

## Legal Issues and Art Collection

## Why collect art?

- ✓ People collect art for many reasons:
  - ✓ Love of art and the aesthetic "magic." Search for beauty and pleasure.
  - ✓ Pursuit of knowledge about the history of art and culture, tracing ideas and trends through time.
  - ✓ Art as investment: expectation of financial gain from collecting.
  - ✓ Many artists are, themselves, collectors.

## Commodification of Art

- ✓ Many lament the treatment of art as merely a "commodity" in the market of possible investments.
- ✓ Claim that this emphasis can distort artistic values.
- ✓ When a work of art commands a high price, viewers may perceive that it is necessarily "great art" without evaluating aesthetic aspects.

## Commodification

- ✓ Protest about commodification usually based on the assumption that prices do not reflect historical importance or aesthetic value of art.
- ✓ In practice, market prices in the art world usually reflect a consensus about artistic value and the related market value, and when the opinion about artistic value changes, market value usually changes with it.

## Collecting for Profit

- ✓ Those who collect with a profit motive are usually disappointed in the outcome.
- ✓ Some investors see art as a hedge against inflation and instability in the stock market.
- ✓ In reality, the market value of art rises and falls with the economy, so a stock market crash also depresses art value, and art markets crash, too.
  - ✓ 1989: art market crashed, with sales falling from \$1.6 billion in 1989 to \$200 million in 1991.
  - ✓ Faltering high-tech economy in 2000-2001 also depressed the art market.

## Profit

- ✓ Collecting art also has a number of associated expenses that work against large profits:
  - ✓ Insurance (About 1% of total value annually)
  - ✓ Dealer's commissions for transactions (e.g. 15% plus sales tax).

## Profit

- ✓ Idea of collecting for profit assumes that the value of art will appreciate greatly in value over time.
- ✓ Reality: value appreciates very slowly, if at all.
- ✓ Rule of thumb: art needs to double in value for a collector to make a profit. Some art will do this, but strictly as an investment, the stock market has better potential.
- ✓ Bottom line: If main interest is making money, the art market is not the way to do it. Collect for enjoyment, not profit.

## Art dealers

- ✓ Art dealers are not licensed, and can set up a business without any requirement of a particular degree or other training or credentials.
- ✓ Few art dealers are art historians or artists.
- ✓ Yet art dealers play crucial role in the market for art, especially for young artists.

## Art dealers

- ✓ Best art dealers are associated with experts who provide expert advice on questions of authentication, conservation, and restoration.
- ✓ Good art dealers provide provenance or authentication information to clients, but some do not.

## Art dealers

- ✓ Many transactions are done without formal written agreements or mutually understood terms, opening the potential for disputes after the sale about value, authenticity, and even title.

## *Graffman v. Espel*

- ✓ Graffman owned painting, *Le Peintre et Son Modele*, by Pablo Picasso.
- ✓ Contracted with Miguel Espel to sell it.
- ✓ Espel asked his brother-in-law, Michael Delecea, to help sell it.
- ✓ Delecea approached the Avanti Gallery in New York, asking them to locate a buyer.

## *Graffman v. Espel*

- ✓ The Avanti gallery located a buyer, the Does, and sold the painting for \$875,000. They paid and the painting was delivered to them.
- ✓ The Avanti gallery paid Delecea the proceeds less their commission. Delecea used \$200,000 to pay off Espel's debts and wired the rest to Espel. Espel failed to pay Graffman.

### *Graffman v. Espel*

- ✓ Graffman sued everyone involved, asking either for his money or for the return of the painting.
- ✓ The court ordered Espel to pay.
- ✓ The court decided that the Does were good faith purchasers of the painting, and so had received valid title and did not have to return the painting.

### Valuation of Art

- ✓ Problems can arise in the way that the value of art is represented by dealers.
- ✓ The question is whether the dealer has any obligation of fair dealing in the representations s/he makes to the potential buyer about the value of art that is offered for sale.

### *Goldman v. Barnett*

- ✓ David Barnett is an art dealer in Milwaukee.
- ✓ David Goldman purchased 2 paintings by Milton Avery initially, then made more very substantial purchases.
- ✓ Purchase price based on an appraisal on Barnett's letterhead, identifying him as a member of the "Appraisers Association of America."

### *Goldman v. Barnett*

- ✓ At the time of consignment of the art, the Milton Avery trust had set a minimum price for the entire collection of Milton Avery paintings, but had not set a reserve price for each individual item.
- ✓ Barnett's appraisal of the collection was substantially more than the reserve price.

### *Goldman v. Barnett*

- ✓ Goldman purchased 60 works of art in all from Barnett, 10 of which were Milton Avery paintings.
- ✓ Goldman was paying \$100,000 per month on his account when he received information from other sources that the appraisals of the Milton Avery works were substantially inflated - up to four times the real market value.

### *Goldman v. Barnett*

- ✓ Goldman had agreed to pay \$886,185 for the Avery paintings, but paid only about \$300,000 before commencing a lawsuit against both Barnett and the Avery trust for misrepresentation and fraud.

### *Goldman v. Barnett*

- ✓ The court held that the “seller has no duty to set a fair price.” Unless there was an affirmative misrepresentation about the paintings, the buyer must, in effect, beware of statements of value from the dealer.
- ✓ Practical strategy: obtain own appraisals if spending large amounts of money on art!

### Title problems

- ✓ Problems with title to works of art can arise when the work has changed hands many times and lacks a solid provenance.
- ✓ Several legal doctrines collide when questions of title of art need to be resolved.

### Title problems: rights of “true owner”

- ✓ One doctrine is that if goods are stolen and then transferred, legal title cannot vest in any subsequent purchaser because the others, beginning with the thief, had no legitimate rights of title to pass on.
- ✓ If the “true owner” acts quickly to assert his/her rights in the property, then the art must be returned.
- ✓ The loss will fall on the subsequent purchaser, even if s/he bought the art without knowledge that it was stolen.

### Title problems: Statutes of Limitations

- ✓ Problem with protecting the rights of the “true owner” in this way: it could disrupt chains of ownership over long time periods if there were no way to resolve uncertainty.
- ✓ Statutes of limitations give time limits during which a person must assert an ownership claim contrary to that of the person possessing the goods.
- ✓ Once that time has passed, the “true owner” is precluded from making a claim.

### Title problems: Statutes of limitations

- ✓ The normal statute of limitations for sale of goods is 6 years -- but 6 years from when?
  - ✓ From the date of the theft?
  - ✓ From the date when the thief transferred the art to the purchaser?
  - ✓ From the date on which the “true owner” discovered the theft and the location of the goods?

### Title problems: discovery rule

- ✓ Most states follow the “discovery rule:”
  - ✓ The statute of limitations begins to run when the owner of stolen goods learns of the claim that s/he has for recovery of the goods.
  - ✓ A rule of “discoverability” may also be applied if an owner fails to exercise diligence to examine inventory and discover a loss for a long period of time. The statute of limitations might run from the time the owner should reasonably have discovered the loss, even if the actual discovery was later.

### *O'Keeffe v. Snyder*

- ✓ Case involved Georgia O'Keeffe and 3 small paintings by O'Keeffe.
- ✓ Parties disagreed about almost everything involved in the case.
- ✓ O'Keeffe claims the 3 paintings were stolen in 1946 from An American Place, a gallery operated by O'Keeffe and her husband, Alfred Stieglitz.

### *O'Keeffe v. Snyder*

- ✓ Neither O'Keeffe nor Stieglitz reported the paintings missing to the police, and they were uninsured.
- ✓ Stieglitz died in 1946 and O'Keeffe began working with Doris Bry, an art dealer in New York. Bry convinced O'Keeffe to report them as stolen to the Art Dealers Association of America, but that wasn't done until 1972.

### *O'Keeffe v. Snyder*

- ✓ In 1975, O'Keeffe discovered the paintings in the Andrew Crispo gallery in New York on consignment from the Danenberg Galleries.
- ✓ Ulrich A. Frank had sold the paintings to Barry Snyder, owner of Princeton Gallery, who sold them to Danenberg.

### *O'Keeffe v. Snyder*

- ✓ O'Keeffe brought a lawsuit for recovery of the paintings in 1976.
- ✓ First question: whether paintings were stolen or not.
- ✓ Ulrich Frank claims that they hung in his father's study as early as 1941 and had been in their continuous possession until he sold them to Snyder.

### *O'Keeffe v. Snyder*

- ✓ The time gap in this case illustrates one purpose of statutes of limitation: memories fail and witnesses disappear, making it nearly impossible to produce evidence of what really happened.
- ✓ O'Keeffe learned that the paintings were missing as early as 1946, but seemed to take no action on it until 1972, when she first listed the pieces as stolen.

### *O'Keeffe v. Snyder*

- ✓ The case was sent back to the trial court for further proceedings, but it seems that O'Keeffe did not have a strong position after the court's clear decision that timeliness in pursuing rights was a key factor in weakening her claim.

## Uniqueness of art

- ✓ Collectors purchase art with the expectation that they are acquiring a unique, original item, unless it is disclosed as part of a series of identical works.
- ✓ What if an artist re-creates the same work after the sale? Does the buyer have any claim for reduction in value because the work is no longer unique?

## *Factor v. Stella*

- ✓ This case addressed the issue of uniqueness.
- ✓ Stella painted three *Marquis de Portagos* with ordinary aluminum paint. He then painted 8 more with alumichrome paint.
- ✓ One of the latter series was sold to the Factors in 1961.
- ✓ In 1964 the painting was damaged and Stella said he could not restore it, but would repaint it with liquitex paint with aluminum particles, clearly different from the original.

## *Factor v. Stella*

- ✓ The Factors' painting was sold at auction in 1970, just after they learned of the existence of one other *Marquis de Portagos*. The reserve at auction was reduced from \$35,000 to \$15,000 because of the existence of the other painting, and it sold for \$17,000.

## *Factor v. Stella*

- ✓ The court said that Stella had a duty to the purchaser of his work to inform them of the existence of duplicate works.
- ✓ However, the court found no proof that the work would have brought a higher price had it been unique, so the Factors could not recover damages.
- ✓ There was some outrage in the art community about the court's statement that artists have a duty to inform buyers of duplicate works.

## Forgery of art

- ✓ Any work of art is susceptible to forgery.
- ✓ Forgeries are intended to deceive buyers into purchasing a very valuable piece for the gain of the forger.
- ✓ Some collectors make copies of their art for security reasons — they display the copy and store the original in a secure place. This is not considered forgery unless they attempt to sell them as the original!

## Art forgery

- ✓ Items most likely to be forged are those most valued during a particular time period.
- ✓ Contemporary works can be forged along with old works, if in strong demand.
- ✓ Famous forgeries have included everything from a Calder mobile to antique Chinese painted ceramics.
- ✓ Detecting forgeries requires expert examination of the work, including canvas, materials, and provenance.

## Auction of art

- ✓ Auctions are another major way of acquiring art and, in some respects, may be a safer way, from the collector's perspective, because of authenticity research.
  - ✓ Christie's guarantees authenticity of all items.
- ✓ Dealers consign work to auction houses and bid on behalf of collectors at auctions.

## Auction mechanics

- ✓ Bidders register with the house by giving name, ID, and signature. Numbered paddles usually used for bidding, although some prefer secret signals arranged in advance.
- ✓ Establishing credit with the house in advance is advisable.

## Auction mechanics

- ✓ Bidders need not be present to bid:
  - ✓ May do a pre-auction order bid that is made in the order in which it would come up.
  - ✓ May bid on the telephone, by prior arrangement.
- ✓ All items are not necessarily sold when a bid is entered.

## Auction mechanics

- ✓ Reserves: Most items are offered with a reserve, a minimum amount which must be met for a sale.
- ✓ Catalogs of some houses mark items that have a reserve, but never disclose the amount of the reserve.

## Auction mechanics

- ✓ Amount of reserve varies by house:
  - ✓ Christie's: reserve usually below the low estimate in price range in the catalogue
  - ✓ Sotheby's: reserve is usually 75 to 80% of the low estimate.
  - ✓ Phillips and Doyle sell properties without reserves. Sotheby's says there is always a reserve.

## Auction mechanics

- ✓ How does a bidder know the competition is the reserve?
  - ✓ Someone from the house might bid from the reserve, or bids relayed from the telephone might actually be from the reserve, although all 4 houses claim only to relay real bids by telephone.
  - ✓ Auctioneer might rapidly increase amount, reflecting movement toward the reserve limit.

### Auction mechanics

- ✓ Order bids are recognized in the order of the dollar amount; orders in same amount are accepted in order received, so the first bid in that amount gets precedence.
- ✓ Order bids are always confidential; the houses don't disclose competing amounts so that an auction gets started before the actual auction.

### Auction mechanics

- ✓ Consignors are not permitted to bid on their own property to raise the price.
- ✓ Sometimes it is hard to know whether an item met its reserve and was sold. When the "hammer" comes down - or the gavel falls - the auctioneer ordinarily will say "sold" only when there is actually a sale.
- ✓ If they bring down the hammer with words like "down it goes" or "gone," the item may or may not have been sold.

### Auction mechanics

- ✓ Occasionally, an item might be sold after the auction is over, if it failed to meet the reserve and a buyer negotiates a deal later.
- ✓ The secrecy is maintained because items that did not meet the reserve are said to be "burned" - or their value impaired by failing to sell at the auction.

### Auction mechanics

- ✓ If an item is sold at one of the New York houses, the successful buyer pays the hammer price plus a 10% buyer's commission and the state sales tax.
- ✓ The art must be picked up within 3 days at Christie's, Sotheby's, and Phillips - Doyle's requires pick-up within 24 hours.

### Cristallina Disaster

- ✓ Cristallina is an art fund that owns many works of art for investors.
- ✓ In 1981, they consigned 8 important works to Christie's New York for sale.
- ✓ Sale held on May 19, 1981, and David Bathurst, chairman of Christie's, announced that 3 works had sold:
  - ✓ 1 Degas at 2.2 million
  - ✓ 1 Van Gogh at 2.1 million
  - ✓ 1 Gauguin at 1.3 million

### Cristallina

- ✓ It turned out that only 1 painting had actually sold, the Degas, and the other 2 reports were false.
- ✓ Cristallina accused Christie's of setting reserves too high for the market and making irresponsible appraisals to lure business.
- ✓ Christie's defense: it had reported the sales to avoid the paintings from being "burned" and creating a depression in the art market.

## Cristallina

- ✓ Outcome:
  - ✓ David Bathurst resigned
  - ✓ Christie's New York president's auctioneer license suspended for 4 months
  - ✓ Christie's fined \$80,000

## Auction houses practices

- ✓ Sotheby's London reported the sale of a rare violin at £115,800, when it actually had sold after the auction for £99,000.
- ✓ Both Christie's and Sotheby's board members have bid on and purchased items at their houses, although they insist they take precautions against "insider trading" advantages (like knowing the reserve . . . )

## Auction house practices

- ✓ Most consumer complaints come from uncertainty of results at end of auction.
  - ✓ People attending don't know if item was actually sold or "bought in" -- retained because the reserve not met.
  - ✓ Many buyers and sellers insist on anonymity for security reasons, adding to the secrecy of proceedings.

## Auction house practices

- ✓ Auctioneers also might make bids "off the chandelier" -- they will arbitrarily report bids not made by anyone in attendance, to bring the price closer to the reserve.
- ✓ Consumers complain about this practice, too.

## Dutch auction system

- ✓ In this system, the auctioneer starts high and works down until someone bids. If 2 or more more bid simultaneously, procedures to break ties followed.
- ✓ Not used for art, but is used for herring auctions - interesting as alternative way of auctioning all goods.