NEW TWISTS AND TURNS IN THE CASE AGAINST THE WARHOL AUTHENTICATION BOARD

Much has happened since *IFAR Journal* published its cover story (Vol. 11, no. 1, 2009)[1] on the lawsuit brought by collector Joe Simon against the Andy Warhol Art Authentication Board and related entities (the "Warhol Defendants")[2] over the Authentication Board's rejection of a silkscreen that Simon owns and that he, along with prominent art historians and Warhol associates, insists is genuine. The crux of Simon's antitrust case is that the rejection of his and other works from the same series — among which is a silkscreen signed by Warhol himself and included in Rainer Crone's 1970 Warhol catalogue raisonné — is part of a broader scheme artificially to inflate the value of Warhol works owned by the Warhol Defendants by eliminating competing works from the market. Simon further complains that, adding insult to injury, the Authentication Board damaged his painting by marking its reverse side — twice — with a red "DENIED" stamp.

The Warhol Defendants had sought to have Simon's action dismissed, but were partially defeated in May 2009 when a federal court allowed most of Simon's claims to go forward.[3] Now, perhaps signaling a more aggressive posture following that setback and its potential ramifications for other Authentication Board rejections, the Warhol Defendants have hired litigator David Boies. (Boies famously represented the United States Department of Justice in its successful antitrust action against the Microsoft Corporation.)

In addition, in October 2009, soon after the *IFAR Journal* article, the *New York Review of Books* published a review by art critic Richard Dorment, which described the Authentication Board's rejection of Simon's work as displaying a "complete misunderstanding" of the nature and import of Warhol's work and experimental methods.[4] Many from the art community, including Crone, Paul Alexander, Richard Polsky, David Mearns, and Richard Ekstract, wrote letters in support of Dorment's article, all of which were published on the *New York Review of Books*' Website. In addition, the Comité René Magritte, the Francis Bacon Authentication Committee and the Arshile Gorky Foundation jointly submitted a letter to the editor describing Dorment's article as "admirably clear." They stressed that, unlike the Warhol

FIGURE 1. Andy Warhol(?), *Self-Portrait,* Silkscreen on canvas, 24" x 20". Coll. Joe Simon; photo courtesy Joe Simon.

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1 See Sharon Flescher and Mary Morabito Rosewater, "Dispute Against the Warhol Authentication Board Allowed to Proceed," *IFAR Journal*, Vol. 11, no. 1 (2009), p. 36.

2 *Simon-Whelan v. The Andy Warhol Foundation for the Visual Arts*, No. 07 CV 6423 (LTS) (S.D.N.Y., filed July 24, 2009).

3 *Simon-Whelan*, No. 07 CV 6423 (LTS), 2009 U.S. Dist. LEXIS 44242 (S.D.N.Y. May 26, 2009).

4 Richard Dorment, "What is an Andy Warhol?" *New York Review of Books*, rev. of *Andy Warhol* by Arthur C. Danto; *Pop: The Genius of Andy Warhol* by Tony Scherman and David Dalton; and *I Sold Andy Warhol (Too Soon)* by Richard Polsky, 22 Oct. 2009.

"The Warhol Defendants also have been at odds with their insurance company . . ."

Authentication Board, their opinions as to authenticity are made in an "advisory capacity," and works submitted to them are never stamped or "compromised physically." [5]

Not all the letters supported Dorment, however. Joel Wachs, President of the Andy Warhol Foundation for the Visual Arts (one of the Warhol Defendants), denounced Dorment's piece as "a highly partisan attack on a charitable entity" and "full of errors, omissions, and half-truths." [6]

The Warhol Defendants also have been at odds with their insurer, Philadelphia Indemnity Insurance Company ("PIIC"). Since 2003 (when Joe Simon first sent the Warhol Defendants a draft complaint), PIIC has denied litigation defense coverage under the Warhol Defendants' $10 million Director and Officer policy. Instead, it admitted coverage under a separate $2 million Errors and Omissions policy. The Warhol Defendants have disputed this interpretation ever since and, in April 2010, commenced an arbitration proceeding seeking a finding of coverage under the D&O policy. Rather than arbitrate, on April 28, 2010, PIIC sued the Warhol Defendants in New York State court. Among other things, it seeks determinations that it is not required to arbitrate; is not liable under the D&O policy; and, in any event, the statute of limitations for a contractual claim has expired.

For his part, Joe Simon, who initially wanted to pursue his claims as part of a broader class action, has had mixed success finding others willing to join him. As *IFAR Journal* reported, an additional plaintiff — noted British art dealer and philanthropist Anthony d'Offay — had been poised to join Simon's case, but ultimately decided not to proceed. At the time its story appeared, and at the request of parties involved, IFAR did not publish d'Offay's identity. His name was later revealed, however, by the *New York Review of Books*. In December, Simon abandoned his efforts to establish a class action and announced that he would be litigating solely on his own behalf. Although court documents do not reveal the reasons for this move, it is likely that aspects of the court's May 2009 decision, coupled with the unavailability of d'Offay, rendered a class action untenable.

The failure of his class action notwithstanding, Joe Simon will not, for all practical purposes, be pressing his case alone. In January, his attorneys filed a separate action against the Authentication Board on behalf of Susan Shaer (formerly Susan Mearns). [7] Like d'Offay, the Mearns family owns a silkscreen from the same (rejected) series as Simon's work. Shaer's allegations against the Authentication Board closely mirror Joe Simon's, and because of the similarities between the cases, *Shaer* was assigned to United States District Judge Laura Taylor Swain, who presides over the *Simon* litigation.

Still, in spite of all the apparent contentiousness, there may be hope for a negotiated resolution: the parties agreed in October 2009 to have the case referred to Magistrate Judge Andrew J. Peck for, among other things, "settlement purposes." The court record indicates that, since then, the parties have appeared for settlement and status conferences before Judge Peck. Yet, so far, a settlement has not been reached. It remains to be seen whether court-guided talks can resolve this difficult conflict, which, regardless of outcome, promises to influence the practice of art authentication for years to come.

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[5] Sarah Whitfield, letter, *New York Review of Books*, 17 Dec. 2009, http://www.nybooks.com/articles/23522.

[6] Joel Wachs, letter, *New York Review of Books*, 19 Nov. 2009, http://www.nybooks.com/articles/23390.

[7] *Shaer v. The Andy Warhol Foundation for the Visual Arts*, No. 10 CV 00373 (LTS) (S.D.N.Y., filed Jan. 15, 2010).