

Good Counsel

When to hire an art lawyer to protect your purchases.

By Daniel Grant

In generations past, art sales were formalized by handshakes and reliant on trust. So much depended upon intangible qualities that legislators shied away from enacting regulation of the art market. These days, the legal community has assumed a much higher profile in the art world, negotiating (or litigating) purchase and sale agreements between collectors and dealers, collectors and auction houses, collectors and artists, artists and galleries, artists and public art commissioning agencies.

The involvement of lawyers in the buying and selling of largely high-end (six- and seven-figure) artworks reflects significant changes that have taken place in this market; among these are the jump in prices since the 1980s, the increasing complexity of many transactions (especially on questions of authenticity, condition, provenance, export and national patrimony laws, as well as concerns over stolen art objects) and the growth in the number of buyers and sellers of art.

Perhaps the prevalence of lawyers in the art trade signifies the degree to which “people think of art as they do any other investment,” says Howard Spiegler, chairman of the art law committee for the New York City Bar Association. It may also be the case that “people of a certain net worth don’t want to take chances, and they feel comfortable using lawyers,” he says. However, he points out that adding lawyers to the process of consigning and purchasing artworks increases the cost and complexity of these transactions.

When to Hire a Lawyer

“There are so many different legal aspects,” says Judith Bresler, a New York attorney with a specialty in art law, who is asked repeatedly by collectors to negotiate consignments of artwork to auctioneers. “Who will assume the cost of packing, shipping, crating, insurance? Who pays for the catalogs, the illustrations for the catalogs? What happens if a collector has to withdraw a lot for some reason?”

Her husband, Ralph Lerner, another art lawyer, has helped collectors reduce their tax burdens when they sell artworks. “You can defer, lessen or eliminate the capital gains tax by selling through a charitable remainder trust or through a foundation or through a Section 1031 Tax Free Exchange,” he says. And Manhattan art lawyer Amy Goldrich states that she has set up corporate partnerships for two or more collectors who decide to jointly purchase expensive art objects. “You want built-in dispute resolution procedures if, for example, one person wants to sell and the other doesn’t,” she notes.

Though disputes occasionally end up in court, they are more often settled out of court and with confidentiality agreements.

Key Points in Art Law

Following are some art-specific laws that collectors should know:

— Warranty of authenticity means that an object has to be what the dealer says it is. Fakes and forgeries as well as objects that are misattributed (for instance, a “Rembrandt” painting that was actually created by the “School of Rembrandt” or a “Follower of Rembrandt”) must be taken back by the dealer, if the sale were based on the items being authentic, for the money paid for them. There would be no warranty if the dealer hazarded a guess or opinion as to the work’s attribution, only if it were stated as fact. There may also be problems in returning an allegedly inauthentic

object if the statute of limitations—which, in most states is between one and six years from the date of the sale—has expired.

— Proper transfer of title. A dealer must either own the work or be empowered to sell it, but complications may arise when a stolen object comes onto the market.

— Print disclosure laws. Fourteen states (Arkansas, California, Georgia, Hawaii, Illinois, Iowa, Maryland, Michigan, Minnesota, North Carolina, New York, Oregon, South Carolina and Wisconsin) have enacted print disclosure laws requiring dealers of limited-edition graphic prints to tell prospective buyers the medium (such as engraving, etching, lithograph, serigraph or photographic reproduction), the size of the edition (and the number of any proofs), as well as if any previous editions of the image have been created.

— Federal laws. The Indian Arts and Crafts Act of 1990, a federal statute, seeks to protect buyers of American Indian objects by requiring that the artists be certified by their tribes in order to prove that they are “authentic Indians.” Sellers of these objects face a fine up to \$1 million for violations of the law, and uncertified artists may be penalized up to \$250,000 and face a five-year jail term. Another federal law, the Visual Artists Rights Act, forbids collectors from intentionally destroying or altering artworks “of recognized stature” without first obtaining the artist’s permission.

Lawyers vs. Art Lawyers

It is difficult to quantify how many lawyers in the United States or even in Manhattan specialize in the visual arts. Spiegler says that the number of full-time art lawyers is probably few but that there are many more “who occasionally have been asked to get involved in art-related matters,” such as when valuable artworks are in an estate or are to be consigned to an auction house. Certainly, a growing number of law firms have added art and entertainment law as a specialty service for clients (at New York’s Hughes, Hubbard, for instance, the art law division bills between \$1 million and \$10 million in business per year), and more and more U.S. law schools now offer art law courses and seminars.

Although most so-called art law is actually general law principles (breach of contract, fraud, negligence) applied to the art field, art lawyers claim that their detailed understanding of the workings of the art world enables them to better assist their collector and dealer clients. “It’s important to know the players, where to look, what questions to ask, what are the customs and terminology of the art world,” Stern notes.

It is also useful to understand the risks involved in purchasing art objects that came from other countries (national patrimony claims, smuggling, etc.) or whose provenance has gaps, which could indicate theft. During the seasons when auction houses are acquiring lots for their major sales, “vast portions of the day” are spent negotiating with lawyers for prospective consignors, according to Jo Backer Laird, general counsel at Christie’s. She says that what is being negotiated is “only partly” financial. “People’s emotions are heavily invested in objects,” she says, and the discussion often focuses on how lots are described in the catalog. “Being a lawyer is a wonderful way of getting involved in the art world when you are neither an artist nor an art historian.”

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