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Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum

United States/États-Unis – Estate of Lea Bondi – Leopold Museum – Artwork/oeuvre d'art – Nazi looted art/spoliations nazies – Judicial claim/action en justice – Settlement agreement/accord transactionnel – Anti-seizure legislation/garantie de restitution – Criminal offence/infraction pénale – Financial compensation/indemnisation – Symbolic gesture/geste symbolique – Loan/prêt

After having been taken from Lea Bondi, a Jew forced to flee Austria following the Anschluss, the painting “Portrait of Wally” by Egon Schiele was seized by the US Forces at the end of the war. The portrait was first returned by the US Restitution Division to the Austrian Federal Office for Preservation of Historical Monument (BDA). Portrait of Wally was then returned by the BDA to another Jewish family, which owned a number of Schiele’s paintings, who sold it to the Oesterreichische Galerie Belvedere. Finally, Portrait of Wally was acquired by the art collector Rudolph Leopold. In 1994, he sold his collection, including Portrait of Wally, to the Leopold Museum. The painting was loaned and exposed at the New York MoMA from 1997 to 1998. After the end of the exhibition, the heirs of Mrs Bondi brought a suit against the Leopold Museum and the painting was seized. On July 2010, an agreement was reached between the heirs, the U.S. Government and the Leopold Museum.

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I. Chronology¹

Nazi looted art

- **1925:** Mrs Bondi, an Austrian Jew, owner of an art gallery in Vienna, acquired the painting “Portrait of Wally” by Egon Schiele for herself.
- **1938:** German troops occupied Austria and annexed it to Nazi Germany (*Anschluss*). Mrs Bondi’s gallery was declared “non-aryan” and subject to confiscation.
- **1938, around March 13:** Mrs Bondi sold the art gallery to Mr Welz for 13.500.- Reichmark. Mr Welz was a member of the National Socialist German Workers. He decided to aryanize the art gallery. The transfer of “Portrait of Wally” to Mr Welz is unclear. Mrs Bondi and her husband migrated to England.
- **1939 or 1940:** Mr Welz acquired a number of Schiele’s paintings and drawings from Dr Rieger, a collector and Austrian Jew. Dr Rieger and his wife died in the Theresienstadt concentration camp (1942).
- **May 1945:** United States Forces occupied Austria. They arrested Mr Welz and seized his property, including “Portrait of Wally”.
- **May 1947:** Dr Rieger’s son engaged attorneys to recover the property taken by the Nazi. His attorney wrote to the Reparations, Deliveries and Restitution Division (RDR) of the United States. The letter did not contain any reference to the painting “Portrait of Wally”.
- **December 1947:** The RDR released fourteen paintings the United States Forces had seized to the Bundesdenkmal, the Austrian Federal Office for the Preservation of Historical Monuments (BDA). “Portrait of Wally” was one of the paintings delivered by the RDR.
- **May 1950:** The BDA delivered several paintings, including “Portrait of Wally”, to the Rieger heirs.
- **Late 1950:** The Rieger heirs negotiated the sale of artworks from Rieger’s collection to the Österreichische Galerie Belvedere (Belvedere). The Austrian Federal Ministry of Education approved the purchase of eleven paintings, including three Schiele’s works. Although not explicitly referenced in either the Ministry of Education approval or the agreement, “Portrait of Wally” was included in the transaction.
- **1953:** An art collector, Dr Leopold, visited Mrs Bondi in London. He acquired several paintings from her. In the course of this transaction, Mrs Bondi asked Dr Leopold where “Portrait of Wally” was. Dr Leopold answered that the painting was at the Belvedere.
- **September 1954:** Dr Leopold acquired “Portrait of Wally”. He did not ask the Belvedere for any documentation showing that “Portrait of Wally” had been returned to the Rieger heirs.
- **1969:** Mrs Bondi died. She never filed a formal lawsuit to obtain the restitution of “Portrait of Wally”.
- **August 1994:** Dr Leopold sold his collection to the newly established Museum (Leopold Museum) and became the Museum’s “Museological Director” for life.
- **1995:** The Leopold Museum prepared a catalogue for three expositions. The provenance note on “Portrait of Wally”, authored by Dr Leopold himself, was as follows: “Emil Toepfer, Wien;

¹ The chronology is a summary of the background made by the Court of New York in *United States of America v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

Richard Lanyi, Wien; Lea Bondi Jaray, Wien später London; Österreichische Galerie, Wien; Rudolf Leopold, Wien.”

- **1997:** The Museum loaned and shipped part of its Schiele collection, including “Portrait of Wally”, to the New York’s Museum of Modern Art (MoMA).
- **1997-1998:** The MoMA exhibited “Portrait of Wally”.
- **1998:** Three days after the end of the exhibition, the District Attorney of New York County issued a subpoena for the painting after Mrs Bondi heirs filed a claim alleging that the painting was stolen in 1938. The subpoena was quashed by the New York Court of Appeals on September 21 (violation of Section 12.03 of New York’s Arts and Cultural Affairs Law which protect artwork on loan to museums in New York from seizure in both criminal and civil actions). **The next day**, United States Magistrate Judge James C. Francis issued a seizure warrant for the painting. The U.S. Customs Service seized the painting under the National Stolen Property Act (NSPA) on the ground that it was stolen property and unlawfully imported into the United States.
- **20 July 2010:** After years of inconclusive litigation, the Estate of Lea Bondi Jaray announced the settlement of the case with the U.S. Government and the Leopold Museum by an unprecedented agreement.

II. Dispute Resolution Process

Judicial claim – Settlement agreement

- Mrs Bondi never filed a formal claim for recovery of “Portrait of Wally”. She thought that it would have been extremely difficult to recover her painting before an Austrian judge and against an Austrian citizen (Dr Leopold)² and she probably also lacked the needed financial resources.³ Nevertheless, the attempts that Mrs Bondi made to negotiate over “Portrait of Wally” suggest that she considered the painting as part of her property. In particular, she asked Dr Leopold (before he bought himself the painting) to introduce her and/or speak about “Portrait of Wally” with the Belvedere. She also sought help from Otto Keller, an American art dealer.
- At the end of 1997, a New Yorker journalist, Mrs Judith H. Dobrzynski, published an article in the New York Times⁴ about Dr Leopold, described as a (too) zealous collector. Furthermore, she pointed out a few paintings from the Leopold Museum exposed by the MoMA as of doubtful provenance. In particular, she stressed out that “Portrait of Wally” was probably taken from Mrs Bondi during the *Anschluss* and that Dr Leopold probably knew that the painting was looted. It seems that the article encouraged both the heirs of Mrs Bondi and the authorities to proceed to recover “Portrait of Wally”.

² *United States of America v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem*, 663 F. Supp. 2d 232 (S.D.N.Y 2009).

³ Judith Dobrzynski, “The Zealous Collector: A Singular Passion for Amassing Art, One Way or Another,” *The New York Times*, December 24, 1997, accessed August 15, 2011, <http://www.judithdobrzynski.com/3016/the-zealous-collector>.

⁴ *Ibid.*

- Following the end of the Schiele exhibition at the MOMA which included “Portrait of Wally”, the heirs of Mrs Bondi filed a legal claim for its recovery.
- Therefore the painting was seized by the District Attorney of New York County. However, the Courts of New York decided that a loaned artwork could not be seized, either in civil or criminal procedure, because it was protected under New York’s Arts and Cultural Affairs Law.
- The day after, the New York Court of Appeal ruled in favour of the Leopold Museum and the MoMA. Subsequently, the Federal Government of the United States stepped in. The painting was seized by the U.S. Customs Service and twelve years of proceedings started in order to determine whether the Leopold Museum violated the NSPA by importing “Portrait of Wally” in the United States.
- Just before going to trial to determine whether or not Dr Leopold, acting as an agent for the Leopold Museum, knew that the painting was stolen when he brought it into the United States, the parties agreed to settle out of court.

III. Legal Issues

Anti-seizure legislation – Criminal offence

- The Case regarding “Portrait of Wally”, “changed the world” by showing that an artwork loaned to the MoMA could be seized by the authorities.⁵
- More precisely, the instant case demonstrated that, whereas a loaned artwork **could not be seized** under New York Law (anti-seizure legislation prohibited the seizure of artworks, even in criminal cases), it **could be seized** by the U.S. Customs Service if the NSPA (federal rules) had been violated. This means that a **looted artwork** could be considered as **stolen** under the NSPA. Therefore, if the artwork is imported in the United States by someone who knows that it was stolen, it cannot be exported by this person anymore.
- Some States offer statutory protection to loaned artwork. Anti-seizure statutes are legal instruments that facilitate the lending of artworks for temporary exhibition by guaranteeing that they cannot be seized by the courts of the borrowing State. Hence, the purpose of such statutes is to overcome the reluctance of museums and similar institutions to loan their artworks to foreign jurisdiction where they might be subject to some form of judicial seizure. In Switzerland, the “Cultural Property Transfer Act/Loi fédérale suisse sur le transfert illicite des biens culturels” (CPTA/LTBC) implements a “guarantee of restitution”. The CPTA is a federal rule and cannot be overruled. But experts believe that the guarantee apply only in case of civil procedure.
- The principal issue at stake before the U.S. Court was whether the NSPA had been violated. A NSPA violation consists of three elements: “(1) the transportation in interstate of foreign commerce of property, (2) valued at \$ 5.000. - or more and (3) with the knowledge that the

⁵ Howard Spiegler, “What the Lady Has Wrought: The Ramifications of the Portrait of Wally Case,” *The Art Law Newsletter of Herrick, Feinstein LLP*, 7 (2010): 4.

- property was stolen, converted, or taken by fraud”.⁶ In particular, the Court had to find out if the painting could be considered as stolen and if the Museum imported “Portrait of Wally” knowing that it was stolen.
- The District Court decided that “Portrait of Wally” **was stolen** (spoliation) by Mr Welz and **remained stolen** at the time the painting was imported in the United States⁷. Moreover, the court stated that the United States have an interest in “enforcing its own laws as applied to conduct on its own soil” in pursuit of its “policy to prohibit knowing transportation of stolen or converted goods into the United States”.⁸
 - The Court was convinced by the arguments of the U.S. Government: “Portrait of Wally” was not part of the Würthle Gallery owned by Mrs Bondi but a private property and was wrongfully taken by Mr Welz. Indeed, “Portrait of Wally”, as a private property, had no connection with the Aryanization of the Gallery. The U.S. Government affirmed that it is an “undisputed fact that Welz was a Nazi and Bondi, as a Jew hoping to escape the unspeakable fate of so many, who died in the Holocaust, could not refuse to comply with his wishes”.⁹ Therefore, Mrs Bondi surrendered the painting because she was afraid Mr Welz would prevent her from leaving the country.
 - The Museum tried to prove that the Belvedere and/or Dr Leopold acquired title to the painting under Austrian law. However, the Court decided that the Belvedere had not acquired title by prescriptive possession under Austrian law. One of the reasons is that no evidence indicated that the Museum conducted any type of follow-up investigation. The Court also decided that Dr Leopold had not obtained ownership title to “Portrait of Wally” neither as a *bona fide* purchaser nor by prescription because he had reasons to doubt the Belvedere acquired title and he never performed a sufficient investigation.
 - Finally, the Court did not decide on summary judgment if Dr Leopold knew that the painting was stolen when he imported it in the United States¹⁰. The Court estimated that the question is properly one for the jury. The parties settled before the beginning of the trial. Therefore, this question remained unsolved.

IV. Adopted Solution

Financial compensation – Loan – Symbolic gesture

- On 19 July 2010, a stipulation and order of settlement and continuance was entered.
- The parties agreed to the following conditions: The Museum Leopold will pay US \$ 19.000.000. - to the heirs of Mrs Bondi; “Portrait of Wally” will be loaned for three weeks at the Museum of Jewish Heritage in New York; the action will be dismissed with prejudice,

⁶ *United States of America v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

⁷ *United States of America v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

⁸ *United States of America v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000), para. 10.

⁹ *United States of America v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

¹⁰ *United States of America v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

without costs and/or attorney's fees to any party; the painting will be returned to the Leopold Museum; a permanent exhibition signage will be displayed next to the painting stating in particular that "based on the evidence presented during the case, the United States District Court in New York concluded in 2009 that the Painting was the personal property of Lea Bondi Jaray and that it was stolen from her in Vienna in the late 1930's by Friedrich Welz, who was a member and collaborator of the Nazi party".¹¹

- Exclusive jurisdiction is attributed to the United States District Court for the Southern District of New York. The settlement governing laws are the laws of the State of New York.¹²

V. Comment

- Maybe the most important issue in this case is the broad definition of "stolen" under the NSPA: "An item is stolen if it belonged to someone who did not [...] consent".¹³ "Portrait of Wally" was not part of Würthle Gallery who Mrs Bondi "sold" (Aryanization) to Mr Welz. Therefore Mr Welz took "Portrait of Wally" without the consent of Mrs Bondi who surrendered the painting fearing that Mr Welz would prevent her to flee the country. If "Portrait of Wally" was part of Würthle Gallery, it seems that the Court would not consider it as Nazi-looted art or as stolen under NSPA because it was not wrongfully taken under the German laws of that time.
- One may wonder why the U.S. Government was involved for such a long period of time in a litigation maybe wasting resources for what is a purely civil matter issue about ownership (and not a civil forfeiture). Indeed, the US Government convened "the 1998 conference of government officials, art experts, museum officials, and other interested parties from around the world to consider and debate the many issues raised by the continuing discovery of Nazi-looted assets including artworks, resulting in the promulgation of the Washington Principles".¹⁴

VI. Sources

a. Court decisions

- *United States of America v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000) (granting motion to dismiss)
- *United States of America v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem* 2000, U.S. Dist. LEXIS 18713 (S.D.N.Y. 2000) (permitting amendment of complaint).

¹¹ Stipulation and order of settlement and discontinuance, *United States of America v. Portrait of Wally, A painting by Egon Schiele, Defendant in Rem* (S.D.N.Y. 2010).

¹² *Ibid.*

¹³ *United States of America v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

¹⁴ Spiegler, "What the Lady Has Wrought," 4.

- *United States of America v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem* 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002) (denying motions to dismiss).
- *United States of America v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem*, Opinion and Order, 663 F. Supp. 2d 232 (S.D.N.Y. 2009) (denying motions for summary judgment and ordering trial).

b. Legislation

- National Stolen Property Act, U.S. Code 1994 Title 18, Crimes and Criminal Procedures (Section 2315: Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps).
- Restatement (Third) Of Foreign Relations 1987 (§§ 443-444).
- Foreign Relations And Intercourse, US Code 2010 Title 22, Mutual Educational And Cultural Exchange Program (Section 2459: Immunity From Seizure Under Judicial Process Of Cultural Objects Imported For Temporary Exhibition Or Display).
- New York Code 2006, Arts and Cultural Affairs (12.01 – 12.03: Artist-art Merchant Relationships).

c. Documents

- Stipulation and order of settlement and discontinuance, *United States of America v. Portrait of Wally, A painting by Egon Schiele, Defendant in Rem* (S.D.N.Y. 2010).

d. Media

- Spiegler, Howard. "What the Lady Has Wrought: The Ramifications of the Portrait of Wally Case." *The Art Law Newsletter of Herrick, Feinstein LLP*. 07 (2010) : 1-7.
- Dobrzynski, Judith. "The Zealous Collector: A Singular Passion For Amassing Art, One Way or Another." *The New York Times*, December 24, 1997. Accessed August 15, 2011. <http://www.judithdobrzynski.com/3016/the-zealous-collector>.