

Provenance and Private Ownership:
Just and fair solutions in the commercial art market

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Sotheby's engages primarily in the public auction sale of fine and decorative works of art and has offices located in more than 40 countries. Auctions are conducted in 11 auction centers throughout the world. Sotheby's today is largely a combination of the London auctioneering firm of Sotheby's founded in London 1744 and the New York auctioneer Parke Bernet which was founded in the autumn of 1937 from the ruins of the American Art Association.

Parke Bernet, Sotheby's predecessor, was one of a number of institutions in the United States to have been chosen by the International Refugee Organization and by the American Government to assist in the liquidation of art objects recovered by the Allies in Germany and of art objects confiscated from Enemy Aliens on American soil. Numbers of auctions of such art objects were held after the cessation of hostilities¹. Unfortunately, our records from these sales, save for the catalogues themselves, no longer exist.

In the years following WWII, Sotheby's was chosen by many private recipients of restituted property to handle their sales including many of the greatest Jewish collectors in pre-war Europe. After the fall of the iron curtain, Sotheby's was also chosen to sell restituted works of art on behalf of many noble families who had been dispossessed. Examples from the 1990s include the Moritzburg Treasure consigned to Sotheby's from the royal family of Saxony.

In most instances Sotheby's acts as agent not as principal and generally has no ownership interest in the artworks which we offer for sale². In this we differ from museums, we also differ in that museums often operate in a public law environment whereas auction houses generally handle privately owned property.

¹ Four sales of property consigned by the IRO were held in 1948: Jewelry and Precious Stones (232 lots), June 21/22, 1948; Continental Silver, Porcelain, Glass and Ornaments (828 lots), June 23-25, 1948; Precious Stones and Gold Jewelry (461 lots), September 14/15, 1948 and Continental Silver, Porcelain, Glass, Gold and Enamel Watches and Rugs (834 lots), September 16-18, 1948. Sales for the Alien property custodian of the U.S include the stock of the New York and Boston stores of Yamanaka & Co., Inc. which took place in 1944.

² Exceptions are disclosed in Sotheby's auction catalogues.

It has been Sotheby's longstanding policy not to sell any work of art that is known to have been stolen or where there is credible evidence that our consignor's title may be compromised by theft or persecution - whether by the Nazis or by anyone else.

Sotheby's is inherently the wrong place to sell stolen or looted art because of the international exposure given to a work offered at public auction by Sotheby's and the wide circulation of Sotheby's catalogues which gives potential claimants and research bodies a good opportunity to identify works which they believe may have been looted. Sotheby's has a strong commercial interest in avoiding the sale of works of art with potentially troublesome provenance; to sell such items has the potential to damage Sotheby's brand, expose the company and clients to liability and is not in the best interests of the company's shareholders³.

In June 1998, together with Aon Insurance, Sotheby's took the decision to lead the financial sponsorship of the Art Loss Register's Holocaust initiative to enable all Holocaust claims to be registered on the ALR database free of charge. Other auction houses later joined in supporting the initiative. As a result, since 1998, Sotheby's worldwide catalogues have been reviewed by the Art Loss Register both in respect of recently stolen property and art seized during the Holocaust.

In respect of works of art created prior to 1933 it is Sotheby's policy to disclose in its catalogues the fullest possible provenance for the years 1933 to 1945.

Since 1997 Sotheby's has run a due diligence program targeted at identifying possible WWII provenance issues amongst the thousands of artworks which we are asked to sell or value every year. The essentials of the program have not changed since 1997 and include the following elements:

- maintaining a specialized international team of provenance researchers within Sotheby's whose role is to support Sotheby's specialists throughout the world in dealing with provenance research and spoliation issues. The team is staffed with art historians and lawyers in New York and London and calls on the services of a network of independent art historians based in Europe and North America
- to ensure that works of art are offered for sale by Sotheby's with good title, all sellers are asked to provide written confirmation of their legal ownership or their authorization to act on behalf of the legal owner. Sotheby's asks sellers to warrant that they have good and marketable title to the property and that both title and right to possession will

³ Sotheby's is publicly quoted on the New York Stock exchange (symbol: BID).

pass to the buyer. Sellers are also asked to warrant that the property is free from any third party rights, claims or potential claim and that they have provided Sotheby's with all information they have regarding the provenance of the property as well as any concerns expressed by third parties regarding its ownership. Sotheby's has the right to require sellers to indemnify the buyer for breaches of these warranties. Sellers are particularly asked to provide all information they may have regarding the ownership history of any work of art for the period 1933 to 1945.

- works of art are physically examined for the appearance of brands, markings or labels that indicate they may have been displaced during the period 1933 to 1945. They will also look for labels and seals of public collections which are known to have lost property during the War.
- works of art are checked against the principal public lists and publications for art looted from museums and individuals including those for Austria, Belgium, France, Germany, Hungary, Italy, Poland and Russia to ensure that the work of art is not an extant loss. The lists checked include the internet based database www.lostart.de.
- prior owners of a work of art are checked against Sotheby's proprietary database of "red flag" names. This database has been constantly updated over the past 12 years and holds details of victims of spoliation (Jewish, noble and political) as well as collaborators and Nazis.
- Sotheby's pays the Art Loss Register to check all lots in its auction catalogues against their databases of losses – both from the WWII period and from recent times.
- complimentary catalogues are sent to the main commissions and working groups in Europe and elsewhere dedicated to researching art stolen or looted during World War II so that they too can make sure that there are no matches in our catalogues with missing works of art.

If the due diligence process highlights a possible WWII provenance issue then this will trigger further research that must be completed, satisfactorily, before the work of art concerned may be included in a sale. Often, this further research will involve work in archives in Europe and the United States as well as inquiries to Governments, provenance research bodies and professional researchers. The research will often involve tracing and contacting the heirs to prior owners of an artwork – sometimes the successors to as many as three or four prior owners of a single artwork where their input is necessary to understand the ownership history of the work.

Despite the importance of provenance to an auction house, it is often impossible to establish the ownership history of a work of art for the years 1933 to 1945.

Sotheby's believes that the absence of a provenance for the years 1933 to 1945 should not necessarily taint a work of art. There are a variety of legitimate reasons as to why provenance information from more than 50 years ago may no longer exist. Whilst it is comparatively easy to trace and reconstruct the history of an important or well-known object, it is understandably far more difficult to uncover the provenance of less important works. There is likely to be a lack of any published exhibition history for these items and they typically are owned by less well-known collectors.

The difficulty of provenance research is compounded by the fact that many works traded in the international art market are not unique (such as prints or multiple paintings of the same subject by a single artist and his studio). The change in attribution of a work from one artist or maker to another may further frustrate research efforts. Furthermore, the titles of paintings and works of art titles or descriptions often change over time because titles are often applied by the art trade and by owners rather than by the artist. Despite the work which goes into ensuring the completeness of our catalogues, there will often be lots which have little or no provenance given for the war years. For the reasons given above this should not be regarded as sinister; Sotheby's believes that the absence of ownership history alone should not of itself taint a work.

For Sotheby's, potential WWII provenance disputes can arise from three different fact situations:

1. where we initiate an inquiry on behalf of the current owner of a work of art with the heirs or successors to a person or body we believe may have parted with it involuntarily in WWII
2. where we receive inquiries or potentially adverse claims to a work of art in an upcoming auction
3. where we receive inquiries or potentially adverse claims to a work of art sold or offered in the past

Where Sotheby's discovers persuasive evidence that a work of art may have been involuntarily displaced between 1933 and 1945, we will inform the consignor and their professional advisors and then work with them to build a strategy as to how to resolve the potential legal, commercial and ethical issues which could arise. Often, the first stage will be to recommend a

research program designed to test whether there really is a problem which might impact on the consignor's ownership rights and/or the marketability of the work of art.

Where our research leads us to believe there is a good chance that a work of art was looted, we will generally seek the consignor's instructions to contact the heirs of the WWII period owner and ask those heirs for clarification of provenance. We receive such instructions in the majority of cases and this regularly leads to a dialogue between the consignor and the heirs. It often transpires that the artwork concerned was restituted after WWII. Our experience has been that where restitution never occurred and where the heirs to the WWII period owner wish to assert a claim then some form of settlement is reached in the majority of cases – probably in excess of 90% of cases. To the extent that Sotheby's is involved in such discussions, often as a facilitator, we try to help the parties and their attorneys to find solutions which are just and fair to everyone taking into account the legal and factual issues in each matter. On average, we are involved in the resolution of around 12 or more of such cases, initiated by proactive research on Sotheby's part, every year.

Sotheby's due diligence program is designed to minimize the risk that a lot in an upcoming sale might be subject to an adverse title claim. Nonetheless claims, and enquiries which might lead to a claim, are received from time to time and we respond to them on a case by case basis.

Where Sotheby's receives a claim to a work which was offered for sale in the past, we will generally offer to forward a letter to the consignor and/or buyer from the historic sale from the claimants or their lawyers. We will only identify buyers and sellers if their names are already in the public domain (for instance if they were designated as sellers in Sotheby's auction catalogue) or if we can locate the buyer or seller and get their consent to the disclosure of their identity. Sotheby's will not disclose clients' identity without their consent as this is commercially sensitive proprietary data of Sotheby's and could constitute a breach of contract and/or a breach of data protection and privacy legislation – depending on the jurisdictions concerned. We are equally sensitive to the privacy concerns of the heirs to looted collections and do everything we can to help them maintain their anonymity in the event that they wish to sell restituted property through Sotheby's.

Each provenance case is different and over the years we have seen the resolution of claims from:

- the heirs to persecuted Jewish art owners (banks, art businesses and private art collectors)
- the German Government acting on behalf of Federal and State institutions

- the heirs to political opponents of the Nazi regime
- Institutions in Russia and the former CIS
- the heirs to private German collections looted by Allied forces and individual combatants at the end of WWII
- the heirs to collections seized by operation of the Beneš decrees
- the heirs to untainted relatives of Nazi officials
- Jewish Communities in former Nazi occupied Europe
- Governments in respect of property taken from foreign embassies in Nazi Europe
- the heirs to Jewish owned collections seized by British and American forces as Enemy Alien Property

Although the facts of each case are different, we will generally not release an artwork which is the subject a credible adverse title claim. Sotheby's has been sued several times by consignors seeking the return of property subject to WWII claims.⁴ As with all other adverse title claims, the key factual issues with WWII era claims include (1) positive identification of the artwork, (2) evidence of pre-WWII ownership, (3) evidence of WWII era involuntary loss and (4) post war restitution or compensation.

The solutions which have been negotiated have ranged from the return of artworks to the heirs of original at one end of the scale to the retention of the artworks with an obligation to share proceeds in the event of sale (but with no obligation to sell) at the other.

Recent examples of resolved provenance issues include:

- the return of an oil painting by Emile C.H. Vernet-Lecomte to the Max Stern estate (the estate's first recovery)
- the return of oil paintings by Jan van der Heyden, Jacob Gerritsz Cuyp and Joachim Beuckelaer, to the heir of Jacques Goudstikker
- the return of a glass and silver gilt tazza to the Schlossmuseum in Gotha

Potential provenance disputes are often resolved by the sale of the artwork concerned and the division of proceeds in a manner which fairly reflects the positions of the current owner and the heirs of the prior owners. In the past 18 months, Sotheby's has sold works of art pursuant to such settlements by artists including Cézanne, Gris, Degas, Sisley, von Brandt, Pissarro and van der Werff.

⁴ For example, see: Sotheby's Sued over Picasso, Bloomberg 4 July 2003 and Will Bennett, The Daily Telegraph, 27 Oct 2003.

Sotheby's is pleased to be able to play a part in the international provenance research community. We regularly receive provenance inquiries from museums, lawyers and collectors. The majority of these inquiries are collegiate in nature and involve an exchange of knowledge as to pre-war collectors and WWII era auction and displacement of art. These we are able to answer fully. We are also delighted share art historical and factual information from the WWII research archive which we have built over the past 12 years to the extent that the information is not commercially sensitive or subject to confidentiality restrictions.

Over the past 10 years, Sotheby's has been an active participant in conferences and seminars on the subject of provenance research and restitution. We have also organized public conferences in the United Kingdom, Israel, the Netherlands and Austria as well as numerous private seminars. This outreach reflects Sotheby's commitment to share in our experience and to publicize the need to conduct thorough provenance research. Sotheby's also supports the digitization of WWII era documents, auction catalogues and restitution records and their publication on the internet.

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