

ART & ADVOCACY



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Abandoned Loan Bill Signed Into Law Statute Grants Title to Certain Property in New York State Museums' Possession

By Frank Lord and Yael Weitz

Overview

On July 7, 2008, Governor Paterson signed into New York State law a statute that provides nonprofit museums located in the state procedures for acquiring title to abandoned works of art and, if they choose, for deaccessioning them. In doing so, the statute provides a solution to the problem of "stale loans," where museums are unable to locate the lenders or original owners of abandoned works of art. The procedures for deaccessioning these artworks cover, among other things, how museums are to use the funds generated by the artworks. According to the Museum Association of New York ("MANY"), this statute "has been a long time coming."

Background

Previous versions of the bill had been vetoed by Governors Pataki and Spitzer. The legislation in its current form addresses their concerns, including protecting the interests of Holocaust victims and their families who may be unaware that a museum may possess artworks looted from them by the Nazis. To protect their rights, the statute requires that museums notify the Art Loss Register (a database of stolen artwork) whenever they attempt to acquire title to abandoned artworks that were created before 1945 and that changed hands in Europe between 1933 and 1945. In addition, the statute exempts art that "changed hands due to theft, seizure, confiscation, forced sale or other involuntary means in Europe during the Nazi Era (1933-1945)" from the provisions of the new legislation granting museums title to the abandoned artworks.

"Stale loan" legislation has been passed or is pending in other states (including Alaska, Arkansas, Florida, Georgia, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, New Mexico, Ohio, Texas, Vermont, and Wisconsin), but only a limited number of states have included provisions directed at the issue of Nazi-looted art. The drafting and enactment of the New York statute is a result of the combined efforts of a number of individuals and groups, including the Art Law Committee of the New York City Bar Association, of which Herrick partner Howard Spiegler was chair at the time.

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Abandoned Loan Bill *(continued from page 1)*

Impact

This statute affects museums, families of Holocaust victims, and anyone whose artwork is the subject of an outstanding or planned loan or donation to a museum. The statute targets property that has been in possession of museums for a minimum of 10 years where the museum is unable to determine the lender, donor, or owner after making a “good faith and reasonable search.”

Notice procedures are as follows:

1. Once a museum determines that it is unable to locate the original lender of an artwork, it must provide notice by certified mail to the lender’s last known address.
2. If the identity or address of the lender is unknown, or if within 30 days the museum does not receive proof that a mailed notice was received, the museum must provide notice by way of publication.

3. Notice that is provided via publication must appear at least once a week for three consecutive weeks in a generally circulated newspaper.

If no one claims the artwork after compliance with these notice procedures, the museum obtains title to it (unless the artwork was created before 1945 and changed hands involuntarily in Europe between 1933 and 1945).

To avoid the issue of unclaimed works in the future, museums must now provide potential donors with a written copy of the museums’ policies and procedures for deaccessioning. With regard to works of art for which museums have acquired title pursuant to this statute, proceeds derived from deaccessions must be used either toward acquisition of new artworks or for preserving and caring for the museums’ existing collections. Proceeds may not be used for ongoing operating expenses.

New Bill Regarding Resale Royalties for Artists

by Darlene Fairman

A bill is pending in the New York State Assembly that would provide that when an entity or person other than the artist sells any work of art within New York, the seller will pay the artist, if living, five percent of the sale amount. If the seller cannot locate the artist, the State Council on the Arts would receive the five percent royalty. The State Council would then be responsible for locating the artist and, if unable to do so after a certain period of time, would transfer the monies to the State Council’s operating fund.

The future of this bill is uncertain, but California has adopted a similar measure that the Supreme Court has upheld. Those whom this legislation may impact may need representation to have their voices heard in the Assembly; Herrick has an active government relations practice and the ability to help.



{ The future of the resale royalties bill is uncertain, but the Supreme Court has upheld a similar measure that California adopted. }

New Guidelines for the Acquisition of Archaeological Materials and Ancient Art

By Darlene Fairman

This summer, both the Association of Art Museum Directors (AAMD) and the American Association of Museums (AAM) issued new guidelines for the acquisition of archaeological materials and ancient art. The Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art, issued in June 2008, and the AAM Standards Regarding Archaeological Material and Ancient Art, issued in August 2008, bear striking similarities, as well as interesting differences.

Both sets of new guidelines call for museums acquiring archaeological materials and ancient art to: (1) thoroughly research the provenance (ownership history) of a proposed acquisition; (2) obtain accurate, written documentation of the history of the object, including import and export documents; (3) require sellers and donors to provide all documentation and information in their possession related to the object; and (4) comply with all applicable U.S. laws.

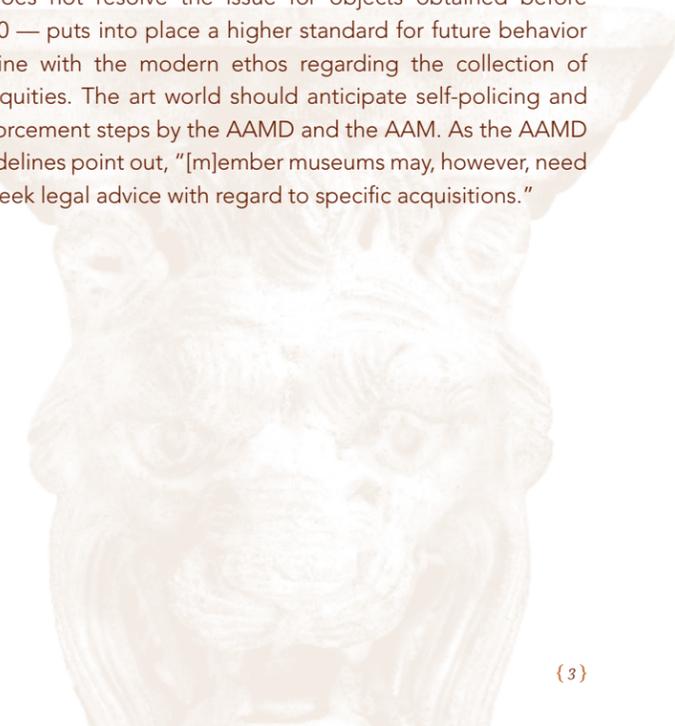
Perhaps the most substantive feature shared by both sets of new guidelines is the recognition of November 1970 — the date the United Nations Educational, Scientific, and Cultural Organization (UNESCO) adopted its Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property — as a watershed date for what the AAMD describes as “the application of more rigorous standards to the acquisition of archaeological material and ancient art.” Both sets of guidelines recommend that an object being acquired be shown to have been either outside its probable country of modern discovery before November 1970 or legally exported from its probable country of modern discovery after November 1970. Both sets of guidelines, however, provide an “out” for museums to use their judgment to acquire works that lack a complete provenance.

There are some differences between the new AAMD and AAM guidelines that are worth noting. For example, while the AAM guidelines direct museums to address claims of ownership by third parties and seek to voluntarily resolve them, the AAMD guidelines additionally call for museums to alert a third party to its right to ownership and initiate the return of the object when they gain information that establishes that third party’s right to ownership.

The AAMD guidelines also affirm the value of the licit market for the legal sale and export of works of art in deterring looting, and encourage the creation of licit markets by urging nations to provide the means for the legal sale and export of such objects. Finally, the AAMD calls for museums to post on the AAMD website an image of, and information on, any work that is acquired without a complete ownership history showing that the work was outside the probable country of modern discovery before 1970 or exported legally thereafter.

The AAM guidelines have additional important and unique directives, the foremost being a clear direction that “museums should not acquire any object that, to their knowledge, has been illegally exported from its country of modern discovery or the country where it was last legally owned.” Thus, where the AAMD guidelines could be read to permit acquisition of an object that is known to have been illegally removed from its country of modern discovery if it was done before 1970, the AAM guidelines would not countenance such acquisition. Also, the AAM guidelines call on museums to make available the ownership history of their existing collections of archaeological materials and ancient art and conduct research on objects in their collections that have an incomplete or uncertain provenance.

Though all of these guidelines are non-binding and unenforceable in court, they are a genuine step in the right direction in the effort to curb the illegal and unscientific looting of archaeological materials and ancient art and the illicit trade of these objects in the worldwide marketplace. In particular, recognizing November 1970 as a watershed date — while it does not resolve the issue for objects obtained before 1970 — puts into place a higher standard for future behavior in line with the modern ethos regarding the collection of antiquities. The art world should anticipate self-policing and enforcement steps by the AAMD and the AAM. As the AAMD guidelines point out, “[m]ember museums may, however, need to seek legal advice with regard to specific acquisitions.”



Goudstikker Exhibition at the Jewish Museum

By Frank Lord



{ *River Landscape with Ferry (1649)* by Salomon Van Ruysdael, one of the artworks recovered by Goudstikker's heir. }

From March 14, 2009, through August 2, 2009, the Jewish Museum in New York will hold an exhibition entitled “Reclaimed: Paintings from the Collection of Jacques Goudstikker.” The exhibition, of which Herrick is a proud sponsor, will display masterpieces by such artists as Jan Mostaert, Salomon van Ruysdael, Jacob van Ruisdael, Jan Steen, and Jan van Goyen, and examine the fascinating history of the artworks — from when the Nazis looted them in 1940 until their return to Goudstikker’s heir.

A Brief History

Jacques Goudstikker was the foremost dealer of Old Master Paintings in the Netherlands during the period between World War I and World War II. He was known for his business acumen, his incredible collection of artworks, and his gracious lifestyle, which included entertaining at his 18th-century country villa,

Oostermeer, and his castle, Nijenrode. Goudstikker met his wife, Désirée van Halban Kurz, in June 1937, when he invited her to come from Vienna and sing at one of his charity events at Nijenrode with an orchestra Goudstikker had brought in for the occasion. The two quickly fell in love and married in December of that year. In January 1939, Dési gave birth to their only child, Eduard, known affectionately as “Edo.”

Sadly, their happiness was short-lived. After the Nazis invaded the Netherlands in May of 1940, Jacques and Dési, who were Jewish, fled, making their escape by sea. Only two days into their journey, Jacques was killed by an accident on the ship, and his widow and son were forced to continue on without him. Within two months, Reichsmarschall Hermann Goering, the second in command of the Nazi forces, looted more than 1,200 artworks that Jacques had been forced to leave behind and took possession of his real estate. Some of the artworks were found by the Allies after the War and returned to the Netherlands, but because of repressive and unfair restitution policies, Dési was unable to recover them.

The works remained in the Dutch government’s custody until 2006, when, after a nearly decade-long struggle, Marei von Saher, Edo’s widow and Goudstikker’s sole heir, recovered them with Herrick’s assistance. At Ms. von Saher’s request, Peter Sutton, a noted scholar of Dutch art of the Golden Age and director of the Bruce Museum in Greenwich, Conn., selected a group of the most important paintings for a traveling exhibition that would pay tribute to Goudstikker and celebrate the restitution. The exhibition debuted at the Bruce during the summer of 2008 with a scholarly catalogue published by Yale University Press. At the Jewish Museum, the exhibition will include a number of paintings not displayed at the Bruce.

Whose Art Is It Anyway?

Issues Concerning Provenance and Good Title When Buying Art

By Mari-Claudia Jiménez

There has been much publicity in recent years about the theft of art and other cultural property, ranging from the smuggling of antiquities from foreign countries to the plunder of art by the Nazis during the Holocaust. The possibility that art may be stolen or that there may be questions about its ownership history naturally affects collectors, since a tainted or even suspicious provenance may raise questions about the title to the work. Therefore, collectors — and attorneys who work with them — should understand the legal issues surrounding the theft, looting, and smuggling of artworks and exercise greater vigilance in ascertaining whether there is a question as to good title.

Applicable Legal Principles

A basic tenet of United States law that distinguishes it from that of most civil law countries (including most European countries) is that no one, not even a good-faith purchaser for value, can obtain good title to stolen property. For purposes of the U.S. rule, whether the purchaser of an artwork was unaware that it had been stolen when he or she purchased it, has had the artwork in his or her possession for decades, or did not buy the artwork directly from the thief but from a subsequent purchaser is irrelevant. The good faith of the purchaser or the seller does not affect the analysis as to whether the title is good. The U.S.

rule is simple: a thief cannot pass good title; therefore, a stolen piece of art is always stolen property no matter how much time has passed or how many subsequent “owners” the piece has had. From this rule follows a single, simple question that forms the core of every case involving title to art and other cultural property: is the person currently in possession the true owner or authorized by the true owner to deal with the property?

The U.S. rule is in sharp contrast to the experience in civil code countries. The civil codes in effect in most European countries are far less favorable to the original owner, and a good-faith purchaser of stolen property can get good title with the passage of time, often a short period (e.g., 10 years in Germany), and sometimes immediately (e.g., in Italy). While good faith must be shown in civil code jurisdictions, that is an amorphous standard at best.

Considerations When Buying Art

When a collector is considering purchasing a particular artwork, he or she should do a threshold inquiry to determine whether there is some indication that the work may have been stolen. Thus, the first step should be to ensure that the work is not listed on the Art Loss Register. The Art Loss Register is a private international database of lost and stolen art, antiques, and collectibles that provides recovery and search services to collectors, the art trade, insurers, and law enforcement. Other lost art databases, such as Trace, which was launched in the U.K., can also be used.

If you are purchasing an artwork from an auction house or a reputable gallery, it is likely the auction house or gallery has already run the piece through one of these databases and otherwise investigated the provenance of the piece before it was put up for sale.¹ But if you are purchasing an artwork outside of an auction house or gallery, it is imperative to make a concerted effort to check these databases. However, it is important to note that only a fraction of all stolen and looted art is listed on one of these databases. Many owners of stolen art are unaware of the theft or, for that matter, of the existence of such databases. Therefore, a clean record from the Art Loss Register or Swift-Find does not mean that the artwork in question is in the clear. Another measure you can take is to check with the International Foundation for Art Research (IFAR). IFAR is a nonprofit organization that offers impartial and authoritative information on authenticity, ownership, theft, and other artistic, legal, and ethical issues concerning art objects.

The next step for the collector is to familiarize himself or herself with the history of the piece in question and perhaps conduct some simple research to ensure that the artwork’s stated

provenance checks out. This could involve calling one or more of the galleries, museums, or former owners that appear on the labels on the back of the piece or, if this is not an option, calling any institution or individual listed in the provenance or who is known to have been connected to the piece in question. Often, a simple Google search can turn up information about a stolen artwork.

Nazi-Looted Art

The phenomenon of Nazi-looted art raises its own special set of issues for collectors. When investigating whether a piece might have been illegally taken during the Nazi era, take note of unexplained gaps in provenance from 1933 to 1945. Certain key names should also raise questions. In recent years, lists of dealers who collaborated closely with officials of the German government and Nazi party members have been generally circulated (the “OSS Lists”). These dealers purchased artworks from the Nazis and then resold pieces of modern art that the Nazis had termed “degenerate” and for which they had no use, except to convert them to hard currency to support the Nazi regime. One example of a looted painting with a gap in its provenance is the Matisse *Odalisque*, which the Nazis looted, along with other artworks, from Paul Rosenberg, a prominent Parisian art dealer, in 1941.² Some of the artworks reached the open market, but the family could not readily recover them after the War. *Odalisque* was purchased in 1954, and later donated to the Seattle Museum of Art. There was a gap in the provenance of the painting between 1941 and 1954, and, after extensive research, the museum acknowledged that the painting should be returned to the Rosenbergs in 1999.³

In *Goodman v. Searle*,⁴ the Goodman family brought suit against Daniel Searle, a collector and important patron of the Art Institute of Chicago, to recover a small landscape by Degas illegally seized during the War. Key evidence that the piece had not rightfully changed hands was that Hans Wendland, one of the dealers on the OSS Lists, was part of the piece’s provenance. As a result, the Goodmans and Searle reached an out-of-court settlement that, among other things, placed the landscape in the Art Institute and gave both the Goodmans and Searle credit for the donation.

Bringing and Defending Claims

The validity of ownership claims may (and usually does) turn on the resolution of technical defenses, such as statutes of limitations.

Statutes of limitations begin to run when the causes of action accrue, but vary in content and application from state to state. While state statutes specify the length of the limitations period,

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Whose Art Is It Anyway? (continued from page 5)

the definition of when a cause of action accrues has been left to the courts' discretion. In cases of stolen art in the possession of good-faith purchasers, the courts have fashioned accrual rules that allow a plaintiff to make a claim for the recovery of art stolen years before.

Some states, including New York, apply a "demand and refusal" rule under which the limitations period does not begin to run until the owner makes a demand for the return of the property and the possessor refuses. In *Menzel v. List*, one of the earliest reported U.S. cases regarding the restitution of Nazi-plundered art, the plaintiffs sought to recover a Chagall painting that the Nazis seized in 1941. In 1963,



{ Collectors can conduct research on an artwork's provenance by contacting galleries, museums or former owners listed on the back of the artwork. }

the plaintiffs located the painting in the collection of the defendant, who had purchased it in 1955 from a reputable New York art gallery. In response to the plaintiffs' lawsuit to recover the painting, the defendant argued that the action was barred by New York's three-year limitations period because, he contended, the cause of action accrued when the painting was stolen in 1941 or, at the latest, when he purchased the painting in 1955. Holding that the cause of action arises "not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand," the court concluded that the plaintiffs were the rightful owners of the painting.⁵

Years later, the New York Court of Appeals reaffirmed the demand and refusal rule in a case in which the Guggenheim Museum sought to recover a painting stolen 20 years earlier. The case called into question whether the museum's alleged failure to take steps to locate the painting was relevant to the application of the demand and refusal rule. The Court of Appeals declined to impose any duty of diligence on the owner in this context.⁶

In recent New York cases, however, the courts have used the equitable doctrine of laches to reject otherwise timely claims by Holocaust claimants. One who uses the defense of laches

must show that the opposing party unreasonably delayed bringing the claim to the prejudice of the defendant. For example, a defendant may not be able to properly defend himself or herself if evidence was lost or witnesses died before the opposing party brought his or her claim.

The majority of states do not apply the demand and refusal rule; rather, they impose a duty of diligence on the plaintiffs, requiring them to establish that they took affirmative steps to locate the property to withstand dismissal on statute of limitations grounds. In these states, under the so called "discovery rule," the limitations period begins to run when the plaintiff discovers or, after the exercise of reasonable diligence, should have discovered the whereabouts of the stolen art.

Art owners are also concerned by headlines regarding stolen art and antiquities. They too can contact the various databases and organizations such as the Art Loss Register and IFAR to determine if there is a problem with an artwork in their collection. A lawyer can also help an owner navigate through the potential issues involved, such as title, export regulations, and statutes of limitations. Should you discover a problem with a piece of art you own, there are a number of options and remedies available to you, including bringing a legal action against the seller.

¹ A sale by auction includes an express warranty of title. Such a warranty cannot be disclaimed by the auction house, regardless of whether the principal is disclosed. Although this warranty protects the buyer, its existence only means that a buyer may hold an auction house liable should the item purchased have a defect in title.

² *Rosenberg v. Seattle Art Museum*, 124 F. Supp. 2d 1207 (W.D. Wash. 2000).

³ Felicia Lee, *Museum to Return Looted Work*, N.Y. Times, June 16, 1999, at E4.

⁴ Complaint, (N.D. Ill. July 17, 1996) (No. 96-6459); Judith Dobrynski, *Settlement in Dispute Over a Painting Looted by Nazis*, N.Y. Times, August 14, 1998, at A17.

⁵ *Menzel v. List*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

⁶ *Solomon R. Guggenheim Foundation v. Lubell*, 153 A.D.2d 143, 550 N.Y.S.2d 618 (N.Y. App Div. 1990), *aff'd*, 77 N.Y.2d 311 (N.Y. 1991).

Artworks and 1031 Exchanges

Taking Advantage of the "1031 Exchange" to Minimize and Defer Taxes Upon the Sale of Artworks

By Michael Kessel and Eli Akhavan

An Introduction

Generally, when a taxpayer sells or otherwise disposes of his property, he must report and pay tax on any gain. For example, if a taxpayer has property with a tax basis of \$90 and exchanges it for property with a fair market value of \$100, he recognizes a gain of \$10. Section 1031 of the Internal Revenue Code (the "Code") provides a well-known exception to this general rule. Under the 1031 Exchange, a seller may exchange his property for another property of "like-kind," and defer tax on any gain that would ordinarily be recognized. The seller will ultimately have to pay the deferred tax upon the taxable disposition of the "replacement" property acquired in the exchange.

There are four requirements to qualify for a 1031 Exchange:

1. There must be an exchange.
2. The exchange must be of property that qualifies under section 1031(a) of the Code.
3. The replacement property must be of like-kind to the property relinquished.
4. Both the relinquished property and the replacement property must be held for productive use in a trade or business or for investment.

Applying the Rule to Artworks

While 1031 Exchanges are commonly used in the real estate industry, they can be used in the art world as well. If you are a collector and wish to exchange one artwork (categorized as "collectibles" under the Code) for another, you can receive significant tax savings. The gain from the disposition of a collectible is taxed at a maximum capital gains rate of 28%, but a 1031 Exchange will allow you to defer that gain. A 1031 Exchange may also allow museums and corporate collectors, which often own highly appreciated artworks, to defer capital gains tax while disposing of these assets with a low tax basis.

Example: You purchase a rare "Old Master" painting for \$1 million. The value of the piece increases to \$2 million, and you want to sell it. You also want to purchase another Old Master painting from your art dealer for \$2 million. Without a 1031 Exchange, you would sell your painting for \$2 million and pay a 28% tax on the \$1 million gain, leaving you with \$1.72 million to purchase the new painting.

However, assuming that you comply with the requirements and mechanics of a 1031 Exchange, you can "exchange" your Old Master painting for a \$2 million replacement Old Master painting from the dealer without having to pay the \$280,000 capital gains tax at the time of the sale. You will only have to pay the capital gains tax when you ultimately sell the replacement Old Master painting.

Multi-party exchange. Suppose that the dealer in this scenario wishes to sell you the painting, but does not want to receive your painting in exchange — the dealer just wants the cash. You can still "exchange" your painting for the replacement painting through the use of an "exchange agent." Your accountant or tax consultant should be able to refer you to one.

Eligibility for a 1031 Exchange

Collectors face many complexities when completing a 1031 Exchange. They must prove that they are holding their property for productive use in a trade or business or for investment. Collectors cannot be "dealers" or engaged in the trade or business of selling artworks primarily to customers (i.e., holding art as inventory). As a result, many art galleries may not qualify.

Another issue is that the exchanged artworks must be of "like-kind," but the IRS does not provide much guidance on what this means for artworks. In giving advice to taxpayers, practitioners generally use an IRS code provision relating to involuntary conversions, which states that lithographs, oil paintings, and watercolors are not of like-kind. They advise clients that paintings can only be exchanged for other paintings, and sculptures can only be exchanged for other sculptures. But even within the various genres, it is not clear what constitutes a like-kind exchange. It is debatable whether an Old Master painting is of like-kind to a modern abstract expressionist painting.

If you have works of art that you would like to sell, and you are considering purchasing other works of art, you may be able to obtain beneficial tax results through a 1031 Exchange. As the rules and regulations allowing such a transaction are complex and strict, you should hire experienced tax counsel to guide you through it.



Art Law Events

Recent Events Involving Herrick's Art Law Department

November 21, 2008

Howard Spiegler and Lawrence Kaye spoke at the Art Litigation and Dispute Resolution Institute, a CLE event at the New York County Lawyers' Association. Mr. Kaye spoke on a panel entitled "Litigation, Arbitration or Mediation: Considerations for Practitioners," and Mr. Spiegler spoke on a panel entitled "Commencing an Action (Replevin, Quiet Title, Slander Title, Injunctive Relief, and Statutes of Limitation)."

December 3-7, 2008

Howard Spiegler spoke at Art Basel Miami Beach, the biggest annual art fair in the U.S., on a panel entitled "Legal Affairs/Art on the Move," regarding the international transportation of art.

February 4, 2009

Charles Goldstein spoke at the Council of American Jewish Museum's 2009 Annual Conference in New York City at a session entitled "Provenance Research and CAJM Leadership: Not an Option, an Imperative," which was held at the Museum of Modern Art.

February 5, 2009

Lawrence Kaye lectured on the topic of "Museum and Collection Ethics: from Antiquities to the Holocaust" to Brown alumni, museum directors and art collectors in Herrick's New York City office.

February 24, 2009

Paul Herman and Jeffrey Galant spoke at a New York State Bar Association's Entertainment, Arts and Sports Law Section event entitled "EASL State of the Art." The event centered on issues in the current art market, such as collecting, selling, gifting, financing, estate planning, as well as insurance.

February 25, 2009

Howard Spiegler was a featured speaker at a United Jewish Israel Appeal (a charitable foundation) luncheon in Leeds, U.K.

Coming Events Involving Herrick's Art Law Department

February 28, 2009

Howard Spiegler will speak at the "Art Law, Policy and Management" forum at the Institute of Art and Law (IAL) in London.

March 19, 2009

Lawrence Kaye will participate on a panel that is being organized in conjunction with the exhibit "Reclaimed: Paintings from the Collection of Jacques Goudstikker" at the Jewish Museum.

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

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