ART & ADVOCACY

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What the Lady Has Wrought: The Ramifications of the Portrait of Wally Case

By Howard N. Spiegler

On July 20, 2010, on the eve of trial, the case of United States v. Portrait of Wally, which our firm litigated for more than ten years, was finally resolved by stipulation and order. The U.S. Attorney in Manhattan commenced the case in the fall of 1999 by seizing the painting, "Portrait of Wally" by Egon Schiele (*Wally*), while it was on loan for exhibition at the Museum of Modern Art in New York. The case has been credited with awakening governments around the world, as well as museums, collectors, and others in the global art community, to the problem of Nazi-looted art almost seventy years after the beginning of the Nazi era in Europe. Although this case will surely be commented on and analyzed for many years to come – including in a documentary film due to be released in the spring – as the attorneys for the claimant in the case, we thought it would be helpful to provide some thoughts from our unique vantage point.

Basics of the Case

Herrick, Feinstein represented the Estate of Lea Bondi Jaray throughout the litigation. Ms. Bondi Jaray was a Jewish art dealer in Vienna who fled for London in 1939 after her gallery was "Aryanized" by a Nazi agent. She was also forced by him to give up a prized personal possession that she kept in her home: Egon Schiele's haunting portrait of his lover and favorite model, Wally Neuzil. After the war, *Wally* was mistakenly mixed in with the artworks of Heinrich Rieger, a collector who had perished in a concentration camp. Along with Rieger's artworks, *Wally* was transferred by Allied troops to the Austrian government. *Wally* ended up at the Austrian National Gallery (the Belvedere) despite the fact that it clearly had never been part of the Rieger collection. Ms. Bondi Jaray later asked Rudolf Leopold of Vienna, a Schiele collector, to help her get her painting back, but instead he arranged to acquire it himself and refused her demands to return it to her. Ms. Bondi Jaray died in 1969.

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Eventually, Leopold established the Leopold Museum in Vienna and *Wally* became part of its collection. In the 1990s, Leopold made the fateful decision to loan several of the Museum's Schiele works, including *Wally*, to the Museum of Modern Art (MoMA) in New York. In early 1998, near the end of the exhibition, Ms. Bondi Jaray's heirs notified MoMA of their claim and then contacted the District Attorney of New York County, who subpoenaed the painting in connection with a criminal investigation that he commenced to determine if *Wally* constituted stolen property present in New York in violation of New York law. MoMA moved to quash the subpoena on the ground that New York law prohibits seizure of an artwork on loan from out of state. The case worked its way up to the state's highest court, which ruled in MoMA's favor.

Immediately thereafter, the U.S. Attorney for the Southern District of New York commenced an action to have the Leopold Museum forfeit *Wally* on the ground that it was stolen property unlawfully imported into the United States. The U.S. Customs Service seized the painting, marking the start of more than ten years of litigation during which Herrick worked closely with the U.S. Government in its attempts to recover the painting and return it to the Estate of Lea Bondi Jaray.

The case was finally settled a week before trial was scheduled to begin. Most of the issues in the case had been resolved by motion last fall and the sole remaining issue for trial was whether Leopold knew that *Wally* was stolen when he, through the Leopold Museum, imported it into the United States for the MoMA exhibition.

Ramifications of the Wally Case and Its Settlement

Rather than attempting to analyze the many legal issues presented by the case, we highlight here several key points that concern the importance of *Wally* to Nazi-looted art claims worldwide.

1. Helping to Bring the Problem Posed by Nazi-Looted Art to the Forefront

The commencement of the New York State and federal litigation in the Wally case "changed the world," as a recent headline in the Art Newspaper declared. The fact that a loaned artwork at MoMA could be seized by U.S. Government authorities sent shockwaves throughout the world and was a major factor in causing governments, museums, collectors, and families of Holocaust victims to focus their attention on Nazi-looted art. It helped open a global reexamination of the massive looting of art fomented by the Nazi regime, as well as the post-war policies of the U.S. and European governments that were purportedly designed to deal with looted art recovered from the Nazis but, in many cases, resulted in the failure to return it to its true owners.

A specific outgrowth of this renewed interest, and an important stimulus to its further development, was the adoption in 1998 by 44 nations of the Washington Principles concerning Nazi-looted art. One principle states that pre-war owners and their heirs should be encouraged to come forward to make known their claims to art that was confiscated by the Nazis and not subsequently restituted; another states that once they do so, steps should be taken expeditiously to achieve a just and fair solution. This led several European governments to create restitution commissions to examine or reexamine claims by victims and their families. And museums all over the world, as well as governments with art collections of their own, started placing on the Internet images and information about artworks in their collections for which there was a gap in ownership history, or provenance, between the years 1933 and 1945, asking those with further information about these works to contact them and perhaps make a claim for recovery. Claims to recover Nazi-looted art have been brought all over the world over the past decade. And each year, new litigations are commenced, especially in the United States, and many settlements are announced.

{ Portrait of Wally by Egon Schiele. }

2. The Role of the U.S. Government in Nazi-Looted Art Matters

What most distinguishes the Wally case from the many subsequent cases brought to recover Nazi-looted art is the fact that it was commenced by the U.S. Government. Indeed, critics of the case repeatedly questioned why the Government was committing substantial resources to what some considered to be nothing more than a title dispute between the Leopold Museum and the Bondi Jaray family – a dispute that should have been resolved in a civil lawsuit between them. Indeed, they asked why the Government was involved at all.

This question is critically important because it raises the issue of whether the U.S. and other governments should play a significant role in trying to resolve Nazi-looted art claims. Despite the misgivings expressed by many, it is clear that this civil forfeiture action was consistent with, and fully promoted, the express public policy interests of the United States regarding Nazi-looted art. The Government's complaint alleged that *Wally* was stolen by a Nazi agent from Lea Bondi in 1939, wrongfully acquired by Leopold, and then knowingly imported by the Leopold Museum into the United States in violation of the National Stolen Property Act. In other words, what was alleged against the Leopold Museum was that it knowingly trafficked stolen property in the United States. After an exhibition at one of this country's foremost museums, the Leopold was going to take this stolen property out of the country, while the heirs of the true owner, among them several U.S. citizens, stood by helplessly. The heirs could not ask a court to attach the property pending a resolution of the matter because New York State law immunizes from judicial seizure art loaned from outside New York. So the U.S. Government acted to assure that the stolen property did not leave the country.

The main points of the settlement stipulation and order, which can be accessed at https://ecf.nysd.uscourts.gov/cgi-bin/login.pl, were:

1. The Leopold Museum paid the Bondi Jaray Estate $19 million, the Estate released its claim to the painting, and *Wally* was transferred to the Leopold Museum.

2. The Leopold Museum is required to display signage next to the painting wherever it is exhibited anywhere in the world, setting forth *Wally's* true history, including the litigation.

3. Before *Wally* was transported to Vienna, it was displayed for three weeks at the Museum of Jewish Heritage in New York, beginning with a ceremony commemorating the legacy of Lea Bondi Jaray and the successful resolution of the litigation.

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As former Chief Judge (and later Attorney General) Michael B. Mukasey determined in one of the early decisions in the case: "On its face, [the National Stolen Property Act] proscribes the transportation in foreign commerce of all property over $5,000 known to be stolen or converted. Although the museum parties and *amici* would have it otherwise, art on loan to a museum – even a 'world-renowned museum' – is not exempt." Explaining further, the court added that "if Wally is stolen or converted, application of [the National Stolen Property Act] will 'discourage both the receiving of stolen goods and the initial taking,' which was Congress's apparent purpose." The court concluded that "there is a strong federal interest in enforcing these laws." But the U.S. Government's interest in discouraging the trafficking of stolen goods is only part of the story. The United States also led the way in urging governments around the world to develop methods to effectuate the policy of identifying Nazi-looted art and returning it to its rightful owners. It was the U.S. Government that convened the 1998 conference of government officials, art experts, museum officials, and other interested parties from around the world to consider and debate the many issues raised by the continuing discovery of Nazi-looted assets including artworks, resulting in the promulgation of the Washington Principles. The U.S. Government continued its participation in this area by playing a critical role in the 2009 Holocaust Era Assets Conference that took place in the Czech Republic and joining in the Terezin Declaration, which reaffirmed and expanded the Washington Principles.

One of those principles encouraged the resolution of these disputes by "alternative dispute resolution," where possible, to avoid long, drawn-out litigation. Throughout the Wally litigation, there was criticism that this lengthy litigation in state and federal courts was the wrong way to go about resolving Nazi-looted art claims. But alternative dispute resolution is not always possible, particularly where one of the parties is unwilling to participate in good faith. In the Wally case, the U.S. Government brought the forfeiture action to prevent the

{ Portrait of Bondi Jaray }

Leopold from sending the painting to Austria, thus placing it beyond the reach of any plausible attempt at resolution. Furthermore, the Austrian Government, while adopting a law in 1998 that purportedly was designed to ensure the careful review of claims for Nazi-looted artworks in the Austrian Government's possession, had determined that, as a "private foundation" under Austrian law, the Leopold Museum was not covered by that statute (despite the fact that the Austrian Government provided a substantial amount of its funding and appointed half of its board of directors).

In any litigation it is usually in all of the parties' interests to reach a mutually acceptable resolution as early as possible. But as is often the case, it is only after the court issues a decision resolving many of the issues in the litigation, as happened in the Wally case last fall, that the parties become better focused on the likely outcome of the case. But regardless of when this case was finally settled, commencing this forfeiture action and securing the artwork in the United States certainly promoted the U.S. Government's interest in fairly resolving these cases and preventing the trafficking of property looted in the Holocaust.

One final note about the U.S. Government's role in these cases. Although the Government sometimes takes a position adverse to the claimants in these kinds of cases, especially where a foreign government is the party in possession of the disputed artwork and issues relating to sovereign immunity are involved, an important lesson of the Wally case for potential claimants is not to ignore the very helpful and often critical role that the U.S. Government can play with respect to individual claims.

3. The Settlement Terms

Since this case involved the resolution of a government forfeiture action, there was little question that the settlement would be filed with the court and its terms open to public scrutiny and review. This is rarely the case in private civil litigations, however, where the confidentiality of the terms of settlement is almost always agreed to by both parties. As a result, the public has been made aware not only of the precise amount of monetary compensation paid to the Bondi Jaray Estate by the Leopold Museum (reflecting the painting's market value), but also of the non-monetary settlement terms, including the opening ceremony and temporary exhibition of *Wally* at the Museum of Jewish Heritage in New York before it was transported to Austria, and the specific signage that must accompany *Wally* at any exhibition sponsored by the Leopold Museum, either at the Museum or anywhere else in the world.

It is important to recognize that Nazi-looted art claims involve very deep emotions occasioned by the horrific experiences of the claimant families during the Holocaust. As a result, even where a claim can be resolved by payment of the full value of the claimed artwork, other interests of the claimant must often be satisfied before the case can be settled. These interests include "correction of the record" concerning the true provenance of the artwork, and providing public and permanent recognition of the true historical facts. The importance of exhibiting the artwork at a museum dedicated to the remembrance of the Holocaust, even temporarily, cannot be overstated. Thus, potential settlements of Nazi-looted art claims should always give heed to the importance of recognizing the emotional needs of the claimants to try to correct the historical, but still deeply felt, injustices of the Nazi era.

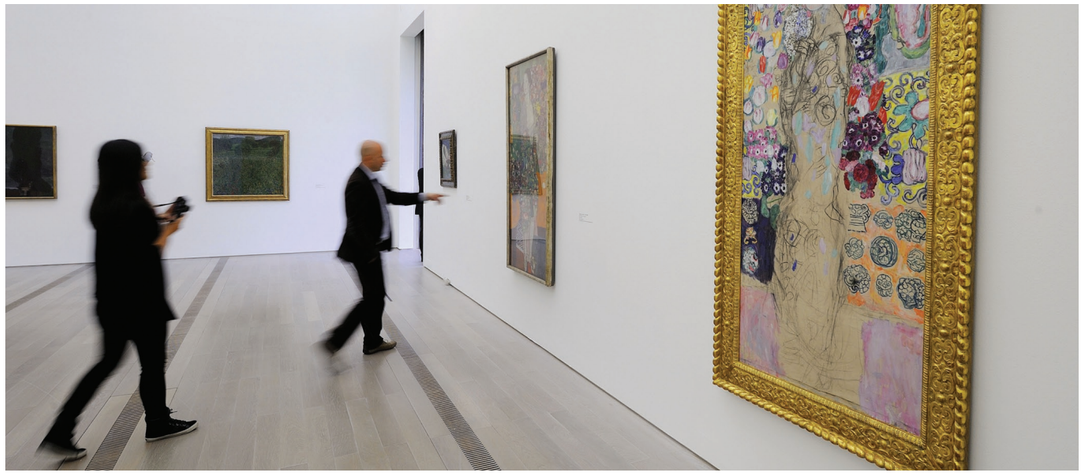
4. The True Impact of the Wally Case

The real importance of the Wally case, however, is what it means for both claimants and possessors of Nazi-looted artwork. First, it sends a clear message throughout the world that the U.S. Government will not tolerate trafficking of stolen property within its borders and will commit the resources required to see that the victims of looted art are treated appropriately. Second, it tells the families of Holocaust victims everywhere that they can stand up for their rights and persevere even in the face of intransigence and procrastination by the current possessors of their property. When their efforts seem hopeless, let them remember *Wally*.

1. *See United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).
2. *See* Martha Lufkin, *Portrait of Wally Case Settled for $19m*, The Art Newspaper (July 20, 2010), http://www.theartnewspaper.com/articles/%3Ci-Portrait-of-Wally-i-case-settled-for-19m/21273.
3. Washington Conference Principles on Nazi-Confiscated Art, *available* at https://ecf.nysd.uscourts.gov/cgi-bin/login.pl.
4. *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445, at *86 (S.D.N.Y. Apr. 11, 2002).
5. Terezin Declaration of June 30, 2009, available at http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf. See L. Kaye & A. Saz-Bolder, *June 2009 in Prague: The Washington Holocaust Era Conference Revisited* (Herrick/Art & Advocacy), Spring 2009, page 5; H. Spiegler, *The June 2009 Prague Conference and Terezin Declaration: A New Beginning? (Herrick/Art & Advocacy), Summer 2009, page 4.*

Bank Loans to Art Dealers

By Stephen D. Brodie



{ Commercial banks in the business of lending to art dealers should strive to improve, not scrap, their basic approach to due diligence on their inventory collateral. }

In the Winter 2010 issue of *Art & Advocacy*, we examined the problems a private bank that lends money to an art collector faces due to the likely inapplicability of UCC Article 9's consignment rules to most art dealers. That deficiency exposes a lender to the danger of losing its priority in collateral securing its loan to a creditor of an art dealer in a situation where artwork collateral is consigned by a collector to the dealer without the lender's consent. Interestingly, a lender to the dealer may also face problems due to this unfortunate gap in the law. The absence of a straightforward procedure designed to protect consignors (and their lenders) also means that a secured lender to an art dealer cannot simply run a lien search to determine which works on display in the dealer's gallery are unencumbered inventory belonging to the dealer-borrower and, therefore, available as collateral.

This uncertainty is exacerbated by the "handshake culture" and inadequate paperwork that are almost traditional in the art world. The result is that it can be difficult for anyone to determine exactly which artworks belong to the gallery (and constitute the lender's inventory collateral), which belong to the gallery owner personally (but are on display in the gallery), which have been consigned, and which are the subject of participation arrangements between the dealer and one or more third-party investors. Both the Salander O'Reilly and Berry-Hill bankruptcies were rife with stories of this kind of chaos. In the Salander case, consignors (including John McEnroe and other celebrities) went through months or more of anxiety over their inadequate title documents and the possibility that their often very valuable artworks might somehow be lost to the gallery's creditors. At the same time, lenders that had advanced money against the inventory of one of these galleries worried that they had been deceived about which works included in their "borrowing base" were subject to the claims of consignors, participants, and other third parties.

A lender that provides working capital loans to a dealer, secured by a "blanket" lien on all of the dealer-borrower's inventory and accounts receivable, typically provides in its loan documents a formula whereby the lender's commitment to extend credit will be limited to a percentage (typically around 35%) of what is called "eligible inventory." For a dealer-borrower, this usually means that: (1) the inventory is located on premises where the lender has easy access to take possession, if necessary; (2) the art has been appraised by a lender-approved expert; (3) the art is adequately insured and in good physical condition; and, most importantly, (4) no third party has a claim of title or similar rights to the works in question or to the proceeds from their sale. This is well traveled ground for middle-market bankers and presents no particular challenge for the lawyers drafting the documents. But if the bank does not conduct adequate due diligence to determine whether its borrower has the documentation to support its claim of unencumbered title to each item of "eligible inventory," it may find that its real borrowing base is far smaller than reported in the monthly borrowing base certificates provided, pursuant to the loan documents, by the borrower.

There are, of course, different ways to carry out due diligence. A true asset-based art lender (typically a fund, and not a commercial bank) relies almost entirely on its ability to turn its collateral into cash, and cares only minimally about the borrower's character and reputation. Such a lender would not usually finance a dealer's entire inventory. Rather, it would more likely study the provenance of a limited number of artworks, accept those works as collateral, and take physical possession of the works—either directly or through an agent, such as a warehouse that issues a receipt to the lender.

A bank, however, is likely trying to begin or to preserve a long-term relationship with the dealer. A full dominion and control approach would not be well suited in such a case. Instead, a bank would be more likely to monitor its inventory collateral and declare ineligible any item that does not pass muster. Commercial bank lenders also try to be discerning about which dealers to trust and which to avoid. These lenders may rely on the dealer-borrower's certifications as to its "eligible inventory," but they understand better than the typical asset-based lender the details of the borrower's business, competitive position, key relationships, and finances.

Commercial banks in the business of lending to art dealers should strive to improve, not scrap, their basic approach to due diligence on their inventory collateral. Banks making this kind of loan should encourage, among their borrower clientele, improved documentation on all consignments, participations, and similar encumbrances. Taking possession and doing full "asset-based lending style" due diligence on every item of a dealer's inventory are not practical measures for middle-market bank lenders. However, requiring dealer-borrowers to follow best practices in documenting transactions is the simplest and easiest way for banks to mitigate the impact of the inapplicability of Article 9's consignment rules and the widespread practice of oral agreements and unwritten promises in the art business.

Congratulations to Howard Spiegler

Howard Spiegler has been appointed to the prestigious position of President of the Art Law Commission of the Union Internationale des Avocats (International Association of Lawyers) ("UIA"). The UIA, founded in 1927, has several thousand individual members from 110 countries, in addition to leading bar associations, organizations and federations from around the world, including the American Bar Association. The UIA's Art Law Commission runs seminars each year around the world, at which the world's leading art lawyers present influential papers for publication. Commission members also contribute articles to "Juriste," the UIA's journal, which is distributed worldwide.

Howard has been associated with the UIA since 2007, when the paper he presented at the UIA annual Congress in Paris won the award for the best submission among several hundred papers presented. He has actively participated in several UIA art law seminars throughout the world, and his involvement with the organization has led to business referrals and contacts with leading international lawyers who have worked with us on several significant art cases.

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

Art Law Events

Herrick in the News

July 21, 2010
Crain's New York Business.com. Larry Kaye was quoted in "Reviving art market offers brush with greatness." The story notes Herrick's representation of the seller of the Picasso whose $106.5 million price tag made it the highest-priced piece of art ever sold at auction. To read the full article, go to www.herrick.com/revivingart.

July 26, 2010
Voice of America. Howard Spiegler was profiled on radio and in print in the multi-media "Fighting for Art Justice: Lawyer Howard Spiegler helps clients reclaim stolen works of art." To read the full article and hear the radio clip, go to www.herrick.com/fightingforartjustice.

September 13, 2010
Hispanic Executive. Mari-Claudia Jiménez was profiled in the magazine's arts and culture section. To read the profile, go to www.herrick.com/hispanicexecutive.

September 13, 2010
Crain's New York Business. Larry Kaye was quoted in "For Collectors, a Hard Lesson in the Art of the Swindle," in which he notes that most insurance claims in the fine arts field are for injury to artwork sustained in transit or installation.

October 2010
ARTNews. Charles Goldstein was quoted in "Tensions are Rising Between the Restitution Community and U.S. Museums Over the Proper Way to Handle Holocaust Art Claims." To read the full article, go to www.herrick.com/tensionsarerising.

Recent Events Involving Herrick's Art Law Group

July 22, 2010
Stephen Brodie and Howard Spiegler presented teleconference seminars to underwriters and credit officers of two major commercial banks across the country. The seminars focused on the legal and due diligence issues involved in lending against art collateral, whether to collectors or to dealers.

September 29, 2010
Howard Spiegler gave a lecture entitled "Restitution and Theft" for Christie's Education, New York, which launched an art business program.

October 30–November 3, 2010
Howard Spiegler, Larry Kaye, and Steve Brodie attended the annual Congress of the Union Internationale des Avocats in Istanbul, Turkey. Howard and Larry delivered papers at the art law seminar on the restitution of cultural property and Steve's presentation was on the U.S. response to the financial crisis.

November 3, 2010
Darlene Fairman spoke on a panel on Restitution of Holocaust Looted Art at Brooklyn Law School.

November 6–9, 2010
Larry Kaye and Howard Spiegler spoke at various events surrounding the publication of "Lost Lives, Lost Art" by Melissa Müller and Monika Tatzkow (Vendome Press, 2010)." Larry and Howard both spoke on a panel at Christie's on November 6. Howard spoke at the Neue Galerie on November 8 and Larry spoke at the 92nd Street Y on November 9.

For questions about upcoming events and other Art Law matters, please contact:

Lawrence Kaye
lkaye@herrick.com
212.592.1410

Howard Spiegler
hspiegler@herrick.com
212.592.1444

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

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