like Cariou v. Prince. They were also recently sparked by the work of artist Kelley Walker, who appropriated images of black people and from the Civil Rights-era and covered them with toothpaste — an act that many judged to be unethical and was the subject of widespread protest at the Contemporary Art Museum St. Louis, where the work was shown. The questions raised regarding racial difference, inequality, and appropriation are difficult ones, and, over time, it has become increasingly urgent that we engage with both the languages of art and law to make sense of how to answer them.

Today, the need for these conversations — particularly as they address non-white, female, queer, and transgender artists — becomes particularly acute in the wake of Donald Trump's election, who has demonstrated an explicit intent to perpetuate unequal treatment before, and despite, the law. How does the art world respond, and how can art lawyers support the need for a critical response?

On the one hand, the role of the art lawyer has been to lubricate the wheels of commerce, which can, at times, reinforce a conventional approach to power in the art world, measured almost exclusively by dollar signs. But this approach, which fails to think beyond the marketplace, runs the risk of missing the most illuminating contributions to art law itself. Consider an example. Last year, the online magazine

Artnet generated a clickbait-worthy list of what it called “some of the most powerful lawyers in the art world today.” While it billed itself as a “non-exclusive but representative roster,” gathered after the author consulted a few “high-profile” attorneys, who remained anonymous, perhaps its most notable aspect was who it did not include, and why. Consisting of an overwhelmingly male and white roster, the list included the top lawyers for Christie’s and Sotheby’s, and others representing a glittering array of largely male and white artists such as James Turrell, Richard Serra, David Wojnarowicz, along with the estates of Cy Twombly and Willem de Kooning. Of the 10 attorneys named, only two are women, one of whom is mentioned at the very bottom of the piece as a veritable afterthought. In sum, rather than take into account the complexity of the relationship between art and law, or cast a wider net of names that reflects the diversity of the art law world, the list of names collectively affirms the depressingly common assumptions that the “worth” of art must always be tied to its perceived market value and that power belongs exclusively to the monied.

To reel out a list of overwhelmingly white, male lawyers and then deem them to be “most powerful,” simply replicates the very thing that many artists — and lawyers alike — protest. This article is an attempt to shift the focus from how artworks function as yet another market commodity to how art and law can work as dynamic, reciprocal forces. Central to this thinking have been many attorneys who are female, LGBT, people of color, and other minorities. Just as there are many different kinds of artists, there are also many different kinds of art lawyers, in fact, binders full of them. Both of us, for example, are women of color, former practicing attorneys, and devoted scholars on art law who have spent much of our professional lives in dialogue with other people who deserve mention, not just due to the diversity that they bring to the table, but because each of these people offers us a different take than a simplistic money-is-power paradigm that pervades commentaries on the conventional art economy.

For instance, art lawyer and curator Pati Hertling works by day on issues of art restitution at a Manhattan law firm, while at night she has also curated exhibitions, salons, and performances focusing on feminism, sexuality, and social conscience, like *Evas Arche und der Feminist*, a performance series she co-curated with artist Marlous Borm. As

Hertling's work demonstrates, it is possible to use the tools of art and law and find ways to offer cultural critiques of both.

The scholarship of Amy Adler, a professor at NYU Law (mentioned only in passing at the end of Artnet's article), was one of the first to consider how art ushered us to rethink the law's regulation of all types of expression, including obscenity and postmodern appropriation. Taking the recent legal battles over Richard Prince's use of images produced by others as a case in point, she recently argued that art and the law will perpetually be at loggerheads unless the latter can admit the degree to which appropriation has become widespread in contemporary art.

But there are examples where lawyers and artists must work closely together, like the legal defense team for Steve Kurtz, the Critical Art Ensemble (CAE) member. His antiwar projects exploring the public health impact on germ warfare programs led to his illegal detention in 2004 by the FBI and the confiscation of his work in the name of national security. The legal case, which was settled in 2008, succeeded in pushing back against the excesses of the USA Patriot Act passed by an anxious Congress.

And then there are the artists-turned-lawyers who deserve consideration as well, because of the ways in which they use the law as a conceptual lens to make important artistic contributions. Terri Keyser, renowned in the 1980s as one-half of the duo United Art Contractors, published strategic advertisements in *Artforum* ("We're Desperate: We Want to Buy Our Way Into a Show"), calling the art world out on its careerism and cynical self-promotion long before it became fashionable to do so. Keyser may have been dreaming of a publication like Artnet when she and her collaborator David Shire offered to pay critics for reviews depending on quality; a bad review by a well-known art critic would earn 50 bucks while a "dynamite" review by an average art critic would gross seventy-five. Eventually, Keyser would attend law school almost as an extension of her practice, subsequently becoming a prominent civil rights attorney. Sergio Muñoz Sarmiento, another artist who became a lawyer, eventually founded the Art & Law program in New York, which to our knowledge is the only initiative in the US dedicated to cultivating a sustained community of individuals committed to critically studying the intersection between art and law.

Largely because women and minorities have been overlooked in both the fields of art and law, they often offer us the most critical insights from an 'outsider' point of view, sometimes within the world of art, and, at other times, within the world of law. Recognizing these names is more than a salvage operation: it is also to underscore the profound importance of women's work and the work of people of color even when not yet legitimized or celebrated according to the assumptions created by a predominantly white male establishment. Such work aspires to many goals, of which the most important of all may be to emphasize how art is more than just a commodity, but the very thing that defines our collective and political identities.