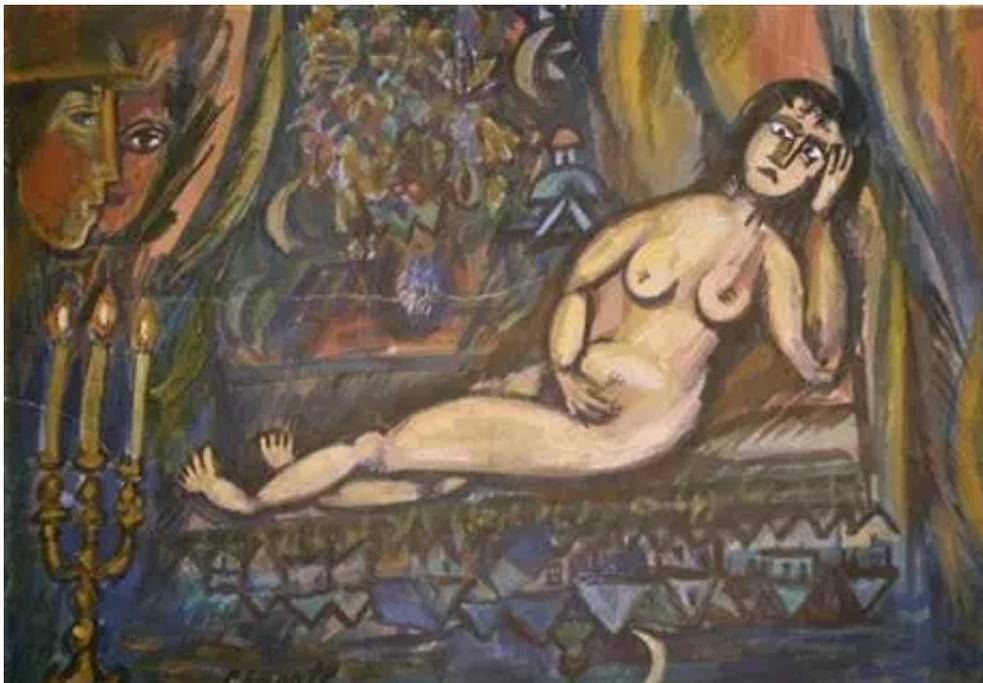


Center for Art Law

Posted on February 18, 2014~~May 24, 2014~~ | by Hanoch Sheps, Esq. | Art Market, forgeries

Burning Fake Chagall's, Market Integrity versus Ownership Rights – A Zero Sum Game

By Hanoch Sheps, Esq.



(<https://evenmoreartlaw.files.wordpress.com/2014/02/460x.jpg>)
Nude 1909-10, deemed a forgery by the Chagall Committee

Authenticity: a trait that seems increasingly hard to establish. Some entities are even burning fake artworks to ensure lasting integrity in the art market. Does the presence of 'fakes' warrant such drastic action, and is it legal to seize and destroy someone's property? Picture this – a collector purchases a particular artwork that is represented as a work by Marc Chagall. A red-letter day, right? Seeking to authenticate the work, the collector submits it to an expert committee or board specializing in the artist's work. To the collector's chagrin, not only does the committee deem the work to be a fake, but intends to burn it instead of returning it. This is a story British collector Martin Lang would say is all too familiar, "[I]t's basically my property. I just couldn't understand why the committee would be so draconian," he told the BBC. "Lang bought what he thought, and was represented to him as a 1909 Chagall watercolor for £100,000 (US\$170,000) in 1992. He then submitted the work to the Chagall Committee, an entity in

France known for authenticating works by the artist, but was told that the work was a fake. As a matter of course, contracts with authenticating entities often include provisions that permit them to destroy the work if deemed a forgery (making it unlikely for him to recoup his expenses).

According to a London-based art lawyer, Pierre Valentin, however, Lang's contract was rather opaque on this point, "[s]ome contracts are more explicit. I haven't seen this contract, but the paragraph was read to me and it's not at all explicit... It should be absolutely clear." (The Destruction Of Fakes (<http://www.artatlaw.com/archives/the-destruction-of-fakes>), Pierre Valentin). What is clear is that France is a staunch enforcer of artists' rights and its courts have upheld decisions to destroy works deemed fakes in the past.

For example, in two separate instances in 2013, a French court ordered the destruction of works formerly attributed to Joan Miró in cases involving an established Miró committee that declared them forgeries. (The Destruction Of Fakes (<http://www.artatlaw.com/archives/the-destruction-of-fakes>)). Artists in countries like France enjoy moral rights or *droit moral* that include the Right of Authorship (*Droit à la Paternité*). One aspect of that right enables the artist to prevent the use of his name on works that he did not, in fact, create. (See Ralph E. Lerner & Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, & Artists* 4th Edition. New York: Practising Law Institute, 2012). It is therefore no surprise that the French legal system would support the decisions of entities that seek to protect an artist's legacy. In fact, a 2004 EU directive also permits courts to order the destruction of goods as a measure of enforcing intellectual property rights. Note, in such an order courts must balance those rights against the severity of the infringement. Perhaps more interesting is that legislators conceive intellectual property rights as limited rights with distinct termination points, whereas artists conceive artwork that can last indefinitely.

What then has greater value, temporal rights or a perpetual artistic legacy? When reconciling the intellectual, moral and ownership rights involved in a case like the Chagall forgery, does it make practical sense to allow the court to pass judgment on an artwork's authenticity? It would not be the first or last time a court has done so, but the experts courts rely on in such cases may not always be the best resource. Legal or not, participants in the art market need to weigh some policy considerations. Without rehashing our recent article regarding fakes (A Plethora Of Fakes and a Series of Thoughts: Where Has All The Real "Art" Gone? (<http://www.linkedin.com/redirect?url=http%3A%2F%2Fitsartlaw%2Ecom%2F2013%2F12%2F24%2Fa-plethora-of-fakes-and-a-series-of-thoughts-where-has-all-the-real-art-gone%2F&urlhash=P-t2>), Center for Art Law), the detrimental effects of fakes in the market and on good faith purchasers is readily apparent. However, committees are not infallible, new evidence emerges, opinions conflict and change – not to mention the opinions of other experts in the industry. Even those entrusted with the legacy of an artist have strayed from that path. Before the 1984 death of Italian painter and sculptor Amedeo Modigliani's daughter, she entrusted her father's archives and a reproduction right to Christian Parisot. In 2010, Italian police raided a Modigliani retrospective organized by Parisot, twenty-two of the works ultimately deemed fakes. Italian authorities later charged Parisot with receiving counterfeit goods and falsely authenticating them, though he still awaits trial. (A Modigliani? Who Says So? (<http://www.nytimes.com/2014/02/03/arts/design/a-modigliani-who-says-so.html?ref=arts&r=0>), NYT). If we call into question the integrity of those we trust to ensure market integrity and protect an artist's legacy, can we justify the seizure and destruction of works on

their part? As deplorable as fakes are, certainly there are better uses for them as tools to teach future authenticators, curators, auctioneers, appraisers. At least the committee can declare a work a forgery, take measures to prevent it from entering the market, and return it to the owner.

After all, the owner sought the committee for an authentication service; if they deny authenticity, should the owner not have the ability to decide what to do with it next – or are the collectors not to be trusted either? The famous case of “double denied” did not result in destruction of the physical object, just the market value of it (a meaningless distinction for some) ([Term of Art: Authenticity \(https://itsartlaw.com/2010/12/15/term-of-art-authenticity/\)](https://itsartlaw.com/2010/12/15/term-of-art-authenticity/), 2010) and there are museums that collect fakes for study purposes – see for example the Fogg Museum at Harvard. In a rather timely fashion The Authentication in Art Foundation (AiA) is organizing an interactive working conference on May Wednesday 7 to Friday 9 2014 in The Hague entirely dedicated to painting authentication. (Visit the conference program page). As collectors and the art market increasingly rely on art experts to ensure commercial value of artworks, art experts, at least in the United States, find themselves on the wrong end of a lawsuit. In order to protect academic scholarship and ensure that authentication committees persist, members of the New York City Bar proposed new expert liability legislation on which we previously reported in its initial unveiling in November (<http://www.authenticationinart.org/congress-programme/>) A Plethora of Fakes and a Series of Thoughts: Where Has All The Real “Art” Gone? (https://evenmoreartlaw.wordpress.com/wp-admin/%20Where%20Has%20All%20The%20Real%20). The art world is increasingly more litigious and while physical destruction may go a long way to preserve the purity of the provenance, there is always a risk that an entity may erroneously order the destruction of an authentic work.

About the Author: Hanoch Sheps, J.D. is a recent graduate of New York Law School. He may be reached at Hanoch.sheps2@gmail.com.

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