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Bronze horse figure from Ancient Greece

Sotheby's Seeks Declaratory Judgment Against Greek Repatriation Demands

By: Armen R. Vartian

In what truly deserves the "man bites dog" label it has been given in the art community, Sotheby's has sued the Government of Greece in the U.S. District Court for the Southern District of New York for a declaratory judgment that a bronze horse consigned to Sotheby's for sale belongs to Sotheby's consignors and not to Greece.[1] The lawsuit, prompted by Greece's 11th hour demand that the figure be removed from its scheduled May 14, 2018 sale, upends the typical scenario where the courts are utilized by foreign state claimants to validate those states' claims of title, not to rebut them. The horse figure, while only 14 cm tall, might have an outsize role in reshaping the current climate for sale of antiquities at auction.

Sotheby's complaint alleges that hundreds of bronze horse figures of the type at issue have been owned privately or in museum collections "for decades, if not centuries", but that to Sotheby's knowledge Greece has never laid

claim to any of them or attempted to stop them from being sold. Sotheby's alleges that the particular piece they were trying to sell had been purchased by the parents of its consignors in 1973 from British antiquities dealer Robin Symes, after having previously been sold at auction at least once, in 1967. This particular bronze horse was "featured, depicted and described" in a 1989 scholarly work on the subject of Geometric Period bronze horses, and Sotheby's claims its existence and ownership was never concealed. Sotheby's began marketing the bronze horse in early-February 2018, posted videos and photographs of it in mid-April 2018, and published the full auction catalogue on April 25, 2018. Despite ample notice, Sotheby's claims that its first indication that the Greek Government was asserting a claim was a letter received by email from the Greek Ministry of Culture on May 11, 2018 and captioned "URGENT".

According to the complaint, the letter asserted that the bronze horse was stolen Greek property, and contained a demand that the horse be withdrawn from the auction for repatriation to Greece, as well as a threat that anyone involved with selling the horse would be subject to criminal prosecution in Greece. While Sotheby's claims that Greece's demand letter "did not set forth any factual or legal basis for Greece's claim that the Bronze Horse constitutes stolen property that belongs to Greece", the letter apparently emphasized that the provenance includes Symes, who was implicated beginning in 2005 in widespread sales of looted antiquities. Sotheby's impliedly accepts that Symes' involvement might raise doubts, but states that the prior (1967) sale of the bronze horse rebuts any assertion that the piece was part of Symes' documented sales of looted property "decades later". The letter apparently also referred to allegations that the bronze horse was exported illegally from Greece, based on the lack of any record in Greece's archives "to prove that [the bronze horse] has left the country in a legal way." Finally, Greece's letter also made references to the 1970 UNESCO Convention, of which Greece became a signatory in 1981 and which came into force for the US in April 1983 with the enactment of the Convention on Cultural Property Implementation Act (CPIA), and the Memorandum of Understanding between Greece and the US, which took effect in July 2011. Sotheby's asserts the indisputable proposition that the bronze horse had left Greece before the effective dates (for Greece and the US) of either the UNESCO Convention or the Memorandum of Understanding.

Sotheby's estimated the bronze horse at $150,000-$250,000, but it's likely the lawsuit isn't about this particular piece as much as it is about establishing the burdens of proof in repatriation cases. The complaint points out that Greece's demand letter "provided no information as to when the Bronze Horse was discovered in Greece, when it was supposedly stolen, who stole it, the circumstances under which it was stolen, when it was removed from Greece, or by whom it was removed from Greece." More controversially, Sotheby's alleges that "as federal law makes clear, the absence of proof that an antiquity has been lawfully exported does not and cannot constitute proof that the antiquity has been stolen in violation of a foreign patrimony law". This latter assertion is problematic to the extent that it is meant to apply beyond the facts of this case, where there is good evidence that the bronze horse left Greece before there were any legal prohibitions that could be applied in the US, and at a time when the Symes connection probably should not be fatal to title claims.

Sotheby's apparently hopes that its declaratory judgment strategy will force Greece, and perhaps Italy, Turkey and other countries as well, to more carefully consider their demands on antiquities being sold in the US, and to proceed only where there is little to no evidence as to when the items left their countries of origin, or at least some credible evidence that they were stolen property. If the federal district judge takes the position that title is presumably in the possessor of an item, and that foreign countries asserting superior title must prove it, a cloud of sorts will have been lifted from many sectors of the art marketplace. However, many items of antiquity do not have the detailed and bulletproof provenance of this bronze horse, and the Memoranda of Understanding between the US and the aforementioned countries provide essentially for a reversal of Sotheby's asserted burdens of proof when items are imported into the US. The mere appearance of an item on a category list enables US Customs to seize the item, following which the importer may establish its provenance. The Fourth Circuit has ruled, in a case involving ancient coins, that the absence of evidence regarding particular coins will result in repatriation if the coins are of a type listed in the Memorandum of Understanding. This, of course, is the result of diplomatic imperatives as well as the real history of looting in some parts of Europe and the Middle East. This lawsuit will not change those realities, however much that might be desirable, and so it is more likely than not that the case of the bronze horse will decide only the fate of the bronze horse, and nothing else.♦

Greece's demand letter "provided no information as to when the Bronze Horse was discovered in Greece, when it was supposedly stolen, who stole it, the circumstances under which it was stolen, when it was removed from Greece, or by whom it was removed from Greece."

[1] *Barnet et al. v. Ministry of Culture and Sports of the Hellenic Republic*, No. 18-cv-4963 (KPF).

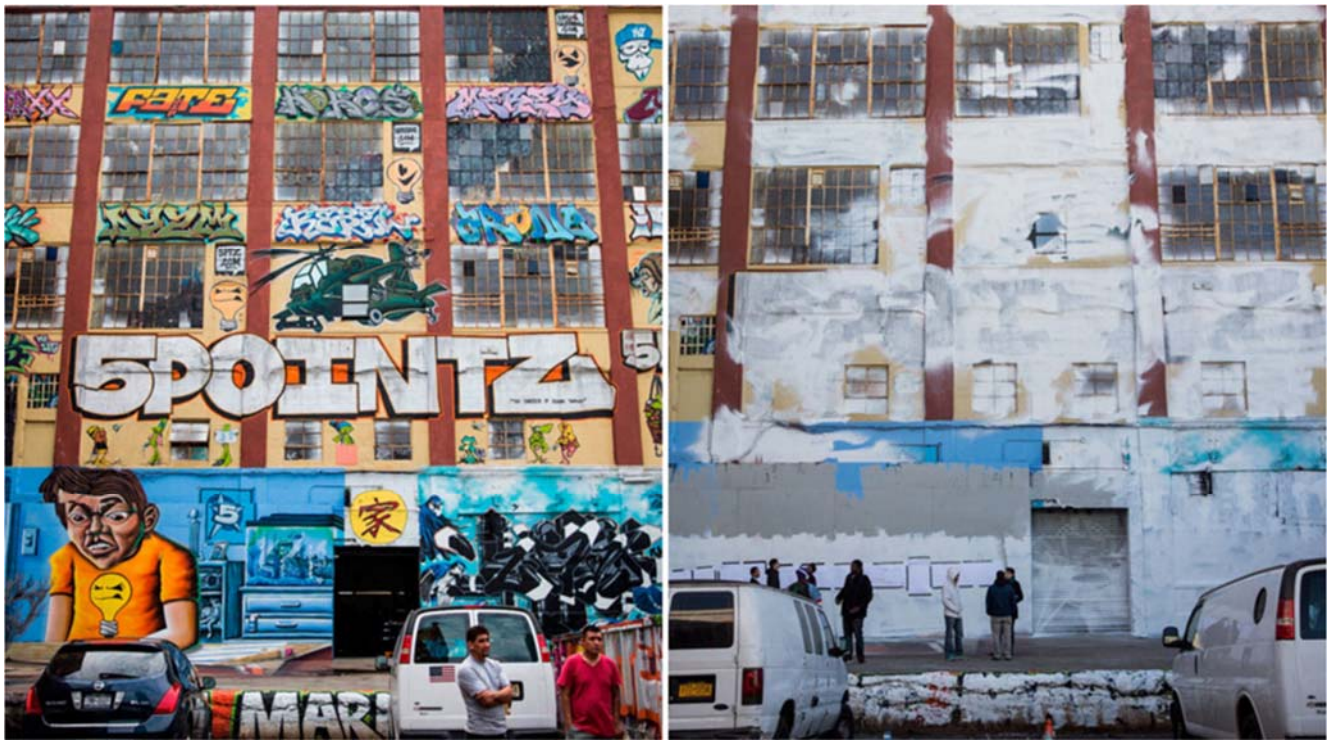
Five Points on 5Pointz

By: Amelia L.B. Sargent[1]

On February 12, 2018, following a three-week trial before an advisory jury, the latest chapter in the notable 5Pointz litigation came in the form of a landmark decision: The court awarded 21 aerosol artists a total of $6.7 million in statutory damages for willful violation of the Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. § 106A against defendant real estate developer Gerald Wolkoff and four of his real estate entities.

Wolkoff and his entities own the derelict warehouse space known since 2002 as 5Pointz, and had allowed graffiti artists to paint there since the 1990s. Thus, 5Pointz had gained recognition as a prominent tourist attraction—"an aerosol-art mecca, the backdrop to a thousand selfies."[2] In 2013, Wolkoff sought to develop the site into luxury condominiums, sparking the current clash with the artists who had made 5Pointz their artistic home.

Grassroots efforts to "Save 5Pointz!" were mobilized. A group of artists brought a VARA claim against Wolkoff. Then—after a preliminary injunction was denied, but *without* waiting for the Court's written opinion or reasoning, and *without* providing plaintiffs with VARA's ninety-day mandatory written notice of "intended action affecting the work of visual art" (*see* 17 U.S.C. § 113(d)(2)(A)-(B))—Wolkoff had the entire building white-



5Ponitz before and after whitewashing

washed at night, in secret, and in what the Court subsequently described as "an act of pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the destruction of their art." *Cohen v. G&M Realty, L.P.*, Case No. 13-CV-05612, 2018 WL 851374 (E.D.N.Y. Feb. 12, 2018) (hereinafter "*Cohen*").

Plenty of commentators have remarked on the decision and what it means—for street art, for developers, and for VARA.[3] But does the 5Pointz decision come out of legal left field? Viewed along the following points, the 5Pointz decision largely tracks trends in VARA enforcement and tried-and-true litigation tactics.

VARA Protects "Temporary" Works.

Street art is fundamentally evanescent. Works are painted over, defaced, or subject to the decaying elements of nature. But the fact that a work is *inherently* temporary does not automatically render it unprotectable under VARA. The 5Pointz Court found various provisions of VARA contemplated temporary works, reasoning that any work that is removable is in some way temporary. *Cohen*, *9-10 (referring to 17 U.S.C. § 113(d) and 17 U.S.C. § 106A(c)(1)).

For further support, the Court also looked to the Copyright Act's "fixed in a tangible medium of expression" standard. *Cohen*, *10 (citing 17 U.S.C. § 101). This analogy to copyright has its own VARA precedent—in *Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011), the Seventh Circuit affirmed that Chapman Kelley's living garden *Wildflower Works* was *not* eligible for VARA protection because, among other things, it lacked the fixation required by the Copyright Act (since, as a garden, it was always growing and changing). *Id.* at 304-305. This minimum "fixation" standard ensures that even the most transient of aerosol art works can be eligible for protection if they meet the other requirements of VARA.

Aerosol Art Can Have "Recognized Stature".

In its first 5Pointz decision, the Court determined aerosol art constituted "visual art" under VARA and cautioned defendants that they would be "exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs' works were of 'recognized stature.'" *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 227 (E.D.N.Y. 2013).

While finding any aerosol art to be "of recognized stature" might seem culturally dissonant to some, the 5Pointz plaintiffs established "recognized stature" in the most traditional of ways: presenting a curated set of works supported by thorough artists' folios and expert testimony.

5Pointz itself was curated by Jonathan Cohen, described by the Court as "one of the world's most accomplished aerosol artists." *Cohen*, *5. Each artist submitted folios that "covered the highlights of their careers, as well as evidence of the placement of their works at 5Pointz in films, television, newspaper articles, blogs, and online videos, in addition to social media buzz." *Cohen*, *12. And plaintiffs' "highly qualified expert," a certified art appraiser, former head fine art expert at Chubb Insurance and an art professor at New York University, "provided detailed findings as to the skill and craftsmanship of each of the 49 works, the importance of 5Pointz as a mecca for aerosol art, the academic and professional interest of the art world in the works, and her professional opinion that they were all of recognized stature." *Id.* In other words, the plaintiffs established "recognized stature" for their works in precisely the same way as an artist would do for any painting or sculpture under VARA.

Aerosol Art On Buildings Is "Removable," Not Site-Specific.

Importantly, the artworks at issue in 5Pointz were 49 individual works painted on the site, *not the site itself.* The plaintiffs asserted through their expert conservator that removal of aerosol art from the walls of buildings was feasible and had been done, and that all 49 could have been removed, either by the artist him or herself (in whole or in part) or by a conservator and contractors. *Cohen*, *16. Thus, whether VARA protects "site-specific" art, as discussed in *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006) and *Kelley v. Chicago Park District*, is still

unresolved.

VARA's Statutory Penalties Have Teeth.

VARA imports the Copyright Act's statutory damages scheme, which allows up to $150,000 per work in cases of willful infringement. Both the advisory jury and the Court found that Wolkoff had acted "willfully" in deliberately whitewashing 5Pointz in the middle of the night, in the middle of the lawsuit. The Court was most clear: All Wolkoff would have had to do is give the plaintiffs 90 days' notice to allow them to remove the art, and he could have avoided violating VARA.

In awarding the maximum amount of damages for each of the 45 works found to have "recognized stature," the Court ruled that the "deterrent effect" of the award was "perhaps the most important factor in this case." "Without a significant statutory damages award, the preservative goals of VARA cannot be met." *Cohen*, *19.

Don't Disrespect the Process.

But the Court's award also demonstrated a truism of trial practice: Credibility is key. The Court was clearly troubled by Wolkoff's disrespect for the judicial process, both in willfully violating VARA and in behaving as a "difficult witness" who was "argumentative" to the point that the Court threatened to hold him in contempt during trial. *Cohen*, *6. The Court drew a striking parallel when it commented that Wolkoff "was bent on doing it his way, and just as he ignored the artists' rights he also ignored the many efforts the Court painstakingly made to try to have him responsively answer the question posed to him." *Cohen*, *18. This parallelism permeates the opinion, which describes Wolkoff's "callous[]" testimony, his "recalcitrant" behavior, his "insolence," and his being "singularly unrepentant" that "his thoughtless act violated the law and had a devastating impact" on the plaintiff artists. *Cohen*, **17-19.

By contrast, the Court found the plaintiffs "conducted themselves with dignity, maturity, respect, and at all times within the law." *Cohen*, *19. In this way, plaintiffs' trial strategy successfully flipped the script on perceptions of graffiti artists—and netted the artists their big win.♦

[1] Willenken, Wilson, Loh & Delgado LLP

[2] Justin Davidson, *Artists Won the 5Pointz Case, But the Decision Was Terrible for Art, New York Magazine*, Feb. 13, 2018, http://nymag.com/daily/intelligencer/2018/02/artists-won-at-5pointz-but-the-decision-was-terrible-for-art.html.

[3] *See* Eileen Kinsella, After 5Pointz, Can Artists and Developers Ever Work Together Again? Experts Lay Out the Way Forward, ArtNet News, March 7, 2018, https://news.artnet.com/art-world/5pointz-graffiti-art-vara-lawsuit-1234652; Greg Howard, *Graffiti Gets Paid at 5Pointz. Now What?*, New York Times, Feb. 20, 2018, https://www.nytimes.com/2018/02/20/nyregion/graffiti-artists-5pointz.html; Justin Davidson, *Artists Won the 5Pointz Case, But the Decision Was Terrible for Art, New York Magazine*, Feb. 13, 2018, http://nymag.com/daily/intelligencer/2018/02/artists-won-at-5pointz-but-the-decision-was-terrible-for-art.html.

A Win for Authentication Committees – Mayor Gallery Ltd. v. Agnes Martin Catalogue Raisonné LLC

By: Laura Tiemstra

Agnes Martin at work

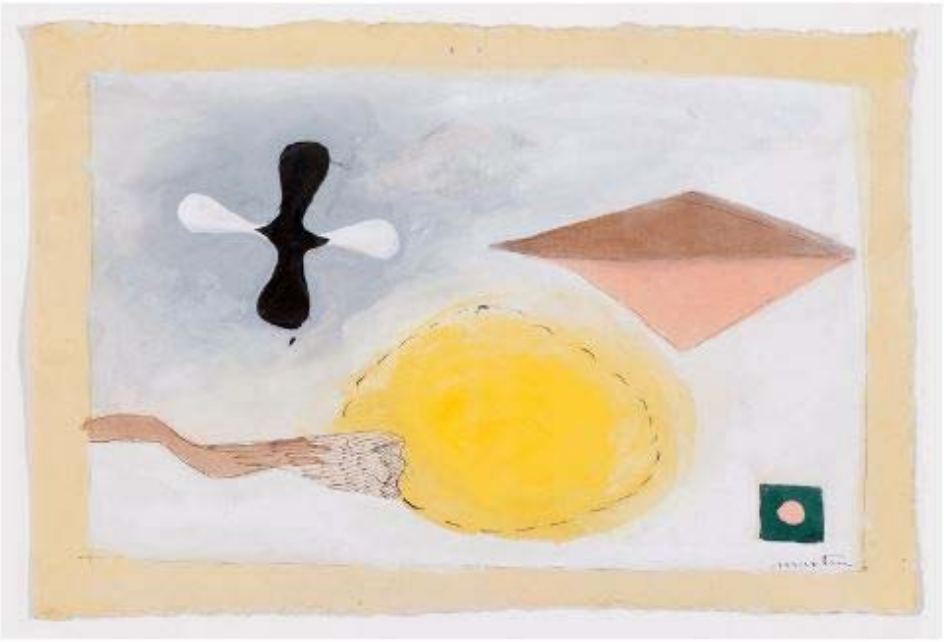
On April 5, 2018, the New York State Supreme Court, Commercial Division, entered a judgment dismissing an art gallery's claims against a committee of experts who refused to authenticate certain works sold by the gallery.[1] In dismissing the claims, the Court relied significantly on the terms of the written service agreement entered into between the parties, demonstrating the value of requiring such an agreement.

A "catalogue raisonné" is a record of artworks that have been authenticated by a collection of experts as being authentic pieces by a specific artist. Works included in the catalogue raisonné are generally accepted in the market as genuine and, conversely, serious doubts extend to works that are submitted to the designated experts for inclusion in the catalogue raisonné but are refused.

Agnes Martin Catalogue Raisonné (AMCR) is the committee of experts who create and maintain the catalogue raisonné for the abstract expressionist and minimalist artist, Agnes Martin. The Plaintiff in this action, The Mayor Gallery ("Mayor"), sold 13 works it believed to be by Agnes Martin; three customers purchased one work each, and the remaining 10 works were all sold to one customer. After purchasing the works, the four customers submitted the works to AMCR for inclusion into the Catalogue of Martin's work. For every work that was submitted to AMCR for consideration, the submitter signed a service agreement provided by AMCR. AMCR refused all 13 works.

Refusal to add a work to the Catalogue, in effect, constitutes an opinion that the works are inauthentic. Thus, upon refusal of the 13 works, Mayor faced rescission of the sales pursuant to its warranty of authenticity (two of which have already been returned). Mayor itself then submitted one of the returned works ("Day & Night") to AMCR, seeking reconsideration of the earlier refusal; AMCR again refused to include the work in the Catalogue. Mayor continued to contest the refusals, asking AMCR to release details of its decisions, including the names of the individual experts who opined on the works.

AMCR refused to engage with Mayor's attempts to dispute their decision, and in January 2017, Mayor initiated a lawsuit for $7.2



Day & Night

million (the combined sales prices of the 13 works). Mayor asserted claims for disparagement and negligent misrepresentation of the 13 works, tortious interference with the rescinded sales as well as prospective future sales with those customers, gross negligence and breach of contract in the consideration of those 13 works for inclusion in the Catalogue, breach of good faith and fair dealing for refusing to reconsider the 13 works, and violation of General Business Law §349, New York's deceptive practices statute.

Mayor also named the individual members of AMCR as defendants in the lawsuit. Such is a nightmare scenario for authenticity experts everywhere; that giving an opinion could result in being held liable for the value of an artwork worth millions. The court put these fears to rest, however, because in order to pursue claims against individual defendants, there must be specific allegations that those individuals acted beyond the scope of their employment. Because opining as to the authenticity of the works was fully within the scope of the individual members' employment for AMCR, they could not be sued in a personal capacity. Therefore, all claims against the individual experts were dismissed.

Despite the fact that, for all but one of the 13 works, there was no agreement between Mayor and AMCR, Mayor attempted to argue that AMCR's position as experts in the realm of Agnes Martin work created a duty owed to the public (of which Mayor was a member) sufficient to support Mayor's claim of gross negligence in AMCR's refusal of all 13 works. The Court was not persuaded, finding that "art expertise alone cannot create a special relationship."[2]

Significantly, the Court relied on the written service contract AMCR requires parties enter into when submitting a work for inclusion in the Catalogue, despite Mayor's protestations that the contract was non-negotiable, i.e., a contract of adhesion. This agreement contains language that grants AMCR sole discretion as to when and how it will evaluate submitted artworks. Further, the Court held that, under the terms of AMCR's service contract, AMCR is not required to turn over any information about its determinations beyond whether it accepts or declines the work, and does not have to grant the submitters an opportunity to rebut AMCR's decision.

Based on AMCR's agreement, the Court found that neither AMCR's alleged improper examination of the works nor its failure to engage in Mayor's requested reconsideration of the 13 works could serve as grounds for claims against AMCR. On this basis, the Court dismissed Mayor's claims for gross negligence and breach of implied duty of good faith.

Similarly, the Court found that Mayor's allegations of malice (necessary for product disparagement claims), intent to interfere with the existing sales contracts, and use of wrongful means (actions that are independently criminal or tortious) to interfere with prospective business, were all conclusions arising from AMCR's refusal to reconsider the 13 works and release details of its decisions. The Court therefore dismissed the remainder of Mayor's claims.

And finally, the Court enforced the attorneys' fees provision in the AMCR agreement (the language of which expressly extended to "AMCR Personnel"), awarding all Defendants their attorneys' fees and costs in defending the Action. The attorney's fees award, which experts consider unprecedented in this type of case, may deter future unhappy submitters from taking their grievances to the courts, and certainly improves the environment for authentication committees generally.♦

[1] *The Mayor Gallery Ltd. v. The Agnes Martin Catalogue Raisonné LLC, et al.*, No. 655489/2016, 2018 WL 1638810 (N.Y. Sup. Ct. Apr. 5, 2018).

[2] *Id., citing Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y. 3d 173, 181 (2011).

Auction Houses as Regulated Institutions—EU's Fifth Money Laundering Directive

By: Lauren Bursey

On April 19, 2018, the European Parliament announced that it had voted to adopt the proposed Fifth Money Laundering Directive (5AMLD), finalizing a legislative process that had begun in July 2016. The agreement amends the current EU Directive (4th AMLD), passed in June 2015, which aims to counter the use of the financial system for the purposes of money laundering or terrorist financing through an "efficient and comprehensive legal framework."[1] 4AMDL has not yet been fully adopted by all member countries, but subsequent global events, including terrorist attacks and the rise in digital currencies as alternative financial systems, have demonstrated the need for an update to the framework. Member of European Parliament Judith Sargentini, who was a co-negotiator of 5AMLD on behalf of the European Parliament, advocated that 5AMLD "gives a clear answer to the problems identified in the Panama Papers and the Paradise Papers."[2] The Panama Papers, referring to the 2016 leak of 11.5 million files from the Panamanian law firm Mossack Fonseca, detailed the ways in which offshore shell companies are used to store and transfer assets outside of legal regulations. Art was one of the assets at issue, as the Panama

Papers demonstrated the extensive secrecy around the true ownership of art, and art's possible use as an asset to evade taxes and launder money.

5AMLD amends Article 2(1) of the 4th AMLD, which states the entities to which the AMLD applies by adding, among others, "persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to €10,000 or more."[3] It also adds "persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by freeports, where the value of the transaction or a series of linked transactions amounts to €10,000 or more."[4]The European Parliament also added to the list in Annex III of products, services, transactions or delivery channels that have a potentially higher risk of terrorism or criminal activity. It now includes transactions related to "oil, arms, precious metals, tobacco products, *cultural artefacts and other items of archaeological, historical, cultural and religious importance, or rare scientific value, as well as ivory and protected species.*"[5] When dealing with cases of high-risk or legal entities established in high-risk third countries, member states are required to apply "enhanced customer due diligence" measures to manage and mitigate the risks.[6] This requirement will apply in particular to art galleries and auction houses which deal in antiquities from the Middle East, where the sale of artefacts is believed to help fund terrorist activities (most notably ISIS).

The Directive prescribes further cooperation and the sharing of information across national borders of the European Union, especially among intelligence units, financial services institutions, and now auction houses and art galleries. The hope is that this access to information will ensure that flows of money can be properly traced, and illicit networks can be traced at an early stage. In addition, member states must put in place mechanisms to ensure that information on beneficial ownership in the registers of companies and trusts is "adequate, accurate and current." While it is unclear at this time what "mechanisms" will be put in place, this law will certainly be controversial in the art world. Despite efforts at reform, the art market is renowned for its secrecy in both its transactions and ownership of art. Indeed, the Panama Papers revealed, in one such example, that a collection of modernist works assembled by Victor and Sally Ganz and sold at Christie's for a landmark price in 1997 was not actually sold by their family, but rather by British financier Joe Lewis, who had secretly bought the collection months prior.[7] Art advisers believe that the public bid such a high price because they were swayed by the provenance of the collectors, which provided its own guarantee of authenticity. 5AMLD's amendment to require auction houses to disclose the ownership of the pieces they are selling may negatively affect the price that artworks and antiquities are able to fetch. Nonetheless, if "mechanisms" is defined to be merely civil and criminal offences, then terrorists are unlikely to be deterred from providing false information, since such consequences already exist for their other continuing activities.[8]

The art market has time to figure out how this new law will operate and give collectors a chance to plan ahead, however. 5AMLD's introduction will be staggered over two to three years, with the interconnected Central Platform of registers of companies and trusts not tasked to take effect until early 2021. Whether the law will have a chilling effect on the art market remains to be seen. ♦

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[1] *Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC*, European Parliament and the Council of the European Union (Dec. 19, 2017).

[2] Anti-Money Laundering Europe, *Agreement on 5th Anti-Money Laundering Directive* (Dec. 2017), http://www.amleurope.com/index.php/news-2/78-agreement-on-5th-anti-money-laundering-directive.

[3] *Id.* at 26.

[4] *Id.*

[5] *Id.* at 65.

[6] *Id.* at 7.

[7] Scott Reyburn, *What the Panama Papers Reveal About the Art Market*, The New York Times (April 11, 2016).

[8] David Dorgan et al., *UBO Register of Trusts: The EU's 5th Anti-Money Laundering Directive*, Appleby Global LLC (Mar. 14, 2018).

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