

A. D. Coleman

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August 21, 2009

To: Denise Bethel
Senior Vice President, Director of the Photographs Dept.
Sotheby's, Inc.
1334 York Ave.
New York, NY 10021

Re: Case No. 08-46617, Motion by Polaroid Corporation, et al, to enable sale at auction by Sotheby's of the entire Polaroid Collection of Photographs.

Dear Denise:

I am a critic, historian, and curator of photography, as well as a cultural journalist. You know my credentials. I'm writing to you in regard to the above case and motion, in which Sotheby's gets identified as the designated auction house for the proposed sale, presumably with the foreknowledge and approval of yourself and your colleagues.

Over the years I have discussed both the Polaroid Corporation and the Polaroid Collection(s) with various figures highly placed in the organization, including Sam Yanes, Eelco Wolf, Manfred Heiting, Jon Holmes, Barbara Hitchcock, Linda Benedict-Jones, and numerous others. Beyond that, over the decades I have discussed with numerous artists and photographers issues relating to their use of Polaroid equipment and materials and the placement of their works in the Polaroid Collection(s). I believe this gives me a background enabling me to comment in an informed way on the proposed sale.

The motion now before the U.S. Bankruptcy Court in Minnesota, the "Motion by Polaroid Corporation, et al, to enable sale at auction by Sotheby's of the entire Polaroid Collection of Photographs," assumes that all the works in this collection are the sole and exclusive property of the Polaroid Corporation/PBE Corporation, unencumbered by any other claims. While I cannot speak to the status of all the work in this collection, I can tell you that the Polaroid Corporation/PBE Corporation's implicit claim to outright ownership of some of the work therein is false and misleading.

A substantial amount of such work entered this collection as long-term loans, through a barter arrangement. The Polaroid Corporation gave the photographers film, cameras, and studio time with the 20x24/40x80 cameras. In return, they deposited selected results of their exploration of these tools and materials in the Polaroid Collection, granting the Polaroid Corporation the license to circulate their work in exhibitions, reproduce it in publications, and make it available to researchers who might visit the Collection in person. They did so on the good-faith basis that, per its expressed commitment to them and other lenders to the collection, the Polaroid Corporation would maintain the collection in perpetuity, as a permanent archive reflecting the diverse creative uses to which Polaroid tools and materials had been put by myself and my contemporaries, for the benefit of the general public, the creative community of artists and photographers, and the research communities in the fields of visual art, media studies, and visual culture.

In depositing their work with the Polaroid Collection they did not transfer their copyright or any subsidiary rights to this work to the Polaroid Corporation in perpetuity. Nor did they donate this work to the Polaroid Corporation. And the Polaroid Corporation did not purchase this work, or any copyright or usage rights to it, from them. They simply licensed specific long-term usage rights to this work, with the understanding that both copyright and ownership remained with the maker. This is verified by the standard letters of agreement with the Polaroid Corporation covering these loans, copies of which I have seen. Beyond that, I was present during the negotiation of one such barter and loan arrangement between the Polaroid Corporation and the photographer Barbara Alper, which took place at the Rencontres Internationales de la Photographie in Arles, France, in early July of 1980. I participated in that meeting as both a cultural journalist and as the volunteer subject for the images Alper made. So I have witnessed such agreements first-hand.

While I am aware that the Polaroid Corporation/PBE Corporation has undergone previous bankruptcy proceedings and reorganization, as an established member of the art and photography press I have never received any communication from these entities concerning the status of the Polaroid Collection or the specific situation of work within said collection. I have never been provided by them with contact information for an appropriate representative with whom to pursue such matters. I have never been notified that the collection faced dispersal. In short, I have never received anything from them suggesting that their relationship to the collection was subject to change, or that they were considering the sale of the work it contained. Indeed, I have received no notice of the motion now before the Court, which would establish by Court order a permanent and irrevocable transfer of ownership to the Polaroid Corporation/PBE Corporation and divest all artists represented therein of their right to determine the future of this work of theirs. To the best of my knowledge, none of those artists have ever been asked to either donate their work to said collection or request its return.

Appropriately, the law places the burden of notification on the debtors or holders of material on loan, not on the creditors or lenders of such material. Counsel for the Polaroid Corporation/PBE Corporation proposes, in a grotesque distortion of the letter and meaning of the law, that lenders to the collection had an obligation to discover the corporation's legal status as it has shifted over the past decade, discover the corporation's plans regarding the collection as those have shifted over the past decade, discover the appropriate party to contact to retrieve their work and object to its sale as that representative's identity has shifted over the past decade, and initiate the process of retrieval unilaterally, and that failure to do so voided any claim they had to their work. This is profoundly irresponsible on the part of the Polaroid Corporation/PBE Corporation and its bankruptcy counsel. The Polaroid Corporation/PBE Corporation has failed in every way to fulfill its legal and moral obligations to those who lent material to the Polaroid Collection.

For all these reasons, I have therefore urged the Court to reject this motion outright. (See my letter, enclosed.) The Court's approval of this motion will have the following immediately detrimental effects on many of the artists included in the collection, in their several roles as the makers of these works, the rightful owners of their physical forms, and the owners of their copyright, subsidiary rights, and other intellectual-property rights:

1. It will strip them of legal ownership of the work itself. This will void their option to (a) reclaim the work and dispose of it by sale, for their own benefit; (b) reclaim the work and donate it to an institution, reaping a tax benefit and other intangible benefits by that act; or (c) reclaim the work and keep it in their own inventories.

2. By so doing the Court will strip them of the ability to include this work of theirs in exhibitions of their works and lend it themselves to other exhibitions, which they could do if it were returned to them.

3. This decision will deprive them of their ability to enable its reproduction in books and magazines and posters, license other subsidiary rights to it, and otherwise benefit from it financially and professionally. They had the ability to exercise those rights when the work was contained with the Polaroid Collection, based on their agreement with the Polaroid Corporation, which commonly allowed them access to the work. Should this work enter a private or institutional or corporate collection, they may never again have such access.

4. Finally, this decision will deprive them of the right to incorporate this work into their cumulative bodies of work, and eventually leave those either to an institution or to their heirs and successors as part of their estates.

From conversations and correspondence over the years, I know that numerous photographers with work in the Polaroid Collection deposited their work in the collection via similar or identical agreements, and have received no notice from the Polaroid Corporation/PBE Corporation asserting these entities' intention to dispose of the collection and providing a system for retrieval of their works. Thus I have no reason to believe that any individual photographer's situation is unique, or that the Polaroid Corporation's failure to communicate with any single one about this situation constitutes an exceptional instance of oversight. The Court's decision in this matter will therefore potentially disenfranchise hundreds of artists.

Therefore I have urged the Court to reject this motion outright, and instead to require the Polaroid Corporation/PBE Corporation to submit to the Court its records concerning the development of the collection, including all correspondence, letters of agreement, and contracts relating to the acquisition of works for the collection. The Polaroid Corporation/PBE Corporation does not have clear, unencumbered title to any works deposited there on long-term loan. Only when the Court has verified which works in the collection the Polaroid Corporation/PBE Corporation owns outright should these entities have the Court's permission to sell the collection — and then only those portions of it that said entities actually legally own.

In my opinion, the works now in the collection on long-term loan should be set aside and protected by the Court on behalf of their owners, the artists who made them. The Court should require the Polaroid Corporation/PBE Corporation to follow the standard procedures of bankruptcy proceedings and the dispersal of properties held in trust by the bankrupt parties: diligent notification of the owners of said property, clear information and simple procedures for reclaiming it or donating it, published notices of the situation in appropriate periodicals (in this case, art and photography periodicals), press releases spelling out the procedures, etc.

It is clear from this very motion that the Polaroid Corporation/PBE Corporation has decided to disregard entirely the interests of the makers of the works in the Polaroid Collection, including their property rights, copyright and subsidiary rights, and intellectual-property rights. It is no less clear that Sotheby's has followed suit, by agreeing to enable this sale without independent inquiry into and clarification of ownership issues. The Court thus has an obligation to investigate this situation before hearing the motion. Certainly, before acting on this motion, the Court should weigh the rights of artists who placed their work in the Polaroid Collection in trust, on a long-term loan basis, with no foreknowledge or subsequent notice that the Polaroid Corporation/PBE Corporation would claim ownership thereof and pursue the sale thereof for profit.

Under the circumstances, I believe that Sotheby's should reconsider its agreement to

participate in the marketing and sale of this large collection of works whose legal status remains, at the least, open to question and challenge. certainly Sotheby's owes the art and photography community a clear, forthright explanation of its willingness to facilitate such a sale under these conditions.

I have also brought to the Court's attention another problem regarding the Polaroid Collection(s) that pertains to this motion. On a page at the Polaroid Corporation's website that I found and linked to from my blog (Photocritical International, www.photocritic.com) on July 16 of this year, but that has since been removed, the Polaroid Corporation claimed that the combined U.S. and European Polaroid Collections comprised a total of 22,000 works. The present motion seeks permission to sell 16,000 works. What has happened to the other 6,000 works? Why are they not accounted for in the motion's inventory? What does the Polaroid Corporation/PBE Corporation and Sotheby's propose to do with them?

Should this motion receive the Court's approval, I hereby notify you that I will report and comment on that decision in various publications, in print and online, and will volunteer to serve as an expert witness in any appeal of that decision and/or in the proposed class-action suit on behalf of all photographers with work in the Polaroid Collection who would be disenfranchised by the Court's permitting the Polaroid Corporation/PBE Corporation and Sotheby's to go forward with this sale.

I have already posted an alert at my new blog, Photocritic International (www.photocritic.com), urging all photographers with works on loan to the Polaroid Collection to communicate with the Minnesota court and with you at Sotheby's on this subject. I expect you'll begin hearing from them shortly. Should you care to comment publicly on this matter, I will be glad to offer you equal time and space in a Guest Post at the blog to explain Sotheby's rationale for validating the Polaroid Corporation's dubious claim to ownership of these works and participating in the sale thereof.

If I can be of further help in this matter, please don't hesitate to call on me.

Sincerely,

A handwritten signature in dark ink that reads "A. D. Coleman". The signature is written in a cursive style and is underlined with a single horizontal line.

A. D. Coleman

CC: Christopher Mahoney
Senior Vice President
Sotheby's, Inc.
1334 York Ave.
New York, NY 10021