

# hotstuff there's a lot of stolen art out there. As a buyer, how do you minimize your risk?

**By Thomas & Charles Danziger**

Sometimes it is not sufficient simply to look a gift horse in the mouth; one may also have to check for missing teeth. This was certainly the case with an important 19th-century painting of a thoroughbred that a trustee of a museum client of ours recently offered to purchase for the institution. The problem was that the painting's provenance had suspiciously large gaps, and the dealer selling it said that he could not fill in the missing information. The museum's director believed that something about the proposed sale seemed fishy, and both she and the trustee asked for our advice.

The trustee was impatient. He complained that he had recently bought a boat, sold a house and left his wife all in the space of a single weekend, and he did not understand what was holding up this deal (or the tax break that went with it). But the director knew of a colleague who had almost been dismissed for inadvertently acquiring a stolen picture, and she did not want to suffer the same fate.

While eager for the donation, the director was aware of both the legal and ethical risks it posed. The International Code of Professional Ethics of the International Council of Museums specifically states that "a museum should not acquire any object or specimen by purchase, gift, loan, bequest or exchange unless the governing body and responsible officer are satisfied that a valid title to it can be obtained." Similarly, the American Association of Museums code of ethics states that the "stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership."

The trustee assumed that as long as neither he nor the museum knowingly received stolen artwork, he could donate it to the museum without any problem. (He also thought that he could list his chauffeur as a dependent on his tax return, but that was another matter.) We politely corrected him: In the U.S., the general rule is that a purchaser (or later recipient) cannot acquire good title to a stolen work and may be exposed to a claim by the original owner almost indefinitely, no matter how innocent

the buyer and no matter how many times the work was purchased, sold or donated.

By contrast, in civil law countries such as France, Germany and Switzerland, a good faith purchaser may indeed acquire title from a thief, even against the rightful owner. In some countries this right arises within an extremely short period of time. For example, in Switzerland a bona fide purchaser obtains good title to a stolen object if five years have elapsed since the theft. Under U.S. law, a purchaser's best hope of gaining title to a stolen work would be if the applicable statute of limitations had run out on the original owner's claim, or if he could mount a successful "laches" defense, that is, showing that the rightful owner of the work had unreasonably delayed in asserting his rights to the detriment of the current owner.

The laches defense was raised successfully just this past December in the New York case *Wertheimer v. Cirker's Hayes Storage Warehouse*, in which Alain Wertheimer failed to recover a Pissarro painting from the gallery Pascal de Sarthe Fine Art. The picture had been owned by Wertheimer's grandfather and had allegedly been misappropriated during the Nazi Occupation of France. In granting summary judgment to the gallery on its laches defense, the court found that the Wertheimer family had done nothing since the 1950s to recover the work, and that the family's lack of due diligence in searching for it substantially handicapped the gallery, because all persons with direct knowledge of the relevant matter had died long ago. It was therefore virtually impossible for the gallery to show that any of its predecessors in interest had acquired good title. The gallery prevailed in court, even though it had done little due diligence before acquiring the work. Indeed, another dealer who was offered the work checked with the Art Loss Register—the largest

private international database for lost and stolen art—and was told that, while the painting was not in its registry, it had been reported as missing in a 1947 publication.

Returning to our case, we suggested that, at a minimum, the trustee enter into a written contract with the dealer that would include a representation that he is transferring good title to the painting. We also recommended obtaining an agreement from the dealer indemnifying both the purchaser and any successor in interest for costs if the work turned out to be stolen. Moreover, in view of our clients' concerns and the recent increase in stolen art cases, we suggested that the trustee and museum consider carrying out their own due diligence on the painting. If their research raised serious ownership questions, they might decide against buying the piece.

On the other hand, if a thorough check turned up nothing and they decided to acquire it, their due diligence would be helpful in the event that the museum later faced an ownership dispute. This is because one common thread in many stolen art cases is a balancing of the equities and a consideration of what is fair under the circumstances. Often such cases involve two essentially innocent parties: the original owner whose work was stolen, and the current owner who legitimately thought he was buying good title.

As part of this balancing act, courts frequently ask how diligent the victim of stolen art was in reporting the loss and looking for the missing work, and how diligent the current owner was in trying to make certain that he was not buying stolen art. We advised our clients that if the museum could show that it had determined, after a thorough inquiry, that the seller of the

picture had good title, it would be in a stronger position if it later faced a lawsuit.

The 1990 case *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts* emphasized just this need for purchasers to conduct proper due diligence. There, Cyprus successfully brought an action to recover stolen 6th-century mosaics that Peg Goldberg, an American dealer, had purchased from a Turkish archaeologist for more than \$1.2 million. After learning of the theft, Cyprus reported it to the United Nations and Unesco, among others. When the aptly named Marion True, a curator at the Getty Museum, heard about Goldberg's mosaics, she contacted Cypriot officials. A U.S. court of appeals in Chicago noted that especially when a potential purchase raises red flags, "dealers can (and probably should) take steps such as a formal IFAR [International Foundation for Art Research] search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like." The court of appeals also noted that "those who wish to purchase artwork on the international market, undoubtedly a ticklish business, are not without means to protect themselves."

The 1995 case *Erisoty v. Rizik* also stressed the need for proper due diligence. It involved a Corrado Giaquinto painting that had quite a history. Stolen from a family in Washington, D.C., in 1960, the work was discovered by a furniture removal company in a garbage bag in 1988, torn into five pieces, and the following year was consigned to an auction house, where it was purchased by a professional art restorer. The original owner had reported the loss to the FBI and the police in 1960, and in 1992 contacted IFAR. The FBI and IFAR located

the painting and removed it from the purchaser's home, and he then sued the original owner in federal court for the return of the work. But the court awarded the painting to the family, and in its ruling criticized the purchaser for failing to investigate "the painting's prior ownership or the identity of the consignor, or making any inquiry of art or law enforcement agencies, and with the knowledge that the painting was in five pieces—suspicious circumstances to say the least." The court also suggested that the current possessor of stolen art is subject to a higher standard of due diligence than the original owner.

In our case, we proposed a number of steps that our clients could reasonably take to investigate whether the painting was stolen, and suggested that a good starting point would be computerized databases. Although no single, all-encompassing registry of stolen art exists, an increasing number of excellent databases are used by the international art world to determine whether works are missing, stolen or are subject to other claims. The Art Loss Register, which has offices in London and New York, is the best known. It was established in 1991 as a partnership between auction houses, the insurance industry, art trade associations and IFAR. Its database includes records from private sources and government agencies such as the FBI and Interpol.

In addition, we suggested that our clients try tracking provenance through other sources, such as scholars, museums, auction houses, dealers and insurance agents. Their research was made more difficult because the painting was more than 50 years old. Generally, a gap in the provenance in the first half of the 20th century is harder to fill than later ones, because fewer exhibition catalogues exist from that period and the catalogues that are available often do not

illustrate works or give dimensions. Furthermore, a particular work may exist under different titles (especially if it deals with a subject the artist treated in several versions), so it may be difficult to trace a work definitively, especially if no catalogue raisonné exists.

We told our clients about various individuals and organizations that perform due diligence, and we agreed to oversee this work and to ensure that it was documented in writing. Decisions such as *Autocephalous* have stressed the importance of having written proof that a search of title has taken place when defending a claim made by a prior owner.

A thorough investigation into the provenance of the horse painting ultimately raised more questions than it answered. As a result, the trustee decided against buying it, and the museum's director was relieved not to have been "saddled" with a scandal.

The moral of the story: No good steed goes unpunished. Especially in federal court.