

Marketing Your Art

2013

- **DISCLAIMER**

**The information provided is for informational purposes only
and may not apply to all circumstances.**

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What Is Art?

- To address what is protectable art under obscenity, copyright, customs, and tax laws, courts have attempted to define art. This has changed over time. For example, imported stain glass windows containing images of saints and other religious images for the use of the Convent of the Sacred Heart in Philadelphia in 1890 were held not to be in the “domain of high art” since they did not serve only a purely ornamental purpose.

What Is Art?

- **Copyright Law's Useful Articles Doctrine.** Since utilitarian articles are excepted from copyright protection, courts often must determine whether an object that has a utilitarian function nevertheless has artistic properties that can be either physically or conceptually separable from the object. If so, the object, or at least the physically separable piece, can be protectable under copyright.

What Is Art?

- **Copyright Law's Useful Articles Doctrine.** In a clear **as mud standard**, a "useful article" is defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article'." 17 U.S.C. § 101 (2000).

What Is Art?

- **Copyright Law's Useful Articles Doctrine.** In analyzing a utilitarian art object, courts consider:
- Whether the object is perceptible as art, intended as art, marketable as art, or primarily used as art. This is a difficult area.

What Is Art?

- Many of the courts rely on century-old United States Supreme Court precedent, written by Justice Oliver Wendell Holmes Jr., in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

There he famously stated:

“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.

What Is Art?

- At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.

What Is Art?

- At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value--it would be bold to say that they have not an aesthetic and educational value-- and the taste of any public is not to be treated with contempt.” *Id.* at 251-252.

What Is Art?

- In *Brancusi v. U.S.*, 54 Treas. Dec. 428 (Cust. Ct. 1928), the customs collector determined that a bronze sculpture by Brancusi entitled “Bird in Flight” was not a work of art, but a manufacture of metal.
“The piece is characterized ... as a bird. Without the exercise of rather a vivid imagination it bears no resemblance to a bird except, perchance, with such imagination it may be likened to the shape of the body of a bird. It has neither head nor feet nor feathers portrayed in the piece ... [I]t is entirely smooth on its exterior which is a polished and burnished surface.”

What Is Art?

- The court recognized that under prior cases it would not have been recognized as art. However, under the influence of modern schools of art, opinions have changed as to what is art. “Whether or not we are in sympathy with these newer ideas and the schools which represent them, we think the fact of their existence and their influence upon the art world as recognized by the courts must be considered.” The piece was found to be art under the newer direction of art as abstract, rather than mere imitation.

What Is Art?

- A marble sculpture by Brancusi from the same series, Bird in Space, sold for \$27.5 Million Dollars at an auction by Christie's in May 2005.

Is Photography Art?

- *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884):
- “[A] photograph is the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture... It is simply the manual operation, by the use of these instruments and preparations ... the accuracy of this representation being its highest merit.” Nevertheless, the photograph of Oscar Wilde which was the subject of this case, was held to be an original work of art based on original arrangement of photographer.

Artist or Artisan

- For customs purposes, whether the creator was an artisan or an artist impacted their decisions. In 1912, in *Consmiller v. U.S.*, 3 Ct. Cust. App. 298 (1912), the court described a sculptor as “one who reproduces that which is pictured by imagination and his production appeals not only to the eye, but to the emotions as well.” A decorator imitates that which he actually sees and his work goes not further than to please the eye. The highly skilled artisan practices a trade, not a profession.

Standard Contracts

- Commission
 - Estimate
 - Confirmation of Order
 - Invoice
- Simple Invoice
- Agent Contract
- Collaboration Contract
- Sale of Artwork

Standard Contracts

- Contract for Receipt and Holding of Art Work
- Gallery Contract with Record of Consignment and Statement of Account
- Lecture Contract
- Licensing Contract to Merchandise Images

Standard Contracts

- Release Form for Models
- Property Release
- Permission Form to Use Image
- Nondisclosure Form for Submitting Ideas

Standard Contracts

- Application for Copyright Registration of an Art Work
- Copyright Transfer Form
- Trademark Application
- Book Publishing Contract

Standard Contracts

- License of Rights
- License of Electronic Rights
- Contract with an Independent Contractor
- Business Lease
- Business Lease Assignment
- Business Lease Sublease

Resources

- Tad Crawford – Served as General Counsel for Graphics Artists Guild
 - Legal Guide for the Visual Artist
 - Business and Legal Forms for Photographers
 - Business and Legal Forms for Graphic Designers
 - Business and Legal Forms for Fine Artists
 - Business and Legal Forms for Authors and Self-Publishers
 - Business and Legal Forms for Illustrators
- Crawford Books Contain Negotiation Checklists and Standard Forms on CD
- Art Law, Cases and Materials, Sherri Burr, et al.

Benefits of Having a Written Contract

- **Establish Rights and Duties of Parties**
 - Ensures that contracting parties clearly know what each party is obligated to do.
- **Avoid Misunderstandings**
 - If any aspect of agreement isn't clear, disputes could arise and problems will result.

Benefits of Having a Written Contract

- **Enforcement of Rights and Duties of Parties as Intended**
 - When a dispute occurs, contract helps to pursue enforcement of rights and duties of parties.
 - Courts and other third parties (e.g., arbitrators) could construe agreement between two parties as something that wasn't intended.
- **Prudent Business Practice**
 - It is in parties' best interest to have contracts in writing.

Standard Terms

- **License** Artist can grant a license as to any protectable right. Right to use property of another, without granting any permanent interest in property. It is merely a privilege, revocable at will of licensor. A license is personal to licensee and, thus, inalienable. Any attempt to transfer a license results in revocation by operation of law. A license, being personal to licensee, does not descend to his heirs upon his death.
- May be exclusive or non-exclusive. Perpetual or for term. Revocable or non-revocable. Terms in license will control.

Standard Terms

- Appraiser
- Independent experts trained to utilize standardized industry methods of research and practice that will ensure an appropriate value determination for an art object.

Standard Terms

Provenance

- Ownership of art in chronological order. The quality of **provenance** of an important work of art can make a considerable difference to its selling price in the market; this is affected by the degree of certainty of the **provenance**, the status of past owners as collectors, and in many cases by the strength of evidence that an object has not been stolen, illegally excavated or exported from another country.

Standard Terms

- **Satisfaction Clause** If there is a satisfaction clause in the contract without any qualification, it means that a dissatisfied party that commissioned the work may reject the work even if the collector should have been reasonably satisfied. It should, therefore, be avoided.

Transactions

- Outright sale.
- Government procurement.
- Gallery transactions (consignment or sale).
- Museum transactions (donate, loan, sell, exhibit).
- Auctions.
- E-tailing - the selling of retail goods on the Internet.

Government Procurement

- Keep in mind federal, state and local government agencies purchase art for public buildings. Market to these entities ahead of time – when you hear of a building forecast.

Gallery Transactions

- **Consignment**

- Act of placing property in possession of another, but retaining ownership until property is sold. This may be done for shipping, or for sale in a store.
- Consignee (party with whom goods are left) pays the consignor (the person with items to sell) only after the sale, from its proceeds.
- Consignment creates bailment. Party with possession of property who is paid fee or has financial benefit has high standard of care with respect to property.

Nature of Consignment

- *Art Law, Cases and Materials*, DuBoff, Burr and Murray, William S. Hein & Co., Inc., 2004, p. 423:
- “A consignment arrangement creates an agency in which the gallery or dealer acts as selling agent for the artist. This fiduciary relationship requires the dealer to act only in the interest of the artist and to forego all personal advantage aside from just compensation. The dealer is also under a duty to respect the confidential nature of the arrangement.”

Museum Transactions

- Donate – gift. Donor-donee-donative intent- property-acceptance of property. If donee keeps right of return, may not get tax deduction. May include restrictions – no sale, permanent display, name of donor to be displayed, etc.
- Sell – outright.
- Structured sale – over time and percentage of interest earned.
- Loan permanently or for term. No tax benefit. May include loan restrictions (keep art behind glass).
- Deaccession – sale or storage of museum pieces.

Museum Transactions

- Cy pres – if museum goes out of business and museum is non-profit, art must be given to non-profit with charitable purpose as near as possible to that of the museum going out of business.
- International Foundation for Art Research – catalogue of art, can check to see if art has been stolen.

Film Transactions

- **Packaging and Development Agreement**
- Term, fee, allow for renewals, purchase price (sequels, prequels, rewrites), exclude droit moral.
- **Attachment Agreements**
- Actor, producer, director. Does producer have to bring financing, certain actor, etc.
- **Pay or Play** Attached party gets paid whether movie made or not.

Film Transactions

(con't.)

- **FINANCING AGREEMENTS**
- Loan (debt financing) or security (equity interest, contribution with expectation of ownership). Have securities attorney.
- **PRODUCTION AGREEMENTS**
- Script clearance. Union signatory process.
- **DISTRIBUTION AGREEMENTS**
- Worldwide or North America. Minimum guaranty or advance that they will pay. Term. Revenues: royalties or revenue share of proceeds – recoup advance and certain distribution costs (cap costs recoverable, fixed fees, etc.).

Television Transactions

- Scripted or unscripted.
- Producer can shop it to networks. Term, pre-nuptial type agreement, sunset clause, address revisions and ownership of revised script.
- **REALITY TV**
- Make a teaser – 1-3 minutes. Be clear on ownership.
- Fees and credits – less than you think.
- Back-end profits (modified adjusted gross).

Literary Purchase Agreement

- Purpose
- Definitions: Property, Motion Picture.
- Conditions Precedent – Execution, Chain of Title
- Purchase Price
- Contingent Compensation
- Credit – On-Screen, In Paid Advertising, General Terms
- Rights
- Reps and Warranties
- Indemnity
- Copyright Protection; Further Documents
- Owner's Name and Likeness
- Limitation on Publicity/Confidentiality
- Rights and Remedies

Literary Purchase Agreement (con't.)

- Assignment
- No Unions
- Notices
- No Partnership
- Waiver of Breach
- Effect of Invalidity
- Section Headings
- Counterparts
- Governing Law
- Legal Proceedings/Arbitration
- Entire Agreement
- Ex. A. Short Form Assignment of Copyright

Writing Services Agreement

- Producer engaging writing services in connection with motion picture (insure Work for Hire)
- Services
- Compensation
- Rights
- Warranties, Representations, Indemnities
- Indemnification/Insurance
- Assignment
- No Injunctive Relief
- Name and Likeness
- Guild Agreements
- Notices
- Miscellaneous

FILM TRANSACTIONS FORMS

- **Certificate of Authorship**
- **Letter of Intent for Actor to Perform in Movie**
- **Attachment Letter for Acting Services and Rights**
 - Engaging Entity
 - Actor Attachment - term, schedule, compensation, credit.
 - Rights to Use Artist's Character
 - Rights Fee, Contingent Compensation

FILM ACQUISITION CHECKLIST

- **Budget**
- **Advance**
- **Territory** - any rights frozen, held-back?
- **Media**
- **Term** – perpetual?
- **Distribution Fee** - % of all media, 20% video royalty
- **Back-end**
- **Delivery**
- **Final Cut**

Auctions

- Account for 50% of annual art sales in U.S.
- Reserve, minimum price, may be set.
- If reserve is not met, the item is “bought in”. It is generally considered negative and has a devaluing effect on the item.
- Auction house or auctioneer may sell as-is and disclaim warranties as to authenticity, provided advance notice is given.

ART AUCTION FUNDRAISER TIPS

- Holding an art auction is an excellent way for non-profits to raise money, for artist-donors to get free publicity, and for bidders to get quality art at reasonable prices. The following pointers will help everyone have a great time and realize their goals at art auction fundraisers, regardless of whether they're buying, selling, or donating.
- **Tips for Artists:**
- Career-wise, the best fundraisers for donating are those that support visual arts organizations and attract members of visual arts communities. These are great opportunities to get your art and your name out in front of anywhere from dozens to thousands of people who like art, collect art, and support the visual arts.

ART AUCTION FUNDRAISER TIPS

- **Tips for Artists (cont'd.):**
- Donate to a non-art related fundraiser only when it's an established art auction or you believe strongly in the organization's goals, and not because anyone promises you career benefits. Donating to a fundraiser that only has a few pieces of art mixed in with lots of other merchandise usually does little for your career.

ART AUCTION FUNDRAISER TIPS

- **Tips for Artists (cont'd.):**
- Before you decide which piece of art to donate, talk to the people conducting the auction and ask what types of art and what price ranges sell best. The more accurately you pinpoint bidders' tastes and budgets with your donation, the better the chances that it attracts attention and sells for a good price.
- Donate a good piece of art. Don't donate the worst, least significant, or most outdated piece you have lying around your studio. You want your donation to reflect positively on your level of generosity as well as on the quality and type of art that you're currently producing.

ART AUCTION FUNDRAISER TIPS

- **Tips for Artists (cont'd.):**
- Include your bio and contact information with your art. You want to attract and introduce yourself to as many new collectors as possible. People who like your art tend to bid higher when they know something about you, what you've accomplished in your career, and how to reach you if they want to buy or learn more.
- Whether your art auctions silently or live, set the minimum acceptable opening bid and selling prices as low as possible. When you set these dollar amounts too high, you scare bidders away. Remember that many people go to art auction fundraisers looking for bargains. Also remember that having nobody bid on your art reflects poorly on your career.

ART AUCTION FUNDRAISER TIPS

- **Tips for Artists (cont'd.):**
- If you refuse to sell your art below a certain price, set your opening bid below that price, but tell the people conducting the auction that you'll only sell when that certain price is reached. For example, if you want a selling price of \$500, start the bidding at \$200. That way, even if the art doesn't sell, it'll at least attract bids. Be aware, though, that insisting on too high a selling price may show that you're more concerned about yourself and how much your art is worth than you are about the goals of the organization selling it.
- If you're a good artist, you have an established track record of shows and sales, and people know it, your art will be bid up to a fair selling price no matter how low you set the opening bid.
- Cooperate with the people conducting the auction and generally do everything within your power to make sure your art sells. The worst possible outcome at this type of event is for your art not to sell.

ART AUCTION FUNDRAISER TIPS

- **Tips for Bidders:**
- Look at all the art. Fundraising art auctions are great places to learn about art and artists you've never seen or heard of before.
- Don't automatically assume that all art is bargain priced. Find out about artists whose art you like before you bid. The best way to do this is to preview the art ahead of time or get a list of artist donors. That way, you're prepared to bid wisely.
- Make sure that you're getting a quality current example of an artist's work. Unfortunately, some artists donate low-end, oddball, or problem pieces that they can't sell and want to get rid of.

ART AUCTION FUNDRAISER TIPS

- Tips for Bidders (cont'd.):
- Be generous. You're attending the auction to support the organization selling the art. Going a bit over budget is not so bad when those few extra dollars go to a good cause.
- Artists often attend fundraising art auctions and position themselves in the vicinity of their art. Keep your eye out for opportunities to meet artists and learn about their art.

ART AUCTION FUNDRAISER TIPS

- **Tips for Organizations Conducting Art Auction Fundraisers:**
- Publish submission guidelines for artist donors. Include pointers on what types of art sell the best, what price ranges bidders like to buy in, and how artists can best present themselves and their art.
- Tell artists how the auction is promoted, how they benefit from the publicity, and how many people come to see their art.
- Urge artists to set minimum bid and selling prices as low as possible.
- Publish a sale catalogue that includes basic information about each artist and work of art that's for sale. Mail it out to attendees as soon as they pay for their tickets. The better you promote the event, the better quality art, artists, and bidders you attract.
- Choose a venue with plenty of room, good ventilation, and adequate display space. Contented bidders are active bidders.

ART AUCTION FUNDRAISER TIPS

- **Tips for Organizations (cont'd.):**
- The admission price to the auction should include complimentary refreshments.
- Make sure that the most active bidders get preferred seating.
- Hire an auctioneer with experience doing fundraising auctions. Get names and contact information from other non-profits that have held successful charity auctions. Fundraisers are not like ordinary auctions where you want to move merchandise as fast as possible to bidders looking for bargains. A skilled charity event auctioneer can make a huge difference in the bottom line.

ART AUCTION FUNDRAISER TIPS

- **Tips for Organizations (cont'd.):**
- Your auctioneer should have a sense of humor, be able to excite an audience, encourage competition among bidders, spend time presenting and describing each item, and convince bidders into being extra generous on behalf of the causes that your organization represents.
- Make sure the auctioneer has notes describing each work of art. Well-described art sells for more money than poorly described art.
- Display each piece of art as prominently as possible. The better the art looks in its surroundings, the higher bidders bid. This is especially true for live auction items. Use quality easels, white gloves, cascading velvet backdrops, pinpoint spotlights, and so on.
- Make sure bidders can find out about any artist whose art they want to bid on. The more informed bidders are and the more comfortable they feel about bidding, the higher they tend to bid.

Tax Implications

- See a lawyer.
 - Income tax;
 - Types of income:
 - ordinary (earned or unearned)
 - capital gains
 - Deductible expenses;
 - Amortization of frames;
 - Depreciation;
 - Home studio ('work space') allowable deductions;
 - Hobbyist v. artist (net profit [2 years out of 5 years] and nine factor profit motive test);
 - Basis in art;
 - Charitable contributions (artist's own works on cash accounting basis – tax basis of zero; on accrual accounting basis – tax basis is cost of materials);
 - Collector status: dealer, investor or hobbyist.
- Estate planning (see lawyer, accountant, life insurance agent, officer of a bank's trusts and estates department).
- State gross receipts and compensating taxes or other taxes must also be considered.

Copyright

- **Copyright** is a set of exclusive rights regulating and protecting the use of a particular expression of an idea or information for a specific time period. The symbol for copyright is "©". Format - use ©, date of creation and artist name: © 2007 Jane Artist or an abbreviation by which name can be recognized or a generally known alternative designation of owner.

Copyright

- First recognized in U.S. Constitution:
- Art. I, §8, cl. 8. To promote the Progress of Science and useful Arts, by securing from limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.
- Led to the Copyright Law of 1790.

Copyright

- Copyright may cover a wide range of creative, intellectual, or artistic forms or "works". These include literary works, movies, musical compositions, paintings, etc. Only requirements are creativity and originality. It does not include fashion designs.
- May use pseudonym.
- Research can be done online or at Library of Congress, www.copyright.gov.

Copyright

Protects fixed tangible medium used in expressing an idea or information, not the idea or facts in public domain. Others are free to express same idea, or use same facts, as long as they do not copy fixed tangible medium of original which expressed such idea or facts.

Copyright

Unless otherwise agreed, the authors of a joint work are co-owners of the copyright.

Copyright

- Common Law Copyright
- Eliminated by Copyright Revision Act of 1976, effective January 1, 1978.
- Under common law, copyright protection came into existence upon creation of the work without any action on part of artist and common law right lasted until work was published or registered with Copyright Office at which time it became statutorily protected.

Copyright

- **Statutory Copyright Notice No Longer Required AFTER March 1, 1989 (Except to Bring Infringement Suit for U.S. Work), But Beneficial**
- Obtained simply by publishing the work with the statutory copyright notice in a conspicuous and accessible place on the work.
 - © 2007 Jane Artist or an abbreviation by which name can be recognized or a generally known alternative designation of owner.

Copyright

- **For Phonorecords: Statutory Copyright Notice No Longer Required AFTER March 1, 1989 (Except to Bring Infringement Suit for U.S. Work), But Beneficial**
- Obtained simply by publishing the work with the statutory copyright notice in a conspicuous and accessible place on the work.
 - Circled P 2007 Jane Artist or an abbreviation by which name can be recognized or a generally known alternative designation of owner.

Copyright

- **Statutory Copyright Notice Benefits**
 - Public knows work is protected by copyright.
 - Public knows date of publication.
 - Public knows creator.
 - May defeat claim of innocent infringement when seeking statutory damages.

Copyright

- The duration of the copyright protection is determined by statute. After January 1, 1978, the Copyright Revision Act of 1976 as amended by the Sonny Bono Copyright Term Extension Act of 1998 applies (life of artist plus 70 years). For corporate owners of work for hire - copyright persists for 120 years after creation or 95 years after publication, whichever is shorter.

Copyright

- Prior to January 1, 1978, see 1998 statute for more specific information concerning duration and handout.

Copyright

- May apply for copyright with U.S. Copyright Office. Failure to register does not invalidate copyright protection, but is required as a jurisdictional matter prior to bringing copyright infringement suit of U.S. work.
- Copyright Kit available from Copyright Office. See website for fees for “unpublished” works and published works.

Copyright

- Work for Hire: In the absence of other contractual arrangements, an employer will own the copyright for work created by an employee artist in the course of employment. Under the Copyright Revision Act of 1976, a free lancer commissioned to do work will own the copyright, unless otherwise agreed in a contract.

Copyright

- Protected exclusive rights:
 - Right to copy.
 - Right of adaptation – right to prepare derivative works – prints from painting.
 - Right of public display.
 - Right of public performance.
 - Right of economic exploitation (sell, lease, loan, donate).
 - Right of digital adaptation.
- Rights are divisible.
- Transfer of copyright by assignment or exclusive license must be in writing and may be registered with Copyright Office.

Copyright

Classes

- G for a work of art, model or design for a work of art.
- H for reproductions of a work of art.
- J for a photograph.
- K for a print or pictorial illustration.

International Protection

- Requirements vary. Certain countries - no short form notice.
Under Buenos Aires Convention, add “All rights reserved.”

Copyright

- **Publication** is a term of art. Defined as the distribution of copies ... of a work to the public by sale or other transfer of ownership or by rental, lease, or lending. The offering to distribute copies ... to a group of persons for purposes of further distribution ... or public display constitutes publication.
- Published and unpublished works may be registered with Copyright Office.

Copyright Infringement

- Ownership of copyright where there has been a taking of an exclusive right. Suit must be brought within three years of the date of the last sale of an infringing work.
- Defenses:
 - Innocent infringer – no notice or knowledge. Party ceases and desists upon notification.
 - Statutory authorization.
 - Fair use.

Fair Use

- Consider:
 - Purpose or character of use – educational or commercial.
 - Nature of copyrighted work – fiction or factual.
 - Portion taken – more work taken, more likely to find infringement.
Was work accessible and is there substantial similarity?
 - Quality taken – heart of work? *Roger v. Coons*, 960 F. 2d 301 (2d Cir. 1992).
 - Market harm – direct loss of income.
 - Right to parody – criticizing or making fun of original may be allowed.
 - Work was not infringement, independent creation.
 - Aspect of work copied was not copyrightable.

Copyright

- Remedies and Damages under Copyright Revision Act of 1976
- Injunction – cease and desist.
- Impoundment and Disposition – Sheriff takes custody of infringing items and disposes of them as required by law (knockoffs).
- Elect between actual or statutory damages prior to judgment:
 - Actual damages/profits: the amount of the financial injury sustained by copyright owner or the infringer's profits.
 - Statutory Damages - \$750-\$30,000 per infringing act if art was registered within three months after first publication.

Copyright

- Remedies and Damages under Copyright Revision Act of 1976
- Willful infringement allows for up to an additional \$150,000.
- Costs and attorney fees may be awarded by court.
- Criminal penalties.

Copyright

No Electronic Theft Act of 1997 – allows for civil and criminal prosecution of persons engaged in copying of copyrighted works without permission even if there was no financial gain. Criminal prosecution allowed for software piracy.

Copyright

Registration Procedures

Online or by mail. File application for copyright registration with nonrefundable filing fee and nonreturnable deposit of a copy of work. Effective on date Copyright Office receives complete application. See Copyright Office website for other requirements.

- **Collaboration between Artists on Project**
 - Requires special attention.

Trademark

- A **trademark** is a distinctive sign used by an individual, business or other legal entity to uniquely identify source of its products and/or services to consumers, and to distinguish its products or services from those of other entities. Type of intellectual property, comprised of a name and/or logo. Apply for trademark with U.S. Patent and Trade Office.

Trademark

- A trademark is “any word, name, symbol, or device, or any combination thereof used ... to identify and distinguish ... goods ... and to indicate the sources of the goods ...” 15 U.S.C. §1127.

Trademark

- The Lanham Act of 1946 and the Trademark Revision Act of 1988 govern the regulation of trade and service marks. The Federal Trademark Dilution Act of 1995 and state laws protect against any use which will tarnish, degrade or dilute the distinctive quality of a mark. Trade dress protection protects the overall appearance of a product or service.

Truth in Advertisement

- Requirement by the Federal Trade Commission as well as various state and local government agencies, that advertisements not make misleading, false, or deceptive claims. Also, the Indian Arts and Crafts Act of 1990, as amended, provides for criminal and civil penalties for passing art off as Indian made. *See also* New Mexico Indian Arts and Crafts Sales Act, Sections 30-33-1- 30-33-11 (NMSA 1978); Colorado Indian Arts and Crafts Sales, CRS §12-44.5-101 through 108.

Mail or Telephone Order Rule

- A Federal Trade Commission rule that requires a seller to ship goods ordered by mail, phone, computer or fax to you within the time promised or, if no time was stated, within 30 days. If the seller cannot ship within that period, the seller must send you a notice with a new shipping date and give you the option of canceling your order and getting a refund.

Anticybersquatting Consumer Protection Act of 1999, 15 U.S.C. §§ 1114 et seq.

- Must have protectable trademark interest to use this remedy.
- Applies not only to those who "use" or "traffic in" domain names, but also to those who merely register them. Anyone who registers a domain name that is identical to, confusingly similar to, or dilutive of a distinctive or famous trademark with a "bad faith intent to profit" from that mark falls within the new law's reach. Where the squatter is found liable, the domain name may be transferred to your client, and, in cases where the squatter was misinformed enough to have registered it after the enactment of the new law, statutory damages between \$1,000 and \$100,000 may be awarded.

Uniform Domain Name Dispute Resolution Policy

- The **Uniform Domain-Name Dispute-Resolution Policy (UDRP)** is a process established by the Internet Corporation for Assigned Names and Numbers ([ICANN](#)) for the resolution of disputes regarding the registration of internet [domain names](#). The UDRP policy currently applies to all [.biz](#), [.com](#), [.info](#), [.name](#), [.net](#), and [.org](#) top-level domains, and some [country code top-level domains](#).
- When a registrant chooses a domain name, he or she must “represent and warrant,” among other things, that registering the name “will not infringe upon or otherwise violate the rights of any third party,” and agree to participate in an arbitration-like proceeding should any third party assert a claim.

Theft of Art

- Global problem.
- Parties may rely on statute of limitations or laches to defeat ownership claims.
- Export and import restrictions are of limited use based on effective dates.
- Treaties are of limited use based on effective dates.
- Examples: Elgin marbles in Great Britain from Greek Parthenon; bust of Nefertiti in Germany from Egypt; Rosetta Stone from Egypt in Great Britain, etc.
- Unlocatable missing art: Amber Room from Russia: 22 ornate amber wall panels, six tons of amber. Looted by Germany during World War II.
- Statute of limitations in New Mexico for conversion is three years.

Theft of Art

- In *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980):

The New Jersey Supreme Court held that if a work of art has been stolen from an artist, the artist's right to recover his or her work from a subsequent possessor would be barred by the statute of limitations if the action were not brought within the state allowable limitations period after the original theft. This can happen even though the artist may have been totally innocent and wholly ignorant of the identity of the thief or of any intervening receivers or possessors of the stolen art. The Court would however apply the discovery rule if the artist can prove "due diligence" in earlier attempting to retrieve the stolen artwork.

O'Keefe had not made an effort to register the art as stolen or taken other steps to recover it.

The National Stolen Property Act

- This Act states: " Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud ... shall be fined under this title or imprisoned not more than ten years, or both..."

The National Stolen Property Act

- An object is considered stolen under the National Stolen Property Act if the U.S. has an agreement with the country of origin, if the country of origin has a clear law defining the objects as stolen, if that law is being enforced in the country of origin, and if the object was stolen (exported) after the date of enactment of the foreign country's law on the subject.

Legal Safeguards

- Right of publicity
- Right of privacy
- Defamation
- Doctrine of unfair competition

Legal Safeguards

- **Right of Publicity** – allows a person to recover for damages only for pecuniary gain from misappropriation of their likeness; defined as the inherent right of every human being to control the commercial use of his or her identity. Creature of state law which gives rise to cause of action for commercial tort of unfair competition. See *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562 (1977) – human cannonball act. First Amendment defense for transformative work.

Hornell Brewing Co. v. The Rosebud Sioux Tribal Court,
133 F. 3d 1087 (8th Cir. 1998)

- Breweries brought action against tribal court, tribal judge, and descendants of Crazy Horse, asserting that tribal court lacked jurisdiction over descendants' claim challenging use of Crazy Horse's name in manufacture, sale, and distribution of malt liquor.

**Hornell Brewing Co. v. The Rosebud Sioux Tribal Court,
133 F. 3d 1087 (8th Cir. 1998)**

- The Court of Appeals held that: (1) breweries' manufacture, sale, and distribution of malt liquor did not occur on reservation land, and tribal court thus did not have jurisdiction over suit, and (2) breweries' advertising of malt liquor on Internet was not basis for tribal court jurisdiction. Case would have to be brought in either federal or state court.

Hornell Brewing Co. v. The Rosebud Sioux Tribal Court,
133 F. 3d 1087 (8th Cir. 1998)

- In 1992, Congress enacted a statute banning the use of the name Crazy Horse on the label of any distilled spirit, wine, or malt beverage product. *See* Pub. L. No. 102-393 §633, 106 Stat. 1729.
- In 1993, the United States District Court for the Eastern District of New York concluded the statute violates the First Amendment of the Constitution. *See Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1245-1246 (E.D.N.Y. 1993).

Hornell Brewing Co. v. The Rosebud Sioux Tribal Court,
133 F. 3d 1087 (8th Cir. 1998)

- Due to legislation passed in various states which had the effect of banning the sale of Crazy Horse Malt Liquor, the name was changed to Crazy Stallion.
- States included Minnesota and Washington, with recommendation against sale in Nebraska also.
- Crazy Horse Malt Liquor was not sold in states with Lakota reservations, including North Dakota, South Dakota and Montana.

Estate of Elvis Presley v. Russen, 513 F.Supp. 1339 (1981)

- Under New Jersey law, singer, during his life, owned property right in his name and likeness which he could license or assign for his commercial benefit and that right of publicity survived his death and became part of his estate.

Legal Safeguards

- Right of Privacy
- In the United States, the **right of privacy** as a tort gives four categories of invasion:
- Intrusion of solitude - physical or electronic intrusion into one's private quarters.
- Public disclosure of private facts -- the dissemination of truthful private information which a reasonable person would find objectionable.
- False light - the publication of facts which place a person in a false light, even though the facts themselves may not be defamatory.
- Appropriation -- the unauthorized use of a person's name or likeness to obtain some benefits.

Legal Safeguards

- **Defamation** In law, defamation is the communication of a statement (orally (slander) or in writing (libel)) that makes a false claim, expressly stated or implied to be factual, that may harm the reputation of an individual, business, product, group, government or nation, that is not legally permissible.

Legal Safeguards

- **Doctrine of Unfair Competition**
- The common law **doctrine of unfair competition** is based upon the principle that one may not appropriate a competitor's skill, expenditure, and labor. It prohibits false advertising and the "passing off" of another's work as one's own. While there is a small body of federal unfair competition law, it is largely a state doctrine with a lack of national uniformity. Although unfair competition may provide relief ancillary to copyright in certain situations, its scope is not as broad.

American Indian Issues

- Summary of Federal Legal Protections for Genuine Indian Arts and Crafts
- Authenticity of Indian Art
- Theft of Indian Art
- Native American Graves Protection and Repatriation Act
- ARPA
- New Mexico Portal

Summary of Federal Legal

Protections for Genuine Indian

Arts and Crafts

- The Tariff Act of 1930 (19 U.S.C. § 1340 and 19 C.F.R. § 134.43)
- The Lanham Act (15 U.S.C. § 1125(a)(1))
- The Indian Arts and Crafts Act, as amended (25 U.S.C. § 305 et seq., 18 U.S.C. § 1158 et seq.)
- The Indian Arts and Crafts Enforcement Act of 2000

The Tariff Act of 1930

- The Tariff Act of 1930 and its implementing regulations require imported goods to be marked so that consumers are informed as to the country in which the goods were manufactured.

The Tariff Act of 1930

- Not only must this country-of-origin marking be “in a conspicuous place” on the imported article at the time of its importation, it must remain on the article at the time it is offered for sale to the “ultimate purchaser.”

Custom Regulations

- Special custom regulations impose exceptionally stringent requirements on the marking of Native American style jewelry and arts and crafts, and require that such country of origin marking be indelible and remain on the goods at the time they are sold to consumers.

Custom Regulations

- “Native American-style jewelry must be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other permanent method. The indelible marking must appear legibly on the clasp or in some other conspicuous location, or alternatively, on a metal or plastic tag indelibly marked with the country of origin and permanently attached to the article.”

19 C.F.R. §134.43

Lanham Act

- Lanham Act makes illegal the use of any “word, term, name, symbol, or device, or any combination thereof, or any false designation of origin,” etc., which is likely to cause a consumer to believe that an Indian-style art or craft item was in fact made by a Native American person.

Lanham Act

- Acts that are illegal under the Lanham Act include:
- Removing a country of origin label; and
- Overtly advertising an item as made by a member of a certain tribe when it fact it had not been manufactured by that person.

Lanham Act

- Of particular interest, the Lanham Act provides for a private right of action such that an aggrieved Native American artist or an aggrieved consumer may sue on his or her own behalf for a country of origin marking violation.

Indian Arts and Crafts Act of 1990

- The Indian Arts and Crafts Act of 1990, as amended, is a truth-in-advertising law that prohibits misrepresentation in marketing of Indian arts and crafts products (produced after 1935) **within the United States**. It is illegal to offer or display for sale, or sell any art or craft product in a manner that falsely suggests 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. *See also* New Mexico Indian Arts and Crafts Sales Act, Sections 30-33-1- 30-33-11 (NMSA 1978); Colorado Indian Arts and Crafts Sales, CRS §12-44.5-101 through 108.

Indian Arts and Crafts Act of 1990

- The IACA, as amended, provides for both civil and criminal penalties:
- It allows for injunctive and equitable relief;
- Compensatory damages (which may be trebled or take the form of statutory damages of not less than \$1,000 per day); and
- Punitive damages and plaintiffs' attorneys fees. (25 C.F.R. § 309.5)

Indian Arts and Crafts Act of 1990

- For knowing violations:
- First violation for sales of less than \$1,000 or more, individual shall be fined up to \$25,000, imprisoned up to one year, or both, and, if a business, be fined up to \$100,000; and
- First violation for sales of \$1,000 or more, individual shall be fined up to \$25,000, imprisoned up to five years, or both, and, if a business, be fined up to \$1,000,000; and
- For subsequent violations, regardless of the amount of the item offered or displayed for sale, or sold, an individual can be fined, imprisoned up to fifteen years, or both, and, if a business, be fined up to \$5,000,000.

Indian Arts and Crafts Act of 1990

- Plaintiffs under the IACA may include an Indian Tribe, an individual tribal member, an Indian arts and crafts organization, or the U.S. Attorney General.

Indian Arts and Crafts Act of 1990

- Rep. Nick Rahall (D-WV) proposed amendment to IACA on April 1, 2013. Amendment would allow for members of non-profit Indian organizations and individuals who are not enrolled members of a recognized tribe to claim authenticity.

Authenticity of Indian Art

- American Indian Law Center Project
- Sponsor Indian Arts and Crafts Protection Collaborative.
- Purpose to instigate legal action using federal international trade laws to stem the tide of fake Indian arts and crafts illegally entering the U.S.

Authenticity of Indian Art

- American Indian Law Center Project
- Private litigation at the U.S. International Trade Commission in Washington, D.C., and, federal district court.

Authenticity of Indian Art

- American Indian Law Center Project
- Seeking injunctive relief barring the importation and trafficking in arts and crafts and monetary damages from large U.S. distributors engaged in such trafficking.

Theft of Indian Art

- The FBI's Art Theft website features a display of American Indian Art which has been entered in the National Stolen Art File, a law enforcement registry of stolen artwork. See www.fbi.gov/hq/cid/indian/spotlight/htm

Native American Graves Protection and Repatriation Act

- Federal law passed in 1990.
- Provides a process for museums and federal agencies to return certain Native American cultural items – human remains, funerary objects, sacred objects, or objects of cultural patrimony (legacies of the tribe) – to lineal descendants, and culturally affiliated tribes and Native Hawaiian organizations.

Native American Graves Protection and Repatriation Act

- In addition, NAGPRA authorizes federal grants to Indian tribes, Native Hawaiian organizations, and museums to assist with the documentation and repatriation of Native American cultural items, and establishes the Native American Graves Protection and Repatriation Review Committee to monitor the NAGPRA process and facilitate the resolution of disputes that may arise concerning repatriation under NAGPRA.

Who Is Responsible for Complying with NAGPRA?

- All federal agencies are subject to NAGPRA. All public and private museums that have received federal funds, other than the Smithsonian Institution, are subject to NAGPRA.

Pueblo of San Ildefonso v. Ridlon, 103 F. 3d 936 (10th Cir. 1996)

- Federal District Court had subject matter jurisdiction, under jurisdictional provision of NAGPRA, over suit by Pueblo of San Ildefonso for repatriation of pottery, displayed in federally funded museum operated by out-of-state university, since its discovery on county land in 1978; unlike NAGPRA's ownership provision, which applied only to items found on federal or tribal lands after November 16, 1990, repatriation of objects of patrimony (relating to items that are part of the legacy of a tribe) do not impose date or location limitations.

Additional Protection of American Indian Cultural Resources

- The National Museum of the American Indian Act provided for the creation of the National Museum of the American Indian of the Smithsonian Institution.
- Other legal protection for Indian cultural resources include: Archaeological Resources Protection Act.

Archaeological Resources Protection

Act of 1979

- *Acronym:* ARPA
- *Citation:* 16 U.S.C. §§ 470aa-470mm (2002).
- *Legislative Purpose:*
- The Archaeological Resources Protection Act expands the protections provided by the Antiquities Act of 1906 in protecting archaeological resources and sites located on public and Indian lands.

Archaeological Resources Protection

Act of 1979

- ARPA encompasses a great variety of objects, not just historic sites like the Antiquities Act. ARPA defines "archaeological resources" as items: (1) of archaeological interest over 100 years old; and (2) found in an archaeological context on federal or Indian lands and requires finders to obtain a federal permit before excavating these objects. ARPA's permitting component authorizes the recovery of certain artifacts consistent with the standards and requirements of the Federal Archaeology Program.

Archaeological Resources Protection

Act of 1979

- Like the Antiquities Act, ARPA has both a permitting and an enforcement component. The enforcement provisions provide for the imposition of both criminal and civil penalties against violators of the Act. While ARPA is applicable to the marine environment, its reach in this context is limited. ARPA specifically states that it does *not* apply to activities occurring on the outer continental shelf.

Preservation of Art and Cultural Property – NM Portal

- The importance of the preservation of art and cultural property may be seen in the special treatment afforded the French Quarter in New Orleans and the Portal of the Palace of the Governors in Santa Fe, New Mexico.

Moral and Economic Rights in Art

- Artist's personal right in seeing art is not changed from original form and that artist is credited with its creation (rights of integrity and attribution).
- Moral rights referred to on European continent as “les droits moreaux” (le droit moral). Meant to capture rights of a spiritual, non-economic and personal nature. Come from belief that artist injects his/her spirit into the work and the artist's personality and work should therefore be preserved and protected.

Moral and Economic Rights in Art

- “Everyone has a right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Art. 27(2), **Universal Declaration of Human Rights**, 6 UN Bull. 6, 8 (Jan. 1, 1949).

Berne Convention

- The **Berne Convention for the Protection of Literary and Artistic Works** is an international copyright agreement adopted in Berne, Switzerland in 1886.
- The U.S. initially refused to become party to the Berne Convention, since it would have required major changes in its copyright law, particularly with regard to moral rights (in contravention of the 1st Amendment) and removal of general requirement for registration of copyright works. On March 1, 1989, the U.S. became a party to the Berne Convention, except as to article 6 re moral rights. As of April 2007, there are 163 countries that are parties to the Berne Convention.

Visual Artists Rights Act of 1990

- Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 17 U.S.C. §§ 101, 106A, 113)
- For singular or limited edition artwork “VARA” provides for rights of attribution and integrity. Term is for life of artist. Not previously recognized under U.S. law.

Visual Artists Rights Act of 1990

- **Right of Attribution**
 - Right to claim ownership of work.
 - Prevent use of artist's name on art which they did not create or on their art which has been distorted, mutilated, or modified.
- **Right of Integrity**
 - To prevent any intentional distortion, mutilation, or other modification of the art work which would be prejudicial to artist's honor or reputation.

Destruction of Art

California's Art Preservation Act prohibits owners and possessors of fine art, other than the artist, from destroying the art, and from authorizing others to do so. (Civ. Code §987, subd. (c)(1)).

- The Act limits all of its protections to works of "**fine art**," which it defines as "original painting, sculpture, or drawing ... **of recognized quality.**"

Destruction of Art

A remedies provision authorizes artists to recover actual and punitive damages, as well as attorney and expert witness fees, upon successful prosecution of a lawsuit under the statute.

Destruction of Art

Botello v. Shell Oil Co., 80 Cal. Rptr. 535 (Cal.App. 2 Dist. 1991)

In 1980 artists were hired by Shell Oil Company (Shell) to paint a large mural on the wall of a service station owned by Shell. Shell accorded them full artistic freedom to design and execute the project. The mural, entitled “Filling Up On Ancient Energies,” was begun in February 1980 and was completed in May of that year. Its themes were of Hispanic culture, and it included depictions of dinosaurs, Mayan deities, motor vehicles, and other things.

Destruction of Art

The mural covered 1200 square feet of wall, and was highly visible to motorists and passersby traveling the Soto and Fourth Street area of East Los Angeles, where it was located. It bore the artists' names and addresses, and earned them a considerable amount of favorable publicity.

The mural was executed in such a way that it could be removed from the wall to which it was affixed without damage to the mural or to the wall. *Id.* at 536.

Destruction of Art

- If the art cannot be removed from the building without damage to the art or the building, the artist is deemed to have waived his or her rights under the statute, unless there is an express reservation of rights in a written, recorded instrument. But if the fine art can be removed from the building without damage (as is true in this case, according to the summary judgment papers), the owner must attempt to notify the artist of the impending destruction or alteration.

Destruction of Art

- The artist then has 90 days to remove the art at his or her own expense. If the artist fails to remove the art within that time, the owner may destroy it without liability. *Id.* at 537. Artist received damages under the statute.
- A mural was found to be a work of fine art, a painting, in the *Botello* case.

NM Statute Preventing Destruction of Art in Public Buildings

- “The legislature finds that the physical alteration or destruction of fine art, which is an expression of the personality of the artist, is detrimental to the reputation of the artist and artists therefore have an interest in protecting their works of fine art against such alteration or destruction. The legislature also finds that there is a public interest in preserving the integrity of cultural and artistic creations.” NMSA 1978 §13-4B-1 (2002)

NM Statute Preventing Destruction of Art in Public Buildings

- Applies to any “original work of visual or graphic art of any media including any painting, print, drawing, sculpture, craft, object, photograph, audio or video tape, film, hologram or any combination of such media of recognized quality.”

NM Statute Preventing Destruction of Art in Public Buildings

- No person except an artist who owns or possesses a work of fine art which the artist has created shall intentionally commit or authorize the intentional commission of any physical defacement, mutilation, alteration or destruction of a work of fine art in public view.

NM Statute Preventing Destruction of Art in Public Buildings

- “Public view” means on the exterior of a public building or in an interior area of a public building.
- Damages available.
- Right is for life of artist plus fifty years.

State Legislation to Protect Moral and Economic Rights

- In *Board of Managers of Soho Int'l. Arts Condominium v. City of New York*, 2003 WL 21403333 (S.D.N.Y. June 17, 2003), Visual Artists Rights Act of 1990 preempts state art preservation statutory claims to the extent that state laws provide equivalent rights of integrity and attribution. Uncertain how this affects states such as Massachusetts and New Mexico that protect film and video or states that provide stricter protection.
- However, California state resale royalty statute held not to be preempted by Copyright Act of 1909 or Copyright Revision Act of 1976. *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir.), cert. denied, 449 U.S. 982 (1980).

California Resale Royalty Statute

The **California Resale Royalty Act** (Civil Code section 986) entitles artists to a 5% royalty payment upon the resale of their works of art under certain circumstances. This California law is unique in the United States, although it is a well-established legal right in many other countries of the world.

The right of artists to share in the appreciated value of their works when resold is important both in principle and in dollars. Resulted from Rauschenberg work initially sold for \$900 which was later resold for \$85,000.

California Resale Royalty Statute

Circumstances Generating a Royalty Payment

Under California Civil Code section 986, an artist shall be entitled to a 5% royalty upon the resale of his/her work of art provided that:

- The work is a painting, drawing, sculpture or original work of art in glass.
- The work does not consist of stained glass permanently attached to real property.
- The seller resides in California or the sale takes place in California.

California Resale Royalty Statute

- The work is sold during the artist's life or within 20 years of the artist's death.
- The work is sold by the seller for more money than she or he paid.
- The work is resold for \$1,000 or more.
- The artist at the time of the sale (or at time of death) is a United States citizen or has been a California resident for at least two years.
- Sales only between art dealers within 10 years after the initial sale by the artist are exempt.

Colorado Indian Arts and Crafts Sales Act

- PROFESSIONS AND OCCUPATIONS
- INDIAN ARTS AND CRAFTS SALES
- **CRS §12-44.5-101 through 108 - Indian Arts and Crafts Sales Act**
- The purpose of this article is to protect the public from false representation in the sale or offering for sale of authentic Indian and other arts and crafts.

Colorado Indian Arts and Crafts Sales Act

- **12-44.5-104. Inquiry as to producer.**
- (1) It is the duty of every person selling or offering for sale at retail authentic Indian arts and crafts or other arts and crafts to the general public to make due inquiry of their suppliers concerning the methods used in producing such arts and crafts and to determine whether such arts and crafts are in fact authentic.
- (2) It is hereby made the duty of every person selling or offering for sale at retail to the general public natural or unnatural turquoise to make due inquiry of their suppliers concerning the source, grade, and quality of the turquoise for resale.
- (3) If the supplier cannot authenticate to the seller the origin and process of manufacture regarding the Indian arts and crafts to be sold or traded to the seller, the seller shall not sell said arts and crafts to the general public as authentic Indian arts and crafts.

Colorado Indian Arts and Crafts Sales Act

- **12-44.5-107. Violations - penalty.**
- Any person who knowingly violates any of the provisions of section 12-44.5-105 or 12-44.5-106 commits a class 1 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S.

Colorado Indian Arts and Crafts Sales Act

- **12-44.5-108. Right of action - damages.**
- In addition to any judicial relief, any person who suffers financial injury or damages by reason of anything forbidden in this article may sue in district court and may recover actual damages sustained by him and the cost of suit, including reasonable attorney's fees.

Protection of Cultural Patrimony

- U.S. law and policy has historically favored the free trade of cultural property. This policy began to be modified in the 1970's, when widespread looting of archaeological sites prompted the U.S. to enter into treaties with a number of South and Central American countries and to pass the first of several U.S. laws that prohibited the importation of pre-Columbian antiquities.

Protection of Cultural Patrimony

- “In 1983, after a decade of debate, Congress passed the Convention on Cultural Property Implementation Act (“CPIA”) in order to implement the 1970 UNESCO Convention. The law created a mechanism for foreign nations to request U.S. import restrictions on cultural objects while preserving the United States’ ability to limit the categories of restricted objects through expert review. The law covered archaeological objects of “cultural significance” that were **at least two hundred and fifty years old**, and objects of ethnological interest that were “important to the cultural heritage of a people because of their distinctive characteristics, comparative rarity, or contribution to the knowledge of the origins, development, or history of that people.”

- **Protection of Species**

Eagles and Migratory Birds

- The **Eagle Protection Act** makes it unlawful to sell parts of a bald or golden eagle without a permit and establishes criminal penalties for violations of that ban. 16 U.S.C. §668(a). Likewise, the **Migratory Bird Treaty Act** prohibits the sale of migratory birds or bird parts without a permit. 16 U.S.C. §703. Both statutes prohibit sales of protected birds or bird parts without regard to when those parts were acquired. These statutes and implementing regulations do, however, allow the possession and transportation of birds or bird parts that were lawfully obtained before the effective date of federal protection.

Eagles and Migratory Birds

- There is no exception for antique Indian objects containing these parts, even ones which were acquired years ago.
- Leighton Deming sold an eagle feather war bonnet attributed to Geronimo to federal agents for \$1 million. In February 2000, Deming pleaded guilty to violation of the Bald Eagle Protection Act.

Endangered Species

- The Endangered Species Act of 1973 makes it illegal to sell or offer for sale in interstate commerce any species (or parts) which is on the Endangered Species list. A specific exemption is granted for objects that are more than 100 years old. Various related acts have been adopted by individual states.

Migratory Bird Treaty Act

- The Act makes it unlawful to ship, transport or carry from one state, territory or district to another, or through a foreign country, any **migratory bird**, part, nest or egg that was captured, killed, taken, shipped, transported or carried contrary to the laws from where it was obtained or import from Canada any bird, part, nest or egg obtained contrary to the laws of the province from which it was obtained. This prohibition applies to birds included in the respective international conventions between the U.S. and Great Britain, the U.S. and Mexico, the U.S. and Japan, and the U.S. and Russia.
- Among the 1043 bird species naturally occurring in the U.S. and its possessions, 868 species (83 percent) are protected by the Act.

Wild Bird Conservation Act - Title I of

P.L. 102-440

- Signed October 23, 1992 (106 Stat. 2224), the Act establishes a new federal system to limit or prohibit U.S. imports of exotic bird species, as follows:
- Imposes an immediate moratorium on the importation of certain exotic bird species identified by the Convention on International Trade in Endangered Species (CITES), and provides procedures for the Secretary to suspend trade in any CITES listed bird species and to remove trade suspensions on species.
- Directs the Secretary to publish in the Federal Register a list of exotic bird species for which trade is allowed, and provides procedures for determining such species.

Marine Mammal Protection Act

- The 1972 Marine Mammal Protection Act established a federal responsibility to conserve marine mammals with management vested in the Department of Interior for sea otter, walrus, polar bear, dugong (large aquatic mammal), and manatee. The Department of Commerce is responsible for cetaceans (whales) and pinnipeds (seals), other than the walrus.

Marine Mammal Protection Act

- With certain specified exceptions, the Act establishes a moratorium on the taking and importation of protected marine mammals as well as products taken from them, and establishes procedures for waiving the moratorium and transferring management responsibility to the states.

Lacey Act, as Amended, 16 U.S.C. §§

3371-3378

- Under this law, it is unlawful to import, export, sell, acquire, or purchase fish, wildlife or plants taken, possessed, transported, or sold: (1) in violation of U.S. or Indian law, or (2) in interstate or foreign commerce involving any fish, wildlife, or plants taken, possessed or sold in violation of state or foreign law.

Lacey Act, as Amended, 16 U.S.C. §§

3371-3378

- The law covers all fish and wildlife and their parts or products, and plants protected by the Convention on International Trade in Endangered Species and those protected by state law.
- The purposes of the Act are to aid in the restoration of game and other wild birds in parts of the U.S. where they have become scarce or extinct and to regulate the introduction of American or foreign birds or animals in localities where they have not previously existed.

Thank You For Coming!!

- Please fill out evaluation form.
- Please let us know what other subjects you are interested in.