



Taking on art fraud

With the advent of scams executed on the Internet, art law has become a niche for intellectual-property attorneys, but focuses on the tort of fraud

BY ANAYAT DURRANI

Richard Diebenkorn was an American modernist painter in the postwar era. Raised in the San Francisco Bay Area, he followed the California school of abstract expressionism, and is most well-known for his “Ocean Park” series begun in 1967 and extending almost 20 years. Diebenkorn passed away in Berkeley in 1993 leaving behind his legacy as America’s premier 20th century abstract and figurative painter. He was once quoted as saying,

“It is not a matter of painting life, it’s a matter of giving life to a painting.”

In May 2000, a 1952 orange and green Diebenkorn painting took on a life of its own during an eBay auction, attracting a closing bid of six figures, one of the highest bids online for artwork. Except, it wasn’t a real Diebenkorn painting. It was a fake.

When art experts and dealers got wind of the historic eBay auction and the New York Times broke the story on their front page, the scam began to quickly unravel. Eventually it would be discovered

that a lawyer working for the third largest firm in Sacramento was behind the elaborate scheme that took Internet art fraud to a new level.

Lawyer Kenneth Walton said when he started selling art on eBay, “It wasn’t with the intent of doing anything illegal.” An old Army buddy named Ken Fetterman, who had been selling art on eBay for years, introduced him to the concept. Soon they enlisted the help of a third person, Scott Beach, to help boost bidding by placing what is called “shill” bids. In a year of eBay art



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auctions, Walton admits he grossed about \$60,000. Anxious to push his wins even higher, Walton began combing antique sales searching for his next big score.

He came across a “great big wild abstract painting” that resembled Diebenkorn’s style and signed the painting “RD52” to pass it off as authentic. Practicing what he called “the naïve seller strategy,” he pretended he had found the painting at a garage sale in Berkeley and that his wife had put the ugly painting in the garage where his son put a hole in it with his big wheel. With the username “Golfpoorly,” he claimed he knew nothing about art and listed the painting with a close up photo of “RD52” on eBay for 25 cents. With the help of shill bids, the painting skyrocketed to \$135,858. A software executive in the Netherlands was the winning bidder.

But this time the scam went too far. Walton and Beach plead guilty in Sacramento federal court to wire and mail fraud. Court records reveal Walton held more than 250 auctions on eBay, three-quarters of them fraudulent. Walton and Beach were ordered to pay more than \$94,000 in restitution to previous victims of eBay fraud. Walton also forfeited his license to practice law. Interestingly, the feds were unaware the painting was a fake until Walton informed them near the end of the prosecution. After nearly two years as a fugitive, Fetterman was captured in Kansas and was given a four-year prison sentence. Walton documented his experience in his book, *FAKE: Forgery, Lies & eBay*. The case marked the first online shill bidding case that forced mammoth eBay to put forth improved bidding safeguards.

Third highest-grossing in the world

The US Department of Justice lists art crime as the third highest-grossing criminal trade worldwide, behind only drugs and arms. Art and cultural property crime – which includes theft, fraud,

looting and trafficking worldwide – has estimated losses of \$8 billion annually.

The FBI’s Art Crime Team, started in 2004, has 13 special agents, and is supported by three special trial attorneys for prosecutions. The Art Crime Team also runs the National Stolen Art File, a computerized index of reported stolen art and cultural properties for the use of law enforcement agencies worldwide.

The FBI or US Postal Service handles most counterfeit art cases, largely because the fraud is carried out across state lines. Most charges are for mail fraud or wire fraud. However, investigating and prosecuting art forgeries can be difficult because to charge mail or wire fraud, a seller’s intent to deceive the buyer must be proven.

Practice of art law growing

The practice of art law is a growing field among lawyers and encompasses multiple legal practice areas as they apply to the arts. Art law overlaps other areas such as contracts, tax, business law, intellectual property and trusts. Art fraud is a broad term that can include forged signatures of artists and the sale of fake art online to shill bids to the sale of phantom artwork and failure to deliver the artwork.

M.J. Bogatin is a founding member of Bogatin, Corman & Gold based in Oakland and has practiced law in the Bay Area for over 20 years. He has a full-time arts practice covering visual art, performing art, literature, and film and video. While his art law practice does not cover art fraud, he said most litigators could take on this type of case.

“I keep a very limited litigation caseload, and not in fraud which requires ‘clear and convincing evidence’ to obtain punitive damages,” said Bogatin. “But like any fraud case, if all the elements are there, and there is no express caveat emptor ‘as is’ disclaimer, and the claimed provenance had been faked, I figure many litigators would be fully prepared to take such a case.”

Patricia Werner, counsel for Bryan Cave LLP in New York, said that the U.S.

legal system provides many options for dealing with art forgeries. She said defendants can face criminal prosecution under federal laws, including the Racketeer Influenced and Corrupt Organizations Act (“RICO”) and, where applicable, federal wire fraud or mail fraud statutes.

“Defendants may also be prosecuted under state criminal laws that prohibit fraud and forgeries,” said Werner, who posts on the firm’s art law blog. “Art forgery may also be subject to civil sanctions, including liability under the Federal Trade Commission Act and state statutes concerning fraud, material misrepresentation, etc.”

Copyright is the legal right that artists have as it pertains to how their work is used or reproduced. Artwork is protected by copyright as soon as an artist creates it. Copyright protects an artist’s right against piracy or unlawful use and allows for additional income from its reproduction for the artist. Even so, copyright remains a looming problem for artists, particularly online where artwork can be forged, reproduced, and sold.

Thomas G. Field, Jr., a law professor at the University of New Hampshire School of Law said that if a painting is copied and auctioned online, the perpetrator commits forgery and copyright infringement. But if the perpetrator only sells one of their paintings as someone else’s then they commit only forgery. He said both result in civil liability as well as criminal liability. Copyright involves federal law, he said, but forgery is covered by state law and also the federal wire fraud statute if it is sold on the Internet.

“Fraud is something every lawyer knows about, including the availability of punitive damages, costs and attorney fees upon prevailing,” said Field. “The problem is detecting and proving it. Detecting is for the client, and proof for the attorney.”

Using intellectual property laws to prevent art fraud

Joseph Gioconda of Gioconda Law Group, an intellectual property firm in



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New York has represented some of the largest art auction houses in a range of transactions. He has written in depth about how the art world can benefit from other industries in dealing with art forgery by finding creative means of applying intellectual property law. He said that effective legal protections against art forgery are not automatic.

“The responsibility of litigating against an art forger usually rests with the private party who has been injured; institutions or individual rights owners must formally register trademarks and copyrights, and record them with U.S. Customs to receive protection,” said Gioconda, “Once properly protected, current federal trademark and copyright statutes allow intellectual property owners to effect swift seizure and ultimate destruction of illicit goods. In addition, the U.S. Customs Service is legally empowered to detain, seize, and destroy infringing products as they are imported into the country.”

Gioconda said civil litigation typically causes individual plaintiffs to become entangled in Uniform Commercial Code disputes and fraud claims, while class-action litigation has proven rarely successful. He said current legal theories have done little to thwart art forgeries and protect consumers and have left the art community and law enforcement officers with limited legal options other than to warn consumers, “Caveat Emptor” (let the buyer beware).

Let the buyer beware

A large number of limited edition prints by master artists began surfacing for sale in the summer of 1999, sold by select dealers. These included two 1968 Pablo Picasso etchings signed in pencil by the artist and numbered from an edition of only 50 prints, a signed print of the “Eiffel Tower” by Marc Chagall, that was one of 90, a Picasso print drawing called “Francoise Gilot” obtained from Picasso’s daughter. There were also thousands of

prints by Calder, Dali, Warhol, Miro, Lichtenstein, and various well-known artists, many of them signed and numbered, and carrying certificates of authenticity. All of them were fake, and many sold at prices driven up by shill bids on eBay. Some of the artwork was sold for \$50,000 each.

Seven individuals allegedly behind two separate but linked counterfeit art rings that included art dealers in Florida, Illinois, and New York and distributors in Italy and Spain were charged in two indictments. The scheme cost victims in Europe, Canada, Australia, Japan, and the U.S. more than \$5 million. The prints were sold in galleries, at art shows, and through eBay, between July 1999 and October 2007.

Chicago art dealer Michael Zabrin was among the seven people charged in March 2008. Zabrin was charged with selling the prints, and with providing fake certificates of authenticity. Zabrin was the first to be convicted and pleaded guilty to one count of mail fraud. The charge carries a maximum sentence of 20 years in prison and a fine of \$250,000. However, prosecutors said that under federal sentencing guidelines Zabrin’s prison term is more likely in the 10- to 13-year range.

“Due to technological developments such as the Internet, online auction sites, and the ease of international distribution, the number of art forgeries is steeply on the rise,” said Gioconda. “The rarity of criminal prosecutions as well as the lack of severity in sentencing has emboldened opportunistic forgers who are, by nature, sophisticated thieves constantly on the lookout for opportunities to copy anything for a profit.”

In October 2010, James Mobley became the third person to be prosecuted in an art scam that swindled more than 10,000 victims of over \$20 million. From 2002 through 2006, a company called Fine Art Treasures Gallery, duped customers into buying “authentic” art sold

on the company’s satellite television show that they claimed was from estate liquidations all over the world. Mobley served as the on air auctioneer of the program. Husband and wife team Gerald Sullivan, 54, and Kristine Eubanks, 52, were also involved in the scam. They bought the fake and forged art from suppliers, and had printed and signed the forgeries themselves, on behalf of the artists like Picasso, Dali and Chagall. Mobley was charged with two felony counts, which included conspiracy and willful failure to file a tax return. Sullivan and Eubanks were charged with conspiracy, filing a false income tax return, interstate transportation of stolen property and conspiracy to commit wire fraud. Eubanks was given 84 months in federal prison, and her husband received four years in federal prison. As part of the investigation into Fine Arts, federal authorities seized about \$3.8 million from bank accounts controlled by Eubanks and Sullivan, according to the U.S. Attorney’s Office.

“Federal trademark laws can assist the art community against the rapid influx of forgeries, but only if artists and their legal counsel aggressively use them,” said Gioconda. “Utilizing existing trademark law against forgers, collaborating with other industries affected by counterfeit goods, and keeping abreast of new developments in intellectual property law are some of the most effective ways for them to do so.”



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