



Takeaways: The 2024 Third Annual Berkeley Art, Finance, and Law Symposium

The Berkeley Center for Law and Business just hosted its third annual Art, Finance, and Law Symposium. With over 100 attendees, this event brought together professionals from all walks of life – lawyers, art historians, financiers, scientists, and scholars – all connected via one central love for art. The Symposium’s scheduled speakers reflected the same degree of diversity as the crowd, with each discussion topic highlighting just how interdisciplinary the world of art law is.

Links Between Art and Science

While science isn’t the first thing that comes to mind when talking art, the day began with Berkeley Professor Chung-Pei Ma reminding the audience that there is both a “science to art” and an “art to science.” Whether examining the drip paint techniques employed by Jackson Pollock or Leonardo da Vinci’s fascination with turbulence, there are a great variety of ways where science and art intersect. In conversation with Professor Frank Partnoy, Keith van der Walde, both an artist and engineer, reflected on how he employs scientific methods into the creation of each of his unique pieces.

Boundaries of Freedom in Art

Berkeley Law Dean Erwin Chemerinsky and Berkeley Law Fellow Steven Hayward were also in attendance to discuss the timely topic of first amendments rights and its impact on art. Mr. Hayward began by expressing the view that he and Mr. Chemerinsky agree that the boundaries of freedom of expression in the arts are primarily cultural, not legal. As an example, he mentioned the controversy over a university professor who was dismissed for displaying a painting of Mohammed, and, more amusingly, the recent trend of airbrushing cigarettes out of classic films. And yet, he argued using the example of anti-cross burning laws, that it ought to be possible for the law to distinguish between expression that is intended to be artistic and that which is intended to intimidate.

Dean Chemerinsky took the podium to affirm that under current Supreme Court rulings, the first amendment mandates that *all* expression is protected unless it rises to the level of inciting illegal activity, even if it is deeply offensive or hateful. Even obscenity laws, of which there are many still on the books, are now so weakened that no attempt is made to enforce them. An exception is when the government is actually funding works of art, in which case it can choose based on standards of decency, and the same applies to curricular decisions in lower public schools. Not only is this the law, but it is desirable, because ultimately the basis of the law is a faith that society is better off with free expression than with a government that has the power to determine what can be expressed.

In discussion, Mr. Hayward mused that it might be better to limit especially troubling expression, and brought up an incident on the Berkeley campus where Hamas sympathizers had put up posters at the law school depicting Dean Chemerinsky feasting on the blood of innocents, and that this had made some students feel unsafe. But the Dean stood firm that even art so deeply offensive did not present the kind of imminent threat of violence that taking them down would not violate the students' right to free expression. However, in such a situation, the school has a responsibility not to be deliberately indifferent to the concerns of students who feel harassed, and must speak out against the offensive expression rather than attempting to censor it.

AI and the Artist

In a change of pace, Alexander Reben, OpenAI's first Artist in Residence, took the stage to show how he uses AI in creating works of art. As an early adopter, he has explored many different tools for creating art from relatively simple algorithms to highly sophisticated models trained on curated sets of copyrighted works. The resulting works ranged from the fascinating to the ridiculous to the outright hilarious. Interestingly, many of his works require the participation of significant numbers of human artisans in order to turn them into physical works. Reben addressed the concern that AI – which he referred to as “creative automation” -- might be the end of art by pointing out that the same had been said about photography 150 years ago.

Approaches to AI Regulation: EU vs. US

Berkeley Law Professor Pamela Samuelson pointed out that although some artists have embraced AI, there are currently 24 suits in progress over AI in relation to art and authorship. These are in the early stages of litigation, and it remains to be seen what effect they will have. Meanwhile, the U.S. Copyright Office has begun an inquiry into generative AI models and received over 10,000 responses from the public. They will be producing a set of reports covering issues like the generation of “deep fakes”, the copyrightability of AI-generated output, and the use of training data. This may lead to recommendations for legislation, but Congress is already working on legislation requiring disclosure of the contents of AI training sets, and there are more than 700 bills now pending in state legislatures.

Envoy Gerard de Graaf discussed Europe's approach to AI regulation, which focusses primarily on ensuring that artists are fairly compensated for the use of their work. The effort has been to develop a framework of regulation so that there is some certainty about what is allowed rather than leaving the resolution of issues to the courts as happens in the U.S. The recently European Copyright Directive already allows for creators to “opt out” from having their copyrighted works used as training data for commercial models. The recently adopted AI Act will further require transparency in what training data is used and how. Going forward, the effort will be around securing compensation through collective licensing for those whose works are used in training AI models.

Professor Samuelson and Envoy de Graaf went on to discuss some areas for future action in both the U.S. and the EU in particular with respect to labeling of AI generated works in an effort to limit their potential for spreading disinformation.

Trends in Art Investment

Berkeley Law Professor Sonia Katyal moderated a wide-ranging conversation between Christopher Bleuher of Deloitte and Drew Watson of BofA, experts in art and investment, that focused on the emerging phenomenon of fractional ownership and how that might affect the art market. Currently, about 20 artists make up 50% of the entire art market by value; while at the same time, 50% of art purchasers are in the market primarily seeking works that will increase in value over time. Fractionalization brings in more of this type of investor because they can use platforms that have a level of expertise that lowers the barriers to entry for art investment, and spreads the enormous cost of blue-chip artworks. This raises many questions about how this market is likely to progress: Will it remain confined to blue-chip artworks, or will it grow to include works of lesser-known artists? Will it remain confined to works with a strong secondary market, or will it work its way into the primary market where works are sold through dealers? Will dealers be willing to sell works to investment funds that may make them inaccessible? Will the public interest be served if large numbers of important works are locked away in storage, although in fact this is already the case with most large museum collections? Will museums see fractionalizing ownership of their collections as a way to raise money for their programs? Will government regulation be necessary to reduce the risk of fraud and money laundering? Will fractional ownership lead to disintermediation of the art market, or will the traditional players – galleries, critics, dealers, auction houses – remain critical? The panelists provided an expert’s perspective on each of these questions that led to a rich and fascinating discussion.

What’s New at SFMOMA

In their fireside chat, Delia Violante, Founder of the Art, Law, and Finance Project, and Adine Varah, General Counsel of SFMOMA, discussed the latest happenings at the museum. In pursuit of furthering the accessibility of art, the SFMOMA has recently instituted a first-of-its-kind campaign to display art created by artists with disabilities. Additionally, on view now is the Art of Noise exhibition, which aims to connect music lovers to the impact visual art has had on their auditory experience. The upcoming Get in the Game exhibition hopes to similarly bring in sport-loving patrons who can then discover a newfound appreciation for art.

Greece Is the Word... on Repatriation

Finishing off the Symposium was a discussion between Delia Violante and Socrates Sourvinos, Consul General of Greece in San Francisco, exploring the famous case of the Parthenon Sculptures. These are a set of statues and friezes that once adorned the Parthenon Temple, but were taken to England by Lord Elgin, the British Ambassador to the Ottoman Empire at the time, where they have remained for nearly two hundred years.

As an initial matter, while colloquially known as the “Elgin Marbles,” Sourvinos discussed how this monument of art history is more appropriately referred to as the “Parthenon Sculptures.” Sourvinos argued that given that antiquities are commonly labeled after their maker or commissioner, referring to them as the “Elgin Marbles” is wholly inaccurate. Lord Elgin, while undoubtedly a major player in the long and complicated history of the sculptures, was in no way connected to their creation.

Consul Sourvinos also noted that he prefers to avoid the term “repatriation” in reference to the return of the sculptures to Greece, preferring the term “reunification”. While roughly half of Parthenon’s frieze lies in the British Museum, the other half resides in Athens. But the sculptures represent a single cultural artifact: The Parthenon Temple. Sourvinos analogized the situation to the Mona Lisa: It would certainly make no sense to split the painting in half, with one part in France and the other in say, Italy. If art so integral to the foundation of art history is to be appreciated properly, it cannot be fragmented.

Greece made began requesting the return of the artifacts from shortly after independence in 1832. The British government has offered many arguments for retaining the sculptures over the years ranging from the legalistic – Elgin supposedly had permission from the Ottoman government – to the paternalistic – Greece was incapable of taking care of such valuable cultural heritage. Enthusiasm for securing the reunification of the works began to gain steam in the 1980s, and reached a peak with the inauguration of the Acropolis Museum in Athens, constructed specifically to house them.

While certainly a matter of great controversy, Sourvinos also reminded the audience that UK and Greece relations are otherwise fantastic. This matter stands in isolation and is unique in nature. A law forbidding the return of the artifacts remains on the books in the UK, but the hope is that soon, constructive dialogue can be had to make headway towards reunification. As Consul Sourvinos noted, “The sculptures are carved in stone; the laws are not.”

A truly wonderful and eye-opening event. See you next year!

This event was supported by generous gifts from the Gerson Bakar Foundation and Bank of America Questions? Interested in being a sponsor? Contact us at bclb@law.berkeley.edu.