

## Articles

### "Recent Developments in the Recovery of Old Master Drawings from Bremen"

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Both the Kunstverein Bremen, the parent organization of the Kunsthalle Bremen, a private museum in Germany, and the Azerbaijan State Museum in Baku, claim ownership of at least eight drawings seized by the U.S. Customs Service and currently held by U.S. authorities in New York. The United States Attorney's Office for the Southern District of New York has obtained a series of indictments concerning the trafficking in twelve of the seized drawings, estimated to be worth more than \$10 million,<sup>(1)</sup> and has seized additional drawings. At least eight of the twelve that are the subject of the current indictments, and possibly some of the others, are believed to have been stolen first from Bremen, at the end of World War II, and later from Baku. The drawings that have not been traced back to Bremen are presently claimed by Baku alone. This criminal case -- itself significant because of the value of the art in question and the issues raised -- will set the stage for a civil dispute between Bremen and Baku over ownership of the drawings.

The current criminal cases began with the arrest and indictment of Masatsugu Koga, a Japanese national, who was accused of criminal involvement with stolen goods because of his alleged role in possessing and attempting to sell the twelve drawings.<sup>(2)</sup> Mr. Koga was charged with violating the National Stolen Property Act<sup>(3)</sup> and for conspiring to violate the act by knowingly possessing stolen property that had crossed a state or United States boundary after being stolen and by offering the property for sale.<sup>(4)</sup> Mr. Koga has pleaded guilty and appears to be cooperating in the prosecution of Natavan Aleskerova, an attorney from Azerbaijan, who has more recently been arrested and indicted for alleged receipt, possession, concealment or sale of stolen property as well as criminal conspiracy.<sup>(5)</sup> U.S. Customs will retain the eight disputed drawings, along with others it has seized, until the criminal charges are resolved.

Once the criminal matters are over, the U.S. Attorney's Office can be expected to file a civil interpleader case to allow the court to decide the conflicting claims to ownership of the property. Unless there is a political solution between Germany and Azerbaijan, the two Museums can be expected to litigate their conflicting ownership claims in a civil lawsuit in New York to determine ownership and right to possession of the drawings.

#### **The Drawings and Their History**

The eight disputed drawings that come from Bremen are attributed to old masters such as Albrecht Dürer, Jacob van Ruisdael and Rembrandt, and include the world-famous "Frauenbad" ("Women's Bathhouse") by Albrecht Dürer.<sup>(6)</sup> During the second World War, the Kunsthalle Bremen hid its prints and drawings collections and some paintings at the Karnzow Castle for protection from air raids.<sup>(7)</sup> The area of the castle became the Soviet zone of occupation and, in spite of the Kunsthalle's efforts to preserve its collection, thousands of items were taken away by Soviet soldiers, and others, including these eight drawings.<sup>(8)</sup>

It is not entirely clear how a portion of the Bremen losses came to be in Baku. It is reported that 14 works with Bremen stamps were offered to the State Museum in 1946 or 1947.<sup>(9)</sup> Seeing the Bremen stamps, Baku authorities notified the KGB, who confiscated the artwork.<sup>(10)</sup> The drawings were then hidden until 1993, when they were first exhibited.<sup>(11)</sup> Around the time the Kunstverein found out that 14 drawings were in Baku, and requested their return, the drawings disappeared again as part of a reported theft of 287 works.<sup>(12)</sup> Some of the Bremen drawings that were missing from Baku surfaced in New York City in 1995, when a group of the same works were shown to Sotheby's; the auction house, however, waited a day to notify U.S. authorities, so the drawings were gone and the trail cold before U.S. law enforcement could take any action.<sup>(13)</sup>

## Articles

Most recently, at the German Embassy in Tokyo Mr. Koga offered twelve drawings allegedly originating from Germany beginning with a price of \$12 million, then for a lower price of \$6 million.<sup>(14)</sup> Eight of the offered drawings could immediately be identified by the German Embassy in Tokyo on the basis of the catalogue of the works of art from the collection of the Kunsthalle Bremen, lost during the evacuation in the Second World War, as belonging to the Kunstverein in Bremen. The other four drawings have no connection with the Kunsthalle Bremen. Mr. Koga, a short time after, offered the same twelve drawings at Bremen to representatives of the Kunstverein. The Kunstverein offered Mr. Koga a "finder's fee" in the amount of 10-15 per cent of the value of the eight drawings from Bremen, but this offer was rejected by Mr. Koga. Bremen had notified U.S. law enforcement of the possibility that the drawings were in New York. U.S. Customs then arranged a sting operation, which led to the seizure of the first twelve drawings.<sup>(15)</sup>

### The Criminal Proceedings

In a prelude to the civil dispute between Bremen and Baku, Ms. Aleskerova filed a motion to dismiss the criminal charges, arguing that the eight Bremen drawings were lawfully seized from Germany. She bases this argument on the proposition that the Allied Control Council and the Soviet Military Administration in Germany authorized seizures of cultural property from Germany.<sup>(16)</sup> (The Kunstverein Bremen disputes any claim that seizure of the drawings was lawfully authorized.)

In addition, Thomas Hoving, the former Director of the Metropolitan Museum in New York, and New York art dealer Frederick G. Schab have submitted affidavits to the New York court in support of Ms. Aleskerova, questioning the attributions of the drawings and stating that they appear to be in poor condition.<sup>(17)</sup> In court papers, Mr. Hoving stated that he found the drawings to be "seriously questionable from the standpoint of condition and attribution."<sup>(18)</sup> Based on these affidavits, Ms. Aleskerova's counsel has argued that the drawings are fake and cannot support a criminal prosecution.<sup>(19)</sup>

The Court has denied Ms. Aleskerova's motions to dismiss so, in the absence of some agreement between Ms. Aleskerova and the prosecutors, these issues will be heard again when the case comes to trial, presently scheduled for June 29, 1998.

### A Federal Interpleader Action

Once the drawings are no longer needed as evidence in the criminal case, their fate will be in the hands of a federal judge who will decide whether the drawings will return to either Germany or Azerbaijan. In the United States, only the judicial branch of the federal government can decide conflicting claims of ownership and the method used to resolve ownership disputes is an interpleader action under Federal Rule of Civil Procedure 22 or 28 U.S.C. § 1335, 1397, 2361. In this type of action, a party or "stakeholder" holding property to which there are multiple claimants may ask the court to decide the issue of ownership. If the stakeholder has no interest in the property, the claimants are left to contest amongst themselves the ownership issue.

One of the purposes of interpleader is to protect the stakeholder from liability.<sup>(20)</sup> By asking the court to decide ownership, the stakeholder, such as the federal government in this case, avoids the risk of being the subject of a later suit for returning the property to the wrong claimant. Thus, one of the requirements for an interpleader action is that there are two or more claimants who are "adverse," *i.e.*, each claims an exclusive right to the property.<sup>(21)</sup> If there are not multiple adverse claimants, the stakeholder is at less risk and is less likely to require the protection of the court.

The Kunstverein is not unfamiliar with the procedure of an interpleader action. In 1995, it recovered three drawings also stolen from the Castle Karnzow at the close of the Second World War. In that case, I represented the Kunstverein in its recovery of the drawings from Yuly Saet, a Russian refugee who offered the three drawings to art dealers in New York. A dealer informed Dr. Constance Lowenthal, then Director of the International Foundation for Art Researching New York, and the Federal Bureau of Investigations seized the drawings from Saet in a sting operation. When the government decided not to prosecute Saet, the FBI turned the drawings over to a federal district court in New York to decide ownership. The court, recognizing the facts supporting the Kunstverein's claim of ownership, decided on the Kunsthalle's unopposed motion for summary judgment that the drawings should return to Bremen.

### Conclusion

## Articles

The presently-pending criminal case will not decide ownership of the drawings as between Baku and Bremen. However, once the criminal case is over, that dispute can be expected to be aired, including the raising of the question of whether the taking of the drawings at the end of WWII was opportunistic looting by individuals or official trophy-taking. If found to be the latter, the Court may have to decide the lawfulness of the Soviet taking of private cultural property.

### Footnotes

1. Benjamin Weiser, *\$10 Million in Looted Art is Recovered*, N.Y. Times, Sept. 10, 1997, at A3.
2. *Id.*
3. 18 U.S.C. § 2311, *et seq.* (1970).
4. Section 2314 of Title 18 of the United States Code prohibits the importation of merchandise known to be stolen at the time of import. *Id.* at § 2314. It specifically states that "[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud" shall be in criminal violation of the act. *Id.* at § 2314 (Supp. 1997).
5. Jo Ann Lewis, *Twice-Stolen Art Takes A Twisted Trail to N.Y.*, Wash. Post, Oct. 21, 1997. Ms. Aleskerova's husband, Aydyn Ali Ibragimov was also accused of this crime in the same indictment, but U.S. authorities have not apprehended him. Under the U.S. legal system, the indictment is merely a formal accusation, and the accused retains the presumption of innocence unless and until proven guilty.
6. Jo Ann Lewis, *Duerer, Drawing a Hot Bath*, Wash. Post, Oct. 26, 1997, at G9
7. Constance Lowenthal, *U.S. Customs Recovers Old Masters Drawings*, IFAR Report, Oct. 1997, at 4.
8. *Id.*
9. Mamed Mamedov, *Did Bul-Bul-Ogly start whistling?*, Moshovskii Komsomolets, October 1, 1997.
10. *Id.*
11. *Id.*; Jo Ann Lewis, *Twice-Stolen Art Takes A Twisted Trail to N.Y.*, Wash. Post, Oct. 21, 1997.
12. *Id.*; Mamed Mamedov, *Did Bul-Bul-Ogly start whistling?*, Moshovskii Komsomolets, October 1, 1997. Minister of Culture of Azerbaijan, Polad Bul-Bul-Ogly reportedly claimed that the stolen works were not authentic. *Id.*
13. Jo Ann Lewis, *Twice-Stolen Art Takes A Twisted Trail to N.Y.*, Wash. Post, Oct. 21, 1997.
14. *Id.*
15. Jo Ann Lewis, *Duerer, Drawing a Hot Bath*, Wash. Post, Oct. 26, 1997, at G9
16. *Reply Memorandum of Law in Support of Motion to Dismiss Indictment* dated January 12, 1998 *citing* Nikolai Nikandrov, *The Transfer of the Contents of German Repositories into the Custody of the USSR, in The Spoils of War* 117-20 (Elizabeth Simpson, ed., 1997).
17. *Affidavit of Thomas Hoving* dated January 14, 1998; *Affidavit of Frederick G. Schab* dated January 14, 1998.
18. *Affidavit of Thomas Hoving* dated January 14, 1998.
19. *Reply Memorandum of Law in Support of Motion to Dismiss Indictment* dated January 12, 1998 at 2-5.
20. 7 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 1704 (2d ed. 1986).

Articles

21. 28 U.S.C. § 1335; 7 Wright, *supra*, § 1705.