

UNITED STATES ARTS LAW UPDATE

RECENT DEVELOPMENTS

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Antiquities Theft: *United States v Frederick Schultz*

[129] On 12 February 2002, a federal jury in New York found Frederick Schultz guilty of violating the *National Stolen Properties Act*² (NSPA) by conspiring to receive stolen antiquities. Schultz is a prominent US antiquities dealer in Manhattan who recently served as President of the National Association of Dealers in Ancient, Oriental and Primitive Art. The objects at issue — Egyptian antiquities — include a black vase and a stone head said to depict the Pharaoh Amenhotep III, sold by Schultz to an English collector for US\$1.2 million. Sentencing was set for 30 May, when Schultz faces up to five years in prison and a fine of up to US\$250,000 or twice the gross gain or loss from his crime.³

The items were considered stolen based on a 1983 Egyptian law (Law 117), which provides that, as of 1983, all object over 100 years old having archaeological or historical importance are considered to be ‘public property’.⁴ As such, Egypt contended that they were stolen when removed from the country without governmental consent. Schultz had unsuccessfully moved for dismissal of the case,⁵ challenging the indictment on three principal grounds:

- (1) that the Egyptian law is more in the nature of a licensing and export regulation, the violation of which would not constitute theft for purposes of the NSPA;
- (2) that even if Law 117 vested the property in the state, the special kind of property thereby vested would not entitle it to protection under US law, and

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² Title 18 United States Code s 2315.

³ Martha Lufkin, ‘New York dealer, Frederick Schultz, found guilty of dealing in stolen Egyptian antiquities’ (March 2002) No 123 *The Art Newspaper* 15.

⁴ *United States of America v Frederick Schultz* 178 F Supp 2d 445, 446; 2002 US Dist LEXIS 15 (SDNY 2002).

⁵ *Ibid.*

(3) even if such foreign interests would in some instances be entitled to such protection, in this case the *Cultural Property Implementation Act*⁶ (CPIA) would [130] supercede a civil enforcement scheme for criminal prosecution.⁷

The Court rejected all three challenges, finding that Law 117 'unequivocally asserts state ownership of all antiquities', that the NSPA has been consistently applied to thefts in foreign countries and subsequent transportation into the US, and that the CPIA does not preempt or modify other available federal or state remedies.⁸

Regarding the first rejected challenge, the Court discusses Law 117, which not only asserts state ownership over all antiquities not in private hands as of 1983, but it also requires that all newly discovered antiquities be reported to the Antiquities Authority and recorded by the state, and that all movable antiquities be stored in the state's museums and storage facilities.⁹ As to the second challenge, the Court cited the rather notorious case of *US v McClain*¹⁰ to support its finding that the NSPA has been applied to thefts based on a foreign sovereign's assertion of ownership pursuant to its laws, as long as it is proven that the defendant knew he was dealing in stolen goods.¹¹ Finally, with respect to defendant's assertion that the CPIA superceded the NSPA in cases such as this, the court notes that the Senate, when reporting on the CPIA, expressly stated that the statute did not pre-empt state law or modify other federal or state remedies.¹² In addition, noted the court, the CPIA focuses on balancing foreign and domestic import and export laws and policies, while the NSPA focuses on 'intentional theft and knowing disposal of stolen goods.'¹³ Thus, one need not work to the exclusion of the other.

Evidence put forth at trial primarily revolved around Schultz's dealings with an English art restorer, Jonathan Tokeley-Parry. Tokeley-Parry (whose original surname was Foreman), described as having a degree in moral sciences from Cambridge,

⁶ *Convention on Cultural Property Implementation Act* of 1983, 19 United States Code s 2601 et seq.

⁷ *United States of America v Frederick Schultz* 178 F Supp 2d 445, 446-7.

⁸ *Ibid* 447-9.

⁹ *Ibid* 447.

¹⁰ *United States v McClain* 545 F 2d 998 (5th Cir, 1977).

¹¹ *United States of America v Frederick Schultz* 178 F Supp 2d 445, 449.

¹² *Ibid*, citing Senate Report No 97-564, 25 (2d Session 1982).

¹³ *Ibid*.

reportedly admitted smuggling approximately 2000 antiquities out of Egypt over the years.¹⁴ He would dip the objects in liquid plastic and paint them to look like cheap tourist souvenirs so that he could remove them from Egypt without notice.¹⁵ According to evidence at trial, Schultz agreed to buy Egyptian antiquities from Tokeley-Parry for resale, often marketing them under the guise of having come from a fictional 'Thomas Alcock Collection' purportedly concocted by Tokeley-Parry and Schultz to disguise the illicit nature of the goods. In fact, Tokeley-Parry testified that he acquired the objects from farmers, builders and corrupt members of the Egyptian antiquities police.¹⁶ After attempting to flee the country during an initial trial and later attempting suicide, Tokeley-Parry was finally convicted in a British court in 1997 of dishonestly handling antiquities, and he served three years of a six year sentence. He was also convicted in absentia by an Egyptian court of theft and smuggling and sentenced to 15 years' hard labor.¹⁷

Schultz's trial has attracted tremendous attention in the art and antiquities worlds. Dealers fear that his conviction may strengthen the hand of foreign governments in US courts when seeking the return of cultural objects.¹⁸ In addition, some in the art trade fear that the antiquities trade will be devastated by [131] the implications of holding a US dealer liable for theft based on foreign patrimony laws asserting blanket ownership over their antiquities. William Pearlstein, an attorney for the National Association of Dealers in Ancient, Oriental and Primitive Art (which Schultz headed last year), is quoted as lamenting: 'I think the government is out to squelch the antiquities trade, and no one is taking into account the interest of the public it serves.' Conversely, Nancy Wilkie, president of the Archaeological Institute of America, is quoted as saying: 'Our belief is that if people find it difficult to sell these objects on the art market, if they fear the objects might be seized and they might end in court, it might be a deterrent.'¹⁹ A number of organizations weighed in with their opinions by submitting amicus curiae (or 'friend of the court') briefs in the case: Christie's Inc, the

¹⁴ Peter Watson, 'Raiders of the Lost Art' (15 February 2002) *Times Online* <<http://www.thetimes.co.uk/article/0,,7-208753,00.html>> (accessed 21 March 2002).

¹⁵ Andrew Chang, 'Digging for Details' (13 February 2002) *ABC News.com* <<http://abcnews.go.com/sections/world/DailyNews/antiquities020213.html>> (accessed 21 March 2002).

¹⁶ Lufkin, above n 3.

¹⁷ Watson, above n 14.

¹⁸ Chang, above n 15.

¹⁹ Celestine Bohlen, 'The Trial of a Dealer Divides the Art World' (30 January 2002) *NYTimes.com* <<http://www.nytimes.com/2002/01/30/arts/design/30DEAL.html>> (accessed 12 March 2002).

Art Dealers Association of America and the National Association of Dealers in Ancient, Oriental and Primitive Art all filed briefs in favor of Schultz, while the Archaeological Institute of American and other groups filed briefs in opposition.²⁰ Interestingly, the museum community did not involve itself in the brief-writing process in this case, unlike the earlier case of Michael Steinhardt and his loss of a Sicilian gold platter to Italy's claim of ownership. Perhaps the active (and apparently knowing) involvement of Schultz in the smuggling process led the museum groups to stay at a distance, despite the significant impact on the antiquities trade that may result from this conviction.

Nazi Loot: *Kann v Wildenstein*

More than half a century after the Nazis looted Alphonse Kann's French residence and seized his estimated 1200 piece collection of art and antiquities, Kann's heirs have taken to court in New York in an attempt to reclaim eight rare manuscripts from the Wildenstein art dealing dynasty. In an unpublished opinion,²¹ the New York Supreme Court denied the parties' motions for dismissal, finding that additional discovery is necessary to clarify facts surrounding the acquisition of the manuscripts by the Wildensteins, including whether the manuscripts were acquired in good faith.

Kann fled France in 1939 in anticipation of the Nazis' arrival; he never returned. In October 1940, Nazi occupation forces raided the Kann residence and seized his massive collection. Kann submitted claims to the Commission de Recuperation Artistique, established in 1945 to facilitate the return of artwork to victims of Nazi looting. Notably, the claims did not include reference to any manuscripts. Kann, however, pointed out in his submission that his claims were based on memory and incomplete. Interestingly, Georges Wildenstein filed a claim with the Commission asserting a loss of, among other objects, nine unidentified manuscripts from his looted collection.²² On 4 June 1949, Georges Wildenstein wrote to the Commission and claimed four of the manuscripts in dispute, which had been exhibited earlier that year at the Bibliotheque Nationale in Paris. By 1952, the Commission had given those

²⁰ Chang, above n 15.

²¹ *Warin et al v Wildenstein & Co Inc* 2001 NY Slip Op 40127U; 2001 NY Misc LEXIS 542 (Sup Ct NY 2001).

²² *Ibid* 3.

manuscripts, as well as three of the others in dispute, to Wildenstein. Defendants deny ever having obtained the eighth manuscript identified by plaintiffs.²³

[132] In 1996, Warin (Kann's great-nephew) became aware of a book by Hector Feliciano, entitled *The Lost Museum/The Nazi Conspiracy to Steal the World's Greatest Works of Art*, in which Feliciano describes an inventory coding system used by the Nazis to identify collections from which items were seized. Items from the Kann collection were apparently assigned the code 'KA;' items from the Wildensteins were coded 'W' or 'WIL'. In October 1996, Warin received a letter from the French Ministry of Foreign Affairs acknowledging that a number of manuscripts marked with 'KA' codes were given to Wildenstein between 1949 and 1952. Warin asserts that this was the first time he became aware that the Wildensteins possessed the disputed manuscripts.²⁴ In November 1996 and January 1997, Warin contacted the Wildenstein foundation and demanded the return of the manuscripts. Guy Wildenstein rejected the demands, asserting that his grandfather Georges bought the entire collection of manuscripts from Kann before World War II.²⁵ This suit followed.

In assessing the parties' various motions to dismiss in the initial phase of this action, the Court determined that French, rather than New York, law should apply to the claims, based on New York's conflicts of law provisions. New York law provides that its court shall take judicial notice of the laws of foreign countries if 'a party requests it, furnishes the Court with sufficient information to comply with the request, and has given each adverse party notice of his intention to request it'.²⁶ Under New York's conflicts of law analysis, the court conducted an 'interest analysis' under which it seeks to apply the laws of the jurisdiction having the greatest interest in the litigation, particularly focusing on the location where the injury occurred. Finding that the Plaintiffs reside in France, the Nazi seizure of Kann's collection occurred in France and the Wildensteins acquired the manuscripts in France, the Court agreed with the Defendants that French law should apply.²⁷ Had New York's statute of limitations rules applied, its period for recovering property from a holder in bad faith would have

²³ Ibid 3–4.

²⁴ Ibid 5.

²⁵ Ibid 5–6.

²⁶ Ibid 6, citing CPLR s 4511(b).

²⁷ Ibid 9.

expired three years after the time of theft,²⁸ while its period for recovering from a good faith purchaser would not expire until three years after the defendants' refusal of plaintiffs' demand for return of the objects.²⁹ In this case, however, the Court determined that the timeliness of the claim would be determined solely by reference to French law.³⁰

Although the Court found that the parties have not yet provided sufficient information on French law to enable the court to resolve the claims, it noted that information in an affidavit submitted by defendants provided translations of certain articles of the French Civil Code. According to the affidavit, the Code establishes a two-prong statute of limitations analysis for determining whether plaintiffs' right to assert its claims has expired.³¹ If a party in good faith acquired lost or stolen personalty, the party asserting a claim for return must do so within three years from the date of loss or theft.³² However, even if the party acquired such personalty in bad faith, the claimant must commence an action for recovery within 30 years, if the possessor has acted as the owner of the property by 'continuous, peaceful, open and unequivocal possession'.³³ Thus, under French law as described by the defendants' expert, the plaintiffs will need to address whether the Wildensteins acquired the manuscripts in good faith and [133] whether their possession has been 'continuous, peaceful, open and unequivocal'. If the plaintiffs can establish that the defendants' possession does not qualify as such, it appears that they might be able to assert a claim under French law even though the 30 year limitations period may have otherwise run out. The Court notes that defendants have failed thus far to establish that their possession of the manuscripts was open and public at any time prior to 1996. Additionally, the plaintiffs submitted an affidavit from a Professor James Marrow that could seriously damage the defendants' case. Marrow asserts that he visited the Wildenstein's New York gallery in 1997 and viewed eight manuscripts, each of which bore the mark 'KA' followed by a three digit number. Marrow also claims that he was told that only one

²⁸ Ibid 8, citing *Sporn v MCA Records* 58 NY 2d 482, 487–8, 462 NYS 2d 413, 448 NE 2d 1324 (1983).

²⁹ Ibid 8, citing *Solomon R. Guggenheim Foundation v Lubell* 77 NY 2d 311, 317–18, 567 NYS 2d 623, 569 NE 2d 426 (1991).

³⁰ Ibid 12.

³¹ Ibid 7.

³² Ibid, citing French Civil Code Art 2279.

³³ Ibid, citing French Civil Code Art 2262.

other person has been permitted to view the manuscripts since they were acquired long ago: the London book dealer Samuel Fogg, who purportedly viewed them only weeks before Marrow.

The defendants also challenge the timeliness of the plaintiffs' action based on two special ordinances passed in 1945 by the post-occupation French government related to looted property.³⁴ According to the defendants' expert, the ordinances required owners to declare all seized property by 31 December 1947, or demand restitution from a third party by 31 December 1949. The plaintiffs, in response, claim that one of the ordinances provides that owners who prove that it would have been 'substantively impossible' to act within the period of limitations may obtain judicial relief from the bar to recovery³⁵. The court notes that such ordinance 'may well serve to preserve plaintiffs' claims under French law'.³⁶

Based on its finding that French law controls, the court denied attempts by each side to assert provisions under New York law that could have altered the results of a pure statute of limitations analysis. The defendants asserted that the plaintiffs' claims should be barred on the ground of laches, regardless of whether their claim was timely pursuant to the applicable statute of limitations. Under New York law, laches may apply to deny a plaintiff recovery in an otherwise timely action if plaintiff unreasonably delayed in commencing the action and if such delay unfairly prejudiced the defendant. The plaintiffs, on the other hand, claimed that under New York law the defendants should be 'estopped' from asserting a statute of limitations defense because they hid the manuscripts from public view and ignored the 'KA' markings, and that such 'affirmative wrongdoing' was the cause for plaintiffs' delay in commencing the action. The court found both doctrines to be unavailable in the instant case because they do not arise under French law.³⁷

Finally, the court considered whether it could properly assert personal jurisdiction over Daniel and Alec Wildenstein. In denying the motions to dismiss filed by Daniel and Alec, the court noted that the plaintiffs provided enough evidence to constitute a

³⁴ Ibid 8, citing *Ordonnances* 11 April 1945 and 21 April 1945.

³⁵ Ibid 15, citing *Ordonnance* 21 April 1945.

³⁶ Ibid.

³⁷ Ibid 16.

'sufficient start' in showing that jurisdiction may exist, and additional discovery should be allowed through which the plaintiffs might establish that its jurisdictional predicate exists.³⁸ The plaintiffs had submitted an affidavit referring to various published articles, which indicated that Daniel and Alec Wildenstein 'participated in the management and control of the business affairs of the Wildenstein family'. Further, the defendants themselves stated in their answer to the lawsuit that the 'Wildenstein family' has possessed, claimed title and ownership over, offered for sale, and in fact sold three of, the manuscripts at issue.³⁹ Plaintiffs assert that personal jurisdiction may exist in New York over [134] a non-resident individual who is deemed to have sufficient presence by virtue of 'doing business' in New York⁴⁰ or who 'transacts any business within the state' and the cause of action 'arises out of that business'.⁴¹ The court notes that, in an unrelated action, it previously characterized the Wildensteins' family interests as an 'interlocking structure',⁴² and it states that if Plaintiffs through discovery can demonstrate that Daniel or Alec, either personally or through an agent, has been involved in business decisions regarding the manuscripts, there may be a sufficient basis for finding personal jurisdiction for this action.⁴³ The action is pending.

Indian Arts and Crafts Act: *Native American Arts v Bundy-Howard*

In this case⁴⁴ the plaintiff, Native American Arts Inc, filed suit against a number of retailers and manufacturers, alleging that the defendants violated the *Indian Arts and Crafts Act* by manufacturing and selling art, crafts and jewelry in a manner falsely suggesting that the goods were Indian-made.⁴⁵ The retailer challenged the Act by asserting that it was unconstitutional because it violated due process (substantive and procedural), and that the Act's regulations exceeded the scope of its authority.⁴⁶ The court ruled against the defendants, finding that the Act's terms and conditions were clearly defined and therefore not violative of the constitution's procedural due

³⁸ Ibid 19.

³⁹ Ibid 20.

⁴⁰ Ibid 18, citing CPLR s 301.

⁴¹ Ibid, citing CPLR s 302.

⁴² Ibid 20.

⁴³ Ibid.

⁴⁴ *Native American Arts Inc v Bundy-Howard Inc et al* 168 F Supp 2d 905; 2001 US Dist LEXIS 16850 (2001).

⁴⁵ Ibid, citing *Indian Arts and Crafts Act*, 25 USC s 305e et seq.

⁴⁶ Ibid.

process; the minimum damages provided by the Act were not violative of the constitution's substantive due process; and the legislature had the authority to allow the Indian Arts and Crafts Board to implement its statutory provisions. Thus, the retailer's challenges to the Act were rejected and the suit permitted to continue.⁴⁷

The United States Congress passed the *Indian Arts and Crafts Act* in 1990⁴⁸ in an effort to promote the development of Indian arts and crafts and to establish protective measures against the misrepresentation of goods as being made by Indians or Indian tribes. For purposes of the Act, the term 'Indian' is defined as any individual member of a government recognised Indian tribe, or anyone who is 'certified as an Indian artisan by an Indian tribe'.⁴⁹ Pursuant to the Act, one who willfully offers or displays for sale, or sells, any good in a manner falsely suggesting that it is 'Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States' may be criminally prosecuted and subject to heavy fines and/or imprisonment.⁵⁰ An individual violator may be fined up to US\$250,000 and imprisoned up to five years for a first offense, with subsequent violations subjecting the violator to a fine of up to US\$1 million and imprisonment up to 15 years. Non-individual violators are subject to fines of up to US\$1 million for a first violation and up to US\$5 million for a subsequent violation.⁵¹ Civil actions are also allowed against one who 'directly or indirectly' acts as described above, although proof of willfulness is not required.⁵² Remedies available in a civil action may include an injunction or other equitable relief, as well as the greater of (1) treble [135] damages, including gross profits accrued by the defendant as a result of his violative actions, or (2) not less than US\$1000 per day for each day on which the violative action continues.⁵³

⁴⁷ Ibid.

⁴⁸ 25 US Code s 305 et seq; Public Law 101-644; 104 Stat 4662 (1990).

⁴⁹ Ibid s 104(c).

⁵⁰ Ibid s 104(a).

⁵¹ Ibid s 104(b).

⁵² Ibid s 105, as amended by the *Indian Arts and Crafts Enforcement Act* of 2000, Public Law 106-497; 114 Stat 2219 (2000).

⁵³ Ibid.

Visual Artists Rights Act: *Pollara v Seymour and Casey*

The plaintiff sued the defendants under the *Visual Artists Rights Act*⁵⁴ (VARA) after the mural she made and hung in a building was removed from its frame and destroyed. Although the mural was not previously exhibited to art critics or the general public, the court nonetheless found that the work might constitute a 'work of recognized stature' within the meaning of VARA and therefore would be protected from unauthorised destruction.⁵⁵

An interesting twist in this case comes from the fact that the owner of the building, the Empire State Plaza, did not commission the mural and never gave permission for the artist to install the work in the building. The Gideon Coalition, a group that lobbies on behalf of groups providing legal services to New York's indigent population, commissioned the artist to create the work. The mural, a 10 foot by 30 foot work on paper, depicted stylized figures lined up outside closed doors to law offices and contained phrases commenting on the threat to legal services funding due to proposed city budget cuts.⁵⁶ Under the assumption that the Coalition had obtained permission, the artist installed the mural by affixing it to a metal frame. That same evening, before the public had a chance to view the work, it was pulled down and, in the process, severely damaged.⁵⁷

Defendants argued that VARA should not apply to the case because it prohibits the destruction of works only if they qualify as of 'works of recognized stature'. The statute does not define the term, but limited case law that has considered its meaning has focused on whether the work is viewed as 'meritorious' and whether the stature of the work is recognized by 'art experts, other members of the artistic community, or by some cross-section of society'.⁵⁸ The court rejected the defendants' assertions that a destroyed work must have had prior recognition in order for a cause of action under VARA to lie. The court identified two underlying policies of VARA as

- (1) the society's interest in the preservation of works of artistic merit; and

⁵⁴ 17 US Code s 106A, and 25 USC s 1983 (1990).

⁵⁵ *Pollara v Seymour and Casey* 150 F Supp 2d 393; 2001 US Dist LEXIS 10223 (N Dist NY 2001).

⁵⁶ *Pollara v Seymour and Casey* 150 F Supp 2d 393, 394–5 (N Dist NY 2001).

⁵⁷ *Ibid* 395.

⁵⁸ *Ibid* 397, citing *Carter v Helmsley-Spear Inc* 861 F Supp 303, 325 (S Dist NY 1994).

- (2) the artist's economic self-interest in preservation of his or her own works so as to enhance his or her reputation as an artist.

After acknowledging that Pollara had demonstrated her established reputation as an artist, the court cited a California case that presumed that a recognized artist's undocumented works could be included as works of recognized stature under VARA.⁵⁹ As examples of why all paintings by recognized artists should be treated as being of recognized stature, the court cites the example of public outrage when a Picasso painting had been cut up and the pieces offered for sale, which in fact had [136] been a significant motivating factor for the passage of VARA. Thus, the court finds that protection of such works properly recognizes the 'significant societal interest in the preservation of great art'.⁶⁰ It also notes that the artist's efforts in creating a work and her interests in the product of those labors justify the protection afforded by VARA, regardless of the failure to have exhibited it publicly prior to destruction.⁶¹ Thus, the court concludes that the policies underlying VARA support its conclusion that Pollara's work should not be excluded from the statutory definition of a 'work of recognized stature' because it had not previously been exhibited.⁶²

Art as Expression: *Lederman v Giuliani, City of New York*

In a lawsuit against the City of New York,⁶³ several visual artists successfully argued that a city regulation prohibiting vendors from operating in certain public areas without a permit was unconstitutional to the extent that it differentiated between vendors of written materials, which are exempt, and art vendors.⁶⁴ The plaintiff artists are also members of an organization, Artists' Response to Illegal State Tactics (ARTIST), which joined in the suit as a co-plaintiff. ARTIST members display and sell their work on New York City streets, including an area in front of the Metropolitan Museum of Art — which is under the Park Department's jurisdiction.⁶⁵ The artist vendors have repeatedly been arrested and had their art confiscated for violating a city regulation prohibiting vendors from operating without a permit. The

⁵⁹ *Ibid*, citing *Lubner v City of Los Angeles*, 45 Cal App 4th 525, 53 Cal Rptr 2d 24 (Cal Ct App 1996).

⁶⁰ *Ibid*.

⁶¹ *Ibid* 397–8.

⁶² *Ibid* 398.

⁶³ *Lederman et al v Giuliani, City of New York et al* 98 Civ 2024 (LMM), 98 Civ 2400 (LMM), 2001 US Dist LEXIS 11567 (SDNY 2001).

⁶⁴ *Ibid*, citing NY R title 56, s 1–05(b).

⁶⁵ *Ibid* (2001 US Dist LEXIS, 1–2).

regulation has not been applied to vendors of written materials pursuant to an exemption granted under the Administrative Code that exempts 'vendors who exclusively vend written matter'.⁶⁶ The New York City Council clarified its purpose in exempting written materials from the licensing scheme as being 'consistent with the principles of free speech and freedom of the press'.⁶⁷

In upholding the artists' challenge to the city's actions, the court cites an earlier New York case, *Bery v City of New York*,⁶⁸ wherein the Second Circuit considered the right of the City of New York to require art vendors to obtain a license to sell their goods. The Court notes that the Bery Court concluded that 'visual art is as wide-ranging in its depiction of ideas and emotions as any book, treatise, pamphlet or other writing', and that under the First and Fourteenth Amendments of the United States Constitution book vendors and art vendors must be treated equally.⁶⁹ Consequently, the *Lederman* court concludes that the permit requirements cannot be legally enforced against art vendors or book vendors; both must be exempt under the city's regulatory scheme.⁷⁰

Copyright: *Oriental Art Printing v Goldstar Printing*

The plaintiff in this case⁷¹ asserted copyright infringement against the defendant over photographs of Chinese meals and designs related to a Chinese restaurant menu. The Court found that the photographs [137] were not copyrightable. However, the plaintiff had obtained copyright in the graphic design for the menu, and it was yet to be determined whether the defendant had infringed upon such copyright. Thus, the motion to dismiss filed by the defendant was granted as to copyright claims in the photographs but denied as to copyright claims related to the graphic designs embodied in the plaintiff's menu.⁷²

⁶⁶ Ibid 15, citing Administrative Code s 473.

⁶⁷ Ibid 18, citing Local Law 33/1982 s 1.

⁶⁸ *Bery v City of New York* 97 F 3d 689 (2d Cir 1996), cert denied, 520 US 1251, 138 L Ed 2d 174, 117 S Ct 2408 (1997).

⁶⁹ *Lederman et al v Giuliani, City of New York et al* 2001 US Dist LEXIS 11567 (SDNY 2001), 14.

⁷⁰ Ibid 19.

⁷¹ *Oriental Art Printing Inc and Ngan & Sons Corp v Goldstar Printing Corp et al* 175 F Supp 2d 542; 2001 US Dist LEXIS 5489; 58 USPQ 2d (BNA) 1843; Copy L Rep (CCH) P28,266 (2001).

⁷² Ibid.

Under the US *Copyright Act*,⁷³ copyright protection extends to ‘original works of authorship fixed in any tangible medium of expression’.⁷⁴ The court states that only those elements of a work that are independently created by the author and possess some minimal level of creativity are protected by copyright.⁷⁵ With respect to photographs, elements of originality may be found in the manner in which the subjects are posed, lighted, and angled, and from which certain desired expressions are captured. Even a ‘slight amount’ of creativity will suffice to satisfy the requirements of copyright.⁷⁶

Despite the low threshold of creativity required, the court here finds that this is a ‘rare case’ where the photographs are so lacking in artistic quality — being ‘mere direct depictions of the most common Chinese food dishes’ — that they do not rise to the level of protectable expression.⁷⁷ Noting that it was ‘clear that the photographs at issue were not designed with creativity or art in mind’, but rather that they were taken ‘to serve a purely utilitarian purpose’, the court determines that they lack the requisite originality for purposes of copyright protection.⁷⁸ The plaintiff failed to demonstrate that any ‘creative spark’ was required to produce the photographs.⁷⁹ In a footnote, the court comments that the photographs, even if copyrightable, would be excluded from copyright protection under the doctrine of ‘scenes-a-faire’.⁸⁰ Under such doctrine, copyright does not extend to elements such as ‘incidents, characters or settings that are as a practical matter indispensable, or at least standard, in the treatment of a given topic’.⁸¹

Despite its finding that the photographs themselves did not qualify for copyright protection, the court acknowledged that the way in which they were incorporated into

⁷³ United States Code, Title 17.

⁷⁴ 17 US Code s 102.

⁷⁵ *Oriental Art Printing Inc and Ngan & Sons Corp v Goldstar Printing Corp et al* 175 F Supp 2d 542, 546 (2001).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid* 547.

⁷⁹ *Ibid* 546.

⁸⁰ *Ibid* 548.

⁸¹ *Ibid.*

the menu's overall design does, in fact, reflect the necessary creativity to render the menu capable of copyright protection.⁸²

Consignments: *Kaufman v Chalk & Vermillion Fine Arts*

The plaintiff artist sued the defendant when, as a result of the defendant's bankruptcy filing, the plaintiff's artwork purportedly became part of the bankruptcy estate.⁸³ The Court found in favor of the plaintiff, noting that under California's *Consignment of Fine Art* law, artwork on consignment to a distributor remains the property of the artist, and the distributor remains liable to the artist for [138] any loss of, or damage to, the artwork.⁸⁴ Consequently, the artist had a right to demand the return of the work and to receive compensation for damage thereto.⁸⁵

⁸² Ibid.

⁸³ *Kaufman v Chalk & Vermillion Fine Arts LLC* 2002 US App LEXIS 621 (2d Cir 2002) (unpublished opinion).

⁸⁴ Ibid, citing Cal Civ Code s 1738 et seq.

⁸⁵ Ibid.