

I Own It

What Exactly Do You Get When You Buy an Artwork?

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When you buy a piece of real estate, you get a deed, and usually a report of a title search conducted by your attorney or a title insurance company, to show the history of the property leading up to that deed.

When you buy a car, you get a document called a “title,” and you also transfer a registration of that car with your state government, and receive a registration certificate and license plates for it.

But when you buy a painting, you may well get just exactly what you’d get when buying a toy for your niece or a package of underwear at a discount chain store: a purchase receipt.

When you buy that toy or underwear in its original package at a big-box store, you probably have no reason to spend one millisecond’s thought on the question of whether the store has proper legal rights to sell you that item or what your legal rights in the item will be once you walk out those doors without setting off the beeping security tag detector. You simply bought the item, own it, will use it, and discard it. If the item proves to be unsuitable once out of the package – inoperable, or the wrong size – you assume that you can probably bring it back along with that purchase receipt and exchange it for another effectively identical item.

But when you walk out of a gallery with a painting – what exactly is it you have purchased?

BUNDLES OF RIGHTS: LAND OWNERSHIP

What comprises the “ownership” of anything is really a complex, fascinating concept that incorporates elements of law, culture, and philosophy. Western “civilized” (i.e. city-dwelling based) culture, for example, holds to the notion that land – real estate, or “real property” – is initially owned by a sovereign, and the sovereign can then authorize the land’s distribution to an infinite number of small private holders, who have exclusive ownership of their parcel subject only to some reserve rights of the sovereign. The western legal philosophy about land ownership is that when you buy a piece of land you buy a “bundle of rights” regarding that land. Each right – to lease the land, to occupy it, to farm it, to develop it, to mortgage it, to leave it to your heirs in your will – is like an individual stick in that bundle, and can be sold or leased separately from the “fee simple,” which is the name for the whole kit-and-caboodle of bundled rights taken all together. But even if you own land in fee simple, you are subject to the underlying rights of the sovereign – the government can still take your land by eminent domain (such as seizing land for highway construction or an airport), can regulate it by zoning and land use controls, and can tax you for your possession of it.

This is not the only legal philosophy there has ever been about land ownership. Native Americans and indigenous and nomadic peoples in many parts of the world did not

embrace a concept of land ownership any more than our present culture embraces a concept of owning outer space. Land to many people, like the Milky Way to us, simply “is,” and though we may travel through it, it does not belong to us. But with six billion people on the planet, mostly living under governments that embrace a deed-based system of land registration and control, the concept of unowned land has nearly vanished from the Earth. The last nomadic peoples of the world, from the Mongolian horse traders to the Sami reindeer herders and the great cattle and hunting cultures of Africa are finding their open lands increasingly hemmed in, and even finding city-dwellers vacation McMansions springing up in the middle of their “unowned” plains. The western legal philosophy of sovereign-dominated deeded ownership of a bundle of rights in land has a near-complete victory over other approaches.

But art is not considered real estate; case law indicates that even large sculptures that are “permanently” installed on a parcel of land are considered personal property, rather than real property – though art, by law, is a very unique kind of personal property.

POSSESSION: OWNERSHIP OF PERSONAL PROPERTY

One of the greatest subtle ironies of modern western culture is that most parents spend the first two or three years of their children’s lives admonishing their kids to “share,” and then spend the rest of their lives pursuing, obtaining, and protecting items of personal property for their individual use and gain. While most clan and tribal cultures of our ancestry recognized some form of private, individual property ownership, particularly for small items of personal adornment, larger items and necessary commodities – boats, food – were often collective property for the benefit of the family or village. But today, the category of individually owned private

property has grown drastically. Although we instinctively revert to ancient tribal wisdom to try to keep our toddlers from arguing over a toy truck, I highly doubt that if I walked next door and got into my neighbor’s Lexus to try to drive it to work this morning, his wife would hand me the keys and admonish him to remember to “share.”

In our present Western culture, private property ownership is highly valued; so valued that our constitution protects our right to property in the same breath as our life and liberty. And if we tend to forget the sovereign’s over-arching interest in our real estate most days, we certainly tend to think of our ownership in personal property items – our television, stereo, and kitchen knives – as entire and absolute. It’s mine. No one else can take it away or use it.

To a large extent, we’d be legally correct in that assessment. Personal property also carries with it a related “bundle of rights” to sell, lease, destroy, use as collateral in a loan, and leave to our heirs. But it is rarer that these rights get divided up with personal property than they do with real estate. And to the extent those rights do get parceled out – I let my neighbor use my lawn mower while his is broken – it is usually done on a very informal basis. Usually, the possession speaks for itself – the lawn mower is in my garage, so it’s mine; the television is in my living room, which demonstrates that it is mine; the necklace is around my neck, so it is mine.

In the legal realm, these personal items of property are usually referred to either as “goods” (particularly when dealing with laws regarding commercial sales and business transactions) or “chattels.” If you think that word sounds a lot like “cattle” you’re correct; they have the same origin, meaning moveable items of personal property. Cattle has long been, and in some parts of the world still is, an extremely valuable form of personal or tribal wealth – after all, you’d have a hard time carrying

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your TV and stereo with you, but cattle walks on its own, meaning you can take it somewhere else to trade with, or carry your own food supply with you when moving to, or conquering, new lands.

But even our ownership of personal property is not absolute. Unlike real estate, however, the limits to the boundaries of our personal property ownership are not often a matter of deferring to the sovereign, but rather deferring to the rights which other people may have in that property – and the term *people* includes those entities which have at law many of the same rights as humans, such as corporations or ships. Those rights include patents and trademarks, as well as rights to be free from my using the item to impose injury on someone. I may have the right to do “whatever I want” with my kitchen knife, but that right does not extend to using the Wusthof trident logo, which is trademarked; copying a patented handle design and selling it as my own; or stabbing somebody with it. Still, I’m free to throw the knife away, sharpen it into weird shapes, or let it rust on a garage shelf if I want to; if I can’t do everything I’d like to with it, I can at least do most things.

REGULATED PROPERTY

Over the last hundred years or so, many different classes of personal property have come to have layers of additional rules regarding their ownership, possession, use, and transfer. These special classes of personal property include things like motor vehicles and boats, which require a government issued “title” and a government-sanctioned registration as proof of ownership. Regulated drugs are only available to persons with appropriate prescriptions, and there is a list of drugs that grows daily which are all together illegal. Hazardous materials are only available to persons who have proper licenses for them and who file government-mandated logs for use and disposal. Governmental

background checks are required for most firearms purchases, and in many states gun licenses are required. In short, the list of items of personal property which require governmental involvement in order to have valid legal title is growing, and the further away from underwear and inexpensive toys, and the closer towards personal property of the expensive or investment variety – cars, stocks, securities – one gets, the more rigorous this regulation is, as a general rule.

But there are some classes of personal property of interest for investment and which can command very high prices but which remain effectively unregulated. This includes antiques, gems, and art. All three share some common challenges for the person wishing to acquire them, mainly questions of authenticity and value. The art and antiques market, and to only a slightly lesser extent the gems and coins market, is a truly free-market system: items are worth what someone will pay for them, which can swing widely depending on the day. But unlike the car buyer who knows they are buying a 1997 Ford Escort, even if they may not be wholly certain of the condition of various internal engine parts, the buyer of art, antiques, gems or coins often is left wondering if the item they bought is even what they presumed it was.

What determines “authenticity” is also primarily a matter of free-market forces. If authenticity is challenged by a buyer who thinks they’ve been duped or a seller who thinks they’ve been ripped off, the ultimate arbiter of whether a work really is a Picasso, Matisse, or Pollock will be the courts. For this, the courts have adopted no rigid or uniform standards; the determination can only be made on a case-by-case basis.

But even if an artwork is “authentic” – that is, it’s really a painting by Miró or whatever it’s been represented to be – there remains the question of what the purchaser’s ownership interest in it really is. The nature of ownership of art differs from things like antiques and gems – as well as underwear

and plastic toys – in several important ways.

THE NATURE OF ART OWNERSHIP

On the “I can do whatever I want with it” theory of private property ownership, you can indeed shred that underwear, smash that plastic toy – and take a hammer to a gemstone or antique chair if you are so inclined (foolhardy, perhaps, but no more so than the rock stars who routinely smash several-thousand-dollar guitars on stage purely for dramatic effect). But you may not have the right to destroy a piece of artwork, or even to “improve” upon it by adding, say, a snowman or a kitten to the scene. If the work is by a living artist, you own that artwork subject to the creating artist’s legal “moral rights.” The artist maintains rights to the integrity of their work, as well as to appropriate attribution. The artist cannot tell you where in your house to hang the painting – but the artist can preclude you from hanging the work in a public or commercial space.

Even if the work is not by a living artist, moral rights may continue to attach to the work, depending on where it originated. Under French law, for example, the artist’s *droit moral* continues to be held by the artist’s heirs.

The artist and his or her heirs also holds the copyright on the image of the artwork which you own. This means you can’t put the image on anything else (T-shirts, mugs, posters, note cards) or otherwise use it, or a derivative of it, commercially.

The artist may also have an economic right which remains attached to the work. Some states – California foremost among them – have passed statutes which vest the artist with royalty rights, a right to some portion of the proceeds of future sales of the work. This is an intriguing new approach to property rights in personal creative property. Imagine if Ford got a slice of the sales price every time a used Escort or Ranger was re-sold. Come to think of it, given that state vehicle and registration laws carefully track

car transactions, I’m surprised that the cash-strapped automotive industry hasn’t proposed this. The theory behind royalty payments is akin to the idea that writers get royalties each time a publisher sells one of their books – but of course writers don’t get royalties on re-sales of used books, something which, given the huge on-line used book market, I’m surprised writers and publishers haven’t proposed.

With artwork, royalties on future sales of works allows the traditional “starving artist” to reap back some of the profits of their own works, since the escalation in value of an artist’s work over time in theory is related to that artist’s continued work and growing reputation. If I sell you an emerald, and next year emerald prices triple and you sell the stone to someone else, it’s hard to argue that I should be entitled to a slice of your sale profits, as I had nothing to do with the change in value. But if I sell you one of my watercolors, and by next year the value of my watercolors has tripled, that increase will be due to the fact that more of the wide world is taking notice and approving of my works. In other words, my continued labor created the benefit of the increased sale price, so I get a royalty off your sale which serves, in effect, as payment on that additional labor by me.

So although you purchase a piece of artwork as *chattel* – a moveable piece of personal property that you wrap up and take home from the store in the back of your SUV – you are really only purchasing some of the sticks in the “bundle of rights” relative to the work’s ownership. You can hang or store the work, sell it without the artist’s permission (and pocket whatever profits there might be from that sale outside the artists royalty rights), or leave it in your will to whomsoever you please. However, the artist continues to hold copyrights, moral rights, and possibly even an ongoing economic interest in the work.

The fact that you may not know who the artist is, or how to contact them, does not terminate the artist’s rights. You are still

*Fine Art
Registry™
is the only
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purchasing an artwork subject to the artist's rights, even if the artist is unknown. If you disrespect those rights – licensing the image for commercial purposes, say, or trying to pass the work off as being that of some other, possibly more highly-priced artist – you run the very real risk of the artist, or their attorney, showing up at your door demanding the legal compensation due to them. Works which may be by unknown artists from states such as California that require royalties on future sales present a particularly risky situation. If you sell such a painting for a substantial sum of money, it might be wise to escrow the royalty funds and to take reasonable steps to locate the true artist.

Of course, it also behooves an artist to maintain track of their works so that they can take whatever steps are necessary to protect their copyrights, moral rights, and royalties interests. To this end, Fine Art Registry™ registration, which allows an artist to monitor the present ownership of the works they've created and any transactions that occur, is the only practical and efficient means of doing so.

WHAT ABOUT OTHER PEOPLE'S INTERESTS?

The artist and the current person who possesses a piece of artwork may not be the only ones with some kind of legal interest or right in the piece. Going back to the example of real estate, all of the "record owners" of a parcel of land will be listed on a deed, which is recorded in the publicly-accessible land records for anyone to see. If a parcel of land is owned by three siblings, all three of their names will be on the deed. If only one name is on the deed, then courts will hold that only that one person owns the land. If a bank loans money to purchase the land or make improvements on it, then a record of that interest – a mortgage – will also be filed in the land records. If the town or a

utility purchases a right-of-way through the land for a road or power line, that is also filed in the land records. By doing a "title search," physically researching the documents in the local land records, anyone can find out who has a legal interest in a piece of land.

If a bank loans me \$3 million to purchase a painting, even if our loan agreement says that loan is secured by the painting itself, subsequent purchasers of the painting will be unaware that the bank has an interest in the painting, because there is no governmental equivalent of "land records" for chattel like paintings. There is no government-issued "title" like a deed or car title for a painting. If a painting is purchased by three siblings jointly, the bill of sale from the auction house or gallery may well simply have the name of one of them on there; the mere fact that you've got one name on a bill of sale for a chattel doesn't mean that there aren't other owners. Or if a restorer or framer does work on a painting, and takes a piece of paper indicating that he'll be paid for his work on the sale of the painting, he also has a secured ownership interest. How can an artwork purchaser ensure that there are not "owners" of a painting other than the person who is offering it for sale?

With no governmental equivalent of land records for chattel like artwork, the Fine Art Registry database is again the best protection both for art purchasers and for anyone with a vested legal interest in a painting. Bank loans, restorers' and framers' liens, gallery or broker commission liens, and the interests of joint owners, can all be listed in the transaction record for an artwork registered with Fine Art Registry. While courts have not yet ruled that a purchaser is entitled to rely on the Fine Art Registry database in the same way that land purchasers can rely on a title search, courts have pointed to the growing legal necessity of having just such a database: "It may be time for the art world to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting. An

efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of adverse possession with all its uncertainties.”

Artwork is unique chattel, and the legal interests of art owners are in many ways different from the rights of owners of any other kind of personal property. But that is precisely the beauty and intrigue of artwork – each piece a totally unique, one of a kind expression of human spirit. Ownership of such a work carries unique risks and rights, but unique rewards, pleasures, and benefits as well. 📌

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