permission or license from the relevant copyright holder(s) can be considered to have committed copyright infringement. The burden of proof then shifts to the gallery or museum displaying the work to prove that such use was permissible. Admittedly, this is a complicated legal analysis and is leading to many public misconceptions about the availability of the fair use defense.

A gallery or museum that is determined to be liable for infringing upon a registered copyrighted work would be responsible for its own defense costs, the plaintiff’s defense costs, as well as any damages. The potential liability exposure from such infringement claims is significant and this price tag commonly catches copyright defendants by surprise.

It is vital that the art market effectively manage this risk by fully understanding the challenges, limitations, and costs of relying on the fair use defense to display or duplicate art that incorporates other copyrighted images. The art market should also consider the ways in which this risk can be mitigated or transferred including seeking a license or permission from the copyright holder(s) involved, through the use of effective indemnity agreements from its artists, and/or through the purchase of specialist copyright liability insurance products that cover such risks.

Nicole Goodwin is Head of Casualty Claims at Hiscox, one of the world’s leading art insurance markets. Prior to joining Hiscox, she was a private practice attorney focused on the area of intellectual property counseling and litigation. She presently serves on the Board of Directors for Volunteer Lawyers for the Arts in New York City.

**All Risk Insurance**

All-risk coverage protects the insured’s property from losses arising from perils other than those that are specifically excluded in the policy. Rather than listing a number of accident types and natural disasters that would be covered, all-risk coverage focuses on the events that would not be covered. The advantage to all-risk policy is that since there is such a wide range of protection, most events are covered – unless specifically addressed in the policy.

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What To Do When You Have a Fine Art Loss

When a sudden loss occurs, emotions run high and panic can set in. What do I do now? The following outlines steps to take in the event of water damage or theft:

**Water Damage**
1. Remove the items from the water. Do not wait. Take photographs to document the damage and its source and place works in a safe place.
2. Call your insurance broker to report the claim. Let your broker know what steps you have taken to mitigate the loss so they can advise insurer.
3. Call your restorer to ask immediate advice.
4. Call your shipper to make sure they are ready to help.
5. Meet with an insurance representative and come up with an agreed plan of action.
6. Determine what options exist (freeze dry, conservation, none). Make sure you have looked at all options and that you are in agreement with your insurer.
7. Begin your plan of action as soon as possible. Do not let mold begin to grow.

All of these steps are important and some occur simultaneously. Having a plan of action (EAP—Emergency Action Plan) is crucial. Do not wait until the loss occurs. If you are the custodian of other people’s artworks, (i.e. a gallery, auction house or museum), you have an important obligation to be prepared.

(Continued on next panel)

**Theft**
1. Call the police.
2. Call your broker and notify them of the claim so they can advise your insurer.
3. Notify the Art Loss Registrar.
4. Notify the auction houses.
5. Notify any associations who deal with your type of artwork around the world (don’t assume the items remain local).
6. Meet with an insurance representative and discuss the steps of the claim.
7. Determine the possibility of posting a reward.

It is vital to put the world on notice when an art theft has occurred. The more people who know an item is missing, the greater the chance of a successful recovery. Unfortunately, the odds are not in your favor. Social media is your ally and you can hit many people via Twitter, Facebook, LinkedIn and blogs. The community on Facebook is larger than the population of many countries, so use it to your advantage.

Gregory J. Smith
Executive Vice President
Berkley Asset Protection
Underwriters, LLC

How to Protect Yourself during Summer Vacations

When the trees begin budding and the temperature rises, we all love to get away for a vacation to enjoy the great outdoors. When making the most of the summer, it’s important to ensure that your property is protected while you’re away. Here are a few helpful tips to keep in mind this summer:

1. A few weeks before you leave, check that your alarm systems are in good working order. If anything is not working properly, set up an appointment with your security system provider as soon as possible.
2. Always keep emergency contact numbers with you, both for family and professional services, including your insurance broker.
3. If you are going away for an extended period of time, make sure you have a close friend or relative check on your home occasionally. If there is a problem, the sooner it is noticed, the more secure and protected you will be.
4. Try to keep all valuable and fragile objects at least three inches off the floor so that in the event of water accumulation, they are less likely to incur damage.

This publication is provided solely for informational purposes and is not intended to provide legal advice or create a binding contract. This publication does not describe all available insurance options. Coverage is subject to the terms, conditions, limitations and exclusions of the specific insurance policy.

(Continued on next panel)

The Expert’s Corner

Fine Art “Fair Use” Controversies

As artists continue to push the boundaries of the “fair use” doctrine of the US Copyright Act, there has been a noticeable increase in claims brought by copyright owners arguing against free, “fair use” of their works by other artists. Most of the claims to date involve the conscious and artistic appropriation of still photos taken by others. Examples of these high profile claims are:

- Richard Prince’s use of Patrick Cariou’s “Rastafarian” photograph
- Lorraine O’Grady’s use of Harry Benson’s photo of Michael Jackson
- Shepard Fairey’s now infamous use of the Associated Press’ Barack Obama photo
- Sherry Levine’s use of certain Walker Evans photographs

While the allegedly infringing artists argue such use is “transformational”, thereby qualifying for the fair use defense under the Copyright Act, the original photographers are taking exception to that position. Unfortunately, the nature of the fair use defense is not clearly defined and it only applies as a matter of law when a judge or jury has determined whether the use of the copyrighted work is “transformational” and not merely a derivative of the original work.

This lack of any bright line application of the fair use defense is leading to an increase in infringement claims against not only the appropriating artists, but also galleries and museums that display the works. Under US law, owners of valid copyrights possess the exclusive right to publicly display their works so a gallery or museum that displays such a work without permission is liable for infringement.

DeWitt Stern will be sponsoring this 13th annual conference for art professionals and lawyers.

August 18–19
Inn & Spa at Loretto
Santa Fe, NM

For more information, go to www.cle.com and choose “Visual Arts and the Law” from the drop-down conference menu.

(Continued on next panel)