

ART & ADVOCACY

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Whose Art Is It Anyway?

Issues Concerning Provenance and Good Title When Buying Art

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

Applicable Legal Principles

A basic tenet of United States law that distinguishes it from that of most civil law countries (including most European countries) is that no one, not even a good-faith purchaser for value, can obtain good title to stolen property. For purposes of the U.S. rule, whether the purchaser of an artwork was unaware that it had been stolen when he or she purchased it, has had the artwork in his or her possession for decades, or did not buy the artwork directly from the thief but from a subsequent purchaser is irrelevant. The good faith of the purchaser or the seller does not affect the analysis as to whether the title is good. The U.S. rule is simple: a thief cannot pass good title; therefore, a stolen piece of art is always stolen property no matter how much time has passed or how many subsequent “owners” the piece has had. From this rule follows a single, simple question that forms the core of every case involving title to art and other cultural property: is the person currently in possession the true owner or authorized by the true owner to deal with the property?

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

Considerations When Buying Art

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

If you are purchasing an artwork from an auction house or a reputable gallery, it is likely the auction house or gallery has already run the piece through one of these databases and otherwise investigated the provenance of the piece before it was put up for sale.¹ But if you are purchasing an artwork outside of an auction house or

gallery, it is imperative to make a concerted effort to check these databases. However, it is important to note that only a fraction of all stolen and looted art is listed on one of these databases. Many owners of stolen art are unaware of the theft or, for that matter, of the existence of such databases. Therefore, a clean record from the Art Loss Register or Swift-Find does not mean that the artwork in question is in the clear. Another measure you can take is to check with the International Foundation for Art Research (IFAR). IFAR is a nonprofit organization that offers impartial and authoritative information on authenticity, ownership, theft, and other artistic, legal, and ethical issues concerning art objects.

The next step for the collector is to familiarize himself or herself with the history of the piece in question and perhaps conduct some simple research to ensure that the artwork's stated provenance checks out. This could involve calling one or more of the galleries, museums, or former owners that appear on the labels on the back of the piece or, if this is not an option, calling any institution or individual listed in the provenance or who is known to have been connected to the piece in question. Often, a simple Google search can turn up information about a stolen artwork.

Nazi-Looted Art

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

In *Goodman v. Searle*,⁴ the Goodman family brought suit against Daniel Searle, a collector and important patron of the Art Institute of Chicago, to recover a small landscape by Degas illegally seized during the War. Key evidence that the piece had not rightfully changed hands was that Hans Wendland, one of the dealers on the OSS Lists, was part of the piece's provenance. As a result, the Goodmans and Searle reached an out-of-court settlement that, among other things, placed the landscape in the Art Institute and gave both the Goodmans and Searle credit for the donation. Bringing and Defending Claims The validity of ownership claims may (and usually does) turn on the resolution of technical defenses, such as statutes of limitations. Statutes of limitations begin to run when the causes of action accrue, but vary in content and application from state to state. While state statutes specify the length of the limitations period, the definition of when a cause of action accrues has been left to the courts' discretion. In cases of stolen art in the possession of good-faith purchasers, the courts have fashioned accrual rules that allow a plaintiff to make a claim for the recovery of art stolen years before.

Some states, including New York, apply a "demand and refusal" rule under which the limitations period does not begin to run until the owner makes a demand for the return of the property and the possessor refuses. In *Menzel v. List*, one of the earliest reported U.S. cases regarding the restitution of Nazi-plundered art, the plaintiffs sought to recover a Chagall painting that the Nazis seized in 1941. In 1963, the plaintiffs located the painting in the collection of the defendant, who had purchased it in 1955 from a reputable New York art gallery. In response to the plaintiffs' lawsuit to recover the painting, the defendant argued that the action was barred by New York's three-year limitations period because, he contended, the cause of action accrued when the painting was stolen in 1941 or, at the latest, when he purchased the painting in 1955. Holding that the cause of action arises "not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand," the court concluded that the plaintiffs were the rightful owners of the painting.⁵

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

In recent New York cases, however, the courts have used the equitable doctrine of laches to reject otherwise timely claims by Holocaust claimants. One who uses the defense of laches must show that the opposing party unreasonably delayed bringing the claim to the prejudice of the defendant. For example, a defendant may not be able to properly defend himself or herself if evidence was lost or witnesses died before the opposing party brought his or her claim. The majority of states do not apply the demand and refusal rule; rather, they impose a duty of diligence on the plaintiffs, requiring them to establish that they took affirmative steps to locate the property to withstand dismissal on statute of limitations grounds. In these states, under the so called "discovery rule," the limitations period begins to run when the plaintiff discovers or, after the exercise of reasonable diligence, should have discovered the whereabouts of the stolen art.

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

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

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

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

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

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

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