

HERITAGE

TRUSTS & ESTATES NEWSLETTER • 1ST QUARTER 2011

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Table of Contents

You Bought it But Do You Own It?	1,4
Auction Schedule	2
Collector's Handbook	3
All About Appraisals	5
Karl Chiao Joins Heritage	6
Sponsored Special Events	7

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You Bought it – But Do You Own It? Questions of Ownership for Art and Collectibles.

By Mark Prendergast

Throughout 2010, the news has been awash with stories of bankruptcies, seized collections and contested ownership of major pieces of art and collectibles. Just in the last three months, there have been reported cases of previously unknown Picasso works that have been challenged for rightful ownership by the artist's estate, a Degas painting showing up at auction that was stolen from a museum almost 40 years ago, and a dispute of ownership of the Calder sculpture hanging in the formerly named 'Sears Tower' in Chicago. Each case is an example of possible situations that could lead an individual, institution or fiduciary professional to question whether title to their or their clients' treasured collections is truly unencumbered.

Even if tangible property is purchased with clear title, in full and in good faith, there are no guarantees that someone may not make a claim of ownership at some point in the future. Due diligence is required to mitigate the risk of subsequent title claims. For art, antiques and collectibles, there is not a centralized facility to search for liens and clear title as one would have in real estate transactions. Research of provenance, use of the Art Loss Register, and considering title insurance are the steps currently available to assessing and protecting clear title to a work of art or collectible.

Trust officers, estate executors, legal professionals, financial advisors and wealth managers should be very aware of the risks associated with title security when working with clients who hold significant art, antiques and collectibles. Ownership disputes go beyond traditional liens and estate claims and can include looted wartime property and nationalist reclamations. All can result in forfeiture of assets and costly litigation – often many years after the item was originally obtained. The responsibility of the fiduciary caring for their client's property may require that title insurance be obtained, UCC-1 statements be filed, and lien searches be conducted.

The prevalence of bankruptcy issues in today's economy brings into question the fate of tangible assets that are partially owned, consigned, or have some financial ties to the bankrupt party. Bankruptcy courts try to sort through the ownership claims of property held by the bankrupt entity when it is held on consignment or on a partial ownership basis, but documentation/reporting in some areas of the art world prove not to be very rigorous and such determinacy is not always easy.

In the fraud/bankruptcy case of Salander O'Reilly Galleries in New York, many of the holdings of the gallery have been and are being sold to satisfy fines, fees and creditor's debts. Since 2007 the Gallery has been a debtor in a Chapter 11 case before the United States Bankruptcy Court for the Southern District of New York. Early in 2010, the court confirmed the Chapter 11 Plan that included creditor settlements and sales of artwork from the gallery's considerable holdings. The over 4,000 works of art will be offered at auction throughout 2010, 2011 and beyond. The Plan guarantees that any artwork sold carries free and clear title – without any liens or encumbrances – but even with that assurance, the selling Trust has sought to strengthen bidder confidence on the items by purchasing title insurance.

Divorce is another situation that can create contested ownership issues when property is sold. If one side of a divorce sells property that is legally jointly owned – the full transfer of title to the buyer may be challenged. The buyer may find themselves embroiled in a legal battle that was completely unforeseen by themselves and the middle-man dealer or auction house.

Continued on page 4

Internationally, the concerns of war time forced sales/seizures and imperialistic commandeering have been a major issue for private collectors, corporate collections and museums for the last 60+ years. Various countries have been bolstering claims to art and antiques that may have been removed from their borders without proper authorization. The yet-still-unresolved dispute of the Elgin Marbles from the Greek Parthenon, that have lived in the British Museum since the early 1800's, is the classic case of the moral legitimacy of historical colonial acquisitions.

The last quarter of the 20th century saw many nations enforcing their perceived rights of ownership during the sale of works deemed national treasures. The active pursuits of the governments of Mexico, Canada, Italy, Greece, Egypt, China and many African countries has stifled sales and subdued the active trade of illicit material.

An artwork may have built an impressive provenance of museum exhibitions, prominent owners and sales through auction before it is challenged as to who is actually the rightful owner. In such instances, the question often becomes who is left holding the financial responsibility of either returning the item to the deemed proper owner or seeking monetary restitution for the item. These instances are extremely rare and account for an incredibly small percentage of the art and collectibles sold throughout the world in a given year. When these issues do arise, they become banner court cases that no collector or fiduciary wants to be involved in and further bolster the merits of seeking title insurance on major tangible assets.

When making a charitable donation – or for an institution accepting a charitable gift – the concern of clear title is paramount to long-term use of the gift or immediate allowance of the charitable deduction. If ownership is contested, the gift may be relinquished and the tax benefits forfeited. There are many high profile instances in which WWII restitution cases are being brought against museums for holdings that were gifted decades ago. This past summer, after a ten year legal battle, Egon Schiele's painting Portrait of Wally of 1912 was 're-purchased' from the heirs of its previous owner by the Leopold Museum in Vienna for \$19 million. The painting was originally acquired by the Museum in 1954 after it had been seized by Nazi agents from the Jewish gallery owner in 1938.

Major auction houses follow their own protocols and provenance research to strive to ensure clear ownership and satisfy any restitution issues of items that are sold through their salerooms. However, there is no comprehensive means to assure full and complete legal title. Most auction consignment contracts require that the signor warrant that they are (or are acting as agent for) the sole owner of the properties consigned for sale, that there are no lien encumbrances and that good title will pass to the purchaser. A seller in good faith can attest to these statements without fully knowing if somewhere in the history of an object it may have been illicitly obtained or carries extraneous claims to ownership.

Speak with an insurance company regarding title insurance to see if you are protected through your general policy for ownership claims. While most major insurance companies do not offer an artwork or collectibles title specific insurance policy, there has been a move in the industry to address the concern. ARIS Corporation is currently the only underwriter for artwork or collectible title insurance with their Art Title Protection Insurance. Other options may be on the horizon, but for the one-time cost of a small percentage of insured value, it may be a worthwhile investment in piece of mind for the most valuable items in a collection.

Have the collection or item appraised to help you realistically establish a fair market or retail replacement value. Research the purchase transaction and provenance of the most valuable items to determine if there is the potential for title risk. Some industry experts suggest a minimum \$50,000 or \$100,000 per item value basis for considering title insurance. Resources for researching if art or collectibles may be stolen or reported missing are presented in this newsletter.

For assistance with valuations, provenance research and insurance company accepted appraisals, please contact Heritage's Appraisal Services or Trusts & Estates Department.



Andy Warhol, *Cowboys and Indians (set of 10)*, 1986
Sold For: \$149,375
October 2010
Modern & Contemporary Art Auction, Dallas
HA.com/5055-32001

Resources for Researching if Your Art or Collectible May Be Stolen or Reported Missing.

International Foundation for Art Research

The International Foundation for Art Research (IFAR) is a non-profit organization which was established to channel and coordinate scholarly and technical information about works of art. IFAR provides an administrative and legal framework within which experts can express their objective opinions. This data is made available to individuals, associations and government agencies. IFAR compiled information about stolen art; and by 1990, IFAR was updating its catalogue of stolen art 10 times a year. In 1991, IFAR helped to establish the Art Loss Register (ALR) as a commercial enterprise. IFAR managed ALR's U.S. operations through 1997. In 1998, ALR assumed full responsibility for the database although IFAR retains ownership. *Appropriated from IFAR.org*

The Art Loss Register

The Art Loss Register (ALR) is a for-profit business that was first established in London in 1991. Its founding shareholders included major businesses from both the insurance and art industries. The ALR is now the world's largest private database of lost and stolen art, antiques and collectables. Its range of services includes item registration, search and recovery services to collectors, the art trade, insurers and worldwide law enforcement agencies. These services are efficiently delivered by employing state of the art IT technology and a team of specially trained professional art historians. ALR has been instrumental in the recovery of over \$320m worth of stolen items. *Appropriated from ArtLoss.com*

Commission for Art Recovery

The Commission for Art Recovery is affiliated with the World Jewish Congress and was established in 1997 to spur efforts to reconstitute art that was seized, confiscated, or wrongfully taken on a massive scale as a result of the policies of the Third Reich and the devastation of the Holocaust. The Commission works to identify works of art whose ownership histories show gaps in the years between 1933 and 1945. Once identified, information regarding such works is made publicly available so claimants may easily search for works of art taken during the Nazi era. *Appropriated from CommArtRecovery.org*

For Searchable Database of Art Objects Cultural Plunder by the Einsatzstab Reichsleiter Rosenberg. Go to www.ERRproject.org