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Literature Update: Selected Law Review Article Summaries

Rebecca Byrne

Jane Langdon

LITERATURE UPDATE

This compilation includes brief overviews of particular articles appearing in other law reviews within the past year which may be of use or interest to the *DePaul-LCA Journal of Art and Entertainment Law's* readership.

Brooklyn Law Review

1990 Vol. 56

Nahitchevansky, *Free Speech and Government Funding: Does the Government Have to Fund What it Doesn't Like?* [pp. 213-263].

This note examines the controversy surrounding government funding and the arts. Focusing on the issue of free speech, the author emphasizes the problems which arise when the government is allowed broad discretionary authority in deciding which organization should receive funding. He argues that the government does not have constitutional authority to base the granting of funds upon a relinquishment of rights of free expression or the authority to withhold subsidies from specific groups so as to suppress potentially dangerous ideas based upon the applicant's political views, religious beliefs, or activities. The author points out that many of these organizations have no alternative source of funding and are therefore unable to remain in existence without government aid. Thus, the government's denial of funds has indirectly suppressed the first amendment rights of many speakers. The author concludes that the low standard of review which is usually applied by the courts in these cases gives too much authority to the government and that, given the increased importance of government funds and interest in protecting freedom of expression, the judiciary must ensure that these funds are allotted in a way that does not penalize or intimidate expression.

Columbia Law Review

1991 Vol. 91

Pak, *Free Exercise, Free Expression, and Landmarks Preservation.* [pp. 1813-1846].

This article is concerned with the restrictions that landmarks preservation places on expression and property rights. The focus is on the practices of religious groups and the restrictions placed upon their artistic expression due to landmark designations. Once it is established that architecture is expression, as the author argues that it is, the use of landmark law is problematic. It is an issue of content-specific regulation with regard to aesthetics which freezes the owners' ability to express themselves through their property. The author suggests that a possible compromise between the interests of the state in preserving its heritage and each owner's property rights would be to afford first amendment protection only to the expressive elements of the structure rather than the whole building. He also argues that only high value expression should be protected, such as religious structures, and that private or personal messages in architecture should not receive protection because they are not meant for a general audience. The article concludes with an in-depth analysis of the importance of allowing freedom in religious architecture and the harm that can result by stifling such expression. The author posits that only highly valued expression should be protected for "then the property owner's right to express himself will be protected without undermining the state's legitimate interest in preserving architectural heritage."

Cornell Law Review

1991 Vol. 76

Carleton, *Copyright Royalties for Visual Artists: A Display Based Alternative to the Droit de Suite.* [pp. 510-547].

This commentary addresses the issue of the rights of visual artists; specifically the need for the right to royalties that other artists possess. The Copyright Act would need minor revision and a repeal of section 109(c) in order to grant these rights to the visual artists. The author argues that visual works are closer to the already protected areas of musical and dramatic performances. The nature of an original is closer to a performance than it is to any other type of copy and this theory is supported by the fact that there is a right of public display. The Copyright Act defines an exclusive right to public display of works of visual art in section 106(5). Unfortunately, this right to public display is limited by section 109(c) (unlike the other rights provided to the copyright holder under the Act) in that it does not survive transfers of ownership. The author argues that section 109(c) should be repealed and then delineates the minor revisions that would be necessary in order to facilitate the artist's use of the display right after the work has changed hands. In the alternative, two models are set out through which royalties for the

visual artist might be based outside of the Copyright Act: the *droit de suite*, and the "exhibition royalty." The article concludes with an update of the bills currently before Congress that aim to increase the rights of visual artists, and the proposition that it would actually make the Copyright Act more consistent to grant royalty rights to artists.

Georgia Law Review

1991 Vol. 25

VerSteeg, *Iguanas, Toads, and Toothbrushes: Land Use Regulation of Art as Signage.* [pp. 437-488].

This article concerns land use regulations pertaining to private property in order to monitor the aesthetics of the community. Among other things, these laws are applicable to billboards and advertising signs. The author states that recent zoning violators have been recorded only to find out that those who erected the structures in questions intended them as pieces of art and not as signs. He argues that these art/sign issues indicate a failure of zoning officials to lay out a reasonable inquiry to follow in order to determine the status of these works and proposes that the proper tool needed to settle the controversy is a well-constructed statute containing a standard definition of "sign." Model definitions are suggested and the author additionally asserts that trademark law should be referenced when there is difficulty determining to which category a work belongs to. The article concludes with a policy argument against classifying works of art as signs. The reality of the issue is that much public access to art and support of the arts comes from corporate America through their purchase of art for public display. This support will be curtailed if the work becomes a "sign" and thus must be removed as a zoning violation.

Stanford Law Review

1991 Vol. 43

Reichman, *Goldstein on Copyright Law: A Realist's Approach to a Technological Age.* [pp. 943-980].

This commentary provides an overview of the treatise by Professor Paul Goldstein entitled COPYRIGHT: PRINCIPLES, LAW AND PRACTICE. The author discusses Professor Goldstein's utilitarian approach to copyright law as a whole and evaluates Professor Goldstein's efforts to describe the nuances that have slipped into the originality requirement since the Copyright Act of 1976 was enacted. Reichman focuses on the heart of Professor Goldstein's treatise by piecing together his innovative, highly contextual approach to infringement which digresses from the standard approach in four major ways. The author continues with a brief discussion of Professor Goldstein's treatment of international interests and the possible clash between the utilitarian bias of domestic law and the broader policies underlying foreign law. Finally, the author concludes with the acknowledgement that many scholars may disagree with Professor Goldstein's theories; however, the author predicts the treaty will have a positive impact on the future development of domestic copyright doctrine.

University of Miami Law Review

1990 Vol. 44

Silvergate, *Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?* [pp. 1243-1281].

This article discusses the affects of subliminal messages in advertising and artistic expression and examines the first amendment protection that should be afforded to both. The author discusses the narrowly defined classes of speech that are not protected under the first amendment and examines the possible categorization for subliminal communication. After an interesting discussion, Silvergate concludes that subliminal communication does not neatly fit into any of the categories of restricted speech. Accordingly, he advocates that the category of subliminal communication encompassing artistic expression be afforded greater protection, because artists have historically been employing subliminal techniques with the support of the First Amendment.

Wisconsin Law Review

1991

Levy, *Liability of the Art Expert for Professional Malpractice.* [pp. 595-651].

This is no longer an era when an expert may casually give his or her opinion as to the authenticity or value of a piece of artwork. Art experts today are expected to thoroughly examine their work, consult appropriate material and specialties, perform scientific tests, keep clear of financial conflicts of interest, and possess qualifications to be competent to voice opinions. This article analyzes the responsibility of art experts to their clients as well as a responsibility to the public which transcends that relationship. The author first discusses the standard of care required in this field, because most art expert malpractice cases arise from negligent professional opinion. Levy states that an art expert is only required to possess the skill and

learning ordinarily found in other experts in the same locality and under the same circumstances, and that the appropriate standard of care is "due diligence" and "due care." He advises that client agreements be in writing because in the absence of such an agreement, custom and usage will be referenced. In addition, Levy notes that courts now recognize that the mood of an art market may be reflected in an opinion, thus permitting vastly different results in estimates of the same work if they are made at different times. In summary, the author recommends that to ease concerns over liability, the experts should acquire malpractice insurance, be familiar with the applicable standard of care, and recognize the limits of his or her own competence.

Yale Law Review

1990 Vol. 99

Adler, *Post-Modern Art and the Death of Obscenity Law.* [pp. 1359-1378].

This discussion explores the controversy of the *Miller* obscenity test as it applies to post-modern art. The author feels that the *Miller* court, which assumed that serious artistic value provided a functional standard that could differentiate between sexually explicit art and obscenity, did not provide a sound standard for determining obscenity in light of recent developments in the art world. This article examines the intersection which has occurred in modern times between art and obscenity and focuses on a group of post-modern artists who defy the standards of serious artistic value. The author concludes that the standard of serious artistic value may be workable if post-modern artists could find art critics to proclaim that their creations are, in fact, art. Ω

Rebecca Byrne
Jane Langdon