

The Journal of Art Crime

Spring 2009



Association for Research into Crimes against Art

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Cover Design: Urška Charney
Printed in the United States by Kendall Press Boston, MA
ISSN (PDF): 1947-5934
ISSN (Print): 1947-5926

Surviving War and Peace:

The Long Road to Recovering the Malevich Paintings

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Abstract

In 1927, Russian artist Kazimir Malevich, the father of “Suprematism”, considered the first systematic school of abstract painting in modern art, traveled to Poland and Germany with over 100 artworks in order to promote his radical artistic theories and non-objective painting in Europe. After exhibiting the works there, Malevich was called back to the Soviet Union and left his artworks in Germany with friends for safekeeping until his eventual return to the West. Malevich died without ever being able to return to Germany to pick up his artworks. After an epic struggle, 81 years later, his heirs were able to right the historical wrong and recover five significant artworks from the City of Amsterdam.

Keywords: art, expropriation, restitution, Malevich, Stedelijk, paintings

In April 2008, the 37 living heirs of Kazimir Malevich ended an epic struggle with the City of Amsterdam when they reached an historic settlement in which five paintings by their renowned ancestor were returned to them, 81 years after he had been forced to leave them in Europe. This struggle, which spanned almost two decades, created a groundbreaking new precedent in the field of art recovery and finally returned artworks that had been kept by war, politics and the Iron Curtain from their rightful owners.¹

In 1927, Russian artist Kazimir Malevich, the father of "Suprematism," considered the first systematic school of abstract painting in modern art, traveled to Poland and Germany to promote his radical artistic theories and non-objective painting in Europe.

Malevich had initially been influenced by Cubism and primitive art, which were both based on nature, but in 1915 he created his own movement, Suprematism, based on geometric forms that enabled him to construct images that had no reference at all to reality. He defined Suprematism as "the supremacy of pure feeling or perception in the pictorial arts." (Malevich, 2003) He viewed the Russian Revolution as having paved the way for a new society in which materialism would eventually lead to spiritual freedom. Ironically, however, Suprematism, and abstract art as a whole, were disapproved of by the Stalinist regime, so Malevich was careful not to reveal the true purpose of his trip to the Soviet authorities.

Malevich brought more than one hundred of his paintings, drawings and other works and manuscripts, which he believed were his best works to date, on this trip. In March 1927 he arrived in Warsaw and held an exhibition of his works at the Polish Artistic Club. This first exhibition outside of Russia was received very positively, and it readied Malevich for the Berlin leg of his journey. In Berlin his works were exhibited at the prestigious Grosse Berliner Kunstausstellung, where the German public was introduced to his revolutionary paintings in May 1927. The exhibition was a great success and Malevich, for the first time, received international recognition for his work. Germany was a hotbed of creativity in the arts at the time, an ironic prelude to what was to come only a few years later.

The Soviet Union at the time, however, did not share a similar interest in abstract art. In June of that year, Malevich was unexpectedly called back to Leningrad and, fearful that his artworks might be in jeopardy in Stalinist Russia, he left them in Germany. Since he expected to return soon to the West in order to continue showing his

artworks and promote Suprematism, he entrusted them for safekeeping to several friends there.

Upon his return to the Soviet Union, Malevich's life began to crumble around him. In 1930, a retrospective of his work in his birth city of Kiev closed almost immediately after it opened, and shortly thereafter he was arrested, detained and questioned for three months in Leningrad about the contacts he had made in Germany and his artworks, which were considered by the Stalinist regime to be "bourgeois" in that they did not express social realities.

In 1933, Malevich, ill with cancer, requested the opportunity to go abroad to receive medical treatment. This request was denied by the Soviet authorities. Making matters even worse, under official pressure from the Soviet government, Malevich abandoned Suprematism and began to paint portraits and small scale works on porcelain.

In 1935, Malevich died a defeated man. In a few short years he had gone from being a well respected artist in his home country—a member of the Soviet Museums Commission and the Commission for the Protection of Monuments who taught at the Vitebsk Practical Art School, the Leningrad Academy of Arts, and the Kiev State Art Institute—to a man who had been forced to abandon abstraction in favor of some approximation of Socialist Realism in order to appease governmental officials. He died penniless, without ever being able to return to Germany to reclaim his artworks. Until the end he remained concerned about the fate of the works he left abroad.

Meanwhile, in Germany, the Grosse Berliner Kunstausstellung exhibition closed in September 1927 and all of the Malevich works were packed and stored in Berlin. Years later, the works were transferred from the storage facility to one of Malevich's friends, Dr. Alexander Dörner, one of those to whom he had entrusted the works. At that time it would have been futile to return the works to Malevich in the Soviet Union because Stalinist condemnation of abstract art would undoubtedly have led to their confiscation and possible destruction.

For some time, Dörner, the director of the Landesmuseum in Hannover, exhibited some of the Malevich works there. The rising Nazi influence in Germany and the corresponding attacks on so-called "degenerate art," however, eventually compelled him to conceal the works in the museum's basement. In 1935, when Alfred Barr, the then director of the Museum of Modern Art in New York (MoMA), visited Dörner and expressed an interest in Malevich's works, Dörner arranged to ship some of them to MoMA to be held by the museum on loan. Two years later, when Dörner fled Nazi Germany for the United States, he brought two other Malevich works with him. When he died in 1957, he bequeathed these works to Harvard University's Busch-Reisinger Museum in Cambridge, Massachusetts, to be held on loan and for the benefit of "the rightful owners."

Before Dörner fled Nazi Germany, however, he took steps to ensure that the Malevich works he was leaving behind would be kept secure for the benefit of Malevich's Heirs. Those to whom Malevich had entrusted his works

¹ The author thanks his associate, Mari-Claudia Jiménez, for her invaluable assistance in the preparation of this article. The author and his law firm, along with Thomas R. Kline and L. Eden Burgess of Andrews Kurth LLP in Washington D.C., represented the claimants in the case of Leonard Malewicz v. City of Amsterdam in the United States District Court for the District of Columbia. All of the facts and legal issues discussed in this article are based on the record in the case, including the claimants' complaint, as recited by the Court in its opinions. (Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005) and Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322 (D.D.C. 2007)). The City of Amsterdam disputes many of the facts alleged by claimants.

in 1927 had already fled Nazi Germany or, like Dorner, were about to leave. All, that is, except one: Hugo Häring, a German architect and writer best known for his works on “organic architecture,” who lived and worked in Berlin.

Therefore, Dorner had the crate containing Malevich’s paintings and drawings sent to Häring, to whose care alone the works were now entrusted. Häring safeguarded the works in Berlin until the bombing of the city in 1943, and then moved them to his native town of Biberach. Remarkably, the works survived. During the time that the works were in Biberach, Häring’s friends attempted to convince him to secure the works against loss or dispersal by entrusting them to the care of a museum. For years Häring refused to do so, repeatedly emphasizing that he was only the custodian of the works, responsible for their safekeeping, and that he had no right to transfer them to anyone else.

In 1951, Dr. W.J.H.B. Sandberg, the then director of the Stedelijk Museum, the modern art museum owned by the City of Amsterdam, The Netherlands, visited Häring at his home in Biberach, upon discovering that he was holding a cache of Malevich works. From 1951 to 1956 Sandberg repeatedly sought to obtain the works for restoration and exhibition by the Stedelijk. Häring again and repeatedly responded that he had no right to transfer the works.

In 1956, after a prolonged illness, Häring finally gave in to these entreaties and agreed to lend the works to the Stedelijk Museum. He entered into a loan contract with the museum that contained an option to purchase all of the Malevich works. The Malevich Heirs alleged that the documents on which this loan contract were based--which purported to effect transfer of the ownership of the artworks from Malevich to Häring upon Malevich’s death--were obvious frauds created, while Häring was on his sickbed, by Häring’s brother-in-law, a German notary and lawyer named Ernst Böhme.

Despite the fact, as alleged, that Sandberg was fully aware that Häring did not own the Malevich artworks, he proceeded with the loan and sale transaction. As a result, the Malevich collection has been housed at the Stedelijk since 1958.

At this time, the vast majority of Malevich’s Heirs resided in the Soviet Union or elsewhere in Communist Eastern Europe. Living in desperate conditions behind the Iron Curtain, the Heirs were unable to find and communicate with each other, let alone take any measures to discover and redress the expropriation of Malevich’s property.

It took several years after the fall of the Iron Curtain for all of Malevich’s living Heirs to locate and contact each other and begin the difficult process of recovering the family’s property, including the expropriated works in Amsterdam. An art researcher, Clemens Toussaint, was instrumental in helping them in this endeavor. Beginning in 1996, and for many years thereafter, the Heirs repeatedly asked the City of Amsterdam and the Stedelijk Museum to return the Malevich Collection. In September 2001 Amsterdam formally advised the Heirs that it would not return the artworks to the Heirs, nor even to continue to negotiate with the Heirs to try to achieve an amicable settlement.

Meanwhile, however, the Heirs turned their sights to the United States with the aid of Toussaint and the author’s New York law firm, Herrick, Feinstein. Their first stop was MoMA, from which they requested the return of the Malevich works that Dorner had shipped to it over 60 years before. In June 1999 MoMA and the Heirs agreed to resolve amicably the Heirs’ claims, and MoMA returned one of the works. The Heirs then approached the Busch-Reisinger Museum, which decided in November 1999 to return to the Heirs both of the Malevich works that Dorner had bequeathed to it. In gratitude, the Heirs donated one of the works to the museum.

But the Heirs’ efforts in Amsterdam were stymied by the Stedelijk’s refusal to return any of the Malevich works in its collection. In 2003, however, the Stedelijk made what turned out to be a momentous decision. It included fourteen of the eighty-four artworks claimed by the Heirs as part of a temporary exhibition in the United States at the Solomon R. Guggenheim Museum in New York City (from May 22, 2003 until September 7, 2003) and the Menil Collection in Houston (from October 2, 2003 until January 11, 2004).

United States law prevented the Heirs from having a court “seize” the artworks, pending a resolution of their claim. The United States Immunity from Seizure Act (22 U.S.C. §2459) provides that the United States Department of State may certify that artworks to be loaned to museums and similar institutions located in the United States shall be immunized from judicial seizure. The Heirs had requested that the State Department refrain from certifying the Malevich artworks, but to no avail. Based on the artworks’ presence in the United States, however, the Heirs nevertheless--a few days before the works were to be returned to The Netherlands--brought suit against the City of Amsterdam for their return. The suit was brought pursuant to the Foreign Sovereign Immunities Act (FSIA), which provides that a foreign state and its agencies and instrumentalities (which includes the City of Amsterdam) are immune from suit in United States courts unless certain exceptions apply, all of which are set forth in 28 U.S.C. § 1605 (a) - (e). These exceptions include any case “in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state” (28 U.S.C. § 1605 (a)(3)).

The Heirs’ lawsuit was brought pursuant to this provision, also known as the “expropriation exception.” The Heirs argued that (i) the defendant, the City of Amsterdam, through the Stedelijk Museum, took the Malevich artworks without compensation to them, their true owners, in violation of international law; (ii) at the time when the lawsuit was commenced in January 2004, the fourteen Malevich works at issue were on exhibit at the Menil Museum in Houston, Texas, and were therefore “present in the United States,” vesting jurisdiction over them in the United States pursuant to §1605 (a)(3); and (iii) because the loan of the fourteen artworks to the Guggenheim and the Menil Museums was a transaction that could be engaged in by a private party, it comprised a “commercial activity” under the FSIA.

The City of Amsterdam moved to dismiss the Heirs' complaint, arguing, *inter alia*, that they could not claim a violation of international law because they had not exhausted their remedies in a court in The Netherlands; the artworks were not "present in the United States" as a matter of law during the course of the exhibitions because they had been immunized from seizure by the U.S. Government; and that the loan of the Malevich artworks to the U.S. museums was not a "commercial activity carried on in the United States" as the FSIA requires.

In an opinion dated March 30, 2005, the U.S. District Court for the District of Columbia denied the City's motion to dismiss. First, the Court found that the City's arguments concerning exhaustion of remedies were not a basis for dismissing the suit on jurisdictional grounds because the Court could "not require Plaintiffs to take their case to a Dutch court unless the City of Amsterdam waiv[ed] its statute of limitations defense and the Dutch court accept[ed] that waiver." (Malewicz, 362 F. Supp. 2d at 308) Second, the Court held that the paintings were present in the United States at the time of the filing of the suit and therefore were present for purposes of FSIA jurisdiction, i.e., the works' immunization from seizure did not negate their presence in the United States for FSIA purposes. In other words, the Court drew a distinction between the Heirs "seizing" the works or preventing their return to Amsterdam, which they were not attempting to do (indeed the works were returned to Amsterdam a few days after the lawsuit began); and their suing to effect their return to the Heirs pursuant to the FSIA.

Last, as to whether the exhibition loan was a "commercial activity," the court based its analysis on the "rule of thumb" adopted by the courts in the District of Columbia: "If the activity is one in which a private person could engage, it is not entitled to immunity." (Malewicz, 362 F. Supp. 2d at 313) Consequently, the Court concluded that it was "clear that the City of Amsterdam engaged in 'commercial activities' when it loaned the 14 Malevich works to museums in the United States" because there is "nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign." (Malewicz, 362 F. Supp. 2d at 314) As the Court further explained, even if the loan were purely educational and cultural in purpose, as the City alleged, it still would be "commercial activity" under the FSIA, citing the language of the FSIA itself: "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." (FSIA, 28 U.S.C. §1603(d)).

It is interesting to note that the United States Government filed a Statement of Interest in the case supporting the position of the City of Amsterdam, contending that "§1605 (a)(3) requires a sufficient nexus with the United States to provide fair notice to foreign states that they are submitting themselves to U.S. jurisdiction and abrogating their sovereign immunity" and that "foreign states are unlikely to expect that this standard is satisfied by a loan of artwork for a U.S. Government-immunized exhibit that must be carried out by a borrower on a non-profit basis."

The Court responded by holding that although "the opinions of the United States are entitled to 'great weight,'" the Court "concludes that §2459 granting immunity and §1605(a)(3) establishing jurisdiction for certain claims against a foreign sovereign are both clear and not inconsistent" and therefore "the Court is bound to the plain meaning of these statutes," that is, that they are "unrelated except that a cultural exchange might provide the basis for contested property to be present in the United States and susceptible, in the right fact pattern, to an FSIA suit." (Malewicz, 362 F. Supp. 2d at 311)

There was one issue that the Court left open for its later decision. On the factual record before it, the Court could not ascertain the substantiality of the City's contacts or activities with or in the United States in connection with the loan of the Malevich artworks, which the Court held was required by the relevant definition of "commercial activity" in the FSIA itself: "A commercial activity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States." (FSIA, 28 U.S.C. §1603(d)) Therefore, although it denied the City's motion to dismiss, the Court requested further development of the factual record in order to make a final determination of the substantiality of the city's contacts with the United States and conclusively determine the question of whether or not the City of Amsterdam was immune from suit and thus whether or not the Court had jurisdiction to hear the case. As a result, the City submitted additional evidence to support its position that it did not have substantial contacts with the U.S. and that it was immune from suit under the FSIA.

In a June 27, 2007 opinion, the Court held that the record contained "sufficient contacts to establish jurisdiction under the FSIA's expropriation exception." (Malewicz, 517 F. Supp. 2d at 340) The Court found that "the City contracted with the American Museums knowing that the paintings would be displayed in the United States--and knowing of the heirs' claim that the City had unlawfully taken the paintings without just compensation. The City received nearly [Euro] 25,000 as consideration for the contract with the American Museums--a substantial sum. More critically, it agreed to send several employees, including its Chief Curator for Paintings and Sculptures, to the United States to oversee the safety of the paintings while they were on loan." (Malewicz, 517 F. Supp. 2d at 332) The Court thus conclusively denied the City's Motion to Dismiss, paving the way for the case to go to trial. The City immediately appealed to the United States Court of Appeals for the District of Columbia Circuit.

Before the parties completed their submissions to the Court of Appeals, a settlement was reached between the Heirs and the City of Amsterdam. The City and the Stedelijk Museum agreed to transfer five important Malevich paintings to the Heirs in exchange for the dismissal of all litigation between them and an acknowledgement from the Heirs that the City has title to the works in the collection remaining with the City. (Images of the five paintings are available at www.malevichpaintings.com).

After 81 years, the Heirs of Kazimir Malevich, who are scattered throughout the globe, were able to achieve

a just resolution that preserved Malevich's legacy and his contributions to the history of 20th century art, kept a representative portion of the collection together on public display for all to see and cherish, and provided them with a representative group of five important paintings by their illustrious ancestor.²

² On November 3, 2008, "Suprematist Composition" 1916, one of the five works restituted to the Malevich Heirs, was sold at auction by the Heirs for \$60 Million, setting a record price for any Russian artwork and a record for works by Malevich.

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