

ART & ADVOCACY



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The Resurgence of Art Funds: Leveraging a Passion for Art into Investment Returns

by *Jessica DeBartolo*

Investing in alternative assets such as art and gold during times of inflationary pressure and turmoil in the financial markets is nothing new. Recently, however, the prevalence of so-called “passion investments” has increased, with art funds emerging as an attractive alternative investment. This article explains how art funds work and sets forth important things to consider before investing in an art fund.

What Is an Art Fund?

An art fund is generally a privately offered investment fund that is managed by a professional investment manager. Such funds may be organized either in the United States or as an offshore vehicle, depending on where the fund’s prospective investors reside. In the United States, art funds are typically structured as “closed-end funds,” more commonly known as private equity funds. In turn, private equity funds are usually organized as a limited partnership. The defining characteristics of a private equity fund are: (1) a fixed life, usually five to ten years, with the option of a limited number of one-year extensions to permit the orderly liquidation of assets; (2) investments by limited partners of a fixed amount, called a “capital commitment,” that the investment manager “draws down” from time to time over the fund’s life to pay for the fund’s investments, fees, and expenses; and (3) limitations on investor withdrawals, except in extraordinary circumstances, prior to the end of a fund’s life.

What makes a private equity fund an “art fund” is its strategy. Some art funds pursue a focused investment strategy (e.g., Old Masters or Chinese Imperial porcelain), while others seek a more diversified portfolio of artworks. While the individual strategies of art funds differ widely, at a basic level all art funds seek to generate financial gains through the acquisition and disposition of artworks.

What Are the Costs?

In consideration of its services, a private equity fund’s investment manager (or an affiliate that acts as the fund’s general partner) typically receives a management fee of 1.5% to 2% of the total amount of capital that the investors have committed to the fund. These management fees pay for expenses related to the manager’s overhead and personnel costs. In addition, the fund’s investment manager receives a share of the fund’s net profits derived from the sale or other disposition of the fund’s investments, which is typically 20%, with the remaining profits paid out to the fund’s investors. Some funds require that investors receive a minimum rate of return, typically 8% to 12%, before the fund’s investment manager receives its share of the profits. In private equity fund parlance, this is called a “preferred return.”

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The Resurgence of Art Funds *(continued from page 1)*

In the art fund context, fee terms are substantially similar to those of other types of private equity funds. Some art funds, however, separate the capital commitments made by fund investors into “investment commitments” and “expense commitments.” The former is the total amount an investor will invest into the fund for purposes of acquiring artworks. The latter is an open-ended commitment by an investor to pay his or her pro rata share of fund operating expenses over the life of the fund, including the management fee paid to the fund’s investment manager. This fee structure reflects the unique operating expenses incurred by an art fund, including the cost of storing, transporting, appraising, and insuring artworks. Another unique expense associated with art funds is fees paid to art advisors, who offer their expertise in connection with the purchase and sale of artworks. These additional carrying costs and expert expenses are not typically associated with other types of private equity funds and can lead to specialized provisions (e.g., separate expense commitments and more frequent capital calls) in art fund documents. In addition, by separating investment and expense commitments, an art fund’s investment manager is better able to determine how much investor capital is available to acquire artworks for the fund’s portfolio.

Art Funds vs. Collecting

Investing in an art fund, as opposed to building a personal art collection, provides certain benefits. By pooling together many individual investments, an art fund benefits from economies of scale unattainable to most individual art collectors. More specifically, an art fund can invest in a greater number of artworks than a typical art collector can invest in, while also offering investment diversification at a much lower cost. This scale also gives an art fund greater negotiating power than the typical art collector has.

Art funds may also reduce the transaction costs paid by art collectors in connection with the purchase and sale of artworks. These costs include the buyer’s “premium” and the seller’s “commission” paid to auction houses and galleries. By relying on its art advisors, an art fund seeks to reduce or even eliminate these transaction costs, thereby increasing the potential investment returns for investors.

Where Is the Art?

Another unique feature of art funds relates to how the artworks (i.e., the fund’s assets) are held. To enhance the provenance of the artworks, most art funds lend their artworks to museums, galleries, and other art institutions. Some art funds lend their artworks to their investors, thereby allowing investors to benefit not only from potential investment returns, but also from displaying the artworks in their homes. In effect, these investors gain personal access to artworks worth much more than their investment in the art fund. But, given the insurance and other risks such loans pose, many art funds do not allow investors to borrow works; instead, they store works in reputable art storage facilities when the works are not on loan to museums.



Tax Considerations¹

It is also important to note the potential tax issues raised by an investment in an art fund. As a general matter, each limited partner of an art fund is required to report separately on his or her tax return his or her allocable share of the fund’s net long-term capital gain or loss, net short-term capital gain or loss, net ordinary income, deductions, and credits. Due to the unique nature of an art fund’s strategy, there is some uncertainty as to the tax treatment of income or gain derived from the disposition of artworks that is allocated to a fund’s limited partners. In particular, the tax treatment differs depending on whether the Internal Revenue Service or a court of law would consider the artworks as “stock in trade,” or alternatively as “capital assets.”² This determination is a question of fact, and how the Internal Revenue Service or a court of law would interpret these facts cannot presently be determined with certainty. These issues are of particular importance to tax-exempt investors and non-U.S. investors. Any fund investor, however, would be well advised to review these tax issues with his or her fund manager prior to investing.

Conclusion

Art funds have recently reemerged as an attractive alternative investment that may serve as a hedge against inflation and a source of returns uncorrelated to the general equity and debt markets. An art fund seeks to wield its size to acquire a diversified portfolio of artworks at prices generally unattainable by individual investors. But, unlike other tangible assets held by many other types of private investment funds, art has no inherent value and, indeed, its valuation is highly subjective. Further, the art market can be extremely volatile with no certainty of liquidity. Thus, art funds rely on professional investment managers and art advisors to implement their strategies and realize investment returns. In light of the risks involved, it is important to consult with a professional advisor before investing in an art fund.

¹ To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any tax-related materials addressed herein.

² Art that is held as a long-term capital asset is subject to a U.S. federal income tax rate of 28% and not the 15% long-term capital gain rate of most other long-term capital assets.

Use of Art Images in Gallery and Auction Catalogues: Copyright Minefield and Practical Advice

by Barry Werbin

A prominent NYC art gallery is preparing for a show highlighting a new exhibition of known and upcoming artists, some of whom are alive and others recently deceased. In preparing the show’s catalogue, which will not be sold publicly, the gallery intends, as is long-standing custom, to include high-quality photographs of all the works in the exhibition. Most photos are obtained from the living artists themselves, or from the estates or trusts that control the underlying copyrights and reproduction rights of the deceased artists’ works. In a few cases, however, the gallery will need to take its own photos. As a courtesy gesture, it intends to ask for approvals to do so from these few artists or their representatives.

A problem arises, however, when a deceased artist’s administering trust questions the provenance of one of that artist’s pieces in the exhibition and refuses to grant permission for the gallery to photograph any of the works for use in the catalogue or for any other purpose in connection with the exhibition. Can the gallery nevertheless take photos of these works and use them in its catalogue, which will not be sold or posted online but only given to attendees at the exhibition? Does it make a difference if the catalogues will be sold or made available digitally on the gallery’s website?

As the issue revolves around copying and displaying images of the original pieces of art, the answer should lie in several provisions of the U.S. Copyright Act of 1976 (the “Act”). But while providing critical guidance, the Act may not entirely provide a clear-cut answer.

Copyright Protection of Artworks

Copyright protects original works of authorship from the moment of their creation. In the case of an individual artist, the artist owns the copyrights of his or her original artworks, and the copyright term lasts for the life of the artist (the “author”) plus another 70 years after his or her death. Section 106 of the Act reserves to the copyright owner specifically enumerated “exclusive” rights, which include (as relates to art) the rights of reproduction (copying), public display and distribution (by sale/assignment, rental, lease/license or lending), and the right to prepare derivative works based on the original. Notwithstanding these exclusive rights granted to the copyright owner, the Act carves out two important exceptions related to what is referred to as the “first sale doctrine” and, particularly germane to artworks, a limited display right granted to an “owner” of an original work. Before discussing these exceptions, however, it is important to recognize the significant difference between ownership of legal title and ownership of copyright.

Legal Title vs. Copyright

The purchaser of an original work of art only acquires legal title to that one original work; the underlying copyright is not transferred. Instead, copyright remains with the artist or his or her successor in interest. Thus, a consignor seller who owns an original work of art cannot grant to a gallery or auction house any rights greater than what that owner has (bare legal title) with no right to exercise any of the exclusive

rights reserved to the copyright owner under Section 106 of the Act.

First Sale Doctrine

Without the statutory exceptions, there could never be a legal art exhibition or sale, as either would invoke the exclusively reserved “display” and “distribution” rights of the copyright holder. In its wisdom, however, Congress included two key exceptions in the Act that facilitate the resale of copyrighted works and grant a limited “display” right. These two exceptions are largely responsible for the legal existence of galleries, auction houses, and museums that display and sell works still under copyright.

First, Section 109, or the “first sale doctrine,” provides that:

Notwithstanding the provisions of section 106(3) [the exclusive distribution right], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to *sell or otherwise dispose of the possession of that copy or phonorecord.*

Thus, someone who owns an original work of authorship protected by copyright (referred to as a “particular copy” in Section 109) is free to sell it. That particular single work may then be resold innumerable times, without limitation, including by a gallery or auction house that is “authorized” by that owner to conduct a sale. The first sale doctrine is responsible for all aftermarket sales of copyrighted materials, including art, used records, music CDs, and books.

But what about the display right that also is exclusive to the copyright owner? Section 101 of the Act defines “display” as follows: “To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process....”

While Section 106 reserves to the copyright owner the exclusive right to display a work publicly and the right of reproduction, Section 109(c) carves out a special limited exception (tied to the first sale doctrine) for the display of a copy of a work rightfully owned:

(c) Notwithstanding the provisions of section 106(5) [the exclusive display right], the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to *display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.*”

This Section is responsible for permitting all “displays” of copyright-protected art by galleries, auction houses, and museums. But Section 109(c) does not on its face permit any copying of a “particular” work, including the taking of any photographs and publishing them in a catalogue or on a website. This exception is further limited to a display only to “viewers present at the place where the copy is located.”

The limited scope of the Section 109(c) exception seems pretty clear on its face. Nothing in Section 109(c) expressly permits our hypothetical gallery to take its own photos and use them in a catalogue in connection with an exhibition. Thus, the gallery's legal fallback becomes the complex and frequently litigated concept of "fair use" under Section 107 of the Act.

Fair Use Doctrine

The "fair use doctrine" has a long, complex, and tumultuous history in the courts that is beyond the scope of this article. In brief, the doctrine is intended to permit certain uses of copyright-protected materials as exceptions to what otherwise would be infringing activity. Section 107, which codifies the doctrine, provides a non-exclusive list of such permissible uses that are then subject to a non-exhaustive list of four specific criteria courts are required to address to determine whether "fair use" exists. The relevant text of Section 107 is rather brief:

[T]he fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—

- (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.

Taking photos of artworks for use in an exhibition or auction catalogue does not fall squarely within the above-enumerated fair use examples, as such copying and display do not facially qualify as criticism, comment, news, teaching, research, or parody. (Although catalogues ultimately may be used for reference and research, that is typically not the original reason a catalogue is created.) Section 107 does not make express exception for making copies for "descriptive" or "display" uses (i.e., to simply describe and display images of what is in an exhibition). This contrasts with U.S. trademark law, which does accept a "descriptiveness" defense where a third party's trademark is used merely descriptively and not in a trademark sense. The delineated statutory examples, however, are just that—examples—as the statute's preamble refers to "the fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as..." Thus, there is room for courts to find that copying for other purposes that are consistent with the policies underlying Sections 107 and 109(c) also qualifies as fair use. Arguably, such use is also commercial in nature if the catalogue will be sold or otherwise used to market an exhibition or auction at which the art will be offered for sale;

but the existence of some commercial aspect of a work has not precluded a fair use finding in all cases because it is just one of the primary factors to be considered by a court.

The fourth fair use factor is particularly significant because taking photos of art for use in a catalogue will likely not have any negative effect "upon the potential market for or value of the copyrighted work." But the four listed factors also must be balanced by the courts. Even where one factor might win the day, the others may be more weighted either against or in favor of fair use, and courts must not lose sight of the fundamental principles underlying the fair use doctrine.

To complicate matters, in recent years courts have also read into the fair use statute a requirement that under the first factor ("purpose and character of the use"), to be "fair" and thus not infringing, a use must also be "transformative." This concept has become controversial as courts have disagreed over what that term means. Essentially, the "transformative" concept looks at the use made of the copy and whether it is for a purpose different from that of the original work. As the U.S. Supreme Court noted in *Campbell v. Acuff-Rose Music, Inc.*,¹ a work is generally deemed "transformative" when the new work does not "merely supersede the objects of the original creation," but rather "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." The non-exclusive permissible uses listed in Section 107, such as for commentary on or criticism of a copyrighted work (which includes parody), are themselves "transformative" uses.

As another example, Google has successfully defended its image search feature under a fair use argument. Google's image search results display digital thumbnail images, which are reduced, lower-resolution versions of full-sized images stored on third-party computers. The image search results are generated in response to end users' search queries for artwork, photos, and other graphical works on the Internet, thereby transforming the thumbnail copies displayed in the search results into a research tool. Google also generates advertising revenues by tying sponsored third-party ads to certain search results. The Ninth Circuit Court of Appeals ruled on this issue in a key 2007 decision, where it found that "the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case."²

Applying the Law

Back, then, to our hypothetical exhibition catalogue. Is photographing artwork to display in an exhibition or auction catalogue "transformative"? Does it satisfy the statutory fair use factors? Can an analogy be drawn to the Google image "search" service? Under a fair use paradigm, should the first sale doctrine and the "display" exception contained in Section 109 of the Act, by implication to carry out their intended purposes, permit a "descriptive" use of art photographs simply to describe the works in an auction or gallery exhibition catalogue? Denying such limited copying and display right

arguably undermines the purpose of the display exception in Section 109(c), which facilitates auctions and exhibitions, because without it the ability to promote such sales and exhibitions is severely compromised. After all, this is visual art.

These are as of yet undecided legal questions, but there are cogent arguments that such use does not meet the fair use criteria under Section 107 as it is written, because such use is essentially "commercial," the entire image is copied (photographed), and the copy is not being used for a "transformative" purpose. On the other hand, an enticing argument can be made that, while it may not truly be "transformative," when a photo is being used solely to identify the art in an auction or exhibition (where such display is authorized by Section 109(c) of the Act), the use of the photo in a catalogue for such limited purpose is merely incidental to a permissible use, and only improves the potential market for the work. It should therefore be considered fair use. But being the test case in the courts would be protracted and expensive.

Galleries and auction houses have always printed beautiful high-resolution catalogues with images of art not in the public domain. But the issue of seeking advance permissions rears its ugly head when an artist's representative objects to such photographic copying because, for example, the representative does not accept the provenance. Moreover, because the owner of an artwork seeking to sell it (unless it's the actual artist or his or her legal representative) owns only that "copy," and does not own the underlying copyright rights, the owner cannot legally grant a gallery or auction house permission to photograph the work from a copyright standpoint.

With all this in mind, the conservative approach would be to seek permission to photograph from the rights owner, his or her agent, or a clearinghouse, and to always do so if the image will be used on the cover of a catalogue or prominently in advertisements or marketing materials to promote an auction or exhibition. In most cases, this should not be an issue because, as a practical matter, most artists or their representatives are happy with this practice as it promotes the works and creates and maintains underlying markets for the art. But in the case of a deceased artist without an estate representative or non-U.S. works under copyright, for example, licensors or clearinghouses will need to be contacted for permission, which likely will require payment of some license fee tied to the notoriety of the artist, scope of use, and number of catalogues to be printed.



Real-World Examples

Gagosian Gallery, for example, always asks living artists for permission to photograph works going into its exhibitions for use in its catalogues. Andrea Crane, a Director at Gagosian Gallery in New York, says that doing shows with living artists requires a "close collaboration with the artists," who are pleased to cooperate. "The catalogues tend to benefit the artist by complementing the artwork," notes Alison McDonald, Gagosian's Director of Publications. According to Ms. McDonald, Gagosian often deals with deceased artists' estates, which typically grant rights to photograph their artists works for use in catalogues. In cases where estates cannot be contacted or don't exist, says Ms. McDonald, permissions are sought, typically for a fee, from artists' publishers and clearinghouses, such as Visual

Artists and Galleries Association (VAGA), Artists Rights Society (ARS), and the Design and Artists Copyright Society (DACS). If consent cannot be obtained, an image of the artwork is not used.

Likewise, Christies auction house "always obtains permissions or licenses to use art images on the covers of its catalogues and in advertising collateral," says Karen Gray, Christies' General Counsel. Ms. Gray notes, however, that "there is a compelling fair use argument for using smaller photos of art tied to the applicable lot description within a particular catalogue, as this is consistent with the policy under Section 109(c), which permits display of the art without the copyright owner's permission, and principles of fair use." Catalogues retained for archival purposes (both in hard copy and digitally on Christies' website) serve a research and reference purpose, which falls more squarely within the traditional scope of fair use.

Conclusion

What guidance should gallery owners and auction house directors take away from all this? Apart from consulting with intellectual property legal counsel, prudence dictates taking a conservative and practical approach, especially in these litigious days in the art world. Some well funded gallery or auction house may one day pick the fair use catalogue fight, but it will be expensive and protracted, and the outcome will be uncertain.

¹ 510 U.S. 569, 579 (1994).

² Perfect 10, Inc. v. Amazon.com and Google (amended opinion), 508 F.3d 1146 (9th Cir. 2007).

Rights of Victims in Criminal Proceedings

By Steven D. Feldman

In an ongoing case being prosecuted by the United States Attorney's Office in Maryland, law-enforcement officials allege that two defendants looted the archives of historical societies in Maryland, Pennsylvania, Connecticut, New York, and Vermont by removing precious original historical documents. According to law-enforcement allegations, the two men pilfered the materials by placing them in hidden pockets in their jackets. One of the men pleaded guilty on October 27, 2011, and is scheduled to be sentenced in February 2012. The other is currently on home detention pending the outcome of the case.

Because historical societies often lack the resources to carefully catalogue their materials and observe those utilizing the materials to guard against theft, law-enforcement officials have opined that some institutions may not even realize their documents have been stolen. Paul Brachfeld, the inspector general for the National Archives and Records Administration, stated, "We're going to surprise a lot of people [when they learn that they were victimized.]"

If an institution is the victim of a crime being prosecuted in federal court, it is guaranteed certain rights by statute, as discussed below, and should utilize those guaranteed rights to protect its interests.

Victim's Rights

When an individual or institution is the victim of a crime being prosecuted in federal court, certain federal laws provide specific rights to the victim. These rights include the right to be informed of the proceedings, to be repaid for losses, and to participate in and speak at the sentencing. Armed with knowledge of these rights, a victim can better protect its interests in the unfortunate circumstance that it is victimized by a crime.

The Crime Victims' Rights statute is set forth at Title 18, United States Code, Section 3771. There, rights applicable to all crime victims (both individuals and entities) in federal criminal proceedings are enumerated. These rights include: (1) the right to be reasonably protected from the defendant; (2) the right to reasonable, accurate, and timely notice of any public court proceeding; (3) the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or parole; (4) the reasonable right to confer with the attorney for the Government in the case; (5) the right to full and timely restitution as provided by law; and

(6) the right to proceedings free from unreasonable delay. 18 U.S.C. §3771(a).

Generally, these rights can be broken down into: (1) the right to notice, (2) the right to be heard, and (3) the right to be compensated. A prerequisite to the exercise of all of these rights is that the victim needs to contact the prosecutor and explain how it has been victimized by the defendant.

Where an institution is the victim of a crime, it is important for the institution to keep informed of the court proceedings. Information concerning the proceedings provides a foundation upon which the institution can make decisions and exercise its other rights. With access to information, the institution can determine how its interests may be advanced in court. All of this depends on access to accurate and timely notice of court proceedings, and is furthered by the victim's right to confer with the attorney representing the Government in the case.

In most cases where an institution is victimized, its top priority will be the return of any stolen property. If that is impossible, the institution will seek to be compensated for its losses. Compensation is discussed further below. But regardless of whether the institution recovers its property or is compensated for its losses, or is never repaid for its losses, the institution may also have an interest in ensuring that the defendant is appropriately punished for his or her criminal conduct. The institution may feel an obligation, on behalf of its members or donors, to push for appropriate punishment. Alternatively, an institution may wish no involvement beyond recovery of its monetary losses. The right of a victim to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or parole facilitates the victim's participation in the judicial process.

In those cases where the defendant pleads guilty, the Crime Victims' Rights statute provides that the prosecutor should inform the victim of the defendant's guilty plea and may also inform the victim of any plea agreement. If certain charges are being dropped in exchange for a guilty plea, the victim may want to provide input as to whether the plea agreement is just. While this process allows a victim to complain that a plea deal is too lenient, generally the Government prosecutor will move forward with the plea arrangement despite protestations because the prosecutor believes he or she best knows the details of the evidence and the likelihood that the Government will prevail at trial.

The Institute of Art and Law just published "Taking it Personally: the Individual Liability of Museum Personnel", a collection of essays edited by Ruth Redmond-Cooper and Norman Palmer. It includes the following essays, among others:

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



{ The front of the US Supreme Court in Washington, DC. }

At sentencing, after a plea or a guilty verdict, the victim's input is even more important. Often, a defendant prepares for sentencing by providing the court with a stack of letters from family, friends, and colleagues describing his or her virtues and how he or she has led an exemplary life until the moment of the crime. The court will consider these letters in determining an appropriate sentence. The victim similarly has the right to submit to the court a victim impact statement explaining how the crime has harmed it. This submission is generally made through a letter to the court. The victim may also appear at the sentencing proceeding to read the statement out loud to the court or to provide an extemporaneous statement concerning the impact of the crime on it.

There are no limits on what a victim might say. For example, in a case of theft of a work of art or item of historical significance, a victim institution may emphasize the loss to the public from the theft of a special one-of-a-kind piece, the financial loss to the institution, or the importance of making an example of the defendant to keep others from committing similar crimes. By emphasizing the cultural and financial loss, the court will better understand the harm caused by the criminal acts and the significance of the stolen object.

Finally, the Crime Victims' Rights statute provides for full and timely restitution as provided by law. Federal law makes restitution mandatory. It provides that in imposing a sentence for a crime, a court "shall order... that the defendant make restitution to the victim of the offense." 18 U.S.C. §3663A(a)(1). Where an institution has suffered a financial loss from a crime being prosecuted by the Government, the restitution order is a substitute for the institution bringing a separate civil action to recover losses. Upon sufficient proof of loss, the court will

order restitution to the victim at the criminal sentencing. This restitution order can be a significant savings for the victim.

Even if the defendant currently lacks the means to repay the loss, the restitution order will follow the defendant for years. Courts will often impose a repayment schedule requiring the defendant to make monthly payments of a portion of his or her salary once released from jail. In addition, where the defendant has used the proceeds of the crime to acquire other personal or real property, the Government can use its civil forfeiture powers to seize and liquidate the proceeds of the criminal conduct and repay the victims.

There are some exceptions to the general rule. If the amount of the loss is impossible or truly difficult to calculate, the court will not hold a mini-trial to determine how much is owed. In such a case, the court will not unduly prolong the criminal proceeding in order to determine a restitution amount. Instead, it will simply sentence the defendant without ordering restitution.

Because of the possibility of obtaining restitution, it is important for a victim to speak up and let prosecutors know that it has suffered a loss. Sometimes, the prosecutors are unable to identify all of the victims of a crime. If a victim is not identified, it may not benefit from the mandatory restitution provision. Similarly, the Government may forfeit the proceeds of a crime and simply keep those proceeds for itself.

In conclusion, the Crime Victims' Rights statute provides a framework for victims to follow the criminal court proceedings, allows victims to participate in those proceedings, and provides for the full and timely payment of restitution. If an institution is the unfortunate victim of a crime, use of these rights can help it obtain some measure of justice.



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Art Law Events

Recent Events Involving Herrick's Art Law Group

October 13, 2011

Herrick's International Art Law and Financial Institutions Practice Groups hosted and spoke at "Art Loans: Prominent Issues for Lenders," a seminar addressing issues of interest to lenders when fine art is utilized as collateral.

October 25, 2011

Howard Spiegler was a guest lecturer at the Art and Cultural Property Law course at Yale Law School.

October 26, 2011

Larry Kaye lectured at Queens College on the "Future of the Past: Turkey's Efforts to Safeguard and Recover Its Cultural Heritage."

November 2, 2011

Howard Spiegler, President of the Art Law Commission of the Union Internationale des Avocats (International Association of Lawyers) (UIA), and Mari-Claudia Jiménez, Secretary of the Commission, presented an art law program at the annual UIA Congress in Miami, Florida, entitled "Nazi-Looted Art: Where do we go from here?" Larry Kaye was one of the speakers.

November 15, 2011

Howard Spiegler participated in a panel entitled "Beyond Valuation: A Practical Discussion of Stolen Art Issues and The Legal and Ethical Questions Faced by the Collector and Appraiser" at Art Law Day, presented by the Appraisers Association of America and the School of Continuing and Professional Studies of New York University.

November 16, 2011

Herrick's Art Law Group presented a joint conference with the U.K.'s Institute of Art and Law on "New Dimensions in Art Recovery." The Panelists, which included all members of the Group, reported on approaches to art law issues within each jurisdiction, highlighting the differences and similarities between them.

November 17, 2011

Darlene Fairman was a panelist at a program presented by the Art Law Association of Brooklyn Law School entitled "The Legal Fight Against Disappearing Antiquities."

November 18, 2011

Michael Kessel spoke on the tax aspects of restituted artwork at the New York County Lawyer's Association's 4th Annual Art Litigation and Dispute Resolution Institute.

December 1, 2011

Larry Kaye and Howard Spiegler spoke on "What (Should) Keep Collectors Up at Night: Fakes, Forgeries, Stolen Art and Other Nightmares" at a program co-sponsored with the Royal Bank of Canada at the Miami Basel art fair.

December 1, 2011

Steve Brodie moderated a panel on art finance at an all-day family office conference sponsored by IvyPlus in Boca Raton.

December 3, 2011

Larry Kaye and Howard Spiegler spoke on "Art Law in the Digital Age" at the Art Salon of the Miami Basel art fair, and they, along with Barry Werbin, fielded questions from the audience.

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