

## **Art as Objects of Desire and Collateral**

### **Issues of Title and Provenance**

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Works of fine art and antiquities are a unique class of tangible assets, whose value consists almost entirely of intangible attributes. I have, for example, encountered a situation where a work of art executed in solid gold was appraised as a work of art at less than the value of the constituent gold. Valuation, the province of connoisseurs, appraisers and auction houses, is not the subject of this brief note, however. Rather, this is a review of basic terms and concepts that business and commercial attorneys may encounter should a client be attempting to buy or sell artworks or pledge works of art as collateral for a loan, and the current status of title insurance for works of art.

The marketplace for art and antiquities is an arena populated with dealers, auction houses, private collectors, and brokers. Disputes over authenticity and value involve expert opinion and whether warranties of the same were given. Individual and institutional buyers protect themselves against the risk that a work is misrepresented or misidentified, or an excessive price, by acquiring knowledge of an artist's work and the market for that work, hiring the appropriate expert, including appraisers, and less frequently, by engaging attorneys to draft purchase agreements with appropriate warranties. Warranties of value are rare, except in the context of some dealers who may guaranty that they will repurchase a piece under certain conditions or credit a buyer with the purchase price of a returned piece, against the price of a different piece.

Until recently, insurance was available for the standard risks of theft or accidental damage, but not for title. This is not to say that examining a seller's good title was not part of standard due diligence. Establishing good title to a work of art was and is part of an appraisal, in that (1) an appraiser will normally issue an appraisal report only to the owner, and (2) an appraiser will also examine provenance, or the history of ownership of a work of art, as part of the process of determining the value of the work, since the documentation of ownership is an element of establishing authenticity, condition, and other factors that affect value. An appraisal by a competent professional remains an important document. However, a buyer has limited recourse for an appraisal which reaches incorrect conclusions.

Rapidly inflating prices, the continuing saga of Nazi restitution claims, international treaties (both multi-lateral and bilateral) requiring the return of a nation's cultural artifacts which are illegally exported, the increasing number of stolen artworks, cases in which established dealers sold works they did not own or had already sold, and the desire of buyers (whether individuals or investment groups) to protect the value of their purchase may have fueled the appearance of title insurance in 2006, when ARIS Title Insurance Corp. first offered true title insurance for works of art. During the recent recession and the collapse of conventional credit markets, anecdotal evidence suggests that a need to pledge additional security to prospective

lenders has led to borrowers offering works of art, or entire collections, as collateral.<sup>2</sup>

There is an increasing possibility that attorneys representing lenders or borrowers will encounter situations in which works of art will be presented as potential collateral for loans. Alternatively, a client who is a potential buyer may consider the work of art as both an object of beauty and desire and as an asset contributing to their net worth. In all these instances, an attorney should have a familiarity with the ways in which a client can protect their investment.

### Title Insurance, Provenance and Due Diligence

Title insurance for works of art has only been available since 2006, when ARIS began offering policies in New York State. <http://www.aris-corporation.com>. Although ARIS remains the only company offering pure title insurance, some other insurance companies have begun insuring some defense costs if title is challenged, as part of comprehensive risk policies, providing due diligence services, or advising clients on due diligence issues. (Chubb, AXA, and Fireman's Fund may offer a "due diligence" service. AIG's Private Client Group was advising clients on due diligence, and may still be doing so.) Obtaining title insurance for works of art has some issues in common with conventional real estate title insurance. Ordinary security interests, liens and encumbrances remain the most commonly identified exception, according to Judith L. Pearson, president of ARIS. Theft and export restrictions, while more sensational and unique to art and antiquities, comprise a much smaller portion of the barriers to passing, and insuring, good title. The art world does have unique rights, such as the trust imposed in Missouri on amounts paid to an art dealer for a work deemed to be consigned.<sup>3</sup> This statutory trust may or may not prevent transfer of good title, but it will not show up in an ordinary UCC search.

Because of the infrequency with which art works are used as collateral, and the fact that title insurance policies are new products and less uniform than traditional title insurance, it is particularly important to understand what information a company requires and what a policy does and does not cover.

The lender and title insurance company will require copies of sale agreement, bill of sale, and any provenance documents from owner. ARIS requires that the owner turn over all documentation, but does not create exceptions for what the insured "should have known," only what they do know. The lender and title insurance company will be seeking confirmation that the work or art or antiquity has not been stolen or illegally exported, and is thus not subject to the claims of former owners or the country of origin. On a more mundane level, they will be seeking confirmation that there are no liens or other encumbrances.

With private sales, the documentation may be surprisingly sparse. Compared to sales involving equal amounts of money in other areas, transactions between collectors in the art world rely on the reputation of the parties, the opinions and reports of experts hired by the buyer, and the buyer's faith in their own judgment. Wealthy individuals who would not purchase a case of paper clips in their own business without a purchase order and a detailed written warranty may well spend hundreds of thousands of dollars to purchase a painting in which the only documentation is a one page bill of sale. Sales may be concluded in which both the seller and the

buyer are anonymous to each other, with only the dealer, broker or attorney who have acted as their agent knowing the identity of the seller or buyer. Sale agreements may place specific restrictions on when the identity of the seller or buyer may be disclosed.

The lender or insurance company may require that additional research and documentation be provided by the borrower, or, for a separate price or as part of the cost of title insurance, conduct provenance research. A client may look to their attorney for guidance in dealing with a title insurance company, lender, or company providing independent research. It may be anticipated that if there is a gap in the provenance which cannot be filled in, a title insurance company may write an exception into the policy which would reduce the value of the insurance, or require that the borrower obtain the missing information. ARIS, however, reports that their premium (from 1-4% of the sale price) includes research on provenance to support the issuance of title insurance, and that in only one instance have they had to go beyond their own resources in order to satisfy their underwriting requirements as to any gap in the provenance of a work of art.

Since “provenance” is a term used in connection with every sale of art works, an attorney assisting their client in this area should know its basic meaning and use. The literal, dictionary definition of provenance is that the word is a noun, from the French, *f*, meaning origin, source, come from, originate/result/stem from or be due to. In the world of art transactions, the literal meaning of the word is the origin or source of the work. Provenance is often defined narrowly as the history of ownership. It means that, and more.

Provenance encompasses the origin and history of a work of art - who made it, who has owned it, and where it has been. “Good provenance” implies a record that supports the “bona fides” of the piece, both as to authenticity, a clear chain of title, and value. A “lack of provenance” implies suspicions as to the origin or authenticity of a work, even that it may have been stolen or illegally exported. What constitutes good provenance varies. A nineteenth century American Hudson River School painting can be sold or accepted as collateral, or insured for good title, with fair confidence even with some gaps in its history due to owners who wanted to remain anonymous. A Gustav Klimt which disappears from records in Austria in 1940 and reappears in 1955 is highly suspect. Pre-Columbian pottery from Mexico originally sold in 1965 without any excavation record may be a safe purchase. If the same pottery first appears on the market in 1973 with no excavation record or export license, a buyer today could receive unwanted attention from U.S. and Mexican authorities and requests for restitution. At the other end of the spectrum would be a post-war American painting by a major living artist, sold by the artist to the previous owner.

I advise a client to seek as much documentation as possible, not only to protect themselves as a buyer or seller, but to preserve information about the object. The cultural meaning and value of a work of art is enhanced by knowledge of its creation, ownership and “use” over time. It is a bonus that the monetary value of a piece of art is normally increased by the same information.

The “sources” of provenance are varied. They include:

- **Sales documents** such as invoices, purchase agreements, advertisements, condition reports, appraisals, shipping records, auction records, and correspondence.
- **Records of attempted sales** such as auction records, and correspondence with potential buyers. (Attempted sales can be missed if you request only records of completed sales.)
- **Owners documents** such as appraisals, insurance valuations, photographs which include the object, exhibition records, and letters referring to the object.
- **Artist's records**, whether directly from the artist or from the artist's estate or heirs, such as production records, sale records, correspondence, and exhibition records.
- **Independent authentication documents** such as certificates from the artist's estate or heirs, or from a trust, foundation or board established by the heirs to authenticate the artist's works. You can purchase reports from organizations tracking stolen art or from organizations keeping records of art sales. A scholar who has published the only study of an artist or made a single artist the focus of her career may be the sole authority whose opinion on authenticity is definitive. A "catalogue raisonné" is a scholarly compilation of an artist's entire body of work. It may be published by a trust, foundation or board dedicated to that artist, or by a scholar or scholars who have made the artist a focus of their career. A catalogue raisonné may be the beginning point for determining the authenticity and provenance of artwork.
- **Public documents** such as newspaper stories, museum catalogs and records, exhibition records, scholarly articles, export permits, law suits, archaeological excavation permits and records, and registries such as the National Stolen Art File maintained by the FBI. Admittedly, some of these "public" documents are easier to obtain than others. Searches of the FBI registry must be made through a law enforcement agency. Interpol, however, offers a public subscription database of stolen art plus a CD listing about 28,000 stolen works of art and cultural property.
- **Private registries and research services** collect information on stolen art and provide services to assure potential buyers that a work of art has not been stolen or illegally exported. The International Foundation for Art Research (IFAR) publishes an online stolen art alert. [http://www.ifar.org/stolen\\_art\\_alert.php](http://www.ifar.org/stolen_art_alert.php) The Art Loss Register accepts reports of stolen art, maintains a database of stolen artworks, registers works of art for owners, and provides investigative services and reports on whether a work has been lost. <http://www.artloss.com>.

Title insurance policies, or insurance providing some elements of title insurance, may differ on the following points:

- The period covered. Does the premium cover the owner for as long as the work is owned, or are annual premiums required?

-Provenance and due diligence research. Does the insurance company offer or require that it perform additional provenance and due diligence research? Is this research part of the premium quoted or a separately priced service?

-Are defense costs provided on top of the quoted policy limit, or deducted from the policy limit?

-What is the premium and when will the premium be quoted? ARIS reports that their premium ranges from 1% to 4% of the value of the work, and that they insure works with a value as low as \$10,000.00 to art valued in the many millions of dollars.

-What gaps in provenance will be acceptable? What steps must be taken to clear liens?

-What types of exceptions are typical? ARIS reports that 95% of their policies contain no exceptions.

### Statutes of Limitation and Equitable Defenses to Ownership Claims

The length of time during which an owner's title may be challenged is likely to affect the decision of a potential buyer whether to purchase title insurance or other insurance covering some of the risks (such as defense costs), or to engage in more conventional due diligence research prior to making a purchase. The period in which title is open to challenge may also play a part in the decision of a potential lender whether to require title insurance.

In the United States, common law and state statutes (at least in their UCC) provide that a thief does not acquire title, and cannot pass good title. Being a bona fide purchaser for value is of no value.<sup>4</sup> However, that principle has not been the end of every case. The equitable defense of laches (in which the diligence of the owner in seeking out the location of the stolen artwork is an issue), and at times even statutes of limitation, have served to divest the original owner of title, even when a work was stolen.<sup>5</sup> In some other countries, there may even be a principle similar to adverse possession after which a good faith purchaser from a thief acquires good title (6 years in Great Britain, 30 years in France<sup>6</sup>) Given the international nature of art sales, an attorney would be well advised to consider whether the law of another country will be applied under a state's choice of law principles. (See, for example, the New York case cited in note 4.)

On the flip side, legislation can extend the period in which an original owner can recover possession, such as in California.<sup>7</sup> In the United States, there has been an evolution of case law principles under which courts have both extended the period of time in which title can be challenged, favoring the original owner, and recognized the affirmative defense of laches, requiring that the original owners demonstrate reasonable continuing diligence in attempting to locate the stolen art. The case law and statutes vary substantially between states, with New York and California favoring the original owner most heavily.<sup>8</sup> However, even in Missouri, one of the states in which I practice, a court of appeals recognized an accrual rule in 1999 in which a chain of indemnity claims arising from the theft of a tractor nineteen years previously were found to be timely because the claims did not accrue until demand was made to honor the warranty of title.

*Oliver v. Blackwell v. Adams v. Nunley*, 2 S.W. 3d 160 (Mo.Ct.App.S.D. 1999). So long as an individual in that long chain of ownership brought a claim “upstream” within four years of demand being made upon them (the statute of limitations under UCC 2-275), their claim was timely brought. The same “accrual” theory could be applied to the sale of works of art, whether governed by the UCC or in applying statutes of limitation for general contractual claims.

### Insurance or Due Diligence?

Title insurance covers chain of title risks (theft, illegal import or export) and classic title risks (security interests, creditor liens, and authority to sell). In the past, buyers and the rare lender depended on appraisals and independent research to establish provenance and value, and when provided, relied on warranties of good title. Title insurance, while a valuable “asset” in itself, does not purport to cover risks of misidentification or forgery, much less changes in scholarly opinion and other factors that affect value. Some individuals advising collectors continue to recommend that a buyer invest in expert due diligence, rather than paying a premium for title insurance. Other collection management and financial advisors foresee a day when title insurance for artworks will become standard practice. As even this brief survey should show, an attorney whose client is requesting even just a sales agreement or bill of sale, should familiarize themselves with the issues of provenance, title, and due diligence described above.

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2. “That Old Master? It’s at the Pawnshop,” Alan Salkin, *The New York Times*, February 23, 2009; “Art in the Recession - The issues involved in using works of art to secure loans,” Philip Davis and Graham Ludlam, *The Art Newspaper*, No. 202, May 2009.

3. See for example, R.S.Mo. 407.904, Consignment, effect, which provides that:

“A consignment of a work of fine art shall result in all of the following:

(1) The art dealer, after receipt of the work of fine art, shall constitute an agent of the artist for the purpose of sale or exhibition of the consigned work of fine art within the state of Missouri;

(2) The work of fine art shall constitute property held in trust by the consignee for the benefit of the artist who is the consignor and shall not be subject to claim by a creditor of the consignee;

(3) The proceeds from the sale of the work of fine art shall constitute funds held in trust by the consignee for the benefit of the artist who is the consignor, and such proceeds shall first be applied to pay any balance due to the artist who is the consignor, unless the artist who is the consignor expressly agrees otherwise in writing.”

“Fine Arts” is defined broadly in 407.900(5).

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4. UCC 2-403; thief's title is void, not voidable.

5. *Kamat v. Kurtha*, 2008 WL 5505880 (S.D.N.Y.), where the U.S. District Court for the Southern District of New York held that a genuine issue of material fact existed as to whether an art collector unreasonably delayed asserting his ownership rights to a stolen painting. Therefore, summary judgment was precluded on the issue of whether laches barred an innocent purchaser's action for a declaration that he was the rightful owner of a painting. This decision suggests the continuing viability of the laches defense, despite the long line of New York cases placing a heavy burden on the purchaser asserting laches, which began with *Guggenheim v. Lubell*, 153 A.D.2d 143, 550 N.Y.S.2d 618 (1990), *aff'd*, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991).

6. French law on acquiring title by prescription is cited and applied under New York choice of law rules in an unreported New York opinion, *The Greek Orthodox Patriarchate of Jerusalem V. Christie's, Inc.*, 1999 WL 673347 (S.D.N.Y.).

7. Cal. Civ. Proc. Code § 338(c) and § 354.3.

8. The evolution of New York law in particular is described in Chapter 3, "Theft, Forgery, Authenticity and Statutes of Limitations" of the three volume work, *Art Law*, (Third Ed.) by Ralph Lerner and Judith Bresler, PLI, 2005. The authors explain the demand-refusal rule, the laches approach, and the discovery rule.