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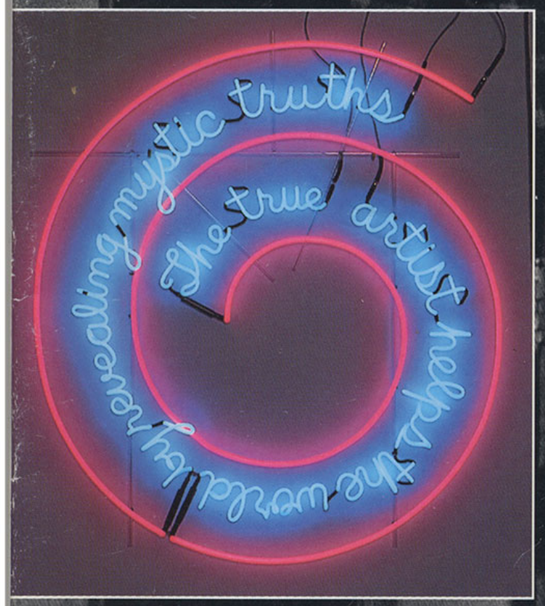

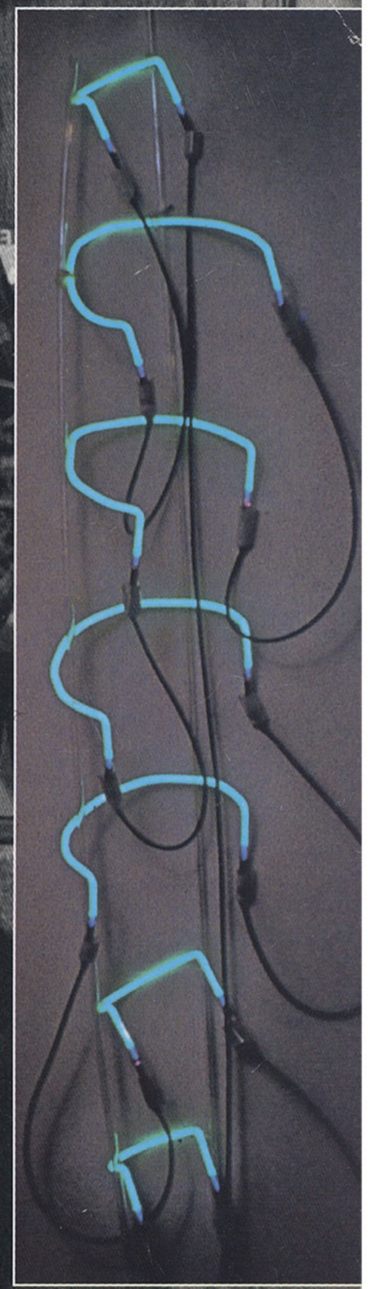

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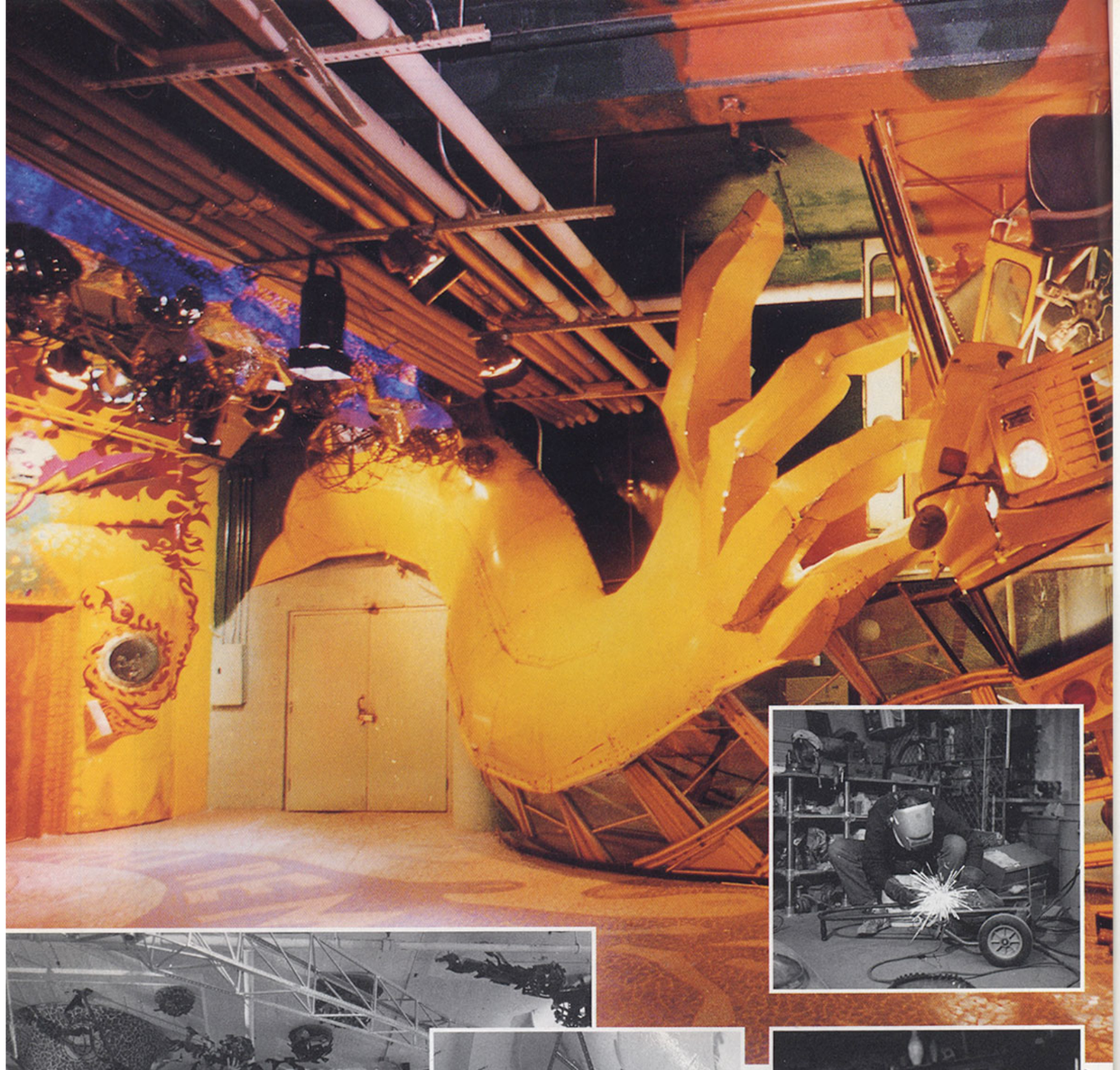

A topsy-turvy schoolbus greets visitors to a warehouse-turned-office building in Queens, N.Y. The artists (clockwise from inset, right) are John Carter; Johnny Swing; J. J. Veronis with assistant Casey Corum (right); and Swing again, with assistant Roisin Reilly (left).

ALL PHOTOGRAPHS: LISA GARNER

The Landlord, the Installation, the Artists, and Their Lawyers

How three little-known sculptors and a freewheeling installation became the first test of a federal law designed to protect artists' rights

By ANN LANDI

John Carter went to work as usual on Wednesday, April 6, of last year. On that particular day, the 30-year-old, ponytailed artist spent most of his time on scaffolding, painting cobalt-blue water splashes on a curved ceiling. His two partners, J. J. Veronis and Johnny Swing, were elsewhere on the premises, adding more components to an ambitious mixed-media installation that would eventually fill the 18,000-square-foot lobby of a former Macy's warehouse in Queens, New York. Described by art historian Robert Rosenblum as a "work that makes Red Grooms look housebroken," the installation, now about three-quarters complete, is an exuberant construction crafted from some 50 tons of recycled junk—automobile carcasses, porcelain sinks, abandoned appliances, and the like.

The theme, Carter says, is "sexual/ecological": On entering the building, flapping letters command the visitor to "start licking." Near the elevator, whose doors separate between gilded teeth, a giant yellow hand—crafted from the chassis of a school bus—snakes across the wall toward the bus's windshield. Around the corner are hanging bells fashioned from rusty pipes, a safe and fire extinguishers suspended from the ceiling, and an astronaut who spins inside the "petals" of a full moon.

The three sculptors, who are all in their early 30s and call themselves the Three Js or J x 3, had put in two and a half years of hard work on the project, but on that day in April they were nervous about their prospects for finishing. Corporate Life Insurance Company, the building's manager and the sculptors' patron, had lost its lease the day before. "We'd heard that something was going down," Carter recalls, "that there might be people in the building from Helmsley-Spear, and that they might own the building."

When Tom Schwartz—son of Alvin Schwartz, partner of real-estate mogul Harry Helmsley—showed up, Johnny Swing introduced himself and politely offered a tour. Schwartz took a look around and firmly declined. Swing was putting the finishing touches on a huge gong suspended over the entrance to the offices of the Queens Symphony Orchestra. As Schwartz walked by, the gong accidentally went off. Schwartz stopped in his tracks. "That noise is unacceptable, do you understand me?" Carter, in later court testimony, recalled Schwartz saying before he stormed off the premises.

That afternoon, Tom Walsh, managing agent for Corporate Life, summoned the Three Js to a meeting in their on-site workshop and confirmed their worst fears: "Helmsley-Spear now runs the building, and this will be your last week," he told them. "Try to wrap things up and get your stuff out as soon as possible."

This was indeed bad news for the three artists, who in December of 1991 had contracted with a previous long-term leaseholder, Irwin Cohen, to begin work on the installation at a salary of $1,000 weekly each, plus health insurance. Cohen, whose daughter was a friend of Veronis's, had commissioned artwork for a building across the street and believed an offbeat lobby might attract more tenants. The arrangement gave Cohen's group ownership of the installation and granted the sculptors "full authority in design, color, and style," a promise to leave the work intact for five years, and a 50-50 agreement to exploit the copyright should any producer want to make a film or even a rock video using the premises. When Cohen sold out his interest in the lease in July of 1993, Corporate Life, an insurance company in Pennsylvania, became the trio's new patron.

The next day, Walsh returned and called another impromptu meeting, saying he needed a key to the shop. "Who needs a key?" Carter asked. "These guys out front," Walsh said. The "guys out front" included Tom Schwartz and another Helmsley-Spear representative, Leon Poll. According to Carter's testimony, Poll told the artists, "We're taking control of this building." When Carter asked if the Three Js couldn't rent the space from their new landlords for the rest of the week, Poll responded, "I wouldn't rent you that space for a million bucks." Then Schwartz laid down the law: "Get out of here right now. You are trespassers as of this moment."

Swing called Richard A. Altman, a New York attorney who had been representing him in a landlord-tenant dispute. By then all three artists were entertaining harrowing visions of revitalized junk on its way back to the junk heap. They needn't have worried, at least not then. Citing the New York State Arts and Cultural Affairs law, which prevents intentional destruction or mutilation of an artist's work, Altman obtained a restraining order against Helmsley-Spear from the state supreme court the next day.

Altman, an independent lawyer who specializes in intellectual property and commercial litigation, soon realized he might have a bigger case on his hands. He started to explore the Visual Artists Rights Act (VARA), an untried amendment to the federal copyright law passed in late November of 1990 that deals with the moral rights of visual artists. VARA protects certain categories of visual art of "recognized stature" from intentional "distortion, mutilation, and other modification" that would harm an artist's honor or reputation.

The amendment covers only original paintings and drawings, sculpture, prints, and noncommercial photographs in editions of up to 200 signed and numbered copies. When the amendment was debated in Congress, the favorite example of abuses VARA would prevent was an advertisement that tempted readers to buy their "very own beautiful Picasso." What the mail-order concern was peddling, for $135 a square inch, were framed, matted one-inch pieces of a Picasso lithograph.

The favorite example of abuses the act would prevent was an advertisement tempting readers to buy "their very own Picasso"

Richard A. Altman, attorney for the artists

VARA is a rather belated attempt at the federal level in this country to recognize that artists have certain "moral rights," as distinguished from patrimonial or property rights. European nations have long realized that a work of art has specific qualities that put it in a category separate from, say, an automobile or a piece of furniture, so that defacing a painting becomes quite a different matter from slashing the tires on a car. Copyright, which is available to artists in most countries, including the United States, is intended to protect the artist's financial interest in his work. "The moral right, on the contrary, is one of a small group of rights intended to recognize and protect the individual's personality," as John Merryman and the late Albert Elsen, scholars at Stanford University, explained in their two-volume study, *Law, Ethics and the Visual Arts*. "Rights of personality include the right to one's identity, to a name, to one's reputation, to one's occupation or profession, to the integrity of one's person, to privacy, etc."

Two cases often cited to illustrate how European courts have recognized artists' moral rights are those that involved the painters Bernard Buffet and James McNeill Whistler. In the mid-1970s Buffet decorated the panels of a refrigerator to be sold at a charity auction in Paris. He considered the work all of a piece and signed only one panel. Six months later, he spotted one of the panels reproduced in the catalogue for another auction and described as a still life on metal signed by Bernard Buffet. The artist brought an action against the owner-consignor to prevent the sale of the separate panel, and the courts sided with Buffet, recognizing that to treat one part of the refrigerator-painting as a separate work violated both the artist's identity and honor and the integrity of the work as a whole.

In 1893 Whistler was commissioned by Lord Eden to paint his wife's portrait for a sum of "between 100 and 150 guineas." When Eden sent Whistler a check for 100 guineas for the completed work, the artist took it as an insult, even though he cashed the check. The painting was returned to Whistler's studio after exhibition at the Salon du Champs de Mars in Paris, and the artist, still miffed at his patron, painted out Lady Eden's head, replaced it with another, and refused to deliver the painting. Eden sued for restoration of the portrait, delivery, and damages, and won on all counts. On appeal, however, the courts decided Eden was entitled only to restitution of his 100 guineas and damages for breach of contract. He could not compel restoration of the work or its delivery. The case is an example of the artist's right to withhold the work, also known as the right of divulgation. "This component of the moral right gives the artist the absolute right to decide when (and whether) a work of art is complete, and when (and whether) to show it to the public," as Elsen and Merryman explained in their book.

In bringing suit for the Three Js under VARA, Altman hoped to test the one and only federal safeguard of moral rights available to artists in this country (eleven states have some artists' rights legislation). He sought protection for the work, payment of legal fees, and damages of $100,000. (Altman was eventually joined by lawyers from Hughes, Hubbard & Reed, a larger firm that had taken an interest in the case.) Helmsley-Spear was represented by Davidoff & Malito, which filed a counterclaim charging the artists with "waste," or damage to the property. During a preliminary hearing a year ago, the judge in the case, David N. Edelstein, "quickly understood that it was potentially a landmark case," according to Altman. In the seven-day trial that followed last summer, lawyers for both sides, as well as the judge, found themselves embroiled in matters of esthetics, territory American litigators have traditionally been loath to enter.

While not on a par with such courtroom dramas as James McNeill Whistler's lawsuit against critic John Ruskin, Carter, Swing, and Veronis versus Helmsley-Spear had its memorable moments. The lawyers for the landlords argued that the installation was a "work for hire" and an example of "applied art," and thus not entitled to protection under VARA. Altman and his co-counsels contended that the unfinished installation should be considered a "work of recognized stature" and that the artists, although salaried, should not be considered hired hands. Each side called in expert witnesses, among them Robert Rosenblum, professor of art history at New York University's Institute of Fine Arts, and Aedwyn Darroll, who teaches at the Parsons School of Design in New York, for the plaintiffs; Hilton Kramer, art critic for the *New York Observer* and editor of the *New Criterion*, testified for Helmsley-Spear.

Rosenblum was unstinting in his praise, calling the installation "absolutely staggering in terms of sheer lunatic invention," and adding that he couldn't "understand how everybody in New York City doesn't know about it and why there aren't crowds of people going there." Pressed to define it as a work of art, he drew comparisons with the eccentric Watts Tower in Los Angeles and Antonio Gaudí's unfinished church of the Sagrada Familia in Barcelona. "This seems to fall somewhere between these two poles," he told the court.

Kramer called the young sculptors' efforts "a pastiche of recognized clichés" and "a work so lacking in merit that I believe that it serves no useful purpose to retain it." He also "found the environment created by this work to be physically frightening." Describing the elaborate mosaic floor of the lobby as a decorative element, he concluded that the work should be considered applied art.

Not one to be outdone by expert testimony, Judge Edelstein periodically interjected with his own references to art history, drawing Rembrandt, Hogarth, and Michelangelo into the arguments. Toward the end of the trial, the wheelchair-bound judge went to Queens for a private tour of the installation. Carter recalls that he had nothing to say about the work's artistic merits, but seemed more intent on questioning the landlord's claims that the piece was a hazard. Edelstein dismissed Helmsley-Spear's brief safety inspection, saying, "I don't think I could do a really thorough inspection even if I had a motorized wheelchair in two hours."

One question raised by the case is why Helmsley-Spear did not take action earlier against Irwin Cohen, the original long-term leaseholder. "Under the lease between Cohen and Helmsley-Spear," says Dan Weiner, a partner at Hughes, Hubbard & Reed, "the lessee was required to inform the owner if there were alterations done to the building which were worth over $200,000." Even though Helmsley-Spear had representatives on the property who saw the work in progress, the company issued "estoppel certificates" almost every month stating that there were no violations of the lease. In court, Davidoff & Malito tried to argue that their client was caught unawares by the Three Js' installation. Edelstein was not convinced. "Helmsley-Spear's recourse should have been against Cohen," adds Weiner, "not against the artists."

The judge heard closing arguments in mid-July. Six weeks later he delivered his decision. ("Cases involving injunctions," Altman says, "generally move pretty quickly.") In a 71-page opinion, Edelstein declared the installation "thematically consistent" and "clearly . . . not applied art." He judged it a work of stature, deserving of protection under VARA, and ruled that the work must remain in place for as long as each of the artists is still alive. Noting that the term "recognized stature" is not defined in VARA, Edelstein claimed that a "plaintiff need not demonstrate that his or her artwork is equal in stature to that created by artists such as Picasso, Chagall, or Giacometti." He further concluded that the "plaintiffs were independent contractors rather than employees." Edelstein also ruled that the artists were not entitled to damages or payment of legal fees.

The aspect of the decision that has experts on art and the law shaking their heads, however, is Edelstein's ruling that the work may not be completed. VARA "does not mandate creation," he stated. "Nothing in the statute compels defendants to allow plaintiffs to engage in further creation."

John Merryman, Sweitzer Professor of Law at Stanford University, called it a "shocking decision, so shocking it may be unlikely to have much effect on other cases." Albert Elsen, Walter A. Haas Professor of Art History, also at Stanford, told *ARTnews* before his death in February that Edelstein "just looks at VARA and cites the fact that it doesn't protect an unfinished work from distortion or mutilation. But an unfinished work is a distortion of the artist's intent. Only the artist has the right of divulgation, that is, the right to decide when something is finished and can be disclosed." If VARA is intended to protect the artist's moral rights, then Edelstein's ruling ironically undercuts those privileges, says Merryman. "An incomplete work is an impairment of the artist's right of integrity."

"This could not have been the case they had in mind when they drafted the legislation," adds Stephen E. Weil, an authority on art law and deputy director of the Hirshhorn Museum and Sculpture Garden in Washington, D.C. The case should have touched on landlord-tenant law, he adds, examining whether the tenant was operating under the confines of the lease. "If Bob Rauschenberg breaks into your house and paints a mural while you're gone," Weil asks, "should the mural stay?"

Franklin Feldman, a professor of law at Columbia University, says the decision is "not in the interest of anyone who owns a building or in the interest of any artist. If I were an owner, I'd be very reluctant to give any artist a commission." Altman says the commissions issue is bogus. A property owner who chooses to commission artwork can always forge his own contract, specifying how long the work can stay in place and whatever other terms he chooses to offer. The artist can then take it or leave it, a decision specifically permitted by VARA.

VARA applies only to artworks made after the statute went into effect in 1990. Had it been passed earlier, it might have protected other artists' works from destruction or displacement in public and private spaces. Certainly Isamu Noguchi would have had a good case against the Bank of Tokyo, when it removed his 1,600-pound sculpture, *Shinto*, from its Manhattan lobby in 1980, cut it into pieces, and shipped it to a warehouse without notifying the artist. Altman believes VARA might have saved Richard Serra's controversial *Tilted Arc*, the site-specific sculpture that bisected Foley Square in downtown Manhattan and was ordered removed after office workers complained about it. Feldman says the General Services Administration, which commissioned the sculpture, would probably have asked him to waive his rights. Indeed, so leery is Serra of another *Tilted Arc* debacle that he usually protects his works in binding legal agreements. And that tactic, in spite of VARA, may well be the only course artists can pursue in this country to guarantee that commissioned works keep the faith.

Though it brought the Visual Artists Rights Act to the attention of a wider public, the case and its outcome left all the participants dissatisfied. In appealing the decision last March, Helmsley-Spear argued that the law did not apply because the artists were employees and further contended that VARA is unconstitutional because it deprives landlords of their property rights. Altman, in his cross-appeal, claimed the artists have the "moral right" to complete the work to their satisfaction. A decision is likely before the end of the summer, but in the meantime, for all those who want to see for themselves—and New York's Municipal Art Society offers regular tours—the installation affords a different esthetic thrill from, say, the lobbies of Rockefeller Center or the Seagram's Building. Take the kids, and start licking. ■

Ann Landi is a senior editor of ARTnews.