

# Art & Cultural Heritage Law Newsletter

*A Publication of the Art & Cultural Heritage Law Committee*

The Art & Cultural Heritage Law Committee is a committee of the American Bar Association Section of International Law.

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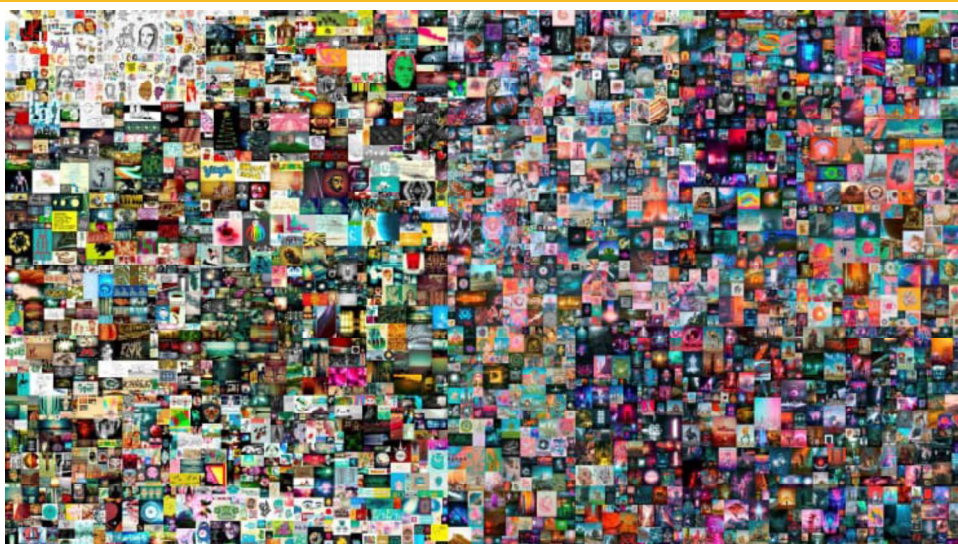
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## New ABCs — Art, Blockchain & Cryptocurrency

By: G. Elaine Wood and Brad Dragoon<sup>1</sup>

The concept of purchasing fine art with cryptocurrencies, such as Bitcoin, has been described as “the future of art.”<sup>2</sup> Smaller galleries and dealers began exchanging works for virtual currencies as early as 2017.<sup>3</sup> That year, a blockchain token known as Artcoin and built on the Ethereum network was launched — designed to fund the development of a shared collection of artwork held among “investors” in the coin offering.<sup>4</sup>

Despite the initial enthusiasm, to date few large dealers or reputable auction houses are accepting cryptocurrencies to settle purchases.<sup>5</sup> In October 2020, Christie’s auction house announced the sale of a digital portrait of the Bitcoin code for more than \$130,000,<sup>6</sup> one indication that cryptocurrency has become part of our society’s collective consciousness. Nonetheless, Christie’s asked for payment in legal tender, confirming the fact that cryptocurrencies have a long way to go before being accepted as a medium of exchange for fine art and antiques.

Proponents of a shift to cryptocurrencies tout the transparency of blockchain technology. The availability of centralized, public ledgers that can record the details of a transaction is promis-

ing for an industry that relies on provenance to combat counterfeiting and antiquities smuggling. Authentication details associated with a Jackson Pollock painting, or confirmation that a cuneiform tablet was not smuggled out of a conflict zone, can be recorded and permanently preserved in a blockchain ledger, removing the burden of re-authentication every time a piece is auctioned or sold.<sup>7</sup>

The public nature of blockchain ledgers is also promoted as a way to prevent financial crime and money laundering. As a result of its intrinsic value, the purchase and trade of fine art has been used for decades to launder the proceeds of illicit activities. Until recently, the customer due diligence and anti-money laundering (AML) requirements for auctioneers and art vendors were extremely limited. Politicians in the U.S. have proposed stricter AML mandates for art dealers, and new EU laws require sellers to undertake customer due diligence for transactions of €10,000 or more.<sup>8</sup> Still, the art trade, which reached \$64 billion globally in 2019, remains far less regulated than the financial services industry.<sup>9</sup>

*Is Cryptocurrency the Answer?*

While blockchain ledgers may provide welcome transparency to the art industry seeking to confirm the authenticity of pieces and to verify the identity of counterparties in high-value transactions, it is unlikely that Bitcoin will become the preferred medium of exchange in the near future. This is primarily because virtual currency does not yet function as a stable store of value or as a reference to set prices. Due to the relative stability of fiat currencies such as the Euro or the U.S. Dollar, pricing indices can be established and critical metrics like price inflation monitored.

Between March and year-end 2020, the value of Bitcoin increased by 700%, and many other digital currencies posted triple-digit gains.<sup>10</sup> Bitcoin then rapidly lost 20% of its value at the beginning of 2021 before stabilizing.<sup>11</sup> Large auction houses and dealers cannot account for the volatility of virtual currencies when issuing price estimates, and any payment received in cryptocurrency would need to be converted quickly into fiat currency to pay overhead expenses and record revenue. Galleries are staffed with historians and experts skilled in authenticating works from the Dutch Masters — not predicting Ethereum's future value.

Besides volatility, it is still not clear if virtual currencies have the technology to process payments in large volume. In comparison to a payment processor like Visa, which executes on average 150 million payments per day, or approximately 1,736 payments per second, the Bitcoin blockchain could guarantee only 4.6 payments per second as of 2019.<sup>12</sup> Literature published in late 2020 reiterates that Bitcoin continues to have significant scalability issues: Bitcoin's blockchain ledger may never be able to handle the more than 700 billion digital transactions processed annually around the world.<sup>13</sup>

There is a silver lining to cryptocurrency's potentially longer path to functionality: time to adjust. Regulatory agencies and central banks should use this transition period to educate themselves on the inner workings of various cryptocurrencies, their uses, and most importantly, their risks. Vendors in the art space should also begin to think critically about if, when, and ultimately how to engage with digital currencies before updating their policies and procedures.

*Gold for a Gauguin or Diamonds for a Dali?*

Proponents view cryptocurrencies as the future of commerce. But, as noted, there are multiple hurdles involving market psychology and technology and regulation that digital currencies need to overcome for everyday use. This opens the discussion to the use of other speculative assets: What about the use of precious

metals, corporate stock, or even other pieces of art to settle accounts?

Should Christie's accept payment for a Ming vase in Krugerrands? While the price of gold does fluctuate, it is commonly used in wealth preservation, has a finite supply and a liquid market. In some ways, the exchange of gold coins or bars for art would be a more stable practice for dealers than Bitcoin, allowing them to generate a price estimate relative to gold prices. The issues of physical storage, rapid conversion to cash and potential increased volatility still exist with gold, which is why auctioneers and dealers still request payment in fiat currency and rarely consider barter involving precious gems or other assets with less defined markets.

A notable exception is the trade of art for art, commonly by the way of consignment. Some auctioneers allow for the payment of purchases through the consignment of other pieces, once they are evaluated. Until recently, so-called "like-kind" exchanges — paintings for paintings, sculptures for sculptures — allowed investors to defer capital gains tax, but the tax code was changed in 2018 to disallow this exemption.<sup>14</sup>

*Do I Know You?*

The discussion regarding forms of payment ultimately leads to important questions about client identification. How can the art industry protect itself from being a conduit for financial crime and money laundering? Currently, bank transfers appear to be the most reliable form of payment. Wire payments, commonly executed through the SWIFT messaging system, contain account information and may have identifying information on the account holders themselves, including an address and even a date of birth.<sup>15</sup>

As noted above, one of the primary benefits of cryptocurrency is the public availability of ledgers.<sup>16</sup> An art seller can track a virtual currency wallet and potentially confirm the buyer's source of funds for purchase — a level of visibility that even the financial institutions do not always have with their customers. Payments in cash provide little or no transparency and are considered a red flag for money laundering specifically in the purchase of art.<sup>17</sup>

Regardless of the form of payment, a dealer needs to conduct due diligence on the buyer and seller of a significant piece of art. Under the EU's Fifth Anti-Money Laundering Directive, art transactions of €10,000 or more require vendors to verify the identity of the customers before completing a transaction.<sup>18</sup> Despite these requirements, identifying the ultimate beneficial owner of a prospective purchaser of high-value artwork is more complicated than requesting an auction bidder's name and assigning a paddle number.

Release of the so-called "Panama Papers" in 2016 revealed that fine art auctions and acquisitions often involve the use of shell companies and corporate vehicles, which obscure the parties to a transaction.<sup>19</sup> For example, Russian billionaire Dmitri Rybolovlev used a British Virgin Islands-based entity to transfer possession of an estimated \$2 billion in art, including paintings by Picasso, Modigliani, Van Gogh, Monet, Degas and Rothko, out of Switzerland and conveniently beyond the jurisdiction of a Swiss divorce court during the split from his ex-wife.<sup>20</sup> In 2020, Russian construction and energy tycoons Arkady and Boris Rotenberg used three shell companies to invest in high-value artworks in evasion of U.S. sanctions.<sup>21</sup>

*Trust, but Verify*

Dealers and auctioneers involved in the transfer of high-value fine art must first understand the risks involved in using any medium of exchange. While virtual currencies provide access to a central ledger, coin wallets can still be tied to shell companies or proxies acting on behalf of unknown ultimate beneficiaries. As with any other currency, sellers should be aware of common red flags such as the use of offshore entities or intermediaries (including lawyers) to stand in for the real parties in interest during the bidding and acquisition process. Due diligence into potential buyers and sellers also should include an analysis of source of wealth and source of funds.

Art dealers typically take great care to determine the provenance of a piece of art before it is offered for sale. By paying similar attention to confirming the identities of buyer and seller and the legitimacy of funds, art dealers can reduce their vulnerability to money laundering and other financial crime. ♦

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<sup>2</sup> <https://blog.singularart.com/en/2019/06/13/buying-in-bitcoin-the-future-of-art/>

<sup>3</sup> <https://www.bbc.com/news/business-40703182>

<sup>4</sup> "Announcing the Crowd Sale for Artcoin, a Blockchain Token Built on the Ethereum Network," *M2 Presswire*, July 18, 2017.

<sup>5</sup> It has been reported that Christie's accepted cryptocurrency ether (ETH) at the March 11, 2021 auction of "Everydays: The First 5000 Days" by digital artist Mike "Beeple" Winkelmann (see image on p. 1 of this newsletter). <https://www.coindesk.com/top-auction-house->



[christies-to-accept-ether-cryptocurrency-for-digital-art-sale](#)

<sup>6</sup> <https://cointelegraph.com/news/crypto-art-piece-sells-for-130k-at-christie-s-auction-house>

<sup>7</sup> <https://digital.hbs.edu/platform-rcdm/submission/digitalizing-the-art-trade-sothebys-became-friends-with-ebay-but-can-it-warm-up-to-blockchain/>

<sup>8</sup> <https://www.apollo-magazine.com/us-senate-report-anti-money-laundering-art-market/>; <https://www.artatlaw.com/blogpost/new-anti-money-laundering-regulations-target-art-market>

<sup>9</sup> <https://www.ubs.com/global/en/our-firm/art/2020/artmarket-insights.html>

<sup>10</sup> <https://www.forbes.com/sites/tommybeer/2021/01/07/bitcoin-continues-its-climb-soars-above-40000-for-the-first-time/?sh=384623d1468a>

<sup>11</sup> <https://fortune.com/2021/01/11/bitcoin-plunge-worst-crash-march-bubble/>

<sup>12</sup> <https://towardsdatascience.com/the-blockchain-scalability-problem-the-race-for-visa-like-transaction-speed-5cce48f9d44>

<sup>13</sup> <https://decrypt.co/47913/bitcoin-is-not-yet-technically-compatible-with-mass-adoption>

<sup>14</sup> See: <https://www.irs.gov/newsroom/like-kind-exchanges-now-limited-to-real-property>

<sup>15</sup> <https://www.moneymover.com/about/faqs/what-mt103/>

<sup>16</sup> <https://www.uscybersecurity.net/public-ledger-small-businesses/>

<sup>17</sup> <https://www.natlawreview.com/article/art-and-money-laundering>

<sup>18</sup> <https://www.theartnewspaper.com/news/eu-extends-anti-money-laundering-rules>

<sup>19</sup> <https://www.nytimes.com/2016/04/12/arts/design/what-the-panama-papers-reveal-about-the-art-market.html>

<sup>20</sup> <https://fusion.tv/story/288515/panama-papers-leak-art-market/>

<sup>21</sup> <https://www.politico.com/news/2020/07/29/probe-russian-oligarchs-evade-art-sanctions-386154>

## Frontiers in Art — Artists crossing borders in South America

By: Anne-Sophie Nardon<sup>1</sup>

In 2020, the Art & Cultural Heritage committee launched an on-going Special Project entitled “Frontiers in Art” to address and identify the legal challenges encountered by visual artists around the world as they cross borders. The purpose of this Special Project is to tackle legal issues concerning the artist as a person, rather than on the artwork, such as migration, immigration, intellectual property rights, import-export, and international Human Rights.

A Tele-coffee program about current immigration issues facing visual artists took place on June 8, 2020 with Bettina Schlossberg and Anne-Sophie Nardon, to present and discuss the legislation in the US and in European countries. In the three following articles, our colleagues and members of the A&CH committee Gabriella Lessa Villaca, Juan Javier Negri and Ariel Orrego Villacorta from South America present the current situation in their respective countries, Brazil, Argentina and Peru, with the added hurdle caused by the Covid-19 pandemic. ♦

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## Frontiers in Art — Immigration for Artists in Argentina

By: Juan Javier Negri<sup>1</sup>

Argentine immigration rules are complicated and cumbersome for everybody. In the case of artists, those rules have added twists that generate additional difficulties.

Argentina’s immigration policies are spelled out in a federal statute enacted by the Argentine Congress at the end of 2003 (“The Migrations Act – Law 25871). We will refer to it as “MA”.

MA became effective on January 2004. In addition to broad and general principles (such as “the right to migrate is guaranteed by the Republic of Argentina”) affecting the rights of foreigners in Argentina in general (not only immigrants), it also contains a myriad of rules and regulations that make it difficult to under-

stand and often almost impossible to apply.

As a general rule, MA classifies immigrants into three broad categories: (a) permanent residents (i.e., those individuals who enter Argentina with the purpose of making it a permanent home and settling in our country); (b) temporary residents, a broad category which includes several types of foreigners who are allowed to stay in Argentina for a maximum of three years. This group includes migrant workers, pensioners, investors, academics, members of the clergy, students, refugees and —perhaps the largest group— natives from certain Latin American countries like Brazil, Chile, Uruguay, Paraguay and Bolivia, etc. and (c) transitory residents, a group composed primarily of those who enter Argentina

as tourists, transit passengers, patients under medical treatments, etc.

The main difference between those three categories is the right to be formally employed or to engage in any legitimate business. While permanent residents have no limitations, temporary residents can work or perform any business activity only during the period of time for which they are admitted. Transitory residents cannot perform any activity for which they may receive payment.

Under the MA, it is illegal to employ, hire or provide paid-for lodging to foreigners who enter Argentina “on an irregular basis”; that is, when they cannot evidence admission under any of the three categories mentioned above.