

ARIS TITLE INSURANCE CORPORATION



**Artist-Endowed Foundations: Effective Practice in
Assessing and Managing Title Risks**

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Artist-Endowed Foundations: Effective Practice in Assessing and Managing Title Risks

Legal title is the full and absolute ownership of property that is clear and enforceable by a court of law and is central to the value of any asset, certainly an artwork. There are two reasons Artist-Endowed Foundations (“AEFs”) may be concerned about risks to legal title with respect to their artists’ works: questions of title might influence conclusions about provenance that inform scholarly publications produced by the AEF; and defects in title might emerge as problematic for artworks maintained in the AEF’s own collection or those works which it may have possessed and then sold or granted to museums.

AEFs are created by artists or their heirs to own the artist’s creative works for use in furthering educational and charitable activities serving a public benefit. Many AEFs are formed with the intent to increase public access to and knowledge about their artist’s creative legacy. Maintaining the artist’s archive, operating a study center, and conducting scholarly research, including producing a catalogue raisonné, are ways that AEFs typically fulfill this mandate, in addition to maintaining an art collection for exhibition and loan. AEFs fund these activities by selective, periodic sales of works from their collection and may also use sales and gifts to place the artist’s works in public collections as a strategy to increase public access.

AEFs are seen as authoritative resources on an artist’s body of work.

The art market looks to AEFs as sources of pertinent information, especially with respect to authenticity of the associated artist’s works. Unlike others in the art industry, AEFs are concerned first and foremost with the authenticity of an artwork from a cultural value perspective, even as this also translates to economic value in the eyes of the market. And although the art market’s perspective is not a primary concern for AEFs, they do understand that the market plays a powerful role in advancing their mission to educate the general public about an artist’s body of creative work.

By virtue of their extensive archives, scholarly expertise, connections to sources of technical expertise, and contact with people in the artist’s circle, AEFs are assumed to have access to the primary information required to ascertain authenticity of the artist’s works, evidenced by a work’s inclusion in a catalogue raisonné.

A catalogue raisonné aims to definitively list an artist’s complete body of authentic works as confirmed by art historical, scientific, and provenance research. The art market may assume that a



work's inclusion in a catalogue raisonné means the underlying provenance research is complete. However, this is not always the case. Similarly, it may also assume that a complete provenance is a guarantee of clear title, which it is not. Provenance tracks physical possession or location from the day the work was created until the present, but does not account for concealed legal title defects, particularly since both sides of every art transaction are never fully recorded.

Scholars doing provenance research typically focus on possession and not on title, *per se*. However, if previously concealed or unrecognized title defects emerge and raise questions about an artwork's provenance, it is a matter of concern to an AEF's scholarly research. Thus, AEFs may find that in some cases it is advisable to assess and investigate potential legal title defects as a dimension of provenance research in the course of preparing a catalogue raisonné or producing other scholarly publications offering definitive conclusions about an artist's works.

Title defects can undermine an AEF's ownership of artwork or compromise its sale or gift of a work.

AEFs are seen as primary sources of authentic works because they have received these works directly from the artist's bequest as well as by gift and bequest from the artist's family members. Both the art market and AEFs themselves assume this position as primary source automatically equates to an AEF having clear title to the artworks in its possession and, as such, has transferred clear title in the artworks it has possessed and sold. In fact, this may not be the case.

Title defects can appear in many different forms and unlike real estate, there is no official registry to record art title. Situations that can produce title defects in artworks received as an artist's bequest to an AEF include family, estate, and divorce disputes; artworks subject to liens and security agreements; unpaid state and federal taxes resulting in tax liens against the artist's assets, including artworks; contract breaches; co-ownership claims, for example by a gallery that funded production costs; insurer interest in works following loss, theft or damage during an artist's lifetime; and lifetime promises by the artist to sell, gift, lend, or license artwork, in some cases even in the form of a verbal commitment.

Ambiguity or errors in artist's estate planning documents can produce legal title risks. Vague language in an artist's will or other testamentary document can result in the unauthorized disposition of assets in the estate or produce competing family member claims to the estate's assets intended for the foundation. Wills can be completely silent on copyrights and improperly drawn



estate plans can result in competing claims to copyrights between foundations and family members when failing to account for the copyright termination rights of legal heirs.

Conversely, AEFs may also find they have claims to title in works that left the artist's possession during his/her lifetime. Conversion, the intentional taking of property of another without permission, occurs when an artist's associate takes the artist's works from a storage room, studio, or exhibition. Sale by the unlawful possessor does not transfer legal title.

The above examples are a few of the legal title issues that can exist for an AEF, even if the artwork is received directly from the artist or the artist's family members. Of concern is that some of these issues may not present themselves until many years after the AEF possesses the work or has possessed and sold it or made a gift of it. The presence of such issues can impede clear legal title and thus undermine an AEF's use of its art assets to fulfill its charitable mission. Having sold or made a grant of a work with compromised title, an AEF may face legal costs, end up in strained relationships with museums and collectors, and generally feel its reputation has been tarnished.

By adopting title-related risk assessment procedures, an AEF can proactively manage and mitigate legal title risk.

Similar to AEFs, ARIS Title Insurance Corporation has a position of authority within the industry as the line of defense in clear legal title. ARIS aims to mitigate the risk of defective legal title that presents itself in all periods of art by insuring and underwriting title insurance. ARIS utilizes a comprehensive risk management procedure which includes initial document request and organization, historical research on provenance, and classic title research on all individuals and entities within the provenance. Lastly, ARIS performs risk assessment based on the information that is both received from a client and revealed through independent research.

During the initial document retention, ARIS obtains the complete provenance as it is known, past or proposed sale agreements, high quality images, and import/export documents, electronically storing and organizing these documents as references for the remainder of the research process. ARIS' historical research on provenance is object-based and confirms the accuracy of the fine art details, provenance, and other information provided from the client, providing the jumping-off point for research on title risks. ARIS goes beyond confirming the accuracy of what is provided and seeks to uncover gaps in information and risks that may never be identified at first glance.



Although ARIS does not establish authenticity, verifying outside conclusions on authenticity is important when assessing the likelihood of fake artworks or forged documentation.

ARIS' classic title research is individual/entity based and involves not only research on the current or prior owners, but also related transactional parties, including art and legal advisors, lenders, and funds who may bear on risk. Due diligence on any parties in the provenance is important especially those with whom ARIS has not had direct contact or are long deceased. This due diligence includes verifying identifies of individuals and entities based on official government documentation and other independent sources. It also includes researching outstanding liens or encumbrances on the object that would make past or future transfers of ownership invalid. Indicating when the research was performed and which sources were relied upon is crucial for developing consistency in the risk management process.

ARIS's risk assessment is based upon identified risks of the individual/entity, artwork, and overall transaction, whether they relate to historical and contemporary theft, liens and encumbrances, authenticity, copyright, export, or political risk. It also incorporates the defense against those risks should a claim arise, the potential claimants, and anticipation of whether a future claim is legitimate.

AEFs can incorporate similar title-related risk assessment and management procedures in stewarding their art collections and conducting scholarly research.

As AEFs utilize their art assets for scholarly projects, exhibition programs, and grants to museums and educational institutions, proactive title-related risk management strategies may help them to produce projects or freely transfer their art assets without fear of facing title-related legal or financial ramifications years down the line.

An AEF can incorporate title-related risk assessment and management procedures that are tailored to its specific functions. For example, an Estate Distribution Foundation accomplishing the charitable disposition of works owned at death by the artist through sales and gifts to museums and educational institutions may encounter title-related risks associated with ambiguous bequests or lack of estate documentation more frequently than a foundation that focuses primarily on study and exhibition of the artist's works.



Working with legal counsel and other advisors experienced in trusts and estates, art law, intellectual property, and foundation law can help an AEF identify situations in which title-related risk assessment may need to be implemented.

Publicly accessible online sources can be important aids in the creation of risk management procedures. Guidelines such as the *Art Transaction Due Diligence Tool Kit* of the Responsible Art Market (RAM),¹ a non-profit initiative which disseminates best practices to address art market risk, can be utilized by all members of the art market, including AEFs.

After identifying an artwork where title-related risk management is needed, an approach for investigating and assessing such risks is to create a checklist of the documents and information associated with title to be researched on all dimensions--for the individual, company, or other legal entity, and for the artwork itself.

As with common practice for provenance research on an artist's lifetime body of work, for each art asset under its control, the AEF should ensure that all the information the artist recorded is safeguarded and unaltered as well as obtain original supportive documents that serve as a primary source for information. If an artwork is presumed to have been in an artist's inventory based on statements by family members or associates, the AEF should confirm that against the artist's records, and maintain an electronic copy of all original documentation. The artist's signature specimen should be maintained and used to identify where a signature may have been forged on a legal document. If there is a condition report or appraisal on file, the background of the individual providing the report can be researched to understand their associations and legitimize their conclusions.

Investigating possible theft, liens, and encumbrances may be something the AEF is able to do itself by accessing an array of databases pertinent to these topics as detailed in the RAM guidelines, or it may wish to have some aspect of this done by its legal counsel when access to records, such as legal proceedings or documentation, is less easily managed.

Just as mere statements of provenance information should never be fully relied upon, statements of good legal title should never be trusted with full confidence. Original documentation that evidences legal title should always be obtained where possible, stored electronically, and safely secured internally. Assumptions of clear legal title should never be made until all uncertainties are

¹ Responsible Art Market. "Art Market Guidelines." <http://responsibleartmarket.org/art-market-guidelines/>



researched and risks are mitigated or ruled out entirely. Further, an AEF should constantly anticipate legal issues and future claims to their art assets.

Lastly, from another perspective, AEFs must also think about risk management to protect title in works they own currently, for example from actions by insiders purportedly undertaken on behalf of the AEF. AEFs should be certain they have governance policies and administrative procedures in place to ensure that individual staff, officers, board members, or other insiders cannot make unauthorized sales or gifts of art in the AEF's name and by doing so, transfer title in those works.

Conclusion

The role of AEFs as authoritative resources on their artists' works remains very important to the scholarly community as well as the art market. Title-related risk assessment and management offers an AEF more confidence when publishing a catalogue raisonné or other scholarly project. Risk assessment and management also allows AEFs to optimize their art assets as a resource to support operations and programs. Unlike the broader foundation world that relies on more liquid endowments, an AEF depends on its ability to gift, lend, sell, and exhibit art assets and related intellectual property. Losing legal title to an artwork can impede not only the charitable mission of an AEF, but also the mission of cultural and educational institutions that rely upon grants and loans of artwork from the AEF. Adoption of a risk assessment and management approach will allow an AEF to meet its long-term goals and provide a public benefit for generations to come.