

ART & ADVOCACY



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Non-U.S. Authors and Artists Lose U.S. Copyright Protection in Certain Circumstances

By *Barry Werbin*

A United States federal court has ruled that the section of the Copyright Restoration Act restoring rights of certain non-U.S. copyright owners is unconstitutional in certain circumstances. The ruling is binding only in certain parts of the country and will undoubtedly be appealed, possibly up to the U.S. Supreme Court, so its full effect remains to be seen. This ruling affects the rights of certain non-U.S. artists' works in the U.S. If you (or your clients, if you're a lawyer) have such interests, it's important to stay up-to-date on this ruling and any appeals.

The Law...and the Problem

Under the U.S. Copyright Act of 1909, authors and artists who wanted their work to be protected in the U.S. had to place a copyright notice on it when it was first "published." Otherwise, the work was thrust into the public domain. The revised 1976 Copyright Act (which affects works created prior to January 1, 1978) relaxed that notice requirement. Then, in 1989, Congress eliminated the requirement entirely. But because the laws of most nations other than the U.S. have never required such notice, older foreign works that were published without notice in their home country, and republished in the U.S. without notice, lost copyright protection in the U.S.

Recent case law has held that publication of a pre-1978 work outside the U.S. without copyright notice does not vitiate any copyright protection for that work in the U.S. if the work was later first published in the U.S. *with notice*. *Societe Civile Succession Richard Guino v. Jean-Emmanuel Renoir*, 2008 WL 5157719 (9th Cir., Dec. 9, 2008) (involving Pierre-Auguste Renoir sculptures first published in France). Still, many other foreign works are at risk of being found to be in the public domain in the U.S.

Problem Solved?

In 2004, the U.S. tried to protect non-U.S. authors from this risk by amending Section 104A of the U.S. Copyright Act (known as the "Copyright Restoration Act"). The impetus was Section 514 of the Uruguay Round Agreements Act ("URAA"), a treaty provision that established a "restoration" right for non-U.S. authors of works that had fallen into the public domain in the U.S. but not in their home country. Under Section 514, a work of original authorship that was created outside the U.S. but whose copyright protection lapsed in the U.S. because of noncompliance with formalities imposed by U.S. copyright law, such as lack of proper copyright notice, could have its copyright

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restored. When a copyright is restored, it lasts for the remainder of the copyright term that the work would have enjoyed had the work never entered the public domain in the U.S.

However, because Section 104A provides that copyright vests automatically as of the date of restoration,¹ it impacts the rights of U.S. citizens who lawfully exploited foreign works that had fallen into the public domain in the U.S. because of lack of notice.

Congress provided some protection for parties who already had exploited such works. The law includes detailed provisions requiring the owner of a restored work to file with the Copyright Office a notice of intent to restore the work, and to notify “reliance parties” if the owner of the rights in a restored work plans to enforce those rights. A “reliance party” is anyone who, before the source country of a work becomes what’s called an “eligible country,” engages in acts that would have violated any of the exclusive rights reserved for a U.S. copyright owner if the restored work had been subject to copyright protection, and who, after the source country becomes an eligible country, continues to engage in such acts. An eligible country is one that adheres to certain specified international conventions after enactment of the URAA.

In addition, under Section 104A, a reliance party who created a derivative work based upon a restored work that was created prior to the date of enactment of the URAA (December 8, 1994) “may continue to exploit that derivative work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation”

A reliance party then has a 12-month grace period (starting from when the reliance party receives notice) to sell off previously manufactured stock, perform or display the work publicly, or authorize others to conduct these activities. The reliance party must cease using the restored work after the 12-month grace period expires unless such party reaches a licensing agreement with the copyright owner for continued use of the restored work. A reliance party who created derivative works based on the restored work is exempt from this requirement.

Once In the Public Domain...

A group of performers, educators, orchestra conductors, film archivists and distributors, and others filed suit challenging Section 514 of the URAA and the Copyright Restoration Act on various grounds, including violation of the First Amendment of the U.S. Constitution, which protects free speech. In 2007, the Tenth Circuit Court of Appeals held that Section 514, while not exceeding Congress’ power inherent in the Copyright Clause of the Constitution, did “not adopt supplemental free speech safeguards,” and that “copyright’s two built-in free speech safeguards — the idea/expression dichotomy and the fair use defense — do not adequately protect the First Amendment interests.” *Golan v. Ashcroft*, 510 F.3d 1179 (10th Cir. 2007).

The U.S. Supreme Court had previously noted that scrutinizing Section 514 under a First Amendment analysis might be appropriate if the copyright law “altered the traditional contours of copyright protection.” *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). The Tenth Circuit, which covers parts of the U.S. Midwest, held that “plaintiffs have shown sufficient free expression interests in works removed from the public domain to require First Amendment scrutiny of § 514.” The Circuit Court found that “one of these traditional contours is the principle that once a work enters the public domain, no individual — not even the creator — may copyright it.” The court emphasized that “[u]nder § 514, the copyright sequence no longer necessarily ends with the public domain: indeed, it may begin there. Thus, by copyrighting works in the public domain, the URAA has altered the ordinary copyright sequence.”

The Tenth Circuit found that Section 514 “deviates from the time-honored tradition of allowing works in the public domain to stay there.” Once a work falls into the public domain, anyone has a right to use it on a non-exclusive basis — “unrestrained artistic use of these works” — and “the clear import of these principles is that the public in general and these plaintiffs in particular have a First Amendment interest in using works in the public domain.... By removing works from the public domain, § 514 arguably hampers free expression and undermines the values the public domain is designed to protect.”

The Court remanded the case to the District Court specifically to determine whether Section 514 of the URAA, and thus Section 104A of the Copyright Act, in fact, violated the First Amendment.

First Amendment Protection

On remand, the District Court held that Section 514 of the URAA did indeed violate the First Amendment and thus is unconstitutional. *Golan v. Holder*, 2009 U.S. Dist. LEXIS 28263 (April 3, 2009). Under U.S. Supreme Court precedent, the standard for assessing this sort of regulation of speech under the First Amendment is whether the regulation “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more

speech than necessary to further those interests.” While such restriction needs to be “narrowly tailored to serve a significant government interest,” that standard is satisfied “where the restriction promotes a substantial government interest that would be achieved less effectively absent the restriction.... This requires a balancing of Plaintiffs’ interests with those of the Government.” The court noted that while complying with international treaty requirements is an important governmental interest, “[t]he impact of removing the restored works without accommodating Plaintiff’s reliance interests is substantial,” and concluded that “Plaintiffs’ interests in copying the works at issue is deserving of full First Amendment protection.”

No Easy Fix

While “reliance parties” are permitted under the statute to continue using restored works for one year and may continue to exploit derivative works forever, so long as a reasonable royalty is paid, speech that remains unprotected under Section 514 is “any speech that involves copying more than one year after notice has been filed, and any derivative works made after notice is filed and without payment of a royalty.” The court found that Congress could have complied with its treaty obligations “without interfering with a substantial amount of protected speech — for example, by permanently ‘excepting parties, such as plaintiffs, who have relied upon works in the public domain.’” As a result, the court concluded that to the extent Section 514 “suppresses the right of reliance parties to use works they exploited while the works were in the public domain — Section 514 is ‘not tied to the Government’s interest’ in complying with [its treaty obligations and] is therefore ‘substantially broader than necessary to achieve the government’s interest.’”

Art as Collateral

By Stephen D. Brodie

Recent articles in *The New York Times* have noted that fine art, prime photographs, and other collectibles can serve as a source of cash for people or businesses under financial strain. One article discussed two loans made to an artist where the rights to her works were made part of the collateral package. The story focused on a firm called Art Capital Group and other “pawnshop” type lenders, as the *Times* referred to them, that bring these transactions an “asset-based lending” (or “ABL”) perspective more commonly found with debtor-creditor relationships in rough-and-tumble businesses. The other article noted how The Metropolitan Opera had elected to grant JPMorgan Chase a security interest in its Chagall murals as substitute collateral — replacing cash held by the bank — for a loan. Anyone considering using art to relieve pressure from

If that were all, it would seem that Congress could avoid the problem by amending the law to permanently “grandfather” parties who have already relied on works in the public domain. But the court found another, perhaps bigger, problem with the law. Because Section 514 grants foreign authors protection that is not granted to U.S. authors, even in their own country, “[r]ather than correct an historic inequity, Section 514 appears to create an inequity where one formerly did not exist. The Government proffers no evidence showing how granting foreign authors copyrights in the United States — yet denying similar protections to United States authors — could constitute an important Government interest.”

This decision has substantial implications, especially in the context of the Tenth Circuit’s prior decision. It marks the first time a court has held that any provision of the 1976 Copyright Act violates the First Amendment. A further appeal will certainly follow, and the issue ultimately may be resolved by the Supreme Court or Congress. In addition, the decision raises a thorny issue: Because the decision is binding only in the Tenth Circuit,² which does not geographically cover many major art centers in the U.S., foreign owners of works may still enforce their restoration rights in parts of the country where the courts do not follow the decision. If the Tenth Circuit affirms the decision, unless reversed by the U.S. Supreme Court, Congress may have no choice but to act in order to comply with its treaty obligations by trying to craft broader protections for U.S. reliance parties. For now, it’s a huge victory for public domain advocates.

¹ The “date of restoration” under Section 104A is generally January 1, 1996, if the source country of the restored work had adhered, as of that date, to the Berne Convention, another major international copyright treaty, or was a World Trade Organization member country on such date. Other dates may apply depending on what country’s restored work is involved.

² The Tenth Circuit covers the states of Utah, New Mexico, Colorado, Kansas, Oklahoma and Wyoming.

creditors needs to know the differences between the niche asset-based art lenders and the bankers that will lend against this type of collateral.

Niche Asset-Based Lenders

True asset-based lenders typically do not care if a borrower defaults. They collect relatively large fees and charge higher interest rates than conventional bank lenders charge. These lenders are usually willing to take their chances with the value of the security and the enforceability of their legal position. This approach, of course, may cause collectors in need of money to worry that they might fall victim to a “loan to own” lender, which will effectively be buying their art for half (or less) of its real value.

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Private Banks

Fortunately for many collectors, the private banking side of several large U.S. commercial banks will also lend against art collateral, often at better pricing than that of the niche asset-based art lenders. To qualify for such loans, borrowers generally must be “high net worth” individuals and either have, or be willing to establish, a significant banking relationship. All private bankers will look at art collateral as a “second way out of the loan.” A key difference between a private bank and an asset-based art lender: The bank must be convinced that the borrower will be able to service the debt and repay the loan at maturity without having to sell the collateral. A concomitant of requiring financial confidence in the borrower is that private bankers care about the character and reputation of their clients. Niche asset-based art lenders are less likely to be concerned with these things. They will always take possession of the collateral, whereas private bankers may not.

Despite their differences, niche asset-based art lenders and private bankers that make art loans have some common ground. Both will use a maximum 40% to 50% advance rate, meaning that the amount of the loan may not exceed 40% to 50% of the then-current appraised value of the collateral. In addition, both will want the appraiser to be of their choosing, and will likely require that there be an international market for the art in question.

Commercial Banks

Although individual collectors generally have to go to either a niche asset-based art lender or a private banker, many reputable businesses, such as The Metropolitan Opera, and many respected galleries and dealers will use art collateral to obtain credit from “middle market” commercial bankers¹ (i.e., business bankers that make loans to middle-sized companies using the bank’s own funds, without reliance upon capital markets). These loans bear some resemblance to private bank financings in that a significant banking relationship, good character, and the ability to repay without resorting to the collateral are necessary. However, these are fundamentally conventional business loans where the bank’s credit policy will dictate such things as profitability over a meaningful period of time, strength of management, barriers to entry in the industry by competitors, and many other considerations.

Though both types of loans are secured, this kind of lending is, in some respects, the polar opposite of asset-based loans. In a typical middle-market business loan, the credit policy considerations referred to above will predominate; the artwork will simply be inventory, which can be converted to accounts receivable, and its current value will be of secondary importance.

The current recession has impaired the quality of almost everyone’s credit, making it difficult for businesses and individuals to borrow from banks. The impact of the economic downturn has had less of an impact on asset-based art lenders because they are almost exclusively concerned with the value of the works and their marketability. Although the most prominent and rarest works appear to be holding their value well, the art market is clearly not as hot as it was a year ago. The global economic downturn is cause for concern that the trend will continue downward for some time. This inevitably leads to greater uncertainty as to the reliability of appraisals, even those made by an expert chosen by the lender. These factors will diminish the credit available even from the niche art lenders.

Today, as in prior recessions, banks and other lenders engaged in workout negotiations with a borrower or guarantor, on a real estate or other kind of commercial loan, will often consider taking a direct pledge of artwork as additional credit support. Thus, where the original property or business assets are deemed “under water,” or insufficient to support an extension of maturity or to obtain approval for a waiver of a financial covenant breach or other default, art can sometimes fill the gap enough to solve the immediate problem. In many of these situations, creditors worry about throwing “good money after bad.” One benefit of this kind of collateral is that, although it is not an income-producing asset, art provides the creditor with the comfort of knowing that it will not have to reach far into its own pocket to maintain the assets, as it would have to with other kinds of collateral offered in problem loan negotiations, such as certain kinds of real estate, boats, and planes, which typically require the lender to incur more expenses on top of what it already has lost or put at risk just to preserve the value of its new security.

At Herrick, Feinstein, we have considerable experience in representing a variety of lenders, as well as art collectors and dealers, in transactions where artwork serves as the key to a new loan or as part of a collateral package shoring up a problem financing.

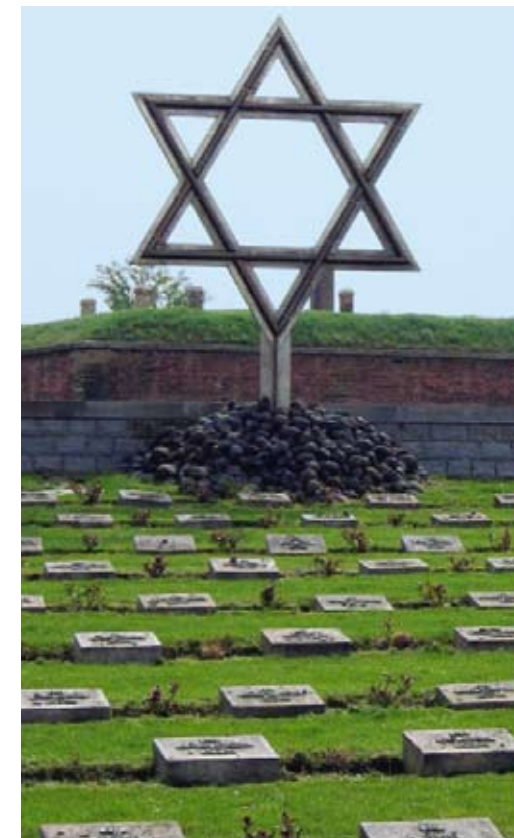
¹ To clarify, commercial banks usually have asset-based lending groups of their own that do not accept art and collectibles as collateral, as do the independent art lenders referred to in the *Times* article. These bankers are looking for something that can easily and reliably be converted to cash. The art market requires too much special knowledge and is subject to too much uncertainty to work well for lenders that are only comfortable advancing money against accounts receivable and inventory in, for example, the jewelry and the apparel business.

June 2009 in Prague: The Washington Holocaust Era Conference Revisited

By Lawrence M. Kaye and Amalia Sax-Bolder

In 1998, the U.S. government hosted the Washington Conference on Nazi-Looted Assets, at which representatives of 44 countries met to discuss how to deal with Nazi-looted property, including artwork, that had not been returned to their true owners after World War II. The experts at the conference considered and debated the many issues raised by the continuing discovery of Nazi-looted assets, and promulgated 11 principles concerning Nazi-looted art; among them, that pre-war owners and heirs should be encouraged to come forward to make their claims known and, once this happens, steps should be taken expeditiously to develop “fair and just claims procedures” with liberal rules of evidence so that the art can be returned to its rightful owners.¹

Much good has come of this. For example, several nations began researching art with questionable provenance and developing the requisite legal regimes. Also, auction houses, museums, and collectors began paying special attention to art with gaps in provenance between 1933 and 1945 and, in many cases, refuse to deal with or acquire such artwork. Governments and non-governmental organizations responded to the Washington Conference in a variety of ways, including adopting resolutions, developing sets of guidelines, and enacting laws concerning Holocaust-looted assets. Among other developments, in November 1999, the Parliamentary Assembly of the Council of Europe, representing 41 nations, unanimously passed Resolution 1205, calling for the restitution of looted Jewish cultural property in Europe.² The Association of American Museum Directors (“AAMD”) developed a set of guidelines for museums on topics such as provenance research and the resolution of claims regarding property illegally confiscated during the Nazi era and not yet restituted.³ Following suit, the International Council of Museums (“ICOM”) and the Association of American Museums (“AAM”) passed similar resolutions and guidelines. In 2000, the AAMD, the AAM, and the Presidential Advisory Commission on Holocaust Assets in the United States (“PCHA”) agreed that museums were doing a lackluster job of providing information to the public about objects in their collections



{ The Terezin Memorial — a cemetery, museum, and research center outside of Prague, commemorating the victims of the Holocaust. }

that were transferred in Europe during the Nazi era.⁴ To address the issue and make provenance information on such objects easily accessible, the AAM developed an Internet database called the Nazi-Era Provenance Internet Portal, which is intended “to provide a searchable registry of objects in U.S. museum collections that changed hands in Continental Europe during the Nazi era (1933–1945).”⁵

While substantial progress has been made in the recovery of Holocaust era assets, the goal of the Washington Conference — that the signatory nations should commit themselves to developing “just and fair” solutions for claims by victims of Nazi looting of property not previously restituted — has yet to be fully realized. Although a few countries, most notably the Netherlands, Germany, Austria, France, and the United Kingdom, have adopted restitution regimes that address the problem in varying degrees, former Under Secretary of State Stuart Eizenstat, the force behind the Washington

Conference, recently reported that more often than not the Washington Principles have been ignored.⁶ Many who work in this field continue to experience great frustration throughout the world, especially in the former Eastern bloc nations, as well as in the United States and Western Europe.

In 2005, seven years after the Washington Conference principles were promulgated and the first AAM Guidelines were adopted, the Jewish Claims Conference began a dialogue with the AAM concerning the participation of U.S. museums in the Nazi-Era Provenance Internet Portal and the adherence of U.S. museums to the AAM Guidelines. In July 2006, the Claims Conference conducted a survey regarding the response of U.S. museums to the Washington Conference. Of the 332 museums in the U.S. that received the questionnaire, 118 did not respond. In addition, it was reported that only 12% of potentially problematic works had been fully researched and publicized: only 20 museums reported that claims had been made for items in their collections.⁷

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June 2009 in Prague (continued from page 5)

One problem is that all countries have procedural and technical roadblocks that impede the resolution of otherwise valid claims for the return of Holocaust loot. For several years, Herrick, Feinstein has been assisting claimants all over the world in their efforts to obtain restitution of their lost assets. While many of those claims have been successful, experience shows that governments and private institutions often overlook the underlying ideals of the Washington Conference. As Stuart Eizenstat stated at the Washington Conference, “we [should] recognize that as a moral matter we should not apply rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.”⁸

Now, 10 years after the Washington Conference, the Government of the Czech Republic, in cooperation with the Documentation Centre of Property Transfers of Cultural Assets of WW II Victims, the Federation of Jewish Communities in the Czech Republic, the Jewish Museum in Prague, the Terezín Memorial, the Institute of Jewish Studies at the Hussite Theological Faculty of the Charles University in Prague, and the Forum 2000 Foundation will host a “Holocaust Era Assets” conference in Prague from June 26 – 30, 2009.⁹ Experts from a variety of fields will assess the progress made since Washington, review current practices regarding provenance research and restitution, and perhaps, where needed, define new effective instruments to improve these efforts. The hope is that the conference will not only allow for international collaboration and networking to establish tangible solutions for mitigating the injustices caused by the Holocaust, but also emphasize the importance of Holocaust education and remembrance. As Thomas Kraus, the executive director of the Federation of Jewish Communities in the Czech Republic, has stated, “the legacy of the Holocaust, as a phenomenon, is so vivid and so urgent that it cannot be forgotten.”¹⁰

But many concerns have been raised about the Prague conference. Some critics have raised doubts as to whether the Prague conference has the potential to effect real change. If the issues are not addressed in a clear, direct, and thorough fashion, the outcome will likely be similar to so many conferences in the past where there were powerful and even passionate calls for action but no concrete results. Sidney Zabludoff is an economist who, upon his retirement from the U.S. government after more than 30 years of service, began to research and publish studies on issues relating to the restitution of Jewish assets looted during the Holocaust era. He recently wrote: “the Prague Conference . . . needs to establish a clear and detailed mechanism to address this issue if it is going to have any meaning beyond diplomatic niceties.”¹¹ He proposes two solutions: the creation of an international organization to create and manage a single location of all records relating to stolen Holocaust era assets, and the establishment of an International Remembrance Fund. Other experts in various fields are expected to bring to the table different sets of issues and proposed solutions.

The non-binding principles from the Washington Conference were a good starting point, but in order for “just and fair” solutions to be implemented, the applicable rules need to be reconciled among nations and made legally enforceable. One issue that needs to be addressed in Prague is the procedural roadblocks that impede the resolution of claims on the merits, such as statutes of limitations, or constructs such as laches (in the United States) and acquisitive prescription (in many European jurisdictions). An enlargement of the rights and remedies available to Holocaust victims and their heirs in order to fundamentally ease their efforts to recover Holocaust assets looted by the Nazis would be a most welcome outcome.

As Kraus says, “it’s about justice and moral issues. We may never have the full picture, but at least we can open some of the chapters.”¹² We hope the Prague Conference will be a substantial step in this direction.

1 See generally Washington Conference Principles on Nazi-Confiscated Art, released in connection with The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998, available at <http://www.state.gov/p/eur/rt/hlct/122038.htm>.
 2 See Resolution 1205 of the Parliamentary Assembly of the Council of Europe, April 19, 1999, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/t99/ERES1205.htm>.
 3 Association of Art Museum Directors, Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933-1945), available at <http://www.aamd.org/papers/guideln.php>.
 4 See AAM Recommended Procedures for Providing Information to the Public about Objects Transferred in Europe during the Nazi Era, October 2000, available at <http://www.aam-us.org/museumresources/prov/procedures.cfm>.
 5 See The Nazi-Era Provenance Internet Portal Project, available at <http://www.nepip.org/>.
 6 See Stuart Eizenstat, Testimony on the Status of Art Restitution Worldwide, before the subcommittee on Domestic and International Monetary Policy, Trade, and Technology

Committee on Financial Services, U.S. House of Representatives, Washington, DC (July 27, 2006), pp. 13-15.
 7 Claims Conference/WJRO Looted Jewish Art and Cultural Property Initiative, *Nazi-Era Stolen Art and U.S. Museums: A Survey*, July 25, 2006. Report available at http://www.claimscon.org/forms/U.S._Museum_Survey_Report.pdf.
 8 Stuart E. Eizenstat, *In Support of Principles on Nazi-Confiscated Art*, Presentation at the Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998, available at <http://fcit.usf.edu/HOLOCAUST/RESOURCE/assets/art.htm>.
 9 See generally, <http://www.holocausteraassets.eu/>.
 10 Curtis M. Wong, “EU Presidency to Highlight Jewish Restitution,” *The Prague Post* (August 13, 2008).
 11 Sidney Zabludoff, “Holocaust Restitution-Prague Conference in June Seen as Last Effort,” *The Cutting Edge* (April 13, 2009).
 12 Curtis M. Wong, “EU Presidency to Highlight Jewish Restitution,” *The Prague Post* (August 13, 2008).

Artist-Museum Partnership Act of 2009

By Michael Kessel and Eli Akhavan

The “Artist-Museum Partnership Act” (“Act”), which is pending in the U.S. Senate and House of Representatives, provides two new rules regarding donations of artwork by the creator. If the Act passes, a creator of artwork will be able to claim a charitable income tax deduction equal to the appraised fair market value of such artwork, upon its contribution by such creator to a qualified charity. In addition, a creator of artwork will be able to claim a charitable income tax deduction for a transfer of the artwork or the copyright pertaining to the artwork, independent of each other.

Current Law

Currently, the charitable deduction for artists who donate their own works to a qualified charity is limited to the actual cost of producing the works (e.g., the cost of the paint and the canvas). In contrast, an investor who holds artwork for more than 12 months may claim a deduction equal to the appraised fair market value of the artwork upon its contribution to a qualified charity. In addition, under current law, an artist is not entitled to a charitable income tax deduction if he transfers his work without the copyright or if he transfers the copyright independently of the work.

Legislative Background

Prior to the Tax Reform Act of 1969, artists and investors were treated similarly with respect to charitable deductions for contributions of artwork. The Tax Reform Act of 1969 instituted the deduction limitation for self-created art. The change was made, in part, to address the perceived problem of artists inflating the value of self-created works to obtain significant income tax deductions. Subsequent changes in law mandating qualified appraisals as a requirement for donations has addressed this perceived abuse, yet the limitation mentioned above remained in place.

Proposed Law

Fair Market Value Deduction

If the Act passes, artists will be able to obtain an income tax deduction equal to the full fair market value of their work, provided:

1. the work was created at least 18 months prior to the contribution; and
2. the work is contributed to a public charity that will use the work as part of its charitable mission — i.e., the artwork cannot be held for investment.

To get the deduction, artists will have to obtain from the charity a statement that the work will be owned, maintained, and displayed by the organization. The “qualified appraisal” rules that apply to all donors would also apply to artists who donate their work. So artists will have to obtain an independent qualified appraisal. And if the deduction claimed exceeds \$20,000 for a work or a group of similar works, it will be subject to a review by the Internal Revenue Service’s Art Advisory Panel.



The deduction amount an artist can claim in the year of the contribution will be limited to the artist’s “artistic adjusted gross income” for such year. Artistic adjusted gross income is defined as: (i) income from the sale or use of property created by the personal efforts of the taxpayer which is of the same type as the donated property; and (ii) income from teaching, lecturing, performing, or similar activity with respect to the donated property. Furthermore, an artist won’t be entitled to “carry forward” the benefits of the donation (other taxpayers can use the charitable donation to offset income in the five years following the year of donation).

Copyright Treated as Separate Property

If the Act passes, creators of artwork will also be able to treat the copyright associated with the artwork and the artwork itself as severable assets. As such, a creator of artwork will be able to claim a charitable income tax deduction for independent transfers of the artwork and the copyright.

Current Status of the Proposed Law

The Act has been referred to the Senate Committee on Finance and to the House Ways and Means Committee. While the Act has received a good amount of support in Congress, it does potentially impact tax revenues. In the current economic climate, it’s unclear whether that concern will impact the Act.



Art Law Events

Upcoming Events Involving Herrick's Art Law Department

June 26-30, 2009

Lawrence Kaye and Howard Spiegler will attend the Holocaust Era Assets Conference in Prague, Czech Republic. Charles Goldstein, as counsel to the Commission on Art Recovery, will chair a key panel discussion on the legal issues of looted art. The conference will host representatives from 49 nations, as well as the leading experts in the field, to discuss the future of Nazi-looted art claims, and evaluate the progress made since the Washington Conference in 1998.

July 30 - August 1, 2009

Mari-Claudia Jiménez will participate on the panel "Recovering Cuba's Looted Artworks" at the Association for the Study of the Cuban Economy conference entitled "Cuba in a World of Uncertainty."

Recent Events Involving Herrick's Art Law Department

April 24, 2009

Lawrence Kaye lectured at a seminar entitled "Reclaiming Nazi-Looted Art: One of World War II's Unfinished Battles" hosted by Gratz College in Pennsylvania.

April 22, 2009

Howard Spiegler lectured on the topic of art restitution at the Sotheby's Institute of Art.

April 7, 2009

Frank Lord spoke at a Yale University seminar entitled "World War II Looted Art: Law and Practice."

April 4, 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.

March 31, 2009

Frank Lord participated on a panel presented by Columbia Law School's Entertainment, Arts and Sports Law Committee to discuss careers in art law.

March 19, 2009

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

February 28, 2009

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

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

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

If you would like to receive this and other materials from Herrick's Art Law Group, please visit www.herrick.com/subscribe and add your contact information.



Errata: *Art & Advocacy*, Winter 2009
The article "Abandoned Loan Bill Signed Into Law" incorrectly identified Howard Spiegler as the Chair of the Art Law Committee of the New York City Bar Association. Mr. Spiegler is the former Chair.

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Herrick's list of "Resolved Stolen Art Claims," updated on May 22, 2009, is available online at www.herrick.com/ResolvedStolenArtClaims.