

# The Estate Analyst®

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## Monuments Men Face Monumental Tasks

### *War and Exotic Issues Affect Art Estates*

By Robert L. Moshman, Esq.

Another good-for-nothing war has taken hold of the Middle East. The Islamic State of Iraq and Syria (ISIS) has captured headlines and cities, beheaded hostages (whilst incongruously exploiting social media), and committed atrocities with a terror army. Yet, in spite of the unusual aspects of ISIS, it has something in common with other armies that have waged wars the world over throughout history: the looting of art.

**War, huh, yeah  
What is it good for?  
Absolutely nothing**

—Norman Whitfield, Barrett Strong

It can take generations to locate, identify, and restore art to its rightful owners. Sometimes it is simply impossible. For estate planners, art that has clouded ownership or which cannot be sold presents a dilemma. Is the artwork's value for tax purposes to be determined by the black market? That unexpected gem of an idea was suggested by the IRS in a recent case involving a Rauschenberg work of art.

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How does artwork of dubious title or marketability affect the distribution of other assets of an estate? Must the estate insure the work for its value in the hands of the rightful owner or for its limited value in the estate's possession? What level of due diligence will protect the executor and estate's attorney from liability to beneficiaries?

Some of those questions can only be posed rhetorically because no one has good answers—especially not the IRS. Here, we review a variety of recent cases involving art and report on the current status of the Monuments Men, i.e., the agency that continues to reunite art with its owners.

## War Without End

It is certainly distressing that the ISIS terror army has looted priceless antiquities and sold them on the global black market for immediate cash. But it is not surprising. It takes money to wage war. In fact, historically, in more than 8,000 global conflicts, mankind has done quite a lot of pillaging and looting.

The Mediterranean Sea may be the epicenter of war. The civilizations around this body of water just can't seem to stop fighting. For example, Sparta and Athens were allies for 50 years during the Greco-Persian wars from 499 BC to 449 BC, yet then squared off against each other in the Peloponnesian War for 27 years, from 431 BC to 404 BC. Then Carthage fought Rome in three phases of the Punic War for more than 100 years, from 264 BC to 146 BC. The main highlight was Hannibal crossing the Alps with elephants in 218 BC. Note: As astonishing as that achievement remains, the sad reality apparently involved the suffering of about 38 elephants of which all but three may have died en route.

Before, during, and after these wars, there were military campaigns to build empires by the Persians, Greeks, Romans, and others. In fact, warfare has been conducted somewhere on our planet almost continuously throughout recorded human history. Rome alone has been sacked seven times.

These many wars leave behind a familiar-looking destruction. Consider the following anecdote:

“General Patton, upon seeing the Roman ruins at Agrigento, remarked to a local expert, ‘Seventh Army didn't cause that destruction, did it, sir?’ ‘The man replied, ‘No sir, that happened in the last war.’ ‘What war was that?’ ‘The Second Punic War.’ ” —Robert M. Edsel, *The Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History*.

## Spoils of War

Historically, once a conquering army concluded its business, it would ransack, loot, plunder, and pillage. Mostly this consisted of food, livestock, and metal, if any existed. Palaces

were ransacked. Those spoils of war included the enslavement of the conquered people as well. By the 18th century, great value was recognized in masterpieces of art, and victorious warriors began looting those as well.

In fact, in 1862, a Columbia University professor named Francis Lieber developed a code of conduct for armies that President Lincoln and other nations adopted. The Lieber Code allowed victorious armies to seize art and libraries and resolve ownership as part of peace treaties at the conclusion of wars. However, the international discourse between nations was cold and distant and the chance of an individual recovering a lost painting, for example, was very limited before modern times.

The systematic looting of Europe by Napoleon during the early 1800s (i.e., the Napoleonic Wars) provided a model for Adolph Hitler to employ on a grand, meticulous, insidious, and profound degree. Germany was not merely appropriating wealth; rather, it was confiscating history and culture, ripping it out by the roots, rewriting it, destroying those works it considered subversive, and, of course, keeping the most valuable art for the Fuhrer's new museum. It was the most massive looting in history.

In turn, the Allies formed the Monuments, Fine Arts, and Archives program, better known as the Monuments Men, a group of 400 dedicated museum curators, art historians, and others from 13 nations who ultimately saved thousands of priceless works of art.

## A 70-Year Cleanup

Despite the work of the Monuments Men in locating art that had been confiscated by the Nazis and restoring thousands of works to churches and museums where they had originated, millions of other works were seized by the Russians, destroyed, or hidden in small private collections. The slaughter of Jewish owners and the destruction of records presents enormous practical problems in establishing what heirs of a particular family might be entitled to.

Laws, international relations, and technology are making a difference in a number of cases. In 1998, 44 countries adopted the Washington Principles on Nazi-Confiscated Art. In 2009, 47 nations endorsed the Terezin Declaration on art and Judaica seized or bought under pressure by Germany or its collaborators. However, a recent report on the work being done to restore art to its rightful owners concluded that two-thirds of the nations supporting the principle of returning art have made little or no progress. The nations doing the most are Austria, the Czech Republic, Germany, and the Netherlands. Meanwhile, Italy is not checking provenances for transferred art.

The key may lie in technology. Online researchable databases of art provenances makes it possible for art dealers and museums to continue to check the legitimate ownership of every artwork that is sold or transferred, even if governments

fail to do so. This is the type of information that led to the 2011 case in which the United States seized a painting by Girolamo di Romano while it was on loan from a Milan museum to a Florida Museum.

Still, the challenges are daunting. In Germany, a trove of 1,400 works of art were located in the Munich apartment of Cornelius Gurlitt, 81, whose father was an art dealer. Long-missing paintings by Matisse, Monet, Renoir, Chagall, and Picasso were found. A task force reviewing the art believes that 590 of the pieces may have been looted. While some of the art may not have been confiscated by the Nazis, there is some suspicion that they were works sold in duress by people fleeing for their lives.

Germany, embarrassed by a two-year delay in investigating whether any of these paintings in Gurlitt's possession were stolen, has made progress on a new law designed to facilitate the restoration of Nazi-confiscated art. Ronald Lauder, president of the World Jewish Congress, is demanding that Germany modify its 30-year statute of limitations on reclaiming stolen property.

### **Black Market Valuation?!**

What happens when a retired Sicilian autoworker discovers that he has paintings by Paul Gauguin and Pierre Bonnard, which have been missing for 40 years? Gauguin's work *Fruit on a Table* may be worth \$41 million. Clearly, people really go for scenes of fruit on tables.

Yet the paintings are stolen property. They were stolen in London in 1979, abandoned on a train, and auctioned for \$30 in 1975. Apparently, *Fruit on a Table* looked more like a \$30 value to the untrained eye. The original owner is now deceased and had no children, but any heirs under his will could still benefit if they can force the current owner to return the painting.

It is very hard to plan an estate rationally when its value could vary from \$0 to \$41 million, but, if ownership doesn't belong to the retired worker, it would be difficult for him to transfer the property in secret. And once the secret is out, retaining ownership might not be possible.

Consider the similar circumstance that affected an estate that possessed a collage by Robert Rauschenberg called

*Canyon*. This unusual work has an eagle mounted on an abstract background of drab colored smears and splotches. The eagle had been discarded by an elderly man who had apparently shot the bird while he was a member of Teddy Roosevelt's Rough Riders, and a neighbor provided it to Rauschenberg, who produced *Canyon* in 1959. One man's trash is another man's collage.

The painting was ultimately acquired by art dealer Ileana Sonnabend, but, based on the 1918 Migratory Bird Treaty Act and the 1940 Bald and Golden Eagle Protection Act, she was only able to retain ownership because the work was continually on exhibit at a public museum. Ms. Sonnabend died in 2007 and left a \$1 billion estate. The painting was valued by Christie's auction house at \$0 because it would be illegal for anyone to sell the painting.

The Art Advisory Panel valued *Canyon* on behalf of the IRS. Despite acknowledging that the sale of *Canyon* would be illegal, the IRS argued for a \$65-million valuation and imposed a tax of \$29.2 million with a penalty of \$11.7 million. The tortured reasoning for this conclusion: The owners could utilize an underground market for the painting, such as a reclusive billionaire from China.

What's that now? Aside from the racist stereotyping that is shocking in its own right, the IRS essentially condoned an illegal and theoretical off-grid sale to a Chinese billionaire as a legitimate guideline for establishing value. That's about as crazy...as a collage with a dead bird. Will the IRS be producing heavily disguised expert witnesses to validate black market sales of modern art in Asia? A settlement in this matter was obtained when the beneficiaries of the Estate of Sonnabend gifted *Canyon* to the Museum of Modern Art in New York.

Writing for *Law.com* Network (May, 2014), attorney Amy F. Altman notes that the U.S. Fish and Wildlife Service has proposed a ban on the sale or trade of ivory. While a ban on the sale of eagle feathers affects only a few estates, a federal ban on the sale of ivory would affect many estates, including collectors who have invested in ivory artwork, as well as a multitude of people who own pianos that have ivory keys. Will the IRS value these ivory possessions based on black market sales? If so, it will arguably be encouraging executors to avail themselves of the black market to pay their estate taxes and will thus be complicit in maintaining an illegal market that endangers elephants.

**“To save the culture of your allies is a small thing. To cherish the culture of your enemy, to risk your life and the life of other men to save it, to give it all back to them as soon as the battle was won ... it was unheard of, but that was exactly what Walker Hancock and the other Monuments Men intended to do.”**

**—Robert M. Edsel, *The Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History***

## *A Petite Renoir*

To place the return of millions of stolen artworks in perspective, consider the path of one napkin-size painting, *On the Shore of the Seine* by Pierre-Auguste Renoir.

This little painting was donated to the Baltimore Museum of Art by one of its patrons but was stolen in 1951. Martha Fuqua claims that she purchased the painting at a flea market for \$7 in 2009 before discovering that it was a Renoir. She had hoped to sell it at auction for about \$75,000, but a reporter for the *Washington Post* discovered the past theft of the painting, and the FBI opened an investigation. Based on the museum's receipt and a police report from 1951, a Court awarded the painting to the museum.

In 2012, Serbian police recovered a painting by Paul Cézanne that had been stolen from a Swiss museum at gunpoint four years earlier. It's hard enough to sell a stolen painting in the modern era of artworks being recorded in world registries and Internet access to images of stolen paintings being readily available, but to brazenly steal a painting from a museum at gunpoint almost guarantees notoriety that will preclude a quiet sale. "Give me *Boy in a Red Waistcoat* or your life," the thief might have announced, but finding any buyer for the \$100-million work of art after that was impossible.

The difference in these two museum robberies is dramatic. In 1951, without the benefit of a world instantly connected by the Internet where everyone can see images of a stolen work of art or a world registry of stolen art, a stolen Renoir can go unnoticed for more than 60 years and end up sold at a yard sale. Today, the theft of a \$100-million painting becomes part of the online news cycle.

By contrast, for the millions of artworks confiscated by the Nazis and then the Soviets and others, the process of connecting possessions with the descendants of former owners is long and difficult.

It took Maria Altmann more than a decade of lawsuits and the fortunate combination of Austrian law changes and adequate proofs to recover the Gustav Klimt paintings that belonged to her father. Her perseverance

took her case through the United States Supreme Court and enabled her to prevail against the Austrian government. Ultimately, one of the paintings was reportedly sold to Ronald Lauder for \$135 million.

Unfortunately, many other people lack the resources or proofs, and paintings looted from their families by the Nazis remain in the hands of Italy, Spain, Russia, and other nations that are not willing to relinquish them.

## *Practical Advice*

A rash of malpractice suits against attorneys and trust companies involved in the planning and administration of estates that involve stolen art indicates a need for greater diligence. In general, estate planners are retained for many years (expanding exposure to claims), and modern trends have eroded traditional defenses to malpractice, such as statutes of limitation and privity, resulting in third-party claims that are many years removed from the fiduciary services that were provided. [*See Trans-Art International: "Why insurance carriers that provide attorney liability and errors and omissions coverage for trust companies need to pay attention to the stolen art problem."*]

For executors, an estate involved with art has to be alert to the issues that can arise. An inventory of art is needed, along with documentation of title. A reasonable investigation of an art object's title must be undertaken using registries of stolen art. Documentation of these efforts is also needed to demonstrate due diligence. Appraisals of art and suitable insurance are needed. The proper care of artwork must be acknowledged—valuable art can be damaged by moisture or sunlight.

And finally, a plan is needed for how the artwork can be included in the owner's estate plan. Art is not always readily marketable, especially if it is part of a large collection of one particular artist. Obtaining the appropriate advice from an art advisor is important, and this advice is preferably paid for with a fee for a service as opposed to being subject to the advisor receiving commissions on sales.

**"If, in time of peace, our museums and art galleries are important to the community, in time of war they are doubly valuable. For then, when the petty and the trivial fall away and we are face to face with final and lasting values, we... must summon to our defense all our intellectual and spiritual resources. We must guard jealously all we have inherited from a long past, all we are capable of creating in a trying present, and all we are determined to preserve in a foreseeable future. Art is the imperishable and dynamic expression of these aims. It is, and always has been, the visible evidence of the activity of free minds...."**

—Robert M. Edsel, *The Monuments Men: Allied Heroes, Nazi Thieves, And The Greatest Treasure Hunt In History*, quoting Fogg Art Museum Associate Director Paul Sachs who was addressing a special meeting of museum directors at the Met in 1941.