

# Chapter 4

## Investigating and Preventing Crime in the Art World

### 4.1 The Art World: Its Actors, Crime Investigation and Crime Prevention

Art shapes society and gives it its character. Art defines humans. Art is both heritage and history. Art is difficult to conceptualize, for it involves esthetics, feelings, utility and imagination. Certain knowledge is required to understand the art world, but this does not mean that one has to take a course in art history. A basic foundational understanding of the art world is sufficient to analyze cases involving robbery, theft, and forgery of artworks, and even money laundering through art.

Yet this is no small task, for artistic production, like the production of food-stuffs, clothing, etc., is the result of vast and ongoing human endeavor. Like agricultural production, the production of artworks can vary in both quantity and quality at different times.

We must not lose sight of what is often understood as persistent discrimination, primarily in favor of Europe and the United States, where quantity and quality are less important than the location and time period that the artwork belongs to. According to Robert Spiel, Jr., “collectors, dealers, and museums discriminate in favor of certain periods and geographical regions and have excluded others, to at least a significant extent.”<sup>1</sup>

The following art, by time period and geographic region, are the most favored<sup>2</sup>

(1) 3000 B.C.–1000 B.C.

Europe	Greek art and Greek and Roman writings
Africa	Egyptian art
Asia	Chinese pottery, Art of Babylon (Iraq) and Troy (Turkey) and the beginnings of Hinduism (India)

---

<sup>1</sup> In *Art Theft and Forgery Investigations*, p. 16.

<sup>2</sup> Based on the work of Robert Spiel, Jr. (*Art Theft and Forgery Investigations*, pp. 16–20), augmented here by the author.

America Olmec art (Mexico)

(2) 1000 B.C.–500 A.D.:

Europe Roman art, Etruscan art (Italy), Greek and Roman coins and Greek art made of gold

Africa Pottery and sculpture (Nigeria), scientific instruments (Alexandria, Egypt) and iron sculptures

Asia Assyrian art (Iraq), Buddha (India 550–480 B.C.), development of Chinese calligraphy and early prophets

America Mayan art (Mexico and Central America) and art of the Moche civilization (Peru)

(3) 500 A.D.–1000 A.D.:

Europe Byzantine art, cathedral architecture and decoration, tapestries, glazed pottery, Russian sculptures and icons, manuscripts and Venetian glass

Asia Islamic paintings, mosque architecture, Buddhist temples, Chinese and Japanese porcelain, Indian and Japanese sculptures, art of the Khmer civilization (Cambodia) and the Táng Dynasty of China

America Incan art (Peru) and Pueblo art (New Mexico and Arizona)

(4) 1000 A.D.–1400 A.D.:

Europe Clocks, scientific instruments, stained glass and Venetian glass

Africa Early Western kingdoms

Asia Ming Dynasty (China, 1350–1650) and Samurai swords (Japan)

America Aztec art (Mexico, 1000–1500) and Anasazi art (Arizona, New Mexico and Utah)

(5) 1400 A.D.–1500 A.D.:

Europe Italy—Botticelli (Quattrocento), Brunelleschi, da Vinci, Donatello, Fra Angelico, Masaccio, Michelangelo, and Titian. Elsewhere—Bosch, Durer, Gutenberg and the Van Eyck family

Asia Sikhism (India)

America Pre-Columbian Period

(6) 1500 A.D.–1600 A.D.:

Europe Italy—Caravaggio, Cellini, Giorgione, Michelangelo, Raphael, Tintoretto, Vasari, and Violins; Elsewhere—Brueghel Family, Cranach, El Greco, Grunewald, Hals, Holbein and Rubens

Africa Sculptures in bronze and ivory (Nigeria)

Asia Oriental rugs and paintings, especially Persian (Iran), Ottoman culture (Turkey) and Ukiyoe paintings (Japan)

(7) 1600 A.D.–1700 A.D.:

Europe Bernini, Borromini, Murillo, Poussin, Rembrandt, Stradivari, van Dyck, Velasquez, Vermeer, Watteau, Zurbarán, silverware and fine porcelain

- Asia Imperial Chinese engravings and artwork
- America Last of the Mayan civilization (Mexico)

## (8) 1700 A.D.–1800 A.D.:

- Europe Antique furniture (Louis XIV and XV), elegant glassware (Baccarat and Waterford), fine porcelain (Dresden, Limoges, Meissen and Sèvres), vintage wines, Canaletto, Constable, David, Fragonard, Gainsborough, Goya, Guardi, Hogarth, Reynolds, Turner, Tiepolo and Wedgwood
- Asia Hokusai and Utamaro (Japanese painters)
- America Copley, Gilbert Stuart and Benjamin West

## (9) 1800 A.D.–1900 A.D.:

- Europe Art museums (ca 1890), art nouveau, Cézanne, Degas, Dufy Family, Fabergé, Gauguin, Manet, Matisse, Monet, Pissarro, Renoir, Rodin, Seurat, Toulouse-Lautrec, van Gogh, the development of photography and the industrial revolution
- Asia Hiroshige (Japan)
- America Bierstadt, Carousels, Cassatt, Homer, Innes, Sargent, Remington, Russell, Stieglitz and Whistler

## (10) 1900 A.D.–1945 A.D.:

- Europe Art deco, cubism, constructivism, expressionism and surrealism. Braque, Brancusi, Calder, Chagall, Dalí, Hummer, Kandinsky, Klée, Léger, Matisse, Miró, Modigliani, Mondrian, Moore, Munch, Picasso and Utrillo
- America Bellows, Benton, Calder, Cassatt, O’Keeffe, Pollock, Rivera, Rockwell, Tiffany, Wood, Wright, Di Cavalcanti, Portinari, Tarsila do Amaral, Anita Malfatti and Galileo Emendabili

## (11) 1945 A.D. to present:

- Europe Picasso, Damien Hirst and Anish Kapoor
- Asia Takashi Murakami
- America Ansel Adams, Botero, Calder, Edward Curtis, Johns, Lichtenstein, Rauchenberg, Rockwell, Rothko, Warhol, Di Cavalcanti, Portinari, Tarsila do Amaral, Anita Malfatti, Galileo Emendabili and Romero Brito.

Ordinarily, when we think of artworks, we immediately think of these and of museums. Museums, however, are but a part of the world of art—one of the most commonly accessed, much like libraries. Both collect and maintain works, rare books and manuscripts that are valuable and draw the interest of collectors and specialized dealers. Oftentimes they regard their establishments as more of a museum than a business. This is partly true, if we take into account the people who frequent these spaces for purposes of observing rather than acquiring art, in an informal way that is more intimate and less institutional than in a museum. Then again, everything a gallery owner has to offer is *placed on exhibit* rather than *put up for sale*.

There is a widespread belief that only the well-off can afford art. Some can, but a surprising number of persons and collectors from the middle class passionately devote their time and money to the arts. Collectors also make donations to one another, much like an exchange of gifts.

Furthermore, large companies or corporations routinely take an interest in acquiring works of art, encountering no resistance from their stockholders. Such acquisitions often turn out to be important investments.

Investors in art are collectors who often care little about the asset collected. Those investors who frequently engage in acquisitions and sales are considered art dealers.

Artworks are fragile and intolerant of temperature and humidity extremes, and therefore require proper transportation by specialized companies.

Mere examination by a specialist<sup>3</sup> is no assurance of authenticity, although the specialist may, in many cases, be capable of authentication. Authentication requires special expertise in specific areas. Anyone who claims knowledge of everything, rather than of fine art, of arms and armor, or of stamps, for example, is unlikely to be a good appraiser or authenticator.

Preservation of a work of art requires diligent care to minimize all hazards, even when strict security measures are put in place. To that end, a proper insurance policy is in order to protect against incidental damage. One would normally expect protection against loss of the work, a drop in its market value, and assumption of liability.

As a general rule, insurance policies are based on contracts. Yet in the case of artworks, special consignment arrangements are often used when the parties would normally be disinclined to rely on standard agreements. Insurance companies and their clients are free to negotiate any contractual clauses that do not violate public policy or preestablished rules.

A number of ethical questions might be raised. One of these might be, for instance, whether a dealer may also be an appraiser. Conflicts could arise as to whether an appraisal was intentionally low so that the appraiser might himself acquire the property through someone else. This would be artificially lowering the price for illegitimate gain. An appraiser for a given class of art ought not to be able to buy or sell it.

Countless variables go into determining the price of a work of art. Diva Benevides Pinho illustrates this complexity by explaining that “people present at the sale of a piece also play a role in determining its price through the operation of supply and demand. If famous buyers compete for a work of art, they bid up the price and their interest lends it an aura of quality. Conversely, if important buyers stay away in droves, the price of the piece tends to fall.” Citing Howard Becker’s observations, she adduces: “It is more important to know who is buying or bidding

---

<sup>3</sup> There are website that specialize in appraisals. In Brazil, for instance, we have [www.catalogodasartes.com.br](http://www.catalogodasartes.com.br), accessed June 3, 2012, which offers price consultation on art and antiques, with photos, specifics, values in both reals and dollars, data, and sources of research.

for the work of a given artist than to have precise knowledge of the quality of that work.”<sup>4</sup>

Academia plays an important role in the scientific study of artworks, placing historical, geographic and sociological aspects of art before the public—especially with regard to those works more recently discovered or held for years by collectors.

For legal issues, there are specialized professionals (such as attorneys) who deal with consignments, auctions, charity institutions, gifts, and copyrights.

In any discussion of the world of art, we would do well to take note of its underworld. Indeed, there is always a need to be aware of the underworld (in the pejorative sense) as an ecosystem apart, one that permeates the artistic environment.

Along similar lines, Robert Spiel, Jr., states that currently, “criminals who are comfortable functioning in the art world far outnumber their police or law enforcement counterparts.”<sup>5</sup>

There are reports of crimes committed by employees of museums and specialized companies, usually from collectors and dealers. Investigations in the United States, for instance, show that most (80–90%) of the crimes committed in this field are perpetrated by participants in the market, which includes curators, collectors, volunteers, dealers, appraisers and even professors. The small remainder is attributable to ordinary criminals who know practically nothing about the object of their crimes—other than what they have heard in the media about how easy they are to steal and how much they are worth. Forgers and distributors of fakes, on the other hand, require knowledge and connections in the art world, and sometimes emerge from the artistic milieu or are themselves professionals in restoration.

Business practices in the art world are different from many other industries. It is not uncommon for collectors or dealers to simply make an exchange, without a penny ever changing hands. Furthermore, museums make acquisitions by payment, barter or on loan from other museums, dependent as they are on donations or government subsidies.

Acquisitions are ordinarily recorded, whether by the seller or the buyer, in the case of museums and auctions. The amounts involved require that the parties keep a record, and that often facilitates investigation. Still, among private collectors or investors, wealthy or not, records are not kept, and proof of legitimate ownership hinges on finding a receipt, petty records or even photographs. There have been cases in which the press revealed the existence of works of art based on photographs taken at the home of a person being investigated.

Inventories gather together many descriptions by collectors, yet partial records of artworks have also been assembled by private collectors, notably of the more important artworks, relying on memory as a form of concealment, to the detriment of searches conducted afterward.

---

<sup>4</sup> See *A Arte como Investimento. A Dimensão Econômica da Pintura*. São Paulo: Nobel and Universidade de São Paulo—Edusp (joint publication), 1989, p. 100.

<sup>5</sup> Cf. *Art Theft and Forgery Investigation*, p. 25.

An important consideration is the confidentiality surrounding dealings in art, except, of course, where dealers are concerned. Buyers and sellers do not seek exposure. Sellers are often embarrassed at having to part with their treasures, and buyers, mindful of this, will avoid adding to their displeasure. Dealers, in turn, are protective of their margins, and prefer not to disclose them.

A general lack of transparency as to how prices are arrived at is a characteristic of this market. We often do not know, for instance, the true worth of museum pieces. Art dealers are by no means consistent, either. Some will cut prices to attract customers, while others will categorize or label their items with little regard for market niceties.

World War II and drug trafficking were important events affecting the theft of artworks. During the war, art was stolen by civil and military authorities. Soldiers engaged in this theft throughout the conflict, and the art taken has ended up on the market because the generation that took it is dying out. This has resulted in claims being brought by the victims (governments, institutions or descendants).

With regard to drugs, there are theories to explain this underworld's connection to the world of art. Art can finance the acquisition of drugs or be coveted by drug dealers or their associates, now engaged in its *legitimate* acquisition—a phenomenon heretofore unknown. One theory is that, as in the case of rich gangsters of yore, the purchase of paintings, engravings, and rare books will, it is hoped, bring them a measure of respectability—a doubtful prospect given the low esteem in which drug traffickers are held.

Manus Brinkman believes that the underlying causes for the international traffic in cultural property are similar to those underlying the traffic in drugs. “On the one hand, there is a demand from wealthy consumers, and, on the other, there is a huge supply in regions where poverty reigns. It is rather strange that the collection of cultural objects of unknown provenance by wealthy private individuals is still widely considered to be socially acceptable. Nobody has to collect illicit material.”<sup>6</sup>

Constant forgery of works of art has decreased the interest of serious buyers. They are increasingly skeptical of an artwork's authenticity and disinclined to blindly trust many dealers, whether because of the quality of the forgery or misgivings about their intentions.

Fences or forgers engaged in selling the proceeds of crime to an unsuspecting public have also played an important role. Criminals pass forged or stolen items along to fences who in turn sell them to the unwary.

The use of fake identification documents is an added complication. A fence with a fake ID can ask a buyer to call the bank to have a payment order made out to the seller's fake name; that way the seller is able to skirt bank security procedures.

---

<sup>6</sup> In *Reflections on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures. Art and Cultural Heritage: Law, Policy, and Practice*, p. 64.

Authentic provenance papers may also be stolen, or even forged from museum or auction house catalogs. The crime against property can occur before or after the forging of provenance papers. The fact that, for example, Sotheby's or Christie's<sup>7</sup> may once have sold a piece is no clear assurance of its authenticity. Provenance may have been legitimately acquired for fraudulent purposes using the family of the artist or even the artist for authenticity, thereby engendering an irrefutable presumption of authenticity even in a court of law. That would happen if an artist or relative were hired to certify new provenance for a third party, causing a conflict of interest between the original buyer of the work and whoever hired the second provenance.

Finally, unlike museums and art dealers, ordinary people rarely have documentation for artworks in their possession. Seldom do they have a bill of sale, proof of payments, provenance, or any trace of original or subsequent documentation. This is normally because the piece has been in the family for generations, providing fertile ground for criminals to commit a vast array of crimes based on advantages deriving from this overly common situation.

Nowadays, with the use of computers, it is easy to verify stolen or recovered artworks, especially in archives containing inventories of pieces in the hands of collectors under investigation or indictment. These also facilitate rapid transmission of information on disappearances, with complete descriptions, often including photographic records.

We know that the commission of ordinary crimes (larceny, robbery and possession of forged works, not to mention fencing) is common in the world of art. This is relevant to calculations involving statutes of limitation. For example, there are large differences among these types of crimes when it comes to statutes of limitation. The issue is to know when the crimes were perfected—that is, when their commission was complete. Theft or robbery is consummated by possession, i.e., once the criminal acquisition is complete or, where violence is involved (robbery), once the deed is done and the thing is taken into the peaceful possession of the perpetrator. It would be easy to calculate the statute of limitations from that moment, but in the case of forged items (receiving), note that the statute of limitations begins to run at the time the perpetrator is in peaceful possession of the work *and* conscious of the forgery having been committed in an earlier crime against the property. As in the case of artworks that have been handed down for generations, only the last person in possession of the work can be held liable as of the moment that person—aware of the illegitimacy of the thing—acts as though he or she is the owner. The statute of limitations would begin to run at that moment.

---

<sup>7</sup> According to Sarah Thornton, Christie's and Sotheby's between them "control 98% of the world market for art auctions. The word *sale* is suggestive of discounts or bargains, but an auction is always after the highest possible price. Indeed, it is precisely these extraordinary sums that have transformed auctions into high society sporting events." In *Sete dias no mundo da arte. Bastidores, tramas, intrigas de um mercado milionário*. Translation: Alexandre Martins. Rio de Janeiro: Agir, 2010, p. 26.

There are large databases listing stolen or missing works of art. They may be found at museums, international agencies (International Criminal Police Organization—INTERPOL<sup>8</sup>), governmental agencies (Federal Bureau of Investigation—FBI<sup>9</sup>), nongovernmental organizations (*The Art Loss Register*<sup>10</sup>) and International Forums (UNESCO<sup>11</sup> and the International Council of Museums—ICOM<sup>12</sup>).

The issue we face today is that both stolen and legitimate artworks may attract criminals seeking to launder dirty money by exploiting a market that is little known, hard to understand, easily manipulated (by its own actors, such as collectors and dealers), and fraught with problems (theft, robbery, forgery and laundering).

Although traditional money laundering methods, such as the purchase of commodities and real property through the financial system (especially parallel or clandestine financing), through third parties (stooges), and through offshore banks or hawala systems, to drive a wedge between the money and its origins, have long served organized crime, it has moved into other areas, less closely watched and with fewer rules.

As explained by Fletcher Baldwin, Jr., a “novel way is through the use of art. Although it sounds strange to think of drug traffickers and arms dealers purchasing famous Renoirs and Picassos, the use of art to launder money is not as strange as it seems; and in fact, it is extremely effective.”<sup>13</sup>

Dealers can help in detecting crimes against property (theft, robbery and fencing) or even financial crimes (money laundering). When a tender is made, they can promptly and anonymously access the websites involved (an informal cautionary investigative technique) and disallow or allow the deal. They might also notify the police, the Attorney General’s Office or the Financial Intelligence Unit for their country (Financial Crimes Enforcement Network – FinCEN, and Council for Financial Activities Control – COAF), in which case they might not remain anonymous (for the records would identify the source). If they do accept the operation while notifying the authorities, they risk future civil or even criminal liability, including prosecution for money laundering (given suspicious activity reporting requirements, should the omission be deemed significant, in view of prior behavior, if there was any risk of an untoward outcome). Here we would have a potential

<sup>8</sup> Headquartered in Lyon, France, <http://www.interpol.int/>. Accessed May 21, 2012.

<sup>9</sup> Art and Cultural Property Crime, which includes theft, fraud, looting and national or international trafficking, generates \$6 billion in annual losses, and the FBI has a specialized department (the Art Crime Team) made up of fourteen special agents with a computerized index of artworks stolen worldwide. (See [http://www.fbi.gov/about-us/investigate/vc\\_majorthefts/arttheft](http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft). Accessed May 21, 2012.)

<sup>10</sup> A private database available for recording, searching and recovery of artworks. See <http://www.artloss.com/en>. Accessed May 21, 2012.

<sup>11</sup> See <http://whc.unesco.org/en/list>. Accessed May 21, 2012.

<sup>12</sup> See <http://icom.museum/programmes/fighting-illicit-traffic>. Accessed May 21, 2012.

<sup>13</sup> Cf. *Art Theft Perfecting the Art of Money Laundering*, p. 2.



criminal offense, a special mode of participation, and a confluence of agents, where the primary act was negligence on the part of the individual who should have taken proper precautions given their prominent position in the market.

In that case there would be no room to allege violation of the principle of legality. The principle does indeed bar curtailment of rights through criminal sanctions provided by law in both the formal and practical senses, already expressly and precisely set forth in great detail. When a crime does not specify the requisite level of intent, it opens the door to subjective interpretation as to whether a crime has occurred, even though the perpetrator may deny having had any intention to commit the crime.<sup>14</sup>

One might invoke the “conscious avoidance doctrine”—that is, a traditional rule in the United States whereby knowledge is imputed to anyone who engages in willful blindness.<sup>15</sup>

Dealers may simply prefer to decline a purchase, in which case they would report nothing and avoid involvement with the authorities. That would make it more difficult to uncover the crime and recover the item for delivery to the victim; this is why their behavior is so important in fighting the kind of crime that pervades the art world.

An unwary or negligent dealer might, in hopes of acquiring some important work, prefer not to select the private method of investigation and simply make the acquisition without notifying the authorities, thereby increasing the separation between the victim and the property (here again we have the possible case of prior behavior having given rise to the outcome).

It might happen that out of panic some dealers, faced with persistent investigation, might destroy the purloined, stolen, forged or laundered item, or simply drive it underground, dodging the investigation and evading their duty to notify the authorities or even protect potential buyers. The intensity of the investigation could have a double effect: It might frighten or provide assurance that the item will be recovered and that perpetrators will eventually face charges. Faced with strenuous enforcement efforts, more and more participants in the market will likely pitch in to cut down on its utilization by criminals.

The dealers could, in effect, act something like informants—that is, those who, by virtue of their confidential contacts (among, perhaps, their former underworld cronies), their contacts in the world of art, or both, either know or are in a position to find out things that would not otherwise be discoverable. These are persons whom criminals are inclined to trust, even though that does not necessarily mean they are themselves current or former criminals. Directly or indirectly, they end up receiving pertinent information about past, present and future criminal activity.

---

<sup>14</sup> Second Report on the Situation of Human Rights Defenders in the Americas. Inter-American Commission on Human Rights. Published by the Organization of American States (OAS), December 31, 2011, p. 33, item 91.

<sup>15</sup> Cf. John K. Villa (in *Banking Crimes: Fraud, Money Laundering and Embezzlement*, vol. I, 2011–2012 Supplement, § 4:11).

In the United States, undercover agents are essential to solving such crimes. They are government law-enforcement agents, professional officers who pass themselves off as criminals. Unlike informers or dealers, they are highly resistant to retaliation, easily controlled or directed, and capable of reacting very capably in an emergency. They are, in addition, able to come off as highly credible witnesses. They would be relatively unexposed to liability in the event of some accident—unlike informers or dealers.<sup>16</sup>

That approach might, together with others, result in the apprehension or recovery of purloined, stolen, forged or genuine works of art procured with the proceeds of earlier crimes. In most legal systems, whenever an arrest is made, it is possible to seize things pertinent to the crime (in the case of money laundering, things relating to the current crime or some antecedent crime). These provide important evidence, both as to the purpose of the crime (the thing or person the unlawful behavior is about) or whom it benefits.

## 4.2 The Art of Money Laundering and the Roles of Those Who Combat It

The romantic view of art (utility, historical record, expression, imagination and beauty) has no parallel in current practices, especially in a world in which unlawful conduct, including the proceeds of drug trafficking, once restricted to certain industries, now makes inroads in the field. To make matters worse, criminal methods have changed radically in pernicious crimes, such as money laundering.

Art has been highly valued by mankind since ancient times. However, its current business sophistication, unprecedented international market, the huge sums of money involved and its use as an investment by persons indifferent to it and even by criminals, would once have been unthinkable.

University of Florida professor Fletcher Baldwin, Jr.,<sup>17</sup> and University of Ohio professor Hanna Purkey,<sup>18</sup> draw an important parallel between real estate and art. Real estate offers some of the best-known methods for money laundering because the properties involved are themselves relatively high in value, are often the subject of speculation, and can even be paid for in cash. There are other similarities between real estate and art. Both are classed as non-financial, and therefore lack the regulation and rigid, standardized controls in place for the financial sector.

One important difference is that art may be transported, appraisers or dealers are easily bought or even made up—insofar as no license or qualification is required of them (reputation and experience being sufficient)—and no authorization is even required for dealing in art.

---

<sup>16</sup> Cf. Robert E. Spiel, Jr. *Art Theft and Forgery Investigation*, p. 213.

<sup>17</sup> In *Art Theft, Perfecting The Art of Money Laundering*, p. 8.

<sup>18</sup> Cf. *The Art of Money Laundering*, pp. 112–113 and 128–134.

In turn, regulatory agencies pay little attention to the art world.

In the United States, the Patriot Act has properly regulated the real estate market to exclude all criminality, and requires real estate agents to report cash operations of \$10,000 or more.<sup>19</sup> Although it does impose reporting requirements on non-financial sectors, Section 365 places no such requirement upon art dealers, as it does for banks, casinos, car dealers and currency exchanges.

In Brazil, the obligation to report suspicious operations is just as incumbent upon “individuals or companies engaged in real estate promotion or the purchase and sale of real property” as it is for “individuals or companies dealing in jewelry, precious stones and precious metals, art objects and antiques” (Article 9, Subsections X and XI respectively, of the Money-Laundering Law, Law No. 9613 of 03/03/1998, amended by Law No. 12683 of 2012). The new language did amend Subsection X to also include individuals, and added Subsection XIII, placing similar obligations “upon business syndicates and depositories of public records.” These amendments are welcome, but ought to be accompanied by more stringent controls on communications, which have traditionally been lacking in the art industry. Another problem is self-regulation, which could lead dealers to accept cash payments without any concern for future liability.

For example, the two largest auction houses in the world, Sotheby’s<sup>20</sup> and Christie’s,<sup>21</sup> are self-regulated and required to act in good faith in the interest of their clients or consignors.<sup>22</sup> Both have accepted cash payment and are not under any specific obligation to report suspicious operations. Sotheby’s does not prohibit cash payments, but does subject them to unspecified legal restrictions, whereas

---

<sup>19</sup> See *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992). In that case, an agent, Ellen Campbell, was convicted of money laundering for selling a piece of property to a drug dealer, Mark Lawing, who claimed to be in the business of customizing automobiles, at a lower price for cash payment (bundled bills), which contributed toward concealing illegal money from the authorities. See also *United States v. Massac*, 867 F.2d. 174, 177–78 (3d Cir. 1989), knowledge that the funds were associated with drugs sufficed for imputation of criminal liability. See also *United States v. Isabel*, 945 F.2d 1193, 1202–03 (1st Cir. 1991).

<sup>20</sup> Cf. <http://www.sothebys.com/en/buysell/buy.html>: “You can pay with cash (subject to certain restrictions and legal limits), check, money order or wire transfer. Certain credit cards are accepted at Sotheby’s London, Amsterdam, Paris, Switzerland and Hong Kong salerooms and you may contact these sale locations directly for specific information. Successful bidders can pay immediately following an auction, otherwise an invoice will be sent to you.” [http://selectsothebysrealty.com/page/make\\_a\\_payment](http://selectsothebysrealty.com/page/make_a_payment): “Make a Payment. Thank you for your business. We are grateful for your relationship with us! Please note that payments are preferred by certified check, personal check or money order. For your convenience, we can also accept credit cards. If you would like to pay with credit card, please submit your payment below. Additional charges may apply for processing.” Accessed May 14, 2012.

<sup>21</sup> In <http://www.christies.com/features/guides/buying/pay-ship.aspx>: “We accept wire transfers, bank drafts or cashier’s orders, cash or checks. Under certain circumstances, some Christie’s salerooms may accept payment by credit card (check with your saleroom for details).” Accessed May 14, 2012.

<sup>22</sup> See Hannah Purkey (in *The Art of Money Laundering*, p. 134).

Christie's does not even mention any limitations on cash payments, which may be made by electronic transfer, payment order, cash or check.

Manus Brinkman explains that "although reputable auction houses and dealers act within the parameters of the law, previously their trade associations did not support initiatives to actively restrict the free trade in cultural objects on the theory that the black market thrives from overly retentive trade in cultural objects: as the demand for antiquities grows, the supply is cut off."<sup>23</sup>

These auction houses foster demand for objects from supplier countries, and they are aggressive trendsetters. Brinkman illustrates: "In 1996, the strong demand for Southeast Asian paintings among an increasingly affluent Asian middle class became apparent when Christie's withdrew five Indonesian paintings from its Singapore sale after the National Museum in Jakarta saw them and identified them as stolen."<sup>24</sup>

International auction houses in the United States all follow the Uniform Commercial Code, which does not restrict the use of cash as a form of payment. They may therefore accept cash payments, irrespective of knowledge of illegality or whether the money comes from unlawful activity—this despite the requirement that they act in the best of good faith.

Because they are self-regulated, it is easy to shift responsibility to the consignor and assume no obligation toward the international community.

Note that according to Erin Thompson, traditional confidentiality has allowed dealers and auction houses to omit information about prior owners. A research paper on Sotheby's and Christie's showed that from World War II until 2000, some 95% of the objects handled in London came with no indication of where they were found, and 89% listed no historical information. Similarly, less than 1% of Mayan objects auctioned by Sotheby's between 1971 and 1999 were listed with any indication of where they were found. It concludes by stating that "the great majority of antiquities sold to private collectors in the last 50 years have no provenance."<sup>25</sup>

It must be pointed out that the lack of provenance means that the piece is not accompanied by documentation on where it was found or a paper trail showing past ownership (to say nothing of the money flow involved). Still, it cannot be categorically stated that the object was necessarily illegally exported from its country of origin.

Lack of proper rules, monitoring, or even interest has caused many launderers to look to this market as a means of cleaning their dirty money, since prices may be established, manipulated and altered at any time.

It is true that dirty money gradually and on a large scale began discovering art and real estate. Increasing the flow of illegal money allowed organized crime to move in, followed by harmful consequences given the increased danger of fraud,

---

<sup>23</sup> Reflections on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 64.

<sup>24</sup> *Id.*

<sup>25</sup> In *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities*. 33 Colum. J.L. & Arts 241, 2010.

tax evasion and corruption. Art thus became a natural channel for the laundering of illegal money.

Authorities have become aware of problems surrounding the world of art, such as its vulnerability on a whole series of issues and threats (for there are terrorist organizations stealing cultural assets to finance their activities). The large amounts of money involved and the lack of transparency in their negotiations require greater control by the authorities, whose inaction provides unprecedented opportunities for organized crime to launder dirty money. All of this leaves out the hunger for profits of private investors, who view art as just another business whose first principle would be “Business is not built on the Beatitudes.”

Actual economic impacts are felt whenever a large volume of illegal money is channeled. In the case of art, in the name of the transmission of cultural values, its actors appear to have paid little attention to a number of unlawful practices—most notably, tax evasion, money laundering, and even corruption.

In an important observation, Misha Glenny explains that “the shadow economy has become such an important economic force in our world, and yet it is surprising that we devote so little effort to a systematic understanding of how it works, and how it connects with the licit economy. This shadow world is by no means distinct from its partner in the light which is itself often far less transparent than one might suspect or desire.”<sup>26</sup>

Questionable practices on the part of its participants have been permitted in the name of the independence of the industry and its necessary secrecy. All the while, court cases, reports in the international press and several studies have suggested that there might be international, organized, illegal conduct behind it.

Neither could the emergence of visible links between organized crime and art be viewed with equanimity, for it could soon spell the end of its market—known as it is for forgeries rather than good practices—and add to this the risk of fostering and perpetuating serious criminal behavior (terrorism) against a backdrop of institutionalized inertia.

There appears to be a generalized perplexity acting against all efforts at government control, dependent, as it is, on confidential information doled out in dribs and drabs and not easily understood. This realization has surprised scholars and confronted orthodox management practices. The industry is surrounded by an aura of mystery that cannot be boiled down to a simple prognosis of unlawful behavior, but instead, more of an unevenly-distributed criminal prognosis.

That sophisticated methods and techniques are used to wipe out all vestiges of crime—methods that mutate in response to changes in crime-fighting techniques—calls for nimble, flexible legislation, focused on the harm done by antecedent crimes, and on the greater harm occasioned to the economy by the mixing of licit and illicit money.

---

<sup>26</sup> In *Memáfia: crime sem fronteiras*. Translated by Lucia Boldrini. São Paulo: Companhia das Letras, 2008, p. 14.

Hence the need to reflect on the role of each participant in the industry, so that necessary measures may be adopted to obtain the desired results in a reasonable time—all of this, of course, without prejudice to fundamental rights.

Despite the appearance of regulatory control, the use of art in the laundering of money has attracted organized crime, inasmuch as the authorities lack the training required to spot a potential suspect. Drug cartels—mindful of the inattention or even lack of knowledge on the part of many authorities as to the considerable growth in the use of art as a means of laundering money—have made considerable use of this industry.

Examples abound worldwide, even in Brazil,<sup>27</sup> showing that artworks are transferred into or out of the country for use in the international market, with little apparent regard for the origin of the funds used to acquire the pieces, but concerned entirely with the art itself as its sole qualification.

Citing Marianne James, Hannah Purkey shows that groups as different as Americans, Italians, the Russian Mafia, the IRA and Colombian cartels are believed to have laundered illegal money through the use of art because of its facility of transport, its high value and its lack of regulation or control.<sup>28</sup>

Other typologies have been detected. One of these, smurfing, consists of dividing up illegal funds among many institutions. It is a spreading out of financial investments designed to make it more difficult for the authorities to fight money laundering. Because it has come under effective control, that approach is no longer so popular among criminals, who have moved on to non-financial vehicles, such as real estate, in order to sidetrack government enforcement efforts. The Financial Action Task Force (FATF) is working on the problem, and has proposed greater control over non-financial activity. It is also looking into techniques whereby prices are artificially raised or lowered to create bogus invoices.

As in real estate, art makes it possible to appraise an asset so as to facilitate laundering, through the resulting substantial increase in insurance (or the mortgage, in the case of real property). Fake documentation makes it possible to obtain an incorrect property appraisal to secure hefty financing.

Laundering through artworks is accomplished by incorrectly stating prices, quantity and quality, and by overseas transportation, all in an effort to convey some legitimacy to illegal money.

---

<sup>27</sup> Take, for instance, a case involving a Colombian national, Juan Carlos Ramirez Abadia, convicted with several others of money laundering, upheld on appeal (record No. 2007.61.81.0011245-7/SP, convictions in 2008, upheld in 2012 by the Region Three Federal Court, which extends to the states of São Paulo and Mato Grosso do Sul, Criminal Appeal No. 0001234-26.2007.04.03.6181/SP, tried 06/03/2012, Rapporteur, Federal High Court Justice Johansom di Salvo). Then there was the case known as Banco Santos, in which Edegar Cid Ferreira, former owner of the financial institution, was also convicted of financial crimes and money laundering in the lower court in 2006 (criminal action No. 2004.61.81.008954-9). Both were heard before the Federal Criminal Court of Justice in São Paulo (Federal Criminal Court No. 6, specializing in Money Laundering and Financial Crimes).

<sup>28</sup> See *The Art of Money Laundering*, p. 123.

### 4.3 The International Council of Museums

Established in France in 1946, the International Council of Museums (ICOM) has been granted consultative status by the United Nations Economic and Social Council. Specifically with regard to museums, it has prepared a Code of Ethics for Museums,<sup>29</sup> unanimously adopted by the 15th General Assembly held in Buenos Aires, Argentina, on November 4, 1986, and revised by the 21st General Assembly held in Seoul, South Korea, on October 8, 2004.

The Code constitutes a minimum standard for museums. It provides, for example, a clear statement of institutional standing for museums (1.1), public access to its collections (1.4), proper safety standards (1.5), sufficient funding (1.9), and income-generating policy (1.10). It requires that every effort be made to ensure that each item purchased, donated, loaned, placed in trust or exchanged was not acquired illegally in its country of origin, nor illegally exported therefrom, nor from any country through which it transited, where clear ownership title might exist, including the country in which the museum is located. To this end, there is a due diligence requirement to establish the complete history of the item in question, back to its discovery or creation (2.3). It bans the acquisition of an object where there is reasonable cause to believe that recovery involved unauthorized or unscientific fieldwork or intentional destruction of or damage to monuments, archaeological or geological sites, or species and natural habitats (2.4). Museums likewise should not acquire biological or geological specimens that have been collected, sold, or otherwise transferred in contravention of local, national, regional or international law (2.6). In the case of disposal, the legal or other requirements and procedures must be complied with fully (2.12).

### 4.4 Cultural Entities and Incentives for the Diffusion of Art

There is no central federal agency in the United States charged with cultural policy—a Ministry of Culture, for example—as there is in Brazil. Cultural policy in the United States is spread out through different institutions, among them the Smithsonian Institution. Regulation of museums is handled through local legislative bodies (on the state, city or county level) and not by federal institutions. Public policies are therefore not easily coordinated.

According to James Reap, amendments made since 1980 to the National Historic Preservation Act (NHPA) have charged the Secretary of the Interior with the responsibility of directing and coordinating North American activities based on

---

<sup>29</sup> *ICOM Code of Ethics for Museums* (English-language version). The French and Spanish versions are titled, respectively, *Code de déontologie pour les musées* and *Código de Deontología del ICOM para los museos*. See <http://icom.museum/who-we-are/the-vision/code-of-ethics.html>. Accessed June 20, 2012.

the UNESCO Convention of 1972, in coordination with the Secretary of State, the Smithsonian Institution and the Advisory Council on Historic Preservation.<sup>30</sup>

The Smithsonian Institution (the world's largest network of museums and research centers), which brings together some 19 museums and galleries, in addition to the National Zoological Park, and nine research centers,<sup>31</sup> is a respectable American institution and receives donations from foundations, corporations and individuals. This happens, according to Judith Leonard, General Counsel for the Smithsonian Institute,<sup>32</sup> as a self-regulated gift authority and a nonprofit organization. Its funding is separate from the Treasury Department. On its website, one sees that money can be donated, yet there is not much information on how such donations or payments are made.<sup>33</sup> Counsel made it clear that the Institution makes careful examination of provenance, and always checks the authenticity of artworks. Both she and Bonnie Magness-Gardiner, FBI agent and member of the Art Crime Team, categorically assert that the Institute has ethical restrictions in place that are stricter than those drawn up by ICOM.

Bonnie Magness-Gardiner added that many crimes were discovered because of illegal transportation, or when suspicious banking activity occurred, in which case alone there would be reason to report a suspicious operation. She also disclosed that all possible information, including the use of Google searches, is obtained by FBI agents, and does include published notices. Finally, she stated that the Archives have suffered considerably from the illegal acts of their countless visitors, because of the sheer quantity and fragile condition of the papers consulted.

The U.S. Congress has, since 1917, allowed deduction of donations to religious, educational and charitable entities organized as nonprofits (NGOs). We cite

---

<sup>30</sup> Public Law 96–515, December 12, 1980, 94 Stat. 3000 (in *The United States and the World Heritage Convention. Art and Cultural Heritage: Law, Policy, and Practice*, p. 234).

<sup>31</sup> Cf. <http://www.si.edu/Museums>. Accessed May 22, 2012.

<sup>32</sup> She hosted a meeting with the author and Bonnie Magness-Gardiner, an FBI agent and member of the Art Crime Team, at 10 AM on 05/21/2012 at the Smithsonian Institution (1000 Jefferson Dr. SW, Room 302, Smithsonian Castle). She said they were under no obligation to list their donors, or to report suspicious activity. Precautions are nevertheless taken, such as not accepting donations in the form of cash, stored value cards or prepaid cards.

<sup>33</sup> “Your Gift Truly Makes a Difference. It’s as powerful as the visionary gift by the Smithsonian’s founding benefactor, James Smithson—because your generosity enables the Smithsonian to educate, inspire, and bring people together. Federal appropriations only provide about 70 cents of every dollar needed: To keep the Smithsonian’s museum doors open to everyone, free of charge, to conduct ground-breaking scientific and scholarly research, to expose visitors of all ages to new ideas and new worlds, the rest is up to you. There are so many ways to give to the Smithsonian—from cash donations, to planned gifts, to support from your family foundation or your business. If you participate in the workplace giving program the Combined Federal Campaign (CFC), contributing to the Smithsonian is easy—simply use our CFC number, 10782. Make a gift to the Smithsonian today. It takes just a few minutes, and helps us bring alive our nation’s history, culture, art and science for people around the world.” In <http://si.edu/giving/>. Accessed May 22, 2012.



a 1938 report from the House Committee on Ways and Means in which Aaron Thompson explains that tax revenue losses due to charitable donations are offset by lessening the financial burden, which, through the resulting benefits, promotes the general welfare.<sup>34</sup>

The correctness of granting large tax deductions has been the subject of frequent assessment of its effectiveness, purpose and potential for abuse. The Internal Revenue Service has only allowed deductions of up to the market value, in the case of art donations, in order to prevent the artificial inflation of appraisals and the corresponding undue increase in the tax deduction.<sup>35</sup> In order to preclude deductions of illegally imported items, only those donations based on provenance should be allowed. This would shift buyers' interest in acquiring fraudulent or stolen objects.

Deductions are also allowed in Brazil. The best-known cultural incentive legislation is the so-called Rouanet Law (Law No. 8313 of 12/23/1991),<sup>36</sup> which

---

<sup>34</sup> In *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities*.

<sup>33</sup> Colum. J.L. & Arts 241, 2010.

<sup>35</sup> *Id.* p. 243.

<sup>36</sup> CHAPTER 1, Preliminary Considerations, Art. 1 The National Cultural Support Program (Pronac) is hereby instituted, for purposes of raising and channeling funds to the sector in order to: I – Help facilitate the means for general free access to the sources of culture and full exercise of cultural rights; II – Promote and foster regional cultural and artistic production in Brazil, and the valuation of local content and human resources; III – Support, elevate and disseminate cultural manifestations and their respective creators as a whole; IV – Protect the cultural expression of Brazilian society's formative groups, they being responsible for the pluralism in our national culture; V – Safeguard the survival and flourishing of ways of creating, doing and living in Brazilian society; VI – Preserve the tangible and intangible assets that are Brazil's cultural and historical heritage; VII – Raise international awareness of and respect for the cultural values of other peoples or nations; VIII – Foster the production and dissemination of universally valuable cultural goods which shape and guide our knowledge, culture and memories; IX – Prioritize Brazil's native cultural creations. Art. 2 – Pronac shall be implemented by means of the following mechanisms: I – National Culture Fund (FNC); II – Cultural and Artistic Investment Funds (Ficart); III – Incentive to cultural projects. § 1 Incentives created by this Law shall only be granted to those cultural projects whose exhibition, use and circulation of cultural asset holdings are open to all persons with no distinctions whatsoever, if free, and to the paying public if admission is charged. (Renumbered from the original standalone paragraph by Law No. 11646 of 2008) § 2 The granting of incentives to works, products, events or other things resulting from, intended for or circumscribed to private collections or circuits which place limitations on access is prohibited. (Included by Law No. 11646 of 2008) Art. 3 In furtherance of the purposes set forth in Art. 1 of this law, all cultural projects for which Pronac funds are raised or earmarked must attend to at least one of the following purposes: I – Furtherance of artistic and cultural education through: a) granting scholarships and fellowships in Brazil or abroad to writers, artists and technicians who are Brazilian or foreign nationals residing in Brazil; b) Granting of prizes to producers, authors, artists and actors, and technicians and their works, films, musicals and performing arts in contests and festivals held in Brazil; c) Startup and maintenance of cultural or artistic curricula intended for the education, specialization and betterment of cultural personnel, at nonprofit teaching establishments; II – Fostering of cultural and artistic production through: a) production of CDs, videos, short and medium length cinematographic and documentary films,

(Footnote 36 continued)

*preservation of cinematographic archives and of other cultural works on sound or image media; (New language given by Provisional Measure No. 2228-1 of 2001) b) Publication of works in the field fields? of humanities, art and literature; c) Organization of exhibits, art festivals, and music, folklore and performing arts shows; d) Covering of expenses for transportation and insurance of culturally valuable objects on road to public exhibitions in Brazil and abroad; e) Holding of expositions, art festivals and shows in the performing arts or others similar in kind; III – Preservation and popularization of artistic, cultural and historical heritage through: a) Construction, instruction, organization, maintenance, expansion and equipment of museums, libraries, archives and other cultural organizations, their collections and holdings; b) Preservation and restoration of buildings, monuments, public areas, sites and other spaces, including those that are natural, once declared a national heritage by the Government; c) Restoration of works of art and real and chattel property recognized as having cultural value; d) protection of popular national folklore, handicrafts and traditions; IV – Foster familiarity with cultural assets and values through: a) Free and public distribution of tickets to cultural and artistic events; b) Surveys, studies and research in the fields of art and culture, and their various branches; c) Providing of resources to the FNC and to specific-purpose cultural foundations, or to museums, libraries, archives and other cultural entities; V – Support of other cultural and artistic works through: a) Organization of cultural missions in Brazil and abroad, to include the provision of tickets for transportation; b) Hiring of services for putting together cultural projects; c) Actions not provided in the preceding subsections yet considered relevant by the State Ministry of Culture following consultation with the National Council for Culture. (New language added by Law No. 9874 of 1999). CHAPTER II – The National Culture Fund (FNC) Art. 4 The Cultural Promotion Fund created by Law No. 7505 of July 2, 1986, hereinafter simply the National Culture Fund (FNC), is hereby ratified and given a mandate to raise and allocate resources for cultural projects compatible with the purposes of Pronac, namely: I – To foster the equitable regional distribution of resources to be invested in cultural and artistic projects; II – To project an interstate vision, and provide support for projects that put together joint cultural proposals, regional in scope; III – To support projects having cultural content emphasizing the professional and artistic improvement of human resources in Brazil in the fields of culture, creativity and cultural diversity. IV – To contribute toward the preservation and protection of Brazil's cultural and historical heritage; V – To further projects that meet cultural production requirements and further the interests of society, to include all qualitative and quantitative levels of satisfaction of existing cultural demands, the multiplier effects produced by projects through their social and cultural aspects and the organization of projects into priority categories of artistic and cultural areas less capable of development with their own resources. § 1 The FNC shall be administered by the Ministry of Culture and managed by the Minister for the completion of the Annual Works Program, following the principles established in Articles 1 and 3. (New language added by Law No. 9874 of 1999). § 2 FNC resources may only be invested in cultural projects once these have been approved, following a finding from the technical agency having jurisdiction, by the Minister of Culture. (New language added by Law No. 9874 of 1999) § 3 Once approved, all projects must be monitored and given technical evaluations by supervisory bodies, with all finances handled by the Presidential Office of the Secretariat of Culture (SEC/PR). § 4 Supervised entities shall, whenever needed, engage experts for analyses and opinions on projects, with allowance for reimbursement of travel expenses, if any, and corresponding fees for services and help with expenses, as set forth in regulations. § 5 The Presidential Office of the Secretariat of Culture shall decide on its own basic unitary structure, to act as Executive Secretary for the FNC. § 6 FNC resources may not be used for Ministry of Culture administrative maintenance expenses, except for the acquisition or leasing of goods and equipment necessary to affect the purposes of the Fund. (New language added by Law No. 9874 of 1999). § 7 Upon completion of the project, the SEC/PR shall conduct a final evaluation to verify the proper use of resources in accordance with standards and procedures to be set forth in regulations for this law and in current legislation. § 8 All public or private institutions receiving FNC funding to carry out cultural projects the final evaluation of which failed of approval by the SEC/PR pursuant to the preceding paragraph, shall be barred for*

(Footnote 36 continued)

*a period of three years from receiving new funding, or for so long as the SEC/PR shall postpone reevaluation of the initial finding. Art. 5 The FNC is an accounting fund set up for an indeterminate period, with a mandate to provide support at a loss or by reimbursable loans, as set forth in regulations, and composed of the following resources: I – National Treasury resources; II – Donations, pursuant to current legislation; III – Legacies; IV – Subsidies and assistance from entities of all types, including international agencies; V – Unused balances from the execution of projects referenced in Chapter IV and this chapter of this law; VI – Return of resources from projects provided for in Chapter IV and here, but were never begun or later interrupted with or without cause; VII – One percent of the gross proceeds from the Regional Investment Funds referenced in Law No. 8167 of January 16, 1991, with due regard in the investment to the corresponding regional origin; VIII – Three percent of the gross proceeds from contests, federal lotteries and the like, provided they be under federal control, and deducting that amount from the amount earmarked as prize money; (New language added by Law No. 9999 of 2000); IX – Reimbursement of loan operations carried out through the fund, as reimbursable financing, with due observance of all repayment criteria which must at least preserve their value in real terms; X – Proceeds from investments in federal securities, with due observance of all current legislation thereto appertaining; XI – Conversion of foreign debt owed to foreign entities and agencies, exclusively through donations, up to a limit to be established by the Minister of Finance, Revenue and Planning, with due observance of all Brazilian Central Bank codes and procedures; XII – Balances from previous fiscal years; XIII Resources from other sources. Art. 6 The FNC shall finance up to 80% of the total cost of each project, once it is shown by the proponent, even if a corporation, that a surplus is being disposed of or that the entity is qualified to obtain the corresponding financing from some other duly identified source, except with regard to resources specifically earmarked at the source. § 1 (Vetoed). § 2 For purposes of tallying up the remaining amount, goods and services offered by the proponent may be taken into consideration for implementation of the project, they being duly evaluated by the SEC/PR. Art. 7 The SEC/PR operating through the FNC shall encourage financial institutions to put together portfolios to finance cultural projects which take into account the social nature of the initiative, in accordance with standards, codes, guarantees and special-interest rights to be approved by the Brazilian Central Bank. III – Cultural and Artistic Investment Funds (Ficart) Art. 8 Authority is granted for the organization of Cultural and Artistic Investment Funds (Ficart) under a joint-ownership agreement with no corporate charter, as a pool of resources earmarked for investment in cultural and artistic projects. Art. 9 For purposes of investing FICART resources and other funds possibly declared by the Ministry of Culture, the following shall be considered cultural and artistic projects: (New language added by Law No. 9874 of 1999) I – Commercial manufacture of musical instruments, and of records, tapes, videos, films and other forms of sound and image reproduction; II – Commercial production of plays and shows featuring dance, music, singing, circus performance and similar activities; III – Commercial publications relating to the sciences, arts and letters, as well as reference works and others of a cultural nature; IV – Construction, restoration, repairs to or equipping of rooms and other environments intended for cultural purposes, and owned by for-profit companies; V – Other commercial or industrial activities of cultural interest, so considered by the Ministry of Culture. (New language added by Law No. 9874 of 1999). Art. 10. Brazil's Securities Division shall, after hearing from the SEC/PR, regulate the organization, workings and administration of all Ficarts, with due observance of the provisions contained in this law and general standards for investment funds. Art. 11. Ficart stock, issued as book-entry stock or registered shares or securities subject to the regulatory provisions of Law No. 6385 of September 7, 1976. Art. 12. Holders of Ficart stock: I – May not exercise any real rights over the assets and securities comprising the equity of the fund; II – Shall not be personally subject to liability for any legal or contractual obligations with regard to the undertakings of the fund or its administering institution, aside from the obligation to pay in the full amount of the capital stock subscribed. Art. 13. The institution administering Ficart shall: I – File and answer lawsuits and claims on its behalf in or out of court; II – Be accountable for loss by breach of seller's warranty of title, if same is liquidated. Art. 14. All revenue and capital gains accruing to the Ficart shall be*

(Footnote 36 continued)

*exempt from taxes on credit, foreign exchange and insurance operations, and also from taxes on income of whatever type. (See Law No. 8894 of 1994).* Art. 15. Revenue and capital gains distributed by the Ficart in whatever form shall be subject to assessment of income tax withholding at the rate of 25%. Sole paragraph. Excluded from the withholding requirements in this article are all earnings distributed to corporate beneficiaries taxed based on real profits, which must be calculated on annual tax returns. Art. 16. Capital gains received by individuals or corporations not taxed on real profits, including those exempt, whether arising from alienation or redemption of Ficart shares are subject to income tax at the same rate provided for taxing income derived from the alienation or redemption of mutual fund shares. § 1 Any positive difference between the assignment or redemption value of a share and the current average cost of the investment, calculated from the dates on which the investment, redemption or assignment took place is considered capital gains pursuant to pertinent legislation. § 2 Capital gains shall be calculated for each redemption or assignment, with allowance for offsetting of losses from one operation by profits from another, alike or different in kind, provided the securities be variable yield, within the same fiscal year. § 3 The tax must be paid no later than the last workday of the first fortnight of the month following that in which the capital gains were obtained. § 4 The yields and capital gains referred to in the header of this article and the preceding article are subject to income tax when gained by investors residing or domiciled abroad, pursuant to pertinent legislation affecting that class of taxpayers. Art. 17. The fiscal treatment provided in the preceding articles shall only be assessed on yields deriving from investments in Ficarts and meeting all of the requirements provided in this law and in corresponding regulations to be passed by the Securities Division. Sole paragraph. Yields and capital gains from Ficart investments which do not meet the specific requirements for this type of fund shall be subject to taxation as provided in Article 43 of Law No. 7713 of December 22, 1988. CHAPTER IV Cultural Projects Stimulus. Art. 18. To encourage cultural activities, the Federal Government shall allow individuals and companies the option of investing portions of their Income Tax—in the form of donations or sponsorships—both in direct support to cultural projects offered by individuals or companies of cultural bent, and through contributions to the FNC pursuant to Art. 5, subsection II of this Law, provided these projects meet all requirements established in Art. 1 of this Law. (New language added by Law No. 9874 of 1999). § 1 Taxpayers may deduct from income tax owed all amounts actually spent on projects listed in Paragraph 3, if approved in advance by the Ministry of Culture, within the limitations and subject to the conditions set forth in current income tax legislation: (Included by Law No. 9874 of 1999) a) donations; and sponsorships. (Included by Law No. 9874 of 1999). § 2 Individuals taxed on real profits may not deduct donation or sponsorship amounts referred to in the previous paragraph as occupational expenses. (Included by Law No. 9874 of 1999). § 3 Donations and sponsorships of cultural productions, which are the subject of Paragraph 1, shall only apply to the following segments: (New language added by Provisional Measure No. 2228-1 of 2001) a) performing arts; (New language added by Provisional Measure No. 2228-1 of 2001); b) books having artistic, literary or humanities-related value; (New language added by Provisional Measure No. 2228-1 of 2001) c) classical or instrumental music; (New language added by Provisional Measure No. 2228-1 of 2001); d) visual arts exhibits; (New language added by Provisional Measure No. 2228-1 of 2001) e) Donations of holdings to public libraries, museums, public archives and cinematheques, and for training of personnel and acquisition of equipment for the maintenance of these holdings; (New language added by Provisional Measure No. 2228-1 of 2001) f) Reduction of short and featurette-length audiovisual and cinematographic works, and preservation and popularization of holdings; and (Included by Provisional Measure No. 2228-1 of 2001) g) Preservation of tangible and intangible cultural patrimony. (Included by Provisional Measure No. 2228-1 of 2001) h) Construction and maintenance of movie auditoriums and theaters able to also function as community cultural centers in towns having populations of less than 100,000. (Included by Law No. 11646 of 2008) Art. 19. Cultural projects provided by this Law shall be presented to the Ministry of Culture or its appointed delegate, together with an analytical budget, for approval of its fit with the purposes of the PRONAC. (New language added by Law No. 9874 of 1999) § 1 Proponent shall be notified of the reasons for any decision adverse

(Footnote 36 continued)

*to the project within a timeframe not to exceed five days. (New language added by Law No. 9874 of 1999) § 2 The notice referred to in the preceding paragraph may be reconsidered upon request presented to the Minister of Culture, to be ruled on in 60 days. (New language added by Law No. 9874 of 1999) § 3 (Vetoed) § 4 (Vetoed) § 5 (Vetoed) § 6 Approval shall only become effective following publication of an official act containing the title of the project gaining approval and the institution responsible for same, the amount authorized for raising of donations or sponsorship and the duration of the authorization. § 7 The Ministry of Culture shall publish annually, by February 28, the amount of resources authorized by the Treasury Ministry for tax benefits for the previous fiscal year, duly itemized by the beneficiary. (New language added by Law No. 9874 of 1999) § 8 Approval of projects shall be based on the principle of non-concentration by segment and by beneficiary, to be checked by the amount of resources, by the number of projects, their capacity for fulfillment and by the availability of absolute tax benefit amounts. (Included by Law No. 9874 of 1999) Art. 20. All projects approved pursuant to the preceding Article shall be monitored and evaluated throughout their execution by the SEC/PR or whomever is assigned that duty. § 1 The SEC/PR shall, following conclusion of the projects provided in this article and within no more than six months, proceed with a final evaluation of the correctness of investment of all funds received, and may bar those in charge for a period not to exceed three years. § 2 Application may be made to the Minister of Culture to reconsider the decision referenced in the preceding paragraph, which reconsideration shall be decided upon within 60 days. (New language added by Law No. 9874 of 1999) § 3 The Federal Court of Auditors shall include in its preliminary findings on the accounts of the Office of the President an analysis on the evaluation dealt with in this article. Art. 21. Entities encouraging and raising funds addressed in this Chapter shall give notice as may be decided by the Ministry of Finance, Revenue and Planning and the SEC/PR of all funding raised and received, and on the entities engaged in raising said funding in order to verify its investment. Art. 22. Projects that satisfy the purposes of this law shall not be subject to subjective evaluations as to their artistic and cultural merits. Art. 23. The following shall hold for purposes of this Law: I – (Vetoed); II – Sponsorship: Transfer of cash for promotional or coverage purposes, by the taxpayer, of tax on income and earnings of any nature, of expenses, or use of real or chattel property owned by same, without transfer of ownership, for some other individual or company to hold or put on some cultural or nonprofit works provided in Art. 3 of this law. § 1 The receiving of any financial or material advantage by a sponsor as a result of sponsorship shall constitute an infraction of this law. § 2 Transfers set forth in this article shall not be subject to withholding of income tax. Art. 24. For purposes of this Chapter, the following donations shall, pursuant to regulations, be considered alike: I – Free distribution of tickets to artistic or cultural events by a company to its employees and legal dependents; II – Expenditures made by individuals or companies for purposes of conserving, preserving or restoring property they own or have legitimate dominion over, declared monuments by the Federal Government, provided the following provisions are complied with: a) preliminary determination by the Brazilian Cultural Heritage Institute (IBPC) of technical standards to govern all projects and budgets addressed in this subsection; b) prior IBPC approval of all projects and corresponding budgets for execution of works; c) subsequent certification by the said agency of all expenses actually incurred and of all circumstances to verify that the work performed was done in accordance with approved plans. Art. 25. Cultural projects to be presented by individuals or companies for purposes of obtaining stimulus subsidies must seek to develop forms of expression, methods of making and doing, processes for preservation and protection of Brazil's cultural heritage and studies and methods for interpreting actual culture, as well as contribute to foster the means, to the general population, to afford them knowledge of artistic and cultural benefits and values, to include, among others, the following segments: I – Theater, dance, circus, opera, histrionics and the like; II – Cinematographic, video, photographic or record production, and the like; III – Literature, including reference works; IV – Music; V – Creative arts, graphic arts, engravings, posters, philately and the like; VI – Folklore and handicrafts; and VII – Cultural patrimony, to include history, architecture, archaeology, libraries, museums, archives and other holdings; VIII – Humanities; and IX – Radio and television, noncommercial, educational and cultural. Sole*

(Footnote 36 continued)

*paragraph. Cultural projects related to the segments in subsection II of this article may only benefit independent productions, and noncommercial cultural educational productions organized and put on by radio and television companies. (New language added by Law No. 9874 of 1999) Art. 26. Donors or sponsors may reduce their income tax liability by the amounts actually contributed to cultural projects approved in accordance with the provisions of this Law, based on the following percentages: (See Arts. 5 and 6, Subsection II of Law No. 9532 of 1997) I – For individuals, 80% of donations and 60% of sponsorships; II – for companies taxed on real profits, 40% of donations and 30% of sponsorships. § 1 Companies taxed based on real profit may take income tax credit for donations and sponsorships as operational expenses. § 2 The maximum amount for deductions mentioned in the header of this article shall be annually established by the President of the Republic, based on a percentage of the taxable income of individuals and of the tax code by companies taxed based on real profits. § 3 Benefits addressed in this article shall not exclude or reduce other current benefits, rebates and deductions, in particular donations to public utility entities made by individuals or companies. § 4 (Vetoed) § 5 The Executive Branch shall establish mechanisms for preserving the real value of contributions made to cultural projects under this Chapter. Art. 27. No donation or sponsorship may be made by persons or institutions having ties to the agent. § 1 The following are considered to have ties to the donor or sponsor: a) companies of which the donor or sponsor is an owner, manager, administrator, stockholder or partner, on the date of the operation or during the preceding 12 months; b) spouses, relatives up to the third degree, including relatives by affinity, and dependents of the donor or sponsor or of owners, administrators, stockholders or partners in a company having ties to the donor or sponsor, pursuant to the preceding subsection; c) any other company in which the donor or sponsor holds an interest. § 2 Nonprofit cultural institutions created by the donor or sponsor are not considered to have ties to said donor or sponsor, provided they be duly constituted and operating in accordance with current law. (New language added by Law No. 9874 of 1999) Art. 28. No investment of resources provided by this Law may be accomplished through any type of intermediation. Sole paragraph. Hiring of services necessary to the organization of projects intended to raise donations, sponsorship or investment, as well as do the raising of resources or its operation by a cultural company, shall not qualify as intermediation as referenced in this article. (New language added by Law No. 9874 of 1999) Art. 29. Resources from donations or sponsorships must be deposited and held in a specific bank account, bearing the name of the beneficiary, and all rendering of accounts must be made pursuant to regulations under this Law. Sole paragraph. For purposes of verifying the stimulus, no consideration will be given to contributions for which this determination is not observed. Art. 30. Violation of the provisions of this chapter shall render the donor or sponsor subject to payment of the indexed income tax amount owed for each fiscal year, without prejudice to possible criminal liability, in addition to all penalties and increases provided in legislation governing such matters. Paragraph 1 For purposes of this article, the individual or company which proposed the project shall be deemed jointly liable for nonperformance or irregularities discovered. (Renumbered from the standalone paragraph by Law No. 9874 of 1999) § 2 Any unresolved issues or irregularities in the execution of proponent's projects placed before the Ministry of Culture shall work to suspend analysis of or granting of new incentives until such time as they are cleared up. (Included by Law No. 9874 of 1999) § 3 Without prejudice to the preceding paragraph, the provisions contained in articles 38 et. seq. of this Law shall, where possible, be applied cumulatively. (Included by Law No. 9874 of 1999) CHAPTER V, GENERAL AND TRANSITORY PROVISIONS Art. 31. To ensure community participation, and representation of artists and creators in official treatment of subjects involving culture and systemic national organization of the area, the Federal Government shall provide stimulus to the institutionalization of Culture Councils in the Federal District, the States and the Municipalities. Art. 31-A. For purposes of this law, gospel music and events related to same shall be recognized as cultural manifestations, except when conducted by churches. (Included by Law No. 12590 of 2011) Art. 32 The National Cultural Promotion Committee (CNIC) is hereby instituted, composed of the following: I – The Presidential Office of the Secretariat of Culture; II – Presidents of all entities supervised by the SEC/PR; III – The President of the national entity bringing together the*

instituted the National Cultural Support Program (PRONAC). There is also a law in support of audiovisual work (Law No. 8685 of 07/20/1993), as well as other similar provisions,<sup>37</sup> as well as exemptions from assessment of the Excise Tax on Goods and Services (ICMS), and a state tax on sales of items imported into Brazil in the states of Rio de Janeiro and São Paulo.

---

(Footnote 36 continued)

*Culture Secretariats of the Several States; IV – A representative from among Brazil's corporate executives; V – Six representatives of associated entities from the cultural and artistic sectors, national in scope. § 1 The CNIC shall be presided over by the authority referenced in subsection I of this article, who shall vote in the event of a tie. § 2 Terms of office, appointment and choice of representatives to which reference is made in subsections IV and V of this article, and the powers of the CNIC shall be stipulated and spelled out in regulations accompanying this Law. Art. 33. In order to encourage and increase appreciation of art and culture, the SEC/PR shall establish an annual system for granting prizes in recognition of the most significant contributions to the area: I – To artists or groups of Brazilian artists or resident alien artists, for their collective or individual work; II – To professionals in the field of cultural patrimony; III – To scholars and writers on the critical interpretation of Brazilian culture, through essays, studies and surveys. Art. 34. The Cultural Order of Merit is hereby instituted, and its bylaws shall be passed upon by Executive Order, and all recognition shall be granted by the President of the Republic, in solemn ceremony, to persons who, through their exercise of their profession, or as exemplars of art and culture, do merit recognition. (Regulation) Art. 35. All resources earmarked for the then extant National Culture Fund, pursuant to Art. 1, Paragraph 6 of Law No. 7505 of July 2, 1986, shall be paid into the National Treasury for investment by the FNC, with due observance of their intended purpose. Art. 36. The Ministry of Finance, Revenue and Planning's Federal Revenue Department shall, in the exercise of its specific duties, see to the effective enforcement of this Law, insofar as investment of fiscal incentives therein provided are concerned. Art. 37. The Executive Branch shall, in order to comply with the provisions of Art. 26, Paragraph 2 of this Law, and bringing in harmony with the provisions of the Budget Directives Law shall, within 30 days, send a message to the National Congress setting forth the total of the tax relief offered and corresponding cancellation of budget expenditures. Art. 38. In the event of malice, fraud or deception, including diversion of purpose, a fine will be assessed to both donor and beneficiary in the amount of twice the undue advantage received. Art. 39. All forms of political discrimination in violation of freedom of expression, of intellectual and artistic endeavors, or of convictions or beliefs during the execution of projects subsumed under this Law shall constitute criminal activity punishable by confinement of two to six months plus a fine in the amount of 20% of the project total. Art. 40. Fraudulent exploitation of any benefit under this Law to obtain a reduction of income tax is a crime punishable by confinement of two to six months plus a fine in the amount of 20% of the project total. § 1 In the case of a company, the stockholder having controlling interest and all administrators participating in the offense shall be subject to criminal liability. § 2 Anyone receiving resources, goods or monetary amounts as a function of this Law and who without just cause fails to carry out or execute the cultural activity for which the incentive was granted shall be subject to the same penalty. Art. 41. The Executive Branch shall, within 60 days, issue Regulations under the present law. Art. 42. This Law shall go into effect as of the date of its publication. Art. 43. All provisions to the contrary are hereby repealed. Brasilia, December 23, 1991; the 170th year of independence and the 103rd of the Republic. Fernando Collor, Jarbas Passarinho.*

<sup>37</sup> MinC Regulatory Directive No. 2 of April 26, 2012—Amending and adding provisions to Regulatory Directive No. 1 of February 9, 2012, establishing procedures for presentation, receiving, analysis, approval, execution, monitoring and rendering of accounts for cultural proposals relating to the Fiscal Incentives mechanism within the National Cultural Support Program (Pronac), and making other provisions; MinC Regulatory Directive No. 1 of February 9,

(Footnote 37 continued)

2012—Establishing procedures for presentation, receiving, analysis, approval, execution, monitoring and rendering of accounts for cultural proposals relating to the Fiscal Incentives mechanism within the National Cultural Support Program (Pronac), and making other provisions; Law No. 12590 of January 9, 2012—Amends Law No. 8313 of December 23, 1991, the Rouanet Law, to recognize gospel music and gospel-music-related events as cultural manifestations; MinC Finding No. 140 of December 28, 2011—Passes the Annual Fiscal Incentives Working Plan for fiscal year 2012; MinC Finding No. 131 of December 21, 2011—Institutes Internal Regulations for the National Commission on the National Culture Fund (CFNC), and makes provisions on artistic language and cultural segments for allocation of FNC resources, and makes other provisions; MinC Finding No. 130 of December 21, 2011—Passes the Annual Fiscal Incentives Working Plan for fiscal year 2012; MinC Finding No. 129 of 21 December 2011—Passes the Annual Fiscal Incentives Working Plan for fiscal year 2011; MinC Finding No. 116 of November 29, 2011—Regulates all cultural segments provided in Para 3 of Article 18 and Article 25 of Law No. 8313 of December 23, 1991; MinC Finding No. 83 of September 8, 2011—Establishes rules for classification and distribution of cultural products or projects among experts, and also related procedures and powers relating to the implementation of the Accreditation System within the scope of the MinC System, and makes other provisions; MinC Finding No. 50 of May 24, 2011—Passes the Ministry of Culture Annual Fiscal Incentives Working Plan for fiscal year 2011; ANCINE Regulatory Directive No. 93 of May 3, 2011—Changes provisions of Regulatory Directive No. 23 of December 30, 2003, Regulating the preparation, presentation and monitoring of audiovisual projects, from Regulatory Directive No. 21 of December 30, 2003, which in turn regulates procedures to be adopted for preparation and presentation of the statement of accounts, and of Regulatory Directive No. 54 of May 2, 2006, setting standards for inclusion of independent Brazilian producers of audiovisual works, and making other provisions; ANCINE Resolution No.39 of May 2, 2011—Establishes parameters within ANCINE for assigning priority to project analyses and requests for fundraising extension deadlines, and for resizing and reassigning sources of funding; Finding No. 34 of April 26, 2011—Approves the Ministry of Culture Style Guide to be used in drawing up the Basic Publicity Plan for cultural proposals presented to the National Cultural Support Program (Pronac), and makes other provisions; Finding No. 43 of July 9, 2009—Passes regulations for the implementation of the experts Accreditation System within the MinC System; Finding No. 29 of May 21, 2009—Provides for the preparation and management of public selection notices of openings in support of cultural projects and for granting of prizes to cultural initiatives within the framework of the Ministry of Culture; Finding No. 8 of March 18, 2008—Provides for the invitation of art and culture-oriented membership associations and representatives of the business community, on a national level, to participate in the choice of institutions to comprise the National Cultural Promotion Committee (CNIC) for the 2008–2010 biennium; Law No. 11646 of March 10, 2008—Changes provisions of Law No. 8313 of December 23, 1991, to extend fiscal benefits for donations and sponsorships earmarked for construction of movie auditoriums in townships having populations of less than 100,000, and other provisions; Decree 6170 of July 25, 2007—Provides standards for the transfer of Federal funding through onlending agreements, and makes other provisions; Decree No. 5761 of April 27, 2006—Regulates Law No. 8313 of December 23, 1991, sets up a working system for the National Cultural Support Program (PRONAC) and makes other provisions; Law No. 9874 of November 23, 1999—Changes provisions of Law No. 8313 of December 23, 1991, and makes other provisions; Law No. 9532 of December 10, 1997—Changes federal tax legislation and makes other provisions; Joint MINC/MF Regulatory Directive No. 1 of June 13, 1995—Provides procedures for monitoring, control and evaluation of fiscal benefits to be instituted by Law No. 8313 of 1991, as amended by Law No. 8981 of 1995, and Provisional Measures Nos. 8981 of 1995, and Provisional Measures Nos. 998 and 1003 of 1995; Law No. 8313 of December 23, 1991—Reestablishes the principles of Law No. 7505 of July 2, 1986, institutes the National Cultural Support Program, and makes other provisions. (New language added by Laws No. 9874 of November 23, 1999 and No. 11646 of March 10, 2008).



The Museum of Contemporary Art of the University of São Paulo (MAC-USP),<sup>38</sup> for example, has been guided by rules established by the ICOM Code of Ethics for Museums, where acquisition takes place by purchase or donation from artists, collectors, institutions, private companies and the Friends of MAC-USP (with or without reliance on cultural stimulus laws). To that end, evaluations are conducted on the merits and documentation by museum professionals, who in turn issue specific findings to be deliberated upon by the MAC-USP Council. Informality between artists and the art market is still prevalent.<sup>39</sup>

Institutions should take note. For example, New York's Metropolitan Museum of Art was publicly criticized for its policy of acquisitions. This is an example of the sort of problems arising from secrecy in acquisitions. In 1972, Dietrich von Bothmer, curator of Greek and Roman Art at the Met, saw a vase in Zurich, which was presented and represented by Robert Hecht, Jr., an American living in Italy and involved in the arts—albeit in several questionable transactions. Dietrich von Bothmer acquired the piece and put it on exhibit in November of that year. A later investigation, however, found that a Lebanese exchange broker took part in the negotiations, and had initially introduced himself as a Swiss collector, then as an Armenian collector and finally as an art dealer. This individual claimed to have received the vase from his father, and to have owned it for 50 years. Subsequent investigation by the Italian police revealed that the piece had in fact been illegally excavated from an Etruscan tomb in 1971.<sup>40</sup>

Museums have grown and developed while changing many of their functions and broadening their scope. They have taken on newfound positions within a globalized and highly competitive society that includes tourism, the Internet and technology among its many features.

As Yani Herreman explains, “[o]ne of the most important and permanent changes in the development of the contemporary museum has been to become more audience-conscious and to be more in step with modern social processes.”<sup>41</sup> This also holds for auction houses, galleries, libraries and fairs,<sup>42</sup> included as they are in this new global context characterized by sustainable development and cultural tourism.

---

<sup>38</sup> Turns 50 in 2013 and its collections include art from such segments as International Modern Art, Brazilian Modern Art, International Contemporary Art, and Contemporary Brazilian Art.

<sup>39</sup> Information given to the author by Prof. Ana Farinha, a member of MAC-USP (received 05/20/2012 by institutional e-mails between TRF3 and USP).

<sup>40</sup> Cf. Leonard DuBoff, Michael Murray and Christy King. *The Deskbook of Art Law*. New York: Oceana, Second Edition, Booklet B (*International Movement of Art*), Release 2010–1, Issued November 2010, B-94.

<sup>41</sup> Cf. *The Role of Museums Today: Tourism and Cultural Heritage. Art and Cultural Heritage: Law, Policy, and Practice*, p. 419.

<sup>42</sup> These have attracted armies of gallery owners and collectors, and among them we cite *The Armony Show* and *Frieze Art Fair* (New York), *Frieze Art Fair* (London), *Art HK 12* (Hong Kong), *Art Basel* (Basel, Switzerland), *FIAC* (Paris), *Art Basel* (Miami), *Arco* (Madrid), *Zona Marco* (Mexico), *ArtRio* (Rio de Janeiro), *SP-Arte* (São Paulo) and *Parte* (Universidade de São Paulo, SP). Cf. *Bienal vende tudo*. Brazil's most important arts fair, SP-Arte, has turned seven in a booming industry. São Paulo, p. 34. Folha de São Paulo newsmagazine, May 6–12, 2012.

Sarah Thornton tells us that although many students enrolled in colleges of fine arts do not feel comfortable with the title of artist, they are often in need of endorsement from an art dealer, an exhibition in a museum or a teaching job.<sup>43</sup>

We thus arrive at the close of the twentieth century and start of the twenty-first century in what is turning into a veritable cultural boom. Never before have so many institutions of culture been turning up under construction, undergoing restoration or being added onto in the midst of important economic and social change.

Auction houses or art galleries may acquire an item by one of two methods—that is, by consignment or by acquisition. They may also enter into combined consignment and acquisition agreements. The first possibility (consignment) is very common because it dispenses with the cost of purchase and, if no sales are forthcoming, simply returns the item to the artist. Because artworks are relatively expensive, auction houses and galleries have opted for that approach coupled with an exposition agreement with the artist, whereby each gets 50% of the sales revenue. This all depends on the agreement, which may arrive at a 70–30% split favoring the artist. The percentage varies, depending on the artist and cost of production of the item, which is good for artists who are still living. Auction houses or galleries in turn undertake to sell the work of the artist, pay to have it published in specialized catalogs (if not their own) and bear the costs of opening up the exposition. Some auction houses specialize in certain types of works or have a knack for making unknown artists popular.

Auction houses are today one of the most popular venues for the sale of artworks and account for 50% of annual sales in the United States. Ninety percent of the multi-billion-dollar global market and almost three-quarters of all sales are handled by Sotheby's and Christie's.<sup>44</sup>

The public—observers and buyers alike—have flocked to auctions. A similar phenomenon has taken place in Brazil and “demanded of art dealers a more organized approach to the product and to the clientele. Larger rooms were sought out in ‘nicer’ locations (...). Innumerable works by unknown or little-known artists were added to the catalogs, increasing the number of sales. The cost-to-invoicing ratio became a subject of great concern with the scarcity of higher-priced works by known artists, and this was aggravated by criticisms to the effect that auctions had become ‘fire sales’ liquidating gallery ‘overstocks.’”<sup>45</sup>

Auction houses play an important and complex role as agents for both seller and buyer, while also representing themselves. Hence their broad range of important responsibilities, including that of obtaining a license for their location, making

---

<sup>43</sup> In *Sete dias no mundo da arte. Bastidores, tramas, intrigas de um mercado milionário*. Translation: Alexandre Martins. Rio de Janeiro: Agir, 2010, p. 71.

<sup>44</sup> See Leonard DuBoff, Michael Murray and Christy King. *The Deskbook of Art Law*. Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–12, Issued December 2010, p. M-1.

<sup>45</sup> For more on this, see José Carlos Duran (in *Arte, Privilégio e Distinção. Artes Plásticas, Arquitetura e Classe Dirigente no Brasil, 1855-1985*. Estudos. Sociologia da Arte. São Paulo: Perspectiva and Universidade de São Paulo—Edusp/joint publication, 1989, pp. 198–199).

strategic efforts to maximize their offerings of goods, providing relevant information as to the nature and price of goods on the market, accepting payment and providing assurance of safely shipping all orders to the buyer. However, they make the seller liable to the buyer for any defect in the item.<sup>46</sup>

To see the profit they make, one must consider the cost of goods sold, their stock of items (inventory and consignment), and their accounting and sales figures. It is not easy to verify the dealings between auction houses or galleries and artists since there is no requirement that they inform the authorities of their revenue from consignment sales. Some artists pay their own personal expenses in cash and prefer that form of payment from auction houses or galleries for their works sold on consignment.

An auction house may offer financial facilities and options. There are cases of loans given to buyers using the item itself as a guarantee for the loan, but this was criticized on the grounds that exaggerated appraisals of the work would serve to facilitate its acquisition.<sup>47</sup>

On inspection of a consignment document, one can see that it contains the name, address and telephone number of the consigning artist, a description of the item or items, the price set by the artist, the date negotiated, the percentage agreed upon between artist and consignee and their signatures. Nothing is said about the form of payment. Then again, in Information Document Requests for the IRS, there is a requirement that all art received on consignment be individually recorded, along with the profit and the amount of items, on a yearly basis.<sup>48</sup> This happens because gross revenue must be understood as all revenue, irrespective of the source—whether money, property, services rendered or even payments in kind (meals, lodging, inventory, etc.), unless prohibited by law.

Once items are sold, auctioneers and their employees carefully examine and appraise them. Experts may be consulted to identify or authenticate an unknown work. In the event of disagreement, the auction house must notify the consignor of its internal disagreement, even though the seller normally sees the auction house as a specialized technical market, relying on its recommendations as to what constitutes a good price.<sup>49</sup> They should therefore provide reliable opinions on prices and make good recommendations as to what to do with an item once consigned.

---

<sup>46</sup> See Leonard DuBoff, Michael Murray and Christy King. *The Deskbook of Art Law*. Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, issued December 2010, pp. M-36–37.

<sup>47</sup> For more on this see Leonard DuBoff, Michael Murray and Christy King (in *The Deskbook of Art Law*. Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, issued December 2010, p. M-43).

<sup>48</sup> See Artists and Art Galleries. Publication by *Internal Revenue Service. Department of the Treasury. Market Segment Specialization Program*. [www.artchain.com/resources/art\\_audit\\_guide.pdf](http://www.artchain.com/resources/art_audit_guide.pdf). Accessed May 23, 2012. Chapter 3, pp. 6–7 and 13–17.

<sup>49</sup> For more on this, see Leonard DuBoff, Michael Murray and Christy King (in *The Deskbook of Art Law*. Booklet M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, Issued December 2010, p. M-69).

As an example, examination of the Conditions of Sale for an auction of antique paintings held at Christie's in New York on June 6, 2012, turned up the following<sup>50</sup>:

01. The Conditions of Sale set forth all of the terms on which Christie's, as the seller's agent, shall deal with the buyer (Para 1). Christie's is allowed to make amendments to the terms during the auction, and the buyer in making his bids is bound by the terms (Introduction), with no time for actual discussion of the conditions *imposed*.
02. Christie's allows advance examination of the work to be auctioned, and even recommends it, but provides no guarantee, and nor does the seller, as to the nature of the item [Para 2(a)]. However, for the five years following the auction, Christie's warrants any property described in headings printed in upper case type in the catalogue, but only that the work is of the stated author or authorship (period, culture, course, or origin), is authentic and not a forgery. The warranty does not apply to any supplemental material which appears below the upper case heading for the works in the catalogue. [Paras 2(a) and 6].
03. The guarantee in question is only valid for the original buyer, and not to any future third-party buyer [Para 6(iii)].
04. In the event the buyer wants to make a warranty claim, Christie's may request written verification by two, mutually acceptable, recognized specialists [Para 6(v)].
05. The buyer must return the item to the same saleroom at which it was purchased, and in the same condition it was at the time of the sale [Para 6(vi)].
06. The auction house may, at its discretion, reject offers and refuse participants [Para 6(a)].
07. To participate in an auction one must first register as a buyer (online or 30 minutes before the scheduled start of the sale), identify oneself and sign a registration form; bank or other financial references may sometimes be required [Para 3(b)].
08. In making bids, the buyer agrees to pay the purchase price, including the buyer's premium and all applicable taxes, plus any and all applicable fees [Para 3(c)].
09. Christie's assumes no liability for currency converters supplied at the auctions, nor for any videos or images depicting the work [Para 3(f) and (g)].
10. Unless otherwise indicated, all works are offered subject to a reserve, that is, a minimum price below which the item will not be sold [Para 3(h)].
11. The auctioneer is empowered to refuse a bid, increase the pace of an auction, divide any lots and—in the event of uncertainty or error—determine the successful bidder [Para 3(i)].
12. The striking of the hammer marks the closing of the deal, and all risk and responsibility for the item and its condition passes to the buyer seven days after the date of the auction [Para 3(j)].
13. In addition to the hammer price, the buyer must pay Christie's buyer's premium (25% of the hammer price, if less than or equal to US\$50,000; 20%

---

<sup>50</sup> See CHRISTIE'S CATALOGUE. *New York, Old Master Paintings. Wednesday 6 June 2012*. London: Christie, Manson & Woods Ltd., 2012, pp. 118–119.

from \$50,000 to \$1 million; and 12% if over \$1 million) in addition to all applicable taxes [Para 4(a)].

14. Following the sale, the buyer must provide a name and permanent address, and, if requested, details of the bank from which the payment will be made. The buyer must pay the full amount due (hammer price, buyer's premium and taxes) no later than 4:30 PM on the seventh calendar day following the date of the auction, a deadline which still holds even if an export license must be obtained. The buyer will not acquire title to the piece until all amounts are paid in full [Para 4(b)]. The auction house may retain the items until all amounts have been received in full in good clear funds, under penalty of cancellation (in which case the piece may be sold to outside parties), and all anti-money laundering and anti-terrorism financing checks have been completed to the auction house's satisfaction [Para 4(c)].

The Christie's Catalogue makes it clear that payment will only be accepted from the person named on the invoice.<sup>51</sup>

Because of its inhomogeneous nature, art requires some specialization, and agencies monitoring the industry must likewise be specialized.

These entities have become centers for cultural diffusion and attractions for any number of multidisciplinary activities intended to draw people in, entertain them, and educate them.

These roles underscore the undeniably cultural quality of these eminently social institutions.

Hence, certainly more delicate situations ought to warrant public scrutiny (by and for the public), even if, outwardly, they appear quite private.

## 4.5 Insurance Companies

Insurance companies are invariably hired in the case of high-value artworks, which are themselves treated differently than ordinary personal property.

For purposes of coverage, the insurance policy should identify each piece, together with its value, and the underwriter normally would ensure full liability for the amounts declared on the insurance application, for those provide the basis for issuing the policy and calculating the premium. The policy should show that they are not insuring goods without irrefutable proof of ownership or existence preceding the onset of the policy period, and furthermore that the items are not smuggled, stolen, purloined, forged, illegally traded or used in money laundering.

Such companies therefore require a proper appraisal because in case of an accident, the amounts paid must match a statement of worth previously agreed upon. They have required a detailed description to better recover the item in the case of loss or diversion. There must, in addition, be periodic updates on the item

---

<sup>51</sup> CHRISTIE'S CATALOGUE. *New York, Old Master Paintings. Wednesday 6 June 2012*. London: Christie, Manson & Woods Ltd., 2012, p. 129.

appraised in order to adjust its value proportionally between the previous evaluation and market value, for one of the difficulties involving art is precisely how to arrive at a value in case of loss. Insurance companies often request appraisal of each item insured, which does not mean that they will be bound by that figure, inasmuch as it is considered merely a suggested value.<sup>52</sup>

The insurance agreement should state that the policy does not cover vitiated claims, or acts by enforcement authorities, such as searches, seizures and forfeitures, or hazards arising from theft, robbery, smuggling, illegal transportation, illegal sale and money laundering.

#### **4.6 Financial Crimes Enforcement Network (FinCEN) and the Council for Financial Activities Control (COAF), Suspicious Activity Reports and Banking Risks**

The confidentiality of Suspicious Activity Reports is protected in the United States. There was some question as to whether this protection was restricted to the Report itself or extended to supporting documentation. At first, only the Report was confidential, but afterward, the Office of the Comptroller of the Currency (OCC)<sup>53</sup> at the Treasury Department decided that supporting documentation was also confidential. This secrecy is so indispensable that even when subpoenas are issued ordering disclosure of Reports or supporting documentation in several cases, the OCC held that it must be notified by the banking institution so that it might take part in the proceedings and that the disclosure must comply with the Federal Rules of Civil Procedure. There was a suggestion that information be shared among financial institutions to better detect new fraudulent schemes. Through FinCEN and other agencies, the Treasury Department decided to provide information so that they might keep abreast of the trends in that class of crimes, issue statements and hold meetings and seminars. In no event could the Report be disclosed to anyone supposedly involved, excepting only FinCEN or other appropriate government agencies.

Note that there is a deadline for Suspicious Activity Reports—30 days from the time the facts are known—but if the suspect cannot be identified, this timeframe extends for another 30 days. No more than 60 days may elapse, however, once the facts become known.

Proper vigilance and Suspicious Activity Reports are deemed essential to ensure that the financial institution has an effective compliance program. Appropriate policies and procedures must be put in place to monitor and identify

---

<sup>52</sup> See DUBOFF, Leonard D., MURRAY, Michael D., CHRISTY A., King. *The Deskbook of Art Law*. Booklet L (Insurance). New York: Oceana, Second Edition, Release 2010–2, Issued December 2010, L-21, 36 and 52.

<sup>53</sup> <http://icom.museum/programmes/fighting-illicit-traffic>. Accessed June 20, 2012.

unusual occurrences by time and place. Reporting systems must include unusual event identifications or alerts (identifying the employee and giving all necessary search information), management alerts (awareness of all methods of identification and evaluation in all business areas), the Report itself and its generation, regardless of size. Monitoring system sophistication must be understood as part of banking risk, with emphasis on what goes into high-risk products, services, account holders and entities. Financial institutions must therefore have adequate personnel to identify, research and report on suspicious activities, with due account taken of the general risk level and volume of transactions.

The Financial Crimes Enforcement Network does not have specific instructions to require auction houses, galleries, museums or art dealers to report suspicious activity. They are, however, under general obligation to report cash payments in transactions of \$10,000 or more.

The Brazilian Council for Financial Activities Control Resolution No. 008 of September 15, 1999, with the aim of preventing the use of art objects or antiquities for the laundering of money, requires the completion of Suspicious Activity Reports by individuals or companies that sell, import, export, or intermediate a sale—whether on a permanent or temporary basis, in a principal or accessory role, and cumulatively or otherwise.

It requires that a record be kept of an individual customer for at least five years, to include name, complete address, identification number, issuer and date of issue, passport or photo ID if a foreign national, and Individual Taxpayer Register (CPF) number. For businesses, the company or corporate name, corporate taxpayer number (CNPJ), complete address, telephone number, primary business and name of parent corporation(s), daughter company(-ies) or affiliate(s) (Article 3). The record must contain a detailed description of each piece, the date and amount of the transaction and form of payment (cash, check, credit card, financing, etc.) (Article 5).

The requirement extends to museums, art galleries and libraries, given their nature and language contained in the Money-Laundering Law, but is not, however, limited to only those individuals or companies permanently engaged in the business (such as galleries). Yet this is poorly understood, despite the clarity of the written law.

Furthermore, according to statistical data compiled by the COAF, the number of Suspicious Activity Reports has been very low - only two in 2009, five in 2010, three in 2011 and nineteen in 2012. Since its inception (1999), the COAF has received only thirty-six reports, which shows that the law in Brazil is not being taken seriously.<sup>54</sup>

We have a situation in Brazil in which lack of monitoring activity on the part of the Financial Intelligence Unit and the belief that money laundering through artistic media is a relatively small risk (highly specialized market, highly visible, with low liquidity and high premiums) compared to other industries combine to make the law a dead letter, a sort of institutionalized make-believe that does not properly merit the attention one would expect from enforcement authorities.

---

<sup>54</sup> See <https://www.coaf.fazenda.gov.br/conteudo/estatisticas/comunicacoes-recebidadas-por-segmento/>. Accessed May 10, 2013.

Furthermore, COAF Resolution No. 10 of November 19, 2001, places the same requirements on nonfinancial sector companies engaged in domestic or international cash transfer services, obliging them to record the amounts transferred, form of payment, transaction date, purpose of the wire transfer, name, individual or corporate taxpayer ID, where applicable, of both sender and receiver and addresses for both.

These requirements give a false impression that any money laundering occurring in that sector could actually be detected. There is also a need to require dealers (in the broadest sense of the word) to turn in Suspicious Activity Reports upon acceptance of such illegal funds as may be detected (applying the willful blindness doctrine).

In addition, institutions that have become aware of art being acquired for laundering purposes ought to monitor all corresponding interbank transactions.

## 4.7 Agencies Involved in Investigating Tax Fraud

Internal Revenue Agents should have, at the very least, the specific knowledge required for a basic understanding of the art market in order to check on declared prices. They should, therefore, be given educational training.

There is a tendency to consider artworks to be duty-free, where the accompanying fiscal document should contain the name of the creative artist, if known, and declare whether they are originals, replicas, reproductions or copies, and evidence may be required that they prove the same as on the import declaration.

U.S. customs law has been organized into a “harmonized system,” requiring uniform descriptions of goods bought and sold in world trade. A classification system is now proposed for transporters, importers, exporters, customs, and record-keeping for a high level of uniformity in fees and statistical data.<sup>55</sup>

The resulting more objective descriptions will allow better measurement and observation on the part of Internal Revenue Service authorities, reducing the chances of defective descriptions in import and export documentation, and improving the exchange of information among customs authorities, with more reliable figures, to track all movement of goods across national boundaries.

Regulatory Directive No. 874 for Brazil’s Federal Revenue Service, dated September 8, 2008,<sup>56</sup> providing customs clearance procedures for temporary admission and exportation of cultural goods, considers such goods to be artworks: literary, historical, phonographic and audiovisual works, musical instruments and equipment, sets, costumes and other goods necessary for putting on dance, theater or opera performances, concerts or similar clearly cultural events (Article 1, sole paragraph).

<sup>55</sup> See Leonard DuBoff, Michael Murray and Christy King. See *The Deskbook of Art Law*. Booklet A (*Art: The Customs Definition*). New York: Oceana, Second Edition, Release 2010–2, issued December 2010, pp. A-38 and A-40-41.

<sup>56</sup> Published in the Federal Official Gazette on 09/09/2008, and again on 09/23/2008.



It requires that the simplified temporary importation clearance papers for cultural goods referenced in Article 4 of Federal Revenue Secretariat Regulatory Instruction No. 611 of January 18, 2006, be presented by the individual or company responsible for their entry into Brazil and their return abroad (Article 2, heading). Where such goods are brought in by a nonresident traveler, the granting of simplified clearance shall be formally set forth on the Accompanied Baggage Declaration, or DBA. The Simplified Import Declaration (DSI) must be filed before the goods arrive in Brazil (§§ 1 and 2).

Article 3 waives completion of DSI fields reserved for import tax amounts and corresponding calculations, as well as for gross weights of each of the items imported. The applicant must specify the purpose of the temporary admission under cultural goods, and enter into the appropriate field all supplementary information for the DSI, including name, location and timeframe for each event occurring in Brazil (Sole paragraph).<sup>57</sup>

Physical inspections may be waived for artworks and historical items submitted for clearance by: (a) a museum, theater, library or cinémathèque; (b) any entity operating an event supported by the government; (c) any entity promoting a well-recognized event; or (d) any permanent diplomatic mission or consular department (Article 6, heading). In such case, authorization is required, but shall only be granted at the request of the interested party, by the chief of Brazil's Federal Revenue Service for custom dispatch to the institution that (§ 1): I—Has been listed with the National Corporations Register (CNPJ) for over three years; and II—Meets all requirements for fiscal compliance with the National Treasury, for providing a joint certificate of no arrears or positive clearance certificate, containing information on standing on all taxes administered by Brazil's Federal Revenue Secretariat, and Amounts Payable to the Government (DAU), administered by the Finance Ministry Prosecutor's Office (PGFN). The filing must be accompanied by images, designs, plans or such other resources as will allow full identification of all works listed in the heading (§ 2).<sup>58</sup>

---

<sup>57</sup> Both the DSI and DBA forms must be accompanied by a Liability Agreement (TR), where applicable, as set forth in specific legislation (Article 4, heading). No indication of suspended import tariff amounts shall be required on the Liability Agreement (§ 1). For nonresident travelers, para 2 establishes that the Liability Agreement shall be: I—Required only for goods valued at more than R\$ 3000.00; II—Signed by the person responsible for the event in Brazil. Failure to comply with simplified regime requirements will result in the tariff amount being assessed by customs authorities, based on information contained in the declaration and corresponding additional documents, and entered in the appropriate field in the TR. (Article 5, heading). Absent documentary proof of the value of the goods in question, the values set forth on the insurance policy may be used for purposes of completing and filing the TR (Sole paragraph).

<sup>58</sup> Cultural items not included in Article 6 of the Regulatory Directive must have their physical examinations obviated by means of an Executive Declaration issued by the Regional Superintendent of the RFB having local jurisdiction over the event being held, to apply specifically to the goods which, by their nature as antiquities, rarities or fragile items require special handling or preservation. (Article 7, heading). Should the event be spread out over different places, over which more than one Fiscal Region exercises jurisdiction, the Executive Declaration

Physical inspection for temporary admission of goods, when not waived or conducted at the event location, may be done by sampling the shipping unit (Article 9). All goods regulated under the Regulatory Directive are subject to specific legislation providing the special temporary admission customs regime (Article 10): I—Requirements for granting of the regime; II—Timeframe for remaining in Brazil; III—Enforcement of the Liability Agreement; IV—Closing out of procedure; and V—Right of appeal.

Should the goods remain permanently in Brazil, the beneficiary must, during the effective term of the temporary entry permit, file for final customs clearance in accordance with applicable law (Article 11, heading). Art objects listed under Common Mercosul Nomenclature (NCM) customs codes 9701, 9702, 9703 or 9706 and received as donations from a museum instituted or maintained by the government or some other cultural entity recognized as a public utility, shall be exempted from import tariffs pursuant to Law No. 8961 of December 23, 1994 (Sole paragraph).

Simplified temporary exportation clearance papers for cultural goods shall be processed based on the Simplified Export Declaration (DSE) referred to in Part. 31 of Federal Revenue Secretariat Regulatory Instruction No. 611 of 2006, filed by the individual or company responsible for their entry into Brazil (Article 12, heading). Should the goods be taken abroad as accompanied baggage (§ 1): I—The interested party may turn in the DSE for recording purposes, with the proper notation in the field intended for supplementary information, accompanied by the traveler's ticket, documentation from consenting agencies, if applicable, prior to embarkation, during normal business hours of the RFB when leaving the country; or II—The traveler must list all goods on the Temporary Exit of Goods Declaration (DST) and file it, prior to boarding, with customs officials, for proper monitoring of goods leaving Brazil. In the case of item I of § 1, upon embarking, the traveler must be in possession of a copy of the DSE, duly cleared (§ 2).<sup>59</sup>

---

(Footnote 58 continued)

must be issued by the General Customs Administration Office (Coana) (Sole paragraph). If the importer so wishes, cultural goods may be made available for physical inspection at the event location (Article 8, heading). To that end, the interested parties should file for temporary admission with the unit having jurisdiction over the event location or, for itinerant events, over the first event location (§ 1). The said goods may be taken to the event location under summary authorized transit through customs as stated on the copy of the dispatch by the agency authorizing the transit (§ 2). Seals may be placed on volumes or cargo units so that these may be promptly and properly stored at the event location, while awaiting the arrival of inspectors. (§ 3) Transit through customs is concluded upon issuance of Simplified Clearance papers (§ 4).

<sup>59</sup> Completion of DSI fields reserved for import tax amounts and corresponding calculations, as well as for gross weights of each of the items imported is waived. (Article 13, heading). The applicant must specify the purpose of the temporary admission and enter his or her name, and the location and timeframe for each event occurring abroad in the supplementary information field on the DSE. (Sole paragraph). In the case of returning goods, customs clearance procedures for re-exportation of cultural goods shall be processed based on the DSE or DRE-E filed by the

---

(Footnote 59 continued)

person or company responsible for returning the goods abroad. (Article 15). The beneficiary of the special temporary customs admission procedure subject of this Regulatory Directive must state, on the DSE or on the DRE-E the number and type of declaration for clearance on admission of the goods into Brazil and, in the event of clearance for consumption of part of the goods, pursuant to Article 11, the number on the declaration that served as the basis for the definitive customs clearance (§ 1). Should the goods they returned abroad be in separate shipments, the interested party must indicate on the supplementary information field of the DSE that a partial return is being made (§ 2). Where goods return abroad as accompanied baggage, the traveler must present to customs authorities at the point of exit a copy of the DSI or DBA used for the grant of temporary entry, for notations necessary to the formalization of departure and presentation to customs authorities at the point of entry so that the corresponding Liability Agreement may be canceled, should the goods exit through some unit other than that which granted temporary entry (§ 3). Goods admitted temporarily with waiver of physical inspection, pursuant to Articles 6 and 7, may dispense with this customs formality on the occasion of their re-exportation, and may also be shipped back out of the country by courier service, in which case the interested party must produce documented evidence of the re-exportation of said goods for the benefit of the unit that granted temporary entry (§ 4). Goods admitted pursuant to Article 8 may be subjected to physical inspection at the location of the event, in which case the DSE must be recorded with the unit having jurisdiction over the location of the goods to proceed in transit through customs for re-exportation through the unit controlling the exit (§ 5). Physical inspection for reimportation or re-exportation of exported goods, when not waived or conducted at the event location, may be done by sampling the shipping unit (§ 6). Customs clearance for return to Brazil of goods exported temporarily shall be processed based on the DSI or on the Express Shipment Import Declaration (DRE-I) (Part 16 heading). The interested parties must place the number and type of declaration that served as the basis for temporary export clearance on the DSI or on the DRE-I (§ 1). Goods exported temporarily with waiver of customs inspection may be exempted from physical inspection on the occasion of their return, if return is effected within the effective term of the temporary permit (§ 2). Goods exported by customs inspection at the site of the event may—pursuant to Article 16—be subject to physical inspection outside of customs facilities in the event of their return, in which case the DSI must be registered with the unit having jurisdiction over the place of arrival of the goods (§ 3). The provisions contained in Article 8 of this regulatory directive shall apply to removal of cultural goods returning to Brazil or re-exported (§ 4). Whenever the return of goods to Brazil occurs within the effective timeframe of the temporary export permit, the completion of fields reserved for calculation of import tariffs to be assessed, and fields for showing the gross weight of each of these items, shall be waived (§ 5). Printed matter, leaflets, catalogs and other promotional material alluding to the event may be granted clearance with no formalities (Article 20). In customs clearance procedures addressed in this Regulatory Directive, no commercial or proforma invoice shall be required, but instead, a declaration containing a list of the goods, dated and signed by the person or entity exercising ownership or possession of the property (Article 21). Temporary admission or exportation of the goods in question shall only be granted by the customs authorities for the Federal Revenue Service unit of record for the declaration, and after verification of compliance of specific controls imposed, if any, by assenting agencies (Article 22). Approval is hereby granted to the model form titled Request for Physical Inspection of Cultural Goods outside of Customs Facilities, in accordance with the Sole Attachment to this Regulatory Directive (Article 23). The request must be filed in three copies, turned in as follows: I—Top copy, to the local Revenue Service unit; II—second copy to applicant; and III—third copy to shipper. Provisions contained in the Regulatory Directive may apply to cultural goods entering or leaving MERCOSUL countries, absent the procedure provided in Federal Revenue Secretariat Regulatory Directive No. 29 of March 6, 1998 (Article 24). The high tariff on imports has made it possible to acquire clandestine art, hidden in the pages of books or disguised as everyday items, while also providing an incentive for exportation of local products, thereby facilitating the flight of art objects.

In fact, there is no evading the importance of the so-called “Third Sector,” the private sector active in the promotion and preservation of cultural heritage, and engaged in promoting its development. So true is this that laws are actually written to implement financial regulations (for example, in the United Kingdom, France, Italy, Germany and Spain) providing stimulus measures and fiscal incentives,<sup>60</sup> as in Brazil and the United States.

Laundering through artworks is accomplished by incorrectly stating prices, quantity, quality and overseas transportation (abroad and back) in an effort to convey legitimacy to illegal money.

Artificial price setting to disguise actual value in imports and exports, a form of speculating on established prices, allows money to be transferred by over- or under-invoicing without raising the suspicion of authorities. The practice makes it difficult for customs agents to determine the true value of items. It is also not difficult to transport larger or smaller quantities in such a way as to avoid detection (in tubes, for instance), or filing descriptions that do not quite match what is being transported (by deliberate misstatement of the quantity or quality), again without alerting border agents.

According to Hannah Purkey, exports are not as strictly regulated in the United States as imports, and domestic transportation of art is duty free.<sup>61</sup>

What we do know is that taking the profit out of crime—preventing the use of cultural goods or assets for illegal purposes—does fight crime.

Since 1986, the Office of International Affairs at the U.S. Department of Justice has been active in the seizure, blocking and successful confiscation of goods both domestically and abroad. Its activities have been stepped up since the 9/11 attacks of 2001. However, terrorist action has gotten top priority in all its enforcement efforts, and nowhere near so much attention has been given to matters involving cultural heritage items.

We must bear in mind that money being laundered often leaves the country to circulate within the international system of payments in order to throw potential auditors off its trail. It is not at all uncommon to use large amounts of cash in the first stage of money laundering (placement, conversion or concealment).

The practice takes many forms, including cash-based negotiations involving hefty sums. This is how art, like jewelry or gold, comes in as an important means of laundering money because it brings together qualities that satisfy the demands of inherent facility—qualities such as being small in size, light in weight, free of odor and difficult to track.

---

<sup>60</sup> The trend, according to María Rosa Suárez-Inclán Ducassi, is in keeping with guidelines contained in the European Green Book, which recognizes the need to encourage social responsibility on the part of private entrepreneurs (in *Financial Regulations and Tax Incentives with the Aim to Stimulate the Protection and Preservation of Cultural Heritage in Spain. Art and Cultural Heritage: Law, Policy, and Practice*, p. 455).

<sup>61</sup> In *The Art of Money Laundering*, p. 126.

Inflating and understating (when not just completely falsifying) of the value of goods and services is a well-known form of fraud used primarily in tax evasion, and is based on the juggling of prices to create added value between importers and exporters. When overpricing is resorted to, the difference received by the exporter is sent to a (secret or unknown) account belonging to the importer. Such a practice may be detected by comparing the export value with the (clearly smaller) value generally used by exporters in that market. For underpricing, used to pay less than the correct tax amount, the exporter receives the difference back through operations that are difficult to track (such as hawala or money changers). This only becomes possible when there is an agreement between the exporter and importer, and any intermediaries. In other words, it requires an agreement among persons, with more than one individual acting at several different points.

The money received often travels a tortuous path in the course of its conversion into another form of currency. Instead of a simple conversion into, for instance, dollars, being accomplished by legitimate exchange with all formal notices required for the transaction, direct payments are made by outside parties, using dirty money—payments entirely unconnected with the operation. This illegally received money is then delivered to a currency exchange or currency broker (usually with a discount off the legal exchange rate), in the absence of any economic motivation that would legitimize the operation (no goods are changing hands; only currency is being exchanged or converted). It could happen, for instance, that a company in one country issues a bill of sale to someone desirous of currency conversion and located in another country. This document would show that “purchase” of a product (perfume, furniture, books, artworks), and the currency to be converted should go to the seller. The money is then turned over to an exchange broker in the buyer’s country, who then looks for a third party in need of that currency and located near the seller (often another exchange broker or a remittance company, when both engage in illegal operations) who then pays the seller, giving rise to a business advantage (a better rate). To throw off the authorities, the negotiator (the buyer) may even receive some of the product in situations where inspection or investigations are expected. It is not at all uncommon for no deal to even exist, other than as a façade, the whole idea being to obtain a better rate of exchange. The need to send the money undetected is the reason for the whole operation. Hence, no goods, products or services are changing hands—instead, only money and paperwork.

Because exports, generally speaking, are not handled with the same strictness by customs authorities seeking to establish their value, over-invoicing is more commonly practiced than under-invoicing.

Historically, policy in North America has been favorable to the free importation of art and cultural items, excluding only those that are dangerous or subject to embargo. There are laws that restrict those imports. We should mention, as Barbara Hoffman keenly points out, that the U.S. Congress has passed few laws regulating private ownership of cultural property or its interstate and international transportation: “[t]he United States is perhaps unique in that it has no export

restrictions on works of art.”<sup>62</sup> There are, however, increasingly more limits on archaeological artifacts and American cultural objects.<sup>63</sup>

In the European Union, the dominant principle is basically free trade in goods. Still, to keep this idea alive while at the same time protecting cultural heritage, two measures were adopted in that region (a Regulation and a Directive). The first is the European Economic Community Council Regulation No. 3911 of 12/09/1992, which deals with the exportation of cultural goods and provides uniform export controls and licensing by the proper authorities. The license must be presented along with the export declaration at the customs offices in which export formalities are to be arranged. To implement this Regulation, Commission Regulation No. 752 of 03/30/1993 determined what types of export licenses may be used and all the formalities required for exportation. The second is Directive No. 93/7 of 03/15/1993, which established a mechanism for the return to the community of cultural goods forming a part of a nation’s archaeological, historical and artistic heritage that was unlawfully removed from the territory of a Member State. One of the purposes of the Directive was to foster cooperation among Member States, particularly in the investigation of items that were illegally removed.<sup>64</sup>

Because arriving at prices is a complex matter, making it difficult for customs agents to arrive at the proper tariff—especially with no foreknowledge or means of accessing data—art has turned out to be a handy vehicle for fraud.

Ideally there would be unregulated international trade in works of art, so as to favor the uncontested spread of culture. But this would entail problems, the magnitude of which might be measured by the number of past incidents of looting, robbery, destruction, etc.

Besides, there is no denying the possibility of money laundering by falsely declaring quantities or quality of goods exported or imported, even if nonexistent, in order to bring about an absolutely illegal flow of money under what would appear to be ordinary transnational trade.

Surely it is now beyond cavil that art lends itself perfectly to money laundering. It is mobile, expensive and poorly regulated—and a more sophisticated means than any other traditionally resorted to for this type of crime, such as the use of financial institutions.

Hence, by fixing the price below the market value, or simply leaving out part of the amount payable, the price actually paid will surely be in cash and delivered under the table. Dirty money is thus converted into an asset that may later be sold at the market price. When prices are pegged at artificially high levels, the launderer may wish to have illicit financing of his acquisition and, to that end, will resort to bad appraisers and fake documentation.

---

<sup>62</sup> Cf. International Art Transactions and the Resolution of Art and Cultural Property Disputes: United States Perspective. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 159.

<sup>63</sup> NAGPRA 25 U.S.C. §§ 3002–3007, 2000.

<sup>64</sup> See Barbara Hoffman. European Union Legislation Pertaining to Cultural Goods. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 191.

In view of all this, developing a policy to establish the role of each of these, of each actor in the system, whether museums, galleries, auction houses, libraries or government agencies, is of utmost importance in confronting the current problem, and even for the preservation of our cultural heritage.

According to Alissandra Cummins, specifically with reference to museums and the like, but as valuable guidance to all participants, managers and controllers of the art market, “[t]he role of heritage institutions in this area should be recognized and coordinated with the role of their counterparts in the legal, security, and customs professions. Initiatives ensuring enhanced dialogue and coordination between the sectors include specialized training and public information programs.”<sup>65</sup>

Clearly, then, we see the need to join together our understandings. This may follow from an understanding of the term “globalization,” as it occurs today in cooking, in lifestyles and in music. In other words, measures must be adopted based on a global discussion, aimed always at cultural preservation, which is only possible if the spaces in which humanity finds its expression are freed of crime, both ordinary and financial. The harmony will be legitimate if and only if it is joined by consensus as to the need to bring safety and sustainability to the arts market.

In order to preserve our cultural heritage, in relation to the law and the acts of interested parties, a response must arise from an analysis of the sufficiency of existing standards and regulations. We must examine the role of loyalty to national interests, held by societies as the bulwarks of cultural preservation, to override mistaken impulses on the part of those involved.

## Bibliography

- ACCUSATIONS of money laundering, vandalism and the theft of a Picasso lithograph in Northern California at a mansion allegedly belonging to the former Ukrainian prime minister. Association for Research into Crimes against Art – ARCA, 06/09/2012. <http://art-crime.blogspot.com/>. Accessed June 13, 2012.
- APOSTOLOS-CAPPADONA, Diane. Course on “Art and Terrorism,” and another on “Art and Ethics.” Information obtained from the professor on 04/19/2012 at a meeting at Georgetown University, Washington, DC [www.georgetown.edu](http://www.georgetown.edu). Accessed May 8, 2012.
- BALDWIN, Jr., Fletcher N. *Art Theft: Perfecting the Art of Money Laundering*. Jan 2009 for the 7th Annual Hawaii International Conference on Arts & Humanities. Unpublished. Sent on 04/20/2012 by the professor emeritus of the University of Florida’s Levin College of Law to the U.S. Library of Congress at the author’s request.
- BIENAL vende tudo. Principal feira de arte do país, SP-Arte completa sete anos e comemora aquecimento do setor. pp. 30–35. São Paulo: Folha de São Paulo, May 6–12, 2012.
- BRINKMAN, Manus. Reflections on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures. *Art and Cultural Heritage: Law, Policy, and Practice*. New York: Cambridge University Press, edited by Barbara T. Hoffman, 2006.
- BUREAU of Educational and Cultural Affairs. United States Department of State, meeting with Margaret G.H. MacLean, Senior Analyst, on 06/21/2012 at 3PM. [exchanges.state.gov/heritage/culprop/review.html](http://exchanges.state.gov/heritage/culprop/review.html). Accessed June 22, 2012.

---

<sup>65</sup> Cf. The Role of the Museum in Developing Heritage Policy. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 50.

- BUTT, Naveed. Insurance/takaful companies: SECP enforces compliance with AML Act. *The Financial Times Limited*. NPO 3/25/2012, 2012 WLNR 6308356.
- CARMICHAEL, Trevor A. Cultural Heritage Preservation: A National Trust Perspective. *Art and Cultural Heritage: Law, Policy, and Practice*. New York: Cambridge University Press, edited by Barbara T. Hoffman, 2006.
- CONSELHO Internacional de Museus—ICOM, <http://icom.museum/programmes/fighting-illicit-traffic>. Accessed June 20, 2012.
- COSTA, Tailson Pires e ROCHA, Joceli Scremin da. A incidência da Receptação e do Tráfico Ilícito de Obras de Arte no Brasil. <https://www.metodista.br/revistas/revistas-ims/index.php/.../523>. Accessed May 23, 2012.
- CUMMINS, Alissandra. The Role of the Museum in Developing Heritage Policy. *Art and Cultural Heritage. Law, Policy, and Practice*. New York: Cambridge University Press, edited by Barbara T. Hoffman, 2006.
- DUBOFF, Leonard D., MURRAY, Michael D., KING, Christy. *The Deskbook of Art Law*. Booklets A (*Art: The Customs Definition*), B (*International Movement of Art*), C (*Theft*), L (*Insurance*) and M (*Auctions*). New York: Oceana, Second Edition, Release 2010–2012, issued December 2010.
- DURAN, José Carlos. *Arte, Privilégio e Distinção. Artes Plásticas, Arquitetura e Classe Dirigente no Brasil, 1855–1985*. Estudos. Sociologia da Arte. São Paulo: Perspectiva e Universidade de São Paulo – Edusp (coedição), 1989.
- FRAMMOLINO, Ralph and FELCH, Jason. What Went Wrong at the Getty. *The New York Review of Books*. 06/23/2011. <http://www.nybooks.com/articles/archives/2011/jun/23/what-went-wrong-getty/?pagination=false>. Accessed May 23, 2012.
- GODDARD, Terry. *How to Fix a Broken Border: FOLLOW THE MONEY*. Part III of III. American Immigration Council Publication. Immigration Policy Center, May 2012.
- HENRIQUES, Diana B. Madoff, Apologizing is Given 150 Years. *New York Times*. 06/30/09. [www.westlaw.com](http://www.westlaw.com). Accessed May 24, 2012.
- HERREMAN, Yani. The Role of Museums Today: Tourism and Cultural Heritage. *Art and Cultural Heritage: Law, Policy, and Practice*. New York: Cambridge University Press, edited by Barbara T. Hoffman, 2006.
- HIRTLE, Peter B. Symposium: Digital Archives: Navigating the Legal Shoals Undue Diligence? 34 Colum. J.L. & Arts 55, 2010.
- HOFFMAN, Barbara T. International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective. *Art and Cultural Heritage: Law, Policy, and Practice*. New York: Cambridge University Press, edited by Barbara T. Hoffman, 2006.
- HOFFMAN, Barbara T. European Union Legislation Pertaining to Cultural Goods. *Art and Cultural Heritage: Law, Policy, and Practice*. New York: Cambridge University Press, edited by Barbara T. Hoffman, 2006.
- KATO, Gisele. SP-ARTE. O Mercado virou curador. *Bravo!* São Paulo: Apr-May 2012, pp. 16–27.
- KATYAL, Sonia K. Filtering, Piracy Surveillance, and Disobedience. 32 Colum. J.L. & Arts 401, 2009.
- LANDERS, Amy L. Patent Claim Apportionment, Patentee Injury, and Sequential Invention. 19 Geo. Mason L. Rev. 471, 2011.
- LAUNDERING Drug Money with Art. *Forbes Magazine*. [http://forbes.com/2003/04/08/cx\\_0408\\_hot\\_print.html](http://forbes.com/2003/04/08/cx_0408_hot_print.html), Accessed May 23, 2012.
- LEWIS, Geoffrey. The “Universal Museum”: A Case of Special Pleading? *Art and Cultural Heritage: Law, Policy, and Practice*. New York: Cambridge University Press, edited by Barbara T. Hoffman, 2006.
- MACKENZIE, S.R.M. *Going, Going, Gone: Regulating the Market in Illicit Antiquities*. London: Institute of Art and Law – IAL, 01/01/2005.
- MAKING a dent in the trafficking of stolen art. *Smithsonian*, 09/01/95, vol. 26, no. 6, 1995 WLNR 5552723.



- MARTÍ, Silas. Sp-Arte atrai estrangeiros, mas compete com ArtRio. *Folha de São Paulo*, E4 Ilustrada, 05/09/2012.
- MONEY LAUNDERING CHARGES for Art Dealers. *New York Times*, 06/02/2001. [www.westlaw.com](http://www.westlaw.com). Accessed June 23, 2012.
- MONEY LAUNDERING, TERROR financing: SECP imposes more conditions. *Business Recorder*. Recorder Report, 09/12/2009. WLNLR 17872644. [www.westlaw.com](http://www.westlaw.com). Accessed June 23, 2012.
- MONEY-LAUNDERING: THIRD Directive set to be unveiled by Commission. *European Report*. 2004 WLNLR 7240827. [www.westlaw.com](http://www.westlaw.com). Accessed June 23, 2012.
- PINHO, Diva Benevides. *A Arte como Investimento. A Dimensão Econômica da Pintura*. São Paulo: Nobel e Universidade de São Paulo – Edusp (coedição), 1989.
- PURKEY, Hannah. *The Art of Money Laundering*. 22 Fla. J. Int'l L. 111, 2010.
- REALUYO, Celina B. *It's All about Money: Advancing Anti-Money Laundering Efforts in the U.S. and Mexico to Combat Transnational Organized Crime*. Washington, DC: Woodrow Wilson International Center for Scholars. Mexico Institute, May 2012.
- REAP, James K. *The United States and the World Heritage Convention. Art and Cultural Heritage: Law, Policy, and Practice*. New York: Cambridge University Press, edited by Barbara T. Hoffman, 2006.
- SOTHEBY'S. <http://www.sothebys.com/held/buy/index.html>. Accessed June 1, 2012. Sotheby's Fine Art Storage Facility. <http://www.sothebys.com/en/inside/services/sothebys-fine-art-storage-facility/overview.html>. Accessed July 11, 2012.
- SPIEL JUNIOR, Robert E. *Art Theft and Forgery Investigation. The Complete Field Manual*. Springfield: Charles C. Thomas, 2000.
- SUÁREZ-INCLÁN DUCASSI, María Rosa. Financial Regulations and Tax Incentives with the Aim to Stimulate the Protection and Preservation of Cultural Heritage in Spain. *Art and Cultural Heritage: Law, Policy, and Practice*. New York: Cambridge University Press, edited by Barbara T. Hoffman, 2006.
- THE SAR Activity Review, Trends, Tips & Issues. *Published under the auspices of the BSA Advisory Group*, Issue 12 FinCEN, Oct 2007.
- THOMPSON, Erin. The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities. 33 Colum. J.L. & Arts 241, 2010.
- THORNTON, Sarah. *Sete dias no mundo da arte. Bastidores, tramas, intrigas de um mercado milionário*. Translation: Alexandre Martins. Rio de Janeiro: Agir, 2010.
- WILSON, David McKay. Who Owns Art? Raymond Dowd, Law'91, and the Fate of Artworks Looted by the Nazis. *Fordham University Alumni Magazine*, Spring 2012, pp. 23–25.
- WIZIACK, Júlio. Obra de Arte rende mais que a Bolsa e fica acessível. Por R\$ 1.000 investidor pode iniciar coleção; galerias fazem parcelamento. *Folha de São Paulo*. 12/10/2012, folhinvest B1 e B3.
- WU, Laura Flahive. *Massachusetts Museum of Contemporary Art v. Buchel: Construing Artists' Rights in the Context of Institutional Commissions*. 32 Colum. J.L. & Arts 151, 2008.