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ART LAW BULLETIN

SHOOK HARDY & BACON

Welcome to the inaugural Art Law Bulletin. In this newsletter, we plan to cover a range of developments in art law, including matters related to repatriation and restitution, copyright status, infringement claims and disputes arising from authenticity concerns, sales agreements and contracts, trusts and estates, and insurance coverage.

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Shook Secures Judgment for Client in Case Alleging Mismanagement of Artist's Trust

A five-year legal dispute between heirs of the renowned artist Thomas Hart Benton and the trust department that administered and managed the Benton Trust produced a significant ruling last month in Jackson County, Missouri Circuit Court. The judgment, in favor of UMB Bank, was issued by the Honorable Mark J. Styles on December 13, 2024. Shook, Hardy and Bacon represented UMB in the litigation, fending off claims for hundreds of millions in damages sought by the artist's daughter and three adult grandchildren. The plaintiffs filed suit in 2019 alleging that the bank lost or mismanaged hundreds of pieces of fine art created by Benton, an acclaimed Regionalist artist with strong ties to Missouri. The complex case covered multiple different lines of dispute, including sales of fine art from the trust, monetization of

alleged copyrights, and investment of the non-art assets held in trust. The trust, which held over 3,000 works of art, including many of Benton's most significant works, had been administered by UMB since its creation nearly 45 years ago. Thus, aspects of the case pertaining to the sale of fine art delved into four decades of evolving standards in highly specialized areas ranging from collection inventories, to curatorial practice, to sales customs, to appraisal methods. After a five-month bench trial, with 67 witnesses, 3,700 exhibits, and a transcript of over 14,000 pages, Judge Styles held that UMB did not breach its duties to the beneficiaries as claimed, awarding only $35,000 to the plaintiffs for five sketches or studies unaccounted for by the bank. UMB welcomed the court's thorough review of the evidence, analysis and conclusions. The plaintiffs' counsel stated that the heirs are evaluating their options. Law.com selected the trial team as its Litigators of the Week for the result.

Authenticity Case Brought Against Florida Gallery

The question of how much diligence buyers must demonstrate may be considered in a new authenticity case brought recently in the Miami-Dade County Circuit Court against a Miami gallery for selling $6 million in fake Andy Warhol paintings. The lawsuit was filed by a family described in the complaint as not having any "specialized training or background in art," but who do "personally enjoy art." This description is noteworthy, as it appears to be an effort on the part of the plaintiffs to show that they are not sophisticated consumers who should be held to a high standard of due diligence. Instead, they allege that the gallery director went to great lengths to pass off forged works as authentic Andy Warhols. Specifically, he told the plaintiffs his contact at the Andy Warhol Foundation would email them to confirm authenticity. But, the plaintiffs assert it was the gallery director himself who emailed the plaintiffs from a fake account that didn't match the Warhol Foundation's domain name. When the family approached Christie's about potentially selling the Warhols they had acquired, the auction house

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expert who examined them expressed doubts as to their authenticity. The gallery director is accused of then sending two people posing as appraisers from rival auction house Phillips to evaluate the works and confirm their authenticity. Phillips has indicated that these individuals presented the plaintiffs with fake business cards and were not in fact from Phillips. The plaintiffs assert breach of contract, breach of express warranty, unjust enrichment, fraud, conversion and other violations of Florida law.

Artists Challenge Companies' Creation, Use of AI-Driven Image Generator

A closely watched case, Andersen v. Stability AI, was brought last year by a group of artists who challenged several AI companies' creation and use of Stable Diffusion, an AI-driven image generator. Specifically, the artists take issue with Stable Diffusion's use of their artwork as "training images," and they object to its production of images "in the style" of those works. Put simply, the plaintiffs argue copyright infringement based on both input and output. For input, they claim that Stable Diffusion's use of their art for training was a direct infringement. For output, they claim that the way the product operates necessarily invokes copies or protected elements of those works. In other words, it was created to induce infringement by design. In August, the judge hearing the case in California district court dismissed claims accusing the AI companies of breach of contract, unjust enrichment and breaking the Digital Millennium Copyright Act. The judge did not address the case's central questions. Namely, does the use of artists' work by AI image models infringe upon their copyright, and is the behavior of AI companies protected under fair use? Some commentators argue there is a strong fair use defense under the Supreme Court's recent decision in Andy Warhol Foundation v. Goldsmith because the purpose of the use for training is to gain an understanding of the unprotectable elements of the artwork which is quite different from the original purpose of these works of art. The lawsuit will now move forward to discovery through which artists may

learn the ways in which the AI companies collected copyrighted materials used to develop their image generators. Relatedly, the director of the U.S. Copyright Office has indicated that a forthcoming report covering questions of infringement and training artificial intelligence models with copyrighted material will specifically address fair use in the context of AI.

Another aspect of copyright and AI relating to art is whether AI generated images may receive copyright protection. A Colorado artist, Jason Allen, sued the U.S. Copyright Office in September, claiming the agency wrongly rejected his application to register his work because it was not made by a human author. Allen created the work, titled “Space Opera,” on Midjourney, which happens to be one of the named defendants in Andersen v. Stability AI. Here, Allen used more than 600 prompts to bring his vision to life, juxtaposing the Victorian Age of elegance with Space Age wonder. Allen is seeking to distinguish his case from a separate recent case brought against the Copyright Office by AI inventor Stephen Thaler that challenges the office’s denial of copyright protection for a work of art created autonomously by Thaler’s Creativity Machine. Allen argues that his significant creative control and artistic input throughout the iterative process clearly distinguish his request for copyright protection from Thaler’s, which is based on the assertion that he should be listed as the author solely because he owns the programming AI system. To date, the Copyright Office has allowed registration of works with AI contributions, as long as those are disclaimed. This means that only the elements of the work that were not AI generated are protected. Allen’s work is different though, as all of the pictorial and graphic content within the image is attributable to AI, and he seeks to register the entire image.

New California Law Helps Residents Recover Art Stolen During the Holocaust

In September, the California legislature passed a new law, Assembly Bill 2867, aimed at helping California residents

recover art stolen during the Holocaust. The bill was inspired by the Ninth Circuit's decision earlier this year in Cassirer v. Thyssen-Bornemisza Collection Foundation that allowed a Spanish museum to retain possession of a famous impressionist masterpiece stolen by the Nazis from the Cassirer family during the Holocaust. After nearly two decades of litigation, the disposition of the case turned on one issue: whether, under California's choice of law test, Spanish law or California law applied to determine ownership of the painting. Under California law, the painting would belong to Cassirer because a thief cannot convey good title, and rightful owners cannot be divested of title when they lack actual knowledge of an artwork's whereabouts. But, under Spain's 1889 law of acquisitive prescription, which is unusually friendly towards possessors of stolen property, Spain would have acquired title through bad faith adverse possession after only six years. Applying California's choice of law test, the governmental interest analysis, the Ninth Circuit determined Spanish law must apply. Accordingly, the court held earlier this year that, under Spanish law, the Thyssen-Bornemisza Museum had gained prescriptive title to the painting. This appeared to be the final word on whether the painting would be restituted to the Cassirer family. The new California legislation, however, clarifies the stipulation in California law that allows the laws of a foreign government to be used in some cases where legal contradictions arise, indicating that California law should supersede contradicting laws when determining whether to return art or other personal property taken as a result of political persecution. The Cassirer family has requested its case be reconsidered by the Ninth Circuit applying California law.

Lawsuits Challenge New York District Attorney's Seizure of Art and Antiquities

Several recent lawsuits challenge the legal authority of the New York District Attorney (DANY) to seize art and antiquities, absent a pending criminal case, when ownership of such art and antiquities is in dispute. Since establishing the Antiquities Trafficking Unit (ATU) in 2017, the DANY has seized

thousands of cultural objects from museums, collectors and other art market participants on the premise that such objects are stolen. The DANY has then obtained turnover orders and returned the objects to countries and heirs that the DANY has identified as the rightful owners. In general, museums and collectors have capitulated, either because the seizure actions have revealed facts demonstrating that the collection items were indeed stolen or because those in possession of such items do not have the means or inclination to engage in costly litigation. Over the last year, however, the Cleveland Museum of Art (CMA), the Art Institute of Chicago (AIC), and a private collector in California have commenced legal actions defending their ownership of the objects the DANY has sought to seize from their collections. Importantly, these lawsuits take issue with the DANY's use of New York Penal Law Section 450.10. As the AIC points out in its court filing, while the ATU may have seized and successfully turned over works of art on consent–that is, obtained turnover applications where ownership was not in dispute–when the ATU's efforts have been challenged by the possessor of the work, the criminal courts of New York have deferred to courts with civil jurisdiction to determine questions of title.