Art ATTACK

Ownership of Paintings and Other Objects of Value Is Being Challenged on a Number of Legal Fronts

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When a client of Chicago lawyers Richard H. Chapman and David M. Rownd called for their help in the growing tug-of-war over her painting by Pablo Picasso, they quickly recognized that it would be no ordinary case.

Femme en Blanc, painted by Picasso in 1922, was thrust into the limelight in 2002 after hanging in the home of Marilyn Alsdorf and her late husband since they purchased it in 1975 for $357,000. When Alsdorf sought to sell the painting through a Los Angeles art dealer, checks into its history flagged it as a work possibly looted by the Nazis during World War II. And now, a law student in California identified as the rightful heir has claimed the painting for his own.

While there were headline-grabbing aspects to the case, Chapman and Rownd viewed the legal issues in terms of fundamental principles of property law.

"When you stripped away all the newsworthiness, it was a case about personal property," says Rownd, a member along with Chapman at Chicago's FagelHaber. "The real issue is who has title."

E. Randol Schoenberg, the attorney for Thomas Bennigson, whose grandmother in Germany owned the painting when it was stolen by the Nazis, draws the case in a different light.

"The painting is a looted painting," says Schoenberg, a partner at Burris & Schoenberg in Los Angeles. "We could have pretended it was not a stolen painting, but it is."

Despite its overtones of emotion and history, the four-year legal battle over *Femme en Blanc* was resolved by a settlement check when Alsdorf paid the heir $6.5 million to extinguish his claim to the painting.

But the positions carved out by the opposing attorneys in the case are emblematic of a growing debate over what rules should decide ownership rights to works of art.

As this debate unfolds, the adage that possession is nine-tenths of the law appears to be holding less and less sway in the art world. Private collectors, dealers, museums and even government institutions in the United States and elsewhere are finding with increasing frequency that their ownership claims to artworks may be decided by other

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considerations than how long they possessed the works or the prices they paid for them.

Criminal theft cases are just one aspect of the art ownership issue—and perhaps the simplest to deal with. More than 60 years after the end of World War II, courts in the United States and elsewhere continue to struggle with questions of ownership and restitution relating to artwork and other objects of value looted during that conflict.

And in recent years, an increasing number of cases have added to the debate over "cultural patrimony"—the contention that artwork and other objects of cultural significance in the possession of foreign individuals or museums should be returned to their countries of origin, no matter how long ago they were taken out.

"There are different policies and debates raging in each area," says Steve Thomas, who heads the art law practice group at Irell & Manella in Los Angeles. "And those debates form the framework for how an action may go forward."

Cases relating to stolen art are widespread as well as complex. The FBI estimates annual losses from stolen art at some $6 billion. That figure encompasses objects "from art to Elvis' guitar," says Patty Gerstenblith, a professor and director of the program in cultural heritage law at DePaul University College of Law in Chicago.

Moreover, ownership claims on art can intrude on a variety of circumstances. Chicago lawyer Thomas J. Handler, for instance, represents a family that wants to sell some of the pieces from its significant art collection but is concerned about possible ownership claims and their potential fallout on the family's business.

"The strategy is to minimize the problem," says Handler, chair of the advanced-planning and family-office practice group at Handler, Thayer & Duggan. "But in some cases you have no idea there is a problem. A piece could be 200 years old. You may have done nothing improper, but how do you prove it? You have to disprove claims."

HIGH COST OF HANDSHAKES

AT ONE TIME, DISPUTES OVER art theft were quietly settled because there wasn't enough money involved to justify legal fights over title, says Theodore N. Kaplan, a former general counsel of Sotheby's auction house who is now a partner at Kaplan Fox & Kilsheimer in New York City.

"When I first began working at Sotheby's we would get things like a small German painting of Heidelberg," says Kaplan. "The local museum would write to us and say that it had that painting in the '40s and it had been stolen by German troops. We would go back to the consignor and find that it was worth $4,000, and then the museum and consignor would make a deal to buy it back for $3,500."

But, Kaplan says, "if that painting is worth $100,000 or $200,000 in today's market, it is all of a sudden worth a claim. It's all market-driven."

And yet despite the large sums of money exchanged for art, antiquities and other valuable objects, most of the deals have been done on a handshake with few, if any, questions asked. Though the well-settled common law in the United States bars a thief from conveying good title, until recently due diligence in the art world to check a work's provenance was rare.

"It's all about trust," Kaplan explains. "It's the kind of marketplace where you have to know who you are dealing with because there are lots of neophytes and lots of phonies."

In addition to market forces, the creation of the London-based Art Loss Register in 1991 bolstered efforts to recover stolen art objects. The register, which has offices in New York City and Cologne, Germany, as well as London, now is considered a necessary first stop in any art transaction to check on a piece's provenance. (For more information on the Art Loss Register, go to www.artloss.com.)

The register records more than 10,000 losses a year based on reports from owners, insurers and law enforcement agencies worldwide, and it has compiled a database of some 100,000 stolen works of art. The register says it has helped recover more than 1,000 lost or stolen works to date. One of them was *Femme en Blanc.*

Other organizations with similar missions exist, including several that are specifically devoted to helping recover art looted by the Nazis before and during World War II.

Now, more collectors and dealers are breaking with the long-standing tradition of doing art deals on a handshake in order to perform due diligence when they purchase art, says Thomas. But, he says, "They also need to understand this same issue of whether or not art has been stolen is a problem they may already have with art in their collections. Before loaning a work of art for public display or putting it on the market for sale or even gifting it to a museum, the collector should thoroughly review the provenance and perform due diligence in an effort to understand if there are any potential concerns or claims. Doing so allows the collector to be more informed and avoid potential surprise—and often can lead to a more efficient resolution of a claim."

A BREAK FROM ROUTINE

DESPITE THE DRAMATIC—AND SOMETIMES EVEN SHADOWY—nature of some art theft cases, legal actions to recover stolen art can be decidedly unsexy, says Gregory Alan Rutchik of Liner Yankelevitz Sunshine & Regenstreif in San Francisco.

Rutchik says virtually all cases seeking the return of stolen art amount to standard replevin claims, in which a party with legal rights to an item of property seeks to recover it from a party in wrongful possession. These cases rarely get to the merits, he says, and instead turn on questions of jurisdiction, statutes of limitation and even whether a theft occurred at all.

But stolen art claims—even those based on such textbook grounds as replevin—don't always stay simple, say Rutchik and other experts. For one thing, accusations of theft are thrown about somewhat loosely in the art world. When a couple is divorcing, for instance, one spouse may accuse the other of theft for taking a piece of art from the marital home. "Is that really theft?" Kaplan asks.

Galleries, auction houses and dealers may be accused of theft or conversion because they have not paid the proceeds of a sale to the owner. The same accusations may fly in cases of fraud or forgery, which normally give rise to claims for breach of implied or express warranty claims, but not conversion or theft.

A number of Holocaust restitution claims also have posed the question of whether a sale under duress constitutes theft or conversion for purposes of a replevin action. Much privately held art changed hands during World War II when many Jews were forced to sell collections to the Nazis at rock-bottom prices to obtain permits to leave the country, explains Hanno D. Mott, who practices art law at Rottenberg Lipman Rich in New York City. So far, no clear answer has emerged.

Earlier this year, for instance, heirs of the Nathan family, which was prominent in banking in pre-Nazi Germany, sued both the Detroit Institute of Arts and the Toledo Museum of Art asking for compensation or the return of paintings by Vincent van Gogh and Paul Gaugin. The heirs claim that their family members sold the paintings under duress during the Holocaust to an art dealer for substantially less than market value. The museums eventually acquired the works from the art dealer.

The cases originated as quiet title suits by the museums. *The Detroit Institute of Arts v. Ullin*, No. 2:06-cv-10333 (E.D. Mich. Jan. 24, 2006); *The Toledo Museum of Art v. Ullin*, No. 3:06CV7031 (N.D. Ohio Jan. 24, 2006).

In a federal court lawsuit filed in 2005, the estate of Canadian art dealer Max Stern sued a Rhode Island woman over title to a painting that she acquired from her stepfather, a high-ranking member of the Nazi party. It is undisputed that Stern was forced to sell much of his art collection during the Holocaust to escape from Nazi Germany, and that the Nazi official acquired the painting in question for below-market value. The stepdaughter in possession of the art, while acknowledging the forced sale, has contested the estate's claim to title on grounds that Stern did receive payment for the painting. She has refused to return the painting to the estate unless she is compensated for its current market value. *Max Stern Estate v. Bissonnette*, No. 06211ML (D. R.I).

Proceedings in both cases are continuing.

STOP THE CLOCK

DEFENDING A CLAIM OF CONVERSION CAN BE ESPECIALLY difficult because of the fungibility of art. In one of the more common scenarios played out in art replevin cases, a stolen work may have changed hands multiple times over many years without anyone knowing it was stolen. Then, by chance, the last owner may learn it was stolen somewhere in the chain of title.

As a result, many good-faith purchasers who end up as defendants in art replevin cases try to attack the claims on procedural grounds.

Statutes of limitation often are the first line of defense for the good-faith purchaser, says Gerstenblith of DePaul University. In most jurisdictions, the statutory period to commence actions to recover stolen property is two years to six years.

Because courts often are trying to balance the rights of two innocents—the rightful owner and the good-faith purchaser—many have interpreted the statutory limitation periods to run not from the date of the theft, but from the date of the discovery of the work's existence or location, says Thomas.

Gerstenblith says most courts now apply what is known as the due-diligence rule, which tolls the statute of limitations as long as the rightful owner has used diligence to find the property.

A minority of states apply a discovery standard to replevin actions, shifting the burden onto the original owner or heirs by running the statute of limitations from the time they should have known of the theft.

New York recognizes a third variation, known as the demand-and-refusal rule, under which the statute of limitations doesn't begin to run until the owner or heir has located the stolen property and demanded its return from the party in current possession.

At the same time, however, New York applies the affirmative defense of laches in replevin actions to recover stolen art. In *Solomon Guggenheim Foundation v. Lubell*, 77 N.Y.2d 310 (1991), the court ruled that, even if the statute of limitations is tolled by one of the procedural rules and the replevin action is considered timely, a defendant may invoke the equitable defense of laches to prove that the claimant's delay in pursuing recovery prejudiced the defendant.

Lower courts in New York have applied *Lubell* in other cases. Thomas says these cases underscore the importance of making the most basic efforts to report thefts and locate missing artwork even though doing so might not seem to be in the legal interest of good-faith purchasers.

"It is still the smart thing to do," Thomas says. "Proper due diligence can help you avoid making a purchase that turns out to be stolen art. It also may help you later because if you do have a replevin claim against you, you have a better shot of asserting a laches defense by saying, 'I did this and that, and the original owner never made any effort to let the art world know [the] art was stolen.' "

HOLOCAUST LEGACY

IN TERMS OF SUBSTANTIVE LAW, CLAIMS TO RECOVER ART looted during the Holocaust aren't significantly different from other stolen-art cases—essentially, they all are replevin actions.

But Holocaust claims often are complicated by the underlying facts, procedural issues and, in some cases, unanswered questions of law.

"I think a lot of collectors now realize that if you get through all of the procedural arguments and get to the merits, you really can show that these things were stolen," Schoenberg says. "But getting through the procedural part is hard because you can get bogged down."

Schoenberg has represented several plaintiffs in successful attempts to reclaim art looted from their families during the Holocaust, including Maria Altmann, who recently recovered six paintings by Gustav Klimt—an influen-

tial artist in Vienna at the turn of the 20th century—from the government of Austria. The paintings had belonged to her family before World War II.

Few Holocaust cases are initiated without strong evidence, says Morton L. Price of Cowan, Liebowitz & Latman in New York City, and they often are negotiated to a settlement with little more than a demand letter. Price represents an estate seeking to recover more than 500 pieces of art taken during the Holocaust.

Procedural issues can produce much more daunting hurdles for claimants in Holocaust restitution cases. Two high-profile cases handled by Schoenberg illustrate some of the difficulties.

When negotiations for the return of *Femme en Blanc* broke down, for instance, Schoenberg tested the limits of how far the California courts were willing to extend their jurisdiction. Even though the current owner of the painting lived in Chicago, Schoenberg filed a replevin action on behalf of the heir of the original owner in California because the painting was in the possession of a Los Angeles gallery that was trying to sell it.

In addition, California in 2003 extended the statute of limitations to 2010 for replevin actions for certain types of property looted during the Holocaust that has turned up in museums and galleries. California's statutory filing period for replevin actions normally is three years from the time the painting's whereabouts become known.

A California Superior Court's ruling that it did not have jurisdiction over the painting because it was being held by the Los Angeles art gallery only on a temporary basis was affirmed by a state appellate court. The parties settled the case before it could be heard by the California Supreme Court.

In Altmann's case, Schoenberg sued the Austrian government in California after Austrian courts required a litigation bond that was too expensive for Maria Altmann to obtain. The suit posed the question of whether a foreign government could be sued in a state court under the U.S. Foreign Sovereign Immunities Act of 1976.

The case went all the way to the U.S. Supreme Court, which ruled in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), that the California courts had jurisdiction over Maria Altmann's suit to recover the Klimt paintings. In its decision, the Supreme Court held that the California courts had jurisdiction under the Foreign Sovereign Immunities Act if the lawsuit was filed after the act's passage, even though the underlying facts giving rise to the case occurred before the law was passed.

Gerstenblith says the high court's ruling in *Altmann* will have far-reaching implications for Holocaust restitution claims, as well as other cases arising under the Foreign Sovereign Immunities Act.

But experts in the field say it can't be assumed that Holocaust restitution cases will be decided under U.S. law. Before the dispute over *Femme en Blanc* settled, for instance, defense lawyers Chapman and Rownd were prepared to argue that French, not U.S., law should control the case. Because French law would recognize good-faith title to property purchased from a thief, the heir to the original owner would have had a weaker claim to the Picasso painting than he had under U.S. law.

The jurisdictional issues aren't easy to sort out, says Schoenberg. "When art is taken in one place, stolen in another and sold in a third place, it gets complicated," he says.

Moreover, he says, "Some of these questions have not been answered by courts in the United States."

WHOSE HISTORY IS IT?

A GROWING DEBATE OVER WHO IS ENtitled to possess antiquities and other "cultural property" from ancient cultures could in the long run overshadow other issues of art ownership.

Increasingly, the debate is pitting archaeologists and "source countries" against museums, galleries, private collectors and others in "market countries" on the question of what the proper place should be for cultural artifacts and antiquities.

"It really comes down to a debate over who owns the past," says Los Angeles lawyer Thomas. "Say an object is 1,500 years old and is found in present-day Syria. Does it belong to Syria because it was found within its border, or does it belong to the world because 500 years ago the area where it was found was located within the borders of some other country and the culture represented by that object has died out? You also can posit that it belongs to no one."

The debate over cultural property has spawned some headline-grabbing cases during 2006. The Italian government, for instance, is going ahead with its prosecution of Marion True, the former antiquities curator at the J. Paul Getty Museum in Los Angeles, on charges that she conspired to loot Italian antiquities. In an unrelated matter, the Getty agreed to return two antiquities to Greece that the Greeks maintained had been removed illegally from the country. In September, the Museum of Fine Arts in Boston returned 13 items of antiquity to Italy that the Italian government said had been looted.

Concerns about cultural property are not new. In 1970, a treaty known as the UNESCO agreement was signed by many nations to help stem the flow of ancient antiquities and artifacts from source countries to market nations like the United States. By that time, many source countries already had passed laws prohibiting any export of cultural objects located within their borders.

The United States implemented the UNESCO agreement through the Cultural Property Implementation Act, but critics said the law had no teeth because it did not bar imports of illegal exported objects.

Because the agreement did not stop the trade of cultural antiquities and artifacts, many source countries then passed "found in the ground" laws declaring all such items to be national property, which meant that any unauthorized removal from a country would be considered theft rather than just an illegal export.

Some 70 source countries also have the added ammunition of found-in-the-ground laws, which make all such items the property of the nation-state. The effect of these laws is to make the unauthorized removal of cultural artifacts a theft, rather than just an illegal import.

In addition, 11 countries have negotiated bilateral agreements with the United States to restrict the import of certain items into this country. But some of these agreements have been criticized for being overly broad,

says Thomas. (See www.state.gov/cultprop for agreement provisions.)

"You don't have to be an expert on ancient cultures," says Gerstenblith. "If [an object] is on the list, you have to find out if there is an export license and on what date it left the country of origin."

The seminal U.S. case in this area, according to Thomas, is *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979), which involved several art smugglers who were indicted under the National Stolen Property Act for conspiring to deal in Mexican artifacts. This case gave rise to the *McClain* doctrine, which says the United States will recognize foreign declarations of ownership or found-in-the-ground laws provided they are unambiguous and enforced domestically in the source country.

The *McClain* doctrine was underscored by the 2002 federal conviction of New York art dealer Fred Schultz for conspiring to sell Egyptian antiquities. Under Egypt's found-in-the-ground law, possession or trade of those items is illegal because they are state property. The Egyptian law was the basis for Schultz's prosecution under the National Stolen Property Act.

The United States also has used civil forfeiture as an enforcement mechanism. In one case, the government seized a $2 million gold platter that New York artifact dealer Michael Steinhardt was importing into the country. The seizure was upheld in *United States v. Antique Platter of Gold*, 184 F.3rd 131 (2d Cir. 1999).

New York City lawyer Carl R. Soller, who helped represent Steinhardt, maintains that the outcome reflects a web of laws and treaties that fail to deal with cultural artifacts in an equitable manner.

One problem, says Soller, a partner at Cowan, Liebowitz & Latman, is that many of the foreign laws have not been interpreted into English. And in many instances ownership of antiquities has not been clearly established under patrimony laws. Another problem, he says, is that U.S. customs regulations do not have adequate procedures to cover the legal importation of antiquities.

Gerstenblith, however, says it might be best for those in the art and cultural property trade to focus on how existing laws are enforced rather than argue their merits.

"Don't get into the debate," she says. "You just need to know what the law is." ■

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A Painting's Tortured Path

Femme en Blanc has had an eventful history influenced by the turmoil of the 20th century.

1922 Pablo Picasso completes *Femme en Blanc.*

1926-27 Robert and Carlota Landsberg, a Jewish couple living in Berlin, purchase *Femme en Blanc.*

1933 Adolf Hitler becomes chancellor of Germany, bringing the Nazis to power.

1939 As World War II begins, Carlota Landsberg, now widowed, sends *Femme en Blanc* to Parisian art dealer Justin Thannhauser for safekeeping and flees Germany. Soon after, Thannhauser departs Paris.

1942 Thannhauser's Paris home is looted by the Nazis.

1958 Thannhauser sends a letter to Landsberg telling her *Femme en Blanc* was looted by the Nazis.

1975 James and Marilyn Alsdorf purchase *Femme en Blanc* for $357,000 from a New York City art gallery.

2001 Marilyn Alsdorf, now widowed, seeks to sell *Femme en Blanc* through a Los Angeles art dealer. At first, the painting does not appear on the database at the Art Loss Register.

2002 The Art Loss Register informs Alsdorf that the painting was looted by the Nazis, but doesn't initially identify Carlota Landsberg as the original owner. After Landsberg's ownership is confirmed, her grandson Thomas Bennigson files a lawsuit against Alsdorf in California Superior Court.

2004 The California Court of Appeal affirms the superior court's ruling that it did not have jurisdiction to hear Bennigson's suit. The California Supreme Court agrees to hear the case.

2005 Alsdorf pays Bennigson $6.5 million in return for dropping his claim to *Femme en Blanc.*

2006 Alsdorf sells *Femme en Blanc* at an undisclosed price to an unnamed purchaser.