



ART DUE DILIGENCE GROUP

Art Due Diligence Group

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“What do you mean it’s not my artwork?” *Title disputes, a common problem in the world of high value art assets*

High value works of art simultaneously arouse great sentiment and can generate great profit. It is perhaps unsurprising that disputes about the ownership of valuable art works arise regularly (and increasingly).

Here are some examples of the sort of disputes that can arise relating to the ownership in valuable works of art and how best to avoid them.

Typical Cases

Joint Owners

It is possible for objects, such as works of art, to be owned by more than one person at the same time. If one buys a work of art from just one owner dealing without the others’ consent, then one will generally become a co-owner with the others who did not sell it. Depending on the circumstances, this might make one’s own ownership interest almost valueless.

A recent high profile example of a dispute over a work of art arising from joint ownership is the case of *Catlin, The Estate of Thomas Lopresti and William Beauty v. Hogan and Christie’s, Inc.*, 160370/2017 (Sup. Ct. NY Cnty. Nov. 21, 2017), where a screen print by Warhol was consigned to an auction house in

2006 and sold by one of several co-owners, the others only learning of the sale in 2016.

Liens – by banks or creditors

There can be property rights in works of art short of ownership such as liens and charges. These can arise where, for example, art is used as collateral for a loan. Buying a moveable object totally without notice of any such property rights is normally safe, but a transfer (such as a gift) not for full value or a purchase where the purchaser has enough information to be put on notice of the other’s ownership right can leave the purchaser encumbered with the charge.

Where the works are in possession of some third party, such as a bank or auction house, who acknowledges the seller’s ownership, but will also acknowledge some other third party’s lien (such as a lender’s interest) the third party might (and would be entitled to) withhold the work from the purchaser’s possession until the lien had been discharged.

In 2009, this issue was in the art press which reported that a number of valuable paintings that a bank had listed as collateral for a loan had gone missing. See the news article [here](#).

Inheritance and disputed Wills

Although buying from an executor of a will usually gives a secure title even if the executor has (without the purchaser's knowledge) misbehaved, difficult and uncertain disputes can arise where it is alleged that the deceased person made a gift of the artwork to someone who is now claiming ownership of it before he or she died.

A recent example of this issue occurred in 2017, when an auction house withdrew the sale of a purportedly original Beatles score which had been consigned by its former owner's daughter who had apparently inherited it after the former owner's widow claimed that it in fact belonged to her. To see the art press article see [here](#).

Theft

Valuable works of art are often stolen and sold on.

In the law of England and Wales, if a work of art (or other object) was bought in good faith long enough ago, then the purchaser cannot be made to give it back. However, this does not apply to gifts and the time only starts to run from the first good faith sale, so buying from the original thief or somebody to whom the original thief gave the work (e.g. in a will) decades after the theft will make the purchaser vulnerable to have to give the work back to its original owner for 6 years after it was bought. Often, the sale itself (especially if at auction) can attract attention to the existence and whereabouts of the work and cause the original owner (or her/his descendants) to come forward and claim it.

In many jurisdictions other than England and Wales, the original owner often has a claim to the title even after a good faith sale.

A recent example (see [here](#)), involved the return to a Swiss museum in 2017 of a sculpture stolen in the early 1990s.

Nazi-looted art cases

Even where the original owner has no legal recourse, holding a work of art that turns out to have a tainted history might be the cause of serious reputational damage to the current owner if not returned, especially where the theft occurred in particularly unpleasant circumstances, as in the example of Nazi looted art.

Although the Nazis were toppled many decades ago, there are many restitution cases involving Nazi looted art and they do not seem to be abating: see for example this claim last year, involving the theft by Nazis of a Dutch Old Master painting entitled "*The Oyster Meal*", by Jacob Ochtervelt, from a bank vault in Arnhem in the Netherlands, which for thirty years was situated on the Lord Mayor of London's wall.

Following a detailed report by the Commission for Looted Art in Europe, it was decided that the morally right thing to do was to return the artwork to the Dutch heirs of the original owner. To read the report see [here](#).

National treasure

Many countries have their own national treasure laws and under these laws a state can interfere with the removal of artworks from its territory.

In the U. K., cultural objects that are 50 years old or more and are above a certain price bracket require an export licence if one intends to take the object outside of the U. K. The Secretary of State can delay the export of artworks deemed to be of national importance by imposing a temporary export bar so that funds can be raised to keep these "treasures" in the U. K.

An example of a current temporary export bar concerns the Head of an African Man Wearing a Turban by Sir Peter Paul Rubens, see [here](#).

Avoiding the pitfalls

When purchasing works of substantial value, it is advisable to undertake adequate due diligence in advance of a purchase to minimise the chance of these problems arising. Whilst there is sometimes in principle legal recourse against the seller if these problems do arise, it is far better to prevent these problems from arising in the first place, especially if the seller may not have enough money to satisfy any judgment.

Practical Steps

Databases

There are many different art title databases that can be checked. These databases contain information pertaining to title issues in works of art (whether they are registered as lost or stolen, and in some cases registration of specific interests in an artwork, for example) and finding a problem by searching such a database can save much time, trouble and expense later.

Information about parties to the transaction

It is important to ensure that one is dealing with a reputable seller who will not disappear without trace before any defect in title becomes apparent.

If buying at auction, one should not rely on the fact that one is dealing with a reputable auction house, as most auction houses have in their written terms and conditions provision that they act solely as agent for the seller, and that any liability for defect in title is that of the seller, not the auction house, which they are generally entitled to do.

In the case of high value transactions, it can be worthwhile having professional background checks undertaken on the seller for this reason, whether the art work be purchased by auction, private treaty or privately through a gallery or art adviser.

Art title insurance

One can obtain insurance against the risk of defects in title emerging after purchase of a

work of art. A licensed art title insurance company has unique expertise to underwrite and assume legal title risks for art.

Purchasing an art title insurance policy at the time of the transaction and for existing collections protects collectors against loss due to potential future claims. The policy coverage includes the financial guarantee of the value of the work and full defence coverage.

Risks covered generally include contemporary and historical theft, import and export defects, liens and encumbrances and illegal or unauthorised sales.

If the circumstances of a sale be such that there is some reason to be wary of whether there are any title problems, this insurance might well be worth considering.

Provenance research

It is important to investigate the provenance of the work and not take provenance material at face value. This may not only uncover issues as to attribution but has the potential to uncover issues as to title as well.

Only through careful provenance research can one be satisfied that one has undertaken relevant and reasonable due diligence steps to try to ensure there are no potential title claims that can arise.

How great are the risks?

Members of 36 Art have seen multiple cases where these issues have arisen, and they are frequently reported in the news.

Where the value of the work is high, the cost of dealing with such difficulties can be correspondingly high, and thus the risk of entering into such transactions without the requisite due diligence can also be considerable.

The Art Due Diligence Group

The Art Due Diligence Group and members of 36 Art are able to provide services both to reduce the chances of these problems arising in

the first place, and to deal with them effectively when they have arisen.

The ADDG is pioneering a standardised process of joined up due diligence to enable participants in high value art transactions to undertake all necessary due diligence steps in a time and cost-efficient way.

For those disputes where the parties need a little assistance in reaching a sensible settlement, Malcolm Taylor is a specialist art mediator who is a member of the ADDG. He operates independently to the service providers of the ADDG and can be hired directly by parties seeking a specialist Mediator.

He has this to say on the subject of art mediation,

“We think it is far more effective to get parties around a mediation table if possible to seek to resolve matters in a timely, cost efficient and discreet way.

Art collectors, who are often HNWs, might well prefer mediation because they are concerned about reputational issues and want to keep matters discreet. That is likely to be the most important factor for them. They would not want their name or their art collections tarnished with sensationalist news coverage of a defective title claim.”

For this reason, the ADDG has a hand-picked team who can tackle these situations before they get out of hand. Our goal is to help clients right at the outset to minimise the risks of any of these situations arising.

This article was written by James E. Petts, member of 36 Art at The 36 Group and Art Due Diligence Group member.



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www.artduediligencegroup.com