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DEPARTMENTS

Legal Lowdown

The Online Secondary Market: Resource or Parasite?

By Joshua Kaufman, Esq

The secondary art market has always played a very important and critical role for the collector. One of the main concerns for people who buy art, particularly with an eye to investment, is art's general lack of liquidity. The reality is that it is very difficult for collectors to resell their art. Most galleries and publishers are interested in selling the newest edition or the latest work by the artist, not reselling secondary market art. At times, galleries will take a work back from a collector on consignment or allow for a trade-in on a new, more expensive work, but generally the gallery that sold the initial work is less than interested in taking back a piece and reselling it, instead devoting its time to selling a new work. As such, those who deal in the secondary market provide an important function in that a collector can go to them for assistance in selling their works. Also, a less publicized but significant area of the secondary market is when galleries are looking to unload works that they have, but cannot sell. Galleries will offer these works at substantial discounts to secondary dealers who then offer them to the public at reduced prices.

It is a third class of dealers who are causing galleries, artists and publishers a great deal of anxiety. They are the secondary market Web sites that have very little or no artwork in stock, yet advertise vast numbers of works in the hopes that someone will come to them seeking to buy a listed work. They then go out into the marketplace and try to find the requested work at a low enough price so that they can buy it and then resell it for a profit. If they are unable to locate the piece, apologies are made and they try to sell the purchaser another work that they can obtain or they move on to a different buyer.

It is this type of dealer that adds little to the marketplace and can cause a great deal of harm. When they approach other dealers seeking works at a discount, they are often inducing these dealers to violate their agreements with the publishers, which limit their sales to individuals and don't allow for cross-marketing. To the public, they might be legitimate if they presented themselves in an accurate manner where they acknowledge that they don't have works in stock but might be able to find them. Unfortunately, that is not the way most of these businesses present themselves. If you visit one of their Web sites, you'll see lists of artists with their portraits, bios, price lists and images of their

artworks, all giving the clear, distinct and unmistakable impression that they have a relationship with the artist or their publisher and that the works are in stock and readily available, when in fact none of that is true (or is rarely true). Selling art in the secondary market is perfectly legal. However, where many secondary market dealers cross the line is not in the sale of a piece, but in how they promote the work. To create their Web sites, the secondary art dealer often goes to the publisher's, artist's or an authorized dealer's Web site where the dealer locates and copies the artist's photograph, bio, price list and images of the artist's works. Since this is all online, it is relatively simple to cut and paste low-resolution images from one Web site to another, or simply scan in tear sheets, books, advertisements and other materials that embody the artist's images.

While there is no specific case law in the United States, let us assume for the purposes of this article that it is permissible to make your own reproduction of an artwork that you own and want to sell, as one might do for inclusion in an auction catalog. However, the online secondary market galleries generally do not own these works and are not taking the pictures themselves. Rather, they are cutting, pasting or scanning pictures that others have taken. They are, therefore, committing a copyright violation by cutting and pasting the works from one Web site to another or by scanning the works from the various media.

Next, when they post them on their Web sites, they are publicly displaying the copyrighted images, which again violates the rights of the copyright owners, not only in the artwork, but also the copyright of either the publisher or the photographer who owns the separate and distinct copyright in the photograph, Web site or advertisement. Therefore, in the copying and posting of the images there are two, perhaps three, copyright infringements involved. The purloined artist biography is usually taken either verbatim, as a "cut and paste," or as a closely paraphrased version from the biography, written by the artist or their publisher. Again, to do so is a copyright violation. The biography is protected the same as any book or any other literary work. Therefore, the unauthorized cutting and pasting or copying of an artist's biography is a copyright violation of the textual materials.

Use of the artist's portrait without his or her consent is a violation of the artist's right of publicity. Almost every state in the United States today recognizes the right of publicity, which, in the simplest sense, holds that one may not use the name or likeness of individuals for commercial purposes without their permission. Using the artist's photograph and name on a Web site without the artist's consent to further the sale of goods would violate the artist's right of publicity.

Additionally, to give a purchaser comfort that they are buying an authentic piece, these sites usually either implicitly imply, or explicitly and falsely state, that they are an authorized dealer or somehow affiliated with the artist or the publisher. To do so is a violation of federal trademark law, specifically Section 43(a) of the Lanham Act. This federal trademark law (most states have similar state laws) states that "one may not create a misdesignation of association or affiliation with an entity (i.e., the artist or publisher) when none exists." The test for violating this federal law is the likelihood of confusion by the public regarding association or affiliation. Therefore, all the secondary sales Web site needs to do to violate the law is give the impression that it is associated with the artist. Even an inference, if it is likely to confuse the average art buyer into thinking that there is a relationship between the Web site and the artist, will cause a violation of Section 43(a) of the Lanham Act.

The artist's name and signature are often trademarked. They may be registered or not; it doesn't matter for infringement purposes. Using the artist's name or signature is also likely to be a separate trademark infringement. Once again, the

test for this type of trademark infringement is the likelihood of confusion on the part of the public. Actual confusion does not have to be shown, so the use of an artist's distinct signature or name in a way that identifies the source of the art would violate trademark law.

The posting of a price list can often also be actionable. Generally, the lists are not made publicly available (they are not posted on the publisher's Web site or generally handed out) but are only provided to authorized dealers in proper circumstances; these lists can be considered proprietary, and their disclosure by publishing them on the Web site can violate trade secret and other similar laws. [Note to artists and publishers: If you do not wish to see your price lists on Web sites, stamp them "Confidential" and ensure that when you send them out to galleries the cover letter accompanying the materials states that "the list is proprietary information and may not be published or shared with third parties."] Posting propriety information, if it violates trade secret law, is actionable in every state in the United States.

Finally, it is illegal in most major jurisdictions for an art merchant to sell, or even offer for sale, a limited edition print or photograph—and in some states, sculptures—without providing a certificate of authenticity. Several states also require a dealer to provide the information contained on the actual certificate at the time the work is offered for sale.

If the secondary market dealer, who in most states would be considered an art merchant, does not provide a certificate of authenticity, it would mean a violation of the numerous print disclosure laws enacted by the states. If the print the dealer is selling does not come with a certificate, he would be hard pressed to obtain the necessary information required to be disclosed. In several jurisdictions, for example New York and California, among others, it is illegal to even offer the piece for sale on a Web site without providing the information contained in the certificate of authenticity on the Web site along with the offer. Even if a secondary dealer obtained a certificate of authenticity from sources prior to the sale, the dealer probably would not have that information until he acquired the print and the accompanying certificate. Thus, the dealer would be offering the prints for sale without the required information, a violation of the various print disclosure laws.

Violating print disclosure laws not only opens up a dealer for civil action, but it is also a criminal violation in many states across the United States.

Additionally, depending on the state in which the dealer is located, and the state to which the dealer is selling, there may be other consumer protection, fraud and unfair trade practices that the online secondary art dealer described above might also be violating.

A word to the wise: If you are a secondary market dealer, do your homework—dot your i's and cross your t's. Make sure that your Web site does not violate any of the artist's or publisher's rights as set out above or you may find yourself the recipient of a federal lawsuit and criminal charges.