



Stacey Gannon

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The Museum of Modern Art, Egon Schiele and Issues of Borrowed Art

Looting during the World War II-Nazi Era set an unprecedented amount of art works in motion. It has been estimated that millions of works of art and cultural artifacts were misappropriated between 1933 and 1945.¹ After World War II, many of these works were restituted to their proper owners or their heirs. However, many other works were not found or not returned, for various reasons. Recently, several museums in the U.S. have faced claims regarding World War II loot. Most of these claims have involved works held in the museum's possession. However, one of the more complex cases involved two Egon Schiele paintings on loan at the Museum of Modern Art (MOMA) in New York. This case had a profound impact on not only the museum and art communities, but affected the legal world as well. In the wake of this case, the museum community produced guidelines for handling loaned works and New York State changed a law that had been on the books since 1968.

¹ Kelly Diane Walton, "Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art" Fordham Intellectual Property, Media & Entertainment Law Journal, 9 Fordham I.P. Media & Ent. L.J. 549, Winter 1999.

This case, commonly called the “Schiele case” involved complex issues that have had serious implications for the museum community. At its core were two paintings, which were looted by Nazis during World War II. The case involved questions regarding the protection of borrowed art, the moral responsibility of museums to check the provenance of works which are merely on loan, and the liability of museums should the loaned works turn out to be stolen property. The legal case itself dragged for two and a half years, first in the New York State courts and then in Federal court.

This case encompassed many aspects of Holocaust-era claims. As with many of these cases, there was the current owner, who claimed he made a good faith purchase when he bought the works. There were the claimants, trying to prove they were the legitimate heirs to works with murky provenance. The added twist to this case was that the works did not belong to the museum to which the claims were made. The case of the two Schiele paintings instead involved works in the museum on loan, and raised important issues that the museum community needs to face.

The Original Claims:

Between October 13, 1997 and January 4, 1998, the MOMA exhibited a collection of works by the Austrian Expressionist Egon Schiele. “Egon Schiele: The Leopold Collection” was a traveling collection on loan from the Leopold Foundation in Austria. The foundation is an Austrian government financed, privately run organization, created out of the private collection of Dr. Rudolf Leopold. Prior to exhibition at the MOMA, the collection had been shown all over the world, including museums in London, Munich and Japan. Ironically, the show originally was not scheduled for exhibition at the MOMA. The museum canceled a planned exhibit of post-war European art due to

expense, and picked up the Schiele show to fill in the slot. Due to this change in plans, there was a very short lead-time for the MOMA to prepare for the exhibition.²

The Schiele exhibit ran for the three months in New York, and after closing was to move to the Picasso Museum in Barcelona, Spain. All did not go as planned though. On December 31st, the MOMA received a letter from Henry Bondi of Princeton, New Jersey. Bondi was the nephew of Lea Bondi Jaray, who had been the pre-World War II owner of one of the works in the show, “Portrait of Wally”. Henry Bondi, representing the heirs to Lea Bondi, claimed rightful ownership of the work.³ The MOMA received a second letter that day, this one from two sisters-in-law, Katherine and Rita Reif, who claimed to be the rightful owners of another work in the show, “Dead City III”.⁴

Both families claimed that the two paintings had been taken from their rightful owners by the Nazis during the Holocaust and never properly restituted. The families wrote that they were willing to discuss options to resolve the matter, but the paintings had to remain at their present location at the MOMA during any discussions.⁵ The MOMA responded to the families that the museum would look into the matter. Then on January 3rd, the MOMA sent letters to the two families saying that although they were sensitive to the issues “...the Museum is under a contractual obligation to return the paintings to the lender.”⁶ In these letters, the MOMA informed the claimants that the museum would be

² Judith Dobrzynski, “The Zealous Collector – A Special Report: A Singular Passion For Amassing Art, One Way or Another” The New York Times, December 24, 1997, Section E, Page 1.

³ Letter from Henry Bondi to Glen D. Lowry, MOMA, Exhibit C, Affidavit of Glen D. Lowry, In Re Application to Quash Grand Jury Subpoena Served in the Museum of Modern Art.

⁴ Letter from Katherine and Rita Reif to Glen D. Lowry, Exhibit D, Affidavit of Glen D. Lowry, In Re Application to Quash Grand Jury Subpoena.

⁵ Letters from Henry Bondi to Glen Lowry, Exhibit C and Letter from Katherine and Rita Reif to Glen Lowry, Exhibit D Affidavit of Glen Lowry, In Re Application to Quash Grand Jury Subpoena.

⁶ Letters from Steven C. Clark, MOMA to Henry Bondi and Katherine and Rita Reif, Exhibit F, Affidavit of Glen D. Lowry, In Re Application to Quash Grand Jury Subpoena.

returning the paintings with the rest of the collection on January 8th, allowing the claimants the few days between to take whatever actions they deemed necessary.

MOMA notified the Leopold Foundation of the claims on the works. On January 7th, the Foundation proposed forming an impartial tribunal to examine the claims and make a determination on ownership.⁷ This offer was premised on the belief that the works would be in the possession of the Foundation during the examination. The claimants though, were concerned over a statement released by the Foundation that said, “The Leopold Museum, together with the Austrian National Gallery, has examined all available documentation in conjunction with “Dead City” and “Portrait of Wally” and to the best of its knowledge the Leopold Museum has true ownership.”⁸ The claimants insisted that in order to insure that the tribunal was impartial, the works had to be left in the United States during the process.

The Schiele Case, Part I: The New York State Case:

To this point, though the events were rather unusual, nothing earth shattering had occurred. The next step that was taken however, would cause serious disturbances in the art and museum worlds. Late in the day on January 7th, the Manhattan District Attorney, Robert Morgenthau stepped in and subpoenaed “Portrait of Wally” and “Dead City III” as evidence in a grand jury investigation.⁹ The subpoena had an immediate and jarring impact on the unfolding events. The MOMA now could not return the two paintings to the Leopold Foundation. This action angered the Austrians, and derailed any possibility of resolving these claims by an impartial tribunal. As the rest of the paintings in the

⁷ Judith Dobrynski, “District Attorney Enters Dispute Over Artworks” The New York Times, January 8, 1998, Section B, Page 1.

⁸ Ibid.

Schiele exhibit were returned to the Leopold Foundation as planned, “Portrait of Wally” and “Dead City III” remained behind, in storage at MOMA.

Central to this controversy, was the idea that museums have an obligation to return borrowed works to their owners. The MOMA moved to quash this subpoena by relying on New York State law. When this case came about New York had a broad statute enacted in 1968, which provided protection from seizure for works in New York for the purpose of non-profit exhibition. The statute, section 12.03 of the Arts and Cultural Affairs Law (ACAL) reads in part:

No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is enroute to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state.¹⁰

This is an automatic protection from seizure covering any work originating from outside New York that is on loan for exhibition in New York. The loan does not have to be international, but merely from outside of New York State. Additionally, there is no application process involved in getting immunity from seizure from the ACAL. The MOMA insisted that the subpoena constituted seizure, and that the works, having been in New York as part of a non-profit exhibition were protected under the ACAL, and moved to quash the subpoena.

Furthermore, the museum argued that the subpoena would have a devastating effect on the exhibition of art in New York. Were the subpoena upheld, the museum asserted it would create a loophole in this broad New York statute, causing owners to be

⁹ Exhibit A to the Affidavit of Glen Lowry In Re Application to Quash Grand Jury Subpoena.

¹⁰ New York Arts and Cultural Affairs Law, Section 12.03, enacted 1968.

unwilling to lend their works to New York institutions, for fear that the works would be seized.¹¹ Most exhibitions are assembled using objects on loan from other owners.

These owners will not lend their objects without the assurance that the object will be safely returned. If the DA's subpoena were upheld it could potentially destroy lenders' confidence in the loan process and scuttle museum exhibitions.

The DA countered that the works were part of a criminal investigation, and as such were not protected by the anti-seizure law. The District Attorney stated that the subpoena was appropriate because, "The Grand Jury is investigating whether specific paintings were stolen by a Nazi agent or collaborator just before World War II, and if so whether the stolen property was, very recently, possessed in New York County in violation of Article 165 of the Penal Code."¹² This Article 165 applies to the knowing possession of stolen property. It was not entirely clear however, who exactly was being investigated. The paintings had been stolen sixty years ago on another continent, and the people involved in the theft are long since dead. The present owner had nothing to do with the original crime. Even if the Leopold Foundation had knowledge that the works had been stolen, as an Austrian entity, the Foundation would be outside the jurisdiction of a New York grand jury investigation. The only New York institution involved was the MOMA, who had no knowledge that the works had been stolen. Whether they should have known that these were tainted works will be discussed later in this paper.

The DA countered the MOMA's claim that the subpoena would devastate the loan process for museums by pointing out that the MOMA chose not to apply for anti-seizure protection under the federal statute. The Immunity from Seizure Act, enacted in 1965

¹¹ Memorandum of Law in Support of the Museum of Modern Art's Application to Quash the Grand Jury Subpoena, January 22, 1998, p.3.

gives anti-seizure protection to international loans in the United States for the purpose of non-profit exhibition. The statute requires that the loan be "...of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest."¹³ Unlike the New York State statute, which is automatic, the federal statute requires an application to the United States Information Agency, which is now a part of the State Department. While these applications are rarely turned down, the application process is time-consuming, and in the case of New York, duplicative of a law that is already on the books in that jurisdiction.¹⁴ Therefore, New York museums had rarely applied for the Federal statute, instead choosing to rely on state protection. In the three years prior to this lawsuit, the MOMA had applied for the federal statute for only four of the eighty-nine exhibitions that it held.¹⁵ As it turned out, it would have been worthwhile for the MOMA to apply. Even DA Robert Morgenthau conceded that he could not have subpoenaed the paintings if the MOMA had the protection of the federal statute.¹⁶

Fallout in the Museum World

The seizure of the two paintings by the Manhattan DA had an immediate and profound effect on the museum community. Owners lend their works based on the promise that the works will be safely returned at the appropriate time. The seizure of the Schiele paintings threw that idea into limbo; suddenly the assurance that works will be

¹² Memorandum of Law In Opposition to the Museum of Modern Art's Motion to Quash the Grand Jury Subpoena, February 13, 1998, p. 3.

¹³ Immunity from Seizure Act, 22 U.S.C. 2459.

¹⁴ Ronen Sarraf, "The Value of Borrowed Art" Brooklyn Journal of International Law 25 Brooklyn J. Int'l L 729. The author of this article asserts that in the past twenty years, only one application has been denied, that being in 1980 when a collection from the Hermitage Museum in the Soviet Union was to be exhibited in the U.S.

¹⁵ Affidavit of Glen D. Lowry, Memorandum of Law in Support of the Museum of Modern Art's Application to Quash the Grand Jury Subpoena, January 16, 1998 p. 7.

¹⁶ Judith Dobrzynski, "Already, Schiele Case is Reining in Art World", The New York Times, January 10, 1998, Section B, Page 7.

returned was no longer concrete. This deeply disturbed both lenders and museums, and caused immediate reactions. The clearest reaction involved the MOMA itself. The MOMA had an exhibition of the works of Pierre Bonnard scheduled to open in June 1998. Two lenders pulled their works from the show after the Schiele seizures. One of the owners specifically referred to the Schiele situation in his withdrawal writing, “The news of the arrest of the two Schiele paintings in your museum made me very anxious and unsure, and you will certainly understand that I’m not in a position to lend you my painting under such circumstances.”¹⁷

On the flip side of the withdrawals from the Bonnard show at the MOMA, the Metropolitan Museum of Art planned on lending three dozen works of Paul Klee to Germany to be exhibited in the National Gallery in Berlin, beginning June 24, 1998. Before sending the works though, the Met reviewed their provenance records more closely than they had in the past. During the review, the Met discovered that two of the works were listed as having been in museums in Essen and Mannheim, Germany prior to World War II. One of the two works had been confiscated by the Nazis during World War II. The Met contacted the museums, informing them of this discovery. Both museums stated that they had no claims to the works and the loan proceeded as planned.¹⁸

Issues of Provenance Research

The DA’s seizure of “Portrait of Wally” and “Dead City III” brought several issues to the forefront of the museum community. First, there was the issue of provenance research. Issues regarding provenance research were nothing new. Other

¹⁷ Judith Dobrzynski, “Lenders Pull Two Bonnards from a Show at the Modern” The New York Times, April 29, 1998, Section E, Page 1.

claims regarding works looted during the Holocaust had already appeared at other museums. Discussions about a museum's responsibility to research the provenance of their own collections were ongoing at the time. The Schiele case though, raised questions about the responsibility of museums to check the ownership history of objects they had merely as loans. How much research would be enough? In the past, particularly in the case of canned exhibitions such as the Schiele show, which had been widely viewed, it was assumed that any questions regarding the works had already been answered. As Glen Lowry, Director of the MOMA stated, "We had no reason to believe that there was any cloud on the paintings' past. Both of the pictures had been exhibited around the world for decades, and both had been reproduced frequently in books."¹⁹

Advice regarding the provenance research question came from two of the major American museum organizations. The seizures had affected not only the individual institutions, but they prompted the American Association of Museums (AAM) and the Association of Art Museum Directors (AAMD) to take action. In January of 1998, in response to several high profile Nazi loot cases, the AAMD formed a task force to look into the issues involving museums and art looted during World War II. In June of 1998, the AAMD released the *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945)*. It is no coincidence that the guidelines contain a section on loan procedure. The relevant section in the AAMD report reads:

1. In preparing for exhibitions, member museums should endeavor to review provenance information regarding incoming loans.

¹⁸ Judith Dobrzynski, "Lenders Pull Two Bonnards from a Show at the Modern" The New York Times, April 29, 1998, Section E, Page 1.

¹⁹ Statement of Glen D. Lowry Before the House Banking and Financial Services Committee, February 12, 1998.

2. Member museums should not borrow works of art known to have been illegally confiscated during the Nazi/World War II era and not restituted unless the matter had been otherwise resolved.²⁰

The AAM was working on its own guidelines as well. Released in December 1999, the AAM guidelines are more specific in their recommendations than the AAMD report. The guidelines read in part:

...museums should be aware of their ethical responsibility to consider the status of material they borrow as well as the possibility of claims being brought against a loaned object in their custody.

- a) Standard research on objects being considered for incoming loan should include a request that lenders provide as much provenance information as they have available, with particular regard to the Nazi era.
- b) Where the Nazi-era provenance is incomplete for a proposed loan, the museum should consider what additional research would be prudent or necessary to resolve the Nazi-era provenance status of the object before borrowing it.
- c) In the absence of evidence of unlawful appropriation without subsequent restitution, the museum may proceed with the loan.
- d) If credible evidence of unlawful appropriation without subsequent restitution is discovered, the museum should notify the lender of the nature of the evidence and should not proceed with the loan until taking further action to clarify these issues.²¹

Comparing the two sets of guidelines, the AAM's are the more specific in terms of what actions should be taken. The AAMD's do not suggest any course of action, but at least they were a step in the right direction. The new guidelines from both the AAM and the AAMD now recommended checking into the background of works to be brought in on loan, with the AAM's recommendations being more detailed.

The argument against this provenance check, of course, is lack of time and resources. How much meaningful research can be done on what may be several hundred

²⁰ Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945), June 4, 1998 Section II.F.

objects that are not owned by the museum? At the House of Representatives Finance and Banking Committee Hearings into Holocaust Assets held in February 1998, Glen Lowry, director of the MOMA stated that, “There is no effective way to determine the provenance of, in this case 150 works of art arriving for a three month loan”.²² At least in the case of the Schiele exhibition, there was only one lender, but that is the exception rather than the rule. More often there are numerous lenders involved. The AAM and AAMD guidelines however, do not ask museums to research the provenance of each and every work. Rather, the guidelines recommend asking the owner for provenance information, and if there seems to be a problem, then follow up on the research, if necessary.

Although beyond the scope of this paper, it is worth noting that the Schiele works were first publicized in a New York Times article questioning issues not about Nazi looted art, but rather issues regarding museum exhibition of privately owned, individual collections. While the MOMA surely did not know about the Nazi loot allegations regarding the collection, the curator of the exhibit was aware of Rudolph Leopold’s questionable collecting techniques. In The New York Times article, published before the claims were made to the MOMA, the senior curator, Magdalena Dabrowski, admitted to hearing rumors of Leopold’s acquisition techniques, but that such issues never came up in the decision to exhibit the collection or in the research for the catalogue. She was quoted as saying, “I didn’t want to go into it....My essay was about Schiele, not Leopold.”²³

While perhaps this was acceptable reasoning prior to the Schiele case, it is not acceptable

²¹ American Association of Museums Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, December 15, 1999.

²² Testimony of Glen Lowry Before the House Finance and Banking Committee, February 12, 1998.

²³ Judith Dobrzynski, “The Zealous Collector – A Special Report: A Singular Passion for Amassing Art, One Way or Another” The New York Times, December 24, 1997, Section E, Page 1.

any longer. Had the MOMA been more concerned over how Leopold had amassed his collection, perhaps they never would have been involved in this case.

There is no easy answer to the question of what a museum should do about ownership history of loans. In an ideal world, museums would have the time and resources to research these collections. In a practical view, time and money play large roles in deciding what can and cannot reasonably be done. It is certainly in the museum's best interest though, to have some knowledge of the ownership history of the works in their institution, even if they are only on loan. While this is adding yet another step to an already complicated process of obtaining a loan it is also one more layer of protection for the museum against problems of murky provenance. When compared to the costs of litigation, the costs of provenance research are minimal.

Now that provenance research is recommended for loaned collections, what happens if questions remain after the research is completed? Would the museum now have to refuse to show the piece? Quite often, definitively determining an object's history is difficult, if not impossible. The AAM guidelines therefore advise that in some circumstances, exhibition of an object with uncertain provenance may reveal more information about its history.

...in certain circumstances public exhibition of objects with uncertain provenance may reveal further information about the object and may facilitate the resolution of its status...the museum may choose to proceed with the loan after determining that it would be lawful and prudent and provided that the available provenance about the object is made public.²⁴

The flow of information about objects comes from their exhibition and the publicity surrounding shows. Very little information can come forth if a painting is hidden away in a private collection. As James Wood, Director of the Art Institute of

Chicago pointed out at the House Hearings, “It is no coincidence that a number of the cases currently pending came to light as a result of the works being included in loan exhibitions and their publications.”²⁵

Protection of Borrowed Art

More than the research issue though, the point that had the most immediate impact on the museum community, was the actual seizure of the works. How safe are loaned works from seizure? Will lenders be willing to hand over objects with the possibility that they may be seized? Contrary to the museum’s dire predictions, the New York museum world did not collapse after the Schiele seizures. There were adverse reactions, as can be seen with the Bonnard incident. On the whole though, the seizures pushed museums to be more conscientious in their dealings, as can be seen with the Met and the Klee loan.

The new focus on protecting loaned works prompted more institutes to apply for protection under the Federal statute, as opposed to relying on New York law. The application for the Federal statute meanwhile, began asking tougher questions about the provenance of the works in the exhibitions. Prior to the Schiele incident, the Federal application, while asking for provenance information, did not have a written policy for what precise information was required. That has since changed.²⁶ In the Check List for Applicants for the Federal Immunity application, the USIA now asks that the applicant certify that

²⁴ American Association of Museums Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, December 15, 1999.

²⁵ Comments of James N. Wood, Director and President Art Institute of Chicago to House Finance and Banking Committee, February 12, 1998.

²⁶ Judith Dobrzynski, “Lenders Pull Two Bonnards from a Show at the Modern”, The New York Times, April 28, 1998, Section E, Page 1.

...it has undertaken professional inquiry – including independent multisource research – into the provenance of the objects proposed for determinations of cultural significance and national interest. The applicant certifies further that it does not know or have any reason to know of any circumstances with respect to any of the objects that would indicate the potential for competing claims of ownership.²⁷

At the House of Representatives Finance and Banking Committee Hearings into Holocaust Assets held in February 2000, Lyndel King testified on behalf of the AAMD that the stringent policies put museums in the awkward position of having to prove a negative, and “...guarantee that there was no possibility of competing claims of ownership. If we could provide such assurances we wouldn’t need immunity.”²⁸

Additionally, questioning the provenance is no guarantee that the works are untainted. In the case of the two Schiele paintings, it is quite likely that they would have passed a provenance check and been granted the Federal immunity. Both works had published, albeit inconsistent provenances.²⁹ Neither painting had the suspicious gaps in the provenance that often point to a problem. Whether the owners had legal title is another question, and one that would require more research than a simple provenance check. Although the Federal statute would provide protection from seizure, simply because a work receives immunity does not unquestionably prove there are no competing claims to the work.

The New York State Decisions

While all of this was going on in the museum world, the case was continuing to proceed through the New York court system. The MOMA won round one, when in May

²⁷ Check List for Applicants, USIA.

²⁸ Statement of Lyndel King, House Hearings, February 10, 2000. King was relating the application experience of a small museum with limited resources.

of 1998 the Supreme Court of New York, New York County, found that the paintings were indeed protected by the ACAL and ordered the works to be returned to Austria. The DA appealed this decision, and in March of 1999 the Appellate Division overturned the lower court decision and upheld the subpoena, saying that the anti-seizure law was intended to cover civil seizure, not seizure for a criminal investigation. The museum then appealed this decision and on September 21, 1999 the highest court in the state of New York, the Court of Appeals, overturned the Appellate Division decision, deciding that the anti-seizure law did in fact cover these works. The court ordered the subpoena to be quashed and the works returned to Austria.

After the decision of the Court of Appeals was handed down, DA Morgenthau's office proposed an amendment to the New York Arts and Cultural Affairs Law.³⁰ The amendment would strengthen the authority of the statute and allow for seizure of loaned works in certain circumstances. The amendment passed, and effective May 24, 2000, the New York ACAL has been changed to read, "No process of attachment, execution, sequestration, replevin, distress or any kind of civil seizure shall be served or levied upon any work of fine art..."³¹ The law now continues to protect works on loan from civil seizure, but leaves them vulnerable to criminal seizure.

The Schiele Case Part II: The Federal Forfeiture

The Schiele case did not end though, with the quashing of the DA's subpoena. Before the MOMA could ship the works back to the Leopold Foundation, the U.S. Customs Service seized "Portrait of Wally" to begin a civil forfeiture procedure to

²⁹ Ronen Sarraf, "The Value of Borrowed Art", Brooklyn Journal of International Law 25 Brooklyn J. Int'l L. 729, 1999.

³⁰ "Stolen Art and the Law", Editorial Desk, The New York Times, May 15, 2000 Section A, Page 18.

determine proper ownership. The works may have been protected under the New York State law, however as has already been mentioned, the MOMA had not applied for protection under the Federal anti-seizure statute. This omission left the works open to federal action. It was determined by this time however, that the painting “Dead City III” had been properly restituted after World War II, and so that work was returned to the Leopold Foundation.

In the case of “Dead City III” it would appear there was a proper restitution, but that part of the family did not know about it. The question surrounding this painting was not how the work reached Leopold, but rather whether the claimants were the proper heirs. Prior to World War II, the work was owned by Fritz Grunbaum, a Viennese cabaret performer. The Nazis seized Grunbaum’s possessions and Grunbaum was killed in the Dachau concentration camp in 1940. Grunbaum’s wife Elisabeth died in 1942 in Vienna. The painting was recovered after the war, and restituted to Elisabeth Grunbaum’s sister, who sold the painting in 1956 to a Swiss art gallery. A Manhattan dealer purchased the painting from the gallery and Rudolf Leopold then purchased the painting from the dealer.³²

The claim to the painting while it was at the MOMA was brought by two sisters-in-law, Katherine and Rita Reif. Both were widows of Fritz Grunbaum’s cousin’s sons. The Reifs claimed that their husbands had searched for family survivors in Europe after the war, and found none. The brothers were then declared heirs to the estate of Fritz Grunbaum.³³ Apparently, the two were unaware of the existence of Elisabeth Grunbaum’s sister and the restitution and subsequent sale of the painting by her. As a

³¹ New York Arts and Cultural Affairs Law, Section 12.03 (2001).

³² Judith Dobrzynski, “German Court Revokes Ruling on Ownership of a Schiele Painting”, The New York Times, April 16, 1998, Section E, Page 6.

result of the evidence that “Dead City III” was properly restituted, that work was returned to Austria.

At the time though, questions remained about the ownership of “Portrait of Wally”, so that work remained behind in storage at the MOMA, to await the decision of a federal magistrate. Customs seized this painting based on the belief that the work was stolen under Austrian law, and therefore it was in the United States in violation of the National Stolen Property Act (NSPA). The federal action was to examine the factual history of the ownership of “Portrait of Wally”, and determine from a murky provenance, whether the work constituted stolen property, and thus would be subject to forfeiture.

The provenance of “Portrait of Wally” travels an unusual path. The work was painted in 1912 by Egon Schiele. Prior to World War II, the work was owned by Lea Bondi, a Jewish gallery owner in Vienna. In 1937, she was approached by a Nazi collaborator and art dealer, Friedrich Welz, who demanded the painting. After initial resistance, Bondi’s husband pointed out that they may want to flee Vienna the next day, and “...You know what he can do....”³⁴ Bondi handed over the painting, and soon after fled for London where she lived out the war and eventually opened another gallery. After the war, American forces detained Weltz as a collaborator, and his collection was confiscated. The American forces handed the collection over to an Austrian commission to be restituted to the proper owners.

Within the collection confiscated from Weltz were works that had been owned before the war by another Viennese collector, Dr. Heinrich Reiger. Reiger was murdered at the Theresienstadt concentration camp. After the war, the Reiger collection was

³³ Judith Dobrzynski, “More Paintings by Schiele Face Ownership Questions”, The New York Times, January 15, 1998, Section B, Page 4.

restituted to Reiger's heirs. During the restitution process, "Portrait of Wally" somehow became mixed in with the Reiger collection. In 1951, according to the records of the Austrian National Gallery, Robert Reiger, the son of Heinrich Reiger sold the collection to the Gallery; "Portrait of Wally" apparently included.³⁵

To return to Lea Bondi's claim, after the war, she discovered that the painting was in the Gallery, and although she did write to Austrian lawyers regarding her painting, due to a lack of financial resources, she never filed an official claim to the work.³⁶ In 1954 in London, Lea Bondi met with an Austrian doctor, Rudolph Leopold. At the time Leopold was already widely known as a Schiele expert and collector. Bondi asked if Leopold could help her retrieve her painting from the Gallery. In return, she would help him locate and purchase other Schiele works. Upon his return to Austria, Leopold did indeed inquire about "Portrait of Wally". However, he then purchased the painting from the gallery for his own collection. Leopold claimed that he accepted the Austrian National Gallery provenance, which included the Reiger restitution. Additionally, the Gallery claimed that it had never been contacted by Lea Bondi and knew of no claims for the work.³⁷ Bondi discovered that the painting was now in Leopold's collection, but never filed a claim for it. According to her family, this was again due to a lack of financial resources.³⁸ Lea Bondi died in London in 1969 at the age of 93. Her heirs, represented by a nephew, Henry Bondi of Princeton NJ, brought the claim against the MOMA in 1997.

³⁴ Judith Dobrzynski, "The Zealous Collector – A Special Report: A Singular Passion for Amassing Art, One Way or Another" The New York Times, December 24, 1997, Section E, Page 1.

³⁵ Ibid.

³⁶ Judith Dobrzynski, "The Zealous Collector – A Special Report: A Singular Passion for Amassing Art, One Way or Another" The New York Times, December 24, 1997, Section E, Page 1.

³⁷ Judith Dobrzynski, "Modern is Urged to Play Solomon in Paintings Dispute", The New York Times, January 1, 1998, Section E, Page 1.

The case of “Portrait of Wally” was not clear-cut. This was not a case of a hidden work of art. The pre-war owner knew the painting’s whereabouts soon after the war ended, yet did not make an official claim for it. This is a well-published work in a well-known collection; it would not have been difficult for the original owner’s heirs to have located it and made a claim for the work years before they did. This knowledge of the painting’s whereabouts would appear to have started the statute of limitations, which then would have run out long ago. Leopold however, knew of the Bondi claim to the work, yet bought it anyway, so his right as a good faith purchaser is questionable.

The American Association of Museums, the Association of Art Museum Directors and several museums, including the Metropolitan Museum of Art, the Guggenheim and the Art Institute of Chicago among others, filed an amicus curiae brief in the federal action. In this brief, the museums challenged the right of the government to seek forfeiture action for what is essentially a civil case involving the title to a work of art. The museums argued much the same point that MOMA argued in the state case, that being the adverse implications of the seizure on the loan process.

A decision was finally made in the case on July 19, 2000 which cleared the way for “Portrait of Wally” to be returned to the Leopold Foundation. The United States District Court for the Southern District of New York decided that the work did not constitute stolen property and therefore could not be seized by the federal government.

In the decision, the court stated that:

...U. S. Forces were charged with recovering stolen items and acting on behalf of the items’ true owners. Accordingly, when they recovered the painting they did so as agents of Lea Bondi Jaray – even though they did not know her name, or that the painting was hers. This recovery purged the painting of the taint that it

³⁸ Judith Dobrzynski, “The Zealous Collector – A Special Report: A Singular Passion for Amassing Art, One Way or Another” The New York Times, December 24, 1997, Section E, Page 1.

had. Although the painting may not have been placed in the correct hands when the Reiger heirs received it, in the eyes of the law it was no longer stolen.³⁹

As the work was no longer stolen, the Bondi heirs had no claim and “Portrait of Wally” was now free to be returned to the Leopold Foundation in Austria.

Conclusions

The Schiele case was not the only high profile case involving Holocaust-era claims to come about recently. For years, the attention in this area was focused on European museums and collections. The recent cases in the US though, have shown that this is a serious issue for American museums as well. Museums have started to take responsibility for the works that they possess, and those they merely exhibit. The guidelines from the AAM and the AAMD were steps in the right direction. While provenance research into loans may be expensive and time consuming, it cannot compare the time and money spent in litigation. The museum community’s response to claims started out slowly, but has improved over the past few years. This is an evolving process, involving issues that will not disappear any time soon.

After all is said and done, and the courts have made their rulings, what lessons can the museum community taken from this action? When the case began, MOMA was in a difficult position, placed in a situation that had not occurred before in an American museum. The museum quickly made a decision that they were contractually obligated to return the paintings, without any further discussion of the claims. Perhaps that decision was made too quickly. Perhaps MOMA could have discussed holding the paintings at a neutral site until the claimants and the Leopold Foundation came to a resolution. There is

³⁹ U. S. v. Portrait of Wally 105 F.Supp. 2nd 288 (U. S. District Court for the Southern District of New York, July 19, 2000).

no way of knowing if that approach would have prevented eventual litigation. However, if the parties had been given the opportunity to discuss the claims, perhaps a better outcome than two and a half years of litigation could have been found.

There are no quick-fix solutions to Holocaust era claims. Perhaps the most important lesson to be taken from the Schiele case is that political posturing and contentious litigation does not leave anyone satisfied with the outcome. There is no telling whether the impartial tribunal suggested when the claims first arose would have come to a satisfactory decision, but the subpoena destroyed that before it was even a viable idea. Instead, for two and a half years, “Portrait of Wally” sat in storage at MOMA, inaccessible to its owner and the public.

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