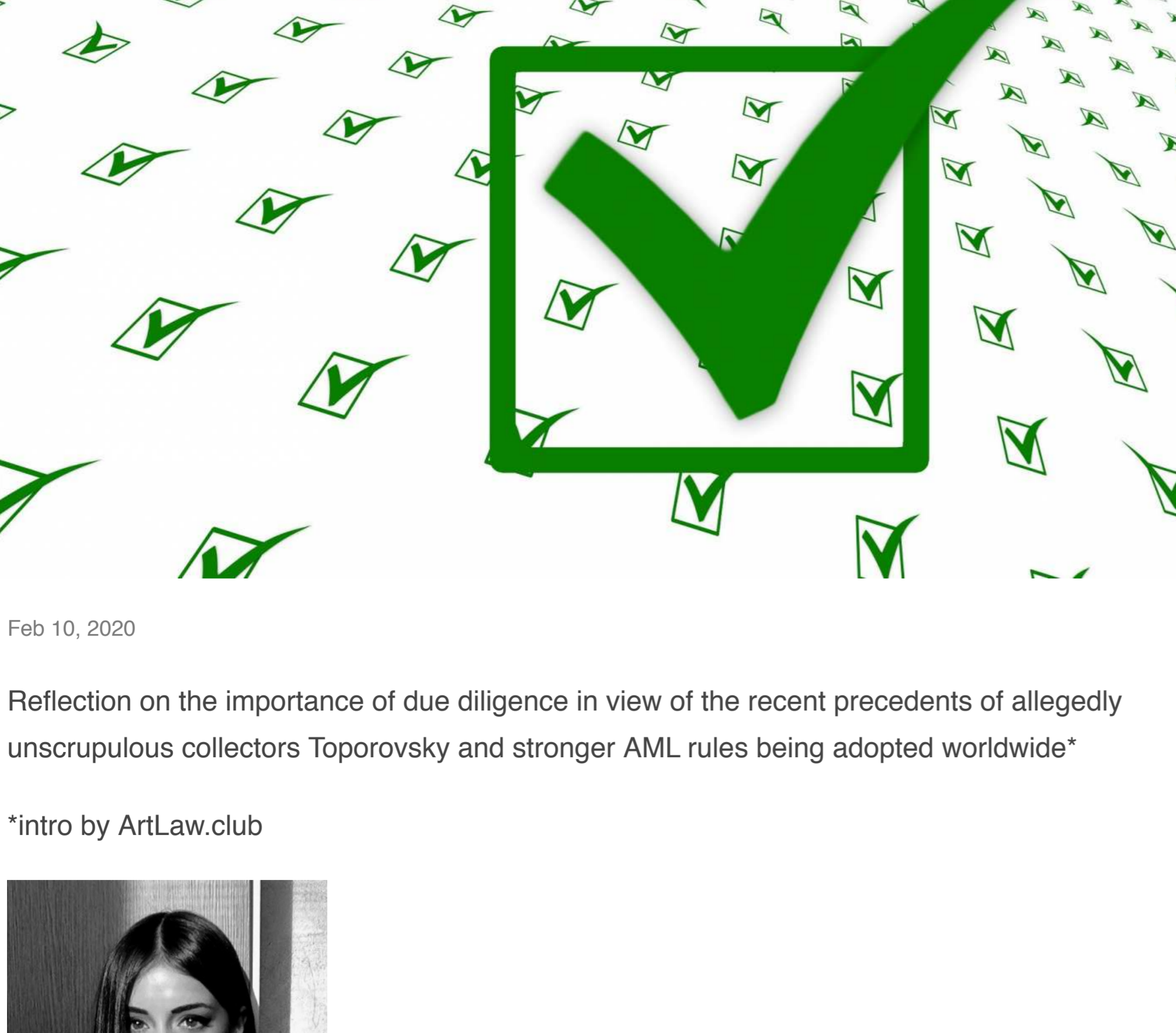


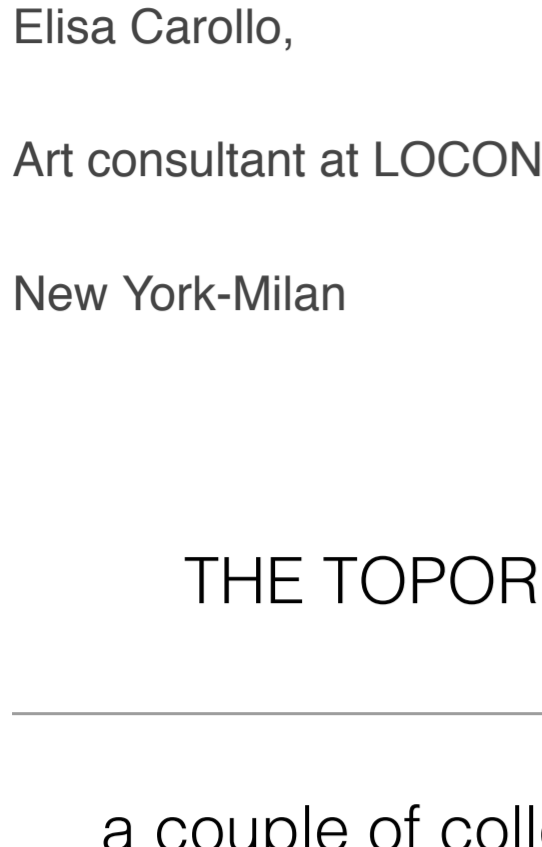
THE TOPOROVSKY AFFAIR AND THE IMPORTANCE OF DUE DILIGENCE TO AVOID THE JAIL: a couple of collectors in Belgium arrested for lending allegedly fake artworks



Feb 10, 2020

Reflection on the importance of due diligence in view of the recent precedents of allegedly unscrupulous collectors Toporovsky and stronger AML rules being adopted worldwide*

*intro by ArtLaw.club



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THE TOPOROVSKY AFFAIR AND THE IMPORTANCE OF DUE DILIGENCE TO AVOID THE JAIL:

a couple of collectors in Belgium arrested for lending allegedly fake artworks

Few weeks ago the news about another scandal surrounding fake Russian avant-garde works^[1] offered some possible food for thoughts on the increasing importance of a correct due diligence, especially when restrictions and controls are becoming more severe all over the world, also for the art world.

The story has already received a lot of media resonance since 2018, when the scandal first emerged. Everything started in 2017, when collector Igor and Olga Toporovsky lent, under the name of their Brussels-Based foundation, the Dieleghem Foundation, some works to the Museum of Fine Arts in Ghent for exhibition titled *"Russian Modernism, 1910-30"*. However, immediately after the opening of the show the 24 works set off the alarm bells of experts, who arose doubts about their supposed authenticity, eventually forcing the museum to put down the show. Later some article on the Art Newspaper speculated that the collectors record in the art world wasn't exactly clean, reporting some 10 years earlier a sale of forgeries by Malevich and Kandinsky which could be tracked back to Igor Toporovsky.^[2]

Thereafter, the couple was taken into custody late last month by Belgian police (it's unclear if they are still under custody because no official declaration has been released) facing allegations of forgery, money laundering and fraud, thus risking years of incarceration after a criminal complaint deposited 18 months ago and signed by several experts. Well respected dealers as James Butterwick, Richard Nagy, Ivor Braka, Natalia Murray, and Alex Lachmann were also among the experts who called the works' authenticity into question in an open letter.

We know about numerous controversies surrounding works by Russian avant-garde which long have plagued its market. As we know authenticity and provenance can be very tricky issues, since they can be disputed and rediscussed over time, as they mostly are based on experts opinions. As art law experts or/and passionate we also know that an initial correct due diligence before buying or even looking for a "bargain" would have probably save the collectors many of these troubles, or at least provide some available remedies in case of claims if they prove "good faith" in buying. For instance, in 2018 other two men were sentenced to three years and 32 months of jail respectively by a court in German western state of Hesse, for having knowingly sold forged pictures by artists including El Lissitzky, Kazimir Malevich and Alexander Rodchenko.

After all, the infamous Knoedler case probably sticks in everyone minds, when the oldest gallery in New York was forced to close its doors after 165 years in business because of multiple claims for selling more than 30 forged works supposedly by Abstract Expressionist masters such as Jackson Pollock, Rothko^[3] and Willem de Kooning. This occurred just because the Gallery didn't process - or intentionally wanted to ignore - sufficient standards of due diligence before accepting works on consignment by an intermediary. The result of the \$70m forgery ring was that both the gallery and its former president, Ann Freedman, after more than 10 lawsuits, were accused of having participated in the "racketeering scheme", regardless of the fact that they were not directly involved in the fraud, and forced to give back millions in damages to collectors, which irremediably mined the reputation of the gallery. Little note: as *"what comes around goes around"* in the art world works better than everywhere else, regardless of this epic scandal, in 2009, Ms. Freedman opened a new gallery, Freedman Art, and she still sells art even after the last law suit was settled only in 2017.

Nevertheless, one of the main problems, I feel, is that most of the civil law countries (as in the Italian case), still consider authenticity being only a mere opinion, which can be released by anyone without any criteria of expertise and certificate to establish a main authority. We are first of all in need of more clarity on who are the subjects entitled to issue the authenticity certificate, and whose opinion can be regarded as a source of authority when issues about authenticity arise. On the other hand, we need not only some official associations of certified experts on the European or at least on the national level, but also higher level of protection for those who deliver these opinions, if we don't want all foundations to close because of too many accusations. Instead, at least in the U.S. once the authenticity is stated or affirmed by the dealer, it can be considered as *"expressed warranty"* putting liabilities on the dealers side if any issues arise.^[4] Moreover, in the U.S. we find specific associations of certified experts as the American appraisals Association, which also provide courses to acquire the USPAP(Uniform Standards of Professional Appraisal Practice) - the generally accepted standards of the valuation profession in the U.S., which are required especially when dealing with the Internal Revenue Service. Even the Art Advisor Association (APAA), which represents the highest standards of professional practice, provides all professional advisors in the U.S. their own code of ethics (APAA Code of ETHICS[5]).

Despite the fact that we often don't have any express prescription and obligations in terms of due diligence neither in the European or in the US laws, the Toporovsky affair as well as other cases and the freshly introduced and dreaded AML regulations, make clear that the art market cannot continue to operate in dimensions of great opacity, and that due diligence is becoming an essential part of every collector's and practitioner's practice in the purchase of artworks, their sale and management over time.

Let's make clear what does *"due diligence"* mean: by *"due diligence"* in the art market we mean the investigation and some reasonable standard of care that a business or person is expected to perform before entering into any agreement with another party. The level of due diligence generally varies, depending on the level of sophistication and familiarity with the business, and what can be required either by law or by customary practices. By and large, this implies inquiring about the reputation of a dealer and intermediary in the market, their title in selling, and conducting deep researches about the authenticity and provenance of the piece, as by requiring all the information and documents available, but also by making use of extra consultations and assessments by experts, if required by the circumstances.

With this regard, it's worth to analyse how different legal systems can imply (or not) different levels of due diligence by expressly providing how warranties and related liabilities are established, which then result in different standards of practice (and obedience) respected by the operators in the local market. For instance, having studying in US but more often operating in Italy, I was able to observe that, although even in the most sophisticated U.S art system there is no regulations on any compulsory due diligence to conduct, there's instead a well-established code of best practices applied in the trade by experts and often also by collectors. In particular, especially where the buyer is an art merchant, the failure to conduct appropriate due diligence may limit the claims and remedies available, and the dealer can also get in trouble as he may not be able to meet the express and the inescapable implied warranty provided for by UCC obligations regarding warranting free and clear title, authenticity, etc.

In Italy, by contrast, most of the best due diligence practices still are mostly unknown both in buying and selling art, and very rarely the use of additional experts and researches is implied. Nevertheless, the art. 64 of Italian Cultural Heritage Code actually requires all dealers to provide the client with an authenticity certificate and all information available on the artwork's provenance, which indirectly implies a prior check of all these facts when buying the artwork, or when receiving it under consignment.

Well, as nowadays art is widely recognised as asset, I'm convinced that this should be treated as all investments in other assets classes: no wealth manager would suggest to invest in any product or security without proper due diligence controls conducted beforehand, which may imply to confirm all facts and the review of financial records. Provenance, for an artwork, is somehow similar to the kind of credentials provided by financial records for an investment.

In the American financial world due diligence became common practice (and a common term) with the Securities Act of 1933, which established that failing to disclose this information to potential investors can make dealers and brokers liable for criminal prosecution. Likewise, in the U.S. art world the implied (and inescapable) warranties of title force dealers to make themselves sure about the ownership and provenance before selling, and any misinformation provided to the buyer, as *"express warranty"*, can be considered a breach of contract.

By and large, we should first of all consider that all countries recognise, and severely punish, fraudulent behaviours and money laundering - which issues of authenticity and provenance can eventually turn in, in most of legal systems. In Italy, for instance, forgery is considered fraud and multi-offensive crime, because it doesn't affect only the artist rights, but also the regular course of the entire art market and institutional reputation. The Toporovsky case is a good example of it: not by chances, the Ghent museum director was immediately dismissed after this scandal which eventually risked to cast shadows also on all the previous exhibitions.

Last year we also saw how the swath of fake Modigliani works (that were previously controversially exhibited in a museum in Genoa in 2017) immediately brought under accuse both the collector and owner of one of the forgeries Piero Ottorino Martino Pedrazzini; the director of Mondo Mostre Skira (the company which organized the show) Nicolò Sponzilli, and Rosa Fasan, one of Skira's employees. Other suspects called into case included Massimo Vitta Zelman, the president of Mondo Mostre Skira; Rudy Chiappini, the Genoa show's curator; and Joseph Guttmann, a Hungarian-born US art dealer who loaned 11 of the contested works to the exhibition.^[6] In this case, after the exhibition closed early and more than 21 works were seized by the police, the consumer advocates in Italy were also demanding refunds for visitors who paid to see the exhibition. But more importantly, all art-market savvy understands how including unnoticed forgeries in important museum exhibition almost immediately elevates their status, their perceived value... subsequently confirming or increasing also their market value. If not seized, these works are to be placed on the market after the show.

As we can learn from this case, due diligence is something that concerns every player in the art system. Not to mention all cases involving museums and restitutions issues for looted or seized works.

Now, if we also take into consideration some strict regulations for the art market adopted by many countries over the past few years, and especially the new AML regulations which entered in force in these months in all the EU, this is going to only increase the importance of transparency, and consequently the role of due diligence at every level of the market chain, both when buying and selling art. In fact, back in July 2018 the European Parliament approved the 5th Anti-Money Laundering Directive (MLD5) as part of the Juncker Commission's response to the terrorist attacks in Paris in 2015 and Brussels in 2016, the Panama Papers scandal, and increased scrutiny of free ports following the Yves Bouvier affair, asking all countries to adopt it by Jan 10, 2020. This step had consequences also outside the EU, when the US introduced these new regulations with the Illicit Art and Antiquities Trafficking Prevention Act.

For all these reasons, today due diligence, especially from the dealers side, should also imply a correct appliance to the new standards of on going control to their clients before entering in any sale, the so called KYC (Know your client) or CDD (client due diligence): this means identifying clients (including beneficial owners of corporate clients) and verifying those identities using independent documentation, as well as inquiring about the sources of the funds and the transactions. Sanctions are generally very severe, so that no dealer can really be "blissfully unaware" of the new regulations.

For those who already conduct due diligence on provenance and title, the new compulsory CDD checks would just constitute a formalisation and natural extension of current practices so that dealers won't be liable of some fraudulent activity - both unknowingly, or intentionally ignoring, money laundering behaviour assisting their clients in cleaning their dirty money.

In conclusion, all these enhanced restrictions and newly introduced requirements can be a guileful and beguiling new operational landscape to navigate for both collectors and dealers.

For these reasons, I feel that in this ever-shifting legal landscape a professional consultant and a new relationship and mentorship between the art world and legal and fiscal assistants is highly desirable, if not necessary. As we observed, today *"due diligence"* has extended to very different aspects of the art business, both in buying and selling. But, more importantly, it seems that the art world is eventually forced to follow the way of a final and inevitable regularisation of its market in line with all the other multimillions businesses.

^[1] Harris, Garret, " Russian collecting couple arrested in Belgium" in *The Art Newspaper*, Jan 3rd 2020 - also available at <https://www.theartnewspaper.com/news/igor-and-olga-toporovsky-linked-to-controversial-show-of-russian-avant-garde-works-in-ghent>

^[2] Hewit Simon, "The Art Newspaper's exposé helps close dubious Russian avant-garde art display in Ghent museum" in *The Art Newspaper*, January 29 2018 - also available at <https://www.theartnewspaper.com/news/the-story-behind-the-dubious-russian-avant-garde-art-show-in-ghent-museum> (last check Feb 1st 2020)

^[3] *De Sole v. Knoedler Gallery, LLC*, 137 F. Supp. 3d 387 (S.D.N.Y. 2015)

^[4] Uniform Commercial Code (UCC) § 2-313. Express Warranties by Affirmation, Promise, Description, Sample ; New York Consolidated Laws, Arts and Cultural Affairs Law - ACA § 13.01. Express warranties

^[5] Association of Professional Art Advisors' Code of Ethics. <https://artadvisors.org/about/code-of-ethics/>

^[6] Rea, Noemi, "Italian Police May Have Solved the Mystery of Who Was Behind an Exhibition of Fake Modigliani Paintings in Genoa" in *Artnet News*, March 14 2019 - also available at <https://news.artnet.com/art-world/fake-modigliani-paintings-1488106> (last check Feb 1st 2020)

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Elisa Carollo FEB 11, 2020 14:28

Dear Maria,

Definitely, I feel that the recently released AMR guide lines should be more widely shared among both art market operators and collectors. The real question is how to share them beyond conferences where usually just operators take parts, how to educate the professional for a today unavoidable increase in controls and thus in the formalism and requirements on both sides?
Probably as happened with other business, fiduciaries as lawyers and consultants are somehow at the gate for introducing the education, to but they are need as well to be educated and informed of the specificities of this market. Therefore I feel that extending RAM initiatives is highly advisable, if we extend them not only geographically but also across all different professionals who come to interact with the art market, even if not directly operating in it.

Maria Boicova-Wynants FEB 10, 2020 16:11

Dear Elisa, thanks for your reply. We are indeed living in a world where proper due diligence starts to become as essential as air. Do you think in this sense that extending the RAM) initiatives (e.g. their Due Diligence toolkit) to be (obligatory?) used by all market participants could be a solution? The sentiment I pick up from some market participants is that there are more and more demands, but not enough internal capacity and not enough right tools to use...

Elisa Carollo FEB 10, 2020 15:37

Dear Maria,

Thank you for your comment on the article.

Well, that's what i intended to address: some higher level of due diligence even on the buyer side before the acquisition of these works would have saved the foundation from these troubles. This also applies to the dealers who provided them the works and introduced them into the market - if not intentionally introducing forgeries in the market at the time. If it's true that years ago there were far less tools to perform due diligence, today it's more about also buyer beware, with all the tools and infos available or obtainable.

Maria Boicova-Wynants FEB 10, 2020 10:11

An interesting read, thank you. But do you believe that in the Toporovsky case the crux of the matter was in the lack of due diligence? Obviously, it was on the part of the Ghent Museum, but what about the Dieleghem Foundation?

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