

# What's Yours is Mine:

## Issues in Private Legal Disputes Regarding Title of Stolen Art and Artifacts

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### INTRODUCTION

More than two millennia ago, an artisan was commissioned to create a gold *philae*, a decorative gold plate with inlaid motifs. His workshop was in a Greek colony on the Sicilian coast, where the natural wealth of the region and the creative skills of Greek colonists nurtured a significant amount of artistic work. His patron would have been extremely satisfied with the final result, which would have been given an honoured place in the family home. However, the times were turbulent, and an upstart town in the north—Rome—was flexing its muscles, having deposed its Etruscan rulers and declaring a republic. The *philae* was soon hidden, perhaps for its protection, and then lost in ensuing wars. Centuries passed by and witnessed the Roman republic and empire rise and fall into the ashes of the Middle Ages before the consolidation of Renaissance kingdoms. When a new republican power, also ruled from Rome, asserted ownership over the island, including its heritage of ancient artifacts, the *philae* resurfaced. It was traded between modern art dealers in Italy and Switzerland, finally

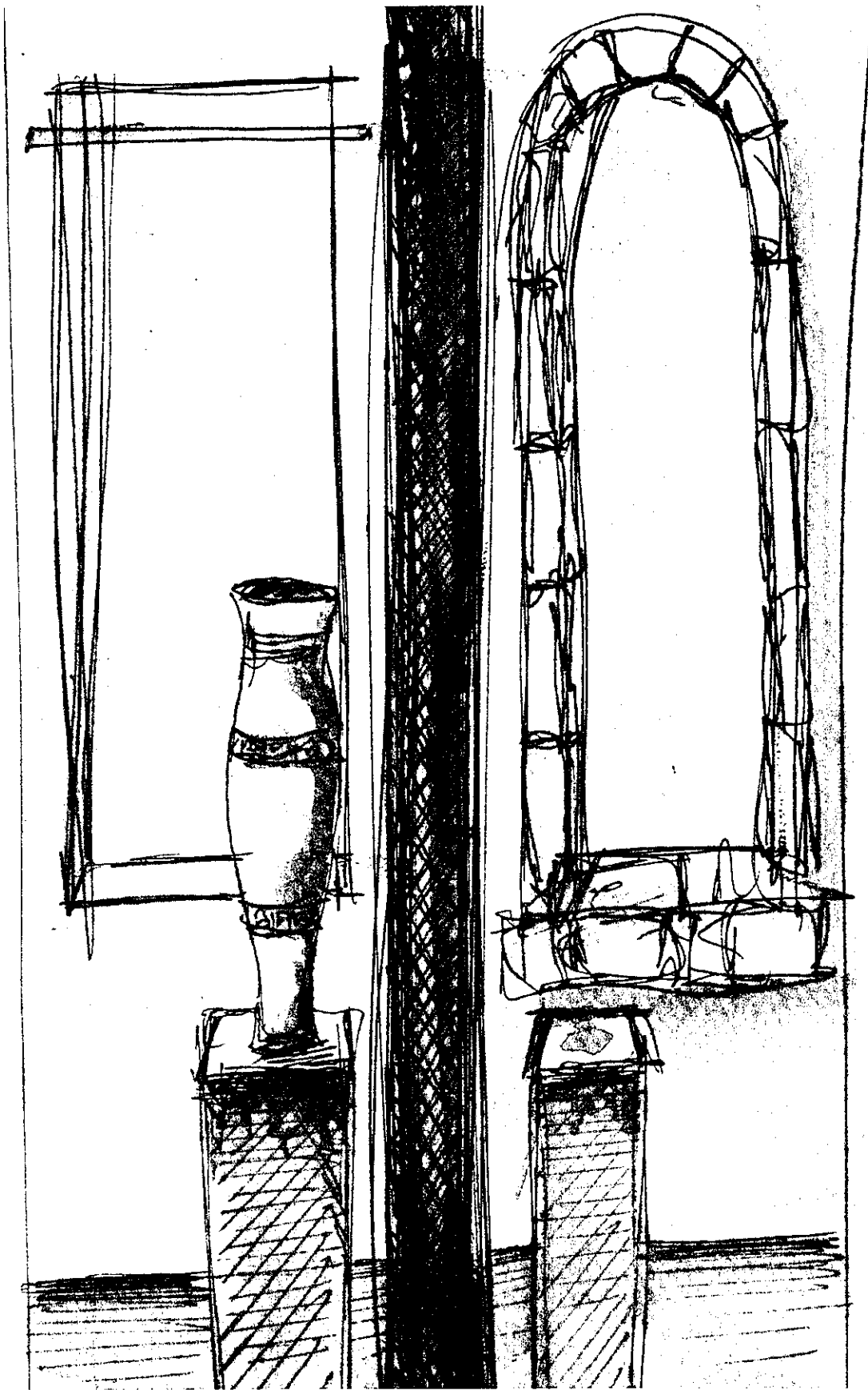
ending up in the private collection of one Mr. Steinhardt of New York, where its market value had increased fifty-fold to US\$1.15 million. But the covert removal of the artifact from Italy had violated state laws, and Italy wanted it back.

### THE INTERNATIONAL PROBLEM OF POSSESSION

The international marketplace for art, artifacts and antiquities is immense, totalling US\$6 billion annually.<sup>1</sup> The high-stakes black market in such items reportedly ranks only behind that of narcotics and the arms trade.<sup>2</sup> The licit and illicit international market involves art and artifacts from all over the world and is characterized by large regional differences in the legal treatment of these objects. Generally, southern regions of the world that have nurtured cultural growth for millennia possess a rich patrimony of art and artifacts and are looked upon as a source of such items by the art markets of wealthier northern countries.<sup>3</sup> Of particular interest are the circumstances in the European Union (E.U.), where an uneven distribution of wealth in both

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- 1 Robin Hardy Villanueva, "Free Trade And The Protection Of Cultural Property: The Need For An Economic Incentive to Report Newly Discovered Antiquities" (1995) 29 George Washington Journal of International Law & Economics 547 at 580.
- 2 Nina R. Lenzer, "The Illicit International Trade in Cultural Property: Does the UNIDRIOT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?" (1994) 15 University of Pennsylvania Journal of International Business Law at 528.
- 3 There are exceptions to this trend, even within a single state's subcultures, an obvious example is the appropriation of Native cultural property by non-Natives within Canada.



market power and cultural property exist. The art-rich or source countries, of southern Europe are the homelands of ancient Mediterranean empires, the birthplaces of the later Renaissance. The ensuing legacy of artistic effort was fuelled by the institutional patronage of the Catholic church. It nurtured tradition that produced classical, baroque, neo-classical, romantic and impressionist art. Sharing this experience are countries such as France, Italy, Greece, Spain and Portugal. Northern countries participated in such artistic traditions, but they did not have the same overlap of artistic ambitions of religious and monarchical powers, rooted in the milieu of classical traditions. Southern European source nations are under pressure to make their rich cultural heritage of art and artifacts accessible to northern market nations, such as Germany, the Netherlands, Belgium, Switzerland, Britain and the U.S. This latter group has the financial resources, institutional mechanisms and market demand to encourage both legal and illegal trade in such items.

Within the E.U., the importance of trade has been heightened by the community's abolishment of internal border controls, with the result that art and artifacts can circulate quickly beyond the border controls of national governments. Some of the southern E.U. source nations have difficulty regulating even domestic trade and are not be able to monitor effectively the cultural property's cross-border transfer. Decreasing regulation of the transfer of property encourages clandestine acquisition of it for sale in foreign markets. Italy alone reported 14,737 missing artifacts in 1997.<sup>4</sup> Art thieves steal 60,000 works of art in Europe each year, which are laundered and

then resold.<sup>5</sup> Beyond Europe, the market demand of the United States also attracts stolen or illegally exported property.

*The evocative nature and unique value of cultural property makes disputes over its possession difficult to resolve.*

Both nations and individuals find themselves in the position of Italy and struggle to deal with the loss of their cultural property to modern art markets. The term cultural property describes a broad range of items that symbolically represent an identity or an awareness of a culture's history. This expression may manifest itself in art, archaeological remains, architectural styles, historical memorabilia, literature, traditional rituals and other tangible and intangible products that are central in defining a people, culture or country.<sup>6</sup> The communal significance of cultural property distinguishes it from other real or personal property in that, even in private hands, it remains part of a larger cultural heritage. As such, the physical expression of a culture through art and artifacts is particularly important because it continues to define a community even beyond its extinguishment.

The evocative nature and unique value of cultural property makes disputes over its possession difficult to resolve. This class of property deserves special legal consideration but cannot be separated from non-legal interests. The starting point for protecting cultural property, both in terms of individual items and the class as a whole, should be the defence of original title. There are circumstances in which title might be passed or extinguished, but only as a result of the wilful conduct of each party with an interest in an object.

4 Ian M. Goldrich, "Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale" (1999) 23 *Fordham International Law Journal* 118 at 119.

5 Victoria J. Vitano, "Protecting Cultural Objects in an Internal Border-Free EC: the EC Directive and Regulation for the Protection and Return of Cultural Objects" (1994) 17 *Fordham International Law Journal* 1164 at 1165.

6 Daniel Shapiro, "Reparation: A Modest Proposal" (1998) 31 *N.Y.U. Journal of International Law and Politics* 95 at 96.

Determining when this happens must involve synthesis of law and policy and must incorporate certain mechanisms for verification of market information. In order to identify what considerations should be accounted for when resolving disputes over title to cultural property, this paper will examine the general nature of possession, legal dimensions of the issue, policy considerations, regulatory problems and the conflicts involved in synthesizing these factors. Finally, after illustrating the major shortfalls of the current legal predicament, this essay will suggest a model regime to resolve future title disputes, which is based on the objective of preserving cultural property.

*Tangible, portable items of cultural significance are the subject of more regulation than are common chattels.*

This paper will also focus on the private law context of western European states and the U.S. because these regions contain the elements central to cross-border cultural property disputes: large art markets, varying legal traditions and, in the case of the European Union, increasing ease of transporting goods across borders. Together, they constitute a forum in which dynamic issues arise regarding the regulation and circulation of cultural property. This paper will concentrate on is the transfer of cultural property where such movement appears to violate individual ownership rights and requires a determination of legal title.

#### WHAT IS PROVENANCE?

In art markets, provenance is the entire

history of an object, including details of its origin and all subsequent transactions.<sup>7</sup> Licit provenance refers to an object that has been legally and willingly transferred by each of its successive owners. Illicit provenance has often been acquired when third parties have intervened opportunistically in areas of political flux to acquire the cultural property of the disempowered, as occurred when Lord Elgin of Britain was permitted by the occupying Ottoman Turks to remove many friezes from the walls of the Parthenon atop the acropolis of Athens.<sup>8</sup> But even in such circumstances, the international law doctrine of prescription<sup>9</sup> stands for the principle that ownership rights in possessed property strengthen with the passage of time.<sup>10</sup>

Tangible, portable items of cultural significance are the subject of more regulation than are common chattels. They represent more than the sum of their constituent parts; they are finite and non-reproducible, and they can be extremely valuable—increasing dramatically with age—which attracts illegal behaviour. The conflict lies in how to balance the protection of a culture's physical heritage of artifacts and the rights of a private property owner to exercise exclusive power over their conversion or transfer. This balance varies within different jurisdictions, and the issue of reconciling different national private laws is the subject of this paper.

#### LEGAL DIMENSIONS

The relationship between ownership and possession varies between states. National legal structures serve to entrench each nation's perception of cultural property. These positions are manifested in two

7 Patrick O'Keefe, "Provenance and Trade in Cultural Heritage" (1995) UBC Law Review at 260.

8 Micheal J. Repas, "The Deflowering of the Parthenon: A Legal and Moral Analysis on Why the 'Elgin Marbles' Must be Returned to Greece" (1999) 9 Fordham Intellectual Property, Media and Entertainment Law Journal.

9 Shawn S. Stephens, "The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed from Occupied Germany" (1995) 18 Houston Journal of International Law 59 at 97.

10 Sylvia L. Depta, "Twice Saved or Twice Stolen?: The Trophy Art Tug-of-War Between Russia and Germany" (1996) 10 Temple International and Comparative Law Journal 371 at 379.

significant ways: export controls and the application of property law. The first instance will not be discussed at length in this paper, but it is an axiom that countries with many resources of art and artifacts, such as Italy, are prone to adopting laws to protect the loss of such resources to foreign collectors. Conversely, other countries, such as Britain, have a tradition of profitably dealing in antiquity markets with cultural items from foreign (i.e., non-British) sources and prefer unfettered trade. The retention of cultural property is often regarded by protective nation-states as necessary both to maintain the integrity of an item (especially if it is part of a larger architectural or historical collection) and to support the sentiment that the object and the culture are bound together in the same national identity.

However, national laws are ill-equipped to protect and consistently regulate the burgeoning international trade (legal and otherwise) in cultural property. This is especially true in western Europe where internal border controls are being reduced. Management of cultural property ownership has become a type of legal tragedy of the commons,<sup>11</sup> with each country trying to maximize the application of its own policy to the detriment of the legal protection of the international resource. Disagreement hinders even the formation of a uniform definition of national treasure within the E.U.<sup>12</sup> The real crisis is that the lack of international co-operation encourages the illegal acquisition and sale of cultural property. While some efforts have been made to curtail such activity, they have not met with great success and point to the need for a more comprehensive analysis of

contested ownership.

In order to resolve international disputes over cultural property three essential elements of the issue must be addressed<sup>13</sup>: (1) a conflict of laws analysis to determine title; (2) the balance between competing sale of goods rights of the dispossessed owner and a *bona fide*, good faith, purchaser; and (3) what limitation period must pass before title consolidates with the new purchaser. Current disputes demonstrate that each of these components is contentious. But before reviewing the consequent litigation of such disputes, it is important to identify two contrasting features on the legal landscape that are central to conflict surrounding title to cultural property.

*Replevin is an action for re-delivery of wrongfully seized chattels to their owner.*

#### SUBSTANTIVE DIFFERENCES BETWEEN COMMON AND CIVIL LAW PERSPECTIVE OF TITLE

Under the Common law, private actions exist for replevin or for damages associated with conversion of stolen cultural property.<sup>14</sup> Replevin is an action for re-delivery of wrongfully seized chattels to their owner. The existing difficulties in pursuing these actions exhibit a crucial difference between Civil and Common law property rights principles. Under the Common law, a thief breaks the chain of good title upon acquiring property from its rightful owner and cannot gain or pass good title to the appropriated object. The determining factor is whether or not an item has been stolen, as the grant of title does not depend on the purchaser's good faith.

11 G. Hardin, "The Tragedy of the Commons" (1968) *Science* 162 1243 at 1244.

12 Christopher G. Jernigan, "Protecting National Treasures in a Single-Market EC" (1994) 17 *Boston College International and Comparative Law Review* 153 at 160.

13 Thomas W. Pecoraro, "Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law" (1990) 31 *Virginia Journal of International Law* 1 at 4.

14 L. Rutherford & S. Bone, eds., *Osbourne's Concise Law Dictionary*, 8<sup>th</sup> ed., (London: Sweet & Maxwell, 1993) at 287.

Therefore, all subsequent buyers are liable to the original owner. This discourages potential buyers from purchasing stolen property (or at least devalues potential profits) since buyers risk having to surrender the property to the owner. This helps deter illicit trade.

Conversely, in the Civil law, good title to stolen property can be acquired if both a codified limitation period has expired, and the purchaser can show that he or she was a *bona fide* purchaser in good faith (belief that the vendor had legal title). This regime provides certainty to buyers, thus encouraging trade and lowering risk-assessment costs. The legislated limitation period is a policy instrument that provides a period for victims of theft to make a claim against the purchaser. It varies among jurisdictions, from ten years in Germany, to five in Switzerland and three in France.<sup>15</sup> In Italy, where so much cultural property smuggling takes place, a *bona fide* purchaser receives good title to stolen goods immediately, thus making it extremely difficult for dispossessed owners to reclaim lost property.<sup>16</sup> Germany's longer limitation period—complemented by Civil Code s. 935—provides that that title does not immediately pass where the chattels are stolen, and there is no exception for purchases made at *market ouvert* (a public auction).<sup>17</sup> Germany permits the purchaser of a stolen or lost chattel to gain title only if the purchase is made in good faith and the purchaser possessed the item for ten years without notification of the spoiled title. However, ten years is not a particularly long cooling period for stolen and appreciating goods.

After ten years Germany's laws are no better at protecting the original owners than other Civil law jurisdictions with shorter limitation periods.<sup>18</sup>

Swiss laws are at the other extreme. The Swiss limitation period runs from the date of loss, regardless of owner's knowledge, and thus can expire before an owner is aware of the loss, let alone before he or she has successfully completed a search for it. Additionally, under Swiss *market ouvert*, the original owner would be required to indemnify the possessor in order to reclaim the property. Unlike in Common law jurisdictions, an original Civil law owner has the burden of proving that the subsequent owner had not acquired the property in good faith.<sup>19</sup> As a result, Civil law countries (Switzerland in particular) are a haven for property laundering<sup>20</sup> since the legal system facilitates trade in stolen cultural property. Middlemen and dealers can effectively purge the taint of an object's defective title and transfer that object for further value without exposing the subsequent purchaser to a risk of loss. Dealers are further insulated from explicitly illicit dealings in Switzerland, since the law permits them to sell artifacts anonymously in Swiss auction house catalogues.<sup>21</sup> An item can be acquired illicitly and sold in a particular sequence in order to ensure good title eventually in both Civil and Common law jurisdictions. Once laundered in a Civil law country, property may be transferred for resale in a Common law country, where original clean title rights can be perfected.

15 Vitrano, *supra* note 5 at 1173.

16 Stephen F. Grover, "The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study" (1992) 70 Texas Law Review 1431 at 1449.

17 Bürgerliches Gesetzbuch (Civil Code) [BGB] § 932 (Ger.).

18 *Ibid.* at 1451.

19 *Ibid.* at 1171.

20 Chauncey D. Steel, "The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts" (2000) 23 Suffolk Transnational Law Review 667. See also Andrew L. Slayman, "Italy Fights Back" (1998) Archaeology at 49; Jennifer H. Lehman, "The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention" (1997) 14 Arizona Journal of International and Comparative Law at 527.

21 Lisa J. Borodkin, "The Economics of Antiquities Looting and a Proposed Legal Alternative" (1995) 95 Columbia Law Review 378 at 387.

## INTERNATIONAL POLICY INSTRUMENTS FOR THE MANAGEMENT OF CULTURAL PROPERTY

To comprehend the problems that result from an incomplete international regulatory framework, it is crucial to understand the competing interests at stake, which in this paper's view were not properly addressed by the UNIDROIT Convention. Market actors exhibit various interests and motivations that, when manifested through cumulative trading activity, may be at odds with the long-term preservation of cultural property. For example, George Ortiz, a world renowned collector who resides in Switzerland, refuses to recognize laws that give a state title to all unknown and unfound artifacts—so unless items are already part of collection or in the process of known, well-delimited excavation sites, they are free for the taking.<sup>22</sup> It is not that his lack of concession to such laws is important, but that Swiss law protects the consequential trade stemming from his kind of disregard for other states' laws. Such an attitude endangers the safety of less economically valuable, but archaeologically important, collateral finds and is concomitantly bolstered by Swiss laws' endorsement of the laundering of such items. Conventions neither adequately address the competing interests of source and market nations, nor do they resolve the interpretation problems and how they might be treated differently by courts in Common versus Civil law jurisdictions. If the conventions could be more predictable in such matters, then perhaps more states would endorse their principles.

Additionally, there remain procedural difficulties in resolving disputes over

cultural property, and a comprehensive multinational process remains elusive. The disparity between protective policy and enforceable regulation fuels the black market in cultural property.

*The court used Indiana choice-of-law rules to affirm the application of Indiana law and held that the defendant could not acquire valid title or right to possession of the stolen property.*

## LITIGATION OVER CULTURAL PROPERTY

Several litigation proceedings over cultural property have helped define the parameters of legal analysis of stolen cultural property. In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*,<sup>23</sup> the plaintiff brought a replevin action in a U.S. Federal Court to recover mosaics that had been taken from a parish church in occupied northern Cyprus that had been closed after the Turkish invasion. The mosaics were eventually examined for purchase in the free port/pre-customs area of a Swiss airport before being brought into the United States by the defendant. The court used Indiana choice-of-law rules to affirm the application of Indiana law and held that the defendant could not acquire valid title or right to possession of the stolen property. When the mosaics went missing, Cyprus made immediate efforts to find them and sought the assistance of UNESCO.<sup>24</sup> Because the plaintiff employed due diligence to locate the mosaics and took substantial

22 Daniel. Shapiro, Opinion: Legal Issues in the Trade in Antiquities (1994) 3 International Journal of Cultural Property at 370.

23 U.S. Court of Appeals, 7th Cir., 1990, No.89-2809, rehearing denied.

24 Even under Swiss law, the defendant could not be a good-faith purchaser due to suspicious middlemen and the suspicious circumstances of the purchase.

and meaningful steps to recover them,<sup>25</sup> the court also employed the Discovery Rule to mark the basis of the replevin action. Under the Discovery Rule, a plaintiff's cause of action would begin when she discovers, or should have discovered, the location of stolen cultural property. Then, the court assessed the merits of the claim itself by measuring the plaintiff's right to possession, the unlawful detention of the objects and the actual unlawful possession by the defendant.<sup>26</sup> Essentially, the court applied the Common law principle of *nemo dat quod non habet*<sup>27</sup> to find that title to the mosaics remained with the plaintiff. Significantly, the case affirmed the applicability of the Discovery Rule to a replevin action and also underlined the necessity of demonstrating due diligence in attempting to locate and recover lost cultural property.

In *Winkworth v. Christie Manson & Woods Ltd.*,<sup>28</sup> the contrast between Common and Civil law traditions reflects contradictory impressions of justice in dealing with art laundering between states that have different transfer-of-chattel laws. The plaintiff's Japanese prints were stolen from his English residence and sold to a *bona fide* purchaser in Civil law Italy, who then returned them to England for auction with the defendants. The plaintiff sued in an English court for an injunction to prevent auction of the prints and for replevin. However, regarding whether English or Italian law applied, the court employed *lex situs*, the law of the place where the chattel was situated at the time of

the wrongful transfer,<sup>29</sup> and thus found that under Italian law, the Italian purchaser had acquired good title. The plaintiff lost his suit on the application of the laws of the state with the most significant relationship to

the contested transaction. *Autocephalous Greek-Orthodox Church* and *Winkworth* illustrate the problems associated with different application of conflict of laws rules even within the Common law system. The rules seem insufficient to reconcile the Civil and Common law consistently in similar factual circumstances, while at the same time Civil law exacerbates this deficiency by inviting continued exploitation of the differences between the two legal traditions.

Aside from emphasis on an original owner's property rights within Common law jurisdiction, legislation in the U.S. has buttressed the regime. The American *National Stolen Property Act* prohibits interstate or international transportation of stolen property. It was expanded in the 1970s to include the importation of illegally removed cultural property (that is, either stolen or contrary to export restrictions) from other countries. In *United States v. Hollinshead*, the Ninth Circuit Appellate Court clarified that, for the purposes of a breach of the act, the U.S. government need only prove that the appellant trafficker, who in that case was indicted for importing a stolen Mayan stele from Guatemala, knew that the item was stolen. In *United States v. McClain*, the Fifth Circuit upheld the applicability of the act to circumstances in which



25 This included contacting international scholars, museums and their associations, auction houses, the media, as well as UNESCO.

26 Keith Higher & George Kahale, "International Decisions" (1992) 86 *The American Journal of International Law* 128 at 131.

27 One cannot give that which one does not possess; a thief cannot pass good title.

28 [1980] 1 Ch. 496.

29 *Bürgerliches Gesetzbuch* (Civil Code) BGB) § 932 (Ger.) at 1456.



the exporting country has asserted national ownership (but not exercised actual possession, as required in *Ortiz*) over cultural property. Additionally, the court underlined the need for clear foreign standards of ownership so that U.S. courts would only apply legal standards that were appropriately specific.

In 1999, a U.S. Court of Appeal applied both *Hollinshead* and *McClain* to a civil forfeiture proceeding regarding the introduction's ancient Greek artifact from Sicily. After being transferred repeatedly within Italy, the artifact was sold to a Swiss dealer and finally to an American dealer in Switzerland where counterfeit export papers concealed the item's true provenance. The American collector Steinhardt purchased it and held it in his American home until 1995 when U.S. customs authorities seized it. It was confiscated because it had entered the country with falsified documentation. As well, the artifact's importation violated the *National Stolen Property Act* because Italian law deemed it stolen. U.S. federal authorities won their forfeiture proceedings (the decision was affirmed on appeal). Italy did not file a civil suit. It was the first time that an American court applied civil forfeiture to illegally transferred cultural property.

While American judgements (by statutory direction) have recognized aspects of foreign law that attempt to regulate the international transfer of artifacts, they are characterized by the application of domestic laws regulating the movement of goods. They fall short of, and point to a need for, standard export control laws that would govern all international trade in cultural property, or at least a mutual recognition of export control laws. The effort to do so has been weakened by opposing perspectives on cultural property trade. Regulation of the movement of goods also does not address the substantive issue of ownership conflicts arising from differences between Common and Civil law.

*Not only is harmonization lacking between E.U. member states' domestic laws, but it also places the disproportionate burden on source nations to use transfer deterrents such as strict export controls and export licensing.*

However, there has been an effort, especially in *Ortiz* and *Autocephalous Greek-Orthodox Church of Cyprus*, to incorporate isolated substantive elements of private law into rulings regarding stolen cultural property. Importing the Discovery Rule into a replevin action addresses the difficulty that plaintiffs have in locating missing items within limitation periods and making a claim to recover them. This is especially true in the circumstances of newly excavated archaeological finds. Additionally, by giving substantial weight to factual findings of due diligence (either on the part of the defendant while ascertaining clean provenance or on the part of the plaintiff while locating the item), the importance of contextual events surrounding the transfer of cultural property is emphasized. This stresses the importance of: (1) checking stolen objects registries, (2) investigating the background of parties involved in a transfer and (3) exercising caution when offered off-par prices or questionable documentation.

#### LEGAL COMPATIBILITY WITH INTERNATIONAL CONVENTIONS

Not only is harmonization lacking between E.U. member states' domestic laws, but it also places the disproportionate burden on source nations to use transfer deterrents such as strict export controls and export licensing. These procedures can be determinative as to the application of domestic law to cultural property, since once an item leaves the country, it loses the protection of that country's laws and may be subject to

*lex situs*. It would be more productive to have parallel import control in market nations, but there is no obligation for member states to apply import restrictions beyond those for property stolen from museums or monuments.<sup>30</sup> The capacity of the E.U. to administer interstate rules is limited by state consent and Treaty of Rome jurisdictional subsidiarity and, of course, does not include non-E.U. jurisdictions such as Switzerland. The lack of a truly pan-European agreement leaves individual states to employ multiple bilateral regulatory measures, which promotes inconsistent legal application, heightened bureaucracy and incomplete participation—in short, the very conditions that fuel the black market in cultural property.

*As with any market, the market for cultural property must be well-organized in order to minimize waste of both wealth and goods.*

Private organizations have provided some assistance in tracking down objects by constructing databases that contain compilations of art and artifacts. One such database is the Art Loss Register (ALR), to which submissions may be made of stolen items. It is the world's largest independent database of stolen art works and antiquities<sup>31</sup> providing a body which prospective buyers, as part of their due diligence, should consult in order to verify the provenance of suspect items. Prompt access to such resources can address the citizen collector's losses and the need for workable private law remedies. But while databases are important tools, their use is neither standardized nor obligatory in either conventions or law, thereby limiting their potential for usefulness to adjudicators.

#### A SOLUTION: THE INVISIBLE HAND

First, it cannot be ignored that the free market has an insatiable capacity for setting the price of goods, even for those such as cultural property that also possess intangible value. Though this observation is often made in support of the internationalist perspective, it is made here because it points to the need to find a solution that operates within market influences. It is, perhaps, not ideal to discuss cultural heritage vis-à-vis the market. Licit and illicit markets in cultural property exist, and the role of law should be to deter the entry of art and artifacts into the black market in order to protect objects themselves, as well as original owners' rights. This means that a licit market in cultural property must function, but that it should do so with maximum transparency and available information so as to heighten the security for *all* participants. In such a context, the maximization of wealth continues to motivate people and institutions, and these market actors will affect the future welfare of cultural property. As with any market, the market for cultural property must be well-organized in order to minimize waste of both wealth and goods.

What type of environment is most likely to offer protection to cultural property? The intuitive answer is one in which the cultural property is valued not only by the purchaser, but also by other parties involved in a transfer—the acquirer, seller, carrier, etc. The central quality to paying full market value is that the market is open to everyone. The scrutiny associated with public markets encourages fair, orderly practices.

Second, a market analysis also suggests that the risk that an item entered the market due to illicit circumstances should be borne by the party best-equipped to do so.

<sup>30</sup> Vitrano, *supra* note 5 at 1177.

<sup>31</sup> "Assistance from Recovery Service", *Lawyer*, Nov 21, 1995, at 16, available in LEXIS, News Library, Lawyer File.

Certainly, market actors—seller and potential buyers—must be made more responsible for the licit status of their purchases because they are *willing* participants. It is unjust to externalize the costs of a transaction by shifting them to extra-market actors (governments, victims of theft, and insurers). With reference to cultural property vis-à-vis legal regulation, this obligation is one of exercising due diligence in verifying clean provenance and legal export. A purchaser that must prove good faith can most easily perform this task, since it is easier to investigate the history of one item than for a claimant owner to comb the world for a missing item or parts thereof.<sup>32</sup>

#### ESTABLISHING TITLE

The real problem with attaching a value to reliance on allegations of good provenance is that this risk has different consequences in different jurisdictions. The international market cannot properly value an important element of a transaction involving cultural property. In order to enhance the reliability and orderliness of the market, it must be regulated consistently, and this means streamlining different legal analyses into a unified whole.

The foremost consideration in this paper's proposition for resolving cultural property disputes is that cultural property, even as a commodity, must not be subject only to the laws that govern normal chattels. Each item is a piece of human heritage, may not be reproducible and, due to its appreci-

ating value, is more likely a target for theft. Therefore, this paper submits that the application of common legal tests to questions of title to cultural property should have as its object the defence of original title, extinguishable only in certain circumstances described further below. The transfer of original title, as exercised in Common law, involves the willing participation of both owner and purchaser, ensuring an item's protection in the care of a true owner, as opposed to that of a thief.

The notion within both international conventions and Civil law that a *bona fide* purchaser should be eligible for compensation from a dispossessed owner for returning an object is not tenable. Why should someone have to pay the customer of a thief to reclaim his own property? While an owner can take reasonable steps to protect his or her property, he or she cannot be held absolutely responsible for subsequent theft. A purchaser is in a better position to verify licit provenance and should be responsible for doing so since, unlike the original owner, the purchaser is a *willing participant* in the transfer of illicitly obtained goods, the very transfer that can affect title. Indemnification of a purchaser by the original owner is an unprincipled and obvious attempt to avoid the central issue of exclusive title. Its application can also be problematic in many cases because the asking prices of various dealers and the passage of time (from initial loss, through subsequent sales, to the point of recovery) would inflate the compensatory market value of what a final *bona fide* purchaser paid.<sup>33</sup>

32 A portrait painting, for example, might be taken and transported without damage, but a torso cut (for easier theft) from an immobile statue leaves the statue severely damaged. A Canadian example would be the effect upon a totem pole if the top three metres were cut off and then further divided into thirds for sale in different overseas art markets.

The author personally encountered such circumstances in the summer of 1998 when he was working at an archeological excavation in Italy. Over the course of one particular day, his team nearly unearthed a partial, but excellent specimen of a bowl in soil strata dating from late Imperial Rome. During the night, a thief hastily removed it from the remaining earth, depriving the team of the opportunity to properly wash, examine, date, draw and catalogue the item before turning it over to regional museum authorities. In the process of removing it from the ground, the bowl may have been damaged in such a way as to retain its market value, but to suffer the loss of certain clues (i.e. artisan markings) that provide important information to archaeologists.

33 In the *Steinhards* case, the market value of the *phiale* increased from US\$20,000 in the early 1980s to US\$1.15 million in 1995, including a 15% dealer's commission.

Requiring compensation for a purchaser of stolen or lost items essentially protects the profits taken by thieves and dealers in such goods.

Original title should be protected from being passed on to any *bona fide* purchaser. This paper suggests that this is more just than allowing any *bona fide* purchaser to acquire title in accordance with the current, limited legal standards. This is more functional since, while one can take measures to prevent the loss of an item, once it actually is stolen, it is difficult to mitigate against the loss of unique items of cultural property. The *bona fide* acquisition of even stolen goods is a policy preference designed for a functional domestic market in more ordinary goods that are readily available. The loss of a television or stereo can be easily mitigated through the purchase of an identical item and readily covered by insurance due to the common value (and little historical significance) of the item. But Civil law and *market ouvert* exceptions within Common law jurisdictions are wrong to apply this policy to unique, non-reproducible pieces of cultural property.

*Once a governing law has been chosen, the critical determinative test in the legal analysis should be what constitutes a bona fide purchase.*

However, the issue of title transfer between Common law versus Civil law jurisdictions is a conflict not easily resolved. The primacy of the *lex situs*, and the application of the domestic law of the site of property transfer as the preferred choice-of-law rule governing transfers of title to

chattels, means that differing state legal regimes will continue to be applied to cultural property disputes.<sup>34</sup> Therefore, the best manner in which to design a legal regime that can be similarly applied in different jurisdictions is by modifying the *components* of the legal tests (i.e., due diligence thresholds) so that the law can best distinguish between (a) the *situs* where an owner validly acquired, possessed and transferred title to an item and (b) the *situs* where this was not the case.<sup>35</sup> It also requires a second stage of a standardized and more thorough regulatory framework.

#### COORDINATING THE LAW WITH INFORMATION MANAGEMENT

Once a governing law has been chosen, the critical determinative test in the legal analysis should be what constitutes a *bona fide* purchase. A standard of diligence could require the use of a group of dependable registries that function in the same capacity as the ALR. An information file associated with a given work of art could also be maintained and reside with purchaser as a form of registration that must accompany any transfer and be filed anew each time title passes. Any proper registration file would contain sufficient information to account for the provenance of an item over relevant limitation periods and also contain contacts (either with owners, dealers or databases) against which the registration information can be verified.

The contemporary availability of the ALR and other databases against which to check provenance, in addition to their utility, suggests that market actors should be legally required to use them.<sup>36</sup> Such parties include not only market actors, but also

<sup>34</sup> Pecoraro, *supra* note 13 at 7.

<sup>35</sup> This distinction can also account for provenance of new archaeological finds.

<sup>36</sup> The Curator of Antiquities at the Getty Museum has suggested making inquiries to the culture ministries of governments of countries that were the possible sources of the piece. Counsel to the Boston Museum of Fine Arts also drew attention to the importance of consulting legal advice from counsel in the country of presumed origin and checking that no encumbrances exist on the item. See seminar commentary in Shapiro, *supra* note 22 at 369-70.

dispossessed owners who would make the market a more predictable, and thus safer, place by immediately reporting their losses to relevant law enforcement authorities and databases. Not having to do so makes non-reporting a tactical, rational option for such owners.<sup>37</sup> However, non-reporting collectively encourages illicit sales because it induces detrimental reliance by an innocent purchaser.<sup>38</sup> The consultation of databases and other sources are especially relevant for dealers in cultural property (who purport to pass good title), since they are repeat market actors with experience in the field and the likely target for legal action from both purchasers and dispossessed owners in any dispute. They have a greater incentive to verify licit provenance. Diligent merchants are in a better position to protect against losses through insurance or other risk management means and their increased legitimacy would attract other potential good-faith buyers. If legal tests of diligent market behaviour included owner reporting and buyer consultation with databases, then bona fide purchases simply cannot include stolen items and purchasers cannot claim ignorance. One author suggests that immediate registry reporting (with a few months' grace period for museums) should supplant limitation periods altogether for items of cultural property;<sup>39</sup> however this envisages quite sophisticated owners. However, the vast majority of stolen cultural property comes from private homes and not from institutions, illustrating the necessity to monitor individual market actors.<sup>40</sup> Not only are homeowners less likely to inventory residences regularly, but they do not operate under the mandate of galleries and

museums to collect for the sake of public access and instruction. This latter group's mission is incompatible with poor management of cultural property and so should be held to stricter standards of exercising its diligence expeditiously. There remains a place for the application of limitation periods, but in precise circumstances.

#### REDEFINING LIMITATION PERIODS

Limitation periods, as I have implied above, are a concession to an undefined sense of justice in the face of unregulated market efficiency. As such, they are driven by policy. A truly international set of limitation periods must be established for two reasons. First, predictable limitations help to clarify transaction liabilities, which can then be more easily allocated between buyer and seller. Second, any time limitation is effectively weighed in balance inversely with the finding of fact of *bona fide* due diligence. For example, in Italy, where there is no limitation period and a *bona fide* purchaser gains immediate title, most analysis during a dispute over provenance is focussed on the circumstances of the transaction, which are then amplified. Conversely, where a post-discovery limitation period runs for decades, any lack of action can seem inappropriate, given the large opportunity to act.

It is suggested that the first limitation would be a notification period (not a limitation period in which to bring an action) for reasonable discovery of the theft. If due diligence efforts are standardized between both Common law and Civil law states to require immediate notification to law

<sup>37</sup> This may include trying not to invite a tax audit for potentially unclaimed capital gains, inheritance and other taxes.

<sup>38</sup> Stephanos Bibas, "The Case Against Statutes of Limitations for Stolen Art" (1996) 5 *International Journal of Cultural Property* at 85.

<sup>39</sup> *Ibid.* at 90.

<sup>40</sup> More than 50% of stolen items reported between 1991 and 1996 to the Art Loss Register, an international database for stolen cultural property with which dispossessed owners can register their losses, were stolen from private homes. See *Art Loss Register News* (Feb 1997) at 4.

enforcement authorities and databases, then notice on the part of the dispossessed owner would demonstrate obvious *bona fide* due diligence. It is also important to limit the application of absolute limitation periods for bringing an action forward to situations where the dispossessed owner failed to make notification within the notification period. Where a notification was properly made, there should be no ultimate limitation period. This discourages illicit possessors from being able to simply conceal the stolen items and wait for limitation periods to expire, during which time the cultural property is likely to appreciate in market value. Clarifying the substance of due diligence for judges and sharpening timelines is especially important to guide an internationally uniform application of law, one that functionally addresses the realities of an international market in cultural property. In the end, real legal solutions are needed. Italy was not able to have its proper title to the *philae* recognised in an American court, and its own law was ineffective

against Mr. Steinhardt. Fortunately, Italy was able to repatriate the item, not on the grounds of substantive law, but rather due to the fact that its forged importation documents had infringed U.S. customs law, and the American authorities decided to pursue this violation. However, thousands of other dispossessed owners around the world, from cosmopolitan cities to towns in Afghanistan are not so fortunate. Profiteers will continue to prosper as long as no comprehensive international system exists to combat the theft of irreplaceable art and artifacts. The regime that this paper has proposed would have protected the integrity of Italy's title over its artifact and extended liability for its theft to all those who sought to profit from its illicit removal—from thief to dealers and buyers. Only by using the tools of modern information technology and the pressure of cross-border economic liability, coupled with a consistent protection of original title, can the law effectively be brought to bear upon this sensitive aspect of our heritage. ■

