

# Paradigm

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## Art and Business Law

Many pension funds, companies, banks and private individuals have bought works of art or even built art collections in recent years. The most important aspect is undoubtedly the aesthetic pleasure: you can sit back and admire a painting, a photograph or a sculpture whenever you want. The fact that the art market has been less affected by the economic crisis than other sectors is surely a pleasant bonus. However, art collectors may be confronted with legal issues that can have an impact on the value of their investments.

### Buying at Auctions

The art world has its own unique way of doing business. Purchase and sale often take place at auctions and by consignment. Auction houses usually act as intermediaries between sellers and buyers. The same applies to art dealers selling art on consignment. A purchase agreement, however, is entered into between buyer and seller. So who is the seller? Is it the auctioneer or the art dealer the artwork was consigned

to? Or is it the owner? In the latter case there is no intermediary. That may not be completely insignificant as it can make a big difference for the buyer if he can turn to the auctioneer or art dealer he is familiar with, or if he has to contact an unknown seller in case any problems arise. A smart buyer should know who the actual seller is before making a purchase, and if he has actually empowered the intermediary he is dealing with to conclude the purchase.

Major auction houses usually do not disclose the names of the seller to the purchaser. This might lead to problems if a purchaser has a claim against a seller. If an intermediary does not wish to disclose the seller's name, the intermediary is presumed to be acting on his or her own behalf. In this case, a claim against the intermediary can be initiated. However, the custom of not disclosing the name of the seller can lead to unpleasant surprises if a work of fine art later turns out to be stolen. Usually, the general terms and conditions of auction houses exclude any liability for this. However,

this liability exclusion clause is only applicable to professional art buyers and usually not to private individuals. Russell Advocaten has been active over the last decades in numerous cases defending the interests of both international auction houses as well as (private or professional) buyers and sellers from many countries.

### Origins Unknown

Before buying, it is very important to conduct research concerning the provenance of the artwork and to gather information with regard to its market value. The lack of provenance or gaps in a work of art's provenance can be an indication for a forged or stolen work of art.

The price can also indicate problems when works of art are offered for sale at a price below the market value, but well above the price for an imitation. Another shady situation is when an art dealer sells works of art that were consigned to him but does not forward the proceeds to the commissioner. A striking example of this is New York art dealer Lawrence Salander who embezzled tens of millions of dollars from his commissioners. Depending on the country in which the transaction takes place, the bona fide purchaser will be protected against claims by the original, duped owner. At the moment, we are defending such a bona fide purchaser of a work of art that may originally have been sold at an auction by Salander.

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**Reinier W.L. Russell** is managing partner of the law firm of Russell Advocaten B.V. He assists domestic and foreign businesses in the Netherlands with corporate and commercial matters including litigation. In addition to art law, he deals with business formation and reorganization, corporate governance, insolvency law, employment issues, real estate issues and all aspects of liability and contract law. Russell Advocaten has worked for many years with international art law issues, representing collectors, art dealers, museums and artists from all over the world.

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### Not Made by the Artist

What happens if you have bought a forged work of art or if the object you purchased turns out to have been made by a different artist? In the Netherlands, the buyer can try to set aside the sales contract due to non-conformity (“my purchase is not what it should have been according to the contract or agreement”) or due to error (“my purchase is not what I thought it was”). The buyer of forged sculptures by Rodin, Degas or Giacometti can request a refund of the purchase price on return of the artwork, which is what we are currently claiming in court. Art buyers have to bear in mind though that there can be changes in attribution and that such changes do not always render the original contract null and void.

### War-looted Art

Pursuant to Dutch law, the owner's right to claim stolen goods back expires after 20 years. However, special regulations apply to art looted during the Nazi regime which later came into possession of the Dutch state as part of the *Nederlands Kunstbezit* collection. The limitation period has been lifted for such claims and the Restitutions Committee will assess whether they are legitimate. After June 30, 2015, it will apply stricter criteria however, so it is best to submit claims before that date. The Restitutions Committee also renders advice on

disputes between private individuals and museums. The first claims concerning such disputes have been successfully submitted by our law firm on behalf of the American and British heirs of a German-Jewish family.

Objects of art are still often seen as attractive loot. Therefore there are many international treaties, governing restrictions on trading in the spoils of war.

### Moral Rights of the Artist

Legal problems are not limited to buying a work of art however. The artist can, based on his moral rights as author, object to any form of damage or change to his work. Even in the case of ownership: the owner may not paint a moustache on a portrait or add clothing to a nude, as one German lady discovered in the classic 1912 case *Felseninsel mit Sirenen*.

In many cases, however, the line will be harder to define. Is a new office owner allowed to destroy a work of art that is integrated in an office wall and refers explicitly to the former owner? Are you allowed to radically renovate architectural structures without infringing the moral rights of the original designer? In practice, the artist's rights will be weighed against the (new) owner's interests. Some factors that may play a role here include whether there is an alternative to the renovation and the quality of the new design.

Destroying an original work of art often causes less problems than changing a work of art, as destruction does not reduce its artistic quality. However, even in that case the artist still has certain rights, such as, for instance, to get the opportunity to document his work of art. Besides, the owner must have a certain interest in destroying the work and he must show that there is no good alternative. When Amsterdam Airport Schiphol removed a work of art from a wall because of renovations and it then warped so badly that it could not be placed back, the company was permitted to destroy it.

In the USA, the protection of the moral rights of authors differs from state to state and objects are often only reluctantly recognized as “works of art”. Though usually known to be rather generous in this respect, the State of California was reluctant to recognize a mural as a painting, i.e. a work of art enjoying protection.

### Experienced Advisor

The complexity of the art world and art law requires the consultation of a specialized and experienced art lawyer. Russell Advocaten has been well familiar with international art law issues for many years and is regarded worldwide as the leading law firm in the Netherlands dealing with art and law issues. **P**