

ART LAW

USA



Art Law

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Quick reference guide enabling side-by-side comparison of local insights, including into buying and selling; export and import controls; taxation; borrowing against art; intellectual property rights; agency; consigning items; auctions; spoliation during Nazi era; lending to museums; cultural patrimony; anti-money laundering; endangered species; consumer protection; art market regulators; and recent trends.

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BUYING AND SELLING

Passing of title

When does ownership of art, antiques and collectibles pass from seller to buyer?

The Uniform Commercial Code (UCC), which has been adopted in some form by every state in the United States, is a collection of laws governing commercial transactions in the country. Sales of tangible personal property, such as fine art, are governed by article 2 of the UCC. Section 2-401(2) of the UCC provides that title to artwork will generally pass from the seller to the buyer upon the physical delivery of an artwork. The parties may seek to circumvent this by agreeing that title will not pass until receipt of payment. The majority view, however, is that after physical delivery of the work, the seller will be left with a security interest in the work, but not title to it.

Law stated - 26 January 2023

Implied warranty of title

Does the law of your jurisdiction provide that the seller gives the buyer an implied warranty of title?

According to section 2-312(1) of the UCC, unless excluded or modified by specific language or circumstances, a contract for the sale of an artwork will include a warranty by the seller that 'the title conveyed shall be good, and its transfer rightful; and the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.' This warranty may be limited with specific language or circumstances that give the buyer reason to know that the seller does not claim title in him or herself, or that the seller is purporting to sell only such right or title as the seller or a third person may have.

Where the seller is a merchant, the UCC also provides the buyer with an implied warranty that 'the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like'. Pursuant to the UCC, a merchant is 'a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction'. In the art context, this definition most often applies to galleries, art dealers and auction houses.

An action for breach of warranty must be commenced within four years after the cause of action has accrued. In general, accrual is measured from the date of the breach, which occurs when 'tender of delivery is made', regardless of a lack of knowledge of the breach. The UCC provides an exception, however, where a warranty 'explicitly extends to future performance' and 'discovery of the breach must await the time of such performance'. Under those circumstances, the cause of action will accrue when the breach is or should have been discovered.

Law stated - 26 January 2023

Registration

Can the ownership of art, antiques or collectibles be registered? Can theft or loss of a work be recorded on a public register or database?

The United States does not have a public register for recording ownership of artworks. If a work of art is lost or stolen, the Federal Bureau of Investigation's National Stolen Art File is a database that may be consulted. The objects listed in this database are submitted by law enforcement agencies in the United States and abroad. Once an object is recovered, it is removed from the database.

Good-faith acquisition of stolen art

Does the law of your jurisdiction tend to prefer the victim of theft or the acquirer in good faith of stolen art?

A basic tenet of US law is that a good-faith purchaser for value cannot obtain good title to stolen property. This rule applies regardless of whether the purchaser acquired the artwork at auction or by private sale, or from a subsequent purchaser rather than directly from the thief. Thus, the true owner has the right to reclaim such property unless barred by the statute of limitations or other defence. On its face, this rule tends to prefer the true owner's rights over those of the possessor's. The statute of limitations and other defences such as laches, however, may tip the scales in favour of the possessor. Whether a purchaser is considered to be in good faith depends on the facts and circumstances of the case, but, as a general matter, the possessor's good faith will be contingent on his or her lack of knowledge that the object was stolen.

Law stated - 26 January 2023

Acquiring title to stolen art through prescription

If ownership in stolen art, antiques or collectibles does not vest in the acquirer in good faith, is the new acquirer protected from a claim by the victim of theft after a period of time?

Where the possessor is in good faith, in some states, including New York, a 'demand and refusal' rule applies, under which the three-year limitations period will not begin to run until the owner makes a demand of the possessor for the return of the property and the possessor refuses. The majority of states, however, follow a discovery rule. In these states, the limitations period, which differs depending on the state, begins to run when the plaintiff discovers, or after the exercise of reasonable diligence should have discovered, the whereabouts of the artwork. Where the statute of limitations runs, a claim for the return of stolen art will typically be barred, unless an equitable doctrine is applied to toll the applicable period. As a counterpoint to the statute of limitations, the equitable doctrine of laches may also bar otherwise timely art claims. To establish the defence, a possessor must show that the claimant unreasonably delayed in bringing the action to the prejudice of the possessor. A court may also weigh the relative equities between the parties in determining whether to apply a laches defence.

Law stated - 26 January 2023

Can ownership in art, antiques or collectibles vest in the acquirer in bad faith after a period of time?

In the United States, title does not pass to a purchaser in bad faith, irrespective of the amount of time that has elapsed. Nonetheless, a claim for the return of the property may be barred as a result of the statute of limitations or pursuant to the equitable doctrine of laches.

Law stated - 26 January 2023

Must the professional seller of art, antiques or collectibles maintain a register of sales?

US law does not require an art dealer to maintain a register of sale.

Risk of loss or damage

When does risk of loss or damage pass from seller to buyer if the contract is silent on the issue?

Where the contract is silent on the issue, the UCC provides that the risk of loss passes to the buyer from a merchant seller upon receipt of the artwork. If the seller is a non-merchant, the risk will pass to the buyer upon 'tender of delivery' of the artwork (ie, when the buyer receives notification reasonably necessary to enable him or her to take delivery of the artwork). The UCC also sets forth specific provisions concerning risk of loss when the artwork: (1) is either required or authorised by the contract to be shipped by common carrier; or (2) is held by a bailee to be delivered without being moved. The UCC provides that the risk of loss may be altered by contrary agreement of the parties.

Law stated - 26 January 2023

Due diligence

Must the buyer conduct due diligence enquiries? Are there non-compulsory enquiries that the buyer typically carries out?

US law does not impose due diligence requirements on the buyer. Nonetheless, the amount of due diligence conducted may impact a buyer's remedies in the event of a claim. Courts also consider whether a buyer is a merchant or non-merchant in evaluating the reasonableness of the buyer's due diligence. Thus, though not required by law to do so, buyers are typically advised to undertake certain threshold enquiries, such as determining whether there are indications that the artwork may have been stolen and to research the provenance of the work (eg, by contacting former owners of the artwork).

Law stated - 26 January 2023

Must the seller conduct due diligence enquiries?

Although United States law does not impose a requirement on sellers to conduct due diligence prior to selling an artwork, proper due diligence on the part of the seller is advised. Pursuant to the UCC, the buyer is provided with various warranties that relate to, for example, the artwork's authenticity, authorship and title. When the seller is a merchant, the UCC provides the buyer with additional implied warranties with respect to the artwork. Therefore, at a minimum, the seller of an artwork should endeavour to ensure that the artwork conforms to these warranties and avoid liability for a breach.

Law stated - 26 January 2023

Other implied warranties

Does the law provide that the seller gives the buyer implied warranties other than an implied warranty of title?

Where the seller is a merchant, a warranty of merchantability is provided to the buyer of an artwork. According to the UCC, for art to be merchantable, it must, in relevant part: (1) be able to 'pass without objection in the trade under the contract description'; (2) be 'fit for the ordinary purposes' for which it is sold; and (3) conform to the affirmations of fact made in the sale catalogue or the bill of sale. Where the seller has reason to know of 'particular purposes for which the

goods are required' and the buyer is relying on 'the seller's skill or judgment to select or furnish suitable goods', the buyer is also provided with an implied warranty of fitness for a particular purpose. Typically, this implied warranty will apply where the seller is a merchant, but it may, in particular circumstances, apply in cases where the seller is not. Both implied warranties may be excluded or modified by the parties.

A cause of action for a breach of warranty must be commenced within four years of accrual, which occurs when tender of delivery is made unless the warranty 'explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance'. Under those circumstances, the cause of action accrues when the breach is or should have been discovered.

Law stated - 26 January 2023

Voiding purchase of forgeries

If the buyer discovers that the art, antique or collectible is a forgery, what claims and remedies does the buyer have?

Where an artwork is discovered to be a forgery or otherwise inauthentic, claims based on breach of warranties, fraud and mistake may be available to the buyer. Pursuant to the UCC, an express warranty may arise from any description or affirmation of fact or promise by the seller relating to the artwork that 'becomes part of the basis of the bargain'. Such statements may be made by the seller in written materials, such as sale documentation, advertisements, brochures and catalogues, or from a seller's oral statements to the buyer. Where the seller is a non-merchant, a court may consider such descriptions, including statements of attribution, to be mere opinion and not an express warranty. But, where the seller is a merchant or is otherwise considered to have a superior level of expertise, and the seller records the artist's name in the invoice, this will generally be considered an express warranty. Good faith on the part of the seller is no defence if the statement proves to be false.

A buyer may also bring a tort action for fraud against the seller. To establish fraud, the buyer must prove that: (1) the seller made a misrepresentation related to a material issue of fact, either by way of a misstatement or nondisclosure; (2) the misrepresentation was intentionally made with intent to induce reliance; and (3) the buyer did, in fact, rely on the misrepresentation to his or her detriment.

A similar tort action that may be available in a claim for negligent misrepresentation. In contrast to a fraud claim, this cause of action may arise where the seller negligently, instead of intentionally, asserts a false statement. Generally, the seller must also owe a duty of care to the buyer.

Alternatively, a buyer may bring a claim on the grounds of mutual mistake, in which both parties are mistaken with respect to a material assumption on which the contract was made – in this case, the authenticity of the artwork. If, however, the seller is aware of the mistake or has reason to know of it, a buyer may have a claim for unilateral mistake.

Law stated - 26 January 2023

Voiding inadvertent sales of works by masters

Can a seller successfully void the sale of an artwork of uncertain attribution subsequently proved to be an autograph work by a famous master by proving mistake or error?

Where both the seller and the buyer are mistaken as to the attribution of an artwork, the seller may, under certain circumstances, succeed in an action for rescission of the sale. Where, however, the seller could have discovered the true attribution of the artwork prior to the sale but did not do so because of a lack of due care or diligence, a court is unlikely to find that a mistake of fact has been made.

EXPORT AND IMPORT CONTROLS

Export controls

Are there any export controls for cultural property in your jurisdiction? What are the consequences of failing to comply with export controls?

With the limited exception of export restrictions applying to archaeological objects removed from Native American or federal lands, the United States does not have export controls for cultural property. The Native American Graves Protection and Repatriation Act prohibits the trafficking of Native American human remains and cultural items, imposing criminal penalties. The Archaeological Resources Protection Act similarly imposes criminal penalties for the trafficking in archaeological resources unlawfully removed from federal and Native American lands.

Law stated - 26 January 2023

Import controls

Other than in relation to endangered species, are there any import controls for cultural property in your jurisdiction? What are the consequences of failing to comply with import controls?

US import laws give US Immigration and Customs Enforcement and US Customs and Border Protection the authority to seize cultural property and art that are stolen or otherwise brought into the United States illegally. The persons involved in such violations may also be subject to civil and criminal penalties, including fines, probation, imprisonment or forfeiture of the artwork.

Law stated - 26 January 2023

Export and import tax

Does any liability to pay tax arise upon exporting or importing art, antiques or collectibles?

Original works of art, antiques and certain other collectibles are generally not subject to customs duty and are covered under Chapter 97 of the Harmonized Tariff Schedule . Duty does, however, apply to mass-produced reproductions or works of conventional craftsmanship of a commercial character, even if these articles are designed or created by artists.

Law stated - 26 January 2023

DIRECT AND INDIRECT TAXATION

Taxes

Outline the main types of tax liability arising from ownership and transfer of art, antiques and collectibles.

With few exceptions, when an artwork is sold in the United States, the buyer is required to pay a state sales tax at the time of the purchase. This general rule applies unless the buyer first takes possession of the artwork in a state that does not charge a sales tax, or if another exception applies (eg, where an artwork is purchased for resale by a dealer who has registered with the relevant state sales tax department). In addition, most states impose a use tax. This tax applies on account of an artwork's use within the state, in contrast to its sale within the state. Where an artwork is

purchased outside a certain state, the buyer may be responsible for paying a use tax once the artwork is brought into the state. In general, sales tax paid on a property will be credited against the owner's use tax liabilities. Nonetheless, a use tax analysis should be undertaken each time art is moved to another jurisdiction, even if merely for a loan.

Law stated - 26 January 2023

Tax exemptions

Outline any tax exemptions or special conditions applicable to art, antiques and collectibles.

An art collector who makes a charitable transfer to a tax-exempt institution may receive a tax benefit as a result of the donation. The availability and amount of the deduction generally hinges on a specific set of requirements, including the status of the organisation, the type of property donated, the use of the donated work and whether a qualified appraisal has been prepared. A collector who transfers an artwork during his or her lifetime may receive an income tax deduction that, depending on the circumstances of the transfer, may be equal to the fair market value of the artwork. Likewise, where the transfer is part of a bequest, the donation may provide the estate with a reduction in the estate tax that is owned by the collector's estate.

Law stated - 26 January 2023

BORROWING AGAINST ART

Types of security interest

In your jurisdiction what is the usual type of security interest taken against art, antiques and collectibles?

In most cases, a lender perfects its security interest in artwork by filing a UCC-1 financing statement – a legal notice filed by a creditor as a way to publicly declare its rights to a debtor's property. Attachment is a prerequisite to perfection and is achieved when: (1) the lender gives value; (2) the debtor has rights in the artwork or the power to transfer rights in the artwork to the lender; and (3) the lender has possession of the artwork or the debtor enters into a security agreement.

Law stated - 26 January 2023

Consumer loans

If the borrower borrowing against art assets in your jurisdiction qualifies as a consumer, does the loan automatically qualify as a consumer loan, and are there any exemptions allowing the lender to make a non-consumer loan to a private borrower?

This is not applicable in the United States.

Law stated - 26 January 2023

Register of security interests

Is there a public register where security interests over art, antiques or collectibles can be registered? What is the effect of registration? Is the security interest registered against the borrower or the art?

UCC-1 financing statements are registered listing the debtor's name and address, the creditor's name and address and the collateral. The financing statement is generally filed with the office of the secretary of state in the state where the debtor resides, which perfects the lender's security interest in the artwork. Perfecting the security interest allows the debtor to retain possession of the artwork while the loan is outstanding.

Law stated - 26 January 2023

Non-possessory security interests

Can the lender against art collateral perfect its security interest without taking physical possession of the art?

Yes, physical possession of the art collateral is not required by the secured creditor to perfect its security interest.

Law stated - 26 January 2023

Sale of collateral on default

If the borrower defaults on the loan, may the lender sell the collateral under the loan agreement, or must the lender seek permission from the courts?

The consequences of default, including the lender's rights and remedies, are determined by the contract between the borrower and lender. Pursuant to the Uniform Commercial Code (UCC), however, a secured creditor-lender can, upon default, take possession of the collateral on its own without breaching the peace or pursuant to judicial action. Once in possession of the collateral, the secured creditor may retain or sell the property. Any sale or dispossession of the collateral must be in compliance with the UCC's notice provisions and be commercially reasonable in every aspect, including as to method, manner, time, place and any other terms. The lender also has the option of filing a lawsuit on the debt to obtain a favourable judgment and to levy the debtor's property to satisfy the debt.

Law stated - 26 January 2023

Ranking of creditors

Does the lender with a valid and perfected first-priority security interest over the art collateral take precedence over all other creditors?

A lender with a valid and perfected first-priority security interest over the art collateral in most cases has priority over all other creditors, with some exceptions. For example, one who became a lien creditor before the security interest was perfected may have priority over the secured lender. Another secured creditor may have priority if it perfected its security interest before the secured lender. The rights of the secured lender are complex and differ based on the particular situation regarding the lender and creditor.

Law stated - 26 January 2023

INTELLECTUAL PROPERTY RIGHTS

Creator copyright

Does copyright vest automatically in the creator, or must the creator register copyright to benefit from protection?

Copyright generally vests in the creator once the work is fixed in a tangible medium of expression without the need for copyright registration. Registration, however, is a prerequisite to filing a lawsuit for copyright infringement. A copyright registration certificate may be presumptive evidence of ownership of a valid copyright. Further, for a copyright owner to be eligible for an award of statutory damages and attorneys' fees, the registration must have occurred before the copyright infringement or within three months after the first publication of that work.

Law stated - 26 January 2023

Copyright duration

What is the duration of copyright protection?

For works created on or after 1 January 1978, copyright protection extends from creation of the work and endures for a term consisting of the life of the author and 70 years after the author's death. For joint works, the term of copyright is the life of the last surviving author plus 70 years. For an anonymous work, a pseudonymous work or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever is shorter. The term of copyright for pre-1978 works is complex and depends on several factors. Thus, an attorney should be consulted to determine duration of the copyright for these works.

Law stated - 26 January 2023

Display without right holder's consent

Can an artwork protected by copyright be exhibited in public without the copyright owner's consent?

While the copyright owner has the exclusive right to display a work publicly, copyright law carves out a special limited exception (tied to the first sale doctrine) for the display of a copy of a work rightfully owned 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.

Law stated - 26 January 2023

Reproduction of copyright works in catalogues and adverts

Can artworks protected by copyright be reproduced in printed and digital museum catalogues or in advertisements for exhibitions without the copyright owner's consent?

An owner of copyrighted artwork (with some limitations, including the exception of a fair use) has the exclusive rights to reproduce the copyrighted work in copies and distribute copies of the copyrighted work. It is thus advisable and common practice that museums seek permission from the copyright owner in connection with the reproduction of images of the copyrighted work in the museum's publications and marketing for exhibitions.

Law stated - 26 January 2023

Copyright in public artworks

Are public artworks protected by copyright?

Public artwork, including 'street art', is afforded the same copyright protection as other artwork that is fixed in a

tangible medium of expression.

Law stated - 26 January 2023

Artist's resale right

Does the artist's resale right apply?

Although efforts have been made over several years to enact federal legislation providing for resale royalty rights, the United States does not recognise resale royalty rights. Under US copyright law's first sale doctrine, once an original copyright-protected work of authorship is sold, the buyer and all subsequent purchasers are free to resell that work (but not any underlying copyright rights in the work) without having to provide any compensation to the original artist or author. Artists may contract for resale royalty rights, which has recently become a more popular practice. NFTs configured through 'smart contracts', for example, may automatically pay out royalties to the original artist with every future sale of the NFT on a specific platform.

Law stated - 26 January 2023

Moral rights

What are the moral rights for visual artists? Can they be waived or assigned?

The United States acceded to the Berne Convention for the Protection of Literary and Artistic Works, an international treaty that governs and protects moral rights (among others), in 1988. In 1990, Congress enacted the Visual Artists Rights Act of 1990 (VARA).

VARA offers an artist of a 'work of visual art' the right of attribution – specifically, the right to:

- claim authorship of that work;
- prevent the use of his or her name as the author of any work of visual art that he or she did not create; and
- prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation or other modification of the work that would be prejudicial to his or her honour or reputation.

VARA also provides the right of integrity, specifically the right to:

- prevent any intentional distortion, mutilation or other modification of the work that would be prejudicial to the artist's honour or reputation; and
- prevent any destruction of a work of recognised stature, and any intentional or grossly negligent destruction of that work.

VARA rights extend for the life of the author for works created on or after its effective date, 1 June 1991, and for works created before 1 June 1991 to which the author still holds title on the same date, the life of the author plus 70 years. For joint works (two or more authors), VARA rights endure for the life of the last surviving author.

VARA rights may not be transferred but may be waived by a written instrument signed by the author.

Law stated - 26 January 2023

AGENCY

Accounting to the principal

Does the law require the agent to account to the principal for any commission or other compensation received by the agent while conducting the principal's business?

The law of agency varies from state to state. As a general matter, a fiduciary relationship exists between an agent and a principal, with the agent owing a duty to act loyally for the principal's benefit with respect to actions taken within the scope of the agency. Pursuant to this duty, an agent is required to make a full and fair disclosure to the principal of information that is material to the agent's duties. The agent also has a duty not to acquire a material benefit from a third party that results from the agent's position. Thus, absent an agreement to the contrary, an agent would be required to account to the principal for any commission received.

Law stated - 26 January 2023

Disclosed agent commission

Does disclosure to the principal that the agent will receive a commission allow the agent to keep the commission unless the principal objects?

In general, an agent may keep a commission where, acting fairly and in good faith, the agent has obtained the principal's consent based on a full and fair disclosure of material facts. Nonetheless, a principal and agent are permitted to modify the duties of the agent to the principal, even allowing the principal to consent to conduct that would otherwise result in a breach of the agent's fiduciary duties. Thus, an agent and principal may enter an agreement that allows the agent to withhold certain information, such as the amount of a commission or other compensation.

Law stated - 26 January 2023

Undisclosed agent commission

If a third party pays a commission to an agent that is not disclosed to the principal, can the principal claim the commission from the third party?

If an agent receives a commission that is outside the bounds of his or her agreement with the principal, the principal is generally permitted to reclaim the ill-gotten commission from the agent. Absent a fiduciary relationship between the principal and the third party, however, the principal may not have sufficient grounds for suing the third party for the unauthorised payment.

Law stated - 26 January 2023

CONSIGNING ITEMS

Protection of interests in consigned works

How can consignors of artworks to dealers protect their interest in the artwork if the dealer goes into liquidation?

When a gallery files for bankruptcy, under the Uniform Commercial Code (UCC) and bankruptcy law, repaying creditors may supersede returning the consigned artwork to its owner if the work is not properly protected. Consignors can

protect their artworks by perfecting their security interest in the artwork and filing a UCC-1 financing statement – a legal notice filed by a creditor as a way to publicly declare its rights to seize property of a debtor, in this case the gallery, which may have defaulted on its loans. The financing statement is generally filed with the office of the secretary of state in the state where the debtor resides, which perfects the lender's security interest in the artwork. Many states also have enacted legislation to protect artists (although not collectors) who consign their works, and they receive priority of ownership ahead of a creditor's claim to the artwork as an asset of the gallery.

Law stated - 26 January 2023

AUCTIONS

Regulation

Are auctions of art, antiques or collectibles subject to specific regulation in your jurisdiction?

Laws regulating auctions are generally governed by state law. Recently, in what was considered a stealthy act, New York City eliminated long-standing regulations governing the auction industry on 15 June 2022. Auctioneers will no longer have to obtain a licence to operate. Moreover, auctioneers will no longer be required to make disclosures in their written consignment contracts, such as the amount of the auctioneers' commissions and charges. Nor in their auction catalogues are they required to disclose that a lot being sold is subject to a reserve price (which previously could not be above the low estimate) or that the auction house had a financial interest in the sale. The provisions designed to oversee 'chandelier bidding', whereby auctioneers invent fictitious bids to stir interest, were also repealed, and auctioneers are no longer prohibited from taking chandelier bids above the reserve price. As the large auction houses have not given any indication that they intend to change their practices as a result of the repeal, its effect on the industry is currently unclear.

Some sections of the Uniform Commercial Code also apply specifically to auction sales, including provisions related to bidding.

Law stated - 26 January 2023

May auctioneers in your country sell art, antiques or collectibles privately; offer advances or loans against art, antiques or collectibles; and offer auction guarantees?

Auction houses may sell art, antiques or collectibles privately, and auction houses have increasingly relied on such sales. Auctioneers may also offer advances or loans against art, which are usually secured by the consigned art as collateral. Auction guarantees are also permitted and commonplace.

Law stated - 26 January 2023

SPOILIATION DURING THE NAZI ERA

Claims to Nazi-looted art

In what circumstances would the heirs of the party wrongly dispossessed typically prevail over the current possessor, if a court in your country accepted jurisdiction and applied its own law to a claim to art lost during the Nazi era?

In the United States, no one, not even a good-faith purchaser for value, can obtain good title to stolen property. Thus, in a civil claim for the return of art misappropriated by the Nazis, the heirs of the wrongly dispossessed party may prevail where the heirs can show that they possess a superior right of possession to the artwork, and that they are entitled to

the immediate possession of the artwork. One of the main hurdles in Nazi-looted art actions, however, has been the use of defences such as the statute of limitations to prevent a case from reaching the merits. In 2016, a special statute of limitations was enacted in an effort to address this issue, establishing a uniform federal statute of limitations for recovery cases involving art lost during the Nazi era. Under the terms of the Holocaust Expropriated Art Recovery Act of 2016, a six-year limitation period applies, which begins to run upon the actual discovery by the claimant of the identity and location of the artwork and the claimant's possessory interest in that property. Nonetheless, other technical defences often stymie claims to Nazi-looted art in the United States, including the defence of laches.

Law stated - 26 January 2023

Is there an ad hoc body set up to hear claims to Nazi-looted art?

Unlike in many European countries, there is no restitution commission or other ad hoc body that has been established in the United States for hearing claims to artworks that were lost during the Nazi era.

Law stated - 26 January 2023

LENDING TO MUSEUMS

Responsibility for insurance

Who is responsible for insuring art, antiques or collectibles loaned to a public museum in your jurisdiction?

The loan agreement between the lender and the public museum should describe the insurance coverage for the artwork, including the work's insurance value. Typically, the borrowing museum will insure the work. International loan agreements should also take into account whether any government insurance will be provided. In the United States, if the exhibition is insured through the Arts and Artifacts Indemnity Act of 1975, the US government will pay insurance claims in addition to the insurance coverage provided by the borrowing museum. This insurance applies to artworks loaned to US exhibitions, where the artworks are of educational, cultural or scientific value, and are certified by the Secretary of State as being in the national interest.

Law stated - 26 January 2023

Immunity from seizure

Are artworks, antiques or collectibles loaned to a public museum in your country immune from seizure?

The Immunity from Judicial Seizure Statute protects certain objects from seizure by a US court. Pursuant to the federal statute, any not-for-profit museum, cultural or educational institution may apply to the US Department of State for a determination that art to be loaned from abroad for exhibition is culturally significant and that the exhibition is in the national interest. If the application is granted, the art is immunised from judicial seizure by the federal government.

Unlike with individual collectors, where the lender is a cultural institution owned by a foreign state, there are added issues to consider. Under the Foreign Sovereign Immunities Act of 1976 (FSIA), a foreign state and its agencies and instrumentalities are immune from suit in US courts unless certain exceptions apply. The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016 (FCEJICA) added section 1605(h) to the FSIA, which made clear that activities of a foreign state associated with the temporary exhibition or display of art determined to be immune from seizure shall not fall under an exception to the FSIA. The FCEJICA itself, however, contains exceptions, allowing for

jurisdiction over claims based on Nazi-era losses or based on other coercive confiscation occurring after 1900 from members of a targeted group.

Law stated - 26 January 2023

CULTURAL PATRIMONY

National treasures

Is there a list of national treasures?

The United States does not maintain a list of national treasures.

Law stated - 26 January 2023

Right of pre-emption

If the state is interested in buying an artwork for the public collections, does it have a right of pre-emption?

There is no federal right of pre-emption under US law. Moreover, in the United States, the vast majority of museums are privately owned or are owned by state and municipal authorities; very few are national museums.

Law stated - 26 January 2023

Automatic vesting in the state

In what circumstances does ownership in cultural property automatically vest in the state?

Ownership of cultural property automatically vests in the state only where such property is found on federal or state land. In addition, the Native American Graves Protection and Repatriation Act provides that any Native American or Native Hawaiian human remains, funerary objects, sacred objects or objects of cultural patrimony found in or on federal or tribal lands vest in the affiliated Native American or Native Hawaiian tribe or, in the case of human remains and funerary objects, in the lineal descendant of the deceased individual.

Law stated - 26 January 2023

Illegally exported property claimed by foreign states

How can a foreign state reclaim in your jurisdiction cultural property illegally exported from its territory?

In 1983, the United States enacted the Cultural Property Implementation Act (CPIA), which implements the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the world's first multilateral treaty to address the illicit trade in cultural property. Pursuant to the CPIA, the United States has entered into special bilateral agreements with a number of countries, including Albania, Algeria, Belize, Bolivia, Bulgaria, Cambodia, Chile, China, Colombia, Costa Rica, Cyprus, Ecuador, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Jordan, Libya, Mali, Morocco, Nigeria, Peru and Turkey. These bilateral agreements allow the United States to enforce those countries' export laws and give the government the power to seize and return undocumented archaeological or ethnological objects that were imported into the United States. Significantly, the CPIA allows the United States to do so even without requiring proof of ownership pursuant to those countries' patrimony

laws.

The CPIA also provides for emergency implementation of import restrictions without the negotiation of a bilateral agreement for objects that are shown to be in particular jeopardy. The United States currently imposes emergency restrictions on archaeological and ethnological materials from Afghanistan, Iraq, Syria and Yemen. In addition, the CPIA bars the importation of any cultural object that is documented as belonging to a museum or to a public or religious institution located in a country that is a party to the UNESCO Convention.

Law stated - 26 January 2023

NON-FUNGIBLE TOKENS

Regulation and case law

How are non-fungible tokens (NFTs) regulated in your jurisdiction? Is there any case law on NFTs in your jurisdiction?

There are currently no specific government regulations in place specifically addressing non-fungible tokens (NFTs), and whether the US Securities and Exchange Commission (SEC) will officially deem NFTs to be securities subject to its rules is yet to be determined. While it is likely that a single work of digital art or collectible will not be considered a security, an NFT sold in groups or fractionalised (ie, sold in shares) may have the characteristics of an investment contract, making compliance with the applicable SEC rules necessary. The SEC has started to look into whether certain NFTs are being used as a means to raise traditional securities revenue and has served subpoenas demanding information about token offerings in connection with its investigations.

A number of lawsuits relating to NFTs have also been filed. Among the most notable are the following.

- *Roc-A-Fella Records Inc v Damon Dash*, No. 1:21-cv-05411 (S.D.N.Y.) – In June 2021, Roc-A Fella Records Inc brought suit in a New York federal court against one of its shareholders, Damon Dash alleging that Dash was wrongfully attempting to auction off the copyright to musical artist Jay-Z's Reasonable Doubt album through an NFT. A New York federal court issued a temporary restraining order, halting the auctioning off of the NFT. The case ultimately settled out of court.
- *Miramax v Tarantino et al*, No. 2:21-cv-08979 (C.D. Cal.) – In November 2021, Miramax, LLC filed suit in a California federal court against filmmaker Quentin Tarantino for copyright infringement, trademark infringement, breach of contract and unfair competition based on his plan to auction off 'exclusive scenes' from the movie Pulp Fiction and related handwritten scripts in the form of NFTs. The case settled out of court.
- *Hermès International et al v Rothschild*, No. 1:22-cv-00384 (S.D.N.Y.) – In January 2022, Hermès International and Hermès of Paris, Inc, filed suit in a New York federal court against Mason Rothschild, a digital artist, for trademark infringement related to his proposed sale of MetaBirkins, a collection of NFTs linked to digital images of faux-fur-covered versions of the luxury Birkin handbags of plaintiffs. Hermès's claim survived a motion to dismiss. While the Court agreed with Rothschild that it should apply the First Amendment test under *Rogers v. Grimaldi*, 695 F. Supp. 112 (S.D. N.Y. 1988), judgment *aff'd*, 875 F.2d 994 (2d Cir. 1989), which weighs the artistic relevance and intentional misleadingness of an allegedly infringing mark, it held that Hermès made sufficient factual allegations to avoid dismissal. *Hermes Int'l v Rothschild*, No. 22-CV-384 (JSR), 2022 WL 1564597 (S.D.N.Y. May 18, 2022). Rothschild's motion for interlocutory appeal on the Court's motion to dismiss order was also denied. *Hermes Int'l v Rothschild*, 590 F. Supp. 3d 647, 657 (S.D.N.Y. 2022).
- *Nike, Inc v StockX, LLC*, No. 1:22-cv-00983 (S.D.N.Y.) – In February 2022, Nike, Inc brought a trademark suit in a New York federal court against StockX, LLC, sneaker resale marketplace, in a New York federal court, alleging that StockX infringed Nike's trademarks by selling NFTs associated with limited-edition Nikes in StockX's custody and linked to images of the sneakers.

- *Yuga Labs, Inc v Ripps et al*, No. 2:22-cv-04355 (C.D. Cal.) – In June 2022, Yuga Labs, a blockchain technology company and creator of the immensely successful Bored Ape Yacht Club (BAYC) NFT collection, filed a trademark infringement lawsuit in a California federal court against Ryder Ripps, and others, based on the creation of their own NFT collection, known as the Ryder Ripps Bored Ape Yacht Club (RR/BAYC), which pointed to the same online digital images as the BAYC collection but used verifiably unique entries on the Ethereum blockchain. In December 2022, the Court denied the defendants' motion to dismiss (*Yuga Labs, Inc v Ripps*, No. CV 22-4355-JFW(JEMX), 2022 WL 18024480 (C.D. Cal. Jan. 16, 2022)), including its California anti-SLAPP motion, ruling that the *Rogers v Grimaldi* test (see above) did not apply because the RR/BAYC collection did not express an idea or point of view but merely pointed to the same digital images of the BAYC collection; was not artistically relevant; and its use of the BAYC mark was misleading. The Court also rejected the defendants' nominative fair use argument because defendants were not using the BAYC marks to sell Yuga's BAYC NFTs but to sell their competing ones. Defendants thereafter filed a notice of appeal with the Ninth Circuit Court of Appeals.

Law stated - 26 January 2023

ANTI-MONEY LAUNDERING

Compliance

What are the anti-money laundering compliance obligations placed on the art trade?

The US art market (as a whole) is not required by law to maintain anti-money laundering (AML) policies. Although the large auction houses (Christie's, Sotheby's, Philips and Bonhams) do have written AML policies in place, on average, private art dealers do not. In July 2020, the US Senate's Permanent Subcommittee on Investigations released a report documenting the lack of transparency in the US art market and recommending, among other things, that Congress amend the Bank Secrecy Act (BSA) to add art to its list of industries that must comply with its requirements. The BSA, which is the primary anti-money laundering law in the United States, applies to dealers in precious metals, stones and jewels, as well as sellers of automobiles, planes and boats, casinos, real estate professionals, travel agencies and pawnshops – but not generally to dealers in art. On 1 January 2021, Congress passed the National Defence Authorization Act for 2021, which includes a new law, the Anti-Money Laundering Act of 2020 (AMLA), requiring individuals engaged in the antiquities trade to comply with the requirements of the BSA. The BSA includes requirements for monitoring and reporting suspicious activity to federal authorities, establishing and maintaining BSA and AML programmes, and identifying and conducting due diligence on customers. The law also requires the US Treasury department, specifically, the Financial Crimes Enforcement Network (FinCEN), to implement regulations and, in coordination with other government agencies, study and report on the facilitation of money laundering and financing of terrorism through the art market. On 23 September 2021, FinCEN issued an advance notice of proposed rulemaking (ANPRM) to solicit public comment on the implementation of AMLA regarding the trade in antiquities. On 4 February 2022, the US Treasury department released the Study of the Facilitation of Money Laundering and Terror Finance Through the Trade in Works of Art, which examined the high-value art market and its participants that may present money laundering and terrorist financing risks and identified efforts that government agencies, regulators and market participants could undertake to further mitigate the laundering of illicit proceeds through the high-value art market in the United States. The Study indicates that anti-money laundering regulation of the art market (as a whole) is not coming soon.

Law stated - 26 January 2023

ENDANGERED SPECIES

CITES

Is your jurisdiction a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

The United States is a party to CITES. The United States Fish and Wildlife Service applies CITES provisions through the Endangered Species Act (ESA) and is charged with issuing permits for the import and export of species that are protected by CITES and the ESA. A species may require a permit under CITES or the ESA, or both.

Under CITES, a species is listed at one of three levels of protection in appendices that have different permit requirements for import and export. Appendix I covers species most at-risk owing to international trade, effectively banning commercial international trade. Appendix II include species that, although not yet at risk of extinction, may become extinct without trade restrictions. Appendix III species are those for which a country has requested the assistance of parties to CITES in controlling international trade.

The ESA prohibits interstate or international trade of endangered species, except under a federal permit. The ESA also protects 'threatened' species.

Law stated - 26 January 2023

Is the sale, import or export of pre-CITES endangered species subject to a licence?

If a specimen of a CITES-listed species was obtained prior to the CITES listing date of that species –collected from the wild or held in captivity – it may be granted a pre-Convention certificate that will allow for the specimen to be exported. Documentation, including a signed statement, or other evidence may be required to show that the specimen was obtained or manufactured prior to the CITES listing date. CITES imposes no controls on interstate or intrastate shipments.

Specimens of ESA-listed species held in captivity or in a controlled environment on or before 28 December 1973 or the date the species was listed under the ESA, whichever is later, are exempt from the ESA prohibitions against import or export or violation of any regulation pertaining to endangered or threatened species promulgated under the ESA, provided such holding and any subsequent holding or use of the specimen was not in the course of a commercial activity. An affidavit and supporting material documenting pre-ESA status must accompany the shipment of listed species. The pre-ESA exemption does not apply to wildlife, including parts and products, offered for sale or other activities prohibited under the statute. The ESA does not impose controls on intrastate commerce; however, some states have laws regulating activity involved with protected species.

Law stated - 26 January 2023

Is the sale, import or export of post-CITES worked or antique endangered species authorised? On what conditions?

The import, export and interstate sale of ESA-listed species is prohibited without an ESA permit, except with respect to items that are 'antique'. An item is antique if it is at least 100 years old, is comprised in whole or in part of an ESA-listed species, has not been repaired or modified with any such species after 27 December 1973, and is being or was imported through a port designated for the import of ESA antiques. Items imported prior to 22 September 1982, and items created in the United States and never imported do not need to comply with the designated port requirement. An

importer or exporter of ESA antiques must provide documented evidence of species identification and age to demonstrate that the article qualifies as an ESA antique, which may include a qualified appraisal, documents that provide detailed provenance or scientific testing, or a combination of these. The ESA does not impose controls on intrastate commerce; however, some states have laws regulating activity involved with protected species.

Law stated - 26 January 2023

Specific endangered animal products

Are there any special rules for works of art made of elephant ivory, rhino horn or other specific endangered animal products?

The US federal government has implemented special rules for elephant ivory items. Different rules apply to African elephant ivory than Asian elephant ivory. On 6 July 2016, the United States instituted a near-total ban on commercial trade in African elephant ivory. The requirements for the import of African elephant ivory are stricter than those for Asian elephant ivory; however, with respect to interstate and foreign commerce, the requirements are stricter for Asian elephant ivory. More information about the specific requirements is available [here](#). Some states also have laws prohibiting or restricting the sale of elephant ivory and rhino horn. The United States has also enacted the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act (which protects endangered birds).

Law stated - 26 January 2023

CONSUMER PROTECTION

Cancelling purchases

In what circumstances may consumers cancel the sale of art, antiques or collectibles?

Federal Trade Commission regulations and state laws provide for special protections concerning 'door-to-door' sales, which permit a consumer to cancel a sale within a few days of the transaction, where the offer for sale and agreement to purchase takes place outside the seller's place of business.

Law stated - 26 January 2023

Duties of businesses selling to consumers

Are there any other obligations for art businesses selling to consumers?

In addition to door-to-door regulations, the Magnuson–Moss Warranty – Federal Trade Commission Improvement Act is a federal law that regulates written warranties with respect to the sale of consumer products, including artworks, which are distributed in interstate commerce or that otherwise affect interstate commerce. The Act requires sellers to provide consumers with detailed information about warranty coverage for such products, including whether the warranty is full or limited. The Act applies to sales that are conducted at the seller's place of business, as well as to sales made through the mail or by telephone. More information about the Act is available [here](#).

Law stated - 26 January 2023

REGULATION

Art market regulator

Is there a specific regulatory body overseeing the art market or certain business activities carried out within the art market in your jurisdiction?

There is no specific regulatory body overseeing the art market in the United States that is equivalent to, for example, the Securities and Exchange Commission (SEC), which regulates the US securities market. Many states have, however, enacted specific laws that regulate certain business activities, such as auction sales.

In addition, under certain circumstances, the SEC may deem non-fungible tokens (NFTs) to be securities subject to its rules – though this is yet to be determined. While it is unlikely that a single work of digital art or collectible will be considered a security, an NFT sold in groups or fractionalised (ie, sold in shares) may have the characteristics of an investment contract, making compliance with the applicable SEC rules necessary.

Law stated - 26 January 2023

Other regulators

What other forms of regulation are professional art market participants in your jurisdiction subject to?

There are a variety of regulations that indirectly govern art transactions and the art market participants involved. For example, when selling art to consumers, art dealers are prohibited from using unfair or deceptive acts or practices pursuant to the Federal Trade Commission Act. In the past, the Federal Trade Commission has brought suit against sellers who violated the terms of the Act, seeking injunctive relief and restitution for the consumers damaged by the unfair or deceptive acts. Individual states have also enacted regulations that affect art market transactions.

Law stated - 26 January 2023

UPDATE AND TRENDS

Key developments of the past year

Are there any other current developments or emerging trends that should be noted?

Law stated - 26 January 2023

Jurisdictions

	China	Jingtian & Gongcheng
	France	UGGC Avocats
	Germany	SKW Schwarz
	Greece	ArtSecure
	Hong Kong	Angus Forsyth & Co
	Italy	CBM & Partners – Studio Legale
	Mexico	Galicia Abogados SC
	Switzerland	Borel & Barbey
	United Kingdom - England & Wales	Constantine Cannon LLP
	USA	Kaye Spiegler PLLC