# The Legal Canvas

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# New Decade. New Market. New Issue.

On September 15, 2008, the same day that Lehman Brothers collapsed, Sotheby's commenced a two-day sale of new versions of classic works by Damien Hirst. The sale netted more than $200 million in proceeds.

It may be that when Hirst conceived the sale, he intended not only to sell art, but to have the sale itself act as a commentary on the seemingly insatiable appetite of the market for trophy art – the more expensive and high-profile, the better. It is unlikely that he anticipated that the sale would mark the end of an era in the way that it did.

The first half of 2009 saw sharp reductions in purchases as collectors waited to see just how bad the economy would get and just how much disposable income they might have going forward. The drop caused a number of important contemporary galleries to shut their doors, closing what had been significant showplaces for emerging artists.

By the fall, some market participants and observers were ready to declare the return of the art market. Sales at art fairs were up, and the auction houses were showing improved sell-through rates. But the good news was premised on lowered expectations; it was good news because it wasn't worse. Auction estimates – and reserves – were considerably more conservative, and the art that was selling at galleries and fairs tended to be at lower prices.

As we go to press, the February auctions in London have shown some strength, with records being set in both the Impressionist and Contemporary sales. Rare works sold well, and the $104 million price achieved for a Giacometti sculpture made some observers giddy. Other commentators have cautioned, though, that these prices do not necessarily mean that the market has "recovered."

The new normal is being established while the old era continues to unwind. As we have noted before, it is during this kind of transitional period -- where the proverbial piper is demanding payment and money may be scarce -- that market participants can discover that their legal rights do not necessarily match expectations based on market experience.

In this issue, we discuss the things a buyer can do to protect himself when he is thinking about buying art. We examine the scope of the legal rights a buyer may have, as well as steps buyers might take to avoid ever having to invoke those rights. We also consider a recent case that serves as a caution to buyers about relying on appraisals when they may not know the real agenda of the appraiser.

In another area where legal rights do not necessarily match up with art market custom, we look at a New York State court decision that held that the creator of a catalogue raisonné had no legal obligation to consider and opine on the authenticity of any given work of art unless it contracted with the work's owner to do so.

Authenticity is also the focus of a piece on the questions that may be raised going forward about art that is technology-based. When the component parts of a work of art are no longer manufactured – and thus can no longer be replaced – can an artist disclaim that work's authenticity? If so, is there anything a collector or museum can do when it purchases a work of technology-driven art to protect against its inevitable obsolescence?

Finally, we examine new regulations from the Transportation Security Administration that will affect shipments of art on commercial flights, and a federal court decision striking down a special statute of limitations for Holocaust-related restitution claims. ❖

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## In this issue . . .



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# Caveat Emptor: Why You Should Protect Your Legal Rights, But Use Your Common Sense

The art market has any number of idiosyncrasies. One is that it tends to operate in its own universe, with its own customs and rules of behavior. In that universe, people prefer not to formalize their relationships or transactions with legal documents. It is a community that has traditionally relied on trust and handshakes. It is considered bad form to doubt someone's word or to ask too many questions.

Remarkably, it is a universe that usually works. Transactions get done and relationships endure. Everything's ok. Until it's not.

Sadly, the downturn in the market has demonstrated any number of ways that things can go wrong. And when they do, the parties wind up in courtrooms where the judges are unfamiliar with the customs of the market and more focused on doctrines of law.

The good news for buyers is that the law affords them substantial protection, as long as they are careful not to waive it. The bad news is that enforcing legal rights is expensive. Once you wind up in litigation, you can expect the fees to be substantial.

Ultimately, the best protection for a buyer is to approach the purchase of art with the same common sense and sound judgment that he applies to other significant transactions. He should be sure that his interests are legally protected, *and* he should do his own due diligence about the artwork, the seller and the price. Most importantly, he should be prepared to walk away from a deal if he is uncomfortable on any one of those fronts.

## *Warranties "come with"....*

Buyers' legal rights can be created by statute, common law or contract. The Uniform Commercial Code (the "UCC"), a statute that has been adopted in some form by all 50 states and that governs commercial transactions (including the sale of art), defines broad rights for buyers.

- Section 3-312 states that every contract for sale includes an implied warranty of *good title*. The seller is deemed to be promising you that, when you buy the picture, you will receive good title to it free of unknown leans on it.

- Section 2-313 states that any "affirmation of fact" or "description of the goods" made by the seller to the buyer that "relates to the goods and becomes part of the basis of the bargain" creates an express warranty that the goods conform to the affirmation or description. If the seller tells you the picture is by Picasso and was once owned by George Clooney, he is promising you that these facts are true.

## *.... but warranties can be excluded by contract....*

Each of the express or implied warranties created by the UCC may be modified or excluded by contract, as long as the exclusion is worded in such a way as to put the buyer on notice that no warranty is being given. Certain forms of liability under common law – such as negligence – may also be limited or excluded. When purchasing art a buyer should pay close attention to the "legalese" that may be included in the purchase contract or invoice. It matters. If the buyer has particular concerns about the purchase, he should be sure those concerns are clearly addressed in writing and not excluded.

In some cases, a buyer will not be able to negotiate the legal terms of sale. Most notably, when you bid

at any of the major auction houses you are deemed to be entering into a contract to be bound by the house's conditions of sale or business. These conditions are included in every auction catalog and on each house's website, and U.S. courts have upheld their enforceability, even against buyers who claim never to have seen or read them.

The conditions of sale at auction strictly limit the auction house's liability to the buyer. The houses explicitly state that each purchase is "as is," subject only to a very limited warranty of the most basic attribution, typically the name of the artist. The warranty is further limited by excluding situations in which, for example, the given attribution was consistent with general scholarship at the time of the sale, there was disagreement among scholars at the time of the sale, or the accurate attribution could have been determined only by using a technology that was unavailable or was inordinately costly as of the time of the sale. If a sale is cancelled, the conditions of sale limit the buyer's recovery to the original purchase price. But before the auction house will rescind a sale of an allegedly inauthentic work, it reserves the right to require that the buyer comply with certain procedures, such as obtaining the written opinions of two acceptable experts to the effect that the work is inauthentic and returning the work to the auction house in the same condition as when it was sold.

***.... and warranties, like other promises, can be broken.***

A warranty is only as solid as the integrity and financial stability of the person who is giving it. Before you buy a work of art, be sure that you are comfortable with the person, gallery or auction house that is selling it. See if other buyers have brought claims or lawsuits against the seller. Even if you have done business with the seller before, update your research. Is there any new indication that the seller may be in financial trouble? Has a pattern of lawsuits developed that would lead you to reassess the seller's

## Buying Art

The purchase of a work of art has always been different than almost any other kind of purchase. The object itself is usually nearly worthless if judged merely by the cost of its components: pigment on canvas, ink on paper, molded clay or resin. It also usually has no functional purpose – you can't drive it, eat it, sit on it, or live in it. Its true value to the collector rests on her subjective reaction to the work and how she experiences living with it. The long term *financial* value of the work rests on whether its esthetic quality generates a similar reaction in others and whether it continues to do so over time.

We are acutely aware that we are lawyers and not art advisors. We are also persuaded, however, that an important way to avoid legal problems in the art market is to proceed thoughtfully and to exercise common sense and sound judgment when you buy art. So we asked Michael Findlay, Director, Acquavella Galleries, for his advice for buyers in today's market. Here is his response:

- Establish your own taste so that you can buy what you like – and not what someone else likes. To do this, you should look at a lot of art. Visit museums and galleries. Go to art fairs. When you like something sufficiently, your curiosity will lead you to learn more about it. This needn't be a stressful endeavor. In fact, you will more likely find it engrossing and exciting.
- Don't be in a rush to buy. Do a lot of window-shopping. Research and visit a broad range of galleries – from the most established dealers to the more experimental spaces. Ask for prices even if you have no intention of buying.
- If you think you need advice, work with a professional art advisor, preferably someone with real credentials in the field. Look for someone who has both commercial experience as well academic or museum-related depth. Ask the advisor for references, and contact those references before you retain the advisor.
- If you work with an art advisor, carefully consider the payment arrangement. Some advisors get paid a flat retainer or hourly fee for their services. Others get paid a percentage of the amount spent by the buyer. Still, others get some or all of their

trustworthiness? If you have any qualms or uncertainty, proceed with the purchase only if you are prepared to take the risk. If the seller breaches a warranty, you may be able to win a lawsuit against him, but you will spend a lot of time and money in the process.

### *Innocent buyers have rights that are superior to a seller's creditors….*

As discussed in the Summer edition of *The Legal Canvas*, the UCC also protects an innocent "buyer in the ordinary course" from having to return a work purchased from a merchant who did not have clear title or the authority to sell the work. A "buyer in the ordinary course" is defined as being a "person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in the ordinary course from a person in the business of selling goods of that type." For most buyers, this means that as long as they don't have actual knowledge that, for example, a painting is merely on loan to a gallery and not for sale, they get good title and the owner is left with a claim for money damages against the dealer. If the buyer is another merchant, he must have acted reasonably in the circumstances to be considered a buyer in the ordinary course.

### *…. but when things go badly, creditors look for relief wherever they can get it.*

The way the law is structured, there would appear to be some incentive for the non-merchant buyer not to ask too many questions. If he has no knowledge of a third party's interest in a picture, he gets title. If he has knowledge, he loses his status as a buyer in the ordinary course and can lose the work. There is, however, every incentive for merchant buyers to be able to demonstrate that they took reasonable measures before they purchased art. In the current bankruptcy proceedings involving the Salander O'Reilly Gallery

payment as a commission from the sellers of art for having made the introduction to the buyer. Each of these methods can create different incentives for the advisor, and you should be sure you are comfortable with the structure.

- When you are buying from a gallery, establish a relationship with one person with whom you feel comfortable. At an auction house, where specialists deal with a wider variety of artists and a larger quantity of art, get to know more than one person in your collecting field at each house. "Ask around" for opinions about quality and value.
- No matter what you buy or from whom, the seller should be able to give you sound reasons for the price of any particular work of art. You should not be afraid to ask "Why is that the price?" or "What makes this work particularly good?"
- Be wary of professionals who use investment terms to persuade you to purchase a work of art. An art professional should be able to tell you the value history of the work and why it is currently worth so much. But nobody has a crystal ball to future value.
- Always ask whether there are any condition problems, and be prepared to have the work examined by an independent conservator. It is well worth the cost if it saves you from buying a damaged piece.
- Buy with your eyes, your heart and your brain, not your ears. Buying a work of art because "everyone is talking about" the artist is likely to make you a victim of hype.
- Pay what you can afford to spend out of disposable income. In other words do not take funds that you expect you might need for future contingencies and imagine that you are putting the money on the wall. Not all works of art appreciate in value and art is illiquid. You may not be able to sell it when you have to. If you buy art to keep and enjoy, in the (sometimes very) long run you or your heirs may very well be happy with the results when it is sold.
- Buying art should be fun. Remember that the real reward is living with the art and getting to know it by constant daily contact.

in New York, a number of lawsuits have been filed against merchant buyers by owners of works that had been consigned or entrusted to the gallery. Unable to receive full restitution from the bankruptcy estate, these plaintiffs are looking to recover from the buyers of their works. The possibility of similar claims being brought against non-merchant buyers would suggest that ignorance may wind up being an expensive strategy. Again, a buyer in the ordinary course will likely be able to defend his title to the work. But the costs could be substantial.

## Doing due diligence.

Not every deal requires the same amount of care. If the purchase price is an immaterial amount to the buyer, the purchase may not require the same amount of research as a more substantial transaction. However, a buyer's inquiry need not be complicated or expensive.

- There is a wealth of information online. Do a simple Google search and use your common sense (as opposed to wishful thinking) to evaluate what you find.
- Search the UCC financing statements of the state in which the seller is located to see if someone else has an interest in the work you are buying. The search can be done online for free. (You should be able to find the website by searching for "UCC filing" plus the name of the state.) If you find out that the work is with the gallery for purposes other than sale, you can avoid potential litigation by not buying the work.
- Ask knowledgeable people whom you trust about the seller. Has he or she done business with the seller? Is the seller trustworthy? Has there ever been any problem?❖

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# Caveat Emptor II: A Case of Misplaced Reliance

The price of any given work of art will depend on a number of variables, only some of which are knowable or quantifiable.

- What prices have been paid for similar works by the same artist?
- Is there anything about the quality, provenance or condition of the work that would make it worth more or less than the artist's other works?
- Where is the art market generally, and what is the market for this particular artist?
- How many other buyers may be competing for the same work?
- How important is it to the owner to sell the work?
- How badly does the buyer want to buy it, and why?

As a result, it is not unusual for similar works of art (or, in the case of multiples, works from the same edition) to be sold at different prices by different galleries. That does not necessarily mean that the more expensive galleries are over-charging – or that there is any wrongdoing involved in their pricing.

If you draw an analogy between sales of art and sales of more standard retail goods, few people would think that they could sue a high-end boutique on Madison Avenue for selling them a set of sheets for a higher price than they might pay at a suburban mall. A retail buyer understands that his relationship with the seller is arm's length, and the law generally permits a seller to charge what he wants.

In the art market, a buyer's relationship with a seller – a gallerist, an owner, or an intermediary – may lead the buyer to believe that the transaction is not at arm's length and that the seller has responsibilities to him that the seller simply does not have.

Especially where the issue is price (as opposed to issues like authenticity or title), courts will generally hold buyers to be on their own. In order for a buyer to be compensated by someone who has caused him to overpay for a work of art, the buyer needs to be able to show that the seller owed him a specific legal duty and that the duty was violated.

An appellate court in New York recently applied that principle to deny recovery to a corporate buyer of a work of art who relied to its apparent detriment on an appraisal given by a market expert, even though the expert did not disclose to the buyer that the expert had an ownership interest in the work at hand.

## *Mandarin Trading Ltd. v. Wildenstein*

In *Mandarin Trading Ltd. v. Wildenstein*, an individual named Amir Cohen approached Mandarin Trading, and said that a painting by Paul Gauguin, *Paysage aux Trois Arbres*, was for sale. Cohen offered to broker the deal. The idea was that after Mandarin Trading purchased the painting, it would consign the painting for auction. Cohen would receive a commission based on the proceeds of the auction sale. Before agreeing to the deal, Mandarin Trading asked Cohen to get the painting appraised. Cohen caused an appraisal to be delivered by Guy Wildenstein of Wildenstein & Co. that valued the picture at $15-17 million. The appraisal stated that Wildenstein had once sold the picture, but did not disclose that Wildenstein had a prior ownership interest in it. In fact, Wildenstein appeared to

have had a current ownership interest in the painting; it was alleged that companies affiliated with or owned by Wildenstein received the bulk of the $11.3 million purchase price paid by Mandarin Trading.

After purchasing the picture, Mandarin Trading consigned it to Christie's, where it was offered for sale with an estimate of $12–16 million. At auction, the bidding stopped at $9 million and the painting failed to sell. Mandarin Trading subsequently sued Guy Wildenstein and the Wildenstein gallery, raising various claims based on misrepresentation and breach of contract.

In 2007, a New York state court dismissed Mandarin Trading's claims, and in August 2009 the dismissal was affirmed on appeal. Each opinion rested primarily on the fact that Mandarin Trading had no relationship with Wildenstein. It was the broker, Cohen, who had requested the appraisal, and the appraisal was delivered not to Mandarin Trading directly but to an intermediary who presumably delivered it to Mandarin Trading.

As a result, Mandarin Trading could not claim that Wildenstein had breached a contractual obligation; there was no contract between them. Nor could Mandarin Trading allege any factual basis to support claims of fraudulent misrepresentation or fraudulent concealment. Mandarin Trading could not allege Wildenstein knew the purpose for which the appraisal was being requested, knew that it was being requested for Mandarin Trading, or knew that Mandarin Trading would rely on the appraisal in purchasing the painting. Moreover, according to the appellate court, the appraisal was merely an opinion, which is not independently actionable, and on its face "contain[ed] no facts that [were] alleged to have been misrepresented."

Similarly, the appellate court rejected the plaintiff's allegation that even if not deliberately fraudulent, the appraisal constituted at least a negligent misrepresentation. Again, without either a contractual relationship between the parties or a relationship that was "so close" as to form the same kind of responsibilities, Mandarin Trading could not recover against Wildenstein.

Finally, the court rejected the plaintiff's equitable claim that Wildenstein was unjustly enriched as a result of the transaction, despite "allegations that [Wildenstein] failed to disclose [an] ownership [interest] in the painting and intentionally inflated [the] appraisal of its value, causing Mandarin to be misled as to the painting's value and to pay an inflated price for it, and that [Wildenstein] or entities related to [Wildenstein] received a large portion of the higher-than-market purchase price…." The court stated that the plaintiff had failed to demonstrate that it would be "against equity and good conscience" to permit Wildenstein to retain the proceeds of the sale. Mandarin Trading was not legally entitled to rely on the appraisal, and "even if" Wildenstein received a benefit, it was not "unjust, especially because Mandarin could have, but did not, obtain its own appraisal from Wildenstein."

Not all of the judges on the court agreed that Mandarin Trading should be left without a remedy. A dissenting opinion took the view that even though legal doctrines would bar relief, Mandarin Trading should have been able to proceed under principles of equity.

The dissenting judge noted that although there was no connection between Mandarin Trading and Wildenstein with respect to the appraisal, there *was* a connection between them with respect to the sale itself. Mandarin was the buyer and Wildenstein was the seller. Then, acknowledging that buyers usually cannot seek equitable recovery where they have not exercised due care, the judge stated that the rule is different where the seller creates a situation that "substantially impairs" the value of the transaction for the buyer. Taking the complaint's allegations as true (the standard for a motion to dismiss), the judge stated that Wildenstein issued an appraisal that overstated

the value of the painting and caused Mandarin Trading to overpay. Mandarin Trading relied on the appraisal because Guy Wildenstein was an acknowledged expert on Gauguin – and because Mandarin Trading had no reason to doubt Wildenstein's objectivity or intent because Wildenstein did not disclose that he owned the picture.

In the view of the dissenting judge, the facts as alleged stated a cause of action that should have been permitted to go to trial. Any other outcome, he said, "'places upon the buyer not merely the obligation to exercise care in his purchase, but rather to be omniscient with respect to any fact which may affect the bargain. No practical purpose is served by imposing such a burden upon a purchaser. To the contrary, it encourages predatory business practice and offends the principle that equity will suffer no wrong to be without a remedy.'"

## The case provides a roadmap for buyers of art.

- Before you buy a work of art, you should make yourself comfortable that the price is reasonable. Information is available, and the courts are unlikely to bail you out if you overpay. Sometimes, due diligence on the price of a work of art will involve merely informal research. Recent auction prices for the artist can be checked inexpensively on websites such as artnet.com. Remember, though, that auction prices may not be available for some artists whose work has not yet been sold at auction – and auction prices may not accurately reflect current prices in the private market. If more than one gallery works with the artist, find out each gallery's price for similar works.

- Where the price of the work is substantial, a more formal appraisal may be called for – perhaps one that the buyer actually pays for. Mandarin Trading was right to seek an appraisal of the painting before it agreed to the purchase. However, it should have sought one on its own, rather than asking the broker who had proposed the deal to obtain one. If Mandarin Trading received an appraisal from another entity, perhaps the appraised value would have been low enough to dissuade it from purchasing the piece for $11.3 million. (Christie's low estimate, for example, was $12 million.) Even if Mandarin Trading had sought and received an appraisal directly from Wildenstein, and even if Wildenstein had not disclosed his interest in the picture and given the same appraisal, Mandarin Trading would have been better off in court. It would have established the direct relationship that the court held was necessary to its legal and equitable claims, and it would have been seen to have done the due diligence that the court criticized it for failing to do.

- Where an appraisal is done, it should be performed subject to a written agreement that should include:

  - A representation that the appraiser has no direct or indirect interest in the art that is being appraised, and that he is receiving no compensation from anyone but the buyer in connection with the appraisal or the sale of the work.

  - An acknowledgement of the purpose for which the appraisal is being performed.

  - A requirement that the appraiser disclose the basis for his or her opinion of value.

  - A clear statement of the fee that the appraiser will charge. The fee should be a flat fee, or a fee based on an hourly rate. It should have no relation to the value of the work. ❖

**For more information on this topic, contact Derek Williams at 212.336.2398 or dwilliams@pbwt.com or Jo Laird at 212.336.7614 or jblaird@pbwt.com.**

# Limitations on Liability of Authors of Catalogues Raisonné

Authentication committees and authors of catalogues raisonné play a critical role in the art world. They are generally made up of people who have a special expertise in the work of an artist – art historical scholars, dealers who have represented the artist's work, family members, and/or representatives of the artist's estate. Without the imprimatur of an authentication committee or the creators of a catalogue raisonné, a work of art may be virtually unmarketable.

We noted in the Summer 2009 issue of *The Legal Canvas* that the art world has an interest in protecting the ability of these experts to provide their best professional opinions without fear of legal exposure. We also noted, however, that their decisions can have substantial financial and art historical implications, and that the market therefore has an interest in holding them accountable when they engage in unlawful behavior. The decision by the federal district court to permit an antitrust complaint against the Andy Warhol Foundation, the Andy Warhol Authentication Board and others to proceed -- on which we reported in that issue -- represented one judicial data point in striking this balance.

In December, an appeals court in New York provided another. In the case of *Joel Thome v. The Alexander & Louisa Calder Foundation, et al.*, the court held that absent an independent contractual responsibility to an applicant, the Calder Foundation, as author of a Calder catalogue raisonné, had no legal obligation to render an opinion on any given work of art.

Joel Thome, the plaintiff in the case, alleged that in 1975, he approached the artist Alexander Calder to discuss the re-creation of stage sets that Calder had designed for a 1936 production of an Erik Satie composition and the mounting of a new production. Calder agreed to the re-creation of three versions of the set – a full size set, a smaller one for smaller theaters, and a maquette, or model. Working from drawings of the original set designs, a set of plans was prepared by an architect and approved in writing by Calder. The sets were constructed, but Calder died before his picture could be taken with them. The production was staged a year later.

In 1997, Thome decided to sell the sets, and supplied documents to the Calder Foundation seeking to have the sets authenticated and included in the catalogue raisonné. He subsequently submitted additional documents. Each submission was acknowledged in writing by the Foundation.

Despite conversations that Thome alleged he had with the Foundation indicating that the works would be included, the works were never given an authentication number. Thome alleged in his complaint that as a result, he has been unable to sell the sets despite interest on the part of a number of buyers.

Thome sued the Foundation, as well as its director and a number of its trustees, seeking a declaratory judgment that the works are authentic works by Calder, an injunction ordering the Foundation to include the work in the catalogue raisonné, and damages under a number of different causes of action. The case was dismissed by the trial court. The appellate court affirmed that ruling.

The core question in the case was whether the Foundation owed any legal duty to Thome, either because it was a not-for-profit corporation, or because of promises that it allegedly made to Thome, or because of "its unique position as the sole arbiter of whether work will be included in Calder's catalogue raisonné."

The court concluded that no such duty existed.

### *A court is just a court...*

The court first stated that even if it concluded that the work was authentic, it had no authority to compel a private entity such as the Calder Foundation to include the work in the catalogue raisonné. Catalogues raisonné are voluntary and private undertakings. No one is compelled by any government regulatory body to issue a catalogue raisonné, or to include any particular work in it. Therefore, "neither the creation of such a catalogue nor its inclusion or exclusion of particular works creates any legal entitlements or obligations." Even if the art market accepts the Foundation's determinations of authenticity as authoritative, "that fact alone does not give a court the right to dictate what the Foundation will include in that catalogue, just as no court has the authority to compel a scholarly author of a treatise on Calder to include a listing or discussion of a particular work."

The court then turned to Thome's request for a declaratory judgment that the works are authentic. The court ruled that it would be inappropriate as a legal matter, and ineffective as a practical matter, to issue such a determination. As a legal matter, the declaratory judgment mechanism is meant to be used as a way of determining the legal rights of parties to a dispute where the facts are not at issue. Here, the court was being asked to *decide* an issue of fact – whether the works are authentic. Since "art authentication involves the exercise of [an] expert's informed judgment, … is highly subjective, and even highly regarded and knowledgeable experts may disagree on questions of authentication," the court concluded that it is not the kind of determination that is suited to being made by a court on a motion for declaratory relief.

Moreover, the court noted that while declaratory judgments are meant to bring resolution to a dispute, a declaration that the works are authentic would not do that. It would act, as the court put it, merely as a record that the decision of the Foundation was disputed – at best, an "advisory opinion." Without the concurrence of a recognized market authority – in this case, the Foundation – the opinion of a court will not be accepted as meaningful by the market. The court noted that this was the result in a case from 1993 involving a Calder, *Greenberg Gallery, Inc. v. Bauman*, in which the judge made a factual determination that a Calder sculpture was authentic. In that case, the court was obliged to make the finding of fact in order to adjudicate the rights of the individual parties to the dispute – the current owners, who claimed that they had been sold a forgery, and the former owners, who maintained that they had not. The court's authenticity finding was not meant to establish the authenticity of the piece to the world at large – and indeed did not. Even though the sellers won, the market continued to rely on the buyers' art expert Klaus Perls, who believed the sculpture to be a forgery, and the new owners were left with a virtually valueless work of art.

In the *Greenberg* case, the court acknowledged that the art world might not accept its opinion, but concluded that this was simply not its problem. *"This is not a market…but a court of law, in which the trier of fact must make a decision based on a preponderance of the evidence."*

The court in the *Thome* matter made essentially the same point. A court of law can make only the sorts of decisions that are entrusted to the courts. It is responsible for adjudicating matters of law. It is not responsible for rationalizing the art market.

## Foundation Governance

The *Thome* court also addressed and reaffirmed two important aspects of the governance of not-for-profit organizations.

The court dismissed Thome's claims that the trustees of the Foundation had acted in breach of their fiduciary duties by failing to authenticate the works. First, while trustees owe fiduciary duties to the Foundation, the court held that they did not owe any such duties to Thome. Second, to the extent that the trustees acted in violation of any duties that they had to the Foundation, the plaintiff had no standing to raise the issue.

The court also noted that the individual defendant trustees enjoyed qualified statutory immunity under New York law from all of the claims in the complaint, because the trustees served without compensation and there was no "reasonable probability" that their conduct constituted gross negligence or was intended to cause harm.

> If buyers will not buy works without the Foundation's listing them in its catalogue raisonné, then the problem lies in the art world's voluntary surrender of that ultimate authority to a single entity. If it is immaterial to the art world that plaintiff has proof that the sets were built to Calder's specifications, and that Calder approved of their construction, then it will be immaterial to the art world that a court has pronounced the work "authentic." Plaintiff's problem can be solved only when buyers are willing to make their decisions based upon the Work and the unassailable facts about its creation, rather than allowing the Foundation's decisions as to what merits inclusion in its catalogue raisonné to dictate what is worthy of purchase.

## But....

Having said that the Foundation did not have a legal obligation to authenticate a given work of art, the court suggested that a failure to authenticate could theoretically support a claim for product disparagement, a form of defamation in which the plaintiff must prove publication of a false statement to a third person, malicious intent, and special damages. The court recognized that this would constitute a substantial expansion of the scope of disparagement claims, as a failure to speak has never been held to satisfy the publication requirement. The court noted, however, that because the art market treats non-inclusion in a catalogue raisonné as a conclusion that the work is a fake, this tended to support the availability of the product disparagement cause of action in this context. The court's view on this issue is not legally binding (mere dicta, as lawyers would say) as it did not actually reach the question in Thome's case. Instead, it ruled that the disparagement claim was time-barred.

The court also did not address the issue of how it could find that a work had been disparaged without making a factual determination that the work was authentic — in effect, engaging in the authentication process itself. Presumably, this is something that this court would be reluctant (or even unwilling) to do, given its earlier statements about a court's role and sphere of competence.

The court also dismissed Thome's claims that the Foundation and its trustees had declined to authenticate his works because they wanted to manipulate the market and buy his works inexpensively. The claim was not only time-barred, but also lacked the sorts of allegations that supported the antitrust claim against the Warhol Foundation.

As we go to press, Thome has sought leave of New York's highest court to appeal the case.

## Where does that leave us?

While the court in the *Thome* case acknowledged that authors of catalogues raisonné may have a crucial art market role, the case establishes that as a general matter they have no legal obligation to render an opinion on a given work.

Courts sometimes do make findings as to authenticity in the course of resolving parties' disputes, and the court in *Thome* appeared open to a tort law claim directly against authors of catalogues raisonné. However, adjudication of such a claim could ultimately be an expensive and fruitless venture for the claimant. Even if a claimant could prove that the failure to authenticate a work was the result of unlawful conduct, he might not succeed in proving that the work is authentic – at least not in a way that will satisfy the market. As we saw in the *Greenberg* case, the market is not likely to take a court's finding of authenticity over that of the market's recognized expert.

Thus, even if the New York Court of Appeals reverses this decision, the Thome matter may ultimately stand as yet another illustration of the fact that some grievances in the art world do not have a legal remedy. ❖

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# Moral Rights and Technology

Collectors are often surprised to learn that when they purchase a work of art, they do not get the copyright in the work even if one still exists. As a general matter, the copyright stays with the artist, which limits what a collector may do with the image of the work.

Collectors of contemporary art may be even more surprised to learn that copyright isn't the only right that stays with the artist. In some cases, for example, an artist may limit the right of the collector to display the work, and may even disclaim authorship. In other words, an artist can declare that a work that he or she actually created is no longer authentic.

These powers derive from the European notion of "moral rights," or the "*drôit moral*." The *drôit moral* seeks to celebrate and protect the artist's "personality," and his art as the expression of that personality. It was first codified in France and then by other civil law countries. The concept has had a difficult journey across the Atlantic, where legislators and judges have been less inclined to impinge on the ownership rights of collectors and museums. It is only within the past several decades that strictly limited versions of the *drôit moral* have been codified in a federal statute, and in the laws of a number of states.

A central premise of the *drôit moral* is that an artist has the right to have his name associated with the art that he creates. He also has the right to disassociate his name from work that is not his, or from work that has been modified in such a way as to cause him disrepute. The consequence is that authorship of a work that was once authentic can be disclaimed. If your Rembrandt has been damaged, you are left with an authentic Rembrandt that is in imperfect condition. If your Richard Serra sculpture has been damaged and the artist asserts his statutory moral rights, you can wind up with an object that is no longer an authentic Serra.

Perhaps not surprisingly, new forms of art create challenging issues of statutory interpretation. There has already been significant litigation dealing with the question of whether the federal and state moral rights statutes protect site-specific art – where the art is argued to be conceptually bound to its environment. Still unaddressed by the courts, however, is the question of whether an artist can disclaim authorship of a work based on a technology that breaks down or becomes obsolete. When you own a sculpture that incorporates a TV screen and the screen stops working, is this inevitable decay an anticipated part of the artist's creative vision, or can the artist declare that it is no longer his work? Is the same true if the light bulbs that make up a piece of sculpture are no longer manufactured? Art that employs technology is inherently prone to mechanical failure and ultimately to obsolescence. Is technology the new "inherent vice"? If it is, can artists who employ technology disown their art when the lights go off?

## I. Moral Rights in U.S. Law

The federal Visual Artists' Rights Act of 1990 (VARA) grants certain artists the moral rights of attribution and integrity. That is, the author of a work of "visual art" has the right:

(1) To claim authorship of that work and to prevent the use of his or her name as the author of any work of visual art he or she did not create;

(2) To prevent the use of his or her name as the author of the work in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation;

(3) To prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation; and

(4) To prevent any destruction of a work of recognized stature (whether intentional, or by gross negligence).

VARA doesn't apply to all works of art. Rather, it is limited to works of "visual art," defined to include unique or limited edition paintings, drawings, prints, or sculpture, and to *exclude*, among other things, any "applied art, motion picture or other audiovisual work… [and] electronic publication."

Before VARA, a number of states had already enacted legislation that took different approaches to the concept of moral rights. The New York Artists' Authorship Rights Act, for example, focuses on the protection of an artist's reputation. As such, it gives the artist the right to disclaim authorship of a work if it is displayed or published in an altered, defaced or mutilated form, where the artist's reputation would likely be damaged as a result. It applies to any art – not just art of "recognized stature." However, the statute does not protect the art itself against being damaged or destroyed; nor does it apply where damaged work is not publicly displayed, or is displayed but not attributed to the artist.

By contrast, the California Art Preservation Act (CAPA) protects only art that is of "recognized quality," and, as its name suggests, protects not only artists but their creations as well. The statute prohibits the intentional alteration, defacement or destruction of a work of fine art, and gives artists the right to claim authorship and, for "just and valid reason," to disclaim it.

## II. Technological Failure and Moral Rights

Works of art that employ technology are necessarily vulnerable to mechanical or electronic failure, and eventually to obsolescence. Depending on the artist, it might be contended that this foreseeable obsolescence imbues the art with a temporal quality that forms part of the intention of the artist. The art is meant to operate as long as its underlying technology permits and takes on a different meaning when its operation is impaired over time. That was then; this is now.

However, technological failure may be argued to constitute distortion or modification that could be prejudicial to the artist's reputation. It also arguably constitutes a form of "inherent vice," i.e., a quality inherent to an artistic medium that causes the art to deteriorate over time. If an artist seeks to exercise his statutory right to disclaim authorship in these circumstances, how might he fare?

A significant threshold question under VARA is whether technology-dependent work qualifies as "visual art," as defined by the statute. For example, is a scrolling LED a sculpture (which would qualify for protection under VARA) or an "audiovisual work" (which would not)? What about a recorded film clip that is playing on a television screen that is itself incorporated into a large metal sculpture? At what point could a work of art that was previously used for advertising (a neon "Budweiser" sign, for example – not covered by VARA) become, with some modification by the artist, a sculpture (which is covered)?

Assuming that the art in question is covered by VARA, the artist may very well be able to disclaim authorship based on a deterioration of its technology. VARA provides that the "modification of a work of visual art which is a result of the passage of time or the *inherent nature of the materials* is not" the sort of "distortion, mutilation, or other modification" that an artist can seek to prevent (or for which he can recover damages). However, the statute does *not* address inherent vice when it comes to the artist's attribution rights. In other words, under VARA, if an artist created a work that was based on transistors that corrode and can't be replaced, he cannot then recover damages when the art ceases to function. He may, however, be able to say that it is no longer his work.

The New York statute might provide a different result. That statute provides an explicit exception to the right to disclaim authorship where the "alteration, defacement, mutilation or modification" of the work of art results from "the passage of time or the inherent nature of the materials," provided that the damage to the work was not the result of gross negligence in its maintenance.

Unlike VARA and the New York Act, the California statute does not contain any explicit reference to the inherent nature of the materials used in a work of art. By its terms the statute protects fine art only against *intentional* defacement, mutilation, alteration or destruction, which would appear to exclude damage based on inherent vice. However, the section of the statute that deals with an artist's right of attribution is much more broadly worded; an artist shall "at all times" have the right for "a just and valid reason, to disclaim authorship of his or her work of fine art." Whether a court will interpret that language as granting an artist the right to disclaim authorship where damage to a technology-based work has been caused by inherent vice may depend on whether there is evidence to show that the artist knew and intended that the working life of the piece be limited.

And, of course, a defendant in a state-law moral rights case may argue that the artist's claim is pre-empted by VARA in any event. The extent of pre-emption will remain an open question until litigants provide courts with more opportunities to consider the matter.

## III. Let's Be Practical

As a practical matter, when an artist disowns a work of art, a collector who finds himself in litigation may already have lost the battle. If an artist says that repairs or deterioration have so altered a work that it is no longer the artist's work, the art market may not care whether a court agrees.

It therefore makes sense to deal with the issue at the time of purchase, with the artist directly or with his gallery. Where a work is prone to technological failure, discuss upfront what the protocol might be for repairs. Will the artist or gallery make the repairs? Will the artist authorize a particular fabricator to do so? If the technology becomes obsolete (for example, if replacement components become unavailable) will the artist agree to recreate the work (or have the work recreated) in a newer form? Who will cover the expense, and how should that affect the initial purchase price? These kinds of discussions will establish mutual expectations, and they should be reduced to writing.

Even with no agreement upfront, if you own a work of contemporary art that is damaged, it makes sense to work with the artist and his gallery on its restoration, repair or replacement. The involvement of the artist could forestall any future moral rights claims. Indeed, the artist may be willing to sign a limited waiver of moral rights that will permit you to do to the work what you need to do in order to restore or repair it.

In certain circumstances, such as large commissioned works or site-specific works that are incorporated into buildings, the patron/buyer may negotiate with the artist for an advance waiver or modification of his moral rights, which is permissible under VARA and certain state statutes. In most other circumstances, engagement with the artist is usually a more productive approach than insisting on a contractual waiver. An artist of any stature has little incentive to waive his rights, and a dealer is likely to be suspicious of a collector who regularly insists on it.

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Every piece of art requires specialized maintenance, and many traditional media involve forms of inherent vice. Technology-based art is different only in the nature of the maintenance that is

required and the sheer inevitability of obsolescence even with the best of care. The moral rights statutes provide artists with a legal basis on which to disown their work where damage and obsolescence occur – and the art market usually gives them power to enforce that right without recourse to the courts. However, most artists share the interest of the collector or museum in preserving both the integrity and the marketability of their art. Raising and resolving those issues up front, before damage has occurred and emotions are in play, will usually provide the best protection for a collector. ❖

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## *New Regulations to Affect Shipments of Art on Commercial Flights*

Beginning on August 1, 2010, federal law will require 100% of cargo shipped via commercial passenger aircraft to be security-screened. Specifically, every piece of such cargo – including those containing works of art – must be physically inspected, x-rayed, and/or subjected to explosives detection to ensure that the cargo is safe for transport.

To reduce the expected strain of conducting the screenings at the airport, the Transportation Security Administration ("TSA") has created the Certified Cargo Screening Program, by which a private entity can pack and screen artworks on-site. Each applicant for certification must, among other things:

- apply at least 90 days before it wishes to begin screening;
- satisfy the TSA that it has the physical space for a secure on-site screening area;
- follow the screening procedures set by the TSA (or propose procedures of its own);
- subject each of its proposed screeners to a TSA background check;
- keep various TSA-mandated records; and
- agree to unannounced on-site inspections by TSA personnel.

If an applicant is approved to conduct self-screening, the certification is valid for three years and can be renewed.

Large museums such as the Metropolitan and Getty have already been certified to conduct self-screening, but the requisite physical, logistical and financial commitments may make it impractical for smaller museums, galleries and dealers to self-screen. Consequently, such entities – and collectors – may wish to retain art shippers that have been TSA-certified to screen cargo bound for commercial passenger aircraft. This should minimize the risks of delay and damage that are present when a work is screened at the airport by personnel potentially unfamiliar with the handling and shipping requirements for fine art. ❖

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# Special Statute of Limitations for Holocaust Claims Struck Down in California

When claims are made for the restitution of art lost during the Holocaust, they are often met with the defense that the statute of limitations on the claim has long since passed. Claimants argue that the limitations period is a technical defense that should not shield a defendant from a claim that is based in profound moral principle. Defendants argue that the adjudication of Holocaust claims involves events that occurred as much as 75 years ago and, in fairness, present exactly the sort of evidentiary issues that statutes of limitations were meant to address.

In 2002, in order to eliminate this procedural hurdle, the state of California enacted a statute that extended until December 31, 2010 the statute of limitations for all claims brought by "any owner, heir or beneficiary of an owner, to recover Holocaust-era artwork" from "any museum or gallery that displays, exhibits or sells any article of historical, interpretive, scientific, or artistic significance."

In August 2009, the United States Court of Appeals held that the statute was unconstitutional as it intruded on the federal government's sole power to control foreign affairs.

The case involved a diptych by Lucas Cranach the Elder entitled *Adam and Eve*, currently owned by the Norton Simon Museum of Art at Pasadena. The Museum purchased the works in 1971 from George Stroganoff Scherbatoff, who received them from the Dutch Government in 1966 after claiming that they had been expropriated from his family after they fled Russia in 1917. They were sold at an auction in Berlin in 1931 entitled "Stroganoff Collection Leningrad." The buyer was Jacques Goudstikker, an important Jewish art dealer. In 1940, Goudstikker fled the Netherlands when the Nazis invaded, leaving all of his assets behind (including his gallery and its inventory). Goudstikker later died at sea. Goudstikker's collection, including the Cranachs, was seized by Herman Goehring. In 1946, the Cranachs were returned by the Allied Forces to the Netherlands, which later gave them to Stroganoff Scherbatoff.

Marei von Saher, Goudstikker's daughter-in-law and sole surviving heir, says that she did not learn until late 2000 that the diptych was at the Museum. She approached the Museum in 2001, and entered into discussions -- and ultimately mediation – to negotiate their return. The parties were unable to reach an agreement, and Ms. von Saher sued the Museum in 2007, relying upon California's special statute of limitations for Holocaust claims, Section 354.3 of the California Code of Civil Procedure.

Although the Ninth Circuit held that the California law did not conflict with any current policy of the United States Government, the court determined that it was "pre-empted" because it impinged on foreign affairs, whose conduct is reserved to the federal government. The court also held that the statute intruded on the federal government's constitutionally granted "power to wage and resolve war, including the power to legislate restitution and reparation claims."

By the time that the *von Saher* matter reached the courts, two other California statutes that sought to extend the statute of limitations for other Holocaust-related claims had already been held to be unconstitutional as an intrusion into foreign policy – one relating to slave labor claims arising out of World War II, the other relating to insurance policy claims by victims and their heirs. Ms. von Saher argued that the statute relating to art claims was different because it related more directly to traditional state interests such as the

regulation of property and the regulation of institutions and galleries within the state. The court rejected this argument, noting that the statute as passed was not restricted to galleries and museums inside the state; in fact, that restriction was eliminated from the legislation prior to passage. As such, according to the Court, the statute's "real purpose was to create a friendly forum for litigating Holocaust restitution claims" and to "express dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of World War II."

The court gave Ms. von Saher the opportunity to amend her complaint so that she could recover *Adam and Eve* under the traditional three-year limitations period. To do that, she will have to show that her action was brought within three-years of the time that she either discovered or reasonably could have discovered her interest in the paintings and where they were located.

In early February, the Court of Appeals denied Ms. von Saher's request for a re-hearing.

### *Did the California Legislature lose by going too far?*

A dissenting opinion issued in the *von Saher* case argued that the court "read the statute much too broadly," and that a fair reading would have limited the effect of the statute to museums and galleries within the state. The statute did not "target enemies of the United States," nor did it "provide for war reparations." It addressed the recovery of stolen property held within the state, a matter that is of traditional state concern, and "does not conflict with federal policy."

The statute may or may not have been upheld if the California legislature had been less ambitious in its scope. Its defeat, however, has at least temporarily affected efforts to enact similar legislation in other states, such as New York.

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Separate and apart from the constitutionality of the California statute, the very complex history of the Cranachs can be said to underscore the factual difficulties presented by restitution claims.

If the case were to be adjudicated, a key question would be whether the Museum received good title to the pictures when it purchased them from Stroganoff Scherbatoff. His title, in turn, derived from the decision of the Dutch government to restitute the pictures to him when he claimed them in 1966. The underlying facts of Stroganoff Scherbatoff's claim are disputed by Ms. von Saher's counsel, who argue that evidence would suggest that the Stroganoffs never actually owned the pictures. As such, they argue that the decision of the Dutch government was incorrect and should not preclude their obtaining the paintings.

So, a trial on of the von Saher case would involve facts that stretch back not only to the 1930's, but to 1917 – nearly a century ago – and would involve the expropriation of the pictures by two different regimes during separate periods of historic upheaval.

The case also spotlights the philosophic premise at the heart of World War II restitution efforts. The Holocaust of World War II may have been the most significant historic disruption of the 20th Century, but it was not the only one. Nor, sadly, was it the only instance of genocide. Victims of other eras have sought to extend beyond World War II the concept of restitution to reclaim property that they and their families lost.

In one recent example, the heir of a Russian art collector has sued Yale University to obtain a Van Gogh painting that has been in Yale's collection for nearly 50 years. The painting, *The Night Café*, was purchased by Ivan Morozov in 1908. It was expropriated by the Soviet government, along with the rest of Morozov's collection, after the revolution. The Soviets later sold the picture to a Yale alumnus who ultimately donated it to the University. Pierre Konowaloff, who says he is Morozov's great-grandson, argues that the Soviet

confiscation was illegal, that Yale's acquisition of the picture was an act of "willful ignorance," and that he is entitled to the immediate return of the picture as well as damages.

Proponents of the restitution of Holocaust-related art reject the notion that the same principles need apply to other historic disruptions. The view is that the Holocaust is simply different. It is a view that has a compelling philosophical and moral basis – but one that may be more difficult to implement as a matter of law. The Ninth Circuit's rejection of California's special statute of limitation for Holocaust-related claims suggests that to do so will require legislative action on the part of the federal government. ❖

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## On the Cover

The painting on the cover of this issue is an untitled acrylic and pencil on panel work by Su-en Wong. This 68" x 120" work was part of her 2009 show of new paintings at the Kevin Bruk Gallery in Miami. The show included paintings that commented on the art of Damien Hirst, whose work has famously included dead animals preserved in formaldehyde. In this image, Wong creates a tank where the animals have a happier afterlife, enjoying "company and camaraderie, amidst tropical plants." Su-en Wong was born in Singapore in 1973, and currently lives and works in New York City. She received her MFA from The School of the Art Institute of Chicago. She has received numerous grants, fellowships and residencies, including grants from the New York Foundation for the Arts and the Joan Mitchell Foundation. Her work has been exhibited widely, and is included in the collections of the Denver Art Museum and the Portland Art Museum in Portland, Oregon. In New York Wong is represented by the Danese Gallery.

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