

Self-Regulation in the Art World and the Need to Prevent Money Laundering¹

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Abstract

Organized crime has had a relatively free hand in its efforts to make criminal assets legal. This is made possible by some ineffectiveness of current national and international laws, which have not kept pace with the changing situation. Due to the fact that there is no particular concern with art, criminals and those involved in illegal activities have discovered the art world to be a real and clandestine arena through which money can be laundered. The following article argues for careful situation involving the actors of the art sector, notably its self-regulation, in order to curb money laundering through art.

Keywords: Money laundering; Art works

Introduction

When we think of artworks, ordinarily we immediately think of museums. Museums, however, are but a part of the world of art, one of the most commonly accessed, much like libraries. Both collect and maintain works and many rare books and manuscripts that are valuable and draw the interest of collectors and specialized dealers.

Oftentimes international auctions houses, galleries and dealers regard their establishments as more of a museum than a business. This is partly true, if we take into account the people that frequent these spaces for purposes of observing rather than acquiring art, in an informal way that is more intimate and less institutional than in a museum. Then again, everything a gallery owner has to offer is placed on exhibit rather than put up for sale.

There is a widespread belief that only the well-off can afford art. Some can, but a surprising number of persons and collectors from the middle class passionately devote their time and money to the arts. Collectors also make donations to one another, much like an exchange of gifts. Furthermore, large companies or corporations routinely take an interest in acquiring works of art, encountering no resistance from their stockholders. Such acquisitions often turn out to be important investments.

Investors in art are collectors who often care little about the asset collected. Those investors who frequently engage in acquisitions and sales are considered art dealers.

Artworks are fragile and intolerant of temperature and humidity extremes, and therefore require proper transportation by a specialized company.

Mere examination by a specialist² is no assurance of authenticity, although the specialist may, in many cases, be capable of authentication. Authentication requires special expertise in specific areas. Anyone who claims knowledge of everything, rather than of fine art, of arms and armor, or of stamps, is unlikely to be a good appraiser or authenticator.

Preservation of a work of art requires diligent care to minimize all hazards, even when strict security measures are put in place. To that end, a proper insurance policy is in order to protect against incidental damage. One would normally expect protection against loss of the work, a drop in its market value, and assumption of liability.

As a general rule, insurance policies are based on contracts. Yet in the case of artworks, special consignment arrangements are often used when the parties would normally be disinclined to rely on standard agreements. Insurance companies and their clients are free to negotiate any contractual clauses that do not violate public policy or pre-established rules.

A number of ethical questions might be raised. One of these might be, for instance, whether a dealer may also be an appraiser. Conflicts could arise as to whether an appraisal was intentionally low so that the appraiser might himself acquire the property through someone else. This would be artificially lowering the price for illegitimate gain. An appraiser for a given class of art ought not to be able to buy or sell it.

Countless variables go into determining the price of a work of art. Diva Benevides Pinho illustrates this complexity by explaining that “people present at the sale of a piece also play a role in determining its price through the operation of supply and demand. If famous buyers compete for a work of art, they bid up the price and their interest lends it an aura of quality. Conversely, if important buyers stay away in droves, the price of the piece tends to fall.” Citing Howard Becker’s observations, she adduces: “it is more important to know who is

¹ For more information about money laundering in the Art World see author’s book: Money Laundering through Art: A Criminal Justice Perspective. Springer, Cham, Heidelberg, New York, Dordrecht, London, 2013.

² There are websites that specialize in appraisals. In Brazil, for instance, we have www.catalogodasartes.com.br, accessed 05 September 2014, which offers price consultation on art and antiques, with photos, specifics, values in both reals and dollars, data, and sources of research.

buying or bidding for the work of a given artist than to have precise knowledge of the quality of that work.”³

In any discussion of the world of art we would do well to take note of its underworld. Indeed, there is always a need to be aware of the underworld (in the pejorative sense) as an ecosystem apart, one which permeates the artistic environment.

The author’s purpose is to go through to this captivating subject, analyzing it according to the U.S. and Brazilian legislation. Considerations will be presented in an effort to further the study to add transparency to business dealings and thereby inhibit or curtail unlawful activity.

The idea is to connect a number of important dots in the world of art, where its business practices are concerned, so as to bring about improvements in crime prevention systems. Our hope is to provide a useful foundation for conducting a critical analysis that is both realistic and practical which touch upon this important and current topic.

The aim is to provide a reading on this sector, a snapshot of the market which will provide the groundwork and guidance necessary to give it transparency and a backdrop sufficient for a particularized analysis. Some rigor in procedures for cataloging and investigation are in order, for we ought to remember that the resurgence of organized crime is often the result of a systemic atmosphere of inattention, mutual tolerance, and ethical codes which, however lofty, are in practice applied only selectively. Matters are worsened by the arrogance and permissiveness, if not covert complicity, of portions of civil society (the elite, the press, etc.) that insist on pointing out only the defects that do not suit their purposes.

This paper is divided into three headings, besides the introduction and conclusions: The Art Sector and some peculiarities; The Art World and its role in the prevention of money laundering. The Self-regulation and Governance of the Art Sector.

The first heading deals with overarching relevant topics of art world. The second heading (The Art World and its role in the prevention of money laundering) addresses the difficult task of catching financial criminals. The third and the last one (The Self-regulation and Governance of the Art Sector) is about the world of art and its treatment by the legal system.

Although this work may, at a glance, appear to cover the entire subject, this is actually far from the case. It has, however, aimed at achieving a logical and practical “completeness” in describing an unexplored and virtually unknown world in which art is used in the commission of serious crimes.

The Art Sector and Some Peculiarities

There are reports of crimes committed by employees of museums and specialized companies, usually from collectors and dealers. Investigations in the United States, for instance, show that most (80% to 90%) of the crimes committed in this field are perpetrated by participants in the market, including curators, collectors, volunteers, dealers, appraisers and even professors. The small remainder is attributable to ordinary criminals who know practically nothing about

the object of their crimes—other than what they have heard in the media about how easy they are to steal and how much they are worth. Forgers and distributors of fakes, on the other hand, require knowledge and connections in the art world, and sometimes emerge from the artistic milieu or are themselves professionals in restoration.

Business practices in the art world are different from many other industries. It is not uncommon for collectors or dealers to simply make an exchange, without a penny ever changing hands. Furthermore, museums make acquisitions by payment, barter or on loan from other museums, dependent as they are on donations or government subsidies.

Acquisitions are ordinarily recorded, whether by the seller or the buyer, in the case of museums and auctions. The amounts involved require that the parties keep a record, and that often facilitates investigation. Still, among private collectors or investors, wealthy or not, records are not kept, and proof of legitimate ownership hinges on finding a receipt, petty records or even photographs. There have been cases in which the press revealed the existence of works of art based on photographs taken at the home of a person being investigated.

Auction houses or art galleries may acquire an item by one of two methods, that is, by consignment or acquisition. They may also enter into combined consignment and acquisition agreements. The first possibility (consignment) is very common because it dispenses with the cost of purchase and, if no sales are forthcoming, simply returns the item to the artist. Because artworks are relatively expensive, auction houses and galleries have opted for that approach coupled with an exposition agreement with the artist, whereby each gets 50% of the sales revenue. This all depends on the agreement, which may arrive at a 70-30% split favoring the artist. The percentage varies depending on the artist and cost of production of the item, which is good for artists that are still living. Auction houses or galleries in turn undertake to sell the work of the artist, and pay to have it published in specialized catalogs (if not their own) and bear the costs of opening up the exposition. Some auction houses specialize in certain types of works or have a knack for making unknown artists popular.

Auction houses are today one of the most popular venues for sales of artworks, and account for 50% of annual sales in the United States [27-35]. Ninety percent of the multi-billion-dollar global market and almost three-quarters of all sales are handled by Sotheby’s and Christie’s⁴.

The public—observers and buyers alike—have flocked to auctions. A similar phenomenon has taken place in Brazil and demanded of art dealers a more organized approach to the product and to the clientele. Larger rooms were sought out in ‘nicer’ locations. Innumerable works by unknown or little-known artists were added to the catalogs, increasing the number of sale [35-40]. The cost-to-invoicing ratio became a subject of great concern with the scarcity of higher-priced works by known artists, and this was aggravated by criticisms to the effect that auctions had become ‘fire sales’ liquidating gallery ‘overstocks.’⁵

Auction houses play an important and complex role as agents for both seller and buyer, while also representing themselves [40-61]. Hence their broad range of important responsibilities, including that

³ See A Arte como Investimento. A Dimensão Econômica da Pintura. São Paulo: Nobel and Universidade de São Paulo – Edusp (joint publication), 1989, p. 100.

⁴ See Leonard DuBoff, Michael Murray and Christy King. The Deskbook of Art Law. Booklet M (Auctions). New York: Oceana, Second Edition, Release 2010-12, Issued December 2010, p. M-1.

of obtaining a license for their location, making strategic efforts to maximize their offerings of goods, providing relevant information as to the nature and price of goods on the market, accepting payment and providing assurance of safely shipping all orders to the buyer. However, they make the seller liable to the buyer for any defect in the item.⁶

To see the profit they make one must consider the cost of goods sold, their stock of items (inventory and consignment), and their accounting and sales figures. It is not easy to verify the dealings had between auction houses or galleries and artists, since there is no requirement that they inform the authorities of their revenue from consignment sales. Some artists pay their own personal expenses in cash and prefer that form of payment from auction houses or galleries for their works sold on consignment.

An auction house may offer financial facilities and options. There are cases of loans made to buyers using the item itself as guarantee for the loan, but this was criticized on the grounds that exaggerated appraisals of the work would serve to facilitate its acquisition⁷.

On inspection of a consignment document one can see that it contains the name, address and telephone number of the consigning artist, a description of the item or items, the price set by the artist, the date negotiated, the percentage agreed upon between artist and consignee and their signatures. Nothing is said about the form of payment. Then again, in Information Document Requests for the IRS, there is a requirement that all art received on consignment be individually recorded, along with the profit and the amount of items, on a yearly basis⁸. This happens because gross revenue must be understood as all revenue irrespective of the source, be it money, property, services rendered or even payments in kind (meals, lodging, inventory, etc.), unless prohibited by law.

Once items are sold, auctioneers and their employees carefully examine and appraise the items. Experts may be consulted to identify or authenticate an unknown work. In the event of disagreement, the auction house must notify the consignor of its internal disagreement, even though the seller normally sees the auction house as a specialized technical market, relying on its recommendations as to what constitutes a good price⁹. They ought therefore to provide reliable

opinions on prices and make good recommendations as to what to do with an item once consigned.

Inventories gather together many descriptions by collectors, yet partial records of artworks have also been assembled by private collectors, notably of the more important artworks, relying on memory as a form of concealment, to the detriment of searches conducted afterward.

An important consideration is the confidentiality surrounding dealings in art, except, of course, where dealers are concerned. Buyers and sellers do not seek exposure. Sellers are often embarrassed at having to part with their treasures, and buyers, mindful of this, will avoid adding to their displeasure. Dealers, in turn, are protective of their margins, and prefer not to disclose them.

A general lack of transparency as to how prices are arrived at is a characteristic of this market. We often do not know, for instance, the true worth of museum pieces. Art dealers are by no means consistent either. Some will cut prices to attract customers, while others will categorize or label their items with little regard for market niceties.

Constant forgery of works of art has resulted in a decreased interest on the part of serious buyers. They are increasingly skeptical of an artworks' authenticity and disinclined to blindly trust many dealers, whether because of the quality of the forgery or misgivings about their intentions.

Fences or forgers engaged in selling the proceeds of crime to an unsuspecting public have also played an important role. Criminals pass forged or stolen items along to fences who in turn sell them to the unwary.

The use of fake identification documents is an added complication. A fence with a fake ID can ask a buyer to call the bank to have a payment order made out to the seller's fake name. That way the seller is able to skirt bank security procedures.

For example, the two largest auction houses in the world, Sotheby's¹⁰ and Christie's¹¹, are self-regulated and required to act in good faith in the interest of their clients or consignors¹². Both have accepted cash payment and are not under any specific obligation to

⁵ For more on this see José Carlos Duran (in *Arte, Privilégio e Distinção. Artes Plásticas, Arquitetura e Classe Dirigente no Brasil, 1855-1985. Estudos. Sociologia da Arte. São Paulo: Perspectiva and Universidade de São Paulo – Edusp/joint publication, 1989, pp. 198-199*).

⁶ See Leonard DuBoff, Michael Murray and Christy King. *The Deskbook of Art Law. Booklet M (Auctions)*. New York: Oceana, Second Edition, Release 2010-2, Issued December 2010, pp. M-36-37.

⁷ For more on this see Leonard DuBoff, Michael Murray and Christy King (in *The Deskbook of Art Law. Booklet M (Auctions)*). New York: Oceana, Second Edition, Release 2010-2, Issued December 2010, p. M-43).

⁸ See *Artists and Art Galleries*. Publication by Internal Revenue Service. Department of the Treasury. Market Segment Specialization Program. www.artchain.com/resources/art_audit_guide.pdf. Accessed 04 Sept. 2014, Chapter 3, pp. 6-7 and 13-17.

⁹ For more on this see Leonard DuBoff, Michael Murray and Christy King (in *The Deskbook of Art Law. Booklet M (Auctions)*). New York: Oceana, Second Edition, Release 2010-2, Issued December 2010, p. M-69).

¹⁰ Cf. <http://www.sothebys.com/en/buysell/buy.html>: "You can pay with cash (subject to certain restrictions and legal limits), check, money order or wire transfer. Certain credit cards are accepted at Sotheby's London, Amsterdam, Paris, Switzerland and Hong Kong salerooms and you may contact these sale locations directly for specific information. Successful bidders can pay immediately following an auction, otherwise an invoice will be sent to you." http://selectsothebysrealty.com/page/make_a_payment: "Make a Payment. Thank you for your business. We are grateful for your relationship with us! Please note that payments are preferred by certified check, personal check or money order. For your convenience, we can also accept credit cards. If you would like to pay with credit card, please submit your payment below. Additional charges may apply for processing." Accessed 05 Sept. 2014.

¹¹ In <http://www.christies.com/features/guides/buying/pay-ship.aspx>: "We accept wire transfers, bank drafts or cashier's orders, cash or checks. Under certain circumstances, some Christie's salerooms may accept payment by credit card (check with your saleroom for details)." Accessed 05 Sept. 2014.

report suspicious operations. Sotheby's does not prohibit cash payments, but does subject them to unspecified legal restrictions, whereas Christie's does not even mention any limitations on cash payments, which may be made by electronic transfer, payment order, cash or check.

Manus Brinkman explains that "although reputable auction houses and dealers act within the parameters of the law, previously their trade associations did not support initiatives to actively restrict the free trade in cultural objects on the theory that the black market thrives from overly retentive trade in cultural objects: as the demand for antiquities grows, the supply is cut off."¹³

These auction houses foster demand for objects from supplier countries. They are aggressive trendsetters. Manus Brinkman illustrates: "in 1996, the strong demand for Southeast Asian paintings among an increasingly affluent Asian middle class became apparent when Christie's withdrew five Indonesian paintings from its Singapore sale after the National Museum in Jakarta saw them and identified them as stolen."¹⁴

Authentic provenance papers may also be stolen, or even forged off of museum or auction house catalogs. The crime against property can occur before or after the forging of provenance papers. The fact that, for example, Sotheby's or Christie's¹⁵ may once have sold a piece is no clear assurance of its authenticity. Provenance may have been legitimately acquired for fraudulent purposes using the family of the artist or even the artist for authenticity, thereby engendering an irrefutable presumption of authenticity even in a court of law. That would happen if an artist or relative were hired to certify new provenance for a third party, causing a conflict of interest between the original buyer of the work and whoever hired the second provenance.

Finally, unlike museums and art dealers, ordinary people rarely have documentation for artworks in their possession. Seldom do they have a bill of sale, proof of payments, provenance, or any trace of original or subsequent documentation. This is normally because the piece has been in the family for generations, providing fertile ground for criminals to commit a vast array of crimes based on advantages deriving from this overly common situation.

Nowadays, with the use of computers, it is easy to verify stolen or recovered artworks, especially in archives containing inventories of pieces in the hands of collectors under investigation or indictment. These also facilitate rapid transmission of information on disappearances, with complete descriptions, often including photographic records.

The issue we face today is that both stolen and legitimate artworks may attract criminals seeking to launder dirty money by exploiting a market that is little known, hard to understand, easily manipulated (by its own actors, such as collectors and dealers), and fraught with problems (theft, robbery, forgery, laundering).

Although traditional money laundering methods, such as the purchase of commodities and real property through the financial system (especially parallel or clandestine financing), through third parties (stooges), and through offshore banks or hawala systems, to drive a wedge between the money and its origins, have long served organized crime, it has moved into other areas, less closely watched and having fewer rules.

As explained by Fletcher Baldwin Jr., a "novel way is through the use of art. Although it sounds strange to think of drug traffickers and arms dealers purchasing famous Renoir's and Picasso's, the use of art to launder money is not as strange as it seems; and in fact, it is extremely effective."¹⁶

When consigning a piece to an international auction house, a consignment document is issued that contains the name, address and telephone number of the consigning artist, a description of the item or items, price set by the artist, date negotiated, percentage agreed upon between artist and consignee and their signatures, but it says nothing about forms of payment.

Because artworks are considered duty-free, the accompanying fiscal document ought to contain the name of the creative artist, if known, and declare whether they are originals, replicas, reproductions or copies, and evidence may be required that they match those on the import declaration. U.S. customs law has been organized into a Harmonized System, requiring uniform descriptions of goods bought and sold in world trade. A classification system is now proposed for transporters, importers, exporters, customs, and recordkeeping for a high level of uniformity in fees and statistical data. The resulting more objective definitions will allow better measurement and observation on the part of Revenue authorities, reducing the chances of defective descriptions in import and export documentation, and improving the exchange of information among customs authorities, generating more reliable figures, to track all movement of goods across national boundaries.

It is entirely up to international auction houses whether to make out a Suspicious Activity Report if they determine that a payment is not made in good cleared funds. They may require, under penalty of cancellation (in which case the piece may be sold to outside parties), evidence that no money laundering or funds for financing of terrorism are involved (Paragraph 4(c) of Christie's Standard Sale Contract). It is clear, however, that Christie's, for instance, only allows payment by the person listed on the invoice—and not a third party.

On the other hand, there are not necessary questions about the origin of the buyer's money once handed over or deposited, because there is no legal obligation to conduct customer due diligence. And some of them only take payment from those named on the invoice. This could, however, be some third party hired by someone who would rather remain hidden.

¹² See Hannah Purkey (in *The Art of Money Laundering*, p. 134).

¹³ Reflections on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 64.

¹⁴ Id.

¹⁵ According to Sarah Thornton, Christie's and Sotheby's between them "control 98% of the world market for art auctions. The word sale is suggestive of discounts or bargains, but an auction is always after the highest possible price. Indeed, it is precisely these extraordinary sums that have transformed auctions into high society sporting events." In *Sete dias no mundo da arte. Bastidores, tramas, intrigas de um mercado milionário*. Translation: Alexandre Martins. Rio de Janeiro: Agir, 2010, p. 26.

¹⁶ Cf. *Art Theft Perfecting The Art of Money Laundering*, p. 02.

Money laundering through art still sparks little interest, given the exacerbated criminality that exists. Nor does the market comply with its obligation to report suspicious transactions (in case of obligation), in part because of lax inspection. There appears to be considerable interest in conducting investigations in the United States, but this comes about after the discovery of some violation of revenue or customs laws, or of suspicious payments through banking institutions.

Examples abound worldwide, and even in Brazil¹⁷, showing that artworks are transferred into or out of the country for use in the international market, with little apparent regard for the origin of the funds used to acquire the pieces, but concerned entirely with the art itself, as its sole qualification.

Citing Marianne James, Hannah Purkey shows that groups as different as Americans, Italians, the Russian Mafia, the IRA and Colombian cartels are believed to have laundered illegal money through the use of art because of its facility of transport, its high value and its lack of regulation or control¹⁸.

The approach might, together with others, result in the conception of an efficient legal system that allows preventing money laundering in the art world as well as the apprehension or recovery of purloined, stolen, forged or genuine works of art procured with the proceeds of earlier crimes.

The Art World and its Role in the Prevention of Money Laundering

We know that the commission of ordinary crimes (larceny, robbery and possession of forged works, not to mention fencing) is common in the world of art. This is relevant to calculations involving statutes of limitation. There are large databases listing stolen or missing works of art. They may be found at museums, international agencies (International Criminal Police Organization – INTERPOL¹⁹), governmental agencies (Federal Bureau of investigation – FBI²⁰), nongovernmental organizations (The Art Loss Register²¹) and International Forums (UNESCO²² and the International Council of Museums – ICOM²³). Furthermore, art sector are been used as a tool for money laundering.

When the law requires proper vigilance and Suspicious Activity Reports – SARs it is deemed essential to ensure that an institution has an effective compliance program. Appropriate policies and procedures must be put in place to monitor and identify unusual occurrences by

time and place. Reporting systems must include unusual event identifications or alerts (identifying the employee and giving all necessary search information), management alerts (awareness of all methods of identification and evaluation in all business areas), the Report itself and its generation, regardless of size. Monitoring system sophistication must be understood as part of business risk, with emphasis on what goes into high-risk assets and services (storage). For that, cultural institutions should therefore have adequate personnel to identify, research and report on suspicious activities, with due account taken of the general risk level and volume of transactions.

The Financial Action Task Force – FATF does not appear particularly concerned with art, for in recommending the compulsory reporting of suspicious operations on the part of designated non-financial businesses and professions (DNFBPs), at no time did it mention that sector (Recommendation No. 22, together with Nos. 18-21).

It can explain the fact that the Financial Crimes Enforcement Network – FinCEN does not have specific instructions to require auction houses, galleries, museums or art dealers to report suspicious activity. They are, however, under general obligation to report cash payments in transactions of \$10,000 or more.

There is no central federal agency in the United States charged with cultural policy—a Ministry of Culture for example, as there is in Brazil. Cultural policy in the United States is spread out through different institutions, among them the Smithsonian Institution. Regulation of museums is handled through local legislative bodies (state, city or county level) and not by federal institutions. Public policies are therefore not easily coordinated.

According to James Reap, amendments made since 1980 to the National Historic Preservation Act (NHPA) have charged the Secretary of the Interior with the responsibility of directing and coordinating North American activities based on the UNESCO Convention of 1972, in coordination with the Secretary of State, the Smithsonian Institution and the Advisory Council on Historic Preservation²⁴.

The Smithsonian Institution (the world's largest network of museums and research centers), which brings together some 19 museums and galleries, in addition to the National Zoological Park, and nine research centers²⁵, is a respectable American institution and receives donations from foundations, corporations and individuals.

¹⁷ Take, for instance, a case involving a Colombian national, Juan Carlos Ramires Abadia, convicted with several others of money laundering, upheld on appeal (record No. 2007.61.81.0011245-7/SP, convictions in 2008, upheld in 2012 by the Region Three Federal Court, which extends to the states of São Paulo and Mato Grosso do Sul, Criminal Appeal No. 0001234-26.2007.04.03.6181/SP, tried 06/03/2012, Rapporteur, Federal High Court Justice Johonsom di Salvo). Then there was the case known as Banco Santos, in which Edegar Cid Ferreira, former owner of the financial institution, was also convicted of financial crimes and money laundering in the lower court in 2006 (criminal action No. 2004.61.81.008954-9). Both were heard before the Federal Criminal Court of Justice in São Paulo (Federal Criminal Court No. 6, specializing in Money Laundering and Financial Crimes).

¹⁸ See *The Art of Money Laundering*, p. 123.

¹⁹ Headquartered in Lyon, France, <http://www.interpol.int/>. Accessed 04 Sept. 2014.

²⁰ Art and Cultural Property Crime, which includes theft, fraud, looting and national or international trafficking, generates \$6 billion in annual losses, and the FBI has a specialized department (the Art Crime Team) made up of fourteen special agents with a computerized index of artworks stolen worldwide. (See http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft. Accessed 04 Sept. 2014.)

²¹ A private database available for recording, searching and recovery of artworks. See <http://www.artloss.com/en>. Accessed 04 Sept. 2014.

²² See <http://whc.unesco.org/en/list>. Accessed 04 Sept. 2014.

²³ See <http://icom.museum/programmes/fighting-illicit-traffic>. Accessed 04 Sept. 2014.

²⁴ Public Law 96-515, December 12, 1980, 94 Stat. 3000 (in *The United States and the World Heritage Convention. Art and Cultural Heritage: Law, Policy, and Practice*, p. 234).

This happens, according to Judith Leonard, General Counsel for the Smithsonian Institute²⁶, as a self-regulated gift authority and a nonprofit organization. Its funding is separate from the Treasury Department. On the website, one sees that money can be donated, yet there is not much information on how such donations or payments are made²⁷. Counsel made it clear that the Institution makes careful examination of provenance, and always checks the authenticity of artworks. Both she and Bonnie Magness-Gardiner, FBI agent and member of the Art Crime Team, categorically assert that the Institute has ethical restrictions in place that are stricter than those drawn up by ICOM.

Bonnie Magness-Gardiner added that many crimes were discovered because of illegal transportation, or when suspicious banking activity occurred, in which case alone there would be reason to report a suspicious operation. She also disclosed that all possible information, including the use of Google searches, is obtained by FBI agents, and does include published notices. Finally, she stated that the Archives have suffered considerably from the illegal acts of their countless visitors, because of the sheer quantity and fragile condition of the papers consulted.

On the other hand, the Brazilian Financial Intelligence Unit (the Council for Financial Activities Control – COAF) Resolution No. 008 of September 15, 1999, with the aim of preventing the use of art objects or antiquities for the laundering of money, requires the completion of Suspicious Activity Reports by individuals or companies that sell, import, export, or intermediate a sale—whether on a permanent or temporary basis, in a principal or accessory role, and cumulatively or otherwise.

It requires that a record be kept of an individual customer for at least five years, to include name, complete address, identification number, issuer and date of issue, passport or photo ID if a foreign national, and Individual Taxpayer Register (CPF) number. For businesses, the company or corporate name, corporate taxpayer number (CNPJ), complete address, telephone number, primary business and name of parent corporation(s) daughter company(-ies) or affiliate(s) (Art. 3). According to the article 5 of the aforementioned Resolution, the record must contain a detailed description of each piece, the date and amount of the transaction and form of payment (cash, check, credit card, financing, etc.).

The requirement extends to museums, art galleries and libraries, given their nature and language contained in the Money Laundering Law, but is not, however, limited to only those individuals or companies permanently engaged in the business (such as galleries). Yet this is poorly understood, despite the clarity of the written law.

Furthermore, according to statistical data compiled by the COAF, the number of Suspicious Activity Reports has been very low—only 54 (since 1999), 9 in 2013 and 10 in 2014 (July 1st, 2014), which shows that the law in Brazil is not being taken seriously²⁸.

We have a situation in which lack of monitoring activity on the part of the Financial Intelligence Unit and the belief that money laundering through artistic media is a relatively small risk (highly specialized market, highly visible, with low liquidity and high premiums) compared to other industries combine to make the prevention of crime a dead letter, a sort of institutionalized make-believe which does not properly merit the attention one would expect from enforcement authorities.

Furthermore, FinCEN and COAF place the same requirements to financial institution on nonfinancial sector companies engaged in domestic or international cash transfer services, obliging them to record the amounts transferred, form of payment, transaction date, purpose of the wire transfer, name, individual or corporate taxpayer ID, where applicable, of both sender and receiver and addresses for both.

These requirements give a false impression that any money laundering occurring in that sector could actually be detected. There is also a need to require dealers (in the broadest sense of the word) to turn in Suspicious Activity Reports upon acceptance of such illegal funds as may be detected (applying the willful blindness doctrine).

Dealers can help in detecting crimes against property (theft, robbery and fencing) or even financial crimes (money laundering). When a tender is made, they can promptly and anonymously access the websites involved (an informal cautionary investigative technique) and disallow or allow the deal. They might also notify the police, the Attorney General's Office or the Financial Intelligence Unit for their country (for instance, the Financial Crimes Enforcement Network in the United States or the Council for Financial Activities Control in Brazil, in which case they might not remain anonymous (for the records would identify the source). If they do accept the operation while notifying the authorities, they risk future civil or even criminal liability, including prosecution for money laundering (given suspicious activity reporting requirements, should the omission be deemed significant, in view of prior behavior, if there was any risk of an untoward outcome). Here we would have a potential criminal offense, a special mode of participation, and a confluence of agents, where the primary act was negligence on the part of the individual who should have taken proper precautions given their prominent position in the market.

²⁵ Cf. <http://www.si.edu/Museums>. Accessed 06 Sept. 2014.

²⁶ She hosted a meeting with the author and Bonnie Magness-Gardiner, an FBI agent and member of the Art Crime Team, at 10 AM on 05/21/2012 at the Smithsonian Institution (1000 Jefferson Dr. SW, Room 302, Smithsonian Castle). She said they were under no obligation to list their donors, or to report suspicious activity. Precautions are nevertheless taken, such as not accepting donations in the form of cash, stored value cards or prepaid cards.

²⁷ “Your Gift Truly Makes a Difference. It’s as powerful as the visionary gift by the Smithsonian’s founding benefactor, James Smithson—because your generosity enables the Smithsonian to educate, inspire, and bring people together. Federal appropriations only provide about 70 cents of every dollar needed: To keep the Smithsonian’s museum doors open to everyone, free of charge, to conduct ground-breaking scientific and scholarly research, to expose visitors of all ages to new ideas and new worlds, the rest is up to you. There are so many ways to give to the Smithsonian—from cash donations, to planned gifts, to support from your family foundation or your business. If you participate in the workplace giving program the Combined Federal Campaign (CFC), contributing to the Smithsonian is easy—simply use our CFC number, 10782. Make a gift to the Smithsonian today. It takes just a few minutes, and helps us bring alive our nation’s history, culture, art and science for people around the world.” In <http://si.edu/giving/>. Accessed 06, Sept. 2014.

²⁸ See <https://www.coaf.fazenda.gov.br/conteudo/estatisticas/comunicacoes-recebidas-por-segmento/>. Accessed 05 Sept. 2014.

One might invoke the conscious avoidance doctrine, that is, a traditional rule in the United States whereby knowledge is imputed to anyone who engages in willful blindness²⁹.

Dealers may simply prefer to decline a purchase, in which case they would report nothing and avoid involvement with the authorities. That would make it more difficult to uncover the crime and recover the item for delivery to the victim. This is why their behavior is so important in fighting the kind of crime that pervades the art world.

An unwary or negligent dealer might, in hopes of acquiring some important work, prefer not to select the private method of investigation, and simply make the acquisition without notifying the authorities, thereby increasing the separation between the victim and the property (here again we have the possible case of prior behavior having given rise to the outcome).

It might happen that out of panic some dealers, faced with persistent investigation, might destroy the purloined, stolen, forged or laundered item, or simply drive it underground, dodging the investigation and evading their duty to notify the authorities or even protect potential buyers. The intensity of the investigation could have a double effect. It might frighten or provide assurance that the item will be recovered and that perpetrators will eventually face charges. Faced with strenuous enforcement efforts, more and more participants in the market will likely pitch in to cut down on its utilization by criminals.

The dealers could, in effect, act something like informants, that is, those who, by virtue of their confidential contacts (among, perhaps, their former underworld cronies), their contacts in the world of art, or both, either know or are in a position to find out things that would not otherwise be discoverable. These are persons whom criminals are inclined to trust, even though that does not necessarily mean they are themselves current or former criminals. Directly or indirectly, they end up receiving pertinent information about past, present and future criminal activity.

University of Florida professor Fletcher Baldwin Jr.³⁰Purkey³¹

One important difference is that art may be transported, appraisers or dealers are easily bought or even made up—inasmuch as no license or qualification is required of them (reputation and experience being sufficient)—and no authorization is even required for dealing in art.

In turn, regulatory agencies pay little attention to the art world.

In the United States, the Patriot Act has properly regulated the real estate market to exclude all criminality, and requires real estate agents to report cash operations of \$10,000 or more³². Although it does impose reporting requirements on non-financial sectors, Section 365 places no such requirement upon art dealers, as it did for banks, casinos, car dealers and currency exchanges.

In Brazil, the obligation to report suspicious operations is just as incumbent upon “individuals or companies engaged in real estate promotion or the purchase and sale of real property” as it is for “individuals or companies dealing in jewelry, precious stones and precious metals, art objects and antiques” (Article 9, Subsections X and XI respectively, of the Money-Laundering Law, Law No. 9613 of 03/03/1998, amended by Law No. 12683 of 2012). The new language did amend Subsection X to also include individuals, and added Subsection XIII, placing similar obligations “upon business syndicates and depositories of public records.” These amendments are welcome, but ought to be accompanied by more stringent controls on communications, which have traditionally been lacking in the art industry. Another problem is self-regulation, which could lead dealers to accept cash payments without any concern for future liability.

The Self-regulation and Governance of the Art Sector

Money laundering through art still sparks little interest, given the exacerbated criminality that exists. Nor does the market comply with its obligation to report suspicious transactions (in case of obligation), in part because of lax inspection. There appears to be considerable interest in conducting investigations in the United States, but this comes about after the discovery of some violation of revenue or customs laws, or of suspicious payments through banking institutions.

The approach might, together with others, result in the conception of an efficient legal system that allows preventing money laundering in the art world as well as the apprehension or recovery of purloined, stolen, forged or genuine works of art procured with the proceeds of earlier crimes.

Along similar lines, Robert Spiel Jr. states that “currently, criminals who are comfortable functioning in the art world far outnumber their police or law enforcement counterparts.”³³

Here it is important to discuss about self-regulation. Although international auction houses have understood the seriousness of the problem and ask for help of the Art Loss Register - ALR to assist in checking provenance in order to keep looted or stolen works from circulating in the market, there are cases that are putting up for sale if even a given work of art is listed in the ALR or INTERPOL files.

Drug traffickers are using the art sector to acquire valuable assets which can be easily transferred from one side to another, sometimes in tubes. Manus Brinkman believes that the underlying causes for the international traffic in cultural property are similar to those underlying the traffic in drugs. “On the one hand, there is a demand from wealthy consumers, and, on the other, there is a huge supply in regions where poverty reigns. It is rather strange that the collection of cultural objects of unknown provenance by wealthy private individuals is still widely considered to be socially acceptable. Nobody has to collect illicit material.”³⁴

²⁹ Cf. John K. Villa (in *Banking Crimes: Fraud, Money Laundering and Embezzlement*, Vol. I, 2011-2012 Supplement, § 4:11).

³⁰ In *Art Theft, Perfecting The Art of Money Laundering*, p. 8.

³¹ Cf. *The Art of Money Laundering*, pp. 112-113 and 128-134.

³² See *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992). In that case, an agent, Ellen Campbell, was convicted of money laundering for selling a piece of property to a drug dealer, Mark Lawing, who claimed to be in the business of customizing automobiles, at a lower price for cash payment (bundled bills), which contributed toward concealing illegal money from the authorities. See also *United States v. Massac*, 867 F.2d. 174, 177-78 (3d Cir. 1989), knowledge that the funds were associated with drugs sufficed for imputation of criminal liability. See also *United States v. Isabel*, 945 F.2d 1193, 1202-03 (1st Cir. 1991).

³³ Cf. *Art Theft and Forgery Investigation*, p. 25.

With regard to drugs, there are theories to explain this underworld's connection to the world of art. Art can finance the acquisition of drugs or be coveted by drug dealers or their associates, now engaged in its legitimate acquisition—a phenomenon heretofore unknown. One theory is that, as in the case of rich gangsters of yore, the purchase of paintings, engravings, and rare books will, it is hoped, bring them a measure of respectability—a doubtful prospect given the low esteem in which drug traffickers are held.

More than just aesthetics goes into measuring the importance of a work of art. Art transcends all institutions, and, deep down, reflects how people lead their lives.

At the outset that all discussion as to the need to reform pertinent legislation should be unanimous as to the direction things ought to be taken.

Conclusions

Art has been highly valued by mankind since ancient times. Art shapes society and gives it its character. Art defines humans. Art is both heritage and history. Art is difficult to conceptualize, for it involves aesthetics, feelings, utility and imagination. Certain knowledge is required to understand the art world, but this does not mean that one has to take a course in art history. A basic foundational understanding of the art world is sufficient to analyze cases involving robbery, theft, and forgery of artworks, and even money laundering through art.

The romantic view of art (utility, historical record, expression, imagination and beauty) has no parallel in current practices, especially in a world in which unlawful conduct, including the proceeds of drug trafficking, once restricted to certain industries, now makes inroads in the field. To make matters worse, criminal methods have changed radically in pernicious crimes, such as money laundering

Its current business sophistication, unprecedented international market, the huge sums involved and its use as an investment by persons indifferent to it and even by criminals would once have been unthinkable.

International auction houses in the United States all follow the Uniform Commercial Code, which does not restrict the use of cash as a form of payment. They may therefore accept cash payments, irrespective of knowledge of illegality or whether the money comes from unlawful activity—this despite the requirement that they act in the best of good faith.

Because they are self-regulated, it is easy to shift responsibility to the consignor and assume no obligation toward the international community.

Observe that according to Erin Thompson, traditional confidentiality has allowed dealers and auction houses to omit information about prior owners. A research paper on Sotheby's and Christie's showed that from World War II to the year 2000, some 95% of the objects handled in London came with no indication of where

they were found, and 89% listed no historical information. Similarly, less than 1% of Mayan objects auctioned by Sotheby's from 1971 to 1999 were listed with any indication of where they were found. It concludes by stating that "the great majority of antiquities sold to private collectors in the last fifty years have no provenance."³⁵

Note that the lack of provenance means that the piece is not accompanied by documentation on where it was found or a paper trail showing past ownership (to say nothing of the money flow involved). Still, it cannot be categorically stated that the object was necessarily exported illegally from its country of origin.

Lack of proper rules, monitoring or even interest has caused many launderers to look to this market as a means of cleaning their dirty money, since prices may be established, manipulated and altered at any time.

It is true that dirty money gradually and on a large scale began discovering art and real estate. Increasing the flow of illegal money allowed organized crime to move in, followed by harmful consequences given the increased danger of fraud, tax evasion and corruption. Art thus became a natural channel for the laundering of illegal money.

Authorities have become aware of problems surrounding the world of art, such as its vulnerability on a whole series of issues and threats (for there are terrorist organizations stealing cultural assets to finance their activities). The large amounts of money involved and the lack of transparency in their negotiations require greater control by the authorities, whose inaction provides unprecedented opportunities for organized crime to launder dirty money. All of this leaves out the hunger for profits of private investors, who view art as just another business in which the first principle would be that business is not built on the beatitudes.

Actual economic impacts are felt whenever a large volume of illegal money is channeled. In the case of art, in the name of the transmission of cultural values, its actors appear to have paid little attention to a number of unlawful practices, most notably tax evasion, money laundering, and even corruption.

In an important observation, Misha Glenny explains that "the shadow economy has become such an important economic force in our world, and yet it is surprising that we devote so little effort to a systematic understanding of how it works, and how it connects with the licit economy. This shadow world is by no means distinct from its partner in the light which is itself often far less transparent than one might suspect or desire."³⁶

Questionable practices on the part of its participants have been permitted in the name of the independence of the industry and its necessary secrecy. All the while, court cases, reports in the international press and several studies have suggested there might be international, organized, illegal conduct behind it.³⁷

Nor could the emergence of visible links between organized crime and art be viewed with equanimity, for it could soon spell the end of its market—known as it is for forgeries rather than good practices—and

³⁴ In Reflections on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures. *Art and Cultural Heritage: Law, Policy, and Practice*, p. 64.

³⁵ In *The Relationship between Tax Deductions and the Market for Unprovenanced Antiquities*. 33 *Colum. J.L. & Arts* 241, 2010.

³⁶ In *Mcmáfia: crime sem fronteiras*. Translated by Lucia Boldrini. São Paulo: Companhia das Letras, 2008, p. 14.

³⁷ For more information, see author's book: *Money Laundering through Art: A Criminal Justice Perspective*. Springer, Cham, Heidelberg, New York, Dordrecht, London, 2013

add to this the risk of fostering and perpetuating serious criminal behavior (terrorism) against a backdrop of institutionalized inertia.

Hence the need to reflect on the role of each participant in the industry, so that necessary measures may be adopted to obtain the desired results in a reasonable time, all of this, of course, without prejudice to fundamental rights.

Despite the appearance of regulatory control, the use of art in the laundering of money has attracted organized crime, inasmuch as the authorities lack the training required to spot a potential suspect. Drug cartels—mindful of the inattention or even lack of knowledge on the part of many authorities as to the considerable growth in the use of art as a means of laundering money—have made considerable use of this industry.

There is a need to fill loopholes which ordinary criminal law (protecting property from theft and robbery, public faith, forgery, counterfeiting, copyrights, public health, and drug trafficking) has largely been insufficient to properly suppress given the increase in financial crime arising out of the exponential increase in international crime.

Hence, a clear and systematic ordering of existing rules on money laundering, especially laundering made possible through art, so as to block off any possibility of criminal behavior, must be defended. Here then it would make sense to put every effort into effective crime fighting not restricted to setting up regulations for the sector, but also aiming at the improvement of payment methods and a clearer notion of the kind of work done by NGOs.

Closer attention to banking or non-banking transactions in order to prevent money laundering is not following to business in galleries or international auction houses which have become centers for cultural diffusion and eminently social institutions.

A review of codes of conduct, with proper supervision, to see to it that the practice is taken up to not involve conflict of interest, or, failing that at least a check on whether illegal behavior is being detected and proper sanctions applied. It must be required Customer Due Diligence (CDD), and suspicious activities reports. All sensitive information ought to be analyzed and duly reported. In other words, they ought to be more closely monitored. This brings us to the establishment of a compliance job description or department, for the occasional work done by peers (especially when located outside of the country of negotiation or donation of artwork), because even information on its existence may be faulty and not prevent the artificial inflation of art appraisals, as occurs in real estate, and frustrate sales or open the door to fraudulent acquisitions, forged documents, unconvincing or nonexistent identification, negotiations made in the name of outside parties or trustees, or the involvement of offshore accounts to conceal the true identity of buyer or seller. It is important the refusal of payments in cash, in prepaid access cards, through electronic transfers or other methods that are untraceable and usually are the result of some sort of tax evasion or illegal act. Also, it is mandatory the refusal of payments on behalf of outside parties or trustees, or which involve offshore accounts that mask the true identity of the buyer.

Thus, a rethinking the role of museums, galleries, auction houses, insurance companies and nongovernmental organizations, to get them to adapt to the situation we face is in order, and to do likewise with regard to the way suspicious payments are made, the hazards of which have hardly been assessed.

Self-regulation by art private sector, like art world, can be an obstacle for an efficient combat and prevention of money laundering.

What is called for is an immediate rereading of all mechanisms of enforcement and prevention of money laundering as a general proposition, and all of its myriad forms of expression, but notably in this very important area where enforcement is the reaffirmation of cultural and social traits.

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