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Cultural Heritage & Arts Review

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and Egypt Leads to Return of
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Plus:

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...and more!

"Bone Shawl Pin Adorned with Two Birds"

Photo by Michael Marsland, Courtesy Peabody Museum/Yale University

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Background Photo: "Bronze Knife Pendant"
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Yale Agrees to Return Machu Picchu Artifacts to Peru: Ethics-Based Repatriation Efforts Gain Steam

by Kimberly Alderman

IN 1911, Hiram Bingham cut through the Andean jungle and rediscovered the ancient site of Machu Picchu. A thick moss covered the ruins, which the world had all but forgotten. Bingham made his heroic return to the United States bearing artifacts such as pottery, jewelry, and bones, which he handed over to Yale University, where he was an adjunct professor in Latin American history.

Shortly thereafter, a dispute arose over whether Yale could properly keep the objects. In 1916, Bingham wrote to the National Geographic Society regarding the human remains: "Now they do not belong to us, but to the Peruvian government, who allowed us to take them out of the country on condition that they be returned in 18 months... The whole matter has assumed a very large importance in the eyes of the Peruvians, who feel that we are trying to rob their country of its treasures."¹

In 1921, Yale returned boxes of artifacts to Peru, presumably containing the disputed human remains. In the late 1920s, Peru demanded the rest of the objects be returned, but Yale refused. The matter was quiet for some 70 years, until 2000, when Peru again demanded Yale return the remainder of the objects. Peru asserted that the loan arrangement described by Bingham applied to the full 40,000 artifacts, not just the human remains. Yale responded that it had returned all lent objects, and had kept only those artifacts to which it had full title.

For the most part, the artifacts do not have inherent beauty; only 350 are museum-quality pieces. Instead, they consist largely of shards and fragments, but are valuable for research purposes. In 2007, Yale and Peru reached a tentative agreement in which Yale would transfer title to the objects to Peru, but the objects would stay at Yale for study and display. That agreement fell through the following year, and Peru filed suit in federal court, demanding that Yale return all the artifacts.²

The lawsuit faced two primary obstacles from its inception. First, in order for Peru to recover improperly removed objects, it must prove that the Government of Peru was the legal owner at the time of their removal from that country. In a case involving the seizure by U.S. Customs of 89 pre-Colombian artifacts from a private individual, the Central District Court of California found that Peru had only demonstrated national ownership of cultural property back to 1929, at the earliest.³

Another obstacle for Peru's lawsuit was that the statute of limitation or *laches* might bar Peru's *replevin* action. Peru made a formal demand for the return of the objects in the late 1920s and Yale refused. This refusal likely began the 3 year statute of limitations on *replevin* actions, and yet Peru failed to file a claim for another 70 years.

Despite these known obstacles to recovering the artifacts on legal grounds, Peru mounted a national mobilization effort to reclaim the Machu Picchu artifacts from Yale in the fall of 2010, instead focusing on moral grounds. First, Peru threatened to pursue



"Ritual Offering Vessel, or Paccha," Photo by Michael Marsland, Courtesy of Peabody Museum/Yale University

1 First Am. Compl., at Ex. O, Republic of Peru v. Yale University, No. 08-02109 (D.D.C. Apr. 20, 2009) (containing reproduction of the original letter); Arthur Brice and Catherine E. Shiochet, *Peru's president: Yale agrees to return Incan artifacts*, CNN WORLD, Nov. 20, 2010, <http://tinyurl.com/3ymfao8> (last visited Dec. 19, 2010).

2 Complaint, Republic of Peru v. Yale University, No. 08-02109 (D.D.C. Dec. 5, 2008); Dave Henderson, *Peru to suspend legal action against Yale*, YALE DAILY NEWS, Nov. 26, 2010, <http://tinyurl.com/22qsbl>.

3 Peru v. Johnson, 720 F.Supp. 810 (C.D. Cal. 1989).

Machu Picchu Artifacts (*cont'd*)

criminal charges against Yale if the artifacts were not returned. What those criminal charges might have been based on was neither stated nor apparent. Next, President Alan Garcia made a formal request for President Obama's intervention. Garcia then mounted demonstrations in Lima and Cusco, where thousands marched to show solidarity in their demand that Yale return the estimated 40,000 artifacts.

These efforts generated support outside of Peru as well. Equadorian President Rafael Correa made a formal statement of support for Peru, and said he would take the issue to the Union of South American Nations. Nine runners in the New York marathon wore t-shirts demanding that Yale return the artifacts taken from Machu Picchu nearly 100 years ago. President Garcia said he also received a message of support from U.S. Senator Christopher J. Dodd.

Yale responded to the public shaming immediately by flying representatives to Peru to make another attempt at negotiating a settlement. Yale and Peru reached an accord in which Yale agreed to return the artifacts over the next two years. The museum-quality objects will be returned in time for the centennial celebration commemorating the 1911 discovery of Machu Picchu. The rest of them will be turned over to the University of Cusco, which will carry out programs for research, educational exchanges, and public exhibitions, and where Yale will have access to the artifacts for research purposes. President Garcia stated he would request a supplemental credit from parliament to fund construction of the appropriate facilities to house the objects. Peru filed their Complaint against Yale shortly after it had filed an appearance in the *Black Swan* case, currently on appeal. In that case, Spain, Odyssey Marine

Exploration, other claimants, and now Peru all claimed ownership of \$500 million worth of coins harvested from international waters. Peru made the ambitious argument that it should own the coins because they were minted in Lima using local labor, even though Peru was a Spanish colony at the time. The combination of Peru's suit against Yale and their claim in the *Black Swan* case demonstrates that Peru wants to assert itself on an international level in the movement to repatriate cultural property to source nations.



A delegation from Peru reviews the collection at Yale

Egypt, Italy, and Greece are all vying for center-stage in the repatriation movement. Each uses political clout to facilitate the return of archaeological objects – even when there are no apparent legal grounds to necessitate repatriation. In November 2010, for instance, the Metropolitan Museum of Art agreed to voluntarily return

to Egypt 19 objects from King Tutankhamun's tomb, even though the law did not require the Met do so [see following page, Ed.].

When it became apparent that legal recourse would likely fail, Peru used techniques employed by Egypt, Italy, and Greece in the hopes of forcing Yale to return the Machu Picchu artifacts. It appears these efforts were successful, although only time will tell whether the Yale-Peru agreement will stand up, since the previous settlement fell through. Yale's willingness to return the Machu Picchu artifacts to Peru demonstrates that the ethics-based repatriation movement is still a viable means for source nations to reclaim extant cultural property.

Kimberly Alderman is a Clinical Assistant Professor at the University of Wisconsin Law School. She maintains the Cultural Property & Archaeology Law Blog at <http://www.culturalpropertylaw.net>.

The Met Voluntarily Returns 19 Items from King Tut's Tomb to Egypt

By Jennifer Boger

ON November 10, 2010, the New York Metropolitan Museum of Art ("Met") announced its decision to voluntarily return 19 artifacts recovered from the tomb of King Tutankhamun to Egypt. Thomas Campbell, Director of the Met, made the announcement collaboratively with Zahi Hawass, Secretary General of the Supreme Council of Antiquities in Egypt ("SCA").

All of the objects are small-scale, fifteen of them being described as "bits or samples."

The remaining four, however, have been described as significant pieces with greater value to art historians and Egyptologists. The latter include a figurine of a small bronze dog, a small sphinx bracelet fragment, part of a handle, and a broad collar accompanied by additional beads.

In the Met's press statement, Campbell noted that following extensive internal investigations, the museum's Department of Egyptian Art concluded "without a doubt" that the 19 items had been improperly removed from Tutankhamun's tomb and that "because of precise legislation relating to that excavation, these objects were never meant to have left Egypt."

Tutankhamun, "the boy king," reigned from about 1336 to 1327 B.C. His tomb, hidden in the Valley of the Kings, was discovered by Howard Carter in 1922. At that time, Egyptian law allowed archaeologists to retain a portion of their finds through a process of partage. Under this system, the archaeologist and the Government of Egypt would review the discoveries and either divide them into two shares of equal value or would otherwise draw lots to determine the allocation of finds.

According to the Met, it was through such a process that it obtained a large portion of its present holdings in Egyptian art, as it sponsored three ongoing excavations in Egypt during the first quarter of the twentieth century.

While Howard Carter had conducted previous excavations subject to the partage rule, once Egyptian authorities realized the unprecedented grandeur of Tutankhamun's tomb, they informed Carter that no

such partition of these particular finds would occur. Despite this understanding, however, Thomas Hoving, a former director of the Met, alleged that Carter nevertheless retained some of his discoveries. Hoving made this assertion in his 1978 book, *Tutankhamun: The Untold Story*.

Following the excavations of the tomb, objects of high

quality, dating to Tutankhamun's time, surfaced on the market and landed in collections outside Egypt, spurring speculation that Carter had taken some of the objects found in the tomb. These speculations were further fueled when a number of fine objects were found in Carter's estate upon his death. These items included the 19 objects returned by the Met.

The Met gained possession of the objects over a span of twenty years, from the 1920s to the 1940s. The bronze dog and the Sphinx bracelet-element were transferred to the museum by Carter's niece, who had inherited them from Carter. The remaining items, including the handle and collar with beads, were acquired by the museum when it was granted the contents of Carter's Luxor home through the terms of his will. That these items were part of the Tutankhamun



"Bracelet Inlay in the Form of a Sphinx"
Photo Courtesy of the Metropolitan Museum of Art

The Met Voluntarily Returns Items from King Tut's Tomb to Egypt (*cont'd*)

tomb was verified by Met researchers who determined that at least two of the items (the dog and the bracelet fragment) appear in a catalog of dig finds, though no photographs of them exist among the excavation records.

It is in light of this discovery, that the items were taken by Carter in contravention of the understanding that no Tutankhamun finds were to leave Egypt, that the Met has chosen to return the artifacts. Although not legally obligated to return the items, the museum and Dr. Hawass indicate that the Met's decision was motivated by notions of fairness, ethics and generosity.

Strong Ties Between the Met and Egypt's SCA

The Met has collaborated with Hawass on a number of occasions and has a good relationship with the Supreme Council of Antiquities in Egypt. The Met has supplied Hawass with information leading to the recovery of other objects and has even purchased an Egyptian antiquity that it then immediately handed over to Egypt, which had the matching piece on display in Luxor. According to the joint statement announcing the return of the Tutankhamun objects, Hawass noted that the Met gave Egypt this granite fragment "so that this object could be restored."

The Met is also currently carrying out excavations in Egypt. It is continuing excavations at Lisht and Dahshur and recently resumed work at the site of Malqata.

In the past, Hawass has revoked excavation permits for museums that were unwilling to return items that he has sought to repatriate. In 2009, Hawass severed

relations with the Louvre over the disputed ownership of five painted wall fragments. Relations were only restored upon the repatriation of the items, though tension still exists over Hawass' outstanding request that the Louvre return the Zodiac of Dendera. By cooperating with Hawass,

the Met also serves its own practical interest in maintaining access to Egypt's rich archaeological terrain.

Zahi Hawass: A Champion of Egypt's Repatriation Efforts

The Met's return of these 19 objects is another coup in Dr. Hawass' efforts to repatriate legions of Egyptian artifacts located outside the country. To date, Hawass claims to have recovered thousands of objects for

Egypt, and he currently has his sights set on some world-famous treasures, including the Rosetta Stone at the British Museum and the Bust of Nefertiti at the Neues Museum in Berlin.

Dr. Hawass obtained a PhD from the University of Pennsylvania in 1987, after which he returned to Egypt. Upon returning to his country, he led excavations at the Giza Pyramid Plateau and within a decade became a vocal proponent of repatriation efforts. Since taking on his role at SCA in 2002, Hawass has waged a tireless campaign to secure the return of items that he believes belong in Egypt—sometimes despite the weight of legal arguments against the necessity of their return. He has also tried to garner support and protection for Egypt's sites through a creative, though not necessarily effective, attempt to copyright certain commercial reproductions of the pyramids. While such a feat may not be legally recognizable on the international level, the publicity given to the effort



"Figure of Dog, Black Bronze"

Photo Courtesy of the Metropolitan Museum of Art

The Met Voluntarily Returns Items from King Tut's Tomb to Egypt (*cont'd*)

served Hawass' ongoing goal of bringing attention to Egyptian antiquities and cultural heritage.

Dr. Hawass has been variously hailed as a crusader for the cause of repatriation and criticized for allegedly interfering with and/or co-opting projects for archaeological research in Egypt. Having personally headed the movement for the repatriation of Egypt's ancient cultural heritage, he has also attracted a great deal of attention for his strong views and vivacious personality. Despite some controversies, Hawass has become the well-recognized face of Egypt's archaeology and its repatriation efforts.

Thanks to frequent media appearances, vocal commentary, and even a TV show on The History Channel (Chasing Mummies), Hawass has put a very visible face on Egypt's ongoing battle to recover its far-flung artifacts. While Hawass may recognize that the law may not always be on his side, he is waging a war of public opinion and has swayed many to see things from his point of view.

In April 2010, Hawass held a conference in Egypt to rally support around repatriation efforts and to encourage unity among the many nations seeking to reclaim their art and artifacts from museums and collections in other countries. Representatives of twenty-two countries, including Greece, Italy and Peru attended the conference. According to the SCA, representatives from the United States Immigration and Customs Enforcement agency also attended, providing information on repatriation efforts from the perspective of a market country.

One of Hawass' goals was to seek support for an amendment to the 1970 UNESCO Convention, which states that trade in cultural property contrary to its provisions is illicit and should be treated as such by States Parties. In recognition of the treaty, the two major museum organizations in the United States, the Association of Art Museum Directors and the American Association of Museums, have adopted guidelines making 1970 a threshold date for determining the propriety of acquiring archaeological material and ancient art. As such, these guidelines call on museums not to

accept a work unless it can be demonstrated to have been outside its country of origin since before 1970 or was otherwise legally exported from the source country after 1970 (although the AAMD guidelines contain additional loopholes). Hawass, and others at the conference, sought to push back this threshold date, establishing similar criteria for items removed from their country of origin prior to 1970. (A summary of the conference agenda and goals can be found in the SCA's online archives.)

It is unclear whether such efforts, even if they succeed, would help Hawass reclaim items such as the Rosetta Stone and the Nefertiti Bust, both of which have been in the hands of foreigners for more than a century. The

Rosetta Stone, discovered by a French soldier in 1799, was granted to Britain two years later as a spoil of war in the Capitulation of Alexandria. Although a throwback to colonialist ideology, acquisition through the rubric of war spoils was recognized as legally valid until at least the later part of the nineteenth century. As for the Nefertiti bust, the museum asserts that it was legally acquired more than one-hundred years ago through the system of partage. Nevertheless, Hawass urges their return and insists that these institutions have an ethical, if not legal, obligation to repatriate these exemplary artifacts.

While it is highly unlikely that the British Museum or the Neues Museum will voluntarily relinquish its artifacts, as did the Met with the 19 Tutankhamun objects, there is no doubt that Hawass will keep up his fight and highlight the Met's efforts as a model for responsible and ethical collections policies and practices. As returns of artifacts to source nations continue to increase, the cooperative relationship between the Met and Egypt shows potential benefits for museums both in terms of publicity and maintaining strong ties to nations rich in historical treasures.

Jennifer Boger is a staff member of the Lawyers' Committee for Cultural Heritage Preservation, www.culturalheritagelaw.org



Assembly Bill 2765: California's Latest Foray Into Holocaust Art Litigation

by Andrew L. Adler

PERHAPS the most acute and enduring source of frustration in Holocaust art litigation in the United States derives from the central role that statutes of limitations play. Although title to stolen property does not pass to a good faith purchaser under American common law, claims for recovery may nonetheless be barred by the statute of limitations. In the inaugural issue of this Review, Professor Kreder reported on the status of a State Department proposal to establish a national art commission, highlighting once again the issue of whether Holocaust art restitution claims should be resolved on the merits rather than on timeliness grounds. Notably, this proposal follows the Executive Branch's decision to sign the 2009 Terezin Declaration, a non-binding policy statement endorsing the merit-based resolution of such claims. While debate over this issue continues at the federal level, the state of California has persisted in a parallel effort to further the merit-based resolution of these claims.

In 2003, the California legislature suspended the otherwise applicable statute of limitations—codified in § 338(c) of the California Code of Civil Procedure—for all such lawsuits against museums and galleries brought on or before December 31, 2010. Cal. Code Civ. Proc. § 354.3. Thus, although § 338(c) had established a three-year statute of limitations for actions brought to recover stolen personal property, § 354.3 temporarily suspended this limitations period for certain Holocaust art restitution claims.

However, California's suspension of the limitations period ultimately failed to take hold. In January of this year, the U.S. Court of Appeals for the Ninth Circuit held in *Von Saher v. Norton Simon Museum of Art* at Pasadena that § 354.3 unconstitutionally infringed on the federal government's exclusive power to "make and resolve war."¹ The *Von Saher* case involves *Adam and Eve*, a circa-1530 diptych painted by Lucas Cran-

ach the Elder. The diptych was owned by the Jewish-Dutch art dealer Jacques Goudstikker, who fled the Nazi regime in 1940 (and died in a fatal fall as he was escaping), leaving his collection to be Aryanized in a forced sale conducted by Nazi officials. Upon gaining possession of these paintings after the war, the Dutch government sold them to Georges Stroganoff-Scherbatoff, who had claimed they came from the Stroganoff Collection, and they were eventually sold by an art dealer acting on his behalf to the Norton Simon

Museum of Art in Pasadena. Marei von Saher, the only surviving heir of Goudstikker, brought suit against the museum in 2007, invoking § 354.3.

In striking down § 354.3, the Ninth Circuit reasoned that, although property was traditionally regulated by the states, the "real purpose" of § 354.3 was to provide relief to Holocaust victims and their heirs, a war-related objective that could be pursued only by the federal government. A petition for a writ of certiorari from the Ninth Circuit's

decision remains pending in the U.S. Supreme Court. And on October 4, 2010, the Supreme Court asked the U.S. Solicitor General for advice on whether to exercise its discretionary jurisdiction to hear the case, a sign that the Court may in fact do so.

Just a few months after the Ninth Circuit's decision in *Von Saher*, the California legislature introduced Assembly Bill (AB) 2765 for cases involving works of "historical, interpretive, scientific, cultural, or artistic significance" stolen or taken by fraud or duress. Over the last several months, this bill has been approved unanimously by both houses of the California legis-



Lucas Cranach the Elder (1472-1553), "Adam" and "Eve"
Image Courtesy of the Norton Simon Art Foundation

1 592 F.3d 954 (9th Cir. 2010).

California's Latest Foray Into Holocaust Art Litigation (*cont'd*)

lature and has recently been signed by the Governor. The legislation will take effect in January 2011, but the question remains: will it suffer the same fate as § 354.3?

Rather than overtly targeting Holocaust-era art claims, AB 2765 amends § 338(c) by inserting special provisions that will apply to lawsuits brought to recover all stolen artwork. It changes the law in two major respects. First, it lengthens the applicable statute of limitations from three to six years. The legislature justifies this extension on the ground that, because works of fine art “often circulate in the private marketplace for many years before entering the collections of museums or galleries,” the three-year statute of limitations “often present[ed] an inequitable procedural obstacle” Second, and more significantly, AB 2765 clarifies that the six-year statute of limitations will begin to run upon the claimant’s actual—rather than constructive—discovery of both the whereabouts of the artwork and the facts sufficient to indicate that the claimant has an interest in the artwork. Together, these two legislative changes will greatly increase the likelihood that art restitution claims will be resolved on the merits.

However, there are several limitations contained within AB 2765. First, AB 2765 applies only to actions brought against a museum, gallery, auctioneer, or dealer; it does not apply to actions brought against private individuals. The legislative history explains that the “rationale for not extending the [statute of limitations] as to non-professional buyers reflects the fact that museums, galleries, and dealers are sophisticated purchasers who deal in a large volume of works and are typically insured.”² This rationale is problematic, however, given that not all sophisticated purchasers are covered. Nonetheless, because the distinction between professional and non-professional possessors does not implicate a fundamental right or suspect classification, this distinction should survive the highly deferential rational basis standard that would apply in any equal protection challenge.³

2 Hearing: AB 2765, “Synopsis” at 9, Assembly Committee on Judiciary (May 4, 2010), available at ftp://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2751-2800/ab_2765_cfa_20100504_141718_asm_comm.html (last visited Dec. 20, 2010).

3 See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 & n.4 (1938).

Second, AB 2765 expressly provides that a party may raise all legal and equitable defenses, including *laches*. The legislative history explains that it was necessary to include this provision “because of existing case law holding that ‘equitable’ remedies like *laches* are not available in ‘legal’ actions like *replevin*, unless of course a statute provides otherwise.” Thus, although the bill’s actual discovery rule does not impose a due diligence requirement, the availability of a *laches* defense should preclude claimants from taking advantage of unrea-

Until more progress is made on the federal front, Holocaust art litigation and the corresponding centrality of state-prescribed statutes of limitations will continue in earnest.

sonable delay. Moreover, AB 2765 explicitly recognizes the museum community’s efforts to publicize information about their collections, and it suggests that courts account for such efforts when applying equitable doctrines.

Third, AB 2765 contains several temporal limitations. First, it applies only to lawsuits brought on or before December 31, 2017, at which time its amendments to § 338(c) will sunset. In this respect, the bill expressly provides that it will apply to lawsuits pending at the time the legislation takes effect. Second, despite its inclusion in earlier drafts, the final version of AB 2765 does not authorize the revival of lawsuits previously dismissed on statute-of-limitation grounds. This is a curious omission given that the drafters had earlier taken pains to explain that such a statutory revival would comport with due process considerations. Third, AB 2765 applies only to lawsuits brought to recover artwork unlawfully taken within the last 100 years.

On its face, AB 2765’s amendments to § 338(c) have nothing to do with the Holocaust, for they apply to all lawsuits brought to recover stolen artwork. However, this approach does not likely reflect a newfound apathy towards Holocaust-era claims on the part of the legislature, but is rather designed to avoid the constitutional infirmities that plagued § 354.3. Indeed, rather than creating a new cause of action overtly designed to benefit Holocaust victims and their heirs, AB 2765 subtly amends the statute of limitations applicable to a general category of lawsuits—i.e., those brought to recover works of fine art. In this way, AB 2765 is less likely than its predecessor to be perceived



California's Latest Foray Into Holocaust Art Litigation (*cont'd*)

as an intrusion on the federal government's exclusive foreign affairs powers.⁴

At the same time, the practical effect of AB 2765 will be to benefit Holocaust art restitution claims. In this respect, the legislation is similar to § 354.3: Although § 354.3 temporarily suspended the statute of limitations entirely, AB 2765's actual discovery rule, coupled with the new six-year limitation period, should facilitate the merit-based resolution of Holocaust art claims in most cases. Thus, the context of AB 2765 strongly suggests that it is designed to achieve the same purpose as § 354.3.

Furthermore, AB 2765 contains two additional features suggesting that its real purpose is to facilitate a merit-based resolution of Holocaust-era claims. First, AB 2765 expressly provides that § 338(c) will govern claims based on an unlawful "taking or theft by means of fraud or duress." While traditional art theft typically involves physical confiscation, the issue of forced sales has taken on great significance in the context of Holocaust art claims, where victims of Nazi persecution were often forced to sell their artwork in order to survive. Second, AB 2765 expressly resolves a split among California intermediate appellate courts by clarifying that § 338(c) will apply to thefts occurring before 1983, the date that § 338(c) originally took effect. However, the legislature curiously credited *Von Saher* with illuminating this split of authority, even though it came into existence back in 1996. The resolution of this split of authority may have been a means of disguising the bill's Holocaust-specific objective.

It is difficult to predict how a court would treat the question of the constitutionality of AB 2765. On the one hand, AB 2765 facially amends the statute of limitations for a general category of property lawsuits, unquestionably an area of "traditional state responsibility." On the other hand, it appears that the real purpose of AB 2765, like § 354.3, is to facilitate a merit-based resolution of Holocaust art restitution claims.

4 See *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 579 (5th Cir. 2010) ("In this case, Louisiana has not pursued any policy specific to Holocaust victims or Nazi-confiscated artwork. The state's prescription periods apply generally to any challenge of ownership to movable property. Louisiana's laws are well within the realm of traditional state responsibilities. In exercising its strong interest in regulating the ownership of property within the state through these prescriptive laws, Louisiana has not infringed on any exclusive federal powers.").

Whether AB 2765 falls within the ambit of *Von Saher* will likely be the subject of future litigation, assuming that the Supreme Court does not take action in the interim. Von Saher has argued that legislative actions taken to further restitution claims in California do not actually conflict with any federal statutes and do not directly affect relations with other nations. The California legislation is indeed consistent with policy norms of the U.S. Executive Branch dating to at least 1949 and current U.S. positions at the Washington Conference and in the Terezin Declaration relating to the restitution of Nazi-looted property.⁵ The question in *Von Saher*, however, is not whether there is an actual conflict in state and federal law, but involves a rather more complex issue of whether the state is preempted from the "field" of legislating on Holocaust restitution and reparation claims.

Of course, Congress could also obviate the *Von Saher* issue by enacting pre-emptive legislation of its own. And one way in which federal pre-emption could occur is if Congress were to establish a national art commission that was made the exclusive forum for resolving such claims. At present, however, the pre-emptive effect of such a hypothetical commission remains unclear. And, until more progress is made on the federal front, Holocaust art litigation and the corresponding centrality of state-prescribed statutes of limitations will continue in earnest.

Andrew Adler is a Law Clerk to Judge Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit.

5 See, e.g., State Department Press Release No. 296, Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers, 20 DEP'T STATE BULL. 592 (Apr. 27, 1949) (*quoted in* *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (*per curiam*), modifying 173 F.2d 71 (2d Cir. 1949) ("The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."); see also Prague Holocaust Era Assets Conference: Terezin Declaration, U.S. DEP'T OF STATE (June 30, 2009), <http://www.state.gov/p/eur/rls/or/126162.htm> (last visited Nov. 23, 2010). See generally Holocaust Era Assets Conference, <http://www.holocausteraassets.eu/> (last visited Nov. 23, 2010).



The Lubomirski Dürers: A Case for Legal and Moral Restitution

by Andreas Cwitkovits and Mickela Moore (www.artlawbusiness.com)

To trace the path of the drawings of Renaissance genius and printmaker Albrecht Dürer (1471-1528) is to journey through history. Coveted by emperors, princes, collectors and politicians, the prints have passed from German and Venetian workshops through the halls of great empires. Treasured by the public in museum collections and attracting the interest of Napoleon and Hitler, the travels of these prints have carried with them great controversies over culture and patrimony.

The modern story of the drawings begins in the early 19th century, when Prince Henryk Lubomirski of Poland assembled a collection of the most prized Dürer drawings, eventually totalling 27.

At the time, Poland sought to counter the influence of Czarist Russia, Habsburg Austria, and Prussia by creating a cultural repository, the Ossolinski National Institute (the "Ossolineum"). Founded in 1816 in the city of Lviv¹ (Lwow) by Count Józef Ossolinski, the Ossolineum was a library, museum, and a publishing house. The objective of its founders and donors was that the cultural treasures housed in the Ossolineum should serve the common good and uplift the Polish spirit.

The Charter establishing the Lubomirski Museum within the Ossolineum in 1823 transferred title of the Lubomirski family's priceless collection of paintings, miniatures, sculpture, arms and armor, plus drawings by the Old Masters, including Dürer and Rembrandt, to the Ossolineum. To ensure that the collection stayed intact, Prince Henryk Lubomirski entailed the family's estate and established a foundation specifying the terms under which the Ossolineum was to retain the collection. The art collection would only revert back to the Lubomirski heirs in the event of: (1) the dissolution of the Ossolinski National Institute; (2) the dedication of the assets of the Institute to goals other than those

ordained by Ossolinski; and (3) the limitation or abolition of rights granted by Ossolinski to the Literary Curator.² It is important to note that Article XI of the founding document foresaw possible political instability and further provided:

*"However, should the reason for the termination of the relationship with the Ossolinski Institute be reversed and the original state be totally restored, then the terminated relation of the Fideicommissum estate and the Lubomirski Museum with the Ossolinski [I]nstitute shall be reinstated. However, such relationship may be reinstituted only within the 50 years from the termination and before the expiry of the families appointed in Article VI."*³

In the 20th Century, history again would intervene in the fate of 24 of the Dürer drawings – resulting in an outcome that would appear to contravene the intention of Prince Henryk Lubomirski. During World War II, the collections of the Ossolineum did not escape the attention of either the Soviet or German occupying forces, and both countries nationalized and redistributed parts of the Ossolineum collections to museums and other institutions within either Soviet or German territory, respectively. In particular, Reichsmarschal Göring specifically ordered the confiscation of the Dürer drawings, which were found in an Austrian salt mine in Alt Aussee after the War.

Soviet troops seized Lviv in 1939, and the Museum of Lubomirski Princes was nationalized and liquidated in 1940. It did not function during the German occupation in 1941 to 1944, nor during the second Soviet occupation in 1944 to 1945.⁴ After Lviv became part of the Soviet Union under the terms of the 1945 Yalta Conference, the Soviets nationalized all institutions under its rule. In contravention of the terms of



1 Lviv was, at that time, part of what is now known as Austria. It was then part of the Republic of Poland from 1918-1945. It is now part of the Ukraine after the Soviet annexation in 1945, in accordance with the terms of the Yalta Conference.

2 Adolf Juzwenko, *THE FATE OF THE LUBOMIRSKI DÜRERS* 15 (Society of the Friends of the Ossolineum 2004).

3 *Id.*

4 See Letter of Adolf Juzwenko, PhD, Head of the Ossolinski National Institute to Cristian DeFrancia, Editor-in-Chief, *Cultural Heritage & Arts Review*, 17 Dec. 2010 (on file with the *Cultural Heritage & Arts Review*).

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a bilateral agreement, the Soviets returned to the Ossolineum in Wroclaw only a small percentage of the collection that was located in Lwow, then Lviv.

During the Potsdam Conference of the same year, the Allies agreed that looted works of art would be returned to the country of their origin and not to individuals, consistent with the terms of the January 5, 1943, *Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control* ("1943 Inter-Allied Declaration"). The American authorities unilaterally modified this rule to exempt countries of the Soviet Bloc when there was a counterclaim from either a political or religious refugee.⁵ This was to become an important fact in the Ossolineum's restitution claims against museums holding Dürer drawings that were part of this collection.

In October 1946, Polish law abolished entailed familial estates – the legal construct that protected the integrity of the Lubomirski family's donation to the Lubomirski Museum. The last heir of the estate and Literary Curator of the Lubomirski Museum, Andrzej Lubomirski, was by this time very ill, but he was still concerned about the Museum and the status of the art collection. It is unclear as to whether Andrzej Lubomirski actually instructed one of his children, George Lubomirski, to send a request to the American authorities (State Department) requesting possession of the Dürer drawings. However, the end result is that after some negotiating, and in spite of some doubts by the American authorities on issues of title, as well as the opposition of the remaining siblings as to the standing of their brother to negotiate, the drawings were returned in May 1950 to George Lubomirski.

The State Department, which justified its decision by focusing on the Lubomirskis' legal rights and on the U.S. Government's unilateral modification of the terms of the 1943 *Inter-Allied Declaration*, returned the looted art work to George Lubomirski, and not to Poland. It is claimed that George Lubomirski promised the American authorities that the drawings would be loaned to the National Gallery in Washington. In any case, this appears to be the only instance in which U.S. authorities returned looted art to a private claimant, in spite of the terms of international agreements to the contrary. These drawings were then sold by George

Lubomirski in auctions to museums and private individuals to the horror of the rest of the Lubomirski family.

By 1952, the Ossolineum had been brought under the auspices of the Polish Academy of Sciences after the Polish Government abolished foundations. With the decline of communism in Poland, the Ossolinski National Institute became a public foundation in 1995, propitiously incorporating the same objectives laid out by the original founder and fulfilling the intent of Jozef Maksymilian Ossolinski and Prince Henryk Lubomirski. The Ossolinski National Institute requested the return of the drawings to the Institute.

In 2001, the Association of Art Museum Directors convened to discuss the fate of the 24 drawings and opined that the State Department's decision to transfer the drawings back to the Lubomirski heir, rather than to Soviet occupied Poland, was correct. It is important to note that the museums are not bound by this finding and can act independently. A book published by the Ossolineum in 2004 refutes the legality of the State Department decision, arguing that the restitution of the Ossolineum within 50 years of its dissolution has fulfilled the terms of the founding charter, and that the Lubomirski family was obligated to return the Dürers to the Ossolineum – a view shared by the grandchildren of Andrzej Lubomirski, the last curator of the Lubomirski Museum.⁶

At the time of the writing of this article, no museum has returned any of the drawings or offered to negotiate any shared use of the Dürer drawings. One can argue that the return of the drawings is not only about the Ossolineum's legal right but is also a moral imperative to restore the drawings to their rightful owner, the Polish people, as the founders intended.

Andreas Cwitkovits' firm, *Art Law Business*, specializes in art law in Vienna, Austria. **Mickela Moore** is a New York State qualified attorney working with *Art Law Business* in Vienna. If you would like more information about this matter, please contact either Andreas Cwitkovits at cwitkovits@aon.at or Mickela Moore at artlawvienna@gmail.com.

⁶ See "Lubomirski Family Statement," *id.* at 63 ("To reverse these wrongdoings, the members of our family, together with the Director of the Ossolinski National Institute, have recently adopted a Solemn Resolution in order to reestablish the Museum of Lubomirski Princes within Ossolineum in Wroclaw. We will spare no efforts to undertake whatever legal actions are necessary to recover the dispersed collections of the Lubomirski Museum.").

⁵ *Id.* at 19.



Art Theft Statistics: Valuable Tools in Need of Reliable Measures

by Mark Durney

STATISTICS are an integral component of the successful illumination of a new social problem because they enable claims-makers to impress upon an audience of lawmakers, journalists, and the members of the general public that the problem is serious and deserving of attention.

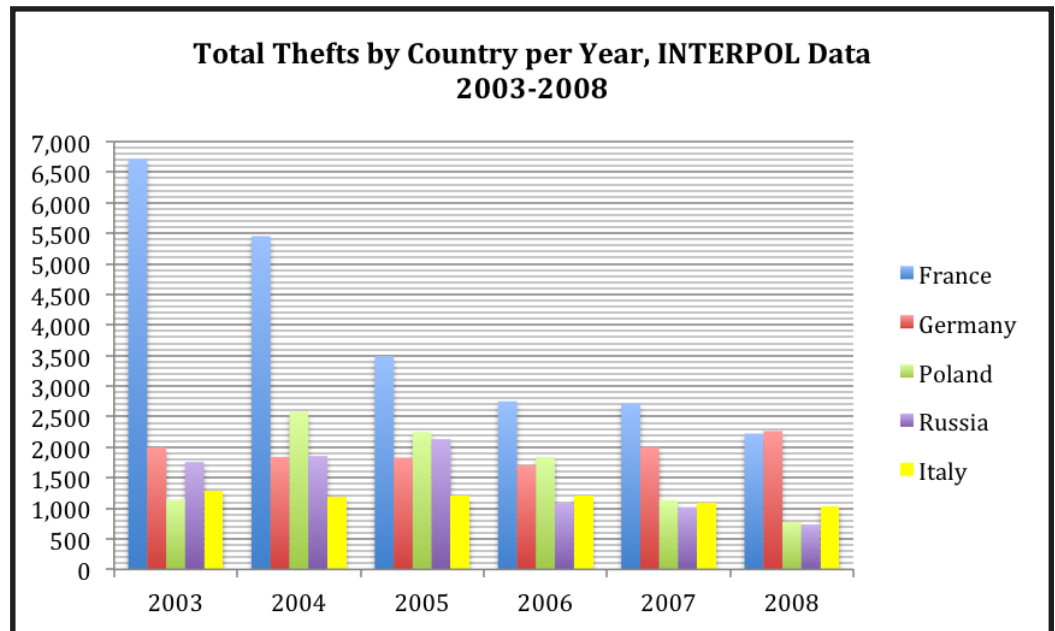
Art theft is not a new social problem. Yet there have been few comprehensive efforts to collect and interpret statistics so as to enhance our ability to assess the effectiveness of current strategies implemented to reduce the depletion of the cultural record. Recently, the International Criminal Police Organization (INTERPOL) revised its claim that art theft was the third largest international illicit industry when it issued the following statement:

*"We do not possess any figures which would enable us to claim that trafficking in cultural property is the third or fourth most common form of trafficking, although this is frequently mentioned at international conferences and in the media. In fact, it is very difficult to gain an exact idea of how many items of cultural property are stolen throughout the world and it is unlikely that there will ever be any accurate statistics."*¹

Art theft statistics are similar to other crime statistics because they only present a reflection of the incidents registered with, or reported to law enforcement. Accordingly, in light of the inability to quantify the unreported or unnoticed thefts, crime statistics do not present an accurate picture of the problem.

In spite of the additional problems inherent in art theft statistics, which stem from the fact that many countries simply lack the basic monitoring and registration systems required to record data, INTERPOL never-

1 INTERPOL, Stolen Works of Art: FAQ's, <http://www.interpol.int/Public/WorkOfArt/woafaq.asp#faq1> (last visited Aug. 16, 2010).



From Mark Durney, *An Examination of Art Theft, Analysis of Relevant Statistics, and Insights into the Protection of Cultural Property* (2010)

theless issues an annual poll to its member countries' national central bureaus. While INTERPOL, which is the only organization to collect international art theft statistics, has restated its assessment of the size and scope of international art theft, many national law enforcement agencies that maintain art theft units still misleadingly assert that art crime is one of the largest illicit industries. In some cases, they still claim that it is worth an estimated \$6 billion annually.² The lack of data to support such claims limits claims-makers' ability to impress upon the public the size of art theft, as well as the scope of the deleterious effect it has on the cultural record.

These problems motivated my recent dissertation, *An Examination of Art Theft, Analysis of Relevant Statistics, and Insights into the Protection of Cultural Heritage*, which qualifies and interprets art theft statistics provided by the London-based Art Loss Register (ALR) and INTERPOL in order to quantify the problem of art theft and to assess the effectiveness of the most recent strategies that have been implemented to combat the illicit art trade. In my analysis of INTERPOL's annual poll data, it became clear that incom-

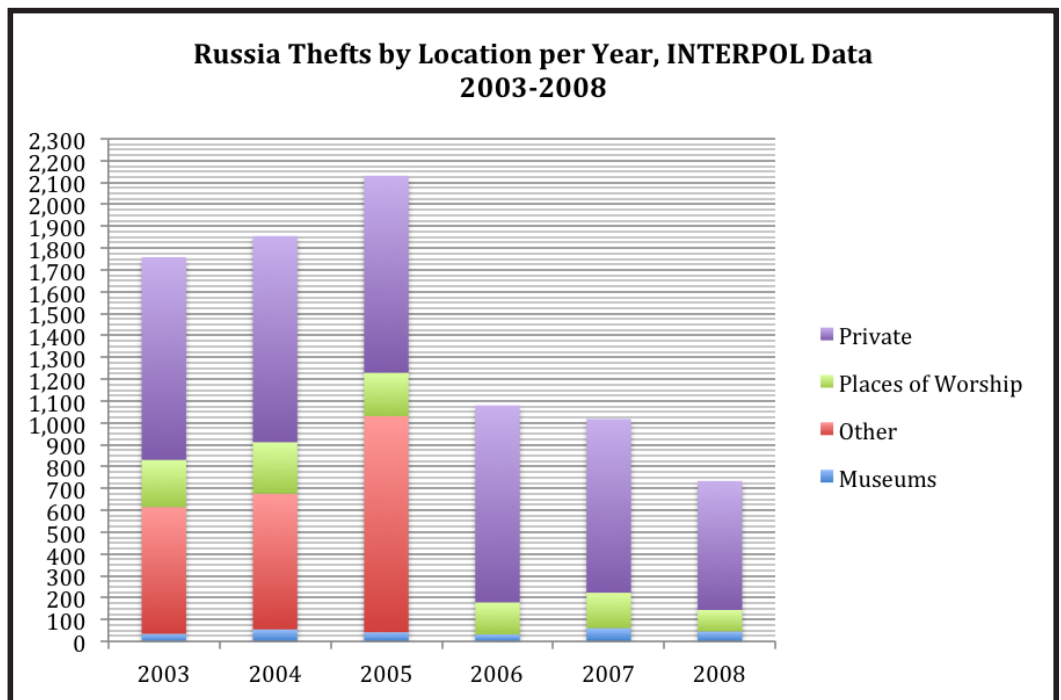
2 FBI, Art Theft, http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/arttheft (last visited Aug. 16, 2010).

Art Theft Statistics: Valuable Tools in Need of Reliable Measures (*cont'd*)

plete statistics reported to INTERPOL can skew interpretations of the data, and therefore, affect the conclusions that can be drawn from such analyses. For example, a face-value analysis of Figure 1, which depicts the total number of thefts by country per year reported to INTERPOL between 2003-2008, depicts a decrease in the number of thefts registered by Poland, Russia, and Italy's national central bureaus from 2005-2008 as well as a decrease in the number of thefts registered by France from 2003-2008. However, when Russia's data is isolated and divided by number of thefts by location from 2003-2008 as depicted in Figure 2, it is obvious that the data is incomplete as the "Other" category is absent from the 2006-2008 data. Interpretations without this additional information are misleading and can lead other law enforcement agencies to follow Russia's methods for the reduction of art theft based on a mistaken impression of success.

In 2006, it was discovered that there were numerous cases of insider theft from the Hermitage Museum as well as from other Russian collections. Upon this stunning revelation, the Russian government organized a committee that included the state security agency FSB, the Attorney General's Office, and the Interior and Culture Ministries to oversee a nationwide collections review. Perhaps, this comprehensive review, which was completed in September 2010 and found that 242,000 objects were missing (24,500 objects were officially registered as stolen), disrupted the annual art theft reporting and registration channels.³ As illustrated by this example, it is impossible to conclude that the Russian authorities reduced art theft from 2006-2008, and therefore, its reduction methods cannot be identified as best practices by other coun-

3 John Williams Narons, *Russia Admits Staggering Losses of Museum Items*, AOL NEWS, SEPT. 19, 2010.



From Mark Durney, *An Examination of Art Theft, Analysis of Relevant Statistics, and Insights into the Protection of Cultural Property* (2010)

tries. However, it is nevertheless admirable that such an extensive review was performed, and its results will be helpful in the country's future efforts to reduce art theft.

Alternatively, the reductions in total thefts registered by France and Poland more accurately depict their successful efforts. Recently, France and Poland began to employ coordinated strategies that focused on international and interagency collaboration. For example, France has fostered cooperative relationships between L'Office Central de lutte contre le trafic des Biens Culturels (OCBC), its customs office, and its local law enforcement agencies to ensure the enforcement of its protective national legislation.⁴

France's art theft statistics tend to be more reliable than other countries' because of the funds and resources it expends to support both a comprehensive inventory of the collections held in French museums and an advanced stolen art database. Since 1975, France's Ministry of Culture has maintained *Joconde: Catalogue des Collections des Musees de France* (*Joconde: Catalogue of the Collections of French Museums*), which is an in-

4 Mark Durney, *An Examination of Art Theft, Analysis of Relevant Statistics, and Insights into the Protection of Cultural Heritage*, 35 (2010) (Master's Thesis, University College London) (on file with author).



Art Theft Statistics: Valuable Tools in Need of Reliable Measures (*cont'd*)

ventory of the collections from 328 museums. The catalogue is supported by 2002 legislation that requires all registered museums to create inventories of their collections and calls for them to be reviewed every ten years.⁵ Today, the catalogue is publicly accessible (<http://www.culture.gouv.fr/documentation/joconde/fr/pres.htm>) and contains over 437,000 objects (there are 254,000 objects with one or more images).⁶ This database is critical to the reduction of art theft because it ensures that all objects in French museum collections are well documented in the event of theft. Complete documentation reduces the potential for art theft because it dissuades potential offenders from targeting such objects due to the fact that it can make the art harder to fence. Also, complete documentation has been shown to correlate to higher recovery rates for stolen art.⁷ The OCBC's stolen art database, *Thésaurus de Recherche Electronique et d'Imagerie en Matière Artistique* (Electronic Research and Image Thesaurus for Artistic Material), also known as TREIMA, contains over 72,000 objects.⁸ It utilizes advanced image recognition software to match objects with those registered as "stolen" on its database. TREIMA is used in concert with Joconde to protect France's cultural goods and to recover any objects that are stolen. Similarly, in 2007, Poland's Ministry of Culture created a catalogue of objects stolen from its various public and private collections. In the same year, it created the National Heritage Board, which implements the State's policy concerning the protection of cultural heritage. Some of its key functions are to document cultural heritage through registering historical monuments their values and the condition they are in and to make resources that relate to the protection of historical monuments more easily accessible.

⁵ Created by Act 2002-5 2002-01-04 JORF 5 Jan. 2002 declaration JORF 18 Jan 2002; repealed by Ordinance 2004-178 2004-02-20 art. 7 23° JORF 24 February 2004. Now implemented under Heritage Code. Art. L451-2 (V).

⁶ French Ministry of Culture, Présentation, <http://www.culture.gouv.fr/documentation/joconde/fr/apropos/presentation-joconde.htm> (last visited Dec. 12, 2010).

⁷ Durney, 30.

⁸ Jumana Farouky, *Spirited Away: Art Thieves Target Europe's Churches*, TIME MAGAZINE, JAN. 10, 2008.

Announcement

The American Society of International Law's Interest Group on Cultural Heritage & the Arts will be co-sponsoring a conference entitled

***"Human Rights and Cultural Heritage:
From the Holocaust to the Haitian Earthquake"***

on

Thursday, March 31, 2011 at Cardozo School of Law.

Co-sponsored by

Cardozo School of Law

The Commission for Art Recovery

Cardozo Art Law Society

The Hofstra Law School Art & Cultural Heritage Club

The Lawyers Committee for Cultural Heritage Preservation
and others...

For details, please see:

<http://www.culturalheritagelaw.org/2011asilconference>

While statistics can help law enforcement agencies, scholars, government officials, and customs authorities, among many others, to identify the best practices to reduce art theft, they must first be qualified in order to limit the risk of drawing inaccurate conclusions. The case of Russia's art theft statistics reported to INTERPOL from 2003-2008 exemplifies a few of the pitfalls that can result from a failure to scrutinize art theft data more closely. In contrast to Russia's statistics, the statistics reported by France and Poland, which upon further investigation reflect a more accurate depiction of each country's effort to reduce art theft, are evidence for other market countries' to adopt similar methods of protection and reduction. Such case studies can assist in the efficient allocation of resources to support the fight against art theft, and will hopefully become more common as countries realize the importance of accurate art theft data.

Mark Durney is a Business and Admissions Director at the Association for Research into Crimes against Art and maintains the blog "Art Theft Central" (<http://arttheft-central.blogspot.com>)

Immunity from Seizure of Cultural Objects Belonging to Foreign States: Dutch Legislation and Practice

by Nout van Woudenberg

DUTCH museums play an important role in the world of international art loans. The Amsterdam museums, such as the Rijksmuseum, Stedelijk Museum, Van Gogh Museum and Hermitage Amsterdam, the Mauritshuis in The Hague, Museum Boijmans van Beuningen in Rotterdam, Groninger Museum in Groningen, and the Drents Museum in Assen are just a few museums which take part in these international art loans. Over the past years, Dutch museums have increasingly demanded, often at the request of foreign museums, that the Dutch government grant an exemption from judicial seizure for the artworks they were planning to borrow. For that purpose, the government can issue so called “immunity guarantees.” But regardless with, or without such a guarantee, cultural objects belonging to a foreign State are, to a large extent, immune from seizure in the Netherlands under Dutch law and international law.

Legal Protection in the Netherlands

The Dutch Code of Civil Procedure¹ contains two provisions prohibiting the seizure of goods intended for public service. One of the provisions bans pre-judgment seizure², the other bans seizure of assets under a writ of execution to levy a judgment debt.³ It is

established practice to treat cultural goods of a foreign State that are in the Netherlands temporarily for an exhibition as goods intended for public service.

Support for this practice can be found in international law. On December 2, 2004, the UN General Assembly adopted without a vote resolution A/Res/59/38 regarding the UN Convention on Jurisdictional Immunities

of States and Their Property.⁴ Cultural objects on loan play a special role under the Convention when it comes to immunity from measures of constraint. Article 21, paragraph 1(e) explicitly states that property of a State forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale shall not be considered as property specifically in use or intended for use by a State

for other than government non-commercial purposes. To put it more simply: those objects are considered as having a public purpose and on that basis the objects are regarded as immune from measures of constraint.⁵ When the Convention was drafted, there was no controversy whatsoever among the States Parties concerning this matter. Consequently, it may be explicitly assumed that this is an applicable rule of international law.⁶



Willem van Haecht, “Apelles Painting Campaspe,” c.1630

Image Courtesy of the Royal Picture Gallery Mauritshuis
The Hague, Netherlands, The Hague, Netherlands

¹ In Dutch: *Wetboek van Burgerlijke Rechtsvordering*.

² Article 703: Goods intended for public service may not be seized.

³ Article 436: Goods intended for public service may not be seized.

⁴ The text of the UN Convention is attached to this UNGA resolution.

⁵ Unless the State concerned explicitly agrees with the lifting of the immunity.

⁶ In my dissertation that is due to be published in autumn 2011, I go into much more detail on this. The dissertation regards the question whether a rule of customary international law exists, stating that cultural objects belonging to foreign States and on

Immunity from Seizure: Dutch Legislation and Practice (*cont'd*)

zure) of the European Union: “Based on (customary) international law, the Netherlands considers cultural property of foreign States as ‘goods intended for public service’, as long as they don’t have a clearly commercial goal (e.g. offered for sale). Also on the basis of (customary) international law, the Netherlands considers that property as immune from measures of constraint. This has been reflected in national legislation as well [...]. And it is also the reason why in its letter of comfort [Guarantor’s Declarations] the Netherlands refers to the corresponding rules in the 2004 UN Convention on Jurisdictional Immunities of States and their Property, although the Netherlands has not yet ratified the Convention [...]”¹

Under Dutch law, in addition to the aforementioned provisions of the Code of Civil Procedure, section 13a of the General Legislative Provisions Act² applies.³ This provision states that the courts must take into account exceptions recognized by international law when determining whether they have jurisdiction. International law recognizes, for example, that certain categories of persons and property enjoy immunity from the jurisdiction of foreign courts (including immunity from execution). This applies to property forming part of the cultural heritage of a foreign State that is temporarily on loan for an exhibition, as long as the property does not serve a commercial purpose in that it is not placed or intended to be placed on sale. In the unlikely event that a cultural object of a foreign State is at risk of seizure, section 3a of the Court Bailiffs Act⁴ applies.⁵ Before carrying out the intended

seizure of the object, the bailiff levying the seizure is required to contact the Ministry of Justice, which will ask the International Law Division of the Legal Affairs Department of the Ministry of Foreign Affairs to determine whether seizure would be contrary to the State’s obligations under international law. If so, the Minister of Justice can issue a notice to the bailiff stating that the object may not be seized. The consequence of the notice is that the bailiff is no longer competent in performing the official act. In the unlikely event that such an object has already been seized, the seizure must be nullified on the basis of the Minister’s notice. The Court Bailiffs Act has been further implemented by means of the Court Bailiffs (Notification of Official Acts) Order.⁶

Due to the aforementioned legislation and judicial practice in the Netherlands, the risk that cultural objects belonging to a foreign State will be subject to seizure in the Netherlands is minimal.

he has performed is incompatible with the State’s obligations under international law.

3. Such notification may only be given *ex officio*. If the matter is urgent, notification may be given verbally, in which case it must be confirmed in writing without delay.

4. The notification shall be published by being placed in the *Government Gazette*.

5. If, when he receives notification as referred to in subsection 2, the court bailiff has not yet performed the official act, the effect of the notification shall be that the bailiff is not competent to perform the official act. An official act performed contrary to the first sentence shall be invalid.

6. If, when a court bailiff receives notification as referred to in subsection 2, the official act has already been performed and involved a writ of seizure, the bailiff shall immediately serve the notification on the person on whom the writ was served, cancel the seizure and reverse its consequences. The costs of serving the notification shall be borne by the State.

7. A judge hearing applications for provisional relief may, in interim injunction proceedings, terminate the effect of the notification referred to in the first sentence of subsection 5 and the obligations referred to in subsection 6, without prejudice to the powers of the ordinary courts. If the official act involves seizure, article 438, paragraph 4 of the Code of Civil Procedure shall apply.

6 Order of the State Secretary for Justice containing rules regarding the notification of official acts of court bailiffs that are incompatible with the obligations of the State under international law, 9 July 2001, No. 5107250/801.

1 On file with the author.

2 In Dutch: *Wet Algemene Bepalingen*.

3 Section 13a: The jurisdiction of the court and the enforceability of court judgments and certified deeds are limited by the exceptions recognized in international law.

4 In Dutch: *Gerechtsdeurwaarderswet*

5 Section 3a:

1. A court bailiff who is instructed to perform an official act shall, if he must reasonably take account of the possibility that performing the act in question would be incompatible with the State’s obligations under international law, immediately inform Our Minister [the Minister of Justice] of the instruction in the manner prescribed by ministerial order.

2. Our Minister may notify a court bailiff that an official act which he has been or will be instructed to perform or which

Immunity from Seizure: Dutch Legislation and Practice (*cont'd*)

Immunity Guarantees Issued by the Dutch Government

A guarantor's declaration by the Dutch government relates to immunity from seizure and declares that the State of the Netherlands will do everything that is legally within its power to prevent the seizure of cultural objects on loan. The declarations are submitted to the requesting Dutch museums, which normally send the declarations on to the lending foreign museums, as the declarations are primarily issued on foreign requests.

The Dutch Ministry of Foreign Affairs is charged with issuing such declarations. The declarations are provided by the International Cultural Policy Unit and signed by the Secretary General of the Ministry of Foreign Affairs on behalf of the Minister of Foreign Affairs. The model law had been drafted by the International Law Division of the Ministry of Foreign Affairs, in cooperation with the Cultural Heritage Department of the Ministry of Culture. The Netherlands issues an average of 15-20 declarations each year.

The issuance of these declarations promotes the international mobility of collections, as foreign museums are more willing to lend their cultural objects if a declaration is issued, although from a legal point of view those declarations cannot as such be considered as 'hard' law. However, the issuance can also be seen

as confirmation that the Netherlands has the firm intention to immunize the borrowed cultural objects from seizure.



*Johannes Vermeer, "Girl with a Pearl Earring," c. 1665
Image Courtesy of the Royal Picture Gallery Mauritshuis
The Hague, Netherlands*

On the basis of the aforementioned legislation and the cited provision of international law (which all deal with States and not with private institutions), firmer guarantees can be given for cultural objects that are the property of foreign States than privately owned cultural objects. In its guarantor's declarations the Netherlands also declares once more that it considers cultural objects of foreign States, temporarily in the Netherlands for an exhibition, as goods intended for public service.

Final Words

To conclude, it can be stated that although the Netherlands does not have specific legislation concerning

immunity declarations regarding cultural property, it provides cultural objects, specifically those belonging to other States, with considerable and satisfactory legal protection against measures of constraint. In practice, other States, which loan cultural objects to Dutch museums for temporary exhibitions, seem to be perfectly at ease. Now the aim is to keep it that way.

Nout van Woudenberg is Legal Counsel of the Dutch Ministry of Foreign Affairs as well as external researcher of the University of Amsterdam. This article has been written in his personal capacity.

The Meaning of Enhanced Protection for Cultural Property Under the Second Protocol to the Hague Convention

by Jan Hladik

IN the first issue of the Review, my colleagues Karim Peltonen and Nout van Woudenberg, who are respectively Chairperson and a Vice-Chairperson of the Committee for the Protection of Cultural Property in the Event of Armed Conflict, summarized the content of the recently adopted Guidelines for the Implementation of the Second Protocol to the Hague Convention ("the Guidelines") in their article entitled "Implementation of Guidelines Gives Boost to the Protection of Cultural Property in Armed Conflict."¹ In this context, they outlined the main tenets of Chapter 3 of the Guidelines related to substantial as well as procedural issues of the granting of enhanced protection.

The readers of this Review may be interested to learn why the Second Protocol introduced a new category of protection - enhanced protection. To appreciate this development, it is necessary to go back to basics - in other words, to analyze different categories of protection under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("the Hague Convention")² and to see how the categories were implemented in practice.

The Hague Convention provides for two categories of protection - general and special.

General protection is granted to all the three categories of cultural property defined by Article 1 of the Convention:

- movable or immovable property of great importance to the cultural heritage of every people such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collec-

tions of books or archives or of reproductions of the property just described;

- buildings whose main and effective aim is to preserve or exhibit the movable cultural property mentioned in the previous bullet; and,
- centres containing monuments.³

All such property is generally protected under the Convention, regardless of its origin or ownership. It is up to the High Contracting Parties (currently 123)⁴ to identify such cultural property situated in their territory.

It should be noted that in addition to general protection under the Hague Convention, Article 8(1) of the Convention also provides for special protection which may be granted to a limited number of three categories of property:

- refuges intended to shelter movable cultural property in the event of armed conflict;
- centres containing monuments; and,
- other immovable cultural property of very great importance.⁵

Thus, movable cultural property may not be granted special protection unless it is stored in a shelter for such property. Unlike the general protection which is attributed to all categories of cultural property, the granting of special protection is not automatic. Article 8 subjects the granting of such protection essentially to two conditions: (1) the cultural property in question must be situated at an adequate distance from any large industrial centre or any important military objective⁶ constituting a vulnerable point; and (2)

³ *Id.*, art. 1.

⁴ The last State - the United States of America - ratified the Hague Convention on 13 March 2009. <http://portal.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha> (last visited Sept. 20, 2010)

⁵ 1954 Hague Convention, *supra* note 3, at art. 8(1).

⁶ The definition of military objective is contained in Article 52(2) of the 1977 Additional Protocol I to the four Geneva Conventions for the protection of war victims. This Article reads as follows:

"2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or

¹ *Cultural Heritage & Arts Review* (A publication of the Interest Group for Cultural Heritage & the Arts of the American Society of International Law), Spring 2010, Volume 1, Issue 1, pp. 29 - 31.

² Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]. A copy of the text is available at http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Sept. 20, 2010).



Enhanced Protection for Cultural Property (*cont'd*)

such property may not be used for military purposes.⁷ The first condition warrants one remark: What is “an adequate distance”? Such a notion is not defined by the Convention and, therefore, is left to the discretion of each State party to the Convention.⁸ Its definition will obviously depend on a number of factors, such as the location of military units, or of armament industry, or requirements of national self-defence.

There is only one exception to the requirement of adequate distance: If the cultural property in question is situated in the proximity of an important military objective, the special protection may be nevertheless granted if the State concerned undertakes not to use this military objective in the event of armed conflict.⁹ The second condition is obvious because cultural property may not be used for military purposes and, at the same time, enjoy protection.

Special protection is granted upon a special request

neutralization, in the circumstances ruling at the time, offers a definitive military advantage.”

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, adopted on June 8, 1977, 1125 U.N.T.S. 3.

7 1954 Hague Convention, *supra* note 3, at art. 8(1).

8 The first meeting of the High Contracting Parties to the Convention held on July 16-25, 1962 considered the issue of adequate distance. It was unable to clarify this issue. See United Nations Scientific and Cultural Organization (UNESCO), *First Meeting of the High Contracting Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, at 3, para. 13, Doc. UNESCO/CUA/120, (September 3, 1962). The meeting recommended that the technical advisory committee be established with a view to studying this problem and submitting its proposal to a subsequent meeting of the High Contracting Parties. See *id.* at 4, para. 18. However, this advisory committee was never created.

9 1954 Hague Convention, *supra* note 3, at art. 8(1).

of the State where the cultural property concerned is situated. No other High Contracting Party(ies) may object; if the objection(s) is (are) lodged and maintained, the special protection may not be granted.

Cultural property under special protection is listed in the *International Register of Cultural Property under Special Protection*, a special register maintained by the Director-General of UNESCO.¹⁰

At present, cultural property in three High Contracting Parties (Germany, the Holy See and the Netherlands) has been entered in the Register at the request of those States (a total number of four refuges as well as the whole of the Vatican City State). Two

States (Austria and the Netherlands) have withdrawn registrations.

It should be noted that the concept of special protection has never fully developed its potential, given that only three States Parties have placed five sites under special protection and the last entry in the Register took place in 1978.

Why have a vast majority of States Parties have so far abstained from placing their cultural sites under special protection? There are essentially two reasons:

- “the practical difficulties encountered when applying Article 8 [of the Convention], in particular with regard to cultural property in the middle of large cities or close to major urban, political, and industrial centres;”¹¹

10 <http://unesdoc.unesco.org/images/0015/001585/158587EB.pdf> (last visited Sept. 20, 2010).

11 Jiří Toman, *The Road to the 1999 Second Protocol*, in PROTECTING CULTURAL PROPERTY IN ARMED CONFLICT: AN INSIGHT INTO THE 1999 SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN



Andy Huszar, *Church, "Toconao, 2010," 28 x 42 inches, Edition 1/5.*
The artist is represented by Ross Contemporary, www.rosscontemporary.com

Enhanced Protection for Cultural Property (*cont'd*)

- “[T]he increasing politicisation resulting from the Cold War and the tensions that pervaded relations between States, including any cultural measures.”¹²

The issue of practical difficulties was raised by Switzerland in its national report on the implementation of the Hague Convention published in the overall Secretariat’s report on the implementation of the Hague Convention and its two (1954 and 1999) Protocols covering the 1995 – 2004 period. In particular, the Swiss national report stated that “the strict application of Article 8(1) of the Convention makes it difficult to select this type of property in a country where all the built-up areas are extremely close together.”¹³

The issue of the efficiency of special protection was discussed during the review of the Hague Convention. This discussion resulted in the elaboration by the March 1999 Diplomatic Conference of a new concept of enhanced protection combining aspects of the special protection and criteria for the inclusion of outstanding cultural property in the *World Heritage List* under the 1972 *UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage*. Under the new concept of enhanced protection, three conditions are to be met: cultural property in question must be of the greatest importance for humanity; it must be protected by adequate domestic legal and administrative measures; and it may not be used for military purposes or to shield military sites.¹⁴ A

THE EVENT OF ARMED CONFLICT 5 (Nout van Woudenberg and Liesbeth Lijnzaad eds., 2010). When analyzing the issue of enhanced protection, Jean-Marie Henckaerts and Nout van Woudenberg stressed the practical difficulties concerning the notion of “adequate distance” and the issue of cultural property in the heart of large cities close to large urban, political, and industrial centres. *Id.* at 32, 52.

¹² *Id.* at 5.

¹³ UNESCO, *Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols: Report on the Activities from 1995 to 2004*, at 14, Doc. CLT-2005/WS/6 (Dec. 31, 2004). The Swiss report also called attention to other two practical issues: (i) the difficulty in selecting cultural property for entry in the Register; and (ii) lack of precise UNESCO instructions and recommendations regarding the procedure for declaring and registering cultural property of international importance. *Id.*

¹⁴ Article 10 Enhanced protection

Cultural property may be placed under enhanced

declaration to this end must be provided. Enhanced protection is granted by the entry of the cultural property in question in the List of Cultural Property under Enhanced Protection. Finally, compared to special protection, enhanced protection may be granted both to immovable and movable cultural property.

In comparison with the system of special protection under the Convention, the granting of enhanced protection is accorded by the Committee for the Protection of Cultural Property in the Event of Armed Conflict,¹⁵ a twelve-Member intergovernmental body

The concept of special protection has never fully developed its potential, given that only three States Parties have placed five sites under special protection and the last entry in the Register took place in 1978.

established by the Second Protocol. As in the case of special protection, objections to the granting of enhanced protection may be made, but they must be based only on the three conditions of Article 10 of the Second Protocol just described. This prevents Parties to the Second Protocol from making objections based purely on political animosity or mutual non-recognition, thus avoiding cases such as that of Cambodia, which in 1972 requested the entry of several sites in the Register. Because of the opposition of four High Contracting Parties to the Convention, which did not recognize the Government of Cambodia at that time,

protection provided that it meets the following three conditions:

- it is cultural heritage of the greatest importance for humanity;
- it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
- it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *opened for signature* March 26, 1999, 2253 U.N.T.S. 212 [*hereinafter* Second Protocol].

¹⁵ The Committee was elected for the first time at the meeting of the Parties to the Second Protocol (Paris, Oct. 26, 2005). It is currently composed of the following six Members (Cyprus, Finland, Greece, Japan, Lithuania and the Netherlands) elected until 2011 and of the following six Members (Argentina, Austria, the Islamic Republic of Iran, Italy, Romania and Switzerland) elected until 2013.



Enhanced Protection for Cultural Property (*cont'd*)

the entry was not made.¹⁶

Concerning procedural issues on the granting of enhanced protection, Article 11 (in conjunction with Article 26(2)) of the Second Protocol provides for two categories of majority when voting on a request for the granting of such protection: (i) two-thirds of the Committee members present and voting when considering such a request; and (ii) four-fifths of the Committee members present and voting in case of representations (in other words, objections) and in the event of a request for provisional enhanced protection at the outbreak of hostilities.¹⁷

Following the adoption of the Guidelines by the extraordinary meeting of the Committee held at UNESCO Headquarters on 2 September 2009 and their subsequent endorsement by the third Meeting of the Parties to the Second Protocol held at UNESCO Headquarters on 23 - 24 November 2009, the Secretariat invited Parties to submit to the Committee requests for the granting of enhanced protection for their cultural property by 30 April 2010.

To date, the Secretariat has received twelve requests for enhanced protection. Six of them were submitted by Azerbaijan, three by Cyprus, one by the Dominican Republic, one by Italy and one by Lithuania. Those requests were evaluated, in accordance with the Guidelines, by the two informal meetings of the Bureau of the Committee. The Bureau faced one important challenge during the evaluation of the requests - the compliance with the condition of Article 10(b) of the Second Protocol (i.e. availability of the adequate domestic legal and administrative measures of protection).

Paragraph 39 of the Guidelines provides for the obligation of the Committee to consider, in particular, national measures intended for:

- the identification and safeguarding of cultural property proposed for enhanced protection in accordance with Article 5 of the Second Protocol;
- due consideration of the protection of the cultur-

al property proposed for enhanced protection in military planning and military training programs; and,

- appropriate criminal legislation providing for the repression of, and jurisdiction over, offenses committed against cultural property under enhanced protection within the meaning of, and in accordance with, Chapter 4 of the Second Protocol.¹⁸

The eleven requests for enhanced protection (the twelfth one from the Dominican Republic was withdrawn before the meeting) were carefully considered by the recent fifth meeting of the Committee (UNESCO Headquarters, 22 - 24 November 2010). The Committee decided to grant enhanced protection to the three Cypriot cultural properties (Choirokoi-tia, Paphos (Sites I and II), and the Painted Churches of the Troodos Region) and one Italian cultural property (Castel del Monte).

All four of those sites are already listed on the World Heritage List. Thus, the meeting has made a significant step by giving birth to a new category of protection of cultural property in peacetime and wartime.

Finally, the meeting decided to refer back for additional information the Lithuanian request and the four Azerbaijani requests. The consideration of the other two Azerbaijani requests was adjourned to the next (sixth) meeting of the Committee scheduled to take place in 2011.

Jan Hladik is a Programme Specialist in the Section of Museums and Cultural Objects, Division of Cultural Objects and Intangible Heritage at UNESCO in Paris. The author is responsible for the choice and the presentation of the facts contained in this article and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization in any way. This article is partly based on previous presentations made by the author. The author wishes to thank Nout van Woudenberg and Karim Peltonen for their valuable comments on the first draft.

16 For more details with regard to the Cambodian case, please see Toman, *supra* note 12, at 5-6.

17 Second Protocol, *supra* note 15, at arts. 11, 26(2).

18 *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two (1954 and 1999) Protocols, Basic Texts*, April 2010, UNESCO document CLT-2010/WS/5 CLD-4625.9, p. 80.



Q&A with Museum Curator and Cultural Heritage Preservation Expert Corine Wegener

Questions compiled by Patty Gerstenblith with input from Interest Group Members



In this Q&A, Museum Curator Corine Wegener discusses the field of post-conflict and post-disaster cultural preservation and her career in it. Ms. Wegener served in the U.S. Army Reserve for 22 years, retiring as a

Major and last serving as an Arts, Monuments, and Archives Officer during Operation Iraqi Freedom. She is an Associate Curator at the Minneapolis Institute of Arts, a part-time International Project Coordinator for the Smithsonian's Haiti Cultural Recovery Project, and is the Founder and President of the U.S. Committee of the Blue Shield.

How did you become interested in cultural heritage preservation?

I am an art historian and work as an associate curator of Decorative Arts, Textiles and Sculpture at the Minneapolis Institute of Arts, so I have always been interested in preservation. I became involved first hand when I served as an Arts, Monuments, and Archives Army Reserve Officer during my tour in Iraq in 2003-2004. I worked with the staff at the Iraq National Museum to help restore their collections after the looting in 2003. During my nine months in Iraq I realized that there were few international organizations capable of deploying to assist cultural heritage organizations during short-term emergencies like armed conflicts and natural disasters. I was determined to go home and help develop such an organization in the US and so I founded the U.S. Committee of the Blue Shield in 2006.

Please describe your work on preserving the cultural heritage of Haiti after this year's devastating earthquake. Which cultural heritage organizations are working in Haiti and what types of projects have they undertaken or plan to do?

As President of the U.S. Committee of the Blue Shield (USCBS), I am working with the Smithsonian Institution as an International Project Coordinator for the Haiti Cultural Recovery Project. On February 5th, USCBS convened a meeting of cultural heritage and US governmental organizations to discuss a coordinated response for the recovery of cultural heritage in Haiti after the earthquake. Established soon after this meeting, the Haiti Cultural Recovery Project was organized by the Smithsonian Institution, the Haitian Ministry of Culture and Communication, and the Haitian Presidential Commission for Reconstruction, in partnership with the U.S. President's Committee on the Arts and the Humanities. Other supporters include the National Endowment for the Humanities, the National Endowment for the Arts, the Institute of Museum and Library Services, and The Broadway League.

Program partners include the U.S. Committee of the Blue Shield, the Foundation of the American Institute for Conservation, La Fondation Connaissance et Liberté (FOKAL), the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) and UNESCO.

The Haiti Cultural Recovery Center opened on June 1st. Current projects include the stabilization of collections from the Centre D'Art, stabilization and removal of the remaining murals of Holy Trinity Episcopal Cathedral and paintings from the Nader collection, just to mention a few. For more information, go to <http://haiti.si.edu/>.

Have the organizations you work with been able to coordinate with each other? If not, what would you suggest to improve coordination in the future?

It was a bit difficult to get information at first. The International Council of Museums (ICOM) Disaster Relief for Museums Task Force (of which I am a member) began collecting information about damage to cultural heritage immediately after the earth-

Q&A with Corine Wegener (*cont'd*)

quake. The ICOM network and other Blue Shield organizations made this possible. There were some questions about which organizations within the International Blue Shield network would take part, but eventually we worked out a memorandum of understanding whereby the US partners (Smithsonian Institution, USCBS, and AIC) would be responsible for museum and art collections and Blue Shield International (working with Blue Shield France, International Committee on Archives and International Federation of Library Associations) would take the lead on helping Haitian libraries and archives collections.

What are the sources of funding for these projects—governmental or private?

For the Haiti project we have received a combination of private and governmental funding. US government funders include the National Endowment for the Arts, National Endowment for the Humanities, the Institute of Museum and Library Services and general US government Haitian relief funding. Non-profit foundation funders include, among others, The Broadway League, the Affirmation Arts Fund and the Foundation of the American Institute for Conservation.

Please describe the work you did in Iraq. What have been the consequences for cultural heritage preservation planning and coordination for the future--i.e., lessons learned?

The first lesson learned is one we can also find in the history of collections saved in WWII. One of the most important things we can do to preserve collections and sites against the dangers of armed conflict

is for the staff to have a good emergency plan. The staff of the Iraq Museum effectively saved the vast majority of their collections by safeguarding them in a hidden storage site. They protected other objects in place by padding them and through various other means.

Another lesson learned is that the international cultural heritage community does not have an adequate organizational structure to provide an emergency

response for cultural heritage property damaged in armed conflict or in natural disasters. While a number of individuals were able to visit the Iraq Museum to assess the damage to the collections, it took nearly a year for the first international conservators to arrive and actually work alongside staff to conserve objects.

Finally, we learned that we needed to organize the cultural

heritage community to raise awareness of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. While the US was not a member of that treaty at the time, we have since successfully lobbied for ratification and the US became a party in 2009. States party to the 1954 Hague Convention are required to plan to protect their own cultural heritage during times of peace, to provide training for their armed forces on respect for cultural heritage, and to provide expertise within their own armed forces on cultural heritage preservation. The US Blue Shield has been helping to train US military units and we encourage our sister organizations in other countries to do likewise. I believe this will be an important factor in protecting



*Surviving murals at Holy Trinity Episcopal Cathedral
Port-au-Prince, Haiti, March 2010. Photo by Corine Wegener, 2010.*

Q&A with Corine Wegener (*cont'd*)

cultural heritage in future armed conflicts in which the US has a role.

Could you discuss the founding and work of the USCBS and of the ANCBS and how these coordinate with other national and international organizations?

USCBS, founded as a US non-profit organization in 2006, is one of more than 20 national blue shield committees that make up the Association of National Committees of the Blue Shield (ANCBS), which was itself founded in 2008. See our website at www.uscbs.org and the ANCBS/ICBS website www.ancbs.org. I am one of the founding board members of ANCBS.

The ICBS is made up of the International Council of Museums (ICOM), the International Federation of Library Associations and Institutions (IFLA), the International Council on Archives (ICA), the International Council on Monuments and Sites (ICOMOS), and the Co-Ordination Council on Audiovisual Archives Associations (CCAAA). The ICBS provides advice to UNESCO on armed conflict situations under the Second Protocol to the 1954 Hague Convention as well as overall oversight of the Blue Shield international organizations. We work together to share information and raise international awareness about cultural heritage at risk from armed conflicts and natural disasters.

What impact, if any, do you think the US ratification of the 1954 Hague Convention has had? How well is the US complying with the Hague Convention?

A big question is how the US will implement the re-

quirement under the 1954 Hague Convention that each country plan protections for its domestic cultural property during peacetime. The U.S. does not have a "Department of Culture" and many of the most important U.S. collections are in private, non-profit institutions. It remains unclear who will take overall responsibility for a comprehensive U.S. plan to implement the domestic portions of 1954 Hague Convention, but such a plan is certainly needed.

I think US ratification has had a real impact on the way the US military views its responsibilities toward cultural heritage during armed conflict. Ratification means that the Hague Convention now has the force of law and is being taken seriously. The U.S. military is doing more cultural property training than ever before and more than many countries who have been part of the Hague Convention for decades! While it will take time to work its way into doctrine at all levels, eventually the 1954 Hague Convention and its protections for cultural property will be trained alongside the other Geneva and Hague Conventions. The U.S. Army Civil Affairs Arts, Monuments and Archives Guide, a manual for cultural property protection, was updated and

reprinted in 2009 and the new field manual, FM 3-07 Stability Operations, includes a section on cultural property.

What, if any, changes have there been in the US military as a result--increased training, increased recruitment of cultural heritage professionals into the military?



*Centre d'art, Port-au-Prince, Haiti
Photo by Corine Wegener, June 2010*

Q&A with Corine Wegener (*cont'd*)

As I mentioned previously, there has been increased training for deploying military units on cultural property awareness and protection. In addition, the U.S. Army Civil Affairs Corps has begun actively seeking out members with professional education and experience in cultural heritage, and awarding them special skill identifiers to add to their personnel files.

Please describe your experiences in the Balkans--the site of one of the worst cases of cultural genocide. Was there anything in your experiences in the Balkans that prepared you for your work in Iraq?

I worked as a Civil Affairs officer in Bosnia, but not as an Arts, Monuments, and Archives officer. However, I worked extensively with humanitarian NGOs, which taught me a lot about how NGOs operate in an armed conflict environment, and which I could relate to when I worked in Iraq.

How do you manage to coordinate your work in Haiti and with the USCBS and ANCBS and your job as a curator at the Minneapolis Institute of Art? Which has had a bigger impact on your leading role now as a cultural heritage preservationist--your work in the military or your work as a curator?

I don't think I can really separate my background as a curator from my former career as a military officer. As a reservist, I lived in both worlds simultaneously



*Head of Warka, Looted in Iraq and later recovered
Iraq Museum, Photo by Corine Wegener, 2003*



*Lion of Tel Harmal, Damaged by Looters, Iraq Museum
Photo by Corine Wegener, 2003*

and that is a strength of mine. Those experiences inform everything I do in my work with the Blue Shield today.

Do you have any advice for young professionals seeking to make a difference in this area? What do you see as the role of lawyers in this work?

Young cultural heritage professionals should seek to better understand the 1954 Hague Convention as part of their everyday responsibility to care for their collections. Every institution should have a plan for what to do in case of a fire or a hurricane. You should be an advocate for developing and exercising your institutional plan. Then it will only take a bit more foresight to have a plan for armed conflict and to network your plans nationally. I also think cultural heritage professionals have a responsibility to communicate with and even to help train their militaries on why cultural heritage needs to be respected and protected.

I see the role of cultural property lawyers and military Judge Advocates General (JAG officers) as advising clients on their responsibilities under the 1954 Hague Convention. Many people talk about the treaty, but I find that few really understand the meaning of terms like "military necessity" or what responsibility each country has for training their own military forces during peacetime. I would like to see lawyers become more active in this role.

Museums Face Legal Obstacles to Deaccessioning Works

by Patty Gerstenblith

PARTICULARLY in times of economic distress, museums, like other institutions, may suffer from economic difficulties. This has led many museums, particularly embedded museums (that is, museums that are a part of a larger institution, typically a university or college), to seek deaccessioning¹ and sale of works from their collections as a way of raising funds.² Whether a museum may remove objects from its collection through sale and what should be done with the proceeds depend on whether the work was donated to the museum with restrictions on alienation imposed by the donor.

Unlike museums in many other countries, in the United States there are no legal restrictions, other than those imposed by a donor, on the ability of a museum to deaccession works. However, guidelines of both the Association of Art Museum Directors ("AAMD") and the American Association of Museums ("AAM") limit what a museum may do with the proceeds realized from the sale of works from a museum's collection. The AAMD restricts the use of such proceeds to acquiring other works for the museum's collection,³ while the AAM permits funds to be used either for acquisitions or direct care of the collection.⁴

1 Deaccessioning is the process by which an object or work of art is formally removed from a museum's collection. Deaccessioning can be done for a variety of reasons including redundancy in the collection, poor condition of particular works, to upgrade or refocus the collection or, as discussed here, to raise funds for the museum.

2 Perhaps the most dramatic, recent example of this was the announcement of Brandeis University that it intended to close the university's Rose Art Museum and sell off the entire collection to fund the university. The university has since backtracked from this position and is now attempting to keep the museum going. Geoff Edgers, *Brandeis to hire new Rose Museum director; Critics who filed suit unimpressed*, Bos. GLOBE, Sept. 21, 2010, at Metro 2.

3 The AAMD adopted a Policy on Deaccessioning on June 9, 2010. It states, "Funds received from the disposal of a deaccessioned work shall not be used for operations or capital expenses. Such funds, including any earnings and appreciation thereon, may be used only for the acquisition of works in a manner consistent with the museum's policy on the use of restricted acquisition funds." Application, Para. I.B, available at: <http://aamd.org/papers/documents/FINALDEACCESSIONINGREPORT060910.pdf>.

4 The AAM's Code of Ethics states, "disposal of collections through sale, trade, or research activities is solely for the advancement of the museum's mission. Proceeds from the sale of nonliving collections are to be used consistent with the

When a donor imposes restrictions on alienation or other conditions on a gift, such restrictions can last in perpetuity, since charitable institutions are exempt from the Rule against Perpetuities. Over time, it can be difficult for an institution to carry out these restrictions as originally imposed by the donor. However, if the institution violates a condition, the gift may be subject to forfeiture, either through reversion to the estate of the donor or to a third-party donee. The institution may seek judicial relief from such restrictions under the equitable doctrine of *cy pres*. Courts are generally reluctant to permit a forfeiture or reversion and over the centuries have developed equitable doctrines that, under the right circumstances, permit the gift to be saved and the terms altered so that the public can continue to benefit from the charitable gift. There is obviously a strong public interest in allowing the trust to continue and in preventing the assets from returning to private ownership. The court must determine whether the terms of the gift have become impossible, illegal, or impracticable. If so, then the court must determine whether the donor had a specific intent (in which case, the gift will fail) or a general charitable intent. If the court finds the latter, then it may change the terms of the gift while keeping them as close as possible to the donor's original intent. The most recent case to examine deaccessioning and the doctrine of *cy pres* in the context of a gift of art works to a museum involves a collection of works donated to Fisk University located in Nashville, Tennessee.

In 1949, the artist Georgia O'Keeffe donated the Alfred Stieglitz Collection of 101 paintings, including her *Radiator Building-Night, New York*, to the historically black college, Fisk University. Suffering from financial difficulties, Fisk sought a court order in 2005 permitting it to sell O'Keeffe's *Radiator Building* and a Marsden Hartley painting in order to raise funds to care for the rest of its collection, add to the University's endowment, and make campus improvements. As successor to O'Keeffe's estate, the Georgia O'Keeffe Foundation objected to the sale, claiming that O'Keeffe had placed

established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collections." The Code is available at: <http://aam-us.org/museumresources/ethics/coe.cfm> (last visited Nov. 30, 2010).



Museums Face Legal Obstacles to Deaccessioning Works (*cont'd*)

a no-sale and other restrictions on the gift and that violation of O'Keeffe's restrictions would cause the gift to fail. In 2006, the O'Keeffe Foundation assigned to the Georgia O'Keeffe Museum in Santa Fe all of its assets and responsibilities, and the Museum then pursued the claim that the paintings should revert to it.

The O'Keeffe Museum and Fisk offered to settle the museum's claim by reaching an agreement that would allow Fisk to sell the Hartley painting, *Painting No. 3*, and give the O'Keeffe Museum O'Keeffe's *Radiator Building—Night, New York* in exchange for \$7.5 million. However, the state attorney general objected to the settlement,⁵ based on assertions of art dealers that the O'Keeffe painting was worth between \$20 and 25 million, and Chancellor Lyle refused to approve this settlement. Further negotiation and litigation ensued, during which time Alice Walton, the Wal-Mart heiress and founder of the Crystal Bridges Museum in Bentonville, Arkansas, offered Fisk \$30 million for an undivided half-ownership interest in the Stieglitz collection.

In a 2008 decision, Chancellor Lyle found that this arrangement would violate O'Keeffe's intent.⁶ The court

further found that O'Keeffe was motivated by a specific, not a general, charitable intent. The court found that the requirements of the *cy pres* doctrine were not satisfied and therefore refused to grant *cy pres*. In response to the O'Keeffe Museum's claim that Fisk had already violated the terms of the gift by placing the

art works in storage while the gallery was renovated, the court held that Fisk had breached the conditions when it declared that it could no longer care for and display the collection but that circumstances did not yet justify removing the collection and the public interest must be considered before ordering a forfeiture. The court gave Fisk until October 2008 to place the works back on display or risk forfeiting the collection. Fisk met this deadline but also appealed the trial court's decision denying *cy pres* relief.

On appeal, the Tennessee appellate court reversed in an extensive and well-reasoned

opinion.⁷ The court began by distinguishing between the four

paintings that had belonged personally to Georgia O'Keeffe and the remaining ninety-seven works that had belonged to her husband, Alfred Stieglitz, the prominent photographer. O'Keeffe's interest in the ninety-seven works was limited to a life estate coupled with a special power of appointment, which she exercised by appointing those works to Fisk. However, since O'Keeffe had no interest in those works that



Georgia O'Keeffe, "Radiator Building"
Image Courtesy of Fisk University

⁵ The Tennessee State Attorney General sought to intervene to represent the interests of the public, as charitable beneficiaries of O'Keeffe's charitable gift to Fisk, under Tenn. Code Ann. § 35-13-110. Although its petition to intervene was initially denied by the chancery court, permission was later granted.

⁶ Jonathan Marx, *Fisk can keep art but can't sell it*, THE TENNESSEAN (Nashville), Mar. 7, 2008.

⁷ Georgia O'Keeffe Found. (Museum) v. Fisk Univ., 312 S.W. 3d 1 (Tenn. App. 2010).

Museums Face Legal Obstacles to Deaccessioning Works (*cont'd*)

would have survived her death, her successor in interest, the O'Keeffe Museum, likewise had no reversionary or other interest in those works. Fisk thus owns those works outright.

As to the four paintings owned by O'Keeffe (Charles Demuth's *Calla Lillies* and *In Vaudeville*, and O'Keeffe's *Radiator Building-Night, New York* and *Flying Backbone*), O'Keeffe originally loaned these to Fisk. She converted the loans into permanent gifts over several years between 1949 and 1956. While these gifts were accompanied by extensive correspondence between O'Keeffe and the Fisk University President expressing O'Keeffe's concern for the university's ability to care for and display the collection properly, the court concluded that none of these letters expressed a sufficiently clear intention that O'Keeffe would retain a reversionary interest in the paintings. Because O'Keeffe had no reversionary interest in these four paintings, the O'Keeffe Museum also had no interest in them. The court concluded that the O'Keeffe Museum therefore lacked standing to participate in the action and dismissed it as a party. The appellate court also found that the trial court had erred in concluding that Fisk could not establish that it was entitled to *cy pres* relief and remanded to the trial court for reconsideration of whether Fisk could establish its entitlement to a *cy pres* remedy and, if so, what *cy pres* relief could be fashioned.

Court approval is necessary when the donee seeks to change conditions placed on a charitable gift. In order to determine whether *cy pres* relief is available, the court must determine that (1) the gift was charitable in nature; (2) the donor had a general, rather than specific, charitable intent; and (3) circumstances changed after the gift was made that render literal compliance with the terms of the gift impossible or impracticable.⁸ If all three prongs are satisfied, then the court must determine whether the proposed modification comes as close as possible to the donor's charitable intent.

The appellate court easily concluded that the gifts were charitable in nature, thus satisfying the first prong. In examining the nature of that charitable intent, the court looked at Stieglitz's will and O'Keeffe's letters

to the Fisk University President and concluded that they shared an intention "to make the collection available to the public in *Nashville* and *the South* for the benefit of those who did not have access to comparable collections to promote the general study of art."⁹ Stieglitz also expressed a desire to give his collection to institutions for the promotion of the study of art. The court bolstered its finding of a general charitable intent by noting the absence of any express divesting condition and the public policy that favors a finding of general charitable intent. The court thus reversed the chancery court's determination that O'Keeffe had a specific charitable intent and remanded to the trial court for a determination of whether Fisk can meet the third prong of the *cy pres* test and, if so, what relief should be fashioned that most closely approximates O'Keeffe's intent.

Upon remand, Chancellor Lyle issued a memorandum and order in August 2010 concerning Fisk's petition to allow the sale to Crystal Bridges Museum.¹⁰ The court concluded that the third *cy pres* prong was satisfied because Fisk, a "struggling university on the brink of closing," was not able to comply literally with O'Keeffe's condition that Fisk maintain and display the collection.¹¹ However, the court also found that the proposal for shared ownership with Crystal Bridges did not sufficiently approximate O'Keeffe's intent. The court invited Fisk and the state attorney general to submit another round of proposals. The court found that O'Keeffe and Stieglitz did not intend to benefit Fisk generally and therefore it was not their intention that the collection could be sold in order to remedy Fisk's dire financial situation. Citing New York case law, the court noted that when an institution becomes insolvent, the remedy is to redirect the gift to another charitable institution, rather than to allow the gift to be "monetized" to provide funds to the first institution. In particular, the court found the Fisk/Crystal Bridges proposal insufficient because displaying the collection in Bentonville, Arkansas, would dilute the collection's connection, intended by O'Keeffe, to the South and to Nashville. Further, the proposal would allow Crystal

⁸ *Id.* at 16 (citing New York law, which governs the case because Stieglitz and O'Keeffe were both New York residents).

⁹ *Id.* at 17.

¹⁰ In the Matter of Fisk University, No. 05-2994-III (Tenn. Chancery Ct 2010).

¹¹ *Id.* at 4.



Museums Face Legal Obstacles to Deaccessioning Works (*cont'd*)



*Susan Vecsey, Untitled A, 2010. Oil on Paper, 18.5 x 26.5 in.
The artist is represented by Spanierman Gallery, New York City*

Bridges to attain more than a half-ownership interest in the collection; it would allow the possibility of further sales outside of the South, and it would require Fisk to spend greater resources on proper care of the collection, which seems beyond its financial ability. The proposal might also divest Tennessee courts of their jurisdiction through an arbitration clause and might allow reproductions of the works to be displayed and loans of works in violation of O'Keeffe's wishes. The court discussed in some detail a hypothetical "condominium" solution in which the Frist Center for the Visual Arts, located in Nashville, would deed some of its space to Fisk where the collection would be displayed. This would assist Fisk by removing some of its costs associated with the collection but without violating the no sale and no loan conditions of O'Keeffe's gift.

In September the state attorney general submitted a proposal, which, in a surprising turn of events, was rejected by Chancellor Lyle. The state attorney general proposed that the collection go to the Frist Center, thereby staying in Nashville, but that it could be

returned to Fisk if and when Fisk became sufficiently solvent to be able to care for and display the collection. In particular, Chancellor Lyle changed her focus away from Nashville and back specifically to Fisk, stating:

Although the donor's intent was to enable Nashville to have access to the Collection, the evidentiary record before the Court establishes that the donor was deliberate about where the Collection was placed in Nashville. That deliberate placement was Fisk University. The evidentiary record is clear

that without Fisk, Nashville would never have been the beneficiary of the Collection. The donor's connection to Nashville was Fisk University.

It would not be in keeping, then, with the donor's intent to keep the Collection in Nashville at the cost of sacrificing the existence of Fisk University.¹²

Chancellor Lyle thus reinterpreted the donors' intent from her earlier opinion to benefit Fisk and not Nashville or the South generally. Chancellor Lyle also rejected the state attorney general's plan because it lacked permanence, whereas stability and certainty are needed. Finally, Chancellor Lyle indicated her willingness to accept the Crystal Bridges plan if the agreement were modified to take into account her earlier objections.

In October the state attorney general submitted yet another plan to establish a fund to assist Fisk with managing the collection as well as a brief in opposition to the Crystal Bridges plan.¹³ Fisk has opposed the state attorney general's most recent plan because it fails to address Fisk's longer-term financial diffi-

¹² *Id.* at 9.

¹³ Robin Pogrebin, *New Proposal to Keep Fisk University from Selling Stake in Collection*, N.Y. TIMES, Oct. 26, 2010.



Museums Face Legal Obstacles to Deaccessioning Works (*cont'd*)

culties, which now seems to be a priority of Chancellor Lyle.¹⁴ Fisk also submitted a revised Crystal Bridges plan that takes into account Chancellor Lyle's objections, ensures that the collection is at Fisk at least half of the time, and helps to remedy Fisk's financial situation.

In early November, Chancellor Lyle approved the Crystal Bridges plan but on condition that \$20 million of the \$30 million to be realized from the sale to Crystal Bridges be placed in an endowment fund to support the care and display of the Stieglitz collection. This leaves Fisk only \$10 million for the support of the university in general. Neither Fisk nor the state attorney general was happy with this ruling,¹⁵ and it is unclear how Chancellor Lyle arrived at this figure, as the income generated from a \$20 million endowment fund would seem to exceed considerably the amount needed to assure the proper care and display of the Stieglitz collection while it is at Fisk.

Final disposition of the Stieglitz collection remains unclear, as Fisk has just announced plans to appeal the latest chancery court decision.¹⁶

Nevertheless, this case and its tortuous history indicate the difficulties that museums may face in deaccessioning works of art from their collections, particularly when the works were donated subject to restrictions.



Lupen Grainne, "Wild Fennel by the Sea"
www.lupegainne.com

Among other things, this case indicates the care that museums and other institutions must take before accepting donations with restrictions, since such restrictions, which may limit the ability of an institution to grow and evolve in response to changing conditions, will remain in force for a very long time and may prove burdensome to change or eliminate.

Professor Patty Gerstenblith is director of the Center for Art, Museum, & Cultural Heritage Law at DePaul University College of Law and founding president of the Lawyers' Committee for Cultural Heritage Preservation.

¹⁴ See Donn Zaretsky, "Fisk Fund (UPDATED 2X)", *The Art Law Blog*, Oct. 25, 2010, available at: http://theartlawblog.blogspot.com/2010_10_01_archive.html (last visited Nov. 30, 2010).

¹⁵ Jennifer Brooks, *Fisk art ruling upsets both sides*, *THE TENNESSEAN* (Nashville), Nov. 4, 2010.

¹⁶ Robin Pogrebin, *Fisk University Plans to Appeal Ruling on Stieglitz Art Sale*, *N.Y. TIMES Arts Beat* on-line, Dec. 1, 2010, available at: <http://artsbeat.blogs.nytimes.com/2010/12/01/fisk-university-plans-to-appeal-ruling-on-stieglitz-art-sale/?partner=rss&emc=rss> (last visited Dec. 10, 2010).

Sovereign Immunity and Restitution: The American Experience

by Cristian DeFrancia

THE doctrine of sovereign immunity derives from the ancient maxim that “the King can do no wrong.”¹ That kings can and often do wrong has long been recognized in the United States, however. The immunity of a foreign government from suit in U.S. courts was never a matter of right for the foreign government, but a recognition of the mutual benefit obtained by according some level of dignity to foreign sovereigns. The principle gives way where the government determines that there are important policy considerations requiring accountability.

In cases involving claims for the restitution of artworks looted before and during World War II, recent decisions in the U.S. have highlighted a unique policy of subjecting foreign sovereigns to suit. Considering the international character of restitution claims, it may not always be clear what is the ideal forum in which to seek recovery. Yet as few countries would allow such cases against foreign states, the U.S. stands out as one of the few nations where such a claim can be pursued. While a grant of jurisdiction is by no means a guarantee that a plaintiff will recover looted works, having a forum to pursue the claim at least provides an opportunity for those whose property was taken to account for that property. Removing the shield of immunity also lessens the chances that state-owned collections will serve as a safe haven for pieces that were originally acquired in violation of international law.

The American Approach

The U.S. “expropriation exception” to foreign sovereign immunity came into law as part of the Foreign Sovereign Immunities Act of 1976 (“FSIA”), and is unique to American law. Recent cases involving the taking of property from Jews during the Holocaust have tested the reach of this exception, however, with results that reflect a policy of broad exceptions to immunity. The most important modern case involving immunity and restitution was *Republic of Austria v. Altmann* in 2004, which held that the FSIA and its expropriation exception apply to conduct that took place during and prior to World War II despite the fact that the statute was signed into law in 1976. In another important case decided in August 2010, *Cassirer v. Kingdom of Spain*,



V. Zveg, “Battle off the Virginia Capes, 5 September 1781”
Courtesy of U.S. Navy Art Collection, Washington, D.C.

the Ninth Circuit Court of Appeals further held that the exception applies even when the sovereign possessing the property was not involved in the original unlawful taking of the property.

Historically, American courts relied on the policies and judgments of the Executive Branch (and later Congress) in determining whether to accord immunity to foreign governments. In *Schooner Exchange v. McFadden*, decided in 1812, the Supreme Court addressed the issue where a party alleged that France had wrongfully converted a private sailing vessel into a state warship.² The Court held that although there was no constitutional limitation on the exclusive and absolute jurisdiction of the U.S. over any party within its territory, “all sovereigns [including the U.S.] have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.”³ Those “cases” elaborated by the Court mostly concerned official functions and properties of the concerned state as opposed to private acts.

The Court in *Schooner Exchange* made it clear that foreign sovereigns did not have an actual right to immu-

² 7 Cranch 116 (1812). The *Schooner Exchange* case is also commonly cited as an early example of the act of state doctrine, which holds that an act of state (most famously an expropriation) cannot be questioned in a foreign court of law. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964). The principal distinction between the act of state doctrine and foreign sovereign immunity is that immunity questions relate to jurisdiction only, yet there is a degree of overlap between the two principles in early case law.

³ 7 Cranch 116, at 136.

¹ See BLACK’S LAW DICTIONARY at 1396 (6th Ed.) (West 1991).



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nity under U.S. law. The U.S. was free to defeat claims of immunity either *de facto* through the employment of force or by expressly subjecting a foreign sovereign to the jurisdiction of its courts.⁴ The power to waive immunity rested with Congress and/or the Executive, however, not with the courts.

Prior to 1976, the Executive Branch was the principal source of authority on whether to accord immunity to foreign governments, albeit in an often inconsistent manner.⁵ In 1952, the State Department legal adviser Jack Tate issued a letter providing more clear policy guidelines for the application of a "restrictive" theory to immunity in which the private acts of a state would not be immune from suit (as opposed to the "absolute" theory in which a sovereign had immunity from all acts).⁶

The expropriation exception was codified in 1976, when Congress passed the FSIA, the principal architect of which was State Department Legal Adviser Monroe Leigh. The FSIA also provided exceptions for commercial activity, immovable property, torts, and liens (it has been more recently amended to provide jurisdiction over governments for claims involving state-sponsored terrorism).⁷ The expropriation exception would apply only if certain conditions were met. First, rights in property must be taken in violation of international law by a foreign government. Second, that property must either be in the U.S. or be owned by an agency or instrumentality of the foreign government that is carrying out commercial activities within the U.S.⁸ Being unique to American law, this exception is not followed internationally.⁹ It developed largely as a result of public outrage in the U.S.

4 *Id.* at 146.

5 *See, e.g.,* *Ex parte Peru*, 318 U.S. 578, 586-590 (1943); *Mexico v. Hoffman*, 324 U.S. 30, 33-36 (1945).

6 *See* 26 Dep't of State Bull., 984 (1952).

7 *See* 28 U.S.C. § 1605 (2010).

8 *Id.* at § 1605(a)(3). The statute presents an alternative application to the requirement of property being "owned or operated" by the foreign state or instrumentality in situations where "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." *Id.* Whether the commercial activity carried out in the U.S. needs to be connected with that property is open to question, although the courts often seem to cite commercial activity that does involve the painting(s) at issue.

9 *See* Hazel Fox, *THE LAW OF STATE IMMUNITY*, 350 (2D ED. 2008) ("There is no parallel to this exception in the practice of other States, perhaps not surprisingly in view of the controversial nature of what constitutes a 'taking.'").

over limitations to lawsuits after the period of Cuban expropriations under the Castro regime, yet it also has some ancestry in U.S. policies arising out of World War II.

World War II and the Expropriation Exception

At the conclusion of World War II in June 1945, the Allied Governments seized control of Germany and began to implement a policy of restituting properties forcibly transferred by the Nazis.¹⁰ The program began as one of "external restitution" in which properties were restored to the governments of the rightful owners for distribution to the original owners and/or as contribution for reparations.¹¹ The rights of individuals to pursue recovery through the courts initially remained unclear.

Before the U.S. Executive had stated any specific policy on restitution and the courts, the Second Circuit Court of Appeals was forced to consider the issue in the 1947 case of *Bernstein v. Van Heyghen Frères Société Anonyme*. The suit was brought by the Jewish owner of a shipping company whose business and vessel were forcibly transferred under the Third Reich.¹² Although the *Bernstein* case was not actually brought against a sovereign, the Appeals Court upheld the dismissal under what is in modern parlance known as the act of state doctrine, namely that an act of a foreign state within its own territory cannot be questioned in a U.S. court of law. Writing for the majority (with Judge Clark dissenting), Judge Learned Hand stated that "the only relevant consideration is how far our Executive has indicated any positive intent to relax the

10 This policy was first articulated in 1943 in the Inter-Allied Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, 8 DEP'T ST. BULL. 21, 21-22 (JAN. 9, 1943) (*quoted in* *Altmann v. Republic of Austria*, 327 F.3d 1246, 1246-47 (9TH CIR. 2003)) ("Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons . . . resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.")

11 *See* American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, Report, 148 (1946); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 958 (9th Cir. 2010).

12 163 F.2d 246 (2d Cir. 1947), *cert. denied* 332 U.S. 772, 68 S.Ct. 88.



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doctrine that our courts shall not entertain actions of the kind at bar.”¹³ The reluctance of U.S. courts to take jurisdiction over questions of unlawful expropriation, even where the expropriating state was not a party to the case, was evident. The Executive Branch soon corrected the court, however.

After the *Bernstein* ruling, the U.S. State Department issued a letter providing the “positive intent” Judge Learned Hand was seeking in the *Bernstein* case. In a letter entitled “Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers,” the U.S. reiterated its policy of undoing the forced transfers and “set[] forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of [Nazi-looted] property, is to relieve American courts from *any* restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.” The Second Circuit Court of Appeals took judicial notice of this letter in *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij* and amended its mandate “by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question.”¹⁴ These early developments opened the door to unlawful expropriation cases involving acts of the Third Reich, providing an early signal that the U.S. Government (notwithstanding the reluctance of the courts) had approved jurisdiction over matters involving unlawful expropriation, at least in the specific case of the Third Reich.

Modern Restitution Cases and Sovereign Immunity

In the last decade, Holocaust victims and their heirs have benefited from more advanced capabilities for identifying lost art, resulting in an increase in claims to recover those works from their current possessors. This has tested court systems in different ways. In the context of foreign sovereign immunities, the question arises of whether states which come into possession of looted artworks should be treated differently than private entities.

An important threshold question arose in the case of *Republic of Austria v. Altmann*, namely whether the expropriation exception under the FSIA should apply to conduct that took place before 1976, and even before 1952, when the U.S. first officially adopted the “restrictive theory” of immunity. The *Altmann* case in-

involved six paintings of Gustav Klimt that were owned by Ferdinand Bloch-Bauer, a Czechoslovakian Jew living in Vienna who fled the Nazi regime. The paintings came into the possession of the Austrian Gallery and were later discovered by the sole surviving heir of Bloch-Bauer, Maria Altmann, who also fled Austria in 1938 and later settled down in California.

The Supreme Court in *Altmann* could not easily categorize whether the expropriation exception to foreign sovereign immunity was solely a matter of procedure or whether it affected the substantive rights of governments. Statutes dealing solely with substantive rights may not be generally applied to past conduct taken in reliance on earlier laws, while procedural rights that do not affect the legal rights applying to the conduct may be applied retroactively.¹⁵ The Court noted that the FSIA was never intended to permit foreign states “to shape their conduct in reliance on a promise of future immunity,” but rather “reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* ‘protection from the inconvenience of suit as a gesture of comity.’”¹⁶ By limiting the holding to matters of jurisdiction, the *Altmann* Court was able to err on the side of this being a procedural issue, and upheld the retroactivity of the expropriation exception.

After the Supreme Court decision in the *Altmann* case, Maria Altmann elected to pursue arbitration of her claim in Austria rather than continuing to navigate the court system on remand. Her victory in the U.S. court case was likely an important trigger to Austria’s willingness to arbitrate the claim with her. The arbitration panel in Austria ruled in her favor and she was able to recover the paintings.¹⁷ It was reported that the most famous of the paintings, the portrait of her aunt *Adele Bloch-Bauer I*, later sold to cosmetics magnate and philanthropist Ronald S. Lauder for \$135 million. It now resides at the Neue Galerie in New York.¹⁸

In *Cassirer v. Kingdom of Spain*, the U.S. Court of Appeals for the Ninth Circuit recently found that the expropriation exception to foreign sovereign immu-

15 See *Landgraf v. USI Film Products*, 511 U.S. 244, 275 (1994).

16 *Id.* at 696 (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)).

17 See Richard Bernstein, *Austrian Panel Backs Return of Klimt Works*, N.Y. TIMES, JAN. 17, 2006.

18 See Carol Vogel, *Lauder Pays \$135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, June 19, 2006.

13 163 F.2d at 251.

14 210 F.2d 375, 376 (2d Cir. 1954).



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nity also applies to subsequent purchasers of artwork, even if they had no involvement in or knowledge of the fact of looting. The *Cassirer* case involves Camille Pissarro's painting *Rue Saint-Honoré, après-midi, effet de pluie*. Lilly Cassirer, the Jewish owner of the painting, sought to depart Germany in 1939 after she was stripped of her citizenship under the Reich Citizenship Laws. In order to secure permission to leave, she was forced to sell the painting to a representative of the Nazi government for a nominal \$360 paid into a blocked account that she would never be able to access. The painting later passed through the Netherlands, St. Louis, New York, and eventually into the collection of Baron Hans-Heinrich Thyssen-Bornemisza in Switzerland.

In 1988, the Spanish government created the Thyssen-Bornemisza Foundation ("Foundation") to lease the Baron's collection for display at the Villahermosa Palace in Madrid, including the Pissarro painting. The Foundation purchased the collection with government funds in 1993. Lilly Cassirer's grandson Claude Cassirer, an American citizen and her heir, learned that the painting was on display in Spain in 2000. He then unsuccessfully requested the Spanish Minister for Education, Culture and Sport to arrange for the return of the painting to him. In 2003, five Members of the U.S. Congress wrote to the Minister in support of Cassirer's request, but were also refused. Claude Cassirer brought suit against Spain and the Foundation in the Central District of California on May 10, 2005.¹⁹ After Spain filed a Motion to Dis-

miss the suit arguing that the FSIA expropriation exception does not apply in this case, the District Court ruled that it did apply and that Spain was therefore subject to jurisdiction. On appeal, a three-judge panel of the Ninth Circuit Court of Appeals affirmed the District Court's findings that the case concerned rights in property taken in violation of international law

and that the Foundation had engaged in sufficient commercial activity in the United States to trigger the requirement that the foreign entity be engaged in commercial activity in the U.S.²⁰ Spain has filed a petition for a *writ of certiorari* to the Supreme Court to hear an appeal of this case. Attorneys for Spain claim that even if jurisdiction is upheld, Spain is in possession of German court records indicating that Lilly Cassirer settled her claims to the painting in 1958.²¹

In what was a potentially important development for plaintiffs, the *Cassirer* panel reversed and remanded on the question of whether

Cassirer should be required to exhaust remedies in Germany or Spain before bringing suit in the United States. It held, in a 2-1 vote, that although the FSIA did not impose a statutory requirement of exhausting local remedies, judicial doctrine required a "pruden-

Dec. 15, 2010).

²⁰ *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009).

²¹ See Press Release, *U.S. Supreme Court Asked To Review Court Of Appeals' Decision; Ongoing Title Claim Legal Battle Over Pissarro Painting Centers Upon International Jurisdiction*, http://www.nixonpeabody.com/publications_detail3.asp?ID=3603 (last visited Dec. 23, 2010). See also Brian Baxter, *As Assange Indictment Looms, WikiLeaks Cables Tie Two Treasure Cases Together*, THE AM LAW DAILY, Dec. 10, 2010, <http://amlawdaily.typepad.com/amlawdaily/2010/12/wikileaks-treasure.html> (last visited Dec. 15, 2010). According to news reports, State Department cables leaked through WikiLeaks allegedly indicate that the U.S. offered its assistance to Spain in its case against Odyssey Marine in exchange for Spain's cooperation regarding the return of the Pissarro painting to the the Cassirer family. *Id.*



Gustav Klimt's "Adele Bloch-Bauer I" was purchased by philanthropist Ronald S. Lauder, whose foundation supports educational and cultural initiatives to revitalize Jewish identity throughout Europe. Image courtesy of the Neue Galerie, New York (www.neuegalerie.org).

¹⁹ Claude Cassirer passed away at the age of 89 on Sept. 25, 2010. His son David has stated that he intends to continue the family's efforts to recover the painting. See *Passages: Claude Cassirer, Holocaust Survivor & Democratic Activist, Gone At 89 But His Legacy Lives On*, EAST COUNTY MAGAZINE, available at <http://www.eastcountymagazine.org/node/4422> (last visited

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tial” consideration of whether remedies had been exhausted or needed to be. This requirement was adopted from the Ninth Circuit’s *en banc* plurality opinion in *Sarei v. Rio Tinto*²² dealing with the Alien Tort Statute (“ATS”), which allows claims against foreign persons for violations of international law. The panel decision in *Cassirer v. Spain* required the District Court either to impose or waive exhaustion of remedies after assessing the availability, effectiveness, and possible futility of remedies in light of various prudential factors.²³ Criticism of this requirement has focused on the fact, emphasized in *Altmann*, that when the Congress enacted FSIA it meant to provide “a comprehensive framework for resolving any claim of sovereign immunity.”²⁴ If this exhaustion requirement were to have been upheld, plaintiffs would be required by the courts (as opposed to by Congress) to show that they have either tried to pursue judicial remedies in the jurisdiction of the state being sued or proved that such action would be futile.

The Ninth Circuit decided to hear the case *en banc* on December 30, 2009,²⁵ which had the effect of vacating the panel decision. Sitting *en banc*, the Court of Appeals issued its opinion on August 12, 2010 upholding the application of the expropriation exception

to Spain.²⁶ Judge Gould dissented, joined by Judge Kozinski, arguing that Congress did not intend for the exception to have such a broad reach. The decision declined to follow the panel in the creation of a judicial exhaustion requirement under the FSIA, but the question remains open whether trial courts will require exhaustion of remedies in the future.²⁷

Exhausting Local Remedies

The idea of requiring a plaintiff to show that remedies were exhausted in other jurisdictions was first adapted by the *Cassirer* panel from a context in which the FSIA was not involved. Although the principle of exhausting local remedies before taking recourse to international institutions is prominent in international law, the doctrine as applied by the *Cassirer* panel had its origin in comments in the Supreme Court decision in *Sosa v. Alvarez-Machain*. This case involved a claim under ATS for kidnapping in which the Supreme Court discussed whether international law requires



Camille Pissarro's "Rue Saint-Honoré, après-midi, effet de pluie" remains in the possession of Spain, which claims that it can prove its rightful ownership of the painting on the merits.

Image courtesy of the Thyssen-Bornemisza Foundation.

a claimant to exhaust local remedies in the domestic legal system before seeking remedies in a foreign jurisdiction.²⁸ The Court in *Sosa* held that although the ATS did not contain an exhaustion requirement, a court “would certainly consider [a judicially-imposed] requirement in an appropriate case.”²⁹ The Ninth Circuit Court of Appeals found such “an appropriate case” in *Sarei v. Rio Tinto*, which was brought by residents of Papua New Guinea against a mining company for violations of international human rights law

22 *Sarei v. Rio Tinto*, 550 F.3d 822, 832 (9th Cir. 2008).

23 *Cassirer*, 580 F.3d at 1063.

24 *Altmann*, 317 F.3d at 699. See e.g., Recent Case, Foreign Sovereign Immunities Act—Exhaustion of Local Remedies—Ninth Circuit Requires Case-by-Case Prudential Analysis of Exhaustion of Local Remedies in Foreign Sovereign Immunities Act Suits—*Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009), 123 HARV. L. REV. 1369, 1373 (2010); NOE HAMRA CARBAJALES, *CASSIRER V. KINGDOM OF SPAIN: DID THE EXHAUSTION OF REMEDIES DOCTRINE FIND ITS WAY INTO CLAIMS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT?*, 18 TUL. J. INT'L & COMP. L. 539, 555 (2010).

25 *Cassirer v. Kingdom of Spain*, 590 F.3d 981 (9th Cir. 2009).

26 Judge Gould, joined by Judge Kozinski, dissented from the *en banc* decision, arguing that the FSIA exception should not apply to a state that was not a participant in the unlawful act. *Cassirer*, 616 F.3d at 1038.

27 *Cassirer*, 616 F.3d at 1037.

28 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

29 *Id.* at 733, n.21.

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in connection with the operation of a copper mine. In *Sarei*, the Court of Appeals ordered that the trial court consider a multi-pronged prudential exhaustion test fashioned according to principles of both federal common law and international law.³⁰ This placed the initial burden on the defendant to plead and justify an exhaustion requirement.

The Ninth Circuit panel in *Cassirer* adapted this prudential exhaustion analysis from the ATS to the FSIA context. This was partly motivated by a comment in Justice Breyer's concurring opinion in *Altmann* that a plaintiff "may have to show an absence of remedies in the foreign country sufficient to compensate for any taking" in order to show a violation of international law.³¹ The *en banc* decision in *Cassirer* effectively overturns the panel on questions of prudential exhaustion, holding that exhaustion is not required by the FSIA, is not a prerequisite to jurisdiction, and is therefore beyond the scope of its interlocutory jurisdiction.³²

In declining to consider "whether prudential exhaustion may be invoked to affect when a decision on the merits may be made,"³³ the *Cassirer* court implies that prudential exhaustion may continue to loom as a defense to hearing a case under the FSIA expropriation exception, albeit perhaps not as a component of the application of the statute. Defendants will continue to plead the requirement, and plaintiffs would be well advised to rebut those claims in the likely event that this question arises again on appeal from a final judgment of a trial court.

Treating Sovereigns as Private Citizens

In its *en banc* decision in *Cassirer*, the Ninth Circuit compares the application of the expropriation exception to "the familiar notion that a purchaser cannot get title of property that has been stolen at any place along the line, which is the general rule at common law."³⁴ Thus, even though Spain was not party to the

unlawful taking under the Third Reich, and purchased the painting in good faith, the fact that the property was unlawfully expropriated is enough to prevent Spain from claiming immunity. The broader implication of this ruling is that states may not be able to maintain immunity where they come into the possession that was taken in violation of international law by some other party. Unless the U.S. Supreme Court holds otherwise, the taint of the original unlawful taking travels with the property under the U.S. law on immunity, placing states at peril of suit for the restitution of items that may rightfully belong to an aggrieved individual.

By subjecting states to the rules of private law regarding interests in unlawfully obtained properties, the U.S. expropriation exception may affect state practice on acquisition and/or restitution of artworks. It will also invite further questions on whether private law will be applied differently in substance to state conduct as the details of the cases become clearer. For the time being, however, the *Cassirer* case holds out the prospect that state-owned entities will be treated the same as private parties in possession of Nazi-looted art when litigating their interests in U.S. courts. This also means that many legal obstacles may remain to recovery, including the application of foreign law on good faith purchases of stolen property, statutes of limitation, *forum non conveniens*, and the possibility that a court will impose exhaustion requirements.

Conclusion

With few legal avenues to pursue the recovery of looted properties, the unique American approach to foreign sovereign immunity indicates a judgment of the U.S. government that state ownership of illegally acquired property is not sacrosanct. In the context of state-owned museum collections, this prevents immunity from being used a shield for ill-gotten works. The *Cassirer* case makes clear that even when the King in fact does no wrong, his treasures may still be subject to scrutiny. In this regard, American law once again declines to recognize a divine right of kings.

Cristian DeFrancia is a legal adviser at the Iran-United States Claims Tribunal in The Hague and Co-Chair of the Interest Group. A related case note by the author on the topic of Cassirer v. Kingdom of Spain appears in International Legal Materials, 49 I.L.M. (forthcoming Dec. 2010).

30 *Sarei*, 550 F.3d 822 (9th Cir. 2008). The *Sarei* decision replaced an earlier panel decision that rejected the prudential exhaustion requirement, and in which Judge Bybee filed a lengthy dissent cataloguing the history of the exhaustion of local remedies requirement from the Jay Treaty of 1794. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007). The *Sarei* case was referred for mediation on October 26, 2010. *Sarei v. Rio Tinto, PLC*, No. 09-56381, 2010 WL 4190718 (9th Cir. Oct. 26, 2010).

31 *Altmann*, 541 U.S. at 714.

32 *Cassirer*, 616 F.3d at 1037.

33 *Id.*

34 *Cassirer*, 616 F.3d at 1029, n.14 (citing Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable*

Artwork, 23 SEATTLE U.L. REV. 631, 633-34 (2000)).



Court Battles on Technical Defenses Continue in *Bakalar v. Vavra* and *Grosz v. Moma*

by Jennifer Anglim Kreder

B*AKALAR v. Vavra*, No. 05-CV-3037, 2008 WL 40673354 (S.D.N.Y. Sept. 2, 2008), and *Grosz v. The Museum of Modern Art*, No. 09-3706, 2010 WL 88003 (S.D.N.Y. Jan. 06, 2010), exemplify the wave of cases in the United States in which federal judges are being convinced to dismiss Holocaust-era art cases on technical grounds. The cases distort the historical record because implicit in the technical dismissals are assumptions about facts that fail to take the context of Nazi-inflicted duress into account and blame survivors and their heirs for failing to recover their property. Moreover, quick judicial dismissals reflecting bias against historical claims are counter to executive policy dating back to the war, which supports Holocaust survivors and their heirs' efforts to seek restitution of their art, including the Washington Principles of 1998 and the Terezin Declaration of 2009 which call for just and fair resolution of Holocaust-era art claims based on the merits.

Luckily, a three-member panel of the Second Circuit on September 10, 2010, vacated and remanded the trial court's opinion in *Bakalar*. 619 F.3d 136 (2d Cir. 2010). *Grosz* has been appealed and was scheduled for oral argument before the Second Circuit on December 8, 2010 in New York.

Bakalar v. Vavra

In the *Bakalar* case, the first Holocaust-era art case to go to trial in over forty years, the collector, David Bakalar, sought a declaration of title on the grounds of good faith purchaser status under the UCC and Swiss law. Bakalar sought to auction *Seated Woman with Bent Left Leg (Torso)*, a drawing by Egon Schiele, when the heirs of Fritz Grunbaum objected and the auction house backed out. The drawing was in Grunbaum's collection in Vienna before he was shipped off to Dachau immediately after the Anschluss. He was forced to sign a power of attorney giving his wife legal authority to inventory his collection for a Nazi appraisal. His wife was murdered in Minsk shortly thereafter. The district court held that title transferred to a subsequent purchaser under Swiss law despite these circumstances.

The Court of Appeals found the district court erred in applying Swiss law instead of New York law, which

is much more favorable to claimants, and by placing the burden of proof as to title on the heirs. The court noted past case law that stressed the reasons why New York law "places the burden of investigating the provenance of a work of art on the potential purchaser," particularly the need to prevent New York, the largest art market in the world, from fostering illicit trafficking in stolen art.

Judge Korman wrote an informative separate concurrence explaining how to correctly interpret the factual evidence of Nazi-looting. He provided the following summary:

"Grunbaum was arrested while attempting to flee from the Nazis. After his arrest, he never again had physical possession of any of his artwork, including the Drawing. The power of attorney, which he was forced to execute while in the Dachau concentration camp, divested him of his legal control over the Drawing. Such an involuntary divestiture of possession and legal control rendered any subsequent transfer void."

The panel correctly noted that "Grunbaum never intended to pass title to the Drawing. On the contrary, the circumstances strongly suggest that he executed the power of attorney with a gun to his head." Also highly compelling is Judge Korman's critique of the district court's findings of fact in support of the present-day possessor's argument "that someone in the Grunbaum family more likely than not exported the Drawing from Vienna." Judge Korman clarified as follows:

*"The district judge merely speculated that [t]he Drawing could have been one of the 417 drawings Elisabeth Grunbaum possibly exported . . . in 1938,' or that the Drawing 'could have been one of three drawings [a family member's] husband exported,' or that 'it could have been' one of the three watercolors exported by [a family member's] brother-in-law. 2008 WL 4067335, at *8 (emphasis added). These scenarios, based on pure speculation, do not constitute findings by a preponderance of the evidence that what 'could have' happened, actually did happen."*

On remand, the lower court will address the issue of laches. Thus, despite the favorable ruling from the Second Circuit, it cannot yet be known whether the heirs' claim will succeed.



Court Battles Continue on Technical Defenses (*cont'd*)

Grosz v. MoMA

An anti-totalitarian German modernist painter, George Grosz, was forced to leave behind his works with art dealer Alfred Flechtheim when he fled Germany in 1933, before being declared an “enemy of the State.” Flechtheim’s galleries were subsequently aryanized, but the trial court described the liquidation of his galleries as having been brought about by his “financial missteps” predating the Nazis. MoMA acquired three Grosz works shortly after the war and certainly knew Grosz’s history. His heirs are seeking their return.

In *Grosz*, the United States District Court for the Southern District of New York dismissed the heirs’ claims on the improper and incorrect factual theory that settlement communications triggered the limitations period under New York’s “demand and refusal” rule, rather than the Museum’s final letter ending negotiations and refusing to return the artwork. This holding is contrary to the mandate in Federal Rule of Evidence 408 that such settlement communications be used only to *negate* a contention of undue delay. Moreover, the court’s characterization of the liquidation of Flechtheim’s gallery is contrary to the historical record, and the judge’s fact-finding is contrary to the long-standing mandate that motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) accept the factual allegations in a plaintiff’s complaint as true. Hopefully, the Second Circuit will vacate and remand this opinion as well.

The Broader Context of These Two Cases

Most readers are familiar with the Washington Principles and Terezín Declaration, so I will not recount their significance here. Fewer readers likely are aware, however, that the Principles and Declaration are mere extensions of prior executive policy dating back to the War. For example, Jack B. Tate, Acting Legal Adviser in the U.S. Department of State, advised the Second Circuit in 1952 of the Government’s “opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls . . . [and that] the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any

restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.”¹

U.S. diplomats also led efforts to warn other countries against looting in the landmark London Declaration of January 5, 1943, which “declare[d] invalid any [coerced] transfers of, or dealings with, property . . . whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.”² At the Nuremberg Tribunal, the plunder of art was declared a war crime. Military Government Law 59 and post-war laws in Germany and Austria repudiated all spurious “transactions” of the Nazi era, including art “deals” that were really seizures cooked up to look legal.³

The next time someone implies that there is no way a 70-year-old claim possibly could be viable, consider this August 27, 1951, statement, “The Recovery of Cultural Objects Dispersed during World War II,” by Ardelia R. Hall, the Fine Arts & Monuments Adviser to the U.S. State Department, which appeared in the Department’s Bulletin: “For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered.”⁴

All federal cases concerning Nazi-era art since 2004 are listed in the chart created by the author available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636295.

Jennifer Anglim Kreder is a Professor of Law at Salmon P. Chase College of Law, Northern Kentucky University, and Co-Chair of the Interest Group.

1 State Department Press Release No. 296, Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers, 20 DEP’T STATE BULL. 592 (Apr. 27, 1949) (*quoted in* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (*per curiam*), modifying 173 F.2d 71 (2d Cir. 1949).

2 Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, 8 DEP’T STATE BULL. 21, 21-22 (Jan. 9, 1943) (*quoted in* Altmann v. Republic of Austria, 327 F.3d 1246, 1246-47 (9th Cir. 2003)).

3 Restitution of Identifiable Property; Law No. 59, 12 Fed. Reg. 7983 (Nov. 29, 1947) (Military Government Law 59).

4 Ardelia R. Hall, The Recovery of Cultural Objects Dispersed during World War II, DEP’T STATE BULL. 337, 337 (1951).

Language as Property: The Case of the Mapuche People

by Michael Pulos

WHEN Microsoft wanted to make a Windows operating system in Mapudungun, the language of the Mapuche People in Chile, the Mapuche People articulated their objection to Microsoft's plans in terms of property rights.¹ Describing themselves as "the author[s] and only holder[s] of the right to [their] cultural heritage," and claiming sole "ownership and custody" over their "intangible . . . intellectual property rights" in Mapudungun, the traditional authorities of the Mapuche People condemned Microsoft's plan as an act of "intellectual piracy."² Among other things, the Mapuche People were concerned that Microsoft's plans to create an operating system in their language infringed upon their ability to manage and develop their own ancestral language; for example, their ability to control the orthography (if any) used when transcribing their mostly spoken language.³

While most academics and practitioners may not immediately think of language as "intellectual property," intellectual property law already *does* protect some aspects of language. Computer languages can be patented,⁴ constructed languages (such as Paramount's

Klingon) are sometimes copyrighted,⁵ and words used in a company's logo can be trademarked. Putting aside the technical restrictions on intellectual property protections—such as time limitations—it follows that a language could be treated as a creation worthy of legal protection. After all, today's languages were often invented, even if not deliberately, by the ancestors of the groups of people who use them today. To the

extent that these users are identifiable, it seems that they at least have a colorable claim that they should be able to assert control over them.

Of course, with many of the world's languages it would be difficult to identify the collective owners who would be legally competent to assert language rights on the group's behalf. But with some languages, it may not be as difficult.



Flag of the Mapuche People

In the case of the Mapuche People, the "traditional authorities" identified themselves as having the power to assert the Mapuche People's collective rights on their behalf. While the validity of the traditional authorities' claim of legitimacy is unclear, there is nothing obviously objectionable about a practice of having a central authority charged with making decisions on the language users' behalf, where such authority is recognized as legitimate. Indeed, the practice is even consistent with historical practices in Western cultures, including for example Welsh customary law, where "[p]roperty rights . . . [were] conceived by the tribal society as belonging to families and kinship groups, not as absolute

15, 2010).

⁵ *About the Klingon Language Institute*, <http://www.kli.org/kli> (last visited Dec. 15, 2010) ("The Klingon Language Institute is a nonprofit 501(c)3 corporation and exists to facilitate the scholarly exploration of the Klingon language and culture. Klingon, Star Trek, and all related marks are Copyrights and Trademarks of Paramount Pictures. All Rights Reserved. Klingon Language Institute Authorized User.").

¹ See *Mapuche letter to Bill Gates (Microsoft)* (August 12, 2005), available at <http://www.mapuche.info/mapu/ctt050812.html> (last accessed Oct. 14, 2010).

² *Id.*

³ *Id.*

⁴ *Microsoft Loses Key Patent Judgment*, Intellectual Property Watch (Dec. 23, 2009), <http://www.ip-watch.org/weblog/2009/12/23/microsoft-loses-key-patent-judgement> (last visited Dec. 15, 2010) (Microsoft lost a lawsuit against a Canadian software company who owned a patent on a computer language Microsoft used in one of its products); see also *Microsoft Statement Regarding the United States Court of Appeals for the Federal Circuit Ruling in the i4i Case*, Microsoft News Center (Dec. 22, 2009), https://www.microsoft.com/Presspass/press/2009/dec09/12-22statement.mspx?rss_fdn=Press%20Releases (last visited Dec.



Language as Property (*cont'd*)

individual rights.”⁶

In the end, are the Mapuche People correct that they have an intellectual property right in their language which they can assert against Microsoft? Perhaps. The question presents a host of broader issues, however: Is language a form of property, and if so, what practical implication could that have on how we understand language rights? In other words, if we view language as a property right,

does this help us evaluate laws that affect language, such as language restrictions

on one end (e.g., Slovakia’s ban on using Hungarian in public),⁷ or language promotion on the other (e.g., Switzerland’s declaration of Romansh as an official language and the \$4 million dollars per year used to foster it)?⁸ The answers ultimately may be “no,” but before we get there, the questions deserve some attention.

All the questions can’t be answered here, but this article endeavors to answer the first: Is language a form of property? It is necessary to begin with the concept of property. Broadly defined, property “embraces every thing to which man may attach a value and have a right.”⁹ Indeed, “[p]roperty as conceived in the founding era [of the United States] included not only external objects and people’s relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being[.]”¹⁰

Property also has been defined as “something that belongs to somebody in a legitimate way, something that

is ‘proper’ to somebody.”¹¹ These general notions apply squarely to language; people often “attach value” to their language, the ability to use one’s language is a “libert[y interest] . . . important for human well-being,” and the principal users of a language would seem to have the most “legitimate” claim to it.

Moreover, drawing upon these same traditional notions of property, it could be argued that identity, or

a certain aspect of identity, is best articulated and understood as a form of property. This argu-

Crafting the specific system that works for language rights will be a challenge, but using general notions of property law could provide valuable guidance.

ment is not new. In her seminal critical-race-studies piece, *Whiteness as Property*,¹² Cheryl I. Harris examined how the private and public societal benefits of white racial identity (i.e., white privilege) were ratified and legitimated as a type of status property. Performing a historic analysis of whiteness in America, Harris argued persuasively that whiteness met not only the theoretical descriptions of property, but also the functional criteria of property:

*“[In sum, t]he liberal view of property is that it includes the exclusive rights of possession, use, and disposition. Its attributes are the rights to transfer or alienability, the right to use and enjoyment, and the rights to exclude others. Even when examined against this limited view, whiteness conforms to the general contours of property. It may be a ‘bad’ form of property, but it is property nonetheless.”*¹³

Language, too, in many ways “conforms to the general contours of property.” For starters, language has been described as a “communally shared good [which] serves an important boundary marking function.”¹⁴ Specifically, language is a tool that helps shape identity by constraining access to participation in activities and formation of social relationships on the basis of ability to communicate in the language.¹⁵ Also, like some

6 See Boudewijn Bouckaert, *What is Property?*, 13 HARV. J.L. & Pub. Pol’y 775, 780 & n.11 (1990) (citing 2 P. Vinogradoff, *OUTLINES OF HISTORICAL JURISPRUDENCE* 321–43 (1920)).

7 *Hovorte po slovensky! (Speak Slovak!): Slovakia criminalises the use of Hungarian*, in *THE ECONOMIST*, Aug. 1, 2009.

8 John Tagliabue, *In Multilingual Switzerland, One Tongue Struggles* (Sept. 28, 2010), available at <https://www.nytimes.com/2010/09/29/world/europe/29swiss.html?pagewanted=all> (last visited Dec. 15, 2010)..

9 Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1726 (1993) (citing 6 JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 101 (Gaillard Hunt ed., 1906)).

10 *Id.* (quoting Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128–29 (1990)).

11 See Bouckaert, *supra* note 6, at 775.

12 106 HARV. L. REV. 1709 (1993).

13 *Id.* at 1731.

14 Stephen May, *Language rights: Moving the debate forward*, 9/3 JOURNAL OF SOCIOLINGUISTICS 319, 331 (2005) (citing Andrée Tabouret-Keller, *Language and Identity*, in *THE HANDBOOK OF SOCIOLINGUISTICS* 315–26 (Florian Columnas, ed., 1997)) (emphasis added).

15 *Id.* at 331 (citing Monica Heller, *The role of language*



Language as Property (*cont'd*)

other forms of property, language can be passed on to children and others; conversely, others can be excluded from accessing language, at least initially when a language is unknown to all but native speakers. Users of language often attempt to assert control over it, for example, by regulating and standardizing its usage, as is the case with the Italian *Accademia della Crusca*, the French *Académie Française*, and the *Real Academia Española*. In the case of the latter, the Academy, which has as its main duty the regulation of the Spanish (Castilian) language, was even placed under King Phillip V's "sanctuary and Royal Protection."¹⁶ Evaluated by traditional notions of property, along with academic conceptions of identity property, language fits nicely within the definition of property.

Accepting language as property, the next (and biggest) challenge will be defining the scope of the legal protections afforded to a language user (or group of language users). Traditionally, the law of property is a "systematic expression of the degrees and forms of control, use, and enjoyment, that are recognised and protected by law."¹⁷ The so-called "bundle of rights" a property owner owns often includes (among others) "the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights of transmissibility and the absence of term, the prohibition of harmful use, [and] the liability to execution and residuary."¹⁸ In defining the boundaries of these rights, it is said that the key is not the relationship between the people and things, but rather the behavioral relations among people that simply arise because of the existence of things.¹⁹ That is, a system of property rights must cre-

in the formation of ethnic identity, in *CHILDREN'S ETHNIC SOCIALISATION: PLURALISM AND DEVELOPMENT* (Jean Phinney and Mary Jane Rotheram, eds., 1987)).

16 This is the author's translation; the original text is "amparo y Real Protección." Official Website of the Real Academia Española, <http://www.rae.es/rae/gestores/gespub000001.nsf/v0TodosporId/CEDF300E8D943D3FC12571360037CC94?OpenDocument&ci=0> (last visited Dec. 15, 2010).

17 SIR FREDERICK POLLOCK, *FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW* 159 (Burt Franklin 1970) (1896).

18 *Prinsloo and Ndebele Ndzundza Community and Others* (2005) 3 All SA Clive 28, 16–17 (SCA) (citing Tony Honoré, 'Ownership' in AG Guest (ed.) *OXFORD ESSAYS IN JURISPRUDENCE* 107 (1961)).

19 Bouckaert, *supra* note 6 at 795 (citing Pejovich, *Toward an*

ate, in effect, a set of economic and social rules defining the position of interacting individuals with respect to the property in question.²⁰ Crafting the specific system that works for language rights will be a challenge, but using general notions of property law could provide valuable guidance.

Of course, the concept of language rights does not fit squarely within current international instruments on cultural property, which are designed largely to deal with the protection and illicit trade in tangible property items. However, language rights do fit into the broader framework of living cultural heritage, which applies to intangible aspects of culture—typically the customs and practices of traditional and indigenous cultures. Moreover, other international instruments,

While the need for the legal protection of minority and regional languages is well-established, a cohesive legal doctrine is not.

such as Universal Declaration of Linguistic Rights, the European Charter for Regional or Minority Languages, and the Framework Convention for the Protection of National Minorities, do provide foundations for the notion of language rights. Despite all this, much work still remains in testing the analytical boundaries of language rights in ways that give practical guidance to lawmakers who want to implement language protections.

I have sought in this article only to present the possibility that the property rights paradigm may be useful in the growing dialogue on the question of language rights. While the need for the legal protection of minority and regional languages is well-established, a cohesive legal doctrine is not. My intention here is to contribute to a broader discussion that will ultimately lead to a powerful, concrete, and useful framework for analyzing language rights. To the extent that language at least resembles property, a language-as-property model may be a useful tool in building that framework.

Michael Pulos is a legal adviser at the Iran - United States Claims Tribunal in The Hague.

Economic Theory of the Creation and Specification of Property Rights, in *ECONOMICS OF LEGAL RELATIONSHIPS* 35–52 (H. Manne e. 1975).

20 *Id.*



The Ancient World Meets the Modern World: A Primer on the Restitution of Looted Antiquities

by Howard N. Spiegler and Yael Weitz

COUNTRIES whose borders encompass the rich culture of ancient lands have struggled for decades to prevent the unauthorized excavation and smuggling of their cultural artifacts, and to attempt to reclaim them after they are discovered in the possession of museums, galleries, and collectors. A few recent developments, including the repatriation of artifacts to Egypt and Peru reported earlier in this issue, serve merely as illustrations of the increasing number of claims being asserted by these so-called “art-rich” countries around the world:

- In July 2010, the FBI, working with the United States Attorney for the District of Delaware, seized a multitude of ancient artifacts, most of which are cuneiform tablets that were used for record-keeping purposes, that originated in Mesopotamia, or present-day Iraq. The artifacts were looted by unknown persons and illegally smuggled into the U.S. The U.S. government discovered the artifacts when a California antiquities dealer offered them for sale.
- On August 7, 2010, the National Institute of Anthropology and History of Mexico announced the largest recovery of looted cultural property from churches and other archaeological sites in Mexico, including fourteen colonial religious art works and one hundred and forty-four pre-Columbian pieces. The artifacts were recovered by Mexican officials earlier in the year after searches in Jalisco, Tlaxcala and Mexico City. Once the objects are studied and restored, they will be returned to the communities from which they were stolen.
- In September 2010, a court in Munich ordered the return of religious artifacts stolen from the Church of Cyprus in 1974 by Turkish national Aydin Dikmen. After a trial that lasted more than a year, the court decided that the Church had succeeded in proving its ownership of the treasures.

This article will briefly explain a few of the important legal issues that are involved in efforts made by foreign governments to reclaim stolen cultural property

in the United States and will examine the current trend towards amicable resolution of claims without litigation.

Establishing Ownership

Underlying any claim for the recovery of antiquities in the United States is a single, fundamental rule: Under U.S. law, no one, not even a good-faith purchaser, may obtain good title to stolen property. When U.S. law is applicable, a true owner always has the right to reclaim stolen property, unless barred by the statute of limitations or other technical defenses. To exercise this right, a plaintiff must first establish that it owns the property in question. In a typical antiquities case brought in the United States by a foreign government, establishing ownership almost always poses several hurdles.

First, the foreign government claimant must prove that the object in the defendant's hands is, in fact, the stolen item. Where the dispute involves a clearly identifiable object, particularly one stolen from a documented or catalogued collection, the question of establishing the identity of the object is straightforward. In many cases involving antiquities, however, objects have been pillaged from unexcavated archaeological or sacred sites, or removed from the country of origin before archaeologists or museum officials were able to view, much less inventory or document, the objects. As a result, it is often difficult for claimants to establish identity in these kinds of cases.

Often, identity can be proven only through the testimony of the original thieves recorded, either by the local police at the time of the original theft or perhaps years later when the antiquities have finally come to light. For example, the testimony of local villagers who had pillaged tombs in the Anatolia region of Turkey was critical in one of the first major cultural property cases brought in the U.S. courts, commenced to recover the objects taken from these tombs after they were discovered in the possession of the Metropolitan Museum of Art. This case, after years of litigation, eventually resulted in the recovery by Turkey of the fabled Lydian Hoard, a cache of exquisitely crafted

A Primer on the Restitution of Looted Antiquities (*cont'd*)

silver jewelry, ceremonial silver and bronze vessels, incense burners, cosmetic accoutrements, fragments of wall paintings, and marble sphinxes created 2,500 years ago during the era of the legendary King Croesus of Lydia.¹

It is important to understand that it is not enough for a foreign government simply to show that antiquities similar to those being claimed had previously been discovered within its borders. The boundaries of ancient civilizations do not necessarily match the borders of the modern world. Therefore, the people from one of these ancient cultures may have lived and created

antiquities now found in several different modern countries that traverse that area. This became a significant issue in a case heard several years ago by a New York state trial court involving the so-called “Sevso Treasure,” considered one of the finest collections of ancient Roman silver ever found and valued at almost \$200 million.

Three countries—Lebanon, Hungary, and Croatia—claimed ownership of the Treasure in the possession of Lord Northampton of England, as Trustee of the Marquess of Northampton’s Trust, based on the similarity between the fourteen silver pieces in the Treasure and pieces apparently found in each of those countries from ancient Roman times. After Lebanon dropped out of the case, and although the items may in fact have been looted from one of the two remaining countries, the jury hearing the case essentially determined that since neither Hungary nor Croatia could establish better evidence of ownership than the other, the objects should remain with the

defendant.²

Even if a foreign government can establish identity, however, that is still only one of the hurdles it must overcome to establish its claim. A foreign government plaintiff must also demonstrate that at the time the objects were discovered in and removed from its territory, there were laws in place that clearly vested the government with ownership rights, or some other proprietary interest, in the objects. Virtually all so-called “art-rich” countries have enacted laws, mostly in the early twentieth century, declaring that anything found in or under the ground, even if not yet

discovered, is owned by the government. These laws, called “patrimony laws,” are usually the key to establishing the foreign government’s ownership.

The interpretation of patrimony laws creates another obstacle for foreign government plaintiffs, for only if the laws clearly provide for ownership by the foreign government of antiquities discovered within its territory may

they be the basis for a recovery lawsuit. Although one might expect that a government claimant would be in the best position to determine what its own laws provide, in an American court of law both sides bear the same burden of doing so. For example, in a long-fought litigation involving the Republic of Turkey, American businessman William Koch, and others over the ownership rights to ancient Greek and Lycian coins unearthed in a small town in Turkey, the attorneys for the Republic of Turkey were in the same position as the defendants’ legal team: Both were required to produce experts on Turkish law, whose qualifications had to be proven to the court. The court eventually resolved the issue in Turkey’s favor, but only

2 Republic of Lebanon v. Sotheby’s, 561 N.Y.S.2d 566 (App. Div. 1990).



Euphronios krater on display at the Metropolitan Museum of Art in New York City.

1 Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990). Herrick, Feinstein LLP represented the Republic of Turkey in this action.

A Primer on the Restitution of Looted Antiquities (*cont'd*)

after a four-day trial during which the court carefully weighed both sides' expert testimony on the meaning of the Turkish patrimony laws.³

For many years, possessors of antiquities looted from foreign countries argued against the use of foreign patrimony laws as a means of establishing ownership in U.S. courts. Their main argument was that foreign patrimony laws are fundamentally different from and contrary to American concepts of private property. But recent court decisions, particularly in the New York federal courts, have held that recovery claims arising under foreign laws that vest ownership of previously undiscovered antiquities in the foreign government will be honored, just as are private ownership rights. The courts' answer to the complaints about applying foreign law in a U.S. court is that the court is not using foreign law in place of U.S. law to determine these cases; rather, it is using foreign law to determine who owns the property in the first place and then using U.S. law to determine whether it should be returned. It is a tenet of international law to recognize a sovereign nation's laws governing interests in property found within its territory.⁴ The foreign government, however, must be able to establish that its laws are truly ownership laws and not laws merely prohibiting the export of antiquities. Export laws are considered part of a country's internal policing regulations and generally are not enforced by the courts of other countries. Only foreign laws clearly establishing that the government owns everything found in or under the ground will be applied in U.S. courts.

To avoid the difficulties created by this distinction, several countries have entered into special bilateral agreements with the U.S. government pursuant to

the Cultural Property Implementation Act of 1983,⁵ which implements the international Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁶ Pursuant to these agreements,

Although foreign governments continue to make claims to repatriate cultural property and hard-fought litigations still occur as a result, there have been hopeful signs recently that we may be arriving at a new way of dealing with these issues.

the United States agrees to enforce the export laws of these countries and will therefore seize and return items brought into the United States from these countries without a permit, even without proof that the government owns those items pursuant to patrimony laws. But only fourteen countries currently have such agreements with the United States, including Italy and several Latin American countries, but not including Greece or Turkey.

The Current Climate: Resolution Rather Than Litigation?

Although foreign governments continue to make claims to repatriate cultural property and hard-fought litigations still occur as a result, there have been hopeful signs recently that we may be arriving at a new way of dealing with these issues.

Starting in 2006, there has been a new spirit of cooperation among art-rich countries and great museums that has led to some momentous agreements. In February of that year, the Metropolitan Museum of Art signed an agreement to return twenty-one looted artifacts to Italy in exchange for loans of other objects. The agreement included the famous Morgantina Collection, sixteen silver Hellenistic pieces dating from the third century B.C., which was returned to Italy this year. Also included was one of the museum's most prized possessions, the Euphronios krater, a painted vase dating from the sixth century B.C. that was purchased in Switzerland by the museum in 1972

3 Republic of Turkey v. OKS Partners, 797 F. Supp. 64 (D. Mass. 1992), *motion denied by, motion granted by* 146 F.R.D. 24 (D. Mass. 1993), *summary judgment denied by* 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994), *summary judgment and partial summary judgment denied by, motion to strike denied by* 1998 U.S. Dist. LEXIS 23526 (D. Mass. 1998). Herrick, Feinstein LLP represented the Republic of Turkey in this action.

4 U.S. v. Schultz, 333 F.3d 393 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004). Herrick, Feinstein LLC advised the Arab Republic of Egypt in connection with this action.

5 Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613.

6 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.



A Primer on the Restitution of Looted Antiquities (*cont'd*)

for \$1 million. It remained on display at the Met until January 2008 and was then returned. In return for the remaining four objects, Italy will lend objects of “equal beauty and historical and cultural significance” to the museum.

A few months later, the Getty Museum in Los Angeles turned to a long-standing claim by Greece, first asserted in the 1990s, that four items acquired by the museum were stolen and should be returned. Three of them—a gold funerary wreath, an inscribed grave marker, and a marble torso dating from 400 B.C.—had been purchased by the Getty for \$5.2 million in 1993. The fourth item, an archaic marble relief that depicts a warrior with spear, shield, and sword, had been purchased in 1955 by J. Paul Getty himself. In August 2006, the Getty returned the grave marker and the relief to Greece; then in March of the following year, it returned the funerary wreath and the marble torso. All four objects are now on display at the National Archaeological Museum in Athens.

And finally, in September of that watershed year, the Museum of Fine Arts in Boston sent thirteen

Whatever the underlying merits of Greece’s claim of ownership may be, it is apparent that any applicable limitations period for bringing a claim has long expired, and therefore this case will not be resolved in a court of law.

pieces back to Italy—eleven fifth century B.C. vases, a “portrait statue” of Sabina, and a first century A.D. marble fragment relief of Hermes. The museum agreed that it will inform the Italian Ministry of Culture of any future acquisitions, loans, or donations of works that could have an Italian origin.

These historic agreements in 2006 appear to have inaugurated a new era of cooperation that has continued to this day. For example, in November 2008, the Director of the Cleveland Museum of Art and the Italian Culture Minister signed an agreement pursuant to which the museum will return fourteen ancient treasures that had been looted from Italy in exchange for several long-term loans of thirteen equally valuable artifacts for renewable twenty-five-year periods. In December 2009, France agreed to return painted wall fragments that were stolen from the Luxor tomb in Egypt and that had been purchased by the Louvre in 2000 and 2003.

Postscript: The Elgin Marbles

Despite all of these cooperative efforts, one dispute continues to defy resolution, even though it has sparked controversy for some 200 years: the notorious case of the Elgin marbles.

In 2009, the new Acropolis Museum opened in Athens, a \$200 million, 226,000-square-foot state-of-the-art monument. Originals of the famous frieze of the Parthenon are displayed on the top floor of the new museum, with the Parthenon itself seen through the museum’s wraparound windows. But alongside these original portions of the Parthenon are mere white



View of the Parthenon Gallery of the Acropolis Museum
Credit Nikos Daniilidis, Photo Courtesy of the Acropolis Museum, Athens
www.theacropolismuseum.gr

A Primer on the Restitution of Looted Antiquities (*cont'd*)

plaster casts of other portions of the frieze. The originals of those portions, known as the Elgin Marbles, are in London at the British Museum, where they have been displayed for almost two centuries.

Thomas Bruce, the seventh Earl of Elgin and British ambassador to the Ottoman Empire from 1799-1803, had purportedly obtained permission from the Ottoman authorities, who ruled over Greek territory at the time, to remove pieces of the Acropolis. From 1801 to 1812, Elgin's agents removed about half of the Parthenon sculptures and transported them by sea to Britain. In England, some critics attacked Lord Elgin for looting these objects. But following a public debate in Parliament, he was exonerated, and the British government purchased the Marbles from him in 1816 and placed them on display in the British Museum.

The legality of their removal has been repeatedly questioned since that time, but the debate was rekindled in modern times in the early 1980s, when the actress Melina Mercouri became the new Greek Culture Minister and made the restitution of the Marbles a personal crusade as well as official government policy. Since then, the Elgin Marbles have become a powerful symbol of the struggle of art-rich countries to have their looted cultural patrimony returned. With the construction of the new Acropolis Museum, it is said that one argument against the return of the Marbles—that Greece was not able to care properly for them—has now been removed. The latest proposal for a resolution of the matter was Britain's recent offer to loan the Marbles to Greece for three months on condition that Greece recognize Britain's ownership. Greece responded by offering to loan Britain any masterpiece it wished as long as Britain relinquished any claim of ownership to the Marbles. The dispute



The Frieze of the Parthenon Gallery

*Credit Nikos Daniilidis, Photo Courtesy of the Acropolis Museum, Athens
www.theacropolismuseum.gr*

continues.

Whatever the underlying merits of Greece's claim of ownership may be, it is apparent that any applicable limitations period for bringing a claim has long expired, and therefore this case will not be resolved in a court of law. The familiar moral and policy issues in this debate, however, will continue to be discussed—including the British Museum's claim that after almost 200 years, the Marbles have become an honored part of Britain's, not to mention the world's, cultural property. Hopefully, even this epic struggle will someday be resolved.

Howard N. Spiegler is a partner at the New York based law firm of Herrick, Feinstein LLP and is co-chair of the firm's International Art Law Group. **Yael Weitz** is an associate at the firm and is a member of the Group. A version of this article appeared in the Spring/Summer 2010 edition of *Art & Advocacy*, the Art Law Group's quarterly newsletter. All issues of *Art & Advocacy* may be accessed at the firm's website at <http://www.herrick.com/artlaw>.

The Global Development of Cultural Law & Policy: Recent Trends

by Michela Cocchi

THE movement to protect art and cultural property gained new momentum following World War II, during which unprecedented amounts of artwork and cultural property were confiscated from individuals and institutions.¹ More recently, trends in cultural heritage law demonstrate how culture is increasingly understood as an individual *and* collective right, as well as an economic interest. Discussions on identity, the nation-state and cultural policy as well as questions addressing globalization and nationalism are often presented as closely interrelated. Throughout the world people are protesting the de-territorializing effects of globalization and call for a revitalization of nationalism as a defense against a possible loss of cultural identity.² Strengthening national or social cohesion as an answer to migration and multicultural challenges is argued as vitally important in current national debates on social and cultural issues.³ In reviewing these developments, it is important to identify the broader policy implications of the law relating to culture.

1 This resulted in a number of conventions being drafted, the first of which was the 1954 Hague Convention, which was created to establish guidelines for protecting cultural property during times of war. The 1970 Convention on prohibiting and preventing the illicit import, export and transfer of ownership of cultural property followed in response to the 1960s surge in illegal art trafficking. The UNIDROIT Convention on stolen or illegally exported cultural objects is a complement to the UNESCO Convention.

2 The national dimension of cultural policy has been strengthened in recent years. In Great Britain, the New Labour and political movements on the left proposed 'progressive nationalism' as a response to the cultural policies of Anglo-Saxon conservatives and their nationalist investments in social and cultural discussions. France gave birth to a new Ministry for Immigration and National Identity. Poland witnessed the creation of a new national self-awareness built on its Catholic faith. In Serbia, radical neo-nationalist movements have been nourished by myths and propelled by demands to legitimise the return of lost territories. At the same time, the increasing importance of the link between identity and nation within defined borders has generated protests both in majority populations and in ethnic minority groups. In Turkey several hundred thousand people participated in protests because they fear a resuscitation of Islamic nationalism.

3 See P. Duelund, *National Cultural Canons as a Cultural Policy Response to Globalisation?*, COMPENDIUM, <http://www.culturalpolicies.net> (last visited Dec. 15, 2010).

Developments in National Legislation

In the recent years, legislation governing art and cultural property has become a source of heated debate.⁴ Specifically, the amount and types of legislation affecting museums today are growing at a rapid pace and are complex. The various international government systems make discrepancies in legislation between countries inevitable. While many nations do not have legislation governing museums, they often have laws relating to cultural heritage that affect how museums operate on a day-to-day basis.⁵

In the context of international disputes, national pride and politics can often take priority over the law, and disputes can become emotional and ultimately unresolvable. ICOM has adopted a mediation strategy, proposed in 2006, whereby the organization offers detailed guidance on mediation procedures that parties to a dispute might adopt in these circumstances.⁶

Paradoxically, the financial crisis is putting a strain on the culture budgets of States, which are often left out of national stimulus programs. Yet cultural stimulus could provide an important means of satiating the conflicts brought about in part by global challenges to cultural identity. A stimulus package for the culture sector would require more than just increased levels of funding. It also needs a clear mix of regulations, financial incentives and innovative policies in support of: artistic creativity and technical skills in the cultural and creative industries; new skills and competences in the conservation and enhancement of the historic and artistic heritage; and, last but not least, new intercultural competences aimed at fostering mutual

4 See A. Mac Devitt, *Upholding the law*, ICOM News, 63, 1, 2010-June.

5 For instance, among the countries that have started developing specific museum law is Switzerland, where the Federal Act on Museums and Collections came into force on January 1, 2010, defining for the first time a federal policy on state-run museums. In Brazil, new Statutes governing museums were introduced on May 12, 2009: they can be considered as a product of the Brazil Museum Policies, which were launched in 2003.

6 See ICOM, *Promoting the use of Mediation in Resolution of disputes over the Ownership of objects in Museum Collections: Statement by the President of ICOM Alissandra Cummins*, ICOM, http://archives.icom.museum/statement_mediation_eng.html (last visited Dec. 15, 2010).



The Global Development of Cultural Law & Policy: Recent Trends (*cont'd*)

understanding and social cohesion in our increasingly multicultural societies. Such programs may play an important role in moderating the more negative effects of globalization.

Investing in Culture: New Concepts for an Art Economy

Is the value of art simply an agreement between conscious entities where the art object escapes the physical world to touch something beyond us? Does this explain why it reaches unimaginable

prices which often bewilder not only the general public, but also art connoisseurs? What does the global valuation of art say about culture?

Exploring the recent growth of a Middle Eastern – specifically UAE – art market, in the words of Steve Sabella,⁷ art is an ‘object of exchange’: given that contemporary art has moved from a ‘pure’ visual aesthetic pleasure to the realm of intellect where art theory is often needed to make one

see an object as art, one could argue that education in its broader meaning, and art education specifically, might be necessary components in any culture seeking to add value to its art. ‘Value’ in aesthetic terms is inextricably associated with the idea, not the object. In other words, if you do not get the ‘idea’, chances are high that you will not attribute any value to the work of art.

The price of a work of art does not necessarily match its value as often prices exceed value. Consuming art is a form of addiction but art addiction requires more time to influence the brain. That is, changes in the perception of value will occur over time. At least twenty

⁷ Steve Sabella is a London-based Palestinian artist who uses photography and photo installation as his principal medium of expression.



Millar Kelley, “White Tiger,” 2009, Oil on Canvas, 48 x 72 in.
www.millarkelley.com

years are needed to create a functioning and coordinated art infrastructure.

Some people assume that an art boom is solely due to the arrival of the auction houses. This perspective does not take into account the direct relationship between a country’s development and political status and the way in which its art is perceived and valued, the correlation between wealth

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and culture, the role of museums in validating art and in adding value to it, the function of curatorial shows in bringing

together artists, dealers, critics and collectors, the dealers as tastemakers, and collectors as artists’ supporters. Art history is rarely made in auction houses, art price needing to be translated into value and survive solidly the test of time.

Although investing in fine art is considered to be a hedge in more mainstream investment markets, a new trend has emerged that has seen numerous attempts to launch projects that aim to introduce alternative methods of investing in art as a hedge against the traditional method of investing in art (namely, purchas-

The Global Development of Cultural Law & Policy: Recent Trends (*cont'd*)

ing a work of art and taking physical ownership). One such project is the innovative art investment start-up in India by an Indian entrepreneur, Arun Rangachari, chairman of venture capital firm DAR Capital, that has purchased the rights to the entire life's work of a reclusive Italian artist by the name of Montanari, who has lived in seclusion for the past 18 years. Rangachari is building up an art collection, of which the work of Montanari will play a significant part, with the intention of setting up an art fund in the future. Before selling any of the paintings, Rangachari plans to increase the value of

Montanari's work by holding exhibitions and building a foundation dedicated to the artist's work.⁸

The Chinese are also getting in on the act with Chinese financial corporation Shenzhen Artvip Cultural Corporation recently going public with China's first openly

traded art portfolio.⁹ The portfolio, which comprises of twelve paintings by contemporary artist Yang Peijing, is being traded on the Shenzhen Cultural Assets and Equity Exchange (SZCAEE) in the form of 1000 shares. All 1000 shares sold out on the first day of trading for a total of US\$354,480 with profits from trading the works of art to be dispersed by Artvip as the works are traded.¹⁰ Interestingly, each of the above

8 See N. Forrest, *Art Market Hedge Trends*, ART MARKET BLOG WITH NICHOLAS FORREST, www.artmarketblog.com, posted on Aug. 3, 2010 (last visited Dec. 15, 2010).

9 See *id.*

10 According to www.artinfo.com: "Established in 2009 by the Chinese government, SZCAEE functions as an alternative platform for the trading of a wide range of cultural assets — including artworks, luxury goods, and films — as part of the Chinese government's attempt to commercialize, diversify, and regulate the public exchange of such cultural properties.

projects are focused entirely on the work of a single living artist.

Cultural Rights: Towards a Definition

Recognition of the fundamental role of ethics and rights regarding culture and cultural policy is perennially a hot topic. Ethics provide the perspective, motivation and values to help ensure democratic and equitable participation in cultural development, diversity and dialogue. Rights serve as the fundamental underpinning and inspiration of cultural creativity and participation and inform the jurisprudence regarding viola-

tions of binding conventions and of other no less important instruments.

However, cultural rights still fall through the gap in the human rights' protection system.

In the words of Patrice Meyer-Bisch,¹¹ universality can only become concrete through the right of each individual to live his

or her humanity. Universality was thought to be above culture, with culture inventing universality, developing it by demanding dialogue. Cultures do not engage in dialogue, however, it is women and men who do, as holders and seekers of this universality that can only be gathered and collected through critical sharing of heritages and cultural experiences.

The adoption of the UNESCO Universal Declaration on Cultural Diversity in September 2001 - that made official the definition of culture adopted in Mexico in 1982 - and of the Convention on protection and promotion of diversity of cultural expression in 2005

SZCAEE plans to offer a second 1000-share portfolio, featuring 40 works by Yang Peijiang, sometime in the future."

11 See P. Meyer-Bisch, *Defining cultural rights*, <http://www.culturalpolicies.net> (last visited Dec. 15, 2010).



Cristian DeFrancia, "Tibetan Nomad with Sacred Text," 2010

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symbolizes an important political turn.¹² Where cultural diversity used to be considered an obstacle to development and modernity (and therefore to progress), it is now more and more understood as a resource for each of these fields and in the context of a need for peace.

The starting point of the actual change in paradigm lies in the definition given to culture. The broad definition developed by the UNESCO since 1982 is hard to challenge, yet it has the inconvenience of not being operational in a human rights context.¹³ The Fribourg Declaration on Cultural Rights remedies this flaw by putting the person at the center: the term “culture” covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meaning they give to their existence and to their development.¹⁴

Cultural Rights are rights for everyone, whether alone or in community, to choose and express one's iden-

tity, to access cultural references, as necessary resources in one's identification process. Like all other human rights, cultural rights guarantee the access of each individual to free and dignified social relations. Their specificity lies in defining more precisely the value of these connections in terms of knowledge.

Cultural Rights establish capacities to connect individual subjects to one another through the knowledge each person carries within his/her self and places in works (objects and institutions) in their respective formative environments. The expression “Cultural

Identity” is understood as the sum of all cultural references through which a person, alone or in community with oth-

ers, defines or constitutes oneself, communicates, and wishes to be recognized in one's dignity.

The Experience of the EU Agenda for Culture

In May 2007, the EU Commission proposed an agenda for Culture founded on three shared sets of objectives: cultural diversity and intercultural dialogue; culture as a catalyst for creativity; and culture as a key component in international relations. This agenda was approved by the cultural sector during the Lisbon Forum of September 2007. It was also endorsed by the Council in its Resolution of November 2007 and then, a first, by the European Council in its conclusions of December 2007.

Under the first set of objectives, the EU and all other relevant stakeholders are meant to work together to foster intercultural dialogue to ensure that the EU's cultural diversity is understood, respected and promoted. To do so, they should, for example, seek to enhance the cross-border mobility of artists and workers in the cultural sector and the cross-border dissemination of works of art. The second set of objectives focuses on the promotion of culture as a catalyst for creativity in the framework of the Lisbon Strategy for growth and jobs and its follow-up “EU 2020.”

Cultural industries are an asset for Europe's economy and competitiveness. Creativity generates both social and technological innovation and stimulates growth and jobs in the EU. Promotion of culture as a vital element in the Union's international relations is the third set of objectives. As a party to the UNESCO

Cultural rights still fall through the gap in the human rights' protection system.

12 The UNESCO Universal Declaration on Cultural Diversity was adopted unanimously in a most unusual context. It came in the wake of the events of September 11, 2001, and the UNESCO General Conference, which was meeting for its 31st session, was the first ministerial-level meeting to be held after those terrible events. It was an opportunity for States to reaffirm their conviction that intercultural dialogue is the best guarantee of peace and to reject outright the theory of the inevitable clash of cultures and civilizations. See <http://unesdoc.unesco.org/images/0012/001271/127162e.pdf> (last visited Dec. 15, 2010). On October 20, 2005, the UNESCO General Conference approved the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. See <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> (last visited Dec. 15, 2010)..

13 Article 2 (Definitions) of Fribourg Declaration on Cultural Rights, adopted in Fribourg on May 7, 2007, states: “For the purposes of the present Declaration: a. The term “culture” covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meaning they give to their existence and to their development; b. The expression “cultural identity” is understood as the sum of all cultural references through which a person, alone or in community with others, defines or constitutes oneself, communicates and wishes to be recognized in one's dignity; c. “Cultural community” denotes a group of persons who share references that constitute a common cultural identity that they intend to preserve and develop.”

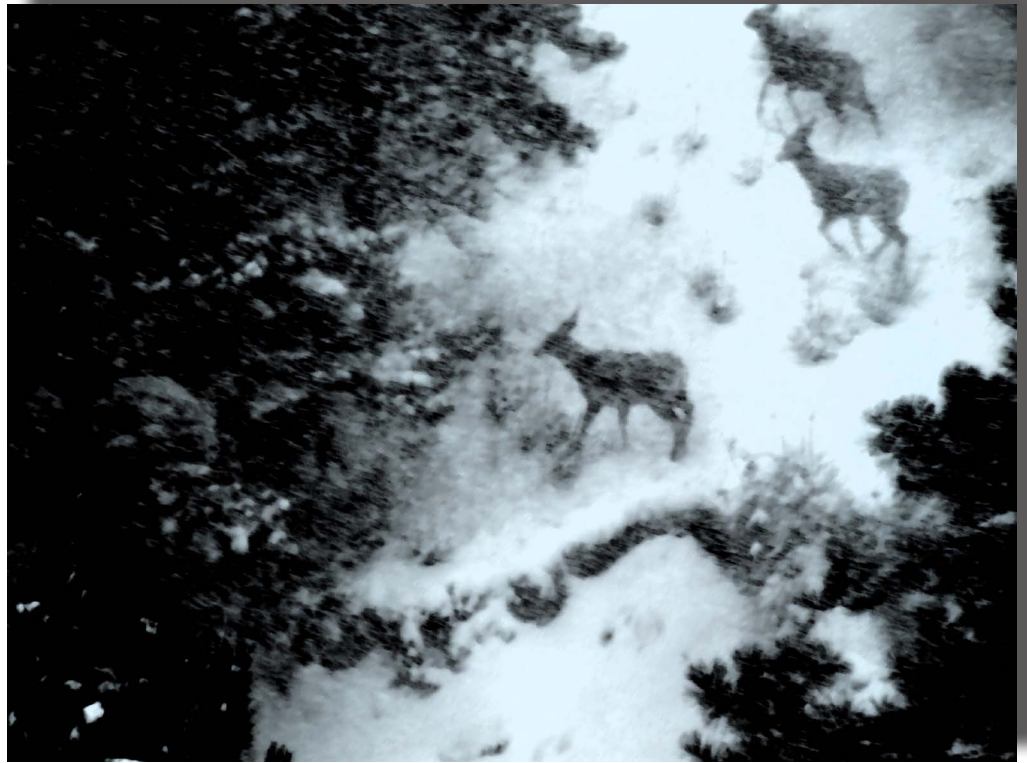
14 See <http://www.culturalpolicies.net/web/compendium-topics.php?aid=171> (last visited Dec. 15, 2010).



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Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, the EU is committed to developing a new and more active cultural role for Europe in international relations and to integrating the cultural dimension as a vital element in Europe's dealings with partner countries and regions.

Within this framework, the EU also strives to integrate culture and its related issues into its wider policies to ensure that due consideration to cultural issues is given in all its actions. Article 151.4 of the Maastricht Treaty 'mainstreams' culture into the broader policy-making framework. The following are examples of how this occurs. Projects supported under the EU's Citizenship programme promote dialogue between different cultures in Europe and support efforts to forge a common European identity. The link between education and culture is a thread running through the EU's educational policies. Culture plays a key role in European economies, and there are many opportunities for the cultural sector, particularly when the project contributes to the development and social cohesion of the territory where it is implemented to acquire financial support under the EU's Structural Funds. The rural development aspect of the Common Agricultural Policy has a cultural dimension under the 'Leader +' initiative to help rural communities make the best use of natural and cultural resources. Audiovisual works are a crucial channel for the transmission of our cultural, social and democratic values.¹⁵ Information technology has an important role in making



Elizabeth Dillinger, "Deer in Snow"

cultural information widely accessible.¹⁶ The Seventh Framework Programme for Research (FP7) also supports culture directly and indirectly through its various specific programmes, in particular in the realm of the social sciences and humanities. Last but not least, there is also a strong link between the promotion of culture and creativity in EU copyright and related rights legislation, as well as the rules governing state aid.¹⁷

Conclusion

We are likely to witness increasing legislative developments in museum, art and cultural law. The international culture community will need to be extra vigilant in keeping up in tracking these changes, and assessing their implications.

Michela Cocchi is a lawyer in Bologna, Italy specializing in art and cultural heritage law.

¹⁵ The Television without Frontiers Directive enables "business without frontiers" in the audiovisual sector, setting the conditions for the transmission across borders of television broadcasts within the EU and, thus, creating a legal framework for the free circulation of European audiovisual material. The MEDIA programme, launched in January 1991, was created to encourage the development of the European audiovisual industry. See http://europa.eu/legislation_summaries/audiovisual_and_media/124101_en.htm (last visited Dec. 15, 2010).

¹⁶ In August 2006, a Commission Recommendation on the digitisation and on-line accessibility of cultural material and digital preservation was adopted.

¹⁷ Within the EU framework, among the most recent initiatives, see Opinion of the European Economic and Social Committee on Unlocking the potential of cultural and creative industries (Green Paper), COM(2010) 183, Oct. 21, 2010.

Immunity from Seizure and Customary International Law: Recent German Case Law

by Matthias Weller

FROM October 17, 2009 to March 14, 2010 the State Museum (*Landesmuseum*) of the Federal State (*Bundesland*) of Baden-Württemberg, Germany, hosted the exhibition *Treasures of the Ancient Syria – the Discovery of the Kingdom of Qatna* to which the National Museum of Syria in Damascus lent two items from its collection. A victim of the terrorist attack of 27 August 1983 against the French Maison de France in Berlin took the occasion to institute proceedings for attachment of these items in order to secure the successful enforcement of a future judgment on claims for compensation for pain and suffering. The court of first instance rejected the motion for pre-judgment attachment.¹ On appeal, the Court of Appeal of Berlin (*Kammergericht*) confirmed the decision.² Since neither the National Museum of Syria as the lender nor the State Museum of Baden-Württemberg as the borrower had applied for a return guarantee granting immunity from seizure by virtue of an administrative decision by the competent authorities, the turning point of the decision was whether the loans by Syria are protected against seizure under the rules of customary international law.

Immunity From Seizure of Property Used for Public Purposes

The German Federal Constitutional Court (*Bundesverfassungsgericht*) is exclusively competent to assess the existence and scope of rules of customary international law under Article 100 (2) German Basic Law (*Grundgesetz*) for the German domestic legal order. The *Bundesverfassungsgericht* had previously ruled that seizure or any kind of attachment of property of a foreign state without that state's consent is inadmissible, if and insofar as the property in question serves public purposes of that state.³ Property serves public purposes if the property is used for *acta iure imperii*

including, in particular, the diplomatic representation of the foreign state,⁴ but also other public acts.⁵

The *Bundesverfassungsgericht* has acknowledged that the cultural representation of a foreign state in Germany constitutes a public purpose.⁶ The Federal Court of Justice (*Bundesgerichtshof*) held recently that the running of the Russian House of Science and Culture (*Russisches Haus der Wissenschaft und Kultur*) in Berlin by the Russian Federation may qualify as an *actus iure imperii* and that property used for the running of the House is used for public purposes, thereby immune from seizure or attachment by German authorities.⁷

In an earlier case, the Court of Appeal of Berlin (*Kammergericht*) had also held that cultural representation of a foreign state in Germany is a public purpose in the sense of state immunity law barring any kind of seizure or attachment of property used for this public purpose. That decision involved again the loan of cultural property by a foreign state, in this case by the State of Libya for the exhibition of its cultural treasures *The Libyan Legacy* in Berlin in 2001. A victim of the terrorist attack against the discoteque La Belle in Berlin on April 5, 1986 applied for pre-judgment measures against the objects loaned by Libya in order to secure successful enforcement of a future judgment

4 Bundesverfassungsgericht, decision of 12 April 1983 – 2 BvR 678/81, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 64, 1, para. 130 – *National Iranian Oil Company*; Bundesgerichtshof, decision of 04 October 2005 – VII ZB 8/05, Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts (IPRspr) 2005, Nr 91, S. 220, Ls. (*ratio*) no. 1. 5; Bundesgerichtshof, decision of 01 October 2009 – VII ZB 37/08, Neue Juristische Wochenschrift (NJW) 2010, p. 769, no. 20 – *Russisches Haus der Wissenschaft und Kultur*. On the latter decision, see Matthias Weller, *Case Note*, KOMMENTIERTE BGH-RECHTSPRECHUNG 304719 (LMK 2010).

6 Bundesverfassungsgericht, decision of 06 December 2006 – 2 BvM 9/03, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 117, 141, 155 – *Botschaftskontenpfändung, Argentinienanleihen*, para. 43.

7 Bundesgerichtshof, decision of 01 October 2009 – VII ZB 37/08, Neue Juristische Wochenschrift (NJW) 2010, p. 769, no. 20 – *Russisches Haus der Wissenschaft und Kultur*. For further discussion of this case, see Matthias Weller, *Case Note*, KOMMENTIERTE BGH-RECHTSPRECHUNG 304719 (LMK) 2010; Matthias Weller, *Vollstreckungsimmunität: Beweislast, Beweismaß, Beweismittel, Gegenbeweis und Beweiswürdigung*, RECHT DER INTERNATIONALEN WIRTSCHAFT 599 (2010).

1 Landgericht Berlin, decision of 04 February 2010 – 13 O 48/10.

2 Kammergericht Berlin, decision of 05 March 2010 – 18 W 2/10.

3 Bundesverfassungsgericht, decision of 13 December 1977 – 2 BvM 1/76, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 46, 342, Ls. (*ratio*) no. 8 – *philippinisches Botschaftskonto*.

Immunity from Seizure Under German Law (*cont'd*)

on his claims for compensation for pain and suffering.⁸

Customary International Law

This case law is by no means a German peculiarity but in line with customary international law. Article 21 *lit. d* and *e* of the United Nations Convention on Jurisdictional Immunities of States and Their Property of December 2, 2004⁹ provide:

*"The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c): (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale."*¹⁰

This Convention is not yet in force, however.¹¹ But its adoption by the UN General Assembly may be taken as a certain sign of overall acceptance,¹² which, of course, does not mean that Articles 21 *lit. d* and *e* thereby are turned immediately into rules of customary international law.

Other incidents of state practice support the view that a rule of customary international law is in fact emerging. In 2005, Switzerland stopped the seizure of 54 paintings with an estimated value of 1.3 billion Swiss Francs on the application by a Swiss businessman who sought to enforce an arbitral award against the Russian Federation. The paintings had been lent by the

State Pouchkine Museum in Moscow to the Fondation Pierre Gianadda in Martigny, Wallis, in Switzerland, to the exhibition *French Paintings from the Collection of the Pouchkine Museum*. The Swiss Government declared: "State cultural property is deemed to be public property that, as a matter of principle, must not be seized or attached."¹³ Further, the Tribunal de Grande Instance de Paris had already held in 1993 that victims of the Russian October Revolution cannot successfully apply for pre-judgment measures against the Russian Federation without a waiver of immunity by the Russian Federation when it comes to the attachment of works of art loaned by the Poushkin State Museum in Moscow and the State Hermitage of St. Petersburg to the Centre George Pompidou in Paris.¹⁴

Finally, a growing number of states have enacted municipal anti-seizure statutes granting immunity to loans from abroad by states (and private lenders) to exhibitions.¹⁵ The Belgium legislature, for example,

13 Swiss Government Department of Foreign Affairs (*Eidgenössisches Departement für Auswärtige Angelegenheiten*), Information of 16 November 2005, www.admin.ch/cp/d/437b6673_1@fwsrvg.html (last visited Oct. 31, 2010); see e.g. Matthias Weller, *Völkerrechtliche Grenzen der Zwangsvollstreckung – vom Botschaftskonto zur Kunstleihgabe*, DER DEUTSCHE RECHTSPFLEGER (Rpfleger) 2006, 364, 370; Kerstin Odendahl, *Immunität entliehener ausländischer staatlicher Kulturgüter*, AJP/PJA 2006, 1175 *et seq.*; Hansjörg Peter, *Les tableaux du Musée du Pouchkine de Moscou*, SCHULDREITREIBUNG UND KONKURS 70 (2006), S. 61 *et seq.*; Matthias Weller, *Freies Geleit für die Kunst – die Schweiz setzt einen Maßstab für Leihgaben im Völkerrecht*, FRANKFURTER ALLGEMEINE ZEITUNG (FAZ), Nr. 275, p. 35, Nov. 24, 2005.

14 Tribunal de Grande Instance (TGI) Paris, judgment of 05 March 1993, RG no. 6218/93; see e.g. Leila Anglade, *Anti-Seizure statutes in art law – the influence of "La Danse" on French law*, in Breen, LIBER MEMORIALIS PROFESSOR JAMES C. BRADLEY (Dublin 2001), pp. 3 *et seq.*; see also Ruth Redmond-Cooper, ART, ANTIQUITY & LAW 2006, 1 *et seq.*

15 See e.g. Matthias Weller, *Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the Liechtenstein Litigation*, VANDERBILT J. TRANS'L LAW 38 (2005), 997. For the German anti-seizure statute in section 20 Kulturgüterschutzgesetz (KultGSchG), see e.g. Matthias Weller, *Die rechtsverbindliche Rückgabezusage*, in Uwe Blaurock et al. (Hrsg.), FESTSCHRIFT FÜR ACHIM KRÄMER ZUM 70. GEBURTSTAG (DeGruyter-Verlag Berlin 2009), 721 *et seq.*; Matthias Weller, *The Safeguarding of Foreign Cultural Objects on Loan in Germany*, ART, ANTIQUITY & LAW 2009, 63 – 77 = Aedon – Rivista di Arte e Diritto online 2/2009, www.aedon.mulino.it; Erik Jayme, *Neue Entwicklungen im internationalen Kunstrecht*, in Pauer (Hrsg.), Kunst im Recht – 4. Fakultätstag der Rechtswissenschaftlichen Fakultät am 16. Mai 2003, Graz 2003, S. 13, 17 *et seq.*; Erik Jayme, *Das Freie Geleit*, Vorlesungen

8 Kammergericht Berlin, decision of 26 June 2002 – 9 W 176/02, Rechtsprechung des Kammergerichts (KGR) Berlin 2002, 356.

9 GA Res. 59/38, UN Doc. A/59/49.

10 For more detailed information on these provisions see *Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries*, ILC-YEARBOOK 1991 VOL. II, PART II, pp. 12 *et seq.*, in particular pp. 58 *et seq.*

11 According to its Art. 30 (1), the Convention enters into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. Currently, there are 28 signatory states and 10 contracting states, UN Treaty Collection, Status of the UN Convention on State Immunity and Their Property, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-13.en.pdf> (last visited Oct. 31, 2010).

12 Kerstin Odendahl, *Immunität entliehener ausländischer staatlicher Kulturgüter*, AKTUELLE JURISTISCHE PRAXIS/PRATI-QUE JURIDIQUE ACTUELLE (AJP/PJA) 2006, 1175, 1180.



Immunity from Seizure Under German Law (*cont'd*)

expressly stated in the legislative materials that the enactment of the municipal statute only “confirms” and “reinforces” immunity as already granted by other sources of law.¹⁶

Conclusion

It seems possible by now to assume a rule of customary international law granting immunity for works of art or cultural property by foreign states to exhibitions in the host state if the exhibition serves the purpose of cultural representation by the foreign state.¹⁷ The new element of this rule merely lies in the acknowledgment that the loan of works of art and cultural property con-

stitutes one of other modes of cultural representation by a foreign state in the host state.¹⁸ Once this small step is taken, it is clear that property used for the purpose of cultural representation falls within the general rule of customary international law that property used for *acta iure imperii* of a state cannot be seized or attached while present on the territory of another state. The practical importance of this rule will continue to grow in the future.¹⁹

Dr. iur. Matthias Weller, Mag.rer.publ., is a Senior Research Assistant (*Wissenschaftlicher Assistent*) at the Institute for Foreign and Private International and Commercial Law (www.ipr.uni-heidelberg.de), University of Heidelberg, and Co-Chair of the German Institute of Art and Law Heidelberg (www.ifkur.de). He can be contacted at: weller@ipr.uni-heidelberg.de.

und Vorträge im Ludwig-Boltzmann-Institut für Europarecht Bd. 11 (Wien 2001).

16 **Chambre des Représentants de Belgique, 27 avril 2004**, *Projet de Loi modifiant le Code judiciaire en vue d'instituer une immunité d'exécution à l'égard des biens culturels étrangers exposés publiquement en Belgique*, Exposé des Motifs, DOC 51 1051/001, p. 4 : « Rien ne fait obstacle à ce que cette immunité soit consacrée et renforcée dans une disposition de droit positif » ; see also Frédéric Dopagne, *Immunité d'exécution et biens culturels étrangers : à propos de l'article 1412ter du Code judiciaire*, JOURNAL DES TRIBUNAUX 2005 at 2.

17 See, e.g., Andrea Gattini, *Immunity from Measures of Constraint for State Cultural Property on Loan*, in BUFFARD ET AL. (HRSG.), INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION, Festschrift in Honour of Gerhard Hafner at S. 421, 437 (Leiden/Boston 2008); Kerstin Odendahl, *Immunität entliehener ausländischer staatlicher Kulturgüter*, AKTUELLE JURISTISCHE PRAXIS/PRATIQUE JURIDIQUE ACTUELLE (AJP/PJA) 2006, 1175, 1182; Sabine Boos, KULTURGUT ALS GEGENSTAND DES GRENZÜBERSCHREITENDEN LEIHVERKEHRS 240 (Berlin 2006); Matthias Weller, *Völkerrechtliche Grenzen der Zwangsvollstreckung – vom Botschaftskonto zur Kunstleihgabe*, DER DEUTSCHE RECHTSPFLEGER (RPFLEGER) 2006, 364, 370; Matthias Weller, VAND.J.TRANSN'L. L. 38 (2005), 997, 1023; Erik Jayme/Matthias Weller, IPRax 2005, 391–392; Jérôme Candrian, L'IMMUNITÉ DES ETATS FACE AUX DROITS DE L'HOMME E À LA PROTECTION DES BIENS CULTURELS 739 (Zurich 2006); but compare Isabel Kühl, DER INTERNATIONALE LEIHVERKEHR DER MUSEEN 28 (Cologne 2004). As a matter of his PhD thesis the issue is being analysed by Nout van Woudenberg, see, e.g., *Is the Cultural Property of State Immune from Seizure Under Customary Law?*, American Society of International Law, CULTURAL HERITAGE & ARTS REVIEW, VOL. I (2010) [see also page 16 of this issue, Ed.].

18 See also Article 3 (1) (e) of the Vienna Convention on Diplomatic Relations of 18 April 1961, UNTS Vol. 500, pp. 95 *et seq.*: “The functions of a diplomatic mission consist, inter alia, in promoting friendly relations between the sending State and the receiving State, and developing their ... cultural ... relations”. See also Article 4 (2) (d) of the Resolution of the Institut der Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, Session of Basel 1991: “The following categories of property of a State in particular are immune from measures of constraint: property identified as part of the cultural heritage of the State, or of its archives, and not placed or intended to be placed on sale.”

19 See e.g. International Court of Justice, Case Concerning Jurisdictional Immunities (*Federal Republic of Germany v. Italian Republic*), Application of FRG 2008, p. 12

(<http://www.icj-cij.org/docket/files/143/14923.pdf#view=FitH&pagemode=none&search=%22Germany%22>, (last visited Oct. 31, 2010). Germany complains about a violation of immunity in connection with the premises of the Villa Vigoni in Italy, on which measures of constraint were laid by Italy in respect to claims arising from war crimes during the Second World War, although, as Germany contends, the premises are used for cultural representation. On this proceeding see e.g. Julia Schaarschmidt, *Die Reichweite des völkerrechtlichen Immunitätsschutzes – Deutschland v. Italien vor dem IGH*, in Tietje (ed.), BEITRÄGE ZUM EUROPA- UND VÖLKERRECHT VOL. 5 (Halle-Wittenberg 2010) p. 38 *et seq.*

Book Review

Bonnie Czegledi, Crimes Against Art: International Art and Cultural Heritage Law

by Jeana Lawson

BONNIE Czegledi's *Crimes Against Art: International Art and Cultural Heritage Law* (Routledge 2010) provides a basic introduction to the area of art and cultural heritage law. As an artist and attorney, Czegledi knows something about art and law. The book offers a glimpse into buying, selling, theft, recovery, coveting, and destroying of art and cultural property. Perhaps due in part to the intrigues of the subject, the book reads as much like an action thriller as a non-fiction book.

The book addresses various aspects of transactions in art and cultural heritage. The author analyzes the motivations that each market player brings to the transaction, and few, if any, come out wearing halos.

The book devotes two chapters to the subject of looting. Although Czegledi discusses war-time looting, including the vast Nazi-looting machine, she notes that looting isn't limited to the museums and galleries in war-torn countries. In her view, a vibrant market for cultural artifacts encourages fortune seekers and treasure hunters to take everything they can carry from unprotected archaeological sites. Looting also impacts countries when a natural disaster strikes, like the recent earthquake in Haiti.

Czegledi emphasizes the broad scope of the problem of trafficking in stolen art and items of cultural heritage. It is a lucrative undertaking, ranking third in the world behind drug and arms trafficking. She conducts much of her account as a history lesson, defining cultural property and outlining the major contemporary art heists of the twentieth century. While some thefts were carefully planned, others were crimes of opportunity. These historical cases, many of which remain unresolved, highlight the gravity of the problem. Even if they are recovered, many works are damaged in the course of being stolen, some being cut from frames, or from improper handling and storage.

In a later chapter, Czegledi similarly recounts the stories of famous forgers and their ability to confuse and inflate the world art market. The author instructs as to the difference between fakes and forgeries. Fakes are often reproductions made for educational purposes, while forgeries are made with the intention of being passed off as original works. Both can have a negative

impact, as even works created without intent to deceive are sometimes later passed off as originals. She notes that the common thread amongst famous forgers is a frustration with their own careers and/or a desire to fool or otherwise embarrass the "experts" in the field.

The challenge of authenticating and valuing works of art is complicated by the subjective nature of the evaluations. The author outlines various methods that can be used to date the materials that make up a particular work, whether it is a painting, pottery, glass or other medium. She points out that while the materials themselves can be dated in this way, sometimes items made in that time frame are also fakes, used to school other artists in the style of the master. Ultimately, the valuation is subjective and relies on the expertise of appraisers. Experts can change their minds, and this complicates the valuation process even more.

Czegledi provides a broad account of the patchwork of laws, treaties and conventions enacted to govern the international movement of art. Ms. Czegledi explains, in laymen's terms, the strengths and weaknesses of the current system of laws. She points out the shortcomings she sees in the current enactments and offers her point of view on how they can be improved.

Not content to merely recount the story, the author does her best to call to action those harmed by looting, trafficking, fakes and forgeries. She calls on buyers to exercise due diligence and provides a checklist that gives a framework to enable collectors to collect and acquire art from rightful owners. She encourages museums to disclose works in their collection with questionable provenance. She points out problem areas in legislation and enabling statutes that should be amended to capture those criminals who slip through the cracks. It will take all these various groups working together to solve the problems associated with trafficking in art.

This book provides a layperson with a broad understanding of the problems associated with illegal trafficking in works of art and items of cultural heritage. It defines the issues, the state of the current law and makes a strong case for the safeguard of the world's vulnerable cultural heritage.

Jeana Lawson is a student at Salmon P. Chase College of Law, Northern Kentucky University.



Art & Antiquities Trafficking News Notes

by Mark Durney of Art Theft Central (www.arttheftcentral.blogspot.com)

and Melissa A. Arnold, Elizabeth Chaulk, Thomas J. Dall, Virginia Fox, Jerrilynn Gundrum, & Laurence Haas, who are students at the Salmon P. Chase College of Law at Northern Kentucky University.

May 2010

☞ Paintings of Picasso, Matisse, Leger, Braque, and Modigliani were stolen from the Musée d'Art Moderne in Paris. Early reports indicated that the lone thief used a motorcycle to flee the scene and may have had help from a museum insider. The total value of the stolen artwork is estimated to be \$100-150 million.

☞ Dallas art collector Marguerite Hoffman filed suit against David Martinez, a Mexican financier, for failing to keep secret her sale to him of a Mark Rothko painting in 2007.

☞ More than \$21 million was raised in a forced sale of works from CNET co-founder Halsey Minor's collection. The U.S. District Court for the Southern District of New York ordered the sale to pay a delinquent \$21.6 million loan to ML Private Finance, an affiliate of Merrill Lynch. The New York Times reported that auction house Phillips de Pury, in order to compete with Christie's for the sale, agreed to give eight percent of its buyer's premium back to ML Private Finance.

☞ The *New York Times* reported that the Museum of Modern Art purchased a fifty percent ownership interest in Matthew Barney's Drawing Restraint Archive. The other half is owned by The Emmanuel Hoffmann Foundation in Basel, Switzerland. The museum's chief curator for painting and sculpture stated that this arrangement shares the financial burden while creating more visibility for the art through a second venue.

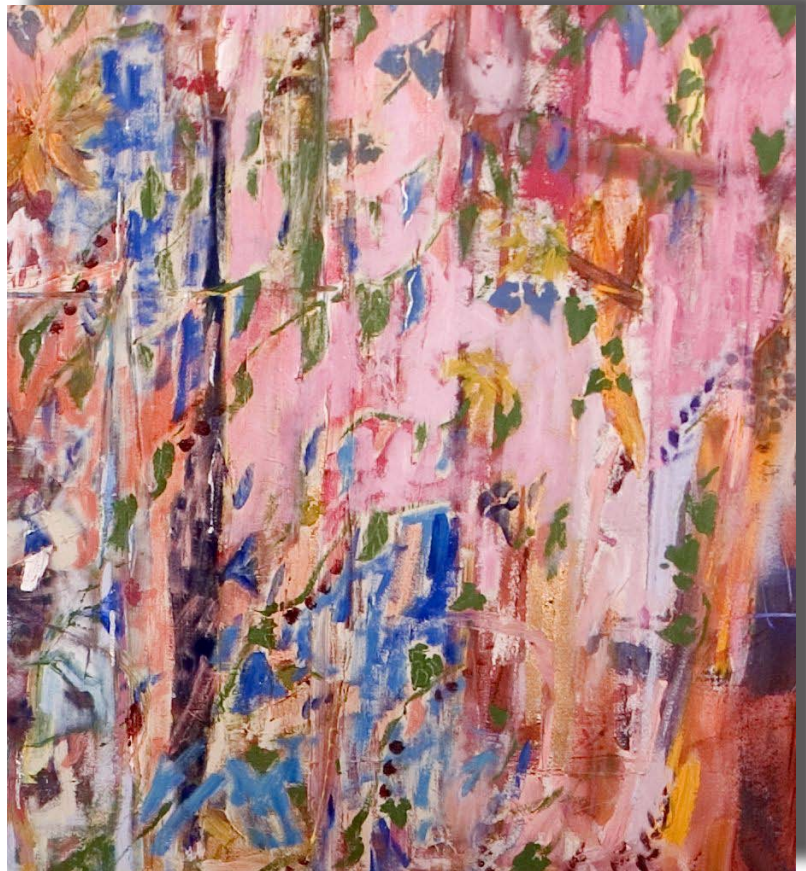
☞ Hit hard by budget cuts, the United Kingdom's Department of Culture, Media and Sport announced that Arts Council England would have to cut £19 million from its budget by March 2011.

☞ Jeanne Marchig, the former owner of a drawing now known as *La Bella Principessa*, sued Christie's for negligence and breach of fiduciary duty. Christie's sold the drawing for \$21,850 in 1998 but a short time later, a Leonardo Da Vinci scholar attributed the drawing to Da Vinci and the value skyrocketed to \$150 million. Marchig alleges that Christie's should have taken greater care in valuing the drawing before its auction. Others, however, continue to question whether it actually is a Da Vinci work.

☞ Officials arrested two farmers in Greece who were discovered loading two 2,500-year-old Kouros, which were newly discovered in the Peloponnese region of Greece, onto a truck. According to *The Associated Press*, the farmers planned to sell the pair of statues for €10 million.

☞ The U.S. National Archive Office of the Inspector General ("OIG") launched a *Facebook* page, which it hopes will aid in the recovery of items belonging to the National Archive. The page will contain features such as a "Missing Item of the Month," which the OIG hopes will encourage the public to help locate and recover missing items.

☞ Paintings stolen from a private collection last November were recovered in Buenos Aires. The 74 recovered paintings, including works by Antonio Berni, Raul Soldi and other international artists, are valued at \$4 million.



Bonnie Czegledi, "France"
www.czeglediartlaw.ca

Art & Antiquities Trafficking News Notes (*cont'd*)

June 2010

- ☞ A copy of Caravaggio's *The Taking of Christ*, which was stolen in 2008 from the Museum of Western and Eastern Art in Odessa, Ukraine, was recovered from three Ukrainians and one German in Germany. Some news groups have reported that the recently recovered painting is the original, while most sources claim the original signed work is in the National Gallery of Art in Dublin, Ireland. Early reports indicate that the painting was cut out of its frame and has many cracks and creases across it, possibly from being rolled or crumpled up for easy transport.
- ☞ The *New York Times* reported that Italian officials have initiated an investigation of J. Michael Padgett, an antiquities curator for Princeton University, for allegedly illegally exporting and laundering Italian archeological artifacts. It is claimed that the items were acquired from a former New York antiquities dealer, Edoardo Almagià, who is alleged to have obtained pieces illegally and resold them to several American institutions. In a separate and amicable agreement, Princeton University agreed to return eight items to Italy in 2007.
- ☞ Italian prosecutors called for the return of three Italian antiquities allegedly linked to the Medici Dossier; two of the three were auctioned by Christie's on June 10 for \$27,500.
- ☞ The International Council of Museums published a Red List of Cambodian Antiquities at Risk.
- ☞ The Fresno Metropolitan Museum has agreed to return six Ansel Adams photographs to his family in exchange for other prints. The bankrupt museum planned to auction the photographs to repay creditors, but will auction the other prints instead.
- ☞ The Meadows Museum at Southern Methodist University learned that three works from its collection appear to have been stolen from Jewish families by the Nazis.
- ☞ Two British families returned antiquities to Libya. The antiquities, including coins, a lamp and mosaic fragments, were removed by soldiers during the British protectorate and subsequently retained by the soldiers' families.
- ☞ The Getty Museum in California has been sued by the Western Prelacy of the Armenian Apostolic Church of America (this entity is distinct from the Armenian Apostolic Church, based in Armenia and led by His Holiness Karekin II, which has not asserted any claim to the Getty's canon tables). The church alleges that the museum illegally bought seven pages of a gospel dating from 1256, which it alleges were taken unlawfully sometime in 1947-48.
- ☞ The *New York Times* reported that looting in Iraq has again increased. Though a new antiquities police force was supposed to number 5,000 Iraqi officers to replace withdrawing American soldiers, only 106 officers were in place by June 2010. Excavations have increased dramatically while thousands of archeological sites are unprotected. The U.S. government has previously awarded \$13 million to help fund the Iraqi Cultural Heritage Project.
- ☞ The sarcophagus of Tang Dynasty empress Wu Huifei (AD 699-737) has been returned to China. The sarcophagus was smuggled out of China in 2006 and sold to an American businessman for \$1 million. After three rounds of negotiations, the businessman returned the 27 ton coffin unconditionally.
- ☞ The Fayetteville Museum of Art in North Carolina closed with more than \$500 million in outstanding debt.
- ☞ The U.S. returned seven sculptures to Cambodia that were previously smuggled out of Cambodia and recovered in 2008.

July 2010

- ☞ Smugglers looted a Sassanid structure located in the Baghmalek region in northeast Khuzestan Province, Iran.
- ☞ Police are investigating the theft of 500-year-old idols of Ashtadhatu and Radha-Krishna, stolen from the Charbhuj temple in Muhana, India. According to *The Times of India*, the heist took place between the hours of midnight and 3 a.m, but was not discovered until a priest entered the temple a few hours later. These idols were also stolen in 2008 but were located within a month of that theft.
- ☞ After over 20 years of negotiations outside of court, the heirs of Hungarian banker and art collector Baron Mor Lipot Herzog have filed suit in the U.S. District Court seeking restitution of art looted by Nazis from Hungary and some of its museums. The heirs are said to have one of the world's largest unresolved Holocaust art claims with at least \$100 million at issue in this lawsuit alone. The litigation is being funded by the proceeds from the auction of one



Art & Antiquities Trafficking News Notes (*cont'd*)

of the paintings that Germany had returned to the heirs. The Herzog heirs have also had a case pending in Russia since 1999 seeking the return of works of art.

☞ Hamas authorities foiled an attempt to smuggle ancient antiques from the Gaza Strip to Israel.

☞ In Creteil, France, twelve men were sentenced for their role in a forgery scam that took place from 1997 to 2005. The men sold approximately 100 forgeries of paintings by world-renowned artists such as Chagall, Leger and Picasso. Jurors sentenced Pascal Robaglia and painter Guy Ribes to two years in jail and a fine of \$1.16 million.

☞ Durham University has renewed its appeal for anyone with information regarding the 1998 theft of six historic books and manuscripts from its library to come forward. The University hopes to reunite the books, valued at around €160,000, with the library's exhibit charting the progress of English literature.

☞ At a press conference in Rome's Colosseum, the Italian authorities displayed 337 antiquities repatriated from Switzerland, including Greek urns and vases, pieces of frescoes, bronze statues, and marble sculptures produced between the eighth century BC and the fourth century AD. The items were recovered by Swiss authorities and the Carabinieri del Reparto Operativo Tutela Patrimonio Culturale, Italy's police force specializing in recovering stolen antiquities. The items, valued at more than €15 million, were found in 2008 in a warehouse in the free port of Geneva, along with other antiquities—20,000 in all.

☞ The National Art Gallery in Bulgaria revealed its new exhibit in memory of Bulgarian artist Nikola Taney. The exhibit includes the painting *Spring in Sofia*, which was recently recovered after being stolen eleven years ago, along with 27 other paintings, from Taney's Museum House. This painting was discovered when a collector brought it to the gallery; however, the other 27 paintings remain missing.

☞ Raymond Scott was found guilty of handling a stolen folio of Shakespeare's plays and sentenced to eight years in prison.

☞ Simon-Whelan, a London-based film-maker, has filed suit against the Andy Warhol Foundation for the Visual Arts and the Andy Warhol Art Authentication Board for its failure to authenticate what he claims is a 1964 Warhol self-portrait. The lack of authentication prevented a 2001 sale of the painting. He is asking for \$20 million in a suit that the Foundation claims is a sham.

☞ In Seoul, South Korea, police recovered 1200 illicit artifacts, including books written by Sukjong, scrolls, and folding screens, from three major antique shops.

☞ Five years in state prison was the sentence handed out to Edward King III, former owner of Generations Fine Art Gallery, for his involvement in sales tax fraud and grand theft resulting from the sales of art consigned at his gallery located in Yountville, California. The charges against him were for the years 2002 to 2006 with the victims' monetary losses ranging from \$2,200 to \$77,000.

☞ Mexican authorities recovered 144 original pre-Columbian pieces and colonial religious works that had been stolen from cultural institutions and Mexican churches.

☞ After a twelve-year battle over *Portrait of Wally* by Egon Schiele, the heirs of Lea Bondi Jaray, the U.S. government and the Leopold Museum in Vienna, Austria, announced a \$19 million settlement. The painting was stolen by the Nazis during World War II and was on display briefly at The Museum of Jewish Heritage in New York before returning permanently to the Leopold Museum.

August 2010

☞ The U.S. Court of Appeals for the Fifth Circuit applied Louisiana's prescriptive laws in rejecting Claudia Seger-Thomschitz's claim to *Portrait of Youth* by Oskar Kokoschka, which may have been the subject of a forced sale in 1939 by the family of Seger-Thomschitz's deceased husband.

☞ A recently discovered illegal excavation, which took place in the Zeus Karios area in Milas, Bodrum, revealed the large tomb stone of King Hekataios.

☞ The Museum Wiesbaden has returned a seventeenth-century painting to the heirs of its rightful owners. Double *Portrait of a Young Couple* by Pieter de Grebber was confiscated by the Nazis in the 1930s.



Art & Antiquities Trafficking News Notes (*cont'd*)

- ☞ After nearly three weeks of monsoon rains, 20 million people in Pakistan were devastated by the worst floods they have faced in eighty years. In addition to destruction of crops, infrastructure, and towns and villages, ancient archeological sites have also been threatened by flood waters in the southern province of Sindh. Moenjodaro, a UNESCO World Heritage Site, and Aamri, two 5000-year-old archeological sites, are in danger, according to Karim Lashari, chief of the provincial antiquities department.
- ☞ Greece has made a formal request to the U.S. to consider imposing restrictions on archaeological material and antiquities that have their origins in Greece, including coins.
- ☞ Germany returned 23 Russian icons that date from the eighteenth and nineteenth century and were stolen from private homes, a church near Yaroslavl and a museum in the region of Arkhangelsk.
- ☞ Sussex (UK) police charged a man with the theft of £1 million worth of antiques from Firle Place, a historic manor near Leeds, in July 2009. The stolen antiquities, which include pieces of Sevres porcelain and historical vases, have not been recovered.
- ☞ Two middle-aged men were arrested while trying to sell two icons from the late eighteenth century, which were stolen from a Byzantine Church in the region of Kouvaras, Aetoloakarnania Prefecture in central Greece.
- ☞ Thieves stole *Poppy Flowers* by Vincent van Gogh from the Mahmoud Khalil Museum outside of Cairo, Egypt. The Egyptian business tycoon Naguib Sawiris offered a \$175,000 reward for information leading to the recovery of the painting. Investigators later discovered that 30 of the museum's 47 surveillance cameras were not working and that its guard staff had been reduced from 30 to nine in recent months.
- ☞ Iraqi authorities are demanding that Israel return an antique Torah scroll which was smuggled into Israel in the early 1950s.
- ☞ An antiques dealer from England was jailed for handling a copy of the first folio of Shakespeare's work that had been removed from the library of Durham University.
- ☞ *The Burial* by Candido Potinari was recovered in Rio de Janeiro. The painting was previously taken from the Contemporary Art Museum in the city of Olinda, Brazil.
- ☞ Judge Alvin K. Hellerstein issued an order denying *The Associated Press's* motion for sanctions over artist Shepard Fairey's use of a photograph by Manny Garcia in creating the Obama *Hope* poster.
- ☞ A 74.85-ounce gold bar worth \$500,000 and recovered by the shipwreck salvor Mel Fisher was stolen from a museum in Key West, Florida.
- ☞ Salvador Dali's sculpture *Lady with Drawers* was stolen from the Belfortmuseum in Brugge, Belgium.
- ☞ A bronze statue by Neyland Brunel was stolen from its plinth in Thompson's Park, Canton, Cardiff, Wales.
- ☞ Questions are being raised about the authenticity of a box of negatives purchased at a garage sale in Fresno, California. A team of experts previously concluded "beyond a reasonable doubt" that the negatives, which were purchased for \$45, were taken by Ansel Adams.
- ☞ A large Roman-era settlement has been discovered in Italy with the aid of aerial photos taken during a helicopter reconnaissance flight conducted by the Carabinieri and officials from the Italian Ministry of Culture's archaeological service as part of their regular monitoring of archaeological sites for possible looting.
- ☞ Italian police seized more than 500 fake works of art and arrested 12 people in connection to a forgery ring that cost unsuspecting buyers £7.2 million.
- ☞ A sketch by Henry Moore and two oil paintings were stolen from a gallery in south Worcestershire, England.

September 2010

- ☞ The Israel Museum has restituted a Paul Klee drawing to the estate of the Jewish art collector after new provenance research demonstrated it was confiscated by the Nazis when he fled to England in 1937.
- ☞ The U.S. Court of Appeals for the Second Circuit remanded *Bakalar v. Vavra* and ordered a new trial, finding that the trial judge erred in choice of law and burden of proof analysis, which led to misinterpretation of facts. Judge Korman's concurrence clarified how the facts supported the allegations made by the heirs of Fritz Grunbaum, who



Art & Antiquities Trafficking News Notes (*cont'd*)

owned the drawing and a significant art collection before being deported to Dachau from Vienna in 1938, that the painting was looted by the Nazis.

—A work of art by the popular graffiti artist Banksy was removed from the storage container it decorated on a beach in Dungeness, England.

—A three-year audit of Russia's national collections found that 242,000 works were missing from museums across the country.

—The paintings *Modern Painting with Yellow Interweave* by Roy Lichtenstein and *Figures dans une structure* by Joaquin Torres-Garcia, which were once owned by convicted Brazilian banker Edemar Cid Ferreira, were returned to Brazilian officials.

—A missal that was acquired by a British soldier from a secondhand bookseller in Naples in 1944 and subsequently bought by the British Museum at an auction in 1947 was the first item to be returned under the Holocaust (Stolen Art) Restitution Act 2009.

—The *Art Loss Register* recovered the painting *Seascape with Ruined Arch* by Charles Lacroix for Hartford, Connecticut's Wadsworth Atheneum. It was reported stolen in December 1980.

—The State Department's Cultural Property Advisory Committee (CPAC) was considering the establishment of a new Memorandum of Understanding with Greece intended to reduce looting and its destructive effects. The request would cover undocumented archaeological objects and ethnological material from Greece dating from the Neolithic Period through the mid-eighteenth century.

—A German court ordered the repatriation of priceless Cypriot treasures, stolen from the Turkish-occupied northern portion of Cyprus.

—The Democratic Republic of the Congo ratified the Convention on the Protection of the Underwater Cultural Heritage.

—In Nelsonville, Ohio, law-enforcement officers engaged in staged artifact-looting exercises to help educate them on how to handle suspected looting cases violating the Archaeological Resources Protection Act.

—The U.S. returned 542 works of art and cultural objects were returned from the U.S. to Iraq. The pieces returned consisted not only of ancient artifacts, such as a 4,400-year-old statue of King Entemena of Lagash looted from the National Museum and 362 cuneiform clay tablets that were smuggled out of Iraq before the invasion, but also more recent items, such as a chrome-plated AK-47 with a pearl grip bearing the image of Saddam Hussein. While the repatriation of the relics was celebrated, questions were raised about Iraq's ability to protect the pieces and whether the antiquities would be caught in a "revolving door" of illegal trading. For example, 632 other cultural objects returned by U.S. forces last year are now missing.

October 2010

—Belgium and Georgia ratified the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

—The U.S. and Nicaragua extended the Agreement to Protect Archaeological Heritage of Nicaragua.

—Governor Schwarzenegger of California signed Assembly Bill 2765, which modifies California's statute of limitations requirements in art theft cases in favor of the original owner. The new law requires actual notice and doubles the length of time allowed between actual discovery and commencement of the cause of action from three to six years. It also includes a broad definition of the term "duress." Although the new standard would apply only to art in museums and galleries in California, it could pave the way for more state-level reform.

—The Solicitor General has been asked by the U.S. Supreme Court to submit a brief on the issue of whether states can enact more permissive limitations rules when they may conflict with the foreign affairs doctrine in the *Von Saher* case (see earlier article on California Bill AB 2765)

—The U.S. Court of Appeals for the First Circuit ruled that Claudia Seger-Thomschitz's claim to recover *Two Nudes (Lovers)* by Oskar Kokoschka was time-barred under Massachusetts' statute of limitations. Seger-Thom-



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schutz is the sole surviving heir of Oskar Reichel, who sold the painting to Otto Kallir after the 1938 Anschluss of Austria. Like the Fifth Circuit in *Dunbar v. Seger-Thomschitz*, No. 09-30717 (5th Cir. Aug. 20, 2010), the First Circuit rejected Seger-Thomschitz's argument that federal law should preempt state-law statutes of limitations in cases related to Nazi-confiscated art.

☞ Police in Landskrona, Sweden, recovered three paintings that had been stolen from Malmö Art Museum. The museum's administration was not aware of the theft.

☞ Criminal charges against Marion True, a former Getty museum antiquities curator accused of illicitly acquiring stolen objects, were dropped by a judge in Italy who ruled that the statute of limitations had expired in the case. Charges are still pending against Robert Hecht. According to Hecht's attorney, the statute of limitations as to the claims against him expires in July 2011.

☞ Eleven Mahmoud Khalil Museum officials named as suspects in the theft of a Vincent van Gogh painting from the Cairo museum, including Egyptian deputy culture minister Mohsen Shaalan and the museum's director, Reem Bahir, were convicted of negligence and sentenced to three years in jail.

☞ *The Associated Press* reports that according to Egypt's chief archaeologist, Zahi Hawass, the U.S. will return a number of sarcophagi smuggled out of Egypt 50 years ago. U.S. authorities seized the sarcophagi on American soil and intended to return them to Egypt within two weeks of the discovery. Hawass lauded the U.S. as the "first country in the world that cooperated with Egypt on the return of antiquities."

☞ *The Art Newspaper* reported that California's National Native American Graves Protection and Repatriation Act (Cal NAGPRA) has been effectively quashed by a lack of state funding.¹ Cal NAGPRA was enacted in 2001 in an attempt to force California institutions with large Native American collections to return objects to their culturally affiliated descendants of both federally and non-federally recognized tribes but has been ineffective because of a lack of money.

☞ Robert B. Knowlton, a sixty-six-year-old resident of Grand Junction, Colorado, pleaded guilty in U.S. District Court to misdemeanor charges for selling an illegally obtained Native American artifact. The sale was uncovered in a federal "sting" operation. Knowlton's previous indictment in connection with the sale was dismissed in light of the guilty plea.

☞ Brandon Laws pleaded guilty to a reduced charge for artifacts trafficking, admitting in U.S. District Court that in 2008 he took a bead from a tribal ruin in San Juan County, Utah.

☞ Spain has sent an armada into its coastal waters to seek out hundreds of shipwrecks in an attempt to head off a U.S. marine exploration firm which it accuses of plundering Spanish property. The area is suspected to contain over 100 shipwrecks and is considered to be one of the world's richest hunting grounds for treasure seekers.

☞ Antiquities, including a bronze statue, were seized in Algeria. According to David Gill of *www.lootingmatters.blogspot.com*, the statue may be the Roman portrait of Marcus Aurelius which was previously stolen from a museum in Algeria.

☞ The *Crosby Garrett* helmet, a well-preserved Roman parade helmet complete with fine facial features on its mask, sold for £2.28 million. It was allegedly discovered with a metal detector in Crosby Garrett, Cumbria. The finder and land owner were not willing to offer the artifact directly to the Tullie House museum and it was sold before it could be scientifically examined. Roger Bland, head of the Portable Antiquities Scheme, suggests that the sale of the helmet exposes gaps in the treasure law. A review of this law was discussed three years ago, but has not yet occurred.

☞ Raphael Golb has been found guilty of 30 counts against him, including identity theft, forgery, and harassment after using online aliases to harass and discredit his father's detractors in academic debate over the origins of the *Dead Sea Scrolls*.

☞ Lau Chun-man has been fined more than \$350,000 for stealing a hand-made Italian violin which dated from 1838. The violin was on loan from the Chi Mei antique instruments museum in Tainan, Taiwan, when it was taken

1 See Marisa Mazria Katz, *The End of Cal Nagpra?*, THE ART NEWSPAPER, Oct. 11, 2010, <http://www.theartnewspaper.com/articles/The-end-of-Cal-Nagpra/21690>.



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from a musician. The musician reportedly fell asleep on the Star Ferry's five-minute Victoria Harbour crossing after playing a concert at the Hong Kong Cultural Center in Tsim Sha Tsu.

—A discussion between Chinese Premier Wen Jiabao and Greek Prime Minister George Papandreou took place in Athens, Greece, regarding the return of stolen antiquities and cultural treasures to their country of origin. Wen Jiabao pledged to support Greece's demand for the Parthenon Marbles that are on display in the British Museum in London.

—Egypt and China signed a cooperation deal on the protection of heritage and cultural property intended to help fight theft and return antiquities which were smuggled out of both countries. The deal forbids exportation, importation, or transfers of ownership of cultural properties and gives the countries the right to ask for its stolen pieces according to formal and diplomatic channels without violating local laws.

—Francesco Bandarin, the director of UNESCO's World Heritage Center, stated that heritage relic trafficking is getting worse, international efforts to crack down on the trafficking are radically insufficient, and the market is completely out of control. He stressed the need to strike a balance between the development of tourism and protection of heritage sites and is calling for a grass roots movement to protect cultural heritage from the bottom up.

—The Holocaust Claims Conference, working with the technical support of the U.S. Holocaust Memorial Museum, has digitized the records of the Einsatzstab Reichsleiter Rosenberg, including index cards, shipping inventories, and other archival materials. The resulting database "Cultural Plunder by the Einsatzstab Reichsleiter Rosenberg: Database of Art Objects at the Jeu de Paume" can be accessed at www.errproject.org/jeudepaume.

—An audit of the Pennsylvania Historical and Museum Commission's collections found that 1,800 historic artifacts cannot be located or are considered missing.

—An untitled painting by Juan Gris that was stolen in 2004 was recovered by the FBI and returned to its owner.

Corrections (by the Editor) to Last Edition:

—An item at the bottom of page 37 and the top of page 38 of the last issue refers to a *Los Angeles Times* article about papers disclosed at Marion True's trial suggesting that J. Paul Getty was "troubled by the questionable legal status of the [Getty Bronze]." No evidence about the Getty Bronze was actually introduced at Dr. True's trial. According to the J. Paul Getty Trust, Dr. True joined the Getty Museum staff in 1982, years after the acquisition of the Bronze, and its purchase was never an issue in her trial. Although it is true that the *Times* ran a story referring to alleged doubts about the legality of the Bronze acquisition, the *Times* was obliged to run a correction: neither the 1976 letter nor the 1975 television program to which the article referred made any reference to the Getty Bronze. Nor did Mr. Getty ever express concern about the legality of his (unsuccessful) attempts to purchase the Bronze. According to his former lawyer's sworn statement, Mr. Getty tried to buy the Bronze, which was publicly offered for sale in Germany, only after a review of the statue's provenance and applicable law was conducted.

—An item on page 39 states that an Italian judge rejected an appeal regarding an ancient Greek statue. The case reported was not in fact an appeal, but an order by an Italian court in Pesaro, Italy on February 11, 2010 for the seizure of the Greek bronze *Statue of a Victorious Youth* (300-100 B.C.), which has been the subject of a long-running dispute between Italy and the Getty. The Getty contests that this ruling fails to reflect a 40 year history of Italian judicial decisions supporting the legality of the Getty's acquisition, including (i) a criminal prosecution in 1966-70 reaching the conclusion (at the Court of Cassation, Italy's highest court) that, *inter alia*, there was no evidence of Italian ownership and (ii) an Italian court decision in 2007 dismissing a renewed investigative effort, which found that any possible defendants were deceased, that any applicable statute of limitation had expired, and that the Getty Museum should be regarded as a good faith purchaser. The Getty has appealed the order to Italy's Court of Cassation. On a related topic, on 13 December 2010 the Getty announced that a large statue of Aphrodite would be returned to Italy, the last of 40 objects that the museum agreed to turn over.

The End.

*Background Photo: "Homage to Freyr Vilhjálmsson (Abstract)"
By Cristian DeFrancia*

American Society of International Law

2223 Massachusetts Avenue, NW

Washington DC 20008

Phone +1 202-939-6000

Fax +1 202-797-7133

