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# The Case for Title Insurance

*by Stephen D. Brodie*

Never underestimate the power of conventional wisdom. Although usually rooted in good reason, it is nonetheless capable of overruling common sense when the original logic outlives its usefulness. I believe that the economic value of fine art has become high enough, and that the risk of a title problem is real enough, that it is time for convention to change. Title insurance is readily available today, and should become a standard feature of art purchases (and loans, eventually), at least above a certain price point.

I have been practicing transactional art law for the past five years, but I have a much longer background as a commercial banking lawyer and in real estate law, where title insurance is a *de rigueur* feature of almost every arm's length purchase or financing in this country. Even before I fully understood the title issues inherent in art sales, and in bank loans where art is used as collateral, I found myself wishing that title insurance were the norm in the art business. Over the past couple of years, I have been able to introduce title insurance into certain art financings that would not have closed without it. Lenders, however, are unlikely to lead the way on this. Most large art loans are made by private banks, and it is simply not competitive, at this point in time, for those lenders to require this kind of insurance as a condition of lending. It is the collectors and the art advisors who can be the real agents of this particular change.

This article includes many examples that highlight the primary title concerns to be considered by everyone in the art market, because it is important to recognize how frequently problems arise in these areas. Also, the article refers mainly to news reports about these claims and cases to demonstrate that it is not even necessary to conduct formal legal research to find these disputes; they are common enough occurrences to be reported regularly in the press.

## Title Issues Concerning Theft

Title risks are many, and this article examines most of the major categories, but theft has to be the first thing to consider simply because it is so common and its legal consequences can be felt for so long. Art is relatively easy to steal compared with other high-value assets. The FBI estimates that worldwide art theft averages around $6 billion annually, with less than a 30% recovery rate. Importantly, the United States has, as a basic legal principle, the rule that a thief cannot pass good title. The effect of this is that any buyer who follows in the chain of ownership after a theft, whether the theft is the result of wartime looting, ordinary burglary, or something in between, is at risk of having his assertion of title denied.

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## The Case for Title Insurance *(continued from page 1)*

Everyone is familiar with the issues that arise when there is a gap in provenance between 1933 and 1945, and many people are familiar with the smuggling of national treasures out of Egypt, Turkey, and other countries in violation of national patrimony laws. Indeed, lawyers at Herrick have been involved in advising and (in some cases) recovering antiquities on behalf of the Royal Library of Sweden, and the governments of Turkey, Egypt, and Guatemala, as well as recovering looted art from the World War II era. *Bakalar v. Vavra*, which was recently decided after many years of litigation, is an important case (one in which Herrick was not involved) for purposes of our analysis. It is illustrative of the kinds of problems one encounters with World War II-related clouds on title.

This case involved a claim to an Egon Schiele drawing that had been part of a collection of nearly 450 artworks owned by Fritz Grünbaum, a prominent Austrian Jewish art collector, arrested and sent to a concentration camp in 1938. Not long thereafter, the Nazis inventoried much of Grünbaum's art collection, and approximately 420 of his artworks were deposited in storage. However, exactly what happened to Grünbaum's art collection between 1938 and 1952 remains unknown. Then, beginning in 1952, many of the artworks began resurfacing in Switzerland, and in 1956 the Schiele drawing at issue was sold to a gallery in that country. Later that year, the Swiss gallery sold the drawing to a gallery in New York, from which collector David Bakalar purchased it in 1964. In 2005, Bakalar filed a case against Grünbaum's heirs, seeking a ruling to declare him the lawful owner of the drawing. Because the initial transfer of the drawing took place in Switzerland, the court first had to determine if Swiss or New York law should govern the issue of title to the artwork. The Second Circuit, overruling the decision of the Federal District Court to dismiss the case upon the application of Swiss law, determined that New York's compelling interests in ensuring that it did not become a haven for stolen property overrode any interest that Switzerland might have had in connection with the transaction.

{ Egon Schiele. *The artists wife Edith Schiele.* c.1917. (1890-1918). Drawing. }

On remand, the District Court applied New York law and held that, although the claim was brought within the prescribed statutory time period, the action was nonetheless barred under the equitable doctrine of laches. This doctrine holds that a claim, even if otherwise timely, may fail where the claimant has unreasonably delayed in taking action, to the prejudice of the other party. The court then found that the Grünbaums and their heirs had sufficient knowledge of the circumstances regarding their title claim to have taken action, but inexcusably delayed in doing so, causing Bakalar to be prejudiced by the loss of witnesses, documents, and memories of the relevant events. The court also found that Bakalar, as a non-merchant purchaser, had no obligation to research the painting's provenance even though it was in his possession for 40 years, so long as he originally purchased it in good faith. (The court suggested that had the possessor been a merchant, however, it would have taken a different view, most likely imposing a duty to investigate the provenance prior to purchase, in which case the laches defense probably would have failed.) The case went up on appeal, and on October 11, 2012, the court's decision was affirmed. The heirs filed a certiorari petition to the United States Supreme Court that was denied by the Supreme Court in April of this year.

The factual and legal issues pertaining to art looted during the Holocaust can be complex and extremely time-consuming to analyze. The fact that an artwork was lost to the original owner during the Nazi era always raises red flags that point to the strong possibility that the original owner or his heirs will have good title to the work. But what the Bakalar case and others like it demonstrate is that even when a court determines that the heirs of such an owner cannot press a valid claim because of laches or other technical defenses, it may still take the current possessor years of litigation at great expense to obtain a final decision. Consider the time frame in this case: Bakalar bought the drawing 19 years after the end of World War II, and sought a declaratory judgment to quiet title a full 41 years after he thought he had become the owner. Then it took him eight more years and, surely, considerable expense to prevail.

But it is not just WWII claims that carry such long tails with such cautionary implications for buyers of art. In some ways, the most significant theft-related title problems are the everyday ones. For example, Herrick represented the owners of a major art collection that was stolen from a warehouse in the Midwest. It turned out that the theft was an "inside job," involving employees of the storage facility. In that case, almost all of the stolen art was recovered and returned to the original owners. But galleries and dealers that purchased the art directly or down the chain from the thieves were left holding the bag since, not surprisingly, the thieves had little or nothing left to pay their claims. And, of course, if the stolen art had not been recovered, lines of bad title to dozens of works would have been spawned from this single incident.

There are numerous other examples of art theft that have made their way into the press in the past few years. Most of these involve a celebrity or public figure of some kind, but it is clear,

from the nature of the claims and the circumstances which gave rise to them, that there are many cases like these which are not reported at all.

- In 2008, *The Las Vegas Sun* carried a story about an expensive legal battle over the Norman Rockwell painting *Russian Schoolroom*. Director Steven Spielberg had bought the painting in 1989 from Judy Goffman Cutler, a Rhode Island art dealer, after Cutler had purchased it in 1988 from a New Orleans auction house. The problem was that the painting had been stolen in 1973 from a gallery in Missouri, where it had been placed on consignment by Jack Solomon. The case was greatly complicated by the fact that both the Missouri gallery and the New Orleans auction house were out of business by the time the lawsuit began, 19 years after Cutler had made the purchase. After litigation began in 2007, Cutler swapped a different Rockwell painting with Spielberg in exchange for Russian Schoolroom, seeking to shield her good client from the fray. At the time of the news story about the case, the legal fees had exceeded the painting's estimated value of $700,000. The newspaper referred to comments from Franklin Feldman of the law advisory council of the International Foundation for Art Research, to the effect that a thief cannot pass "good title" even when the purchase was made in good faith, but (and this is where things get much more complicated) that subsequent purchasers can still use certain defenses to protect their ownership. These would include the original owner waiting too long to bring a claim or failing to effectively report a loss. The story goes on to point out that there are long statutes of limitations on many claims of this kind. Another fact in the case demonstrates how difficult it can be to confirm good title to art: Cutler apparently checked with the FBI before purchasing the picture in 1988, but the FBI missed its record of the original theft. It all came to light only when the FBI later began looking into some cold cases.
- Another reported theft involving a celebrity as a downstream purchaser made the news in 2011, when Boy George returned a Byzantine-style icon he had purchased 26 years earlier to the Cyprus Orthodox Church. A bishop of the Church recognized the icon on a wall in Boy George's home while watching a television interview with the 1980s pop star. Boy George had reportedly not known that the icon had been stolen in the 1974 invasion of Cyprus.
- In August of 2012, *The New York Times* reported that a missing Roy Lichtenstein painting entitled *Electric Cord* was discovered in a Manhattan warehouse after a gallery owner had asked the Lichtenstein Foundation to authenticate the work on behalf of an unidentified owner. The painting had been reported missing from the collection of famed art dealer Leo Castelli in 1970. The unnamed possessor claimed to have an invoice from Castelli, but the matter went to litigation involving the warehouse, Castelli's widow, and the unidentified person claiming ownership.
- In March of 2012, an *Open Channel* report indicated that Henry Bloch (co-founder of H&R Block) had become yet another downstream purchaser caught up in a title dispute. Bloch had purchased a Degas painting from the Peter Findlay Gallery in New York that had been stolen from the Fifth Avenue mansion of Huguette Clark in the 1990s. Clark had never reported the theft to the police, pursued recovery, or registered the Degas as missing or stolen in an art loss database, apparently because of her extreme aversion to publicity. Nonetheless, the FBI eventually became aware of the theft. In 2005, Bloch learned that the painting had been stolen, and Clark simultaneously discovered that Bloch possessed it. Several years later, the parties reached a settlement in which Clark agreed to donate the painting to the Nelson-Atkins Museum of Art in Kansas City, Missouri, where Bloch was a benefactor, for which she received a $10 million charitable gift tax deduction. For his part, Bloch agreed to transfer his right, title, and interest to the museum, but retained the right to physical possession during his lifetime. The settlement was kept confidential for years. It was reported that only three of the museum's 21 trustees knew about it, and the museum's records did not reflect the accession. This story highlights a major challenge in the art market, that of so-called "orphaned artworks." Clark was probably unique in her extraordinary aversion to publicity, but many other art collectors are determined to maintain their privacy and do not contact the authorities or lost art databases about missing works. This lack of visibility of art thefts makes it difficult for buyers to know whether they are obtaining clear legal title to certain artworks being sold in the market.

Before we leave this subject and look at these "non-theft-related" risks, consider the time frames involved in the cases cited above. Some of the facts in the *Bakalar* case are typical of a World War II-related claim. Yet, even without an historical event of such magnitude that its effects can be expected to stretch far into the future, there seems to be no clear point in time, or degree of separation from the original crime, when a buyer can feel "out of the woods" as to the risks associated with an art theft from decades earlier. It is a complex subject, and beyond the scope of this article, but as noted in *The Las Vegas Sun* story about *Russian Schoolroom*, the statutes of limitations, where applicable, can often begin to run only years after the original theft. Finally, it is also worth considering that a cloud on title may persist after cases like *Bakalar*, where the winning party prevails on a technical defense such as laches. It is not difficult to imagine that a potential future purchaser might be concerned that new claims could be brought by the heirs of the original owner, arguing that the technical defenses should not apply in the context of subsequent sales.

## Other Common Title Problems

Although looting, garden-variety larceny, and everything in between, and the bad chains of title resulting from them, are

major concerns, there are other, rather common, title problems that have nothing to do with theft. There are three aspects of the art business that come to mind in this context: the "handshake culture;" the widespread use of agents for undisclosed principals, frequently on both the buyer's and the seller's side; and the involvement of multiple middlemen. This all has the effect of obscuring the true identity of the real owner. The desire for confidentiality is easy to understand, but there are inevitable and unwanted consequences to such secrecy. And as problematic as the effects of hiding the names of the real parties in interest may be, the seemingly traditional lack of good and comprehensive documentation for art transactions may well be a more frequent source of trouble.

{ Egon Schiele, *Yellow Town*. 1914. Oil on canvas, 110 x 140 cm. }

Obscuring the identities of buyers and sellers and sparse or poor documentation, coupled with the usual problems that can cloud title to any type of asset, such as hidden liens; questions about donor intent; capacity; and due authorization, all combine to have the effect of producing a volume and variety of title problems that are not found with any other asset class. Research into title disputes in the art world reveals, among other things: a multitude of cases involving questions as to whether art had been loaned or gifted outright to a museum, a friend, or a family member (perhaps many years earlier); questions about title arising from will contests and divorces; questions as to whether the terms of a gift have been breached, possibly causing a reversion of title to the grantor or his heirs; and cases involving hidden encumbrances, including those asserted by holders of undisclosed interests whose approval for a sale had not been obtained but may have been required.

The examples from all of these groupings are far too numerous to present in this article. But references to some specific instances in the major categories will illustrate that title to art is a legal minefield. If that sounds like an exaggeration, reflect on the fact that, as with theft-related title problems, many of these issues arose decades after the gift or other transfer that eventually gave rise to the cloud on title. And, while it is true that many of the claims asserted in cases that do not involve theft are less likely to prevail against downstream buyers than claims asserted in cases where the art in question had been stolen, the risk of such a buyer incurring considerable legal expense is certainly real, to say nothing of the time and aggravation associated with such a matter. A few of the cases cited below involve valuable collectibles rather than art, but the legal principles and the points remain the same.

## Gift or Loan?

Both gifts and loans of artworks are extremely common, and when there is doubt as to whether a transfer was a gift or loan, title problems come to the fore.

- In 2012, *Auction Central News* reported the case of *North Carolina Historical Commission v. Heirs of James Iredell*. Iredell had been one of the first justices of the U.S. Supreme Court, and the Historical Commission had been in possession of his papers for more than 100 years. Nonetheless, the North Carolina Court of Appeals ruled that the grant from an Iredell descendant in 1910 had been a loan, and that the papers, valued at more than $3 million, belonged to Iredell's heirs. Had the papers been sold some time during the intervening century, the buyer or one or more transferees who came after such a buyer might have faced a major lawsuit that they could not have anticipated.
- This spring, *ArtInfo* had a story about a Paris court ruling that the community of Montreuil, France, and not the heirs of artist Paul Signac, is the legal owner of a Signac painting that has been hanging in the Montreuil city hall since 1938. The heirs claimed the picture was merely loaned, and neither side had contemporaneous loan or gift documentation to support its position.
- In 2012, *The New York Times* reported that former Yankees pitcher Don Larsen had recovered from the San Diego Hall of Champions the uniform he wore in October of 1956 when he pitched the only World Series perfect game. Larsen had provided the Hall with the uniform (valued at between $250,000 and $1.5 million) in 1964, but the Hall lacked accession paperwork to demonstrate that it had received a gift rather than a loan, and elected not to fight about it, despite its stated belief that the grant had been an outright gift from Larsen.
- In 2009, *Courtroom News Service* reported that Edward Low was suing the Ohio Historical Society Museum, alleging conversion of a rare stone plate that Low had found in West Virginia in 1942. The museum had had physical possession of the tablet since 1971. The museum argued that the grant was a gift, but Low asserted that he had merely loaned it for research and public display purposes.

The same kinds of controversy can sometimes be found in situations involving friends and family:

- *The Globe and Mail* reported that the heirs of Lord Beaverbrook

and the Beaverbrook U.K. Foundation were appealing a judge's decision granting title to 85 of 133 artworks in Lord Beaverbrook's $100 million collection to the Beaverbrook Art Gallery. The dispute hinged on whether the art had been loaned or gifted to the gallery in the 1950s and 1960s. The litigation had been going on since 2006, and more than $5 million in legal costs had been incurred by the time of the news report of the appeal in 2008. Whether there were sales of any of these works during the long hiatus between the deliveries of the art to the gallery and the lawsuit is unknown, but a buyer of a work from the gallery along the way would have ample cause for worry.

- In 2011, *Courthouse News Service* reported that Robert Fenton, husband of the late art dealer Shaindy Fenton, had sued his brother-in-law, Robert Balick, to recover a commissioned Andy Warhol portrait of Shaindy. Fenton alleged that the picture had been loaned to Balick by the Fenton Family Trust, but that there was no intention to transfer title to the artwork. Balick apparently disagreed.

### Terms of Gift

This category is a close relative of the gift or loan grouping, and the cases are also commonly a direct result of little or inadequate documentation, a central feature of the "handshake culture" in the art business.

- Earlier this year, *seattlepi.com* carried a story reporting that the heirs of donors of more than 100 Chinese artifacts to the Tacoma Art Museum in the 1970s had sued the museum to block the sale of the gifted items. The heirs and the donors allegedly believed that the museum would keep the works in its permanent collection. However, the museum later notified the heirs that it had changed its collecting focus to Northwestern art, that the collection was not of museum quality, and that it was worth only $300,000. But then the museum sold only one-third of the collection at auction for $230,000, and the heirs sued to prevent further sales. One wonders how secure purchasers of the items in the original one-third may be in light of these claims.
- In 2010, *Courthouse News Service* reported that Ansel Adams' son was suing The Fresno Metropolitan Museum to enjoin the sale of (and to recover for himself) six original Adams prints that had been donated by the plaintiff in 1983. The museum had closed a few months earlier due to financial difficulties, and Dr. Adams was seeking to prevent the sale of the prints to help pay off the museum's $4 million of debt. His position was that the terms of the gift did not permit the museum to dispose of the prints at its discretion.

Since so much art is donated to museums, one can easily conclude that there are many situations similar to the Adams case, where sales to pay off creditors, either in or out of bankruptcy, can cloud the title of downstream buyers. And these cases raise another important concern. In view of the current controversy over the increasing practice of deaccessioning artworks from museum collections, the issue of restrictions, by lenders or donors, has become increasingly important for not-for-profit institutions. Museums must be cognizant of potential title claims to artworks donated and loaned, especially where there is no documentation of the gift or the loan, the gifting documentation is unclear or contains cumbersome conditions (or conditions calling for a subjective determination), the loan agreement is for an indefinite period, or the artwork is "abandoned" or the subject of a "stale loan" where the donor or lender cannot be located or even identified.

### Other Hidden Encumbrances

Restrictions of the type seen in the Adams and Tacoma Art Museum cases are one type of encumbrance that can burden sellers and buyers of art. There are many others, as can be seen from this sampling:

- In March of 2013, *Salon* reported that a New York State court had granted a temporary restraining order (TRO) to *Rock and Roll Hall of Fame* musician (and former member of *The Band*) Garth Hudson, to stop a Kingston, NY, storage facility landlord from selling an alto sax and band memorabilia in an online auction to pay six years' worth of storage fees. Hudson claimed that he was not properly notified of the foreclosure sale and that the landlord overstated the amount due. If the TRO had been granted a little later and some of these items had already been sold, the purchasers could have found themselves in limbo because there is legal uncertainty as to whether a good-faith purchaser, who buys in the foreclosure of a "warehouseman's lien," takes free and clear of the landlord-owner's claims of title, when the warehouseman fails to comply with all statutory prerequisites.
- A few years ago, *ArtInfo* published an article saying that so-called "resale clauses" were becoming widely used in the contemporary art world. These clauses are incorporated into artists' and galleries' bills of sale for primary market transactions. The clauses require buyers who later decide to sell to offer the work back to the dealer or artist for a period of time, and prohibit such buyers from reselling the work in the secondary market, unless the artist or dealer has first declined to exercise its right of first refusal. These clauses pose risks to secondary market buyers who may not know that a particular work is the subject of such a resale clause.
- In 2010, *Courthouse News Service* reported that Stephen LaChapelle had sued Nancy Bishop in Los Angeles for a declaratory judgment of ownership of a Warhol painting that sold at auction less than two weeks before the news report. LaChapelle claimed that in 1990 he had loaned Bishop $25,000 based on a handshake agreement to purchase the painting, and that Bishop never returned the money. The successful bidder's title was said to be in flux and it appeared that Christie's would be retaining the sale proceeds until there was a resolution. It may well be that claims like those of LaChapelle would not survive a sale to an innocent purchaser,

but the risks of being caught up in a litigation, and (absent title insurance) of having to defend title at your own expense, are quite real.

## Authority to Sell and Capacity

Some of the cases highlighting title issues involve fact patterns that are a direct result of the opaque and secretive business practices so common to the art world. Others are simply disputes as to capacity and authorization that can arise in many other contexts.

- According to *Courthouse News Service*, in May of 2011, New York's Metropolitan Museum of Art and Jan Cowles sued to recover, and be declared owner of, a Mark Tansey painting. Cowles alleged that she had purchased the work from her son before gifting a 30% interest to the museum. She further alleged that in August of 2009, without her approval and while the painting was in her son's possession, he consigned it to the Gagosian Gallery, which, in turn, sold it to two collectors. The two collectors sued the gallery for failing to notify them of the museum's interest in the painting.
- A few months later, The New York Post reported that Jan Cowles had sued Larry Gagosian, his gallery, and John Doe (an unidentified buyer of a Lichtenstein painting) to recover the work. Cowles alleged that the gallery knew that the Lichtenstein belonged to her, and not her son, and that it made no effort to contact her to obtain authority to take the painting from her apartment or to offer it for sale. This all certainly sounds like some intra-Cowles family problem, but that would be of no solace to an innocent purchaser who thought he or she had bought a Lichtenstein for the $5 million he paid to Gagosian.
- In 2012, *The New York Times* reported that a signed photograph of Gustav Mahler that had been owned by Arnold Schoenberg, and was missing since the late 1980s, had been found. A man from Los Angeles claimed that his grandfather had received the photograph as a gift and offered to sell it to the Schoenberg family. But the family suggested that the man's title was tainted because Arnold Schoenberg would never have given the Mahler memento away. Legal action was threatened. Scholars believe that the photograph was either stolen, borrowed for a research project and not returned, or lost during a cataloguing. It is, however, easy to imagine that the photograph could have been sold to an ordinary course purchaser whose title would suddenly be in doubt.
- In 2012, *Auction Central News* carried another story about Huguette Clark reporting that the Public Administration for the City of New York, appointed to administer Clark's estate, had ordered recipients of $37 million worth of gifts, including a Stradivarius violin, to return them to the estate. The administrator also ordered the investigation of other gifts, including a Manet painting that Clark had gifted to a hospital. At issue were Clark's intent and mental capacity over a 20-year period late in her life (she died at 104), a daunting determination for any court or administrative agency to have to make. Someone unfortunate enough to be a downstream buyer of items gifted by a donor like Clark might find himself involved in a quite unexpected litigation challenging his ownership. There could also be subsequent buyers who might have bought from the first buyer. This type of problem is not unique to the art world; the same questions could, for instance, be asked about real estate transferred by a donor whose state of mind was questionable. However, with real estate, the hypothetical buyers would almost certainly have purchased title insurance.
- The *New York Times* reported in 2009 that competing lawsuits were being filed between the Dedalus Foundation, which protects the legacy of the artist Robert Motherwell, and Joan Banach, a former Foundation curator, Motherwell collection manager, and board member. According to the story, the Foundation's complaint claimed that Banach stole at least 10 works and, without authority, sold some of them. Banach claimed the works in question had been given to her by the artist in 1991. This was plainly a wider dispute between people in the Motherwell inner circle. It, nonetheless, underscores how difficult it is to keep track of title to these valuable assets when there is no central filing system to record ownership or even to record the very existence of the item in question.
- In 2008, *Maine Antique Digest* published a story about the estate of artist Martin Ramirez. The estate had filed suit in New York to recover 17 works by Ramirez, which a therapist had acquired 45 years earlier when Ramirez was a patient in a California psychiatric hospital. The estate alleged (again, 45 years later) that under California law no one could have acquired good title to the Ramirez works while the artist was involuntarily committed because he lacked capacity to make a gift or any other kind of transfer. The therapist had attempted to sell the works at auction in New York, and sued in California for a declaratory judgment to quiet title.

## Family Disputes

Then there are the usual will contests, divorce-related claims, and similar battles. The fact that these can be readily found outside the art world does not make the problems any less serious.

- *The BBC* reported in 2011 that the sixth and last wife of actor Tony Curtis had auctioned art and memorabilia through a Beverly Hills auction house despite the protests of the actor's five children, who had been disinherited in his final will, written a few months before his death. Curtis' collection included works by Warhol, Balthus, Picasso, and Chagall, as well as some of his own paintings. Will contests over undue influence and similar matters sometimes succeed. A buyer from an estate encumbered with a will contest, or even a potential contest, would appear to be at some risk of a challenge to his title.

- According to *The Independent*, in 2011 the estranged wife of late actor Dennis Hopper obtained a temporary restraining order from a California court, blocking the sale of many artworks scheduled for sale at Christie's in New York. Hopper had filed for divorce shortly before his death, claiming, among other things, that his wife had absconded with more than $1 million worth of his art collection.
- Then there is the New York State Court of Appeals case reported by *Courthouse News Service* in 2012 involving Biond Fury, boyfriend of the late Yulla Lipchitz, who was the widow of artist Jacques Lipchitz. The court held that Fury had acquired title to a Lipchitz sculpture in 1997 through an *inter vivos* gift. Fury's interest in the sculpture had been sold in 2005 to David Mirvish. Hanno Mott (Lipchitz's son from her first marriage and a beneficiary under her will) had been contesting ownership of the sculpture since 2003. Lipchitz had gifted this piece and many others to Fury by writing a note on the back of an image of each intended gift. Around the time the gift was privately made, Mott had loaned the work to France. Mott did not learn of the gift for some time, and believed that he had properly sold the work in 2004 through Marlborough International Fine Art. This case again highlights that it is virtually impossible for an ordinary buyer, or even an art professional, to know all of the important facts bearing on title and the potential for litigation in any given situation. The fact that Mott was unaware of the gift, and the fact that New York State courts went back and forth on this case, until the Court of Appeals finally put it to rest, are exactly why the art world needs title insurance. It is not just that neither the buyer from Marlborough nor Mirvish should have bought the sculpture; it is the fact pattern here that amply demonstrates how easy it is for appearances to be misleading and for true ownership to be obscured. And when assets worth millions (or tens of millions) of dollars are involved, insurance has an obvious role to play. Regardless of the outcome, this situation was bound to become a mess for at least one of the two buyers.

{ Jasper Johns, *Flag*, 1954-55 (dated on reverse 1954). Encaustic, oil, and collage on fabric mounted on plywood, three panels, 42 1/4 x 60 5/8", Museum of Modern Art, New York }



## Other Cases

There are also potential title issues in the art world that are not easily categorized.

- Earlier this year, *Bloomberg* reported that Henry Kravis and his wife, Marie-Josce Kravis, president of the board of trustees of the Museum of Modern Art (MoMa) in New York, had sued art collector and former MoMA trustee, Donald Bryant, Jr., for breach of a co-ownership agreement for three Jasper Johns works acquired in 2008. The agreement called for annually alternating possession and the eventual gift to MoMA of the three artworks. Mr. and Mrs. Kravis claimed that Bryant was refusing to relinquish possession of the artworks on the agreed-upon schedule, unless they would agree to repudiate the promised gift. Co-ownership arrangements are common in the art world and, because of the "handshake culture" and inadequate documentation so common in the business, problems such as this can cloud title to valuable artworks (the Jasper Johns works in this case are valued between $15 million and $25 million) for long periods of time.
- According to a story in *The New York Daily News* last year, Colleen Weinstein, widow of the late Arthur Weinstein, owner of the Chelsea Hotel on West 23rd Street in Manhattan, had threatened to sue the new owners of the iconic hotel to recover her husband's artworks. Mr. Weinstein's collection hung, until recently, in the halls of the hotel. The new owner asserted that it had acquired title to the art as part of the purchase of the hotel. Anyone who might have purchased artwork in this collection from the new hotel owner likely would have had no way of knowing of the potential for a claim by Mrs. Weinstein.

## New Problems Still Being Born

Lately, there has been a trend to charge certain seemingly innocent third-party buyers with legal responsibility for knowing that their sellers committed a fraud in connection with their purchases of art. Two cases, in particular, have been noted in the press, but there are likely others and there will probably be more:

- In 2009, *The Washington Post* carried a story reporting that the National Gallery of Art and the Estate of Lorette Jolles Shefner had settled a lawsuit and reached an ownership agreement regarding the 2004 sale of a Soutine painting. In its complaint, the estate had alleged that two Soutine experts fraudulently induced Shefner to sell them her painting for far less than its real market value, and that the experts had turned around and resold it to the National Gallery for double the price. The claim against the museum was based on the allegation that it had done little or no due diligence on the ownership history of the work or on how the experts came to be selling it. In commenting on this

case in its newsletter, ARIS Title Insurance Corporation said:

> The Shefner case reflects the continued heightening of due diligence obligations of downstream buyers to investigate clear legal title to artworks outside of the WWII historical theft context. The Soutine painting is the first work that the National Gallery of Art has deaccessioned from its permanent collection on the basis of a non-WWII related title claim. Under the changing industry standards, good faith buyers are charged with having certainty that the seller did not acquire the work under fraudulent circumstances, an issue which is heightened in the current market where buyers are attempting to secure works at below market values, and face the risk of rescission of the transaction, loss of the object as well as loss of the gain in value over time.

- *Art News* reported in 2009 that John McEnroe and Morton Bender, a trustee of the Dorothy G. Bender Foundation, had sued "art merchant" Joseph Carroll for conversion, unjust enrichment, and restitution in connection with Carroll's purchase of a Gorky painting from the bankrupt Lawrence Salander and his gallery. McEnroe and Bender each claimed to have purchased 50% interests in the painting that was sold to Carroll by Salander. The fact pattern is somewhat more complicated, but essentially McEnroe and Bender alleged that when Carroll acquired the painting from Salander, Carroll should have known that Salander did not have the authority to sell it without the approval of McEnroe and Bender. Thus, we see another case where a claim is made by a former owner against a downstream buyer, alleging that the party selling an artwork to him (in this case, Salander, as consignee) was engaging in a fraudulent activity. In view of the above-noted widespread use of agents for undisclosed principals in the art business, it stands to reason that this type of challenge could become increasingly common in situations where consignors become dissatisfied with, or question the motives of, the art dealers who represent them.

## Conclusion

One does not have to be the Stephen Hawking of inductive reasoning to see the pattern here. Many lawsuits and disputes that have made the news in recent years highlight the title risks in buying art. There are obviously many more out there. And given the increasing economic value of art, the growth of art investment funds, and the growth of interest in art as an alternative investment and as a separate asset class, there is good reason to believe that title claims will become more prevalent.

My background in real estate has made me keenly aware of the comfort and protection a title insurance policy can provide. Of course, art title insurance is not identical to real estate title insurance because many of the concerns are different. For example, no one can actually steal real estate, and yet we know that theft is a major source of title issues in the art market. Also, title insurance for art does not provide actual coverage as to authenticity, an issue that does not even exist in real estate transactions. But because every fake artwork at some point must have a bad provenance, art title insurance does provide some practical comfort as to this important concern. For purposes of this writing, it is fair to assume that the title insurance I am advocating is sufficiently comprehensive and of the necessary duration and amount to provide meaningful protection against all major title risks. At the moment, only ARIS Title Insurance Corporation offers such complete insurance.

If the case for title insurance is so overwhelming, why then is it not more widely used by collectors? For one thing, sales of art carry a four-year implied warranty of title under the UCC, and buyers take at least some comfort from this. For another, purchases through major auction houses carry their imprimatur and can reasonably be believed to be at least somewhat safe, given the great resources and experience of these firms, and the reputation risk they would bear if they were selling too much art with bad titles. Another reason is that there is, of course, a cost. ARIS charges a one-time premium that is generally between 1.5% and 3% of the amount insured. Title defects insurance that is less comprehensive (and less expensive) than that offered by ARIS is also available for certain purchases. All things being equal, people will not ordinarily spend this kind of money for premiums unless the insurance is a matter of course for the risks in question, such as fee title insurance is when buying a home.

My real point is that it is time for art market professionals to encourage making art title insurance just such a matter of course. I am reminded of two specific experiences I had that demonstrate the power of convention. Several years ago, I represented the lead lender and agent bank in a large syndicated financing for the owners of a major league baseball team, where the primary collateral consisted of a pledge of 100% of the limited partners' interests in the entity that owned the franchise. At almost exactly the same time, I was also representing a major private bank in a mezzanine loan secured by pledges of equity and of economic interests in various entities that owned a number of Manhattan office buildings. There was, at that time, a relatively new UCC Article 9 title insurance being offered by two major real estate title insurers. Legally speaking, the two deals were all but identical in terms of title risk. Nonetheless, the lender on the second deal did not want to make the loan without title insurance, and the borrower put up no resistance. All the people involved were accustomed to title insurance and, although the collateral was not real property, it was understood from the start that the request for title insurance as to the bank's security interest was "market." On the other deal, however, although the credit executives at the agent bank liked the idea, the borrower's representatives had literally never heard of it, and the bank quickly dropped the demand.

The second experience involved two loans to the owners of a National Hockey League team located in Canada. Herrick was selected to act as U.S. counsel to the administrative agent and lead lender, as certain documents were governed by New York law and some collateral was located in the United States. The Toronto

law firm serving as Canadian counsel to the lead lender provided two terms sheets: one for the main credit facility and another for a real estate loan (for tens of millions of dollars) secured by the local equivalent of a mortgage on the team's arena. A review of the terms for the arena loan revealed that title insurance was not included as a condition precedent. When asked why, the attorney at the Toronto firm explained to me that, although title insurance had become available in Canada in recent years, it was not yet "market" to require it, even on a loan of this size. The loan closed without the title policy.

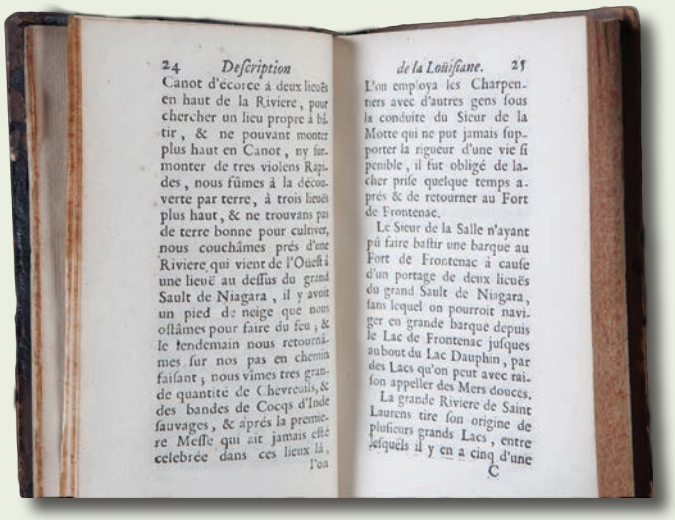
Habit, tradition, and inertia are all strong forces. As can be seen in the stories about the sports financings and the mezzanine real estate loan, whether consciously or not, people are often guided by the prevailing views in their field. Most of the time, this makes good sense and serves most everyone well. But things are never static in nature or in business, and there is such a thing as an idea whose time has come. Some art professionals agree with this position, but others are comfortable with the way things have traditionally been done. They see little or no need to siphon off money to pay a third-party insurance company that could go to pay for art, fees, and commissions. I am, however, a believer in enlightened self-interest. If insurance came to be used widely enough to eliminate most title risks from the art business, premiums would go down, buyers would be more confident, lenders would make loans more readily available against art as collateral, and the entire market would ultimately benefit.

## Rare Books Returned *By Yael Weitz*

On June 24, 2013, one of Herrick, Feinstein's clients, the National Library of Sweden, recovered two antique books at a repatriation ceremony conducted by the U.S. Attorney's Office for the Southern District of New York. The books were stolen from the National Library in the 1990s along with dozens of other rare books. The return of the books resulted from significant efforts by the U.S. Attorney's Office and the Federal Bureau of Investigation, which tracked down the purchaser of the books, antique bookseller Stephen Loewentheil, and worked with him to return the books to the National Library. Because Mr. Loewentheil had sold the two books to customers, he made the extraordinary effort of purchasing the books back from his customers, and then returning them to the Library without receiving compensation. At the repatriation ceremony, the National Library of Sweden awarded Mr. Loewentheil a medal for his efforts to make cultural property available to scholars and the public.

Although the books had been part of the National Library's collection for hundreds of years prior to their theft, they are closely related to American history. One book, written in 1683 by Louis Hennepin, includes the first printed record of the Louisiana territory and the first description of Niagara Falls. A copy of the book was owned by Thomas Jefferson, who consulted it in connection with his eventual decision to have the U.S. make the Louisiana Purchase. The second book, a 19th-century volume by Henry Lewis, is a rare first edition that includes remarkable hand-colored lithographs and texts from the author's exploration of the Mississippi River between 1846-1849, and is believed to have done more to acquaint prospective emigrants with the American West than any other work of the period. The return of the Hennepin and Lewis books was noted in a number of major media outlets, including the July 23, 2013, *New York Times* article, "National Library of Sweden to Recover Stolen Books," and the July 24, 2013, *Wall Street Journal* article, "Rare, Stolen Books Returned to Swedes."

The successful return of these books comes one year after the recovery of another volume that had been stolen from the National Library, a 415-year-old atlas created by Cornelius van Wytfliet that is known as the "Wytfliet Atlas." The recovery of the atlas was reported in the June 26, 2012, *New York Times* article, "Swedes Find Stolen Atlas in New York." The remaining stolen books are part of an ongoing investigation and recovery effort launched by the National Library in cooperation with U.S. officials and with Herrick's assistance. For a complete list of the stolen books, please visit www.wytflietatlas.com.


24 *Description*
Canot d'écorce à deux lieuës en haut de la Riviere, pour chercher un lieu propre à bâtir, & ne pouvant monter plus haut en Canot, ny surmonter de tres violens Rapides, nous fûmes à la découverte par terre, à trois lieuës plus haut, & ne trouvans pas de terre bonne pour cultiver, nous couchâmes prés d'une Riviere qui vient de l'Ouest à une lieuë au dessus du grand Sault de Niagara, il y avoit un pied de neige que nous ostâmes pour faire du feu; & le lendemain nous retournâmes sur nos pas en chemin faisant; nous vîmes tres grande quantité de Chevreuils, & des bandes de Coqs d'Inde sauvages, & aprés la premiere Messe qui ait jamais esté celebrée dans ces lieux là, l'on

*de la Louisiane.* 25
l'on employa les Charpentiers avec d'autres gens sous la conduite du Sieur de la Motte qui ne put jamais supporter la rigueur d'une vie si penible, il fut obligé de laisser prise quelque temps aprés & de retourner au Fort de Frontenac.

Le Sieur de la Salle n'ayant pû faire bastir une barque au Fort de Frontenac à cause d'un portage de deux lieuës du grand Sault de Niagara, sans lequel on pourroit naviger en grande barque depuis le Lac de Frontenac jusques au bout du Lac Dauphin, par des Lacs qu'on peut avec raison appeller des Mers douces.

La grande Riviere de Saint Laurens tire son origine de plusieurs grands Lacs, entre lesquels il y en a cinq d'une

C

# The True Cost of Authentication Litigation

*by Darlene Fairman*[1]

It is now more than six years since the Pollock-Krasner Foundation ceased its authentication services, and well over a year since the Warhol authentication board disbanded. Since 2006 the art market has seen the voluntary demise of numerous authentication boards, including those for works by Alexander Calder, Roy Lichtenstein, Jean-Michel Basquiat, and Keith Haring. Many speculated that the absence of these boards would have a deleterious effect on the art market, presumably because there would be no means by which to authenticate the purported works of the affected artists.

Bear in mind that these authentication boards are a recent creation. They are fundamentally an outcropping of the estates of deceased artists that seek to retain control over the body of those artists' work. In this way, such authentication boards attempt to re-create the French legal concept, known as *droit moral* (or moral rights), which bestows upon the artist, among other things, the right to authenticate his or her own works. Upon the artist's death, this right passes to an heir or designee. *Droit moral*, however, is not a concept that has gained ground in the U.S.; therefore, the effort to voluntarily compel the market to accept only one authenticator for an artist plainly did not find great success. The art market operated without such boards for hundreds of years. Surely it will once again operate just fine without them. Indeed, most artists have never had an authentication board, nor in the case of U.S. artists would the concept of *droit moral* even be applicable, yet somehow the market still finds a way to determine what art is authentic and what value it has. The market will weigh the value of any given opinion of authenticity, and value will derive from the weight given to such opinion or opinions. As the Appellate Division, First Department astutely observed in *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 890 N.Y.S.2d 16 (1st Dep't 2009), neither inclusion in a catalogue raisonné nor a court order declaring an artwork authentic will have any effect on the value of an artwork if the marketplace does not respect that catalogue or agree with the court decision.

It is not the lack of art authentication boards that will burden the art market. Rather, it is the lack of willingness on the part of uninterested experts to opine on the authenticity of artwork that could have the most impact on the market. As art lawyers, we have heard experts voice their fears of rendering any opinions on authenticity for fear that a negative opinion will engender litigation from the disappointed party, alleging anything from product disparagement and slander of title to anti-trust violations.

An expert retained to render a decision on authenticity may, and in fact should, require that the parties first enter into a hold-harmless agreement wherein the party seeking authentication waives any claims against the expert and covenants not to sue. Such an agreement has been upheld in New York. *Lariviere v. Thaw*, 2000 N.Y. Slip Op. 50000(U) (Sup. Ct. N.Y. County June 26, 2000). It should be noted that a federal district court in New York declined to uphold the hold-harmless agreement between the parties in *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 Civ. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009) case. In the *Simon-Whelan* case, the court found that the allegations of fraud and intentional wrongdoing in the solicitation of the hold-harmless agreement by the Warhol Foundation were sufficient to state a claim for invalidating that agreement. In this way, the *Simon-Whelan* decision was well in keeping with the decision in *Lariviere,* where the court noted that such an agreement is void where it purports to grant exemption from willful or grossly negligent acts, or where a special relationship exists between the parties. It was a most unusual situation alleged in the *Simon-Whelan* case, however, where the plaintiff alleged that he was fraudulently induced to submit his work for authentication and to enter into a hold-harmless agreement. Generally, an art owner seeks out an authenticator, rather than the other way around.

But authentication experts have expressed that it is not their fear that a hold-harmless agreement will not be upheld because they engaged in intentional wrongdoing that keeps them from consenting to authentication engagements. Rather, they fear the thousands of dollars it will cost to defend themselves before a court finally upholds the agreement and dismisses the case. One solution to this fear of unfounded litigation is to include in any hold-harmless agreement a fee-shifting clause that would require an unsuccessful claimant to pay the costs and attorney's fees of the expert.

Another solution is new legislation that has been recently drafted and proposed by the Art Law Committee of the Association of the Bar of the City of New York. This proposed legislation, which is now undergoing review by the Legislative Committee of the Association, does several things. First, it defines an authenticator covered by the new law as a person recognized as having expertise regarding the artist for whom an opinion is sought, or as having expertise in uncovering facts that serve as a direct basis for an opinion as to authenticity. Thus, connoisseurship, as well as historical, technical, and scientific basis for opinion, are all preserved and protected. The definition makes clear that covered authenticators include authors of catalogues raisonné and other scholarly works, while excluding those who have a financial interest in the work for which the opinion is to be rendered (other than compensation for actual authentication services). Next, the proposed legislation requires that claims against authenticators be stated with particularity and that the elements of each claim must be proven by clear and convincing evidence. Thus, both the elements of pleading and the burden of proof would be raised for such claims, immediately alerting prospective claimants that they will bear a heightened burden. And if that were not enough to dissuade meritless claims, the highlight of the proposed legislation is that it would permit the authenticator to recover her reasonable attorney's fees, costs, and expenses if, and to the extent, the authenticator prevails in an action brought against her.

This proposed legislation also has the advantage of applying to what might be referred to as the "gratuitous" expert. Indeed, several cases that have been brought against experts for defamation or disparagement arose in the context of an expert who was not retained to give an opinion on authenticity. For example, in *Hahn v. Duveen*, 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. N.Y. County 1929), the art dealer Joseph Duveen was sued for defaming an artwork. Duveen had not been retained to render an opinion on authenticity. Rather, during an interview in which the reporter asked him what he thought of Hahn's painting, Duveen remarked that the real work was in the Louvre. Obviously, there had been no prior request for an opinion and no opportunity to enter into a hold-harmless agreement. The proposed legislation would protect such a gratuitous expert, as long as he or she meets the definition of "authenticator" under the language of the legislation.

On the other hand, an expert authenticator may yield a great deal of power over an artwork's value. The market and the law should want to protect authenticators who act diligently and in good faith, not the ones who scheme, self-deal, or make arbitrary or reckless determinations. The proposed legislation does this in several ways. First, it excludes as an authenticator someone who has a financial interest in the artwork for which the opinion is being rendered. Second, it protects persons who are recognized for expertise, and not impersonal boards or board members who may have no particular expertise. Third, it raises the burdens of pleading and proof. This will presumably serve to deter those who are merely unhappy to learn their art is not authentic from bringing claims, but not deter those with true claims of malicious behavior, fraud, and self-dealing. Finally, the shifting of attorney's fees should the claimant lose will hopefully be a strong deterrent to claimants who have nothing to lose by bringing a case and everything to gain from a good-faith authenticator who would rather settle with a payout of some kind than go through the rigors of litigation, even if she would win at the end of many years in court. Moreover, under the proposed legislation, an expert who loses a lawsuit would not be entitled to recover legal fees, thus making sure that experts continue to exercise appropriate care when speaking about the authenticity of an artwork.

In sum, the demise of authentication boards has never posed any threat to the art market, but the threat of litigation against expert authenticators does. And while authenticators may obtain some level of protection from well-crafted engagement agreement, the new legislation proposed by the New York City Bar Association's Art Law Committee provides the broader protections that the market needs to openly evaluate art and should serve as an example of how the law can effectively aid the art market in making rational valuation decisions, not by mandating what is or isn't authentic, but by fairly protecting those with the ability to guide the market to make such determination.

1 Jacob Weisfeld, Cardozo Law School Class of 2013, assisted with research for this article.

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# Art Law Events

## Upcoming Events Involving Herrick's Art Law Group

*October 9, 2013*

Howard Spiegler will give his annual lecture on Holocaust looted art issues to graduate students at Christie's Education.

*October 10, 2013*

Darlene Fairman will participate on a panel at the Appraisers Association of America's "Legal and Ethical Concerns for Appraisers" seminar.

*October 11, 2013*

Charles Goldstein and Lawrence Kaye will participate on a panel at a program entitled "Due Diligence in Cultural Heritage Litigation Cases: Is there a Minimum Legal Threshold?" This program is organized by the Board Members of the Holocaust Art Restitution Project, Inc. ("HARP"), in collaboration with the Ciric Law Firm, PLLC.

*October 15, 2013*

Howard Spiegler will speak on "Immunity for Art Works on International Loan: Immunity from Seizure or Immunity from Jurisdiction?" at the American Bar Association's Section of International Law 2013 Fall Meeting in London.

*October 26, 2013*

Charles Goldstein will speak on a panel on International Art Law during the annual meeting of the International Law Association in New York.

*November 1–2, 2013*

Howard Spiegler and Stephen Brodie will speak at the Union Internationale des Advocats 57th Congress in Macau, China.

*November 8, 2013*

Yael Weitz will participate on a panel entitled "Antiquities Case Studies" at the Appraisers Association of America Art Law Day at NYU program.

*November 9, 2013*

Michelle Bergeron Spell will participate on a panel entitled "Planning Strategies and Financial Tools for Your Clients" at the Appraisers Association of America National Conference.

## Recent Events Involving Herrick's Art Law Group

*September 17, 2013*

Howard Spiegler was part of a panel discussion on "Nazi-looted Art: Unfinished Business" at the Cornell Fine Arts Museum at Rollins College in Winter Park, FL.

*September 10, 2013*

Stephen Brodie participated on a panel entitled "State of the Art Lending Market" at the Ivy Plus Family Office Trends seminar.

Frank Lord also participated in the Ivy Plus Family Office Trends seminar on a panel entitled "Trends in Art Transactions."

*July 17, 2013*

Larry Kaye spoke about "The International Struggle for Antiquities" at the EDNY ADR Forum at the Brooklyn Courthouse of the Eastern District of New York.

*June 21–24, 2013*

Charles Goldstein moderated a lecture on museum co-operations at Motovun Group Association's 2013 Summer Meeting in Avignon, France.

*June 13–15, 2013*

Stephen Brodie spoke about "The Risk Calculus of Art Loans: Lending against Value in an Extraordinary Market" at Art Basel in Switzerland.

*May 29, 2013*

Larry Kaye gave a telephonic lecture on Art Law sponsored by The Rossdale Group, which focused on the topic of "Mastering Sports, Entertainment & Art Law."

*May 21, 2013*

Mari-Claudia Jiménez gave a lecture about "Practical Advice on Handling Legal Issues Confronting the Art World Today" at the New York City Bar Association.

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