ART & ADVOCACY

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Managing the Risks of Art Ownership with Insurance

By Alan Lyons

We all purchase insurance for our homes and cars. Those with valuable art collections, however, also need to consider properly insuring their artworks. Standard homeowners insurance may not be sufficient to protect fine arts and artifacts kept in the home. Several leading insurers offer dedicated and comprehensive fine art insurance policies that provide broad coverage on a worldwide basis, even covering transportation risks, so that art owners can protect their treasured belongings and avoid sleepless nights.

Purchasing a Policy

There are several considerations an art owner should take into account when determining how to best insure his collection. First, the art owner should ascertain whether fine art is covered under his standard homeowners insurance policy, and if so, what the scope of coverage is. Under most "deluxe" type homeowners policies from large insurers, there is some coverage for fine art within the contents coverage. However, the scope of coverage for fine art under the contents coverage of a homeowners insurance policy is generally much more limited than under a scheduled fine art insurance policy. For example, under contents coverage, there would be coverage for the cost of repairs, but generally no coverage for loss of value of fine art following a loss, no transit coverage, and no off-site storage coverage. Most likely, a deductible would apply. People with significant art collections should, therefore, consider purchasing a separate fine art insurance policy that has broader coverage and may even have a much lower premium rate than a contents policy.

Second, the owner should consider whether a blanket policy or a scheduled policy is the best approach to insure his artwork. With scheduled coverage, every piece is individually listed on the policy for a stated insured amount. With blanket coverage, there is no stated insured amount for each piece, but rather a total insured limit that applies to any one piece or all insured pieces. According to Raymond Condon, president of risk services with Aon Group's Private Risk Management team, scheduled coverage "makes for a simpler and faster claims process in the event of a total loss from, say, a house fire, since there would be no dispute over the insured amount."

Whether to purchase scheduled or blanket coverage depends upon the insured's particular circumstances. Mr. Condon gave the following example:

> If an owner has a $40 million art collection, with the pieces located in four separate homes across the country, and the highest value in any one home is $15 million, then it might make sense for that owner to purchase a blanket policy covering the art at all locations with a $15 million limit, instead of a scheduled

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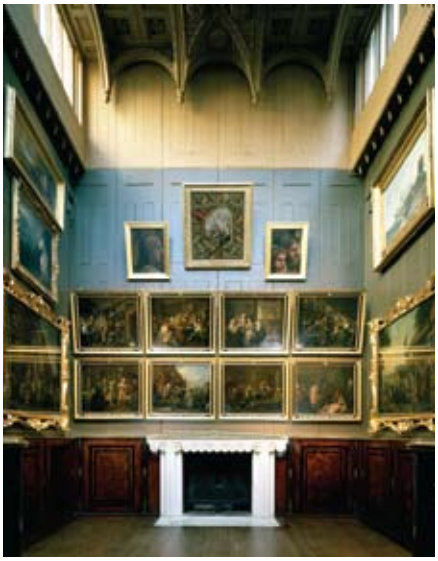
policy with a $40 million limit, because $15 million is the most that could be damaged in any one fire, earthquake, etc. With scheduled coverage, the claims process becomes easier in the event of a total loss because the insurer would pay the scheduled amount, and it gives the owner peace of mind over the insured amount.

In addition, some scheduled policies pay up to 150% of the scheduled amount when the market value of the piece has appreciated at the time of loss, so the insured can actually collect more than the scheduled amount under certain circumstances. An art owner should speak with an experienced fine art insurance professional to determine whether scheduled or blanket coverage is appropriate for his particular needs.

Third, the owner should consider what risks will be covered under an art insurance policy, and what risks will be excluded. The standard coverage in the marketplace for fine art insurance is "all risk" coverage. That means that the policy covers all risks, most commonly fire, water, theft, and accidental damage, except those risks that are expressly excluded by the policy. If the loss is not caused by an excluded risk, it is covered. Coverage is generally provided on a worldwide basis, including during transit. Examples of excluded losses are wear and tear, gradual deterioration, fading, cracking caused by natural or artificial light, and loss while the artwork is being restored.



{ *Personal Art Collection of Sir John Soane* }

Perhaps most important, the owner must decide how much to insure an artwork or an art collection for. Mr. Condon recommends insuring a piece of art for the retail replacement value so that the insured can attempt to purchase another piece of "like kind and quality" in the event of a loss. The retail replacement value could be significantly higher than the amount the insured paid for the piece. The insurer will likely request an appraisal to support the retail replacement value.

Lastly, the cost of insurance must be considered. Several factors generally drive the premium for fine art insurance. The location of the artwork is particularly relevant. For example, is the artwork located in a five-star building in Manhattan with a state-of-the-art alarm system? Or is the artwork located in a flood zone or an area susceptible to earthquakes or hurricanes? Other relevant factors include the fragility of the artwork, the presence of fire protection equipment, and the insured's particular loss history.

Choosing an Insurance Company

When choosing an insurance company for fine art insurance, an owner should inquire as to whether the insurer has expertise in this area, including underwriters and claims personnel who understand the art business. Of course, a proven track record in paying claims to clients' satisfaction is also desirable. Mr. Condon noted that "there are several ancillary services that the leading art insurance companies provide that are very valuable."

For example, some insurers provide loss prevention services where they will send a representative to an insured's home to advise about certain preventative measures that can be taken to minimize the possibility of a loss occurring. Insurers may also have a wildfire protection unit which, when alerted to an impending wildfire in the area, can quickly dispatch a team of personnel who will put emergency fire protective measures around the property in an attempt to prevent the fire from damaging the home and the art inside it. Insurers can also arrange to remove art from a home to a secure location prior to a hurricane or wildfire that is expected to hit the area. As another example, an insurer's loss control department can send someone to an insured's home with an infrared camera to check for water situations behind a wall where a valuable painting is going to be hung. The top insurers in the art field are not just involved in the underwriting and claims side post-loss; they are also actively involved pre-loss to help the insured do everything possible to minimize the possibility of a loss occurring.

As with insurance providers, insurance brokers with special expertise in fine arts are also available. When experienced in this particular area, a broker can advise clients as to the most appropriate coverage, help secure the best coverage at competitive premiums, and assist in the claims process. In addition to helping the owner negotiate specific terms and conditions in an insurance policy, such brokers may also be able to recommend shippers, storage facilities, appraisers, and collection management systems all over the world.

Owners of fine art would do well to contact a professional, such as an insurance broker in the field of art insurance or counsel experienced in art matters, to assist them in examining and addressing their specific insurance needs.

Art Law Litigation in 2011

By Yael Weitz and Laura Tam

The year 2011 was a diverse and significant one for art litigation, with important court decisions regarding the restitution of Holocaust-era artwork, the forfeiture of stolen cultural property, and the infringement of intellectual property. These cases present familiar arguments, such as assertions of statutes of limitations, laches, and the Foreign Sovereign Immunities Act (FSIA) in the area of Holocaust-era restitution, as well as novel developments, such as what constitutes fair use in cases involving copyright infringement. This article explores the variety of issues that emerged in some of the most significant art law cases from 2011.

Bakalar v. Vavra, 05 Civ. 3037 (WHP), 2011 U.S. Dist. LEXIS 91851 (S.D.N.Y. Aug. 17, 2011)

At issue in *Bakalar v. Vavra* is the title 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 who was arrested and sent to a concentration camp in 1938. Not long after Grünbaum's arrest, the Nazis inventoried much of Grünbaum's art collection, and approximately 420 of his artworks were deposited in storage. Although exactly what happened to Grünbaum's art collection between 1938 and 1952 remains unknown, beginning in 1952 many of the artworks began resurfacing in Switzerland. In 1956, Grünbaum's sister-in-law sold the drawing to a gallery in Switzerland, which later that year sold the drawing to a gallery in New York, from which David Bakalar purchased it in 1964. In 2005, Bakalar filed a declaratory judgment action against Grünbaum's heirs, seeking a ruling that he is 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 whether the purchaser obtained good title to the artwork upon its transfer. The Second Circuit, overruling the decision of the 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 interests Switzerland might have had in connection with a transaction where the purchased property left the country almost immediately.

On remand, the district court applied New York law and held that, although the claim was brought within the statutory time period, the action was nonetheless barred under the doctrine of laches – an equitable doctrine under which a case may be dismissed, even if otherwise timely, if the plaintiff unreasonably delayed in bringing the claim to the prejudice of the defendant. The court determined that the claimants, as well as their ancestors, had sufficient knowledge of the circumstances regarding their claim to have taken action earlier, but that they inexcusably delayed in doing so, causing Bakalar to be prejudiced by the loss of witnesses, documents, and memories of the relevant events. An appeal of the decision is currently pending.

De Csepel v. Hungary, No. 10-1261 (ESH), 2011 U.S. Dist. LEXIS 98573 (D.D.C. Sept. 1, 2011)

In *De Csepel*, the heirs of Baron Mór Lipót Herzog brought claims against the Republic of Hungary, three Hungarian museums, and a Hungarian university for the recovery of more than 40 paintings, sculptures, and other works of art seized by the Hungarian Government and Nazi officials in the early 1940s. The defendants moved to dismiss the action, asserting, among other defenses, that the district court lacked jurisdiction over the defendants under the FSIA, which provides that foreign states are immune from the jurisdiction of United States courts, unless one of the enumerated exceptions to the law applies. 28 U.S.C. § 1605. One of those exceptions is the expropriation exception, which states that where property has been expropriated in violation of international law, a foreign state will not be immune where the rights to such property are at issue. 28 U.S.C. § 1605(a)(3). Relying on this exception, the district court held that it had jurisdiction over the case. The court determined that, even though Hungary did not enact formal laws taking away the citizenship of Jews during the Nazi era, it had subjected Jews to measures that stripped them of the rights typically accorded to citizens. Thus, even though the plaintiffs were technically Hungarian citizens, Hungary could commit violations of international law under the FSIA's expropriations exception.

The court also rejected the defendants' arguments that the case should be dismissed based on the statute of limitations, *forum non conveniens*, the political question doctrine, and the act of state doctrine. The court did, however, grant the defendants' motion to dismiss with respect to 11 paintings at issue on international comity grounds. The 11 paintings had been the subject of a claim filed in Hungary in 1999, and the court deferred to a 2008 decision by the Budapest Metropolitan Court, which dismissed the claim and held that the 11 paintings had been acquired by the Hungarian Government by way of adverse possession. Both parties filed motions for immediate appellate review of the district court's decision. On November 30, 2011, the motions were granted, and the matter is still pending.

Westfeld v. Fed. Republic of Germany, 633 F.3d 409 (6th Cir. 2011)

In another restitution case involving the FSIA, the heirs of a prominent German art dealer, Walter Westfeld, sought to recover damages for the seizure and conversion of Westfeld's art collection by the Nazis during WWII. The heirs argued that Westfeld had intended to send his collection to Tennessee prior to its seizure, and therefore Germany had prevented Westfeld from selling it on the private market there. The heirs argued that Germany should be held liable for the theft under another exception to the FSIA, the "commercial activities" exception, which provides that sovereigns are not immune from suit if the action is based upon (1) the sovereign's commercial activity carried on in the United States; (2) an act

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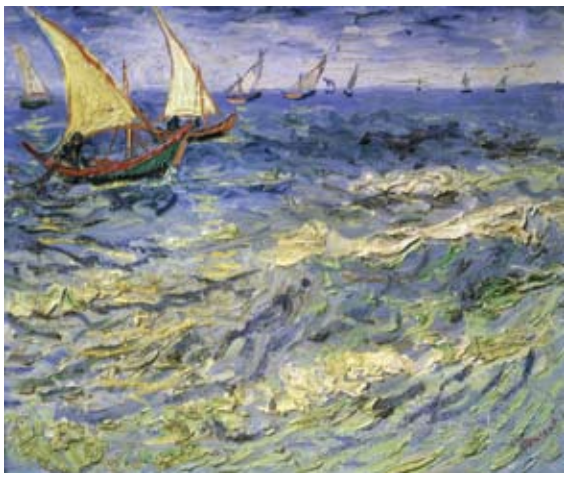
performed in the United States in connection with the sovereign's commercial activity elsewhere; or (3) an act outside of the United States in connection with the sovereign's commercial activity elsewhere that causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2). The heirs argued that the third prong of the exception was applicable because the seizure by the Nazis was in connection with a commercial activity that caused a direct effect in the United States. The district court rejected the heirs' claims, holding that the exception did not apply, and therefore the court lacked jurisdiction to hear the case. Although the court found the theft to be "ineffably horrendous," it held that the actions by the Nazis were "unique to a sovereign power rather than a private person," and therefore the seizure of the art collection was not in "connection with a commercial activity."

The Sixth Circuit affirmed the district court's decision, but on different grounds. Without reaching the issue of whether the actions by the Nazis were in connection with a commercial activity, the court explained that "Germany is nonetheless entitled to immunity because the Heirs have not established that those actions caused a direct effect in the United States." Relying on cases involving bonds issued by foreign governments, the court drew a careful distinction between actions that cause "effects" in the United States and actions that cause a "direct effect" in the United States. Although the actions of the Nazis prevented Westfeld from sending his collection to Tennessee, the court determined that "any effects felt in the United States did not follow as an immediate consequence of Germany's actions." The court found that "Germany had not obligated itself to do anything in the United States" and had acted "entirely within its own borders." Therefore, the court held that the "commercial activity" exception did not apply and that the heirs' claims were barred by the FSIA.



{ *Seascape At Saintes-Maries by Vincent Van Gogh* }

***Orkin v. Swiss Confederation*, 09 Civ. 10013 (LAK), 2011 U.S. Dist. LEXIS 4357 (S.D.N.Y. Jan. 13, 2011), *dismissed by* 770 F.Supp.2d 612 (S.D.N.Y. 2011), *aff'd*, No. 11-1414-cv, 2011 U.S. App. LEXIS 20639 (2d Cir. 2011)**

In this third restitution case involving the FSIA, the plaintiff sought the recovery of a Vincent van Gogh drawing, "Les Saintes-Maries de la Mar." The drawing had been allegedly sold under duress by the plaintiff's grandmother to Swiss collector Oskar Reinhart to help fund her family's escape from Nazi Germany in 1933. In or around 1945, Reinhart established a nonprofit foundation and donated part of his collection to it. The rest of his collection, including the drawing at issue, was transferred to the Swiss Confederation as part of a testamentary bequest by Reinhart in 1965.

In its January 2011 decision, the district court held that, even if the foundation was an agency or instrumentality of the Swiss Confederation that had engaged in commercial activity in the United States, the court lacked subject matter jurisdiction under the FSIA because the foundation did not own the drawing in question. Nonetheless, the court allowed the claimant to submit additional evidence to demonstrate a genuine issue of material fact as to the existence of subject matter jurisdiction, allowing the case to continue.

But, in the proceedings that followed, the district court dismissed the action, this time holding that there was no subject matter jurisdiction under the FSIA's "takings" exception because the acquisition of the drawing was made by Reinhart, a private individual, and not a sovereign. The court explained that under the FSIA, "the term 'taken'…refers to acts of a sovereign, not a private enterprise, that deprive a plaintiff of property without adequate compensation. In consequence, 'takings' jurisdiction exists only where the property at issue passed in the first instance from the plaintiff – or, as here, the plaintiff's predecessor – to a sovereign or to some person or entity acting on a sovereign's behalf." On October 12, 2011, the Second Circuit affirmed the district court's decision.

***W. Prelacy of the Armenian Apostolic Church of Am. v. J. Paul Getty Museum*, No. BC 438824 (Cal. Super. Ct. Nov. 3, 2011)**

This case involves a claim by the Western Prelacy of the Armenian Apostolic Church of America for the recovery of seven pages of a 13th-century illuminated manuscript, a sacred book known as the *Zeyt'un Gospels*, from which the relevant pages were allegedly stolen in Marash, now part of modern-day Turkey, in or around 1920. The claimants allege that the action is timely, asserting, among other things, that a recent amendment to California's Code of Civil Procedure § 338(c)(3) applies to the claim. The amended statute, which was signed into law in 2010 and became effective as of January 1, 2011, extended the statute of limitations from three years to six years for claims brought for the recovery of a "work of fine art" unlawfully taken or stolen, including "by means of fraud or duress," against "a museum, gallery, auctioneer, or dealer." The amendment also changed the accrual date for these claims so that the statute of limitations will not begin to run until six years from the "actual discovery by the claimant" of the identity and whereabouts of the work, and

the "information and facts" necessary to determine that a claim exists. Under the prior law, a "discovery rule" applied, meaning that the statute of limitations began to run when the claimant either discovered or reasonably could have discovered his or her claim to the artwork.

The Getty disputed the timeliness of the claims, and asserted that the amended statute of limitations is unconstitutional on the grounds that it violates the Due Process Clause and the First Amendment. On November 3, 2011, a Los Angeles court denied the defendant's demurrer on statute of limitations grounds, declined to address the defendants' constitutional arguments, and ordered that the parties spend four months in mediation to try to resolve the dispute. If, by March 2, 2012, the parties were not able to reach a settlement, the case was to resume in court.

Agudas Chasidei Chabad v. Russian Fed'n, 05-cv-1548 (RCL), 2011 U.S. Dist. LEXIS 80971 (D.D.C. July 26, 2011)

After seven years of litigation, the claimants in *Chabad v. Russian Federation* continue to seek the return of thousands of religious books, manuscripts, and other artifacts that had been seized by the Soviet Union, and in 2011 there were important developments in the case. In 2008, after the district court held that the Russian Federation was not immune from suit under the FSIA, Russia announced that it would no longer participate in the lawsuit. In 2010, the district court issued an opinion ordering a default judgment against Russia to surrender the complete collection of materials. When Russia did not comply, Chabad filed two motions, one to enforce the judgment and another seeking the imposition of sanctions against the defendants. Before the district court could rule on these motions, Russia announced that it was "suspending exchanges of Russian art and cultural artifacts with American institutions" until the case was resolved. In response, on June 15, 2011, the United States submitted a Statement of Interest to the court, explaining that the Government has "an interest in ensuring proper enforcement" of 22 U.S.C. § 2459, a federal anti-seizure statute that immunizes art and objects of cultural significance from seizure when the objects are imported into the United States from a foreign country pursuant to an approved agreement between the countries' cultural institutions.

On July 26, 2011, the district court granted the plaintiff's motion to enforce the judgment, finding that the defendants had been properly served with the default judgment and had been given an adequate opportunity to respond. Moreover, the court also determined that, while it would be "superfluous" to include specific exemptions for property covered by the anti-seizure statutes in its order granting enforcement of the declaratory judgment – because such immunities exist regardless of whether the court makes note of them – the court would include such language in its order in light of the concern expressed over such seizures. As for Chabad's motion for sanctions, the court denied the motion as premature because the defendants had not yet received notice that they could be subject to sanctions for not complying with the default judgment. Therefore, the court directed the plaintiff to serve copies of its motion on the defendants, granting the defendants 60 days to respond. Although the 60 days have since expired without any response from the defendants, Chabad has filed requests with the court to temporarily stay contempt sanctions and enforcement of the judgment with the hope of "facilitat[ing]…ongoing discussions" with the Russian Government.

United States v. Painting Known as "Cristo Portacroce Trascinato da un Mangoldo" by Romanino a/k/a Christ Bearing the Cross Dragged by a Rascal, No. 11-00571 (N.D. Fla. Feb. 3, 2012)

While art restitution cases most often involve litigation brought by the victims or their heirs, sometimes Holocaust-era litigation is initiated by the U.S. Government. These cases, known as civil forfeiture actions, often begin with the Government's seizure of the allegedly stolen property. If the Government is able to prove its case, and the Government agrees that the heirs are the rightful owners, the forfeited property is often returned to the rightful owners.

On January 3, 2012, a Florida district court issued a default judgment against the Italian Republic, the Italian Ministry of Culture, and the Pinacoteca di Brera of Milan, Italy (the "Brera") in a civil forfeiture action initiated by the U.S. Attorney for the Northern District of Florida for the forfeiture of a painting on loan from Italy and on display at the Mary Brogan Museum of Art and Science in Tallahassee, Florida. As alleged in the complaint, in violation of U.S. law the painting was imported into, or was to be exported from, the United States, with the defendants' knowledge that the painting constituted stolen, converted, or fraudulently taken property. The painting, "Cristo Portacroce Trascinato da un Mangoldo" by Girolamo Romanino, had been owned by Federico Gentili di Guiseppe ("Gentili"), an Italian Jew who lived in France prior to WWII. Although Gentili died of natural causes in 1940, just weeks before the Nazi invasion of France, Gentili's children were forced to flee France shortly thereafter, leaving behind his entire estate. Vichy France enacted various anti-semitic measures, including one that revoked the citizenship of individuals who left France and provided for the confiscation of their property. Another measure prohibited Jews who had fled France from returning to the occupied territory. Following these measures, in March 1941, a Vichy court ordered the liquidation of Gentili's estate, including his art collection. The painting, along with about 70 other paintings, was auctioned off, eventually ending up at the Brera in 1998.

In 2000, Gentili's grandchildren, as heirs of the estate, contacted the Brera, seeking the return of the painting. The Brera ignored their requests. Subsequent demands for return of the painting were also refused. In March 2011, the painting was loaned to the

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Mary Brogan Museum, where it was to be displayed until November of that year. The U.S. Attorney for the Northern District of Florida initiated forfeiture proceedings on November 4, 2011. Following the default judgment, the painting, which was in the U.S. Government's possession after its seizure by federal agents, was forfeited to the Government. This gave the heirs the opportunity to assert an ownership claim to the painting. Recognizing that the painting had been stolen and that the heirs were the rightful owners, the U.S. Government entered into a settlement agreement with the heirs, pursuant to which the Government agreed to release the painting to them.

The Art Museum Subdistrict of the Metro. Zoological Park v. United States, No. 4:11-cv-00291-HEA (E.D. Mo. Mar. 16, 2011)

This case is another important forfeiture-related proceeding, though not a Holocaust-era claim. In an unprecedented order of events, on February 15, 2011, the St. Louis Art Museum ("SLAM") initiated an action against the U.S. Government, seeking a declaration by the court that it is the rightful owner of a 3,200-year-old Egyptian funerary mummy mask known as the Mask of Ka-Nefer-Nefer. In filing its action, SLAM sought to preempt a seizure and/or forfeiture of the mask by the U.S. Government, claiming not only that the mask does not constitute stolen property that was smuggled or clandestinely imported into the U.S. in violation of 19 U.S.C. § 1595a, but that in any event, a forfeiture proceeding by the U.S. Government would be time barred under the relevant statute.

The U.S. Government responded to SLAM's declaratory action with a motion to dismiss and the commencement of its own lawsuit – a civil forfeiture proceeding filed with the hope of returning the mask to Egypt, which claims to be the rightful owner of the property. Both SLAM's and the U.S. Government's claims have yet to be decided. To date, the Government has succeeded in obtaining an order from the court restraining SLAM from disposing of the mask and further finding that probable cause exists that the mask was "illegally imported into the United States" in violation of 19 U.S.C. § 1595a.

Wach v. Byrne, Goldenberg & Hamilton PLLC, No. 1:11-cv-01792 (D.D.C. Oct. 7, 2011)

Wach is a recent case that may have significant consequences for attorneys who represent clients in art restitution cases. In October 2011, Thomas Wach, an alleged heir of Paul von Mendelssohn-Bartholdy, sued the law firm that successfully represented the Mendelssohn-Bartholdy heirs in *Schoeps v. Museum of Modern Art*, 594 F.Supp.2d 461 (S.D.N.Y. 2009). The dispute in *Schoeps* involved competing ownership claims to two Picasso paintings in the possession of the Museum of Modern Art and the Solomon R. Guggenheim Foundation. The museums initiated a declaratory action to quiet title to the paintings after the heirs of Mendelssohn-Bartholdy claimed that the paintings had been transferred as a result of Nazi duress. The museums filed a motion for summary judgment, but the court denied the motion, allowing the case to proceed to trial. On the eve of the expected trial, however, the parties entered into a confidential settlement agreement resolving the case.

More than two years after the parties' agreement, Wach commenced an action alleging that he is the nephew of one of Mendelssohn-Bartholdy's sisters, and therefore is entitled to participate in the settlement and share in its proceeds. In response, the law firm has filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Wach has failed to join two "required" and "indispensable" parties, namely two other potential heirs from Sweden and France who have also asserted competing claims over the settlement proceeds. According to the law firm, because Wach is a Swiss citizen, joining the other potential heirs as defendants would "destroy diversity jurisdiction [since] [t]he federal diversity statute – 28 U.S.C. § 1332 – does not confer federal jurisdiction when aliens are aligned on opposing sides of a lawsuit." Wach has opposed the firm's motion to dismiss, arguing that the potential heirs are not required parties and that the court is capable of granting complete relief. On December 13, 2011, the firm filed a reply, and the matter is currently pending.

Though this case is still in its infancy, it may have important ramifications for Holocaust-era restitution cases. In addition to the challenges of locating looted artworks and conducting provenance research, it can often be difficult to identify and locate each of the heirs entitled to participate in Holocaust-era cases. In the wake of WWII, families were often separated and scattered all over the world. Moreover, because these thefts and forced sales occurred many years ago, there are now generations of heirs who may potentially have ownership claims. It is often left to the attorneys who litigate these cases to search for and locate possible heirs.

Cariou v. Prince, 784 F.Supp.2d 337 (S.D.N.Y. 2011)

Copyright is the primary form of intellectual property protection afforded to original works of art. Thus, copyright issues play a substantial role in the art law field. In *Cariou v. Prince*, one of the most significant decisions on copyright law and fair use to be decided in recent years, the district court held that contemporary artist Richard Prince committed copyright infringement when he used photographer Patrick Cariou's images of Rastafarians in his paintings without permission. Prince, who has frequently appropriated images from others in his works, argued that his use of Cariou's photographs constituted fair use. The defense of fair use requires the court to balance four elements outlined in Section 107 of the 1976 Copyright Act: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." The district court

rejected Prince's defense, finding that consideration of each element warranted against a finding of fair use in the case.

First, the court analyzed the purpose and character of Prince's paintings to determine whether they were transformative of the original photographs. Relying on Prince's own testimony that "he had no interest in the original meaning of the photographs" and that he did not "really have a message," the court found that the paintings were not sufficiently transformative. Second, the court found that Cariou's photographs were "highly original and creative artistic works," thus falling within "the core of the copyright's protective purposes." Third, the court determined that Prince's use of the photographs "was substantially greater than necessary, given the slight transformative value of his secondary use." Finally, the court found that Prince's paintings had "unfairly damaged the original market" for Cariou's photographs. Thus, the court held that Prince could not avail himself of the fair use defense.

The court granted Cariou's motion for summary judgment and entered a permanent injunction, prohibiting further infringement of Cariou's photographs. The court also issued an unprecedented and extraordinary order requiring that the paintings and related infringing materials be "delivered up for impounding, destruction, or other disposition, as Plaintiff determines." As for the paintings that had already been sold, the court ordered that the current and future owners be notified in writing that the paintings could not be lawfully displayed. Prince has filed an appeal to the Second Circuit. In the meantime, the paintings have been temporarily stored in a warehouse, pending a final decision by the court.

Gaylord v. United States, 98 Fed. Cl. 389 (Fed. Cl. 2011)

In another case involving copyright law and fair use, the Court of Appeals for the Federal Circuit reversed the decision by the Court of Federal Claims, which held that the U.S. Postal Service's issuance of a stamp depicting a photograph of Frank Gaylord's sculpture for the Korean War Veterans Memorial constituted fair use under the 1976 Copyright Act. The decision by the Court of Federal Claims was notable because the court rarely ventures into intellectual property and art matters and its analysis of the fair use factors delineated under the Copyright Act was controversial.

Analyzing each of the statutory fair use elements in turn, the Court of Appeals determined that the Government had not met its burden of showing that its use of Gaylord's work, "The Column," without permission, constituted fair use. Although the claims court determined under the first factor that the stamp was transformative because it had a "new and different character and expression," the Court of Appeals disagreed because "both the stamp and The Column share a common purpose: to honor veterans of the Korean War." For the second element, the Court of Appeals found that "the overall creative and expressive nature of [The Column]…weighs against fair use." With respect to the qualitative and quantitative amount of the original work used in the photo and stamp, the Court of Appeals found that the stamp used a substantial portion of "The Column" because "The Column constitutes the focus – essentially the entire subject matter – of the stamp." Finally, the Court of Appeals determined that only the fourth factor did not weigh against fair use since the potential market for "The Column" had not been adversely affected. Balancing all the fair use factors, the Court of Appeals reversed the lower court's finding of fair use and remanded the case to determine damages.

On remand, Gaylord argued that he was entitled to a multi-million-dollar award based on a percentage of the overall revenue earned by the U.S. Postal Service from the stamp. The court disagreed, finding that a royalty theory of damages was not authorized under the statutory damages provision of the Copyright Act. Furthermore, the court determined that a multi-million-dollar award was not "within the zone of reasonableness" because the Government had never paid more than $5,000 to license a copyrighted image on a stamp. Thus, the court awarded Gaylord only $5,000 in damages. Gaylord has filed an appeal of this decision, which is currently pending.

Conclusion

The past year has been noteworthy for important cases involving the restitution of Nazi-looted art, the forfeiture of stolen cultural property, and copyright infringement. These cases demonstrate how diverse and complex art law litigation can be, and provide insight into the legal issues and arguments that will develop in the near future.

The Institute of Art and Law published "Taking It Personally: The Individual Liability of Museum Personnel." This collection of essays explores an initiative that has begun to occupy increasing attention in modern claims against museums: the visiting of personal liability upon individual members of museum staff for acts and omissions related to their employment. It includes the following essays:

1. "The Particular Position of the Museum Director, Curator and Registrar in Holocaust-Related Claims" by Charles Goldstein and Yael Weitz of Herrick, Feinstein
2. "New Weapons and New Targets: Criminal Sanctions and Redress Against Museum Workers under U.S. Law" by Yael Weitz

New York: 212.592.1400 | Newark: 973.274.2000 | Princeton: 609.452.3800 | www.herrick.com

Art Law Events

Upcoming Events Involving Herrick's Art Law Group

May 10–11, 2012
Larry Kaye and Howard Spiegler will be participating in the International Council of Museums (ICOM) Workshop for Mediators in Art and Cultural Heritage in London.

May 12, 2012
Darlene Fairman and Johanna Ferraro will participate in the Penn Law Reunion 2012 panel entitled "Local and Global Art Conflicts: From the Coordination of the Barnes Foundation Move to the Recovery of Nazi-Looted Art."

June 14–15, 2012
Larry Kaye and Howard Spiegler will be speakers at the Symposium on Criminality in the Art and Cultural Property World, being presented by the McGill University Faculty of Law, in Montreal, Quebec.

Recent Events Involving Herrick's Art Law Group

April 18, 2012
Yael Weitz moderated the panel, "Art in a Time of Chaos," a CLE event sponsored by the Fine Art and Culture Law Association at New York Law School. The panel explored issues regarding antiquities and other cultural artifacts that are compromised during times of civil unrest and instability, with focus on the events that have taken place in Egypt, the Middle East, and Greece.

April 18, 2012
Larry Kaye and Howard Spiegler were on the Honorary Committee, and Herrick was a corporate benefactor of the Annual Award Luncheon of the Appraisers Association of America.

April 11, 2012
Howard Spiegler lectured a class of the Sotheby's Institute of Art on restitution and other art law matters.

April 11, 2012
Darlene Fairman was presented with the Dean Jones-Woodin Art Law Award for outstanding commitment and achievement in the field of Art Law by the Brooklyn Law School Art Law Association.

February 24, 2012
Herrick hosted the Volunteer Lawyers for the Arts' Legal and Business Bootcamp for Arts Professionals. The program discussed the legal and business issues that affect individual artists and individuals within arts and cultural institutions in film, music, and interactive media.

January 30, 2012
Herrick hosted the showing of excerpts from the highly acclaimed documentary, "Elusive Justice: The Search for Nazi War Criminals," which was shown recently on PBS and in which Elizabeth Holtzman appears. The film was recently named one of the year's two best TV documentaries by the *Wall Street Journal*. After the excerpt, there was a panel discussion with Ms. Holtzman, Eli Rosenbaum, who heads the Department of Justice's Nazi-hunting effort, and filmmaker Jonathan Silvers.

Herrick in the News

March 2, 2012
Howard Spiegler's article, "What the Lady Has Wrought: The Ramifications of the Portrait of Wally Case," appeared in the Fall 2011 issue of *The Journal of Art Crime*. This article first appeared in *Art & Advocacy's* Fall 2010 issue.

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Additional information on Herrick's Art Law Group, including biographical information, news, and articles, can be found at www.herrick.com/artlaw.

If you would like to receive this and other materials from Herrick's Art Law Group, please visit www.herrick.com/subscribe and add your contact information.