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Native American repatriation in the auction industry: A transparent approach

1. Introduction

In January of 2019, early in its second year of business, Minnesota art auction house Revere Auctions received a large consignment of Native American art and antiquities. Due to the sacred nature of many of the items, it became clear that making consignment decisions based on marketability alone would not be enough. The Association on American Indian Affairs (AAIA), an organization focused on protecting and repatriating Native American cultural heritage, reached out to Revere with concerns about several objects in the sale. Through insights gained during discussions with the AAIA and consultation with Tribal officials, Revere drafted a policy dedicated to the ethical handling of Native American objects. As employees of Revere Auctions, we, the authors of this article, have been closely involved with this policy from its inception to its current stage. During that time, we have been party to the many complexities and unique challenges of forging a new path of ethics in the auction industry. In the early phases of the policy's development, it became clear that accessible policies of this nature are close to nonexistent in the private sector. Revere's policy is an attempt to make steps to resolve the widespread damage the auction industry and art market have inflicted on Native American cultural heritage by creating a clear framework for how to deal with complex situations involving Native American objects.

Native American artifacts and cultural heritage have been subject to widespread theft and displacement dating back to the early days of colonization. Similar to art with ownership ties to Nazi Germany, Native American objects on the market have significant risk of having an unsound provenance. Many Native American objects on the market would have never been sold by Native American peoples due to sacredness, spiritual identity, or communal ownership, and were therefore illegally obtained.[1] However, the issue with many Native American objects on the market goes farther than just the manner of acquisition, and lies in the very ideas of property and ownership. What many collectors view as art or interesting historical objects are seen by Native American peoples as sacred living beings that are neither objects nor ownable.[2] At the least, buying, selling, handling, and displaying sacred cultural heritage such as funerary objects, ceremonial objects, and objects of cultural patrimony is misappropriation; at most it is cultural genocide. Not only is it a great disrespect to Native American peoples, it is a threat to the culture itself, as many objects of cultural heritage "are essential to the continuation of diverse American Indian cultures, traditions and religious practices today".[3]

2. Repatriation in the private sector

While some progress has been made in recent decades to deter the unethical treatment of Native American cultural heritage in museums, universities, and many public institutions, auction houses have been slow to make similar changes in both policy and practice. The Native American Graves Protection and Repatriation Act (NAGPRA) has served as the primary legislation regarding the protection of Native American cultural heritage since its introduction in 1990. However, unlike many museums and universities with Native American cultural heritage in their collections, auction houses are not federally funded and therefore are not required to adhere to the Act.[4] This gives auction houses a wide breadth of flexibility when establishing policies that deal with the handling of Native American objects, with the source of pressure to act being a result

[1] CCP Stuff, "AAIA Challenges Private Ownership of Native American Art", *Cultural Property News*, 29 November 2018, https://culturalpropertynews.org/aaia-challenges-private-ownership-of-native-american-art/ (accessed: 10.11.2020).

[2] E.A. Sackler, "Calling for a Code of Ethics in the Indian Art Market" [in:] *Ethics and the Visual Arts*, eds. E.A. King, G. Levin, Simon and Schuster, New York 2006, pp. 92–93.

[3] Association on American Indian Affairs, "Buyers Should Invest in Contemporary American Indian Art Instead of American Indian Antiquities", *News Release*, 6 December 2018, https://www.scribd.com/document/395017777/2018-12-05-final-draft-statement-buyers-hould-invest-in-contemporary-art?secret_password=bxITfvaTI80gAJnGhvGl (accessed: 15.11.2020).

[4] Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3003(a), 1990.

of public criticism rather than legal obligations. Successful stories of auction house repatriation are typically the result of outside demands to action from organizations such as the AAIA, rather than individual Tribal Nations, who would need to file civil suits in order to make legal claims. Auction houses and art institutions often rely on legal loopholes that tribal governments are unable to dedicate the resources to challenge.[5] If an ethical market is to exist, the attitude of auction houses and stakeholders must change from one of discretion to accountability.

While public criticism has made it increasingly difficult for auction houses to deal in culturally sensitive objects, the industry is far from where it needs to be. Private institutions or people dealing with the sale of Native American art commonly vow to conduct "due diligence" in vague policy statements that do little to clarify the actual actions being taken to prevent the misuse and appropriation of Native American cultural heritage. The lack of details surrounding these policies and procedures, as well as the continued practice of putting sensitive cultural items on the market, points to the lack of effectiveness of this approach.[6] One of the central problems in the "due diligence" approach is that academic or industry "experts" cannot conduct sufficient provenance research alone without consulting Tribal representatives. For example, a New Jersey auction house withdrew several culturally sensitive Native American lots from a 2018 auction in response to demands from the AAIA. Rather than consulting Tribes about the objects' provenance, research was conducted by an in-house "specialist in Tribal art".[7] According to the AAIA, Native American peoples must be the primary authority in this research, as oftentimes "information about the origination of an item has been manipulated and the affiliated Tribe is the only appropriate expert to confirm whether an item is saleable or has been misappropriated".[8] The deceptive idea of "good faith" acquisitions, which are the foundation of many collections, must be rejected entirely.[9]

Ideally, all pieces of Native American cultural patrimony would be with their ancestral Tribes. The AAIA stresses that collectors should seek out art by contemporary Native American artists rather than antiquities or other historical objects. However, with millions of Native American objects spread throughout the world, the most effective

[5] CCP Stuff, "AAIA Challenges Private Ownership…"

[6] ATADA, Voluntary Returns Program, https://atada.org/voluntary-returns (accessed: 20.11.2020).

[7] Association on American Indian Affairs, "Rago Auction Withdraws Native American Cultural Heritage Scheduled for Sale", *News Release*, 17 October 2018, https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-10-17_rago_pr.pdf (accessed: 15.11.2020).

[8] Association on American Indian Affairs, "Auction Alerts", 2020, https://www.indian-affairs.org/auction-alerts.html (accessed: 15.11.2020).

[9] M. Masurovsky, "A Comparative Look at Nazi Plundered Art, Looted Antiquities, and Stolen Indigenous Objects", *North Carolina Journal of International Law* 2020, vol. 45, no. 2, p. 523.

role auction houses can take is to produce business models that minimize future unethical sales and prioritize facilitating the return of sensitive cultural objects.[10] In order for this to work, the model must be centered around transparency and consultation with Native American peoples. While auction houses do not have the power to determine the buyer, they do have the ability to influence the narrative of objects brought to market. Even if they can only control what they themselves make available on the market, refusing to recognize Native American cultural heritage as art objects and making a point to condemn any unethical treatment can help redefine market norms.[11]

Rather than being a central participant in the misuse and appropriation of Native American cultural heritage as auction houses have historically been, policies can be structured to use auction houses' unique position as intermediaries in the art market to aid in the return of cultural heritage. Sales at auction are a matter of public record, and provide a great deal of visibility to the objects being sold. A public venue of sale allows Tribal Nations, as well as other stakeholders, to see what is being sold. This allows them to coordinate repatriation efforts, as well as allowing them to track a piece of cultural heritage via a public record of its sale. This is a clear advantage over a private sale, in which the buyer and seller are often the only parties aware of the sale. Auction houses can also play the role of a neutral intermediary in transactions of Native American cultural heritage. The anonymous nature of many sales at auction houses can allow a buyer or seller to communicate with a Tribal Nation about the return of an object without having their identity revealed. Auction houses also have significant power when it comes to establishing future practices in the market for Native American art or objects. By finding ways to stop prices from rising on pieces of cultural heritage and building the market for art created by contemporary Native artists, auction houses can help create a market for Native American art that respects and benefits Native American people.

3. The policy

The primary goal in drafting the policy was to create a process for dealing with Native American cultural heritage that was ethical yet realistic, approaching the industry where it currently stands. It is an unfortunate fact that often people liquidating collections of Native American art and cultural heritage are not interested in donating their collections to Tribal Nations and simply want to sell. In many cases, consignors have invested

[10] National Congress of American Indians, Resolution SAC-12-008: Support for International Repatriation, https://www.ncai.org/attachments/Resolution_DuwbLqpfrhQZrLoqKUXshHYKXcvQNfLTUBIPSJWHSmpYZnFkOQL_SAC-12-008.pdf (accessed: 10.11.2020).

[11] Association on American Indian Affairs, "Buyers Should Invest…".

a great deal of money into their collection and cannot afford to forgo profits and donate; in other cases, overwhelmed heirs inheriting collections want the whole collection liquidated without having to sort out sensitive objects. Our fear in drafting this policy was that if we were to outright refuse to sell any object that might be culturally sensitive, the consignors might turn to any available seller, regardless of ethics. We hope that by providing a framework for ethical handling that works within the current limitations of the market, we can slowly change the culture within the industry to a more ethical one. The policy consists of the following four steps:[12]

1) We make information about objects of Native American origin available to appropriate authorities, such as Tribal Historic Preservation Officers, so they can review the items and flag any that are extremely culturally significant, and therefore require dialogue and communication that other objects do not.
2) Items that are flagged will be subject to a seven business day waiting period before the auction winner can pay and pick up the item. This time allows the Tribal Nation to appeal to donors and/or the consignor. For these appeals, we solicit written explanations of the significance of the objects, which are then used to provide the information necessary for consignors, buyers, and outside donors to consider donating the objects.
3) Should the Tribal Nation wish, they can buy the object for the hammer price without participating in the auction. This ensures that repatriation efforts do not inflate the market on items that tribal authorities feel are inappropriate for sale. If a donor is found, they can buy the object for the hammer price and donate it to the appropriate Tribal Nation at this time.
4) After a Tribal Nation has worked with us for an auction, if they ask us not to sell objects from their nation, we will honor that wish to the best of our ability.[13]

In drafting this policy, we drew on multiple existing legal policies. Several pieces of our methodology were influenced by the methodology laid out in NAGPRA. While auction houses do not have to comply with NAGPRA, as discussed above, NAGPRA is the standard when it comes to repatriation in the United States. Its methodology is widely accepted and has been used for many years with success. The first action NAGPRA requires museums and Federal Agencies to take is to create an inventory of potentially qualifying objects, which are then shared with appropriate Tribal authorities.[14] We de-

[12] Revere Auctions' full statement and policy can be found at https://www.revereauctions.com/native-american-objects-ethics-statement/ (accessed: 25.11.2020).

[13] We intend to honor this under all circumstances; however, we recognize that there may be times in which an object is misidentified or its origin is otherwise unclear, which could lead to its being offered for sale.

[14] 25 U.S.C. § 3005(a), 1990.

cided to start with this as our first step: there is a clear, well-established precedent, and it is a straightforward way to start the consultation process. The next step in NAGPRA is the "expeditious" repatriation of any objects requested by "a known lineal descendant of the Native American or of the tribe or organization".[15] This, of course, is not possible for an auction house. Since any object in question belongs to a consignor, it remains at their discretion whether or not to return an item before it has been sold. Therefore, we needed a policy with clear steps for how to proceed if an object flagged as cultural heritage is actually sold.

The United Kingdom's policy on the Export of Works of Art and Objects of Cultural Interest provides a useful set of steps for the sale and subsequent return of an object. The purpose of this policy is to prevent "national treasures" from being removed from the country. Items are assessed by a committee using the Waverley Criteria, a set of three questions used to determine "if a cultural object is a national treasure and if its departure from the UK would be a misfortune".[16] If the committee decides that the item fits the criteria, the Secretary of State can place it under temporary export deferral, and then public institutions are given the chance to raise funds and match the sale price, to keep the item in the UK for the benefit of the public.[17] By using a similar framework, Revere Auctions has been able to create a process that allows objects to pass through the auction house without requiring Tribal Nations to bid, driving up the price on and therefore strengthening the market for their cultural patrimony. Bringing in outside donors allows consignors with a monetary need to sell to be paid without having the object pass into a private collection.

4. The policy in action

Revere has been able to use this policy to successfully repatriate several objects. Each time an auction includes Native American objects, we send a list to the AAIA, which helps us get in touch with the appropriate Tribal Historic Preservation Officers (THPOs) or other officials. So far, we have helped facilitate the return of objects to the White Earth Nation (Ojibwe/Anishinaabe), the Oglala Lakota Nation, and the Navajo Nation. In some cases, this has required extensive and detailed consultation. In one instance, a consignor

[15] Ibid.

[16] Reviewing Committee, Arts Council, https://www.artscouncil.org.uk/supporting-collections-and-cultural-property/reviewing-committee#section-1 (accessed: 28.11.2020).

[17] Department for Digital, Culture, Media & Sport, *Export of Objects of Cultural Interest, 1 May 2016 to 30 April 2017,* p. 71, https://www.artscouncil.org.uk/sites/default/files/download-file/Export%20Objects%20Cultural%20Interest1617_web.pdf (accessed: 20.11.2020).

brought in a ceremonial bundle of objects, which included a diverse group of sacred pieces. The provenance information was vague, and upon initial research, it was not clear to which Tribal Nation they should be returned. After many emails, photos, and details sent to different THPOs, the groups we were consulting with determined that several of the objects contained in the bundle were Navajo and several were Oglala Lakota. Following further discussions with the consignor and the THPOs from the aforementioned nations, the consignor donated these objects to their respective peoples.

The donor process outlined in step three of our policy has been particularly successful on multiple occasions. In these cases, the consignor declined to donate the object, so it was sold at auction. During the seven day holding period, a donor was found, so the consignor was paid, and then the object was returned to the Tribal Nation. This process has largely been met with positive responses from buyers. Younger buyers in particular have been receptive to participating in sales conducted in this way. One buyer who won a lot for which a donor was found reached out to Revere to express their relief at avoiding involvement in an unethical situation. The receptiveness of donors and young buyers suggests that the goal of an overall shift in the market toward a more ethical approach is not only possible, but close at hand. Furthermore, it suggests that the enactment of a transparent public policy such as Revere's can actively help to move the market in that direction.

Unfortunately, due to the nature of the policy and the industry, not every object of cultural importance is able to be repatriated. There have been situations in which the consignor was not interested in donating objects, and we were unable to find donors. In those situations, the sale proceeds as usual after the holding period. It is unfortunate that these pieces end up in private collections instead of with the Tribal Nation who created them; as we work to improve this policy, finding ways to avoid this outcome is a high priority. However, in these cases, it is important to remember that the piece of cultural heritage would have been sold regardless. In this case, we hope our policy helps to mitigate some of the damage of these transactions by providing Tribal Nations with information and a way to pinpoint a place in the object's history. In some cases, we have also provided the buyer with the contact information for the Tribal Historic Preservation Officer for the Tribal Nation from which the object originated, to facilitate future consultation or donation.

The reception to the policy has been mixed. We have had several people, like the buyer discussed above, who were very pleased with our policy. There have been irate telephone calls from others who felt our policy vastly oversteps its boundaries, and we should only do what is required of us by law – which is to say, nothing. Conversely, we have had some people tell us that we are not doing nearly enough to protect culturally sensitive objects. In November of 2019, Revere sent two representatives to the

AAIA's Annual Repatriation Conference to present on a panel with two members of the Hopi Nation about ways to bring the auction industry up to speed on ethical treatment of Native American cultural patrimony. Many productive discussions with fellow panelists and attendees ensued, and although individual reactions varied, the general consensus seemed to be that a comprehensive, consultation-centered public policy was a step in the right direction. It is abundantly clear that transparent public policies about this issue are something that the auction industry needs and, by and large, does not yet have. This policy is a first attempt at creating something that will fill that void, helping to move the overall cultural trend of sensitive and ethical handling of Native American cultural heritage into the auction industry.

5. Conclusions

The strong reactions to Revere Auctions has received in response to this policy point to the sensitive nature of this topic – and to the importance of continued work being done to address it. Revere's policy is a first attempt at creating a transparent public policy regarding handling of Native American cultural patrimony by auction houses. Repatriation within private institutions will require extensive work to build a process that works as well as possible for all stakeholders. Revere's approach is designed to be flexible, and to evolve as we continue to learn and have conversations. Moving forward, we plan to continue enacting the policy at all relevant occasions, and to continue consulting with Tribal authorities and other stakeholders about ways to clarify and improve our methodology.

Creating public policies is only a first step in ethical practices relating to Native American cultural heritage in the auction industry. Reconciling the extremely disparate views of the stakeholders in this issue will require a shift in the broader cultural discourse about Native American cultural patrimony, allowing for the creation of an environment that acknowledges clashing cultural understandings of ownership, takes into account historical trauma, and truly listens to everyone involved. In the words of Marc Masurovsky of the Holocaust Art Restitution Project, creating a world where institutions can ethically handle material culture and share knowledge about oppressed peoples "requires a de-centering of a discourse whereby the host institution is no longer the purveyor of a system of ideas and values that has enabled and justified cultural crimes. For that to happen, new forms of dialogue must be conceptualized, practiced, and implemented between the hosts of the displaced objects, the aggrieved parties, and the mediating institutions – a new social contract of cultural rights".[18]

[18] M. Masurovsky, "A Comparative Look at Nazi Plundered Art…", pp. 524–525.

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Summary

Native American repatriation in the auction industry: A transparent approach

United States legislation protecting Native American cultural heritage fails to extend to the private sector, allowing auction houses to continue contributing to the misappropriation and displacement of Native American cultural heritage. In response to this problem, Revere Auctions developed a Native American Objects Ethics Policy that lays out a transparent methodology for handling Native American cultural patrimony, with a focus on consultation with the Association of American Indian Affairs and Tribal government officials. By enacting this policy, we hope to

help facilitate the repatriation of Native American cultural heritage and create new trends in the way the auction houses approach culturally sensitive materials.

Keywords: Native American cultural heritage, restitution, transparency, auction industry, culturally sensitive materials

Streszczenie

Repatriacja dóbr kultury Indian północnoamerykańskich w sektorze aukcyjnym: imperatyw transparentności

Prawo amerykańskie chroniące dziedzictwo kultury Indian północnoamerykańskich nie obejmuje sektora prywatnego, przez co domy aukcyjne nadal przyczyniają się do sprzeniewierzeń i trwonienia tego dziedzictwa. W odpowiedzi na ów stan dom aukcyjny Revere Auctions przyjął „Politykę etyczną obiektów indiańskich", w której ustalono przejrzysty sposób obchodzenia się z przedmiotami stanowiącymi indiańskie dziedzictwo, z uwzględnieniem konsultacji ze Stowarzyszeniem Spraw Indian Północnoamerykańskich (Association of American Indian Affairs) i z władzami plemiennymi. Wypada wyrazić nadzieję, że wdrożenie tej polityki przyczyni się do ułatwienia repatriacji dziedzictwa kultury Indian Północnoamerykańskich i zapoczątkuje nowe sposoby postępowania z przedmiotami, których natura ze względów kulturowych jest delikatna.

Słowa kluczowe: dziedzictwo Indian północnoamerykańskich, restytucja, transparentność, sektor aukcyjny, przedmioty o kulturowo delikatnej naturze