Art and Cultural Property Law

Cases and Materials

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A. General Introduction

Art law is a highly specialized legal field. It is an interdisciplinary area, including all aspects of the law connected with art and cultural objects in general.

At present art trade, licit or illicit, as well as the protection and preservation of valuable goods, has become international for its most part, the knowledge of at least the basics in international law and conflict of laws is essential. The relevant issues are numerous and in a short course it is impossible to cover all of them in a detailed manner. The present course will cover only visual arts. The issues presented are really the highlights, which can provide to the interested lawyer the platform to build a more thorough knowledge of this area of the law later.

Definitions

The meaning of the term “cultural good” is neither self-understood, nor identical among the various jurisdictions. Its definition is a very difficult task, usually unsuccessful, especially since the concept to be defined includes vague notions, such as “culture” or “art”. Culture in itself is a complex and constantly developing concept, depending on various factors. Its content is hard to determine.

Equally difficult, therefore, is the definition of “cultural goods”, since it must take into account the complex character of the cultural element of an object. What we usually call “cultural goods” are diverse objects, movable or immovable, humble or important, used for various purposes, made of worthless or valuable materials, elaborate or not artistic at all. They acquire the quality of “cultural” with the aid of sociology, art history, anthropology, aesthetics, history etc.

If each group of people, each country, or greater geographical area understands—as it does- culture in a different manner, the meaning of “cultural good” is bound to differ accordingly. What is extremely significant for a country may be valueless for another. The Stone of Scone, for example, an oblong block of red sandstone, used for centuries in the coronation of the monarchs of Scotland and later the monarchs of England, Great Britain, and the United Kingdom, is precious for the Scots, has been
the object of a treaty in 1328 between the Kingdom of Scotland and the Kingdom of England, but if it was found in another area of the world and if its history was unknown, it would be treated as a cheap building block.

Every discussion on culture and its derivatives usually finds, at the very start, this difficulty concerning definitions: What is the meaning of culture and what is the meaning of cultural heritage? It is exactly the vastness of the world cultural wealth and its variety of forms that makes definitions difficult and inadequate. The relevant discussion is interlined with philosophical, social, historical, aesthetic, anthropological, political and other parameters, takes time and its conclusions are hardly ever generally accepted. Most of the time an attempt of defining cultural heritage is a description complemented with a list of objects. We may say that it is the legacy of physical artefacts and intangible attributes of a group or society, which are inherited from past generations, maintained in the present and bestowed for the benefit of future generations. We remember a people long gone by the cultural remains they leave behind: Egyptian writing and temples, Greek and Roman sculpture, Mesoamerican ballgame courts, Cambodian temples, Etruscan tombs, and ancient African masks and drums. These expressions of human creativity and achievement are celebrated as the highest accomplishments of human work, and we attribute an ever-increasing monetary value to objects of art and antiquity. Quite often what one generation considers cultural heritage may be rejected by the next generation, and is revived by a succeeding generation. Physical or "tangible" cultural heritage includes buildings, monuments, or historic places, artefacts, etc. that are considered worthy of preservation for the future. Objects significant to archaeology, architecture, prehistory, history, religion, science or technology of a specific culture are included in it. Heritage can also include cultural landscapes (natural features that may have cultural attributes), such as a cave or even a tree!

Tangible cultural property comprises movables (e.g. the Koh-I-Noor diamond decorating the English crown of Queen mother Elizabeth, or the Bell of Freedom) and immovables (such as the Acropolis in Athens, the Pyramids in Egypt, or the Coliseum in Rome). Intangible cultural property includes social values and traditions, customs, and practices, aesthetic and spiritual beliefs, artistic expression, language and other aspects of human activity. Intangible cultural heritage is usually more difficult to preserve than physical objects, as it is not always possible to “encase” it in a physical manner
The concept of “cultural good” varies in time as well. Much depends on the time it has been produced and the prevailing idea of culture at the time when it is evaluated. Sometimes an object that was meant for everyday use, without anything artistic on it, may later be considered an important cultural good, because it represents a certain era in the history of mankind.

The legislator does not define something in abstracto; he has certain purposes to serve. For example, a wide definition of cultural goods chosen by a country’s legal system means that a greater number of cultural objects of that country are protected. There are several ways to define cultural goods. One is the enumeration of categories (e.g. religious, historic, ethnographic etc. objects). Another is listing certain objects, a method which may leave out whatever for any reason has not been listed. A third method, quite often used, is the combination of the said methods.

Often the term “cultural good” is confused with the term “cultural heritage”. However the latter designates an array of objects of great significance, which must be safeguarded with extra care on behalf of future generations. And it should be added that there exists the concept of cultural heritage of a nation and that of cultural heritage of mankind. In many cases the former is also part of the latter.

Art is a problematic concept as well, considering its various forms all over the world and the ideas it represents through time. Many of the modern art pieces would probably be totally discarded by art specialists in the past. An antique brass lamp may not be high art according to present day criteria, but it may have been an artistic and technical achievement in its time.

**Cultural nationalism and cultural internationalism**

A basic issue related to cultural goods is the question “who they belong to”. This issue is of great importance, because a huge number of tangible cultural goods originating from art-rich countries are found in museums and collections all over the world, far from their countries of origin, either because of historical and political reasons or due to illicit trade. It is true that the discussion on the ownership of cultural items supplants the dominant cultural element and may reduce such items to the level of ordinary goods that may be owned, bought or sold freely. For this reason I would personally prefer to use the term “possession”. For many of those representing countries which receive cultural goods in their territory, museums and collectors, the
issue of responsibility for such goods and their repatriation is set on a pure property basis, and the connection of cultural goods with human rights is considered a mere sentimentality.

Countries where cultural goods are created or found naturally wish to own and keep them. Two theories have been advanced as regards such a claim: a) cultural internationalism and, b) cultural nationalism.

According to cultural internationalism objects with artistic, archaeological, ethnological or historical value constitute elements of the common human civilization, regardless their country of origin, their present location, or ownership rights of a country. The cultural achievements of a people are the product of global interaction and the heritage of future generations all over the world. In other words cultural internationalism sees cultural goods as assets of humanity. Cultural internationalism attributes more importance to the ability of a country to safe keep cultural goods than to its affinity with them, as long as all people are offered the opportunity to see and enjoy them. Consequently it seems logical that Greece should not request the return of the Parthenon Sculptures from the British Museum, since they are protected and millions of visitors can visit them every year.

However the real aim of this theory is the rebuff of restitution claims by the countries of origin of cultural objects. It serves fine the importing countries and does not do justice the exporting countries; this is the reason why it is supported by the former. The canvass of most arguments supporting cultural internationalism is actually the veil covering the endeavors of museums and countries, usually wealthy, which possess cultural treasures that other countries claim as belonging to their cultural heritage, to keep those treasures in their possession. The principle of preservation has furthermore led to the idea of their being part of a world cultural heritage that has to be taken good care of. The capstone of that idea is that rich, hoarding countries, are the ones that can offer such care for the benefit of humanity and thus should keep the objects.

According to cultural nationalism cultural artifacts should belong to a country or a group because of the relationship between them and the cultural identity of the country or group. The supporters of cultural nationalism do not focus on the ability of a country to safeguard and preserve more effectively the cultural objects. They consider the place where such an object has been created important, no matter how long ago this occurred. Nevertheless, the truth is that world cultural heritage has not
been created by universal creators, and there is no such legal concept as international or universal ownership. The term refers not to the establishment of ownership but to the common interest and responsibility related to it for the care and protection of things that are of universal importance and thus constitute the world heritage.

The relationship of cultural goods with a group, a specific culture, or a country may be so close, that the goods become elements, even prerequisites, of the integration of people in that group. At the same time they constitute the mirror of the cultural achievements of the group. Undoubtedly the preservation of cultural goods is a common meeting point of both cultural nationalism and cultural internationalism. But cultural nationalism places the cultural element above the interests of ownership and aims at the respect of the cultural significance of things, even to the detriment of established principles of property law. Their destruction or damage diminishes their relationship and cultural importance for a given civilization.

Cultural goods and human rights: An American example

All human beings have a right to life, liberty, property, happiness etc. In the past the struggle concerning human rights focused on ensuring for every person such human rights through equal access to food, housing, employment, education, or participation in the democratic process. Adding the right to access and enjoyment of cultural property to the above rights may seem rather odd.

However cultural property is an irreplaceable resource, which defines the existence of a group of people in a unique manner. It helps in defining group identity in both a spatial and a temporal context. It consists of things manifesting the expression of people who interact with their environment (e.g. a certain kind of edifice) or the intellectual property of groups (e.g. a ceremonial song). The preservation of cultural property rights helps to make human existence meaningful and creates bonds among the members of a group or a society.

The affinity of a given group with certain cultural goods makes their protection and restitution an issue of human rights. It is exactly this affinity, this relationship that defines and maintains the perception that an individual belongs to a group. Or, to put it differently, cultural heritage brands the identity of a group in space and time. It is the tangible expression of interaction between people and their environment and reflects the collective evolution. A group is not a fortuitous
aggregation of persons. Through integration its members define their identity and connect, up to a certain extent, their prosperity with the prosperity of the group as a whole. Therefore, if cultural goods constitute elements of the identity of the group, for example national or tribal identity, safeguarding the ceaseless ties with them becomes a vital prerequisite for a meaningful human existence, besides the biological survival. It is well known that some cultural treasures occupy a key position in national conscience, dignity and imagination. Their detachment from the group diminishes the elements of the group’s existence, may lead to the destruction of the social fabric and constitutes cultural genocide. This is not mere romanticism. John Steinbeck, in his well-known novel “The Grapes of Wrath” wonders: “How will we know it’s us without our past”?

Since the right to one’s culture and, more specifically, to cultural goods is so important, it must also be protected. As Judge Kaufman of the United States Court of Appeals for the Second Circuit has stated, who or what will the world community identify as the next "enemy of all mankind"? Could depriving a people of its own cultural heritage be considered so fundamental to our humanity that the international community will one day regard it in the same category as torture or piracy on the high seas?

Unfortunately placing cultural rights among the other human rights was very late, exactly as it happened with environmental rights, and this is the reason we call them third generation rights. Cultural rights relate to art and culture in their wide sense. The target of these rights is to guarantee for all individuals and all communities/groups access and enjoyment of civilization and its elements in conditions of equality, human dignity and without discrimination. These rights are, among other things, closely related to cultural heritage and the free access to it. If cultural items, representing the revered cultural treasures and identity of a group, have been removed from where they stood, group members can no longer enjoy them in their context, at the place that feels “at home”.

Morality is the foundation of human rights. The claim for the return of cultural treasures to their country of origin is a moral issue. The possessor of cultural goods who cannot or refuses to understand their significance for the culture of the community from which they were taken, he who does not comprehend their intertemporal link with the identity of that culture and rejects as pure sentimentality
the relationship between objects and cultural communities is probably not the best caretaker of those objects.

Although controlling a group’s or a nation’s cultural property is very important, it is often taken for granted and not adequately regulated. No American would ever think of giving away the Statue of Liberty, which belongs to the citizens of the U.S. and is protected by a web of legislation and case law. But are other items, such as the cultural property of Native American tribes equally protected? A very brief excursion to the solutions existing in the U.S. and relate to this issue may offer some replies to the question.

Since the arrival of European colonists the dominant social ethic in the U.S. has been that items held in common and placed in accessible areas, including the contents of unmarked Native American graves, were available for personal or government collections. During the 19th century Native American possessions and even their remains were systematically collected by federal officials and placed in federal or personal collections. The government controlled permits for excavations within its jurisdiction and the findings were to be placed in public museums. In 1979 the Archaeological Resources Protection Act (ARPA) strengthened federal control over material remains of past human life or activities that were at least 100 years old. Although archaeological findings discovered in non-Indian land remained the property of the U.S., ARPA permits were granted to scientific institutions for their study and even long term analysis. Such institutions usually retained possession of items in perpetuity. The adoption of the Federal Curation Regulations in 1990 drew clearly the line between the fiduciary duty of the federal government and the repository institution. There is no way to delegate the federal responsibility to care and account for cultural property from federal and Indian lands.

The recognition of cultural property rights has been obstructed by the disparity between Eurocentric views of personal private property (defining personal property interests as assets under lock and key) prevailing in the U.S. as well, and the traditional communal property practices of native people. Their inability to assign cultural property to a person and their traditional practices to store items in open areas or caves created problems in the pursuit of cases of theft of communally owned Native American cultural goods.

Until not very long ago old burial sites in unmarked graves or those outside the graveyards of religious institutions usually did not receive any protection from
state burial laws. As a result, a great number of remains of Native American individuals and funerary objects, together with other cultural items, are placed in U.S. museums, while corresponding remains of non-Native Americans are scarcely represented.

Property law dictates that human burials cannot be owned but that descendants may direct the disposition of the remains and effects of their ancestors. Church property may be the common property of the congregation, it may or may not be kept in storage, but no member of the congregation would allow the removal of such property just because the items are more than a hundred years old and somebody has received and ARPA permit.

A distinction between property rights and human rights may be suspect. Human rights constitute part of a person’s property rights and the latter include cultural property rights as well, notwithstanding the fact that the cultural element makes such property something special. Cultural property rights are fundamental rights, inherent within existing law, but quite often their protection may be strengthened by specific new legislation.

By 1990 almost every state in the country had amended its laws so that protection for Native American burial sites was included. The National Museum of the American Indian Act of 1989, applying only to the Smithsonian Institution and requiring the inventory and identification, in consultation with Native American religious leaders and Indian tribal officials, of origins of Native American human remains and an unknown number of funerary objects in the Institute’s collection, which then could be returned to the individual’s descendants or culturally affiliated tribe, was the first federal legislation to address the disposition of Native American cultural property. The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) is the most comprehensive statute dealing with historical inequities in the disposition of Native American cultural property. It requires all federal agencies (except the Smithsonian Institution) to consult with lineal descendants, Indian tribes, and Native Hawaiian organizations before any intentional excavations, and immediately after inadvertent discoveries of Native American human remains and certain “cultural items” on federal or tribal lands. The Act also requires all federal agencies and institutions that receive federal funds to repatriate Native American human remains and cultural items in their collections upon the request of lineal descendants or culturally affiliated Indian Tribes or Native Hawaiian organizations.
Last but not least, the Act imposes criminal penalties to the traffickers of Native American human remains and cultural items in certain situations.

The objects that may be claimed belong to 4 classes of Native American cultural property: a) human remains, b) funerary objects, c) sacred objects, d) objects of cultural patrimony.

NAGPRA has been accused for violating equal protection by creating a special category for Native Americans. Actually it was drafted to acknowledge a government-to-government relationship between the U.S. and Indian tribes. However it does not protect any class of property not protected by American property law and it does not create any new or special rights for Native Americans. It really affords Native Americans equal protection under the law. Rights to cultural property are part of human rights and the deprivation of property without compensation amounts to “taking” which is proscribed by the Fifth Amendment of the Constitution.

Cultural property is a form of capital common to a group of people. The responsibility for its preservation falls upon the government. Like natural and monetary capital, it is necessary to the healthy being and continuation of society. Any infringement on the human property rights to cultural capital is compensable. NAGPRA and similar laws provide a process for establishing Native American cultural property rights. Native American burial sites are protected as any other such sites and sacred items, group or individually owned, which are protected. Claims are based on information that comes from the tribes without being dictated to them.

**The two aspects of cultural property**

One of the aspects of a cultural good (or cultural property) is the property aspect, derived from the fact that it consists of tangible, movable or immovable elements. By calling it “property” we imply that it can be owned or at least possessed and, therefore, controlled. It may be made of precious materials and its value, because of such materials, and its beauty may be very big. The other aspect is its cultural significance.

In the following example the two aspects can be better understood: In the archaeological museum of the small town of Vergina, in the north of Greece, one can see a beautiful golden wreath, a golden box (“larnax”) and some other golden artifacts. The box contained the bones of King Philip, the father of Alexander the
Great, and the rest of the objects were worn or used by him or his last wife and they were all found in his magnificent tomb. All of them are superb examples of ancient Greek art. As pure gold they are worth millions and that is their extrinsic value. Their intrinsic value lies in the fact that they have cultural significance not only for the people who created them but also for present day Greeks, who see in them the evidence of their historic past. They are associated with a glorious personality and they manifest the artistic achievements in ancient Greece and, more specifically, of its part called Macedonia. They help build the identity of the Greeks.

If one strips such art objects of their cultural significance they remain mere property, beautiful or rare, being extrinsically valuable, but their overall value substantially diminishes.

A clay pot used in prehistoric times in a settlement of Peloponnese has little extrinsic value, it is neither artistic nor made of an expensive material, but its intrinsic value, what it represents for archaeology and anthropology, makes it precious. If cultural objects did not possess the cultural quality, they would be protected only by the laws of property. It is the cultural element that calls for special treatment. And it is precisely the incredible value connected with the cultural element that fills the antiquities world with strife and pits entire nations against one another. For example, for more than 200 years the Greeks are trying to reclaim the marble sculptures that originally adorned the Parthenon and are held by the British Museum. Also, Mexico's only hope of seeing its last emperor's *quetzal* headdress is through a potential loan agreement with the Austrian government.

**Ownership of cultural property**

The most crucial question is who owns cultural property, “who owns the past”. This question is closely connected with illicit trade, replevin actions and repatriation. (The term “replevin” describes the action which lies for the recovery of a cultural good taken by theft or such other illegal activity, rather than for the value of that good. It is primarily a possessory action. Repatriation means the return of the object in the country (patria) where it belongs). Trade in cultural goods cannot be illicit if it does not dispossess someone of his rights or does not violate state rules. Moreover cultural property cannot be returned, unless the claimant shows “better title”.

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The owner of an art object may be a State, a nation, a tribe, a group of people or an individual (natural or legal person). Repatriation or return of the object is a moral issue, relates with the right treatment of diverse cultures and objects important to them and focuses on the cultural significance, i.e. the cultural aspect of the object. If the question is about the legitimate claimant and who may legitimately release cultural property to the possession of another, then the focus is on the replevin issue, which is a title issue connected mainly with the property aspect of a cultural item. However an object of cultural heritage is not a fungible commodity, and can never be replaced or reproduced. The connection of a society with its manifestations of cultural expression (i.e., objects of cultural heritage and other archaeological remains) should amount to an inalienable right.

Modern society has associated the ability to pay a high price for the purchase of a cultural object with a certain amount of perceived prestige and power. For some, it seems that the intrigue and mystery surrounding the acquisition of an exquisite piece of artwork or a relic from the ancient past is irresistible.

Artworks and economy

The development of the television, radio, computer imaging, and sound industries, the non-profit arts industry, and the governmental support of the arts have had important effects to the economy. There is a distinct impact to the industrial output of goods and services, the amounts spent by consumers, the employment of artists and other persons in the work force specializing in the art related industry. The arts have become an integral part of the US economy, positively affecting international trade and the balance of payments and contributing a significant percentage to gross national product.

If one sees artworks as commodities, he will discover that they pose a significant problem in certain areas in a world market: the ownership and trade of the artifacts, especially those which are cultural treasures of a nation, and the methods for resolving relevant problems (e.g. arbitration). The artistic resources of a nation or a region have always been part of the fabric of its culture. Picasso's "Guernica" is a good example. The world-famous work was the artist’s protest to the bombing of the city of
Guernica, Spain, during the Spanish Civil War and has become a symbol of the Spanish nation as it now exists.

**Efforts towards the protection of cultural goods**

In modern times the need to regulate and protect cultural heritage is evident and rules to that effect are widely promulgated, because it is the response to a threat of loss. Colonization was the reason of the wholesale removal of much of the cultural heritage from the colonial regions. Much more was rejected or abandoned in the name of modernization. Industrialization and the technical revolution cause irreplaceable sites, objects and skills to obliterate quickly. Many communities have lost their identity and their people appear rootless, alienated, and they are losing their ability to reproduce their culture. Wars have created and are still creating devastation. Cultural heritage is very fragile and cultural resources, just like the environmental ones, are finite and certainly not inexhaustible.

The legislative efforts towards the protection of cultural property aim for:

a) Conservation, i.e. Protection of the physical continuance of the object.

b) Avoidance of illicit trade.

c) Keeping art at its natural place and context. This is especially important for antiquities. If they are removed from their context the information they would otherwise pass to us on past civilization diminishes or is totally lost.

d) The promotion of licit art trade and exchanges.

e) The protection of the rights of the rightful owner of a cultural object (replevin or repatriation issues), of the artists and of merchants.

f) The protection of access to the object.

g) The prevention of losses.

The approach of each country either at the moment it is making domestic laws or at the time it is adhering to international treaties may differ, depending on its interests. The preservation of the object may mean the prevention of destruction of the records of civilization, the concern over taking cultural items away from the culture in which it belongs, the integrity of a work of art, i.e. avoidance of its dismembering, the safeguarding of its ability to generate money through tourism, the interest to show the world the achievements of the source nation, the interest in preserving the national
patrimony as a matter of pride and inspiration. These are the interests of the source nations.

Acquisitive nations also have interests linked with cultural objects: Interest in their preservation, interest in manifesting their country’s superiority, influence or power that allows them to have gathered art treasures, the interests of good faith purchasers, the desire to enrich their own cultural patrimony and the breakdown of parochialism as far as cultural property is concerned.

More specifically, protection of the rights of an owner of a cultural object, such as a Rembrandt painting, may mean enabling a collector (or a museum) to enforce his rights as owner by recovering the painting if stolen from him. Artists have legitimate interests regarding the appreciation, and integrity of their works, and they expect to be adequately compensated for them. Honest merchants need a safe environment for their dealings. Protection of the physical continuance of the object may mean prevention of its destruction or deterioration, even in its owner’s hands. Protection of access to the object may mean prevention of its exportation or requiring its display for the public.

However it is true that a strong policy of protection of cultural goods may be contrary to another policy of the international community, i.e. the freedom of movement of cultural materials. Such freedom is enshrined in the 1950 Florence Agreement on the Importation of Educational, Scientific and Cultural Materials and a commitment to it imposes on a state the need to weigh its desire to protect against the advantage of free movement. It is a delicate balance that varies according to the volume of flow of cultural resources in or out of that state.

Actually many of the problems related with cultural property/art protection would be comparatively easy to solve, if they were purely local ones. But the art market has become a powerful international market, and this creates additional difficulties. So far there is no universal consensus on whether art objects deserve a special treatment, distinct from the treatment of common movables. There is no unanimity on what constitutes a work of art. Even if a majority of states were to agree on certain common principles of substantive law, this would not necessarily imply mutual recognition of their national regimes of cultural property. The different solutions in existence often cause tensions, diplomatic activity, and may lead to efforts towards the conclusion of international treaties. But it is sad to see that many of these treaties do not find approval and ratification by many market states.
Basically the solution of problems of international art trade depends on three sets of rules: a) domestic rules of each country involved, b) conflict of laws rules of each country involved, and c) international law. To these one should add EU law, which is a unique kind of law, stemming from a supranational legal entity and covering the area of the European Union –and often extending beyond it. Ideally uniform rules applying internationally would be the proper answer, but this is a utopia so far.

**Globalization in art law**

There are five typical interests in international art law:

1. One has to consider the global interests of international civil society, which has a claim for public access to important artworks and for the protection of the free movement of art objects for international exhibitions, for the protection of human rights, for the existence of anti-seizure laws and limitation of actions. A good example of the argument on public access is the following:

   In 1815 the famous Italian sculptor Antonio Canova was commissioned by the Pope as his envoy to achieve and superintend the return of artworks Napoleon had taken from Italy. In the Paris Peace Conference he had to face all sorts of legal and factual objections. One of the strongest was that the artworks were housed in the Louvre museum in Paris, which was accessible to all visitors, while their return would mean that they would be dispersed in various collections, not always accessible to the public, as many Italian cities, besides the Holy See, raised claims. Canova, showing a great diplomatic ability, used, among other arguments, the promise that if the looted items were returned to Italy they would definitely be accessible to the public, and his mission became a success.

2. National interests, such as national identity, export control, “nationality” of artworks, rights of minorities and indigenous people to their cultural heritage, are also important.

3. Interests of private parties (owners, artists) as regards ownership restrictions, resale rights (*droit de suite*), often loaded with conflict of laws issues.

4. One must not overlook the interests of the artworks: For example, the safeguarding of their religious functions -if that is their purpose-, their integrity and the protection of their context.
5. The interests of the art market which are very strong. Trade freedom is demanded. Export controls are a means of control used by the states that want to restrict the illicit art market, while the latter is fuelling the art trade. Big auction houses, such as Christie’s and Sotheby’s, handling a great part of the artwork market, are faced with antitrust laws limiting their activities. Last but not least, the art market needs legal certainty, which is not always possible, considering the various legal rules involved in international art trade.

The clash of some of the above interests is often inevitable.

**B. Licit and illicit art trade**

**The importance of licit trade**

The importance of licit art trade has been recognized by many, including UNESCO, the organization that is the champion in the efforts of encouraging the identification, preservation and preservation of cultural and natural heritage around the world. In the Preamble of the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property it is stated: “The interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and insures mutual respect and appreciation among nations”. The 1976 UNESCO Recommendation concerning the international exchange of cultural property also states that “The circulation of cultural property is a powerful means of promoting mutual understanding and appreciation among nations” and encourages “a systematic policy of exchanges among cultural institutions”.

Legality is the basic limit to the circulation. Excessive restrictions on export may boost the black market of cultural goods.

Both supply and demand for cultural objects are rapidly increasing. The supply side is served by many: First of all, there is the exploration of archaeological sites. Besides the archaeologists who dig and uncover them in an organized and scientific manner, there are the amateur “archaeologists” who search for their own
interests, the farmers who discover antiquities accidentally and very often sell the findings in the black market instead of turning them to the authorities, the grave diggers who, using state of the art equipment, loot ancient tombs and graves, destroy the context, remove what can fetch a good price and leave shambles behind, or the wars, where not only destruction but looting as well happens in a great scale.

As regards art trade in contemporary items, supply has increased because many everyday objects end up becoming collectibles and there are more artists and artisans today.

The demand side is a result of the increased levels of education, growing affluence, increased life expectancy meaning that more people have an expendable income, more leisure time, intellectual and physical energy to learn about cultural objects, to pursue and collect them.

Another factor is the fragile economies of many source nations, rich in cultural artifacts. Their cultural objects may be exploited as an additional economic resource.

**Meaning of licit trade**

Characterizing art trade as licit is not as simple as it sounds. What may be licit for one country may be considered illicit by another one. For example, it is not self-understood that a state will enforce export controls of another state. International law should be able to offer solutions to this issue, but so far is rather ineffective.

There are basically two systems as regards the structure and the operation of licit art trade. The first one is the barter system, which allows exchanges, loans and gifts between institutions, and provides for state shops to sell redundant objects (example: China). The second one is the market system. In such a system market prices respond to the supply and demand. They are not always the same with the real value of an art object but they serve as indicators. The collectors in a market system are necessary because they supply the bulk of demand. Museums depend on collectors and collectors depend on the market. Source nations may generate income using the market to sell surplus items.

The market system seems more efficient. However it is unpopular for many because museums, collectors and galleries are a major cause for looting, through which their demand is satisfied. Additionally, artworks are treated as commodities
and this is not in line with their (main) cultural characteristic, which distinguishes them from common merchandise.

**Illicit art trade**

Art crime (theft, fraud, looting, trafficking across international lines) is a looming enterprise. It is part of the “ecosystem” of illicit industries.

Drug transactions are interwoven with money laundering schemes. They both use cultural objects as collateral. A well-known example is the case of the crime boss M. Cahill: His gang stole 18 paintings from Russborough House in Dublin (including a Vermeer, a Goya, and a Rubens). Fifteen of them were later rescued. Cahill used the paintings as collateral for a one million loan from an Antwerp diamond dealer, and then he used the money to purchase a stake in an Antiguan bank, which served as a vehicle for laundering his drug profits.

Thieves are not like Pierce Brosnan or Catherine Zeta-Jones, as popular culture or movies like “The Thomas Crown Affair” present them. They are shady individuals, mostly common criminals, not art connoisseurs, who usually smash and grab, see art objects as a means of making money and, eventually, sell them to an intermediary. After the artworks enter the legitimate art market the most interesting part of the story is the battle between the true owner and the –often innocent- new one, when the issue raised is that of ownership.

A collector, when purchasing an art object, expects to acquire a clear title. But as the illicit trade in artworks has become international, the relevant issues have also become complex. The theft may have occurred in country A and the subsequent purchase in country B. Each one of those jurisdictions has different laws, the application of which may lead to different results. Civil law and common law countries have different rules on jurisdiction, statutes of limitation (or prescription), and different laws on legal title. Inevitably, as it happens in all conflict of laws cases, the question arises: Which law will apply, the law of the country where the sale took place, the law of the residence of the present owner, the law of the residence of the original owner or what?

Terrorism is connected with illicit art trade. It is well known that in Afghanistan the Talibans have used it to finance their quest, and more recently the same has been found for ISIS. One of the leaders of the September 11 attack, Atta,
had approached someone in Germany and offered to sell cultural goods. He claimed that the money would be used to buy a plane.

Looting, especially in war times, is a provider of cultural goods in the illicit art market. It may be organized and in fact it is a very old story. In ancient times pillage was a custom, but it was not done for trade. The Romans pillaged the countries they conquered and brought the pillaged goods to Rome to decorate public places and private mansions. In 1204 the Crusaders invaded Constantinople, the capital of the Byzantine Empire, and pillaged all they could put their hands on. Napoleon had architects, engineers and other specialists accompany his troops in the Egyptian campaign in order to find and bring back to France archaeological treasures. Besides, one of the targets of his campaign in Italy was the pillaging of its cultural treasures. More recently, Hitler organized the removal of cultural goods from their owners who were mostly Jews (see below). Looting may also not be organized. A well-known example is the looting of the National Bagdad museum back in April 2003. A great number of precious objects were removed by the mob and will probably surface in the market countries.

Theft of cultural objects is prohibited and punished by most national legal systems. This leads to the important generalization that there can be no licit trade in such stolen items. But one should bear in mind that in some countries, mostly belonging to the civil law system, the acquisition of a stolen object may be allowed, as long as the buyer is in good faith or if the rightful owner’s rights are subject to prescription.

Trafficking is another problem. In areas such as the EU, where custom border controls are abolished between most member states, it is rather easy to carry artifacts from one country to another without any export permit. There have been reported many incidents in other parts of the world where interested individuals practically order objects to traffickers, who then go, remove, and bring them to the buyer.

ECOSOC, the United Nations organization, has issued a Practical Recommendation providing for a) cooperation, b) mutual legal assistance, c) need on legislation on seizure, return or restitution, d) awareness raising, e) inventories, f) security measures, g) monitoring police, customs services, tourism sector, h) effective measures to prevent illicit trade (e.g. through the Internet, or auctions) and to give back (restitution or return) removed cultural objects to their rightful owners, all being proposals that may control, if properly used, the illicit art trade.
Art fraud

Art fraud is very usual in the art world, but not all scams are successful. One of the best-known cases is that of John Myatt, considered to be the biggest art fraud in the 20th century. Myatt started as a talented songwriter and art teacher in the UK, but due to his need for a better income he gradually got drawn into deceit and went on to paint 200 fakes from art history’s long line of great masters, which were sold at very high prices. He ended up in prison in 1995, when his ex-partner ‘blew the whistle’. Although after his release he did not feel inclined to paint again he restarted painting “legitimate fakes” which are a sell-out.

Another case is that of Wolfgang Beltracchi, a self-taught German painter, who suddenly appeared in Freiburg, Germany, and led a posh life. For decades, the former hippie had passed off his own paintings as newly discovered masterpieces by Max Ernst, André Derain, Max Pechstein, Georges Braque, and other Expressionists and Surrealists from the early 20th century. His wife, along with two accomplices—including her sister—had sold the paintings for six and seven figures through auction houses in Germany and France, including Sotheby’s and Christie’s. One phony Max Ernst had hung for months in a retrospective at the Metropolitan Museum of Art in New York City. When a Maltese company, Trasteco Ltd., purchased Red Picture with Horses sold as work of the German expressionist Campendonk at an auction for €2.8 million, they requested an authenticity certificate. In a Munich laboratory chemists determined that the work contained a pigment, titanium white, that did not exist in 1914, when the painting was supposed to be created and that was how the fraud was uncovered.

Export controls

The justification of export controls has three prongs: Protectionism, retentionism and movability.

a) Protectionism aims at the preservation of cultural goods, accessibility to them and information that can be obtained about them and their context. Art objects are too fragile or too dependent on context; it is not wise to move them. Many of them
are not yet documented (but of course this does not mean that the documented ones can be transported freely). Also it is necessary to reduce clandestine excavations or the removal of artifacts across borders. The question though is how effective export controls are, whether they cause corruption and result in the creation of a black market, and whether profits go to the wrong people.

b) Retentionism is connected at a certain extent with cultural nationalism, i.e. the belief that cultural objects “belong” to the country of their origin. A well-known example case is the one of Poussin’s painting “Holy family on the steps”. Its owner, a collector in France, sold it to the Cleveland Museum in the U.S. without obtaining an export permit. The director of the museum was told by eminent French and American lawyers that such permit was not required. The French government supported a different interpretation. The director of the museum was prosecuted and France demanded the return of the painting. One might argue that French people were deprived of an important element of their cultural heritage, but, on the other hand, how valid is such an argument if the public in France had no access to the painting while it was kept in a private collection?

c) Movability should be a characteristic of all movable cultural items. However many of them are culturally “immovable” mainly for the following reasons: i. An object is very closely connected with a culture or there is a belief that the system from which the object came is still alive, and in both cases the object should remain within that culture or system, ii. The object was meant for religious, ceremonial or indigenous use in a specific country or indigenous group. If the object is removed to another country and eventually is returned, it should put to these uses.

For example, in the Afo-A-Kom case (Cameroon) a sculpture was removed by members of the royal family and bought by an American dealer. Eventually it was offered for sale in a New York gallery, but it was claimed back as a religious and ceremonial object. Finally the case was settled without litigation. Similar problems are usual with cultural goods removed from Greece, Egypt, Italy, Turkey, China and Mexico.

**Art theft and illicit trade**

It is a fact that cultural objects are valuable. International trade in them is flourishing. The improvement of living standards in developed countries favors a
switch of the public towards art and culture in general. Systematic or occasional collectors increase and their collecting interests are enriched. New museums are created. Art is a good investment for many and unfortunately it is often used for money laundering.

Illicit art trade is a billion dollar phenomenon that involves huge amounts of money and it is second only to the trade in drugs and weapons. Thieves and smugglers benefit from the differences of domestic law and the ineffectiveness of international conventions. The unwillingness of the various states to tackle the problems is due to the attitude they adopt as regards their answer to the question “who owns the past?”

In most instances today art theft is motivated by greed. Profitability fuels it. The art market rises when the stock market declines. In deals involving arms and drugs artworks may serve as collateral for loans. The majority of known artworks which form part of the cultural heritage of a country either belong to states or to public or private institutions and they are under strict control and definitely not for sale. Sometimes they belong to individuals who do not intend or cannot sell them. Therefore stealing them is the only solution. It is roughly estimated that at least 450-500 art objects disappear every day all over the world. The recovery rate is very low, only about 30% at best. Catching art thieves is difficult, because they do not fit a typical model, they take the stolen goods across borders, often in countries where their ownership can be transferred easily due to the attitude of the legislator, and most times they do not keep them for themselves. Policing is very difficult and some countries look the other way, having a financial incentive to allow transactions on stolen cultural goods within their borders.

Clandestine archaeology equals art theft. Many thieves act as illegal archaeologists, choosing places to dig and they either sell their findings to smugglers or they smuggle them themselves. Sometimes the excavation is innocent, when farmers and builders end up with chance finds, but innocence is lost when the finds are sold to traffickers. States try to stop such transactions by offering the incentive of compensation if the items are delivered to the state authorities.

Each country adopts a different attitude towards the protection of cultural property. Art-rich countries usually have strict rules concerning the protection of their cultural patrimony. Art-poor countries favour the import of cultural goods, sometimes even of suspicious provenance. And there is a third case, the countries which indirectly encourage art trade on their territory, even when it involves illicitly
imported items, because they have a financial interest in the relevant transactions. Quite often illicitly acquired art objects hidden in bank vaults serve as collateral for loans and similar financing activities, as it has already been explained. Additionally, civil law favors protecting a bona fide purchaser over the original owner and allows good title to pass from the bona fide purchaser to a subsequent purchaser, leaving the original owner with nothing. In contrast, common law protects the original owner, and regardless of the purchaser's good faith intentions, if an item was stolen, the purchaser cannot convey good title to a subsequent purchaser, and the original owner is entitled to the return of the property. Many European countries follow civil law, whereas the United States and the UK are unequivocally common law jurisdictions. This variety of attitudes and the legal complexity enable participants in the art trade to profit from their wrongdoing by hindering legal recourse against them.

If one starts from the idea that art works are cultural property items which require protection, one has to make sure he understands the meaning of terms such as cultural property or cultural heritage (supra), because effective protection cannot be afforded if it is not clear what is protected and why.

Most art objects are not treated differently from any other piece of movable property by the various jurisdictions. The latter can be classified into three categories, depending on the requirements they pose for the transfer of the goods (i. valid contract, ii. contract and possession, iii. consent to transfer and possession).

A plaintiff claiming back his cultural object has to show that the transfer has been void and that ownership has not passed to the defendant. It is important to know the country where stolen objects are sold, because national laws on bona fide purchase differ from one another. For example, in Germany (§ 935 (1) BGB (Civil Code) stolen goods cannot be acquired bona fide unless this happens at a public auction or even a private one open to the public. In common law jurisdictions the basic rule is that no one can convey a better title than he/she has. Consequently a purchaser cannot acquire good title from a thief. In Italy, art. 1153 of the Civil Code allows ownership of moveable property to pass to a possessor in good faith where the assignor was not the owner as long as an apparently adequate form of transfer can be shown.

Not all jurisdictions agree about the classification of goods as “stolen”, “moveables” or “immovables”, on the meaning of good faith or the duty of good care. These differences make the problem even bigger. Depending on the country where a
lawsuit is brought the outcome of the case may differ, since neither the conflicts rules of that country nor the substantive rules of the law applicable will be identical.

**Enter conflict of laws**

It is clear by now how special cultural objects are. One would expect the legal rules that deal with their acquisition or transfer to be different from rules concerning common goods. Nevertheless most legal systems do not contain special rules for such transactions; they most often contain public/administrative law rules controlling their import and export.

Ideally uniform rules applying internationally should be applicable in matters related to cultural goods. But the international community has been unable and/or unwilling to adopt such rules. Therefore, since national legal systems differ, inevitably the rules on transactions concerning cultural goods will differ as well. When an art law case with international elements (e.g. provenance of the good, different nationality/citizenship of the parties, place where the good is located) reaches the courts of a given country the relevant issues must be resolved by its conflicts rules.

Conflict rules, or private international rules as they are usually called in continental Europe, must indicate the competent court (issue of international jurisdiction, the applicable law (conflict of laws issue) on the case, and the rules according which the ensuing judgment will be enforced.

Before anything else, a court has to characterize the facts of the case in order to be able to find the appropriate rules for the above issues. Then it must decide whether it has jurisdiction to hear it. If the answer to the latter issue is positive, the court, by applying its conflicts rules (every country or state has its own), will find which law, of those involved in the case, will be applied.

The usual actions concerning cultural goods are transfer of ownership or possession cases, emanating from a contract (contract of sale, gift, loan, succession) or a tort (theft, embezzlement). There may be of course many other types of issues, such as insurance or guarantees (guarantee of authenticity, guarantee of provenance, wrong appraisal of a work of art, etc).

The jurisdictional issue will be answered by the domestic law of the state/country where the court sits (*lex fori*), unless the *forum* is bound by a relevant
international convention or other jurisdictional rules of international provenance. In all EU countries, for example, with the exception of Denmark, Regulation 44/2001 on jurisdiction, recognition and enforcement in civil and commercial cases, as has been recently amended by Regulation 1215/2012, applies. The new art. 7.4 of the latter is “custom made” for cultural objects. It provides that “…as regards a civil claim for the recovery, based on ownership, of a cultural object, as defined in point 1 or art. 1 of Directive 93/7, initiated by the person claiming the right to recover such an object, (proceedings may be initiated) in the courts of the place where the cultural object is situated at the time when the court is seized.

In most other countries the usual jurisdictional basis is the domicile of the defendant.

After the issue of jurisdiction has been solved, the court will have to find the law applicable using its conflicts rules. In contracts the usual solution is the application of the law chosen by the parties or, if such choice does not exist, of the proper law of the contract. In torts or transfer of property cases the possible solution may be the *lex loci delicti* (law of the place of the tort), the *lex rei sitae* (law of the place where the good is situated), the law of the country where the results of the tort occurred, or the proper law of the tort.

It has been proposed that since conflict of laws is interested in indicating the law which is really the most closely connected to the issue, for cultural goods in tort or property cases the law applicable should be the law of the country/state of origin (*lex originis*). The latter is a form of *lex rei sitae*. It only crystallizes at the time of removal of the object and does not change afterwards, so that the dangers of the *lex rei sitae*, i.e. the fact that a thief will usually remove the good to a country with most favorable laws for him and that most art transactions take place in such countries, can be overcome.

The recognition and enforcement of a judgment which orders the restitution of an illegally removed cultural object will have to take place in the country where the object is situated.

But in all this conflicts process there are various factors and concept to be considered by the courts:

**Inalienable movables.** There are some jurisdictions where certain movables are considered *res extra commercium*, i.e. goods that cannot be transferred by transactions.
of private law. Such a concept may be easily used in purely domestic transactions, but not as easily in international trade.

Inalienable goods are generally held by the State. The protection of state property in international law creates few problems, as long as the state claims the goods as its property and sues for their return. But when applying a foreign law the court seized may have to apply not only private law provisions but also rules of a public law character and that may present certain difficulties, especially when a jurisdiction refuses to apply foreign public law rules. Moreover there may be case where the forum may have to make use of foreign “mandatory rules”, and that is also a controversial issue.

**Time limitations.** The statute of limitations (or prescription, as it is usually called in civil law) that may bar recovery, has to be qualified as being either a matter of substance or of procedure. In civil law systems causes of action *in rem* are subject to prescription according to the law governing the action itself, in other words the substantive issue. For example, prescription of a tort claim is governed by the law governing the tort. Normally the cause of action vanishes when the period for adverse possession expires or when the limitation period provided by the statute of limitations has run out. In common law jurisdictions the traditional approach is that issues of statutes of limitation are procedural issues. However in the U.S. the new Uniform Act [12 U.L.A. 65 (1988)], already in force in several states, adopts the premise that limitation periods are a substantive matter, which should be governed by the law applicable to the merits of the case (*lex causae*). A rapidly increasing minority of courts in the U.S. subject’s limitation issues to the same choice-of-law analysis as that employed for other issues before the court, without any prior reliance to the *lex fori*. A similar attitude has been adopted by the revised version of section 142 of the Restatement (Second).

There are two more problems which, in their international context, may prove difficult to deal with: a) The impossibility to bring a suit in a foreign country and b) the tacking together of time periods spent under different laws governing the time limitation.

The role of the public policy of the *forum*. Public policy is a device by which courts may avoid an intolerable result produced if a foreign rule is applied. In other words, foreign substantive law will not be applied, if the result of its application is incompatible with the fundamental ideas of the *forum*. 
**Good faith.** Good faith is important because it may give the defendant, who can prove that he acted in good faith, the right to compensation, when he is ordered to return a cultural object. In common law jurisdictions a thief cannot pass good title even to a good faith purchaser, nor can the good faith purchaser pass good title of an artwork acquired from a thief to a third person. In civil law jurisdiction a good faith purchaser may acquire good title under certain conditions, such as the passage of time. In the USA the original owner of an art object may recover it from the good faith purchaser even decades after the theft, provided the claim is not barred by statutes of limitations or laches.

**Due diligence, discovery rule, demand and refusal.** Due diligence is closely connected with the time the statute of limitations begins to run. It includes the efforts an original owner has made to locate his stolen artwork. According to the discovery rule in case of a recovery claim the clock starts ticking only after the claimant knows the identity of the possessor and the location of the object. A law suit may follow only after the original owner has demanded the restitution of the artwork and the possessor has refused to do so. (See discussion of these concepts in case law and especially in the Kanakaria and O’ Keeffe cases).

**Liberative prescription.** In common law systems it focuses on the owner’s inaction. If he fails to act in time, then his action is barred.

**Acquisitive prescription (adverse possession).** Civil law focuses on the activity of the adverse possessor rather than the owner. If the possessor proves an open and public possession for a required period of time, he may acquire the ownership of the good, even if the real owner did not know the whereabouts of the good.

Both liberative prescription and acquisitive prescription are problematic concepts. Liberative prescription leads to a result that is both inequitable (in the absence of a discovery rule it bars the owner’s action, without regard whether he ever had the knowledge necessary to assert it) and conceptually anomalous, because it denies the plaintiff’s ownership, even when the defendant does not meet the requirements for acquiring ownership. Acquisitive prescription does not correct the unfairness resulting from the failure to inquire as to whether the owner had the necessary knowledge to protect his ownership rights. Both concepts are a bit old, not always good for today’s international transactions. In both cases the discovery rule may be of help.
International legal assistance

States are expected to grant international legal assistance voluntarily, when no international treaties facilitate international cooperation. Assistance is also provided by international organizations, such as UNESCO and INTERPOL, and by private organizations which collect information on stolen pieces of art and alert art dealers, museums and even private collectors. They all seek to protect the original owners. Such services are rendered by the International Foundation of Art Research (IFAR), in New York and the Art Loss Register in London.

However it is always important that owners alert the public about their missing art objects, and potential buyers seek sufficient information about an item on sale in order to avoid problems and accusations later on. There are a number of databases on the Internet where such information can be found.

Art trade in times of war or occupation

From ancient times till the 19th century the victorious party had the privilege to loot the enemy’s property. Many cultural objects from conquered lands decorate many European capitals today or fill famous museums. Since the second half of the 19th century arbitral awards and private codifications (such as the Lieber Instructions for the Government of Armies of the U.S.A. in the Field of 1863) have smoothed the way for the Hague Conventions of 1899 and 1907 concerning the Law and Customs of War on Land. Their provisions were already applied during World War I, although many monuments and collections had not been protected in time. According to the Hague Regulations of 1907, art. 3, the violation of its provisions by a belligerent party entailed the payment of compensation. Belligerent parties were also responsible for all acts committed by persons forming part of their armed forces.

The vast destruction of cultural property, movable and immovable, during World War II made clear that the international community had to take effective measures to prevent such disasters in the future. In 1954 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was signed and two years later it entered into force. It has been ratified by a big number of states and it covers the protection of both movable and immovable cultural property in times of
conflict, including local wars or guerilla warfare within one country. Its central provision, art. 4, provides that contracting states should refrain from any use of cultural property in their territory or within the territory of other contracting states or its immediate surroundings or of the appliances in use for its protection, for purposes which are likely to expose it to destruction in the event of armed conflict. They should also refrain from any hostile acts directed against such property. The said obligations may be waived only in cases where military necessity imperatively requires such a waiver. The contracting states also undertake to prevent or put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property.

In the first Protocol to the Convention (1954) states parties undertake the obligation to prohibit the export of any cultural goods from the territories they occupy during an armed conflict and to protect such goods imported from other countries to such territories. The goods imported have to be returned at the end of the conflict to their country of origin. A second Protocol (1999) provides that military necessity exists only in the case of immovables, which, due to their use by the enemy, have become a military objective and there is no alternative way offering an alternative military advantage in place of the attack against a cultural site. As for movable cultural goods the Protocol provides that a contracting state occupying the whole or part of a territory of another state will prohibit and prevent any transfer of ownership, export, excavation, or any other activity unnecessary for the preservation of cultural property.

“Nazi Art”

The Nazis and Hitler himself had a great dislike for modern art, which they called “degenerate art”. Their preference was the classic masters. They destroyed many modern paintings, although they saved paintings of famous impressionist, cubist, or surrealist artists in order to raise money, if needed for their quest, by selling them. They created a whole organization, Einsatzstab Rosenberg, in order to collect art from occupied territories. In 1942 Hitler issued a further decree, authorising Rosenberg, the head of the organization, to search libraries, lodges and cultural establishment, to seize material from those establishments, as well as cultural treasures owned by Jews. The decree directed the cooperation of the Wermacht High
Command. In the Nurnberg trial it was reported that during the period from March 1941 to July 1944 the special staff for pictorial art brought into the Reich 29 large shipments, including 137 freight cars with 4,174 cases of art works. 25 portfolios of pictures of the most valuable works of the art collection seized in the West were presented to the Fuehrer. Thirty nine volumes, prepared by the Einsatszstab, contained photos of paintings, textiles, furniture, candelabra and numerous other objects of art, and illustrated the value and the magnitude of the collection which had been created. In many of the occupied countries private collections were robbed, libraries were plundered and private houses were pillaged. The Nazis took by force or obliged the owners to give them “willingly” their art objects, with the excuse that they would protect them during wartime and they even issued “receipts” to be used for their return, when the danger was over. Museums, palaces and libraries in the USSR were systematically looted. Rare volumes and objects of art from the palaces of Peterhof, Tsarskoye Selo and Pavlovsk were shipped to Germany. In Greece the majority of the archaeological contents of museums were buried underground to save them from bombings or pillage.

Today many cases concerning claims of art taken by the Nazis have been heard or are pending before the courts, especially American courts. Relevant case law is increasing and is particularly interesting.

C. The contemporary players in the art market

Art dealers

Art dealers are important for art trade. They handle a great bulk of art objects, antique or contemporary, and their practice affects the legality of the relevant transactions. CINOA (Confédération Internationale des Négociants en Œuvres d’ Art) is the world association of art and antique dealer associations, and represents 5,000 dealers in 22 countries.

There are certain customary rules of the practice which must be observed by the dealers, if they want to avoid problems with the law or their clients:
a) Confidentiality: B. Franklin had said that “three may keep a secret if the two of them are dead”. Dealers should not disclose information on their clients (sellers or buyers). They must use code names for them. Many of them “seed” client data with dealer’s address in order to catch data thieves. They must keep their data on secure servers and must emphasize confidentiality with their staff. But dealings should not be kept confidential when it would be illegal to do so. An advice often given to dealers is “if you would be embarrassed to have your client or others see an email, then don’t write it”. They shouldn’t hire someone saying he is bringing confidential information from another dealer, because later he may repeat it with his next employer. They must be aware of the provisions of international law and EU law. They must know where the money for a deal comes from to avoid problems with money laundering. And they should choose arbitration to solve problems, since it is the best vehicle to protect confidentiality.

b) Art dealers must carefully document all transactions in writing, they must make them clear and they usually insist on no disclosure on provenance of an art object.

What dictates the path of cultural heritage's future is whatever decisions are made by the buyers and sellers before an art deal closes. Art dealers decide whether to investigate further into an item's chain of title or not, and whether to insist on knowing the seller's identity or not. Each decision carries with it long lasting effects on the art market. Continuing the secrecy of the industry perpetuates the black market. Transparency in dealings, on the other hand, will hinder the black market. What is most needed is collective action by key market participants, especially art dealers and auction houses, to abide by the same guidelines and play by the same rules. The adoption of a uniform code of ethics and standards could combat the illicit art market from the inside out, forming a damper on the profitability of the black market. This, in turn, could ensure a fair playing ground for all buyers and sellers, and promote efficient competition in the legitimate art trade market.

Auctions
An art auction is the sale of art works usually in auction houses. The practice is old, but it has been refined in our days. It involves three parties, a) the consignor (seller), b) the auction house (agent) and c) the buyer. The legal relationships between these parties can be quite complicated.

Auction houses enjoyed a boom period for art in the late 1980s. Few years later the market collapsed. The U.S.A. overtook the EU as the world's largest art market with a global share of 47 per cent by 2001. The U.K.'s market ranks second. In continental Europe, France was the market leader, but its share in the art market has been shrinking. In Asia, Hong Kong continues its dominance. In 2004, the global fine art market turnover was estimated at almost a billion. Sales reached a record billion in 2007, fuelled by speculative bidding for artists such as Damien Hirst, Jeff Koons, and Richard Prince. At present Christie's and Sotheby's are the leading auction venues. The recent rise of the Chinese art market, both in terms of the size of its domestic sales and the international significance of its buyers, has, combined with a rich cultural heritage of art and antiques, produced a huge domestic market and it seems that it has ended the lead held by London and New York for over 50 years.

In 2004 Ms T. Thomson sued Christie’s and the Marquess of Cholmondeley, a rich bachelor filmmaker, for misrepresenting a pair of gilt and porphyry urns she purchased from the Marquess at a Christie’s sale in London in 1994 for almost 2 million pounds. After the auction she placed the urns in storage with Christie’s, but she became concerned about their authenticity in the fall of 1998, after a rumor started by an art dealer that the urns “were not right”. Thomson had bought the urns believing that they were masterpieces from the reign of Louis XV of France. She expressed her concerns to Christie’s first, and then caused an investigation. When she later came to the conclusion that they were 19th century reproductions legal proceedings followed. Thomson gave evidence that she relied wholly on the advice given by Christie's and would not have bid for the vases had she known of the slightest risk of authenticity. The court decided that although there was a 70 per cent probability that the urns were 18th century, Christie's had to pay Miss Thomson damages for negligence and misrepresentation. Christie's appealed, arguing that it was only required to qualify the description in its catalogue if there was any real doubt about authenticity. Here it had been established that the risk as regards the authenticity of the vases was fanciful. As counsel put it, there was no duty to warn Thomson about the obvious, theoretical risk.
that others might not agree with Christie's own competent, unqualified yet reasonably held opinion. The Court of Appeal agreed.

The above case received a wide coverage in the art world, because of the possible implications for liability for auction houses and the effects in the art market. It shows the risks of art auctions, which may prove to be a gamble.

Aggressive competition, actually “cut throat”, among auction houses is severe, as they try to get the “sexiest” confinesments. They have ended up providing complex services, financial and other. They often use illegal business practices, such as price fixing (agreement on a fixed rate to charge consignors, preventing them from bargaining over fees, thus raising their profits and keeping other competitors out of the market. Sotheby’s and Christie’s have been struggling for years as business is not as it used to be. In an effort to regain public confidence they joined forces in the early ’90s agreeing to charge identical commissions. They agreed to pay $512 million to settle the claims that they, the world's most powerful auction houses, cheated buyers and sellers in a price-fixing scheme dating back to 1992.

The “buyer’s premium”, a percentage of the final price of the good the buyer must pay the auction house, has created controversy in the art world.

An auctioneer may guarantee a minimum price, but this practice creates an interest of the auction house on the good, because it is as if it is auctioning its own property and results in distorting the prices.

Auctioneers keep reserve prices (prices below which they will not sell) secret, but such prices must be realistic. If an art object does not sell the reputation of both the auction house and the object is tarnished.

The auctioneer’s duty to the seller is controlled by the law of agency. There is also a fiduciary duty to obtain the best price for the consignor. The auction house must act in good faith and in the utmost interests of the consignor. However the rules on agency are not sufficient and the principal has little control over the agent (auctioneer). The usual causes of action if problem arise between the consignor and the auctioneer are based either on negligence or contract. If the auction house represents both the seller and the buyer there may follow a conflict of interests.

The consignor is expected to make certain representations and warranties, mainly as regards legal title. This means that if the title is defective, the consignor will have to indemnify the auction house.
The relationship between the buyer and the auction house is not a fiduciary one. The buyer will have to pay the hammer price and the buyer’s premium. He relies on the auctioneer’s expertise, credibility and representations on the authenticity of the artwork. If issues of authenticity arise after the sale, the buyer will seek recourse from the auction house.

In the U.S. an auctioneer must have a licence. In France the auctioneer is a public official and auctions are supervised by the courts. In the Netherlands the auctions are supervised by a notary public.

The liability of the auctioneer is treated in a different manner in the various jurisdictions. For example, in the U.S. case law establishes that auctioneers are liable for express warranties of authenticity for objects sold to buyers. In France the system is rather rigid in not finding the state-appointed auctioneer liable for much of anything against the buyer. In the Netherlands, that has a strong consumer protection system, the protection is based mostly in the buyer’s rights against the seller and not the auctioneer.

Authenticity is important for an art object sold by an auction house. There are various relevant issues:

a) Provenance. Often there are no records.

b) Expert valuation. There are many cases where several experts gave contrary evidence.

c) Scientific testing may be inconclusive.

d) The authentication process may become problematic.

Big auction houses base their practice on glamour, prestige and class. There are many instances of even the most prominent and reputable art houses cooperating with the black art market to obtain art and antiquities. Most buyers who have been misled do not admit it. Dealers and auctioneers cite the rule “caveat emptor” (buyer be aware!). If a gallery or an auction house offers an artwork for sale it implicitly inspires confidence. Nevertheless there is an information asymmetry, unless both parties, buyer and seller (or his agent, the auction house), are experienced and equally sophisticated. In attributing and authenticating due diligence and respect for the duty of care must be shown. Experts run the risk of claims for professional malpractice.

Unlike doctors and lawyers art experts do not undergo any licensing procedure. Currently sellers are liable for misattributed art. Attribution procedures are quite
complex. If attribution, for example, is done on the basis of photos, it may lead to big mistakes. Stylistic and scientific analysis is necessary.

An auction house's ability to facilitate illicit art trade is aided by the fact that auction houses have historically been subject to relatively few legal controls. This has been a great problem, particularly in England and Switzerland. The major auction houses in London have historically needed only to determine that the seller is the *bona fide* owner of an artwork. Investigation of ownership is difficult, and the English houses have not been required to guarantee title or examine origin. Besides, English auction houses have traditionally included an exclusionary clause regarding authenticity and authorship in their sales contract. Consequently it has been virtually impossible to obtain and return illegally exported items appearing in auction showrooms.

The smaller auction houses of Switzerland have also contributed a lot to illegal art trade as well. According to the Bureau of Cultural Heritage in Switzerland, the country's lack of restrictions on the import and export of art treasures has greatly affected illicit art trade. Switzerland is known to be the center of stolen art from Italy, Greece, Turkey, Tunisia, and Egypt.

This section should not end without mention of the contemporary phenomenon of online auctions. E-Bay may the best known, but there are more, such as Amazon.com, uBid.com, Overstock.com etc. Such auctions put strains on the law, besides the possibility of sales of counterfeits. An online sale through an Internet site creates a relationship between the seller and the buyer and leaves out the auctioneer. The legal rules we are accustomed to so far have a geographical scope but the Internet is borderless. So concepts such as the place of contracting, the place of performance, the place of the tort, the place where the damage due to tortuous activity occurs, cannot always be adjusted to the new technological environment. In conflict of laws the prevailing rule is that auctions are governed by the law of the country where the auction takes place.

Art loans
An art loan may be a way to borrow money using one’s art objects as collateral (provided they are of high value). But the loans that are of interest for this course are the loans of art objects from museums or individual collectors who lend works of art from their collection to qualified institutions, domestically and abroad, for exhibition or study purposes.

For such a loan an agreement is necessary in the form of a contract. The agreement has to deal with several important issues: a) Reproduction rights (who is responsible for the reproduction and who collects the profits. b) Insurance. Quite often the insurance cost for the loan is so high that the parties are not ready to face it. The more important the art objects are and the risk connected with their packaging, transportation, storing or safety higher, the higher the insurance cost is.

There are also special issues connected with international loans, such as export permits. Sometimes serious problems occur, when an object is seized while on loan in another country, because there is an ownership claim.

**Taxation**

In the U.S. artefact donations/gifts to museums which have obtained the “approved Museum” status with the National Heritage Board are tax deductible. The artefact has to be a worthy collection item and its value is assessed by the Board. After April 2006 if one donates sculptures or works of art for public display to the NHB or any of its approved recipients, one qualifies for tax deduction as well.

In the U.K. there is a scheme granting donors of art works relief on capital gains or income tax (about 25%). Another scheme, the acceptance in lieu scheme, enables objects to be accepted by the state in settlement of inheritance tax. Interestingly for lawyers who are not familiar with the EU rules, a donation by an English donor, living in England, to a museum of another EU country is also tax deductible.

**Moral rights of visual artists and droit de suite**
Moral rights are personal rights that connect visual artists to their work. They are distinct from the economic rights included in copyright. Moral rights arise automatically and have a legal meaning. There are three types of moral rights: a) **Right of attribution**: this is the right of an artist to be identified and named as the author of his/her work; b) **Right against false attribution**: this is the right of an artist to prevent others to be identified and named as the author of his/her work; and c) **Right of integrity**: this is the right of an artist to ensure that his/her work is not subjected to derogatory treatment. In 1990, Congress for the first time legislated limited moral rights of attribution and integrity to authors of narrowly defined works of visual arts (VARA). These rights, following the model suggested in the international Berne Convention for the Protection of Literary and Artistic Works, mirror rights granted to authors by most industrialized nations of the world. They guarantee to authors of so-called fine arts and exhibition photographs the right to claim or disclaim authorship in a work; limited rights to prevent distortion, mutilation, or modification of a work; and the right, under some circumstances, to prevent destruction of a work that is incorporated into a building. **Droit de suite** (the artist's resale right) is a royalty payable to a qualifying artist or the artist's heirs each time a work is re-sold during the artist's lifetime and for a period up to 70 years following the artist's death. The French term is a consequence of the fact that the right is first mentioned in France, back in 1893, and in that country the parliament recognized the droit de suite in 1929, based on the gross price of the art sold at public auctions. Writers, cinematographers, and musicians enjoy the fruit of copyright, but in the visual arts copies cannot be made and, therefore, resale rights are justified. In the U.S. California was the first state to recognize artists’ resale rights in 1979.

**Law and ethics in the art world**

The law and ethics of the cultural property market are changing dramatically. An important development in this area is the Code of Ethics for Museums adopted in 1986 by ICOM (International Council of Museums), and revised in 2004. It establishes the values and principles shared by ICOM and the international museum community. It is a reference tool translated into 36 languages and it sets minimum standards of professional practice and performance for museums and their staff. Also
the members of Art Dealers Association of America, (“ADAA”), have acknowledged in writing their acceptance of, and compliance with, a code of ethical and professional practices which they observe in their relations with clients, artists, other dealers and auctions.

D. International and Regional Solutions to a Universal Problem

The problem of illicit international art trade and the need for protection of cultural goods cannot be solved or satisfied by rules of the national legislator. Adequate solutions must be accepted by the international community and this is manifested by the legislation produced internationally or regionally. The multilateral conventions concerning cultural goods are the following:

- The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict that requires its signatories to protect cultural property in war. It was signed at The Hague, Netherlands, on May 14, 1954, and entered into force on August 7, 1956. As of February 2014, it has been ratified by 126 states.

- The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Ratified by a big number of countries. The United States has implemented the 1970 UNESCO Convention through the Convention on Cultural Property Implementation Act ("CCPIA"). The CCPIA grants the President the authority to enter into agreements with other nations after receipt of a request under the 1970 Convention, when the President determines it is necessary to apply import restrictions according to the source country's designation of protected items. The United States has entered into bilateral agreements with various source nations, specifically restricting the importation of certain items the source country deems of great importance to its national patrimony. CCPIA case law is sparse, however, and the CCPIA has been invoked relatively few times since its passage in 1998.
The 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, which recognizes that certain places on Earth are of "outstanding universal value" and should form part of the common heritage of humankind.

The 1985 European Convention on Offences relating to cultural property produced by the Council of Europe.

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. It has been ratified by 46 countries so far.


Although all the above texts are significant for the protection of cultural property, the one which could play a decisive role in international art trade is the UNIDROIT Convention of 1995. Its provisions, being rules of private law and not generalisations of international law could really limit illicit art trade, if only the convention is ratified by a big number of countries. So far only 35 countries have ratified it but none of them is a market country.

E. Case Law

Patrick CARIOU, Plaintiff-Appellee,

v.

Richard PRINCE, Defendant-Appellant,
In 2000, Patrick Cariou published Yes Rasta, a book of classical portraits and landscape photographs that he took over the course of six years spent living among Rastafarians in Jamaica. Richard Prince altered and incorporated several of Cariou's Yes Rasta photographs into a series of paintings and collages, called Canal Zone, that he exhibited in 2007 and 2008, first at the Eden Rock hotel in Saint Barthélemy ("St. Barth's") and later at New York's Gagosian Gallery. In addition, Gagosian published and sold an exhibition catalog that contained reproductions of Prince's paintings and images from Prince's workshop.

Cariou sued Prince and Gagosian, alleging that Prince's Canal Zone works and exhibition catalog infringed on Cariou's copyrights in the incorporated Yes Rasta photographs. The defendants raised a fair use defense. After the parties cross-moved for summary judgment, the United States District Court for the Southern District of New York (Batts, J.) granted Cariou's motion, denied the defendants', and entered a permanent injunction. It compelled the defendants to deliver to Cariou all infringing works that had not yet been sold, for him to destroy, sell, or otherwise dispose of.

Prince and Gagosian principally contend on appeal that Prince's work is transformative and constitutes fair use of Cariou's copyrighted photographs, and that the district court imposed an incorrect legal standard when it concluded that, in order to qualify for a fair use defense, Prince's work must "comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos." Cariou v. Prince, 784 F.Supp.2d 337, 349 (S.D.N.Y. 2011). We agree with Appellants that the law does not require that a secondary use comment on the original artist or work, or popular culture, and we conclude that twenty-five of Prince's artworks do make fair use Cariou's copyrighted 699*699 photographs. With regard to the remaining five artworks, we remand to the district court, applying the proper standard, to consider in the first instance whether Prince is entitled to a fair use defense.
BACKGROUND

The relevant facts, drawn primarily from the parties' submissions in connection with their cross-motions for summary judgment, are undisputed. Cariou is a professional photographer who, over the course of six years in the mid-1990s, lived and worked among Rastafarians in Jamaica. The relationships that Cariou developed with them allowed him to take a series of portraits and landscape photographs that Cariou published in 2000 in a book titled Yes Rasta. As Cariou testified, Yes Rasta is "extreme classical photography [and] portraiture," and he did not "want that book to look pop culture at all." Cariou Dep. 187:8-15, Jan. 12, 2010.

Cariou's publisher, PowerHouse Books, Inc., printed 7,000 copies of Yes Rasta, in a single printing. Like many, if not most, such works, the book enjoyed limited commercial success. The book is currently out of print. As of January 2010, PowerHouse had sold 5,791 copies, over sixty percent of which sold below the suggested retail price of sixty dollars. PowerHouse has paid Cariou, who holds the copyrights to the Yes Rasta photographs, just over $8,000 from sales of the book. Except for a handful of private sales to personal acquaintances, he has never sold or licensed the individual photographs.

Prince is a well-known appropriation artist. The Tate Gallery has defined appropriation art as "the more or less direct taking over into a work of art a real object or even an existing work of art." J.A. 446. Prince's work, going back to the mid-1970s, has involved taking photographs and other images that others have produced and incorporating them into paintings and collages that he then presents, in a different context, as his own. He is a leading exponent of this genre and his work has been displayed in museums around the world, including New York's Solomon R. Guggenheim Museum and Whitney Museum, San Francisco's Museum of Modern Art, Rotterdam's Museum Boijmans van Beuningen, and Basel's Museum fur Gegenwartskunst. As Prince has described his work, he "completely tr[ies] to change [another artist's work] into something that's completely different." Prince Dep. 338:4-8, Oct. 6, 2009.

Prince first came across a copy of Yes Rasta in a bookstore in St. Barth's in 2005. Between December 2007 and February 2008, Prince had a show at the Eden Rock hotel in St. Barth's that included a collage, titled Canal Zone (2007), comprising 35 photographs torn out of Yes Rasta and pinned to a piece of plywood. Prince altered those photographs significantly, by among other things painting "lozenges" over their subjects' facial features and using only portions of some of the images. In June 2008, Prince purchased three additional copies of Yes Rasta. He went on to create thirty additional artworks in the Canal Zone series, twenty-nine of which incorporated partial or whole images from Yes Rasta. The portions of Yes Rasta photographs used, and the amount of each artwork that they constitute, vary significantly from piece to piece. In certain works, such as James Brown Disco Ball, Prince affixed headshots from Yes Rasta onto other appropriated images, all of which Prince placed on a canvas that he had painted. In these, Cariou's work is almost entirely obscured. The Prince artworks also incorporate photographs that have been enlarged or tinted, and incorporate photographs appropriated from artists other than Cariou as well. Yes Rasta is a book of photographs measuring approximately 9.5" × 12". Prince's artworks, in contrast, comprise inkjet printing and acrylic paint, as well
as pasted-on elements, and are several times that size. For instance, *Graduation* measures 72 3/4″ × 52 1/2″ and *James Brown Disco Ball* 100 1/2″ × 104 1/2″. The smallest of the Prince artworks measures 40″ × 30″, or approximately ten times as large as each page of *Yes Rasta*.

In other works, such as *Graduation*, Cariou's original work is readily apparent: Prince did little more than paint blue lozenges over the subject's eyes and mouth, and paste a picture of a guitar over the subject's body.

Between November 8 and December 20, 2008, the Gallery put on a show featuring twenty-two of Prince's *Canal Zone* artworks, and also published and sold an exhibition catalog from the show. The catalog included all of the *Canal Zone* artworks (including those not in the Gagosian show) except for one, as well as, among other things, photographs showing *Yes Rasta* photographs in Prince's studio. Prince never sought or received permission from Cariou to use his photographs.

Prior to the Gagosian show, in late August, 2008, a gallery owner named Cristiane Celle contacted Cariou and asked if he would be interested in discussing the possibility of an exhibit in New York City. Celle did not mention *Yes Rasta*, but did express interest in photographs Cariou took of surfers, which he published in 1998 in the aptly titled *Surfers*. Cariou responded that *Surfers* would be republished in 2008, and inquired whether Celle might also be interested in a book Cariou had recently completed on gypsies. The two subsequently met and discussed Cariou's exhibiting work in Celle's gallery, including prints from *Yes Rasta*. They did not select a date or photographs to exhibit, nor did they finalize any other details about the possible future show.

At some point during the *Canal Zone* show at Gagosian, Celle learned that Cariou's photographs were "in the show with Richard Prince." Celle then phoned Cariou and, when he did not respond, Celle mistakenly concluded that he was "doing something with Richard Prince.... [Maybe] he's not pursuing me because he's doing something better, bigger with this person.... [H]e didn't want to tell the French girl I'm not doing it with you, you know, because we had started a relation and that would have been bad." Celle Dep. 88:15-89:7, Jan. 26, 2010. At that point, Celle decided that she would not put on a "Rasta show" because it had been "done already," and that any future Cariou exhibition she put on would be of photographs from *Surfers*. Celle remained interested in exhibiting prints from *Surfers*, but Cariou never followed through.

According to Cariou, he learned about the Gagosian *Canal Zone* show from Celle in December 2008. On December 30, 2008, he sued Prince, the Gagosian Gallery, and Lawrence Gagosian, raising claims of copyright infringement. See 17 U.S.C. §§ 106, 501. The defendants asserted a fair use defense, arguing that Prince's artworks are transformative of Cariou's photographs and, accordingly, do not violate Cariou's copyrights. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994). Ruling on the parties' subsequently-filed cross-motions for summary judgment, the district court (Batts, J.) "impose[d] a requirement that the new work in some way comment on, relate to the historical context of, or
critically refer back to the original works" in order to be qualify as fair use, and stated that "Prince's Paintings are transformative only to the extent that they comment on the Photos." *Cariou v. Prince*, 784 F.Supp.2d 337, 348-49 (S.D.N.Y.2011). The court concluded that "Prince did not intend to comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos when he appropriated the Photos," *id.* at 349, and for that reason rejected the defendants' fair use defense and granted summary judgment to Cariou. The district court also granted sweeping injunctive relief, ordering the defendants to "deliver up for impounding, destruction, or other disposition, as [Cariou] determines, all infringing copies of the Photographs, including the Paintings and unsold copies of the *Canal Zone* exhibition book, in their possession." *Id.* at 355.[4] This appeal followed.

**DISCUSSION**

I.

We review a grant of summary judgment *de novo.* .................................................

The purpose of the copyright law is "[t]o promote the Progress of Science and useful Arts...." U.S. Const., Art. I, § 8, cl. 8. As Judge Pierre Leval of this court has explained, "[t]he copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public." Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L.Rev. 1105, 1107 (1990) (hereinafter "Leval"). Fair use is "necessary to fulfill [that] very purpose." *Campbell*, 510 U.S. at 575, 114 S.Ct. 1164. Because "excessively broad protection would stifle, rather than advance, the law's objective," fair use doctrine "mediates between" "the property rights [copyright law] establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them — or ourselves by reference to the works of others, which must be protected up to a point." *Blanch*, 467 F.3d at 250 (brackets omitted) (quoting Leval at 1109).

The doctrine was codified in the Copyright Act of 1976, which lists four non-exclusive factors that must be considered in determining fair use. Under the statute,

[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. As the statute indicates, and as the Supreme Court and our court have recognized, the fair use determination is an open-ended and context-sensitive inquiry. *Campbell*, 510 U.S. at 577-78, 114 S.Ct. 1164; *Blanch*, 467 F.3d at 251. The statute "employs the terms `including’ and `such as’ in the preamble paragraph to
indicate the illustrative and not limitative function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses." *Campbell, 510 U.S. at 577-78, 114 S.Ct. 1164* (quotation marks and citation omitted). The "ultimate test of fair use ... is whether the copyright law's goal of 'promoting the Progress of Science and useful Arts' ... would be better served by allowing the use than by preventing it." *Castle Rock, 150 F.3d at 141* (brackets and citation omitted).

The first statutory factor to consider, which addresses the manner in which the copied work is used, is "[t]he heart of the fair use inquiry." *Blanch, 467 F.3d at 251*. We ask whether the new work merely 'supersedes the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message[,] ... in other words, whether and to what extent the new work is transformative.... [T]ransformative works ... lie at the heart of 706*706 the fair use doctrine's guarantee of breathing space....

"If the secondary use adds value to the original — if [the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." *Castle Rock, 150 F.3d at 142* (quoting Leval 1111). For a use to be fair, it "must be productive and must employ the quoted matter in a different manner or for a different purpose from the original." *Leval at 1111.*

The district court imposed a requirement that, to qualify for a fair use defense, a secondary use must "comment on, relate to the historical context of, or critically refer back to the original works." *Cariou, 784 F Supp.2d at 348*. Certainly, many types of fair use, such as satire and parody, invariably comment on an original work and/or on popular culture. For example, the rap group 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman" "was clearly intended to ridicule the white-bread original." *Campbell, 510 U.S. at 582, 114 S.Ct. 1164* (quotation marks omitted). Much of Andy Warhol's work, including work incorporating appropriated images of Campbell's soup cans or of Marilyn Monroe, comments on consumer culture and explores the relationship between celebrity culture and advertising. As even Cariou concedes, however, the district court's legal premise was not correct. The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute. *Id. at 577, 114 S.Ct. 1164; Harper & Row, 471 U.S. at 561, 105 S.Ct. 2218*. Instead, as the Supreme Court as well as decisions from our court have emphasized, to qualify as a fair use, a new work generally must alter the original with "new expression, meaning, or message." *Campbell, 510 U.S. at 579, 114 S.Ct. 1164*; see also *Blanch, 467 F.3d at 253* (original must be employed "in the creation of new information, new aesthetics, new insights and understandings" (quotation marks omitted)); *Castle Rock, 150 F.3d at 142*.

Here, our observation of Prince's artworks themselves convinces us of the transformative nature of all but five, which we discuss separately below. These
twenty-five of Prince's artworks manifest an entirely different aesthetic from Cariou's photographs. Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative. Cariou's black-and-white photographs were printed in a 9 1/2" × 12" book. Prince has created collages on canvas that incorporate color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs. Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work. See *Campbell, 510 U.S. at 579, 114 S.Ct. 1164*.

Prince's deposition testimony further demonstrates his drastically different approach and aesthetic from Cariou's. Prince testified that he "[doesn't] have any really interest in what [another artist's] 707*707 original intent is because ... what I do is I completely try to change it into something that's completely different.... I'm trying to make a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene." Prince Dep. 338:4-339:3, Oct. 6, 2009. As the district court determined, Prince's *Canal Zone* artworks relate to a "post-apocalyptic screenplay" Prince had planned, and "emphasize themes [of Prince's planned screenplay] of equality of the sexes; highlight 'the three relationships in the world, which are men and women, men and men, and women and women'; and portray a contemporary take on the music scene." *Cariou, 784 F.Supp.2d at 349;* see Prince Dep. 339:3-7, Oct. 6, 2009.

The district court based its conclusion that Prince's work is not transformative in large part on Prince's deposition testimony that he "do[es]n't really have a message," that he was not "trying to create anything with a new meaning or a new message," and that he "do[es]n't have any ... interest in [Cariou's] original intent." *Cariou, 784 F.Supp.2d at 349;* see Prince Dep. 45:25-46:2, 338:5-6, 360:18-20, Oct. 6, 2009. On appeal, Cariou argues that we must hold Prince to his testimony and that we are not to consider how Prince's works may reasonably be perceived unless Prince claims that they were satire or parody. No such rule exists, and we do not analyze satire or parody differently from any other transformative use.

It is not surprising that, when transformative use is at issue, the alleged infringer would go to great lengths to explain and defend his use as transformative. Prince did not do so here. However, the fact that Prince did not provide those sorts of explanations in his deposition — which might have lent strong support to his defense — is not dispositive. What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so. Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may "reasonably be perceived" in order to assess their transformative nature. *Campbell, 510 U.S. at 582, 114 S.Ct. 1164; Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 113-14 (2d Cir.1998)* (evaluating parodic nature of advertisement in light of how it "may reasonably be perceived"). The focus of our infringement analysis is primarily on the Prince artworks themselves, and we see twenty-five of them as transformative as a matter of law.
Here, looking at the artworks and the photographs side-by-side, we conclude that Prince's images, except for those we discuss separately below, have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's. Our conclusion should not be taken to suggest, however, that any cosmetic changes to the photographs would necessarily constitute fair use. A secondary work may modify the original without being transformative. For instance, a derivative work that merely presents the same material but in a new form, such as a book of synopses of televisions shows, is not transformative. See Castle Rock, 150 F.3d at 143; Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1378 (2d Cir.1993). In twenty-five of his artworks, Prince has not presented the same material as Cariou in a different manner, but instead has "add[ed] something new" and presented images with a fundamentally different aesthetic. Leibovitz, 137 F.3d at 114.

The first fair use factor — the purpose and character of the use — also requires that we consider whether the allegedly infringing work has a commercial or nonprofit educational purpose. See, e.g., Blanch, 467 F.3d at 253. That being said, "nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research... are generally conducted for profit." Campbell, 510 U.S. at 584, 114 S.Ct. 1164 (quotation marks omitted). "The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work." Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir.1994). This factor must be applied with caution because, as the Supreme Court has recognized, Congress "could not have intended" a rule that commercial uses are presumptively unfair. Campbell, 510 U.S. at 584, 114 S.Ct. 1164 Instead, "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." Id. at 579, 114 S.Ct. 1164. Although there is no question that Prince's artworks are commercial, we do not place much significance on that fact due to the transformative nature of the work.

We turn next to the fourth statutory factor, the effect of the secondary use upon the potential market for the value of the copyrighted work, because such discussion further demonstrates the significant differences between Prince's work, generally, and Cariou's. Much of the district court's conclusion that Prince and Gagosian infringed on Cariou's copyrights was apparently driven by the fact that Celle decided not to host a Yes Rasta show at her gallery once she learned of the Gagosian Canal Zone show. The district court determined that this factor weighs against Prince because he "has unfairly damaged both the actual and potential markets for Cariou's original work and the potential market for derivative use licenses for Cariou's original work." Cariou, 784 F.Supp.2d at 353.

Contrary to the district court's conclusion, the application of this factor does not focus principally on the question of damage to Cariou's derivative market. We have made clear that "our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work." Blanch, 467 F.3d at 258 (quotation marks
omitted) (emphasis added); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481-82 (2d Cir.2004). "The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." *Campbell*, 510 U.S. at 592, 114 S.Ct. 1164. Our court has concluded that an accused infringer has usurped the market for copyrighted works, including the derivative market, where the infringer's target audience and the nature of the infringing content is the same as the original. For instance, a book of trivia about the television show *Seinfeld* usurped the show's market because the trivia book "substitut[e]d for a derivative market that a television program copyright owner ... would in general develop or license others to develop." *Castle Rock*, 150 F.3d at 145 (quotation marks omitted). Conducting this analysis, we are mindful that "[t]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original," even though "the fair use, being transformative, might well harm, or even destroy, the market for the original." *Id.*

As discussed above, Celle did not decide against putting on a *Yes Rasta* show because it had already been done at Gagosian, but rather because she mistakenly believed that Cariou had collaborated with Prince on the Gagosian show. Although certain of Prince's artworks contain significant portions of certain of Cariou's photographs, neither Prince nor the *Canal Zone* show usurped the market for those photographs. Prince's audience is very different from Cariou's, and there is no evidence that Prince's work ever touched — much less usurped — either the primary or derivative market for Cariou's work. There is nothing in the record to suggest that Cariou would ever develop or license secondary uses of his work in the vein of Prince's artworks. Nor does anything in the record suggest that Prince's artworks had any impact on the marketing of the photographs. Indeed, Cariou has not aggressively marketed his work, and has earned just over $8,000 in royalties from *Yes Rasta* since its publication. He has sold four prints from the book, and only to personal acquaintances.

Prince's work appeals to an entirely different sort of collector than Cariou's. Certain of the *Canal Zone* artworks have sold for two million or more dollars. The invitation list for a dinner that Gagosian hosted in conjunction with the opening of the *Canal Zone* show included a number of the wealthy and famous such as the musicians Jay-Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, *Vanity Fair* editor Graydon Carter, *Vogue* editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt. Prince sold eight artworks for a total of $10,480,000, and exchanged seven others for works by painter Larry Rivers and by sculptor Richard Serra. Cariou on the other hand has not actively marketed his work or sold work for significant sums, and nothing in the record suggests that anyone will not now purchase Cariou's work, or derivative non-transformative works (whether Cariou's own or licensed by him) as a result of the market space that Prince's work has taken up. This fair use factor therefore weighs in Prince's favor.

The next statutory factor that we consider, the nature of the copyrighted work, "calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Campbell*, 510 U.S. at 586, 114 S.Ct. 1164. We consider ""(1) whether the work is expressive or creative, ... with a greater leeway being allowed to a claim of fair use where the work is factual or informational, 710*710 and
(2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.” Blanch, 467 F.3d at 256 (quoting 2 Howard B. Abrams, The Law of Copyright, § 15:52 (2006)).

Here, there is no dispute that Cariou's work is creative and published. Accordingly, this factor weighs against a fair use determination. However, just as with the commercial character of Prince's work, this factor "may be of limited usefulness where," as here, "the creative work of art is being used for a transformative purpose." Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir.2006).

The final factor that we consider in our fair use inquiry is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). We ask "whether the quantity and value of the materials used[] are reasonable in relation to the purpose of the copying." Blanch, 467 F.3d at 257 (quotation marks omitted). In other words, we consider the proportion of the original work used, and not how much of the secondary work comprises the original.

Many of Prince's works use Cariou's photographs, in particular the portrait of the dreadlocked Rastafarian at page 118 of Yes Rasta, the Rastafarian on a burro at pages 83 to 84, and the dreadlocked and bearded Rastafarian at page 108, in whole or substantial part. In some works, such as Charlie Company, Prince did not alter the source photograph very much at all. In others, such as Djuana Barnes, Natalie Barney, Renee Vivien and Romaine Brooks take over the Guanahani, the entire source photograph is used but is also heavily obscured and altered to the point that Cariou's original is barely recognizable. Although "[n]either our court nor any of our sister circuits has ever ruled that the copying of an entire work favors fair use[,].... courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image." Bill Graham, 448 F.3d at 613. "[T]he third-factor inquiry must take into account that the extent of permissible copying varies with the purpose and character of the use." Id. (internal quotation marks omitted).

The district court determined that Prince's "taking was substantially greater than necessary." Cariou, 784 F.Supp.2d at 352. We are not clear as to how the district court could arrive at such a conclusion. In any event, the law does not require that the secondary artist may take no more than is necessary. See Campbell, 510 U.S. at 588, 114 S.Ct. 1164; Leibovitz, 137 F.3d at 114. We consider not only the quantity of the materials taken but also "their quality and importance" to the original work. Campbell, 510 U.S. at 587, 114 S.Ct. 1164. The secondary use "must be [permitted] to `conjure up' at least enough of the original" to fulfill its transformative purpose. Id. at 588, 114 S.Ct. 1164 (emphasis added); Leibovitz, 137 F.3d at 114. Prince used key portions of certain of Cariou's photographs. In doing that, however, we determine that in twenty-five of his artworks, Prince transformed those photographs into something new and different and, as a result, this factor weighs heavily in Prince's favor.

As indicated above, there are five artworks that, upon our review, present closer questions. Specifically, Graduation, Meditation, Canal Zone (2008), Canal Zone (2007), and Charlie Company do not sufficiently differ from the photographs of Cariou's that they incorporate for us confidently to make a determination about their transformative nature as a matter of law. Although the minimal alterations
that Prince made in those instances moved the work in a different direction from Cariou's classical portraiture and landscape photos, we can not say with certainty at this point whether those artworks present a "new expression, meaning, or message." *Campbell, 510 U.S.* at 579, 114 S.Ct. 1164.

Certainly, there are key differences in those artworks compared to the photographs they incorporate. *Graduation*, for instance, is tinted blue, and the jungle background is in softer focus than in Cariou's original. Lozenges painted over the subject's eyes and mouth — an alteration that appears frequently throughout the *Canal Zone* artworks — make the subject appear anonymous, rather than as the strong individual who appears in the original. Along with the enlarged hands and electric guitar that Prince pasted onto his canvas, those alterations create the impression that the subject is not quite human. Cariou's photograph, on the other hand, presents a human being in his natural habitat, looking intently ahead. Where the photograph presents someone comfortably at home in nature, *Graduation* combines divergent elements to create a sense of discomfort. However, we cannot say for sure whether *Graduation* constitutes fair use or whether Prince has transformed Cariou's work enough to render it transformative.

We have the same concerns with *Meditation*, *Canal Zone* (2007), *Canal Zone* (2008), and *Charlie Company*. Each of those artworks differs from, but is still similar in key aesthetic ways, to Cariou's photographs. In *Meditation*, Prince again added lozenges and a guitar to the same photograph that he incorporated into *Graduation*, this time cutting the subject out of his background, switching the direction he is facing, and taping that image onto a blank canvas. In *Canal Zone* (2007), Prince created a gridded collage using 31 different photographs of Cariou's, many of them in whole or significant part, with alterations of some of those photographs limited to lozenges or cartoonish appendages painted or drawn on. *Canal Zone* (2008) incorporates six photographs of Cariou's in whole or in part, including the same subject as *Meditation* and *Graduation*. Prince placed the subject, with lozenges and guitar, on a background comprising components of various landscape photographs, taped together. The cumulative effect is of the subject in a habitat replete with lush greenery, not dissimilar from many of Cariou's *Yes Rasta* photographs. And *Charlie Company* prominently displays four copies of Cariou's photograph of a Rastafarian riding a donkey, substantially unaltered, as well as two copies of a seated nude woman with lozenges covering all six faces. Like the other works just discussed, *Charlie Company* is aesthetically similar to Cariou's original work because it maintains the pastoral background and individual focal point of the original photograph — in this case, the man on the burro. While the lozenges, repetition of the images, and addition of the nude female unarguably change the tenor of the piece, it is unclear whether these alterations amount to a sufficient transformation of the original work of art such that the new work is transformative.

We believe the district court is best situated to determine, in the first instance, whether such relatively minimal alterations render *Graduation*, *Meditation*, *Canal Zone* (2007), *Canal Zone* (2008), and *Charlie Company* fair uses (including whether the artworks are transformative) or whether any impermissibly infringes on Cariou's copyrights in his original photographs. We remand for that determination.

In addition to its conclusion that Prince is liable for infringing on Cariou's copyrights, the district court determined that the Gagosian defendants are liable as vicarious and
contributory infringers. *Cariou, 784 F.Supp.2d at 354*. With regard to the twenty-five of Prince's artworks, which, as we have held, do not infringe on Cariou's copyrights, neither Lawrence Gagosian nor the Gallery may be liable as a vicarious or contributory infringer. *See Faulkner v. Nat'l Geographic Enters., Inc., 409 F.3d 26, 40 (2d Cir.2005)*. If the district court concludes on remand that Prince is liable as a direct infringer with regard to any of the remaining five works, the district court should determine whether the Gagosian defendants should be held liable, directly or secondarily, as a consequence of their actions with regard to those works. *See Copyright Act, 17 U.S.C. § 106(1), (2), (3), (5).*

CONCLUSION

For the reasons discussed, we hold that all except five (*Graduation, Meditation, Canal Zone (2007), Canal Zone (2008), and Charlie Company*) of Prince's artworks make fair use of Cariou's photographs. We express no view as to whether the five are also entitled to a fair use defense. We REMAND with respect to those five so that the district court, applying the proper standard, can determine in the first instance whether any of them infringes on Cariou's copyrights or whether Prince is entitled to a fair use defense with regard to those artworks as well. The judgment of the district court is REVERSED in part and VACATED in part.[5] The case is REMANDED for further proceedings consistent with this opinion.

Andrew J. ORKIN; F. Mark Orkin; Sarah-Rose Josepha Adler; A. Heinrich Zille, Plaintiffs-Appellants,

v.

Elizabeth TAYLOR, Defendant-Appellee.

No. 05-55364.

United States Court of Appeals, Ninth Circuit.

Filed May 18, 2007.

Appeal from the United States District Court for the Central District of California; R. Gary Klausner, District Judge, Presiding. D.C. No. CV-04-08472-RGK.

Descendants of Jewish art collector Margarete Mauthner (collectively, "the Orkins") claim that their ancestor was wrongfully dispossessed of a painting during Hitler's Nazi regime, entitling them to ownership of the painting, which was later purchased by actress Elizabeth Taylor. In this appeal, we conclude that the Holocaust Victims Redress Act does not create a private right of action and that the Orkins' state law claims are barred by the statute of limitations. We affirm the judgment of the district court, dismissing the complaint.

* Vincent van Gogh is said to have reflected that "paintings have a life of their own that derives from the painter's soul." The confused and perhaps turbulent history of his painting *Vue de l'Asile et de la Chapelle de Saint-Rémy* may prove the truth of his observation.

In 1889, a few months after cutting off the lower part of his left ear following a dispute with Paul Gauguin, van Gogh entered the Saint-Paul-de-Mausole asylum near the town of Saint-Rémy-de-Provence. During this period of his life, he produced over 150 paintings, including some of his most famous works, such as *The Starry Night*. In the summer or fall of 1889, he painted *Vue de l'Asile et de la Chapelle de Saint-Rémy*, which may have been part of a series that he described to his brother Theo as "Sketches of Autumn." The painting portrays either the Church of Labbeville near the town Auvers, a few miles from the asylum, or a monastery that was part of the asylum. Within a year of completing the painting, van Gogh died from a self-inflicted gunshot wound.

Van Gogh sold only one painting during his lifetime. Since his death, however, his works have indeed had lives of their own. After Vincent's death in 1890, and his brother Theo's death six months later, ownership of *Vue de l'Asile et de la Chapelle de Saint-Rémy* passed to Theo's widow, Johanna. The German art dealer Paul Cassirer, an early promoter of the works of van Gogh and other post-impressionist artists, purchased the painting in 1906 or 1907. Shortly thereafter, Cassirer sold the picture to Margarete Mauthner, an early collector of van Gogh's works. The parties vigorously dispute the circumstances under which Mauthner parted with the painting, and that dispute forms the basis of the current controversy between the parties. We need not, and we do not, resolve those factual disputes in this appeal because the issues before us are purely legal in nature. However, a description of the general factual background of the case—highlighting where appropriate the factual disputes—is helpful to frame the legal issues presented.

One of the tools used by art historians to trace ownership is an artist's *catalogue raisonné*. A *catalogue raisonné* is an annotated, illustrated book of a particular artist's works, usually prepared by art historians, scholars, and dealers, which constitutes "a definitive listing and accounting of the works of an artist." *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d. Cir. 1987). A *catalogue raisonné* published in 1928, *L'oeuvre de Vincent Van Gogh Catalogue Raisonné*, shows Margarete Mauthner as the owner of the painting. J.B. de la Faille's *catalogue raisonné* of van Gogh, published in 1939, also identifies Mauthner as the owner.

As the Nazis' persecution accelerated, Mauthner fled Germany to South Africa in 1939, leaving her possessions behind. She remained there until her death in 1947, at the age of 84. What happened to *Vue de l'Asile et de la Chapelle de Saint-Rémy* during that time is not clear from the record. A 1970 *catalogue raisonné* prepared by a committee of scholars in the Netherlands lists the next owner as Alfred Wolf, a Jewish businessman who left Germany for Switzerland in 1934 and ultimately relocated to South America. The auction catalogue prepared by Sotheby & Co. in 1963 lists the provenance, or chain of title, as including three owners prior to Wolf. The Sotheby's catalogue traces the ownership of the painting from Mauthner to Paul Cassirer, to Marcel Goldschmidt, and then to Alfred Wolf. The Orkins contend that this chain of ownership cannot be correct because Paul Cassirer had committed suicide in 1926, two years before the 1928 *catalogue raisonné* was published, listing Mauthner as the owner.

Notably, the Orkins do not contend that the painting was confiscated by the Nazis. Rather, they allege economic coercion, contending that Mauthner sold the painting "under duress." They note that laws promulgated by the Allied Forces after the conclusion of World War II established a presumption that any transfer or relinquishment of property by a persecuted person within the period January 30, 1933 to May 8, 1945 was an act of confiscation. Military Government Law No. 59 § 375(b).

Taylor contends that, at best, the record shows that the painting was sold through two Jewish art dealers to a Jewish art collector, with no evidence of any Nazi coercion or participation in the transactions.

In short, the parties agree that Mauthner once owned the painting and that it was later possessed by Alfred Wolf. At this point in the development of the case, the rest of what transpired with the painting during the 1930s in Berlin is clouded in uncertainty. Sometime in the early 1960s, the Estate of Alfred Wolf commissioned Sotheby's to sell by auction a number of Impressionist and Post-Impressionist paintings, including *Vue de l'Asile et de la Chapelle de Saint-Rémy*.

With the help of her father, who was an art dealer, Elizabeth Taylor began collecting art in the 1950s, acquiring works of Degas, Renoir, Pissarro, Monet, Cassatt and other prominent artists. She had long wanted to acquire a van Gogh. While living in London with her husband, Richard Burton, Taylor learned that *Vue de l'Asile et de la Chapelle de Saint-Rémy* would be offered at a Sotheby's auction in April 1963. She authorized her father to bid for her at the auction, and he was successful in purchasing the painting on her behalf for £ 92,000.
Taylor's acquisition was publicized at the time. Subsequently, the 1970 catalogue raisonné referenced Taylor's ownership. From November 1986 until March 1987, the painting was exhibited publicly at the Metropolitan Museum of Art in New York, in an exhibition entitled *Van Gogh in Saint Rémy and Auvers*.

In 1990, Taylor offered the painting for sale through Christie's auction house in London. The provenance for the sale lists Taylor as the current owner, with the prior owners being Alfred Wolf (of Stuttgart and Buenos Aires), Marcel Goldschmidt & Co. (of Frankfurt), Margarete Mauthner (of Berlin), Paul Cassirer (of Berlin), and Johanna van Gogh-Bonger (of Amsterdam). The work did not sell at the auction.

In 1998, Congress enacted three statutes pertaining to victims of Nazi persecution: the Holocaust Victims Redress Act ("Act"), Pub.L. No. 105-158, 112 Stat. 15 (1998), the Nazi War Crimes Disclosure Act of 1998, Pub.L. No. 105-167, 114 Stat. 2865 (1998), and the United States Holocaust Assets Commission Act of 1998, Pub.L. No. 105-186, 112 Stat. 611 (1998). The Orkins allege that their inquiry into whether their ancestor, Mauthner, may have lost her art collection due to Nazi persecution began upon the passage of these acts. They retained a law firm in 2001 and claim that, until their attorneys completed their investigation, they did not discover the basis of their current claim. The Orkins allege that, before they began that investigation, they did not know that Mauthner had owned *Vue de l’Asile et de la Chapelle de Saint-Rémy*, that she had lost the painting as a result of Nazi persecution, that Taylor had bought the painting, or that there was a legal basis for recovering the painting. They also claim that they first learned of Taylor's ownership in 2002, through a rumor on the internet that Taylor was interested in selling the painting.

In December 2003, the Orkins wrote a letter to Taylor, demanding that she return the painting to them. After some discussion of settlement, Taylor wrote a response letter declining settlement and asserting that the Orkins' claim to the painting was untimely. Taylor then filed a complaint for declaratory relief to establish her title.

In 2005, the Orkins filed their First Amended Complaint for recovery of the painting under theories of specific recovery, replevin, constructive trust, restitution, and conversion. The district court dismissed the complaint, concluding that the state-law actions were time-barred and that the federal statute did not create a private right of action. Because there is complete diversity between the parties and because the painting is worth more than $75,000, the district court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291, and we review *de novo* the district court's dismissal of the complaint pursuant to Rule 12(b)(6). *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir.2003).

Because the district court dismissed this case on a Rule 12(b)(6) motion, we must assume that all facts stated in the complaint are true and that they are provable by admissible evidence. Although the parties vigorously dispute whether the painting was effectively confiscated by the Nazis through forced sale or was legitimately sold through Jewish art dealers, we need not resolve that issue. We assume, for the purposes of our discussion, that the allegations of the complaint are true and that Mauthner was coerced into giving up the painting before she left Germany.
The district court properly dismissed the Orkins' federal claims on the ground that the Holocaust Victims Redress Act did not create a private right of action against private art owners. In determining whether a federal statute creates a private right of action, congressional intent is the cornerstone of the analysis. The Supreme Court has established a four-factor test for discerning whether a statute creates a private right of action. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Under that test, we must ask: (1) whether the plaintiff is a member of a class that the statute especially intended to benefit, (2) whether the legislature explicitly or implicitly intended to create a private cause of action, (3) whether the general purpose of the statutory scheme would be served by creation of a private right of action, and (4) whether the cause of action is traditionally relegated to state law such that implication of a federal remedy would be inappropriate. 422 U.S. at 78, 95 S.Ct. 2080.

The most important inquiry under *Cort* is the second factor: whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Opera Plaza Residential Parcel Homeowners Assn. v. Hoang*, 376 F.3d 831, 834-35 (9th Cir.2004) (quoting *Cort*, 422 U.S. at 78, 95 S.Ct. 2080); *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1121-22 (9th Cir.2000) (same). Indeed, the three *Cort* questions that are not explicitly focused on legislative intent are actually indicia of legislative intent, such that the *Cort* test itself is focused entirely on intent. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). The four *Cort* factors, thus, are merely targeted inquiries to guide our central project of discerning Congress's intent. *Id.*

The plain text of the Holocaust Victims Redress Act leaves little doubt that Congress did not intend to create a private right of action. The Orkins rely on § 202 of the Act, entitled "Sense of the Congress Regarding Restitution of Private Property, Such as Works of Art." That section reads in its entirety as follows:

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.


"Sense of the Congress" provisions are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law. *Yang v. Cal. Dept. of Soc. Servs.*, 183 F.3d 953, 958-59 (9th Cir.1999). Although "sense of the Congress" provisions are sometimes relevant to our determination of whether other mandatory provisions create private rights of action, *id.* at 959 & n. 4, the Orkins can point to no provision of the Act or of any of its companion legislation that can fairly be characterized as mandatory. There is simply no "right- or duty-creating language" anywhere in the statutory scheme, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n. 13, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), and § 202's announcement of a "sense of the Congress" cannot, of its own force, imply a private right of action, *Yang*, 183 F.3d at 958-59.
Additionally, the Act's legislative history indicates that even its most ardent supporter did not intend for the bill to create a private right of action. Rather, the legislative intent was to encourage state and foreign governments to enforce existing rights for the protection of Holocaust victims. The sponsor and primary champion of the legislation, Representative Jim Leach (R-IA), believed that existing law would suffice to restitute Nazi-stolen artworks to their Nazi-era owners. At a hearing that occurred after passage of the Act, Representative Leach noted the possibility that new "domestic legislation" might assist in restitution of stolen art, but he went on to conclude that "Congress may have gone as far as it appropriately should on this subject in the Holocaust Victims Redress Act." *Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services, 105th Cong., 2d Sess. (1998).* That statement strongly implies, consistently with the precatory language of the legislation itself, that the Act was a limited bill, passed with an understanding of constitutional limitations on congressional power. The second *Cort* factor, thus, does not support the Orkins' claim; the bill simply did not intend to create a private right of action.

Examination of the remaining *Cort* factors buttresses this conclusion. With respect to the first *Cort* factor, although there is no doubt that the Act was focused on Holocaust victims and (in a colloquial sense) intended to benefit them, Holocaust victims do not constitute a "beneficiary class" within the meaning of the *Cort* test. The provision's focus is on "governments" rather than individuals, urging those governments "to facilitate" enforcement of preexisting property rights. Act § 202, 112 Stat. at 17-18. The statute, thus, does not "explicitly confer[] a benefit on" Holocaust victims; it merely expresses Congress's sense that Holocaust survivors and heirs should benefit fully from preexisting protections. *Cf. Cannon,* 441 U.S. at 693-94, 99 S.Ct. 1946 (concluding that the first *Cort* factor was met because the statute at issue "explicitly confers a benefit on" an identifiable class and because the plaintiff was a member of that class). The Orkins, thus, are not members of a class that Congress "intended to benefit," as that phrase is used in *Cort.*

With respect to the third *Cort* factor, the text and history of the legislation reveal that its overarching purpose was not to provide for private litigation. Rather, the general purpose of the statutory scheme was to fund research efforts and to declassify records, while simultaneously encouraging foreign governments, as well as public and private institutions, to do likewise. In other words, the motivating concern was not access to courts; it was access to information. In fact, throughout the committee hearings, witnesses testified that courts would likely do a poor job of resolving Holocaust victims' claims. Specifically, the committee heard testimony that the difficulties of tracing information would likely preclude effective judicial resolution of discrete claims, and several museum directors testified that alternative fora such as mediation and arbitration were preferable to litigation. *Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services, 105th Cong., 2d Sess. (1998)* (testimony of Philippe de Montebello, director of the Metropolitan Museum of Art). The general purposes of the statute, therefore, do not support the conclusion that Congress intended to provide a private right of action in this case.

Finally, with respect to the fourth *Cort* factor, there can be no doubt—as this case amply demonstrates—that state law provides causes of action for restitution of stolen artworks. Furthermore, the torts asserted here are undoubtedly causes of action that
are traditionally relegated to state law. Implication of a federal remedy in this case, therefore, would be inappropriate under the fourth Cort factor. Representative Leach's statement that "Congress may have gone as far as it appropriately should" when it passed the Act strongly supports the conclusion that Congress did not intend to supersede traditional state-law remedies when it passed the Act. Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services, 105th Cong., 2d Sess. (1998).

In short, the Act does not satisfy any of the Cort factors; none of the relevant indicia of intent supports the conclusion that Congress intended to create an implied private right of action in this case. The Act is a precatory announcement of the "sense of the Congress," which neither confers rights nor creates duties. Given the absence of congressional intent to create a private right of action, the Orkins' assertion of a federal right of action must fail.

III

The district court also properly concluded that the Orkins' state-law claims were time-barred. California provides a three-year statute of limitations for any action arising from the "taking, detaining, or injuring" of any "goods or chattels." Cal. Civ.Proc.Code § 338(c). In 1983, the statute of limitations was amended to specify that a "discovery rule" governs accrual of causes of action for recovery of "any article of historical, interpretive, scientific, or artistic significance." Id. In other words, under the new law, an action for recovery of artwork accrues when the rightful owner discovers the whereabouts of the artwork. Before 1983, the statute did not specify when a cause of action for theft would accrue.

The Orkins do not argue that the 1983 amendment applies retroactively to their allegations of a 1939 theft and a 1963 conversion. Rather, they contend that the discovery rule applies even under pre-1983 law, citing an intermediate appeals court decision that so held. Naftzger v. Am. Numismatic Soc'y, 42 Cal.App.4th 421, 49 Cal.Rptr.2d 784 (1996).

"The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum." Ticknor v. Choice Hotels Intern., Inc., 265 F.3d 931, 939 (9th Cir. 2001) (quoting Gee v. Tenneco, Inc., 615 F.2d 857, 861 (9th Cir.1980)). If the state's highest appellate court has not decided the question presented, then we must predict how the state's highest court would decide the question. Id. In doing so, we take state law as it exists without speculating as to future changes in the law. Id.

The California Supreme Court has never confronted the question of what rule governs accrual of pre-1983 causes of action for theft and conversion. The California Supreme Court has, however, specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive notice. In Jolly v. Eli Lilly & Co., the California Supreme Court held that, under California's discovery rule, "[a] plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 658, 751 P.2d 923 (1988). In other words, under the discovery rule, a cause
of action accrues when the plaintiff discovered or reasonably could have discovered her claim to and the whereabouts of her property. In assessing California law, we conclude that it is highly unlikely that the California Supreme Court would abandon the Jolly rule, much less adopt a new rule that eschewed the concept of constructive notice.

Under Jolly, the latest possible accrual date of the Orkins' cause of action was the date on which they first reasonably could have discovered, through investigation of sources open to them, their claim to and the whereabouts of the van Gogh painting. From the face of the Orkins' complaint, it is apparent that Taylor's acquisition of the painting was certainly discoverable at least by 1990, when she held it out for sale in an international auction, and most probably as early as 1963, when she acquired the painting in a highly publicized international auction. In fact, the complaint alleges—and demonstrates by attachment—that Taylor bought the painting at a publicized auction in 1963, that Taylor was listed as the owner of the painting in a publicly available 1970 catalogue raisonné, and that Taylor publicly offered the painting for sale in 1990. Had the Orkins investigated any of those publicly-available sources, they could have discovered both their claim to the painting and the painting's whereabouts long before the 2002 internet rumor was posted.

We therefore affirm the district court's conclusion that the Orkins' state-law claims are time-barred. Even under the most generous possible rule for accrual of the causes of action, the claims expired in or before 1993—three years after the last public announcement of Taylor's ownership. The district court correctly held that the Orkins' state law claims were untimely filed.

IV

Congress did not create a private right of action in passing the Holocaust Victims Redress Act, which merely reflected the sense of Congress. The Orkins' state law claims are time-barred. The district court was entirely correct in dismissing the complaint. We need not, and do not, reach any of the other issues urged by the parties.

AFFIRMED.
OPINION AND ORDER
RAKOFF, District Judge.

Defendant charged with conspiracy to receive and possess stolen properties, specifically Egyptian artifacts, moved to dismiss indictment.

The District Court, Rakoff, J., held that: (1) defendant's alleged conduct was a theft under Egyptian law, and (2) Cultural Property Implementation Act of 1983 did not preclude defendant from being charged with a crime.

The marvelous artifacts of ancient Egypt, so wondrous in their beauty and in what they teach of the advent of civilization, inevitably invite the attention, not just of scholars and aesthetes, but of tomb-robbers, smugglers, black-marketeers, and assorted thieves. Every pharaoh, it seems, has a price on his head (at least if the head is cast in stone); and if the price is right, a head-hunter will be found to sever the head from its lawful owner. So, at least, is the theory of the instant indictment, which alleges, in effect, that the defendant and one or more co-conspirators arranged to steal highly valuable ancient Egyptian artifacts-including a million-dollar head of Amenhotep III and “fence” them in New York. This, says the indictment, makes the defendant guilty of conspiracy to violate section 2315 of Title 18, United States Code, which provides, in pertinent part, that “[w]hoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise ... which have crossed a State or United States boundary after being stolen ... knowing the same to have been stolen ... [is guilty of a crime].”

The defendant has pleaded not guilty and is presumed innocent. For purposes of this pre-trial motion, however, he assumes the facts as stated in the indictment and maintains that the indictment nonetheless fails to state a conspiracy to violate section 2315 because it presupposes, wrongly in his view, that someone who conspires to smuggle ancient artifacts out of Egypt is thereby guilty of, among other things, dealing in stolen goods, by virtue of Egyptian Law 117. See Indictment ¶¶ 1-6.

That law provides that, as of 1983, all Egyptian “antiquities”—that is, objects over a century old having archeological or historical importance (Law 117, Art. 1) FN1—“are considered to be public property,” that is, property of the state. Law 117, Art. 6. The defendant principally argues: (i) that Law 117, despite its assertion of state ownership, is really more in the nature of a licensing and export regulation, the violation of which does not constitute theft of property in the sense covered by section 2315; (ii) that, assuming Law 117 really does work an expropriation of property by Egypt, the special kind of property thereby vested in that foreign state does not give rise to interests entitled to protection under United States law; and (iii) that even if such foreign interests might sometimes be entitled to such protection, here Congress, in enacting the Cultural Property Implementation Act of 1983, 19 U.S.C. §§ 2601 et seq., chose to substitute a civil enforcement regime for criminal prosecution.

FN1. While the defendant expends much time and energy in arguing that the definition of “antiquities” under Law 117 is too vague to afford fair notice of what is covered and what is not, none of the ancient Egyptian artifacts that is the subject of the instant indictment (and corresponding bill of particulars)—such as a pharaoh's head and two old Kingdom painted reliefs, see Indictment, 8(a),8(g)—remotely raises questions of fair notice under any reasonable interpretation of that definition. That a
definition may be fuzzy around the edges does not render it meaningless, or inapplicable to what it clearly covers at its core. [1] The primary problem with defendant's first argument—that Law 117 is really regulatory in nature—is the language of the law itself, which unequivocally asserts state ownership of all antiquities (Art. 6), requires their recording by the state (Art. 26), prohibits (with certain practical exceptions) private ownership, possession, or disposal of such antiquities (Arts. 6-8), and requires anyone finding or discovering a new antiquity to promptly notify the Antiquities Authority (Arts. 23-24), which, in the case of movable antiquities, then takes physical possession and stores the antiquities in the museums and storage facilities of the Authority (Art. 28). Thus, so far as Egyptian antiquities are concerned, Law 117 on its face vests with the state most, and perhaps all, the rights ordinarily associated with ownership of property, including title, possession, and right to transfer. This, on its face, is far more than a licensing scheme or export regulation. To be sure, Law 117 qualifies certain aspects of state ownership where obvious practicalities so require. For example, while every newly-discovered but immovable antiquity is still deemed state owned, nonetheless “where the find is located on private property, the Authority shall decide within three months whether to remove the find, to initiate measures for expropriating the land upon which it is located, or to leave the antiquity in its place and register it in accordance with the provisions of this law.” (Art. 23). Similarly, pre-1983 owners or possessors of antiquities, though now required to register their antiquities with the state if they have not already done so, may in certain circumstances maintain possession or even dispose of their antiquities, but only with permission of the Authority. See, e.g. Arts. 7, 8, 9, 13. These adjustments to physical and historical circumstances only serve to confirm, however, that the statute's primary purpose is to transfer ownership to the state to the extent reasonably practicable. FN2 FN2 Moreover, the conspiracy here alleged relates only to movable antiquities, and the Government has formally disclaimed any intention to argue to the jury that the defendant knew that any pre-1983 antiquities were stolen. See Government's Post-Hearing Memorandum In Opposition to Defendant's Motion to Dismiss the Indictment, at 3 fn.2. Despite the plain language of Law 117, however, defendant argues that, in practice, even those antiquities discovered after 1983 have been left in the hands of their discoverers or other private transferees and that the law in operation really works more like a licensing or export regulation than like a transfer of property. But when, in response to these and other defense assertions, the Court convened an evidentiary hearing, pursuant to Rule 26.1 of the Federal Rules of Criminal Procedure, the defendant was unable to adduce any material, let alone persuasive evidence to support this contention. The most he could offer in this respect was the opinion of Professor Abou El Fadl, a professor of Islamic and Middle Eastern law at UCLA Law School, to the effect that nothing in Law 117 definitively prevents the Antiquities Authority from leaving physical possession of even an antiquity discovered after 1983 in the hands of a private finder, so long as the private finder promptly notifies the Authority of his find. See transcript of hearing of November 20, 2001 (“Tr.”), at A20. FN3 FN3 The transcript pages of the first portion of the November 20 hearing, taken by the Court Reporters, are denoted “A” followed by the page number. The transcript pages of the second portion of the November 20 hearing, originally taped and then transcribed by the Transcription Service, are denoted “B” followed by the page number. *448 In response to this purely hypothetical opinion, the Government presented, among much else, the testimony of Dr. Gaballa Ali Gaballa, Secretary General to the Supreme Council of Antiquities, that in fact the state takes immediate physical
custody of newly discovered antiquities, sometimes by the tens of thousands, tr. A77-79. Another Government witness, General Ali Sobky, Director of Criminal Investigations for the Antiquities Police (which employs more than 400 police officers), testified that his department regularly investigates and prosecutes dozens of serious violations of Law 117, of which relatively few are for smuggling and most are for trafficking within Egypt (including unlawfully possessing and disposing of state-owned antiquities), tr. B51-55. General Sobky also testified that even in the case where someone is acquitted of stealing a newly discovered antiquity, the antiquity is confiscated by the state as the lawful owner, tr. B69.

FN4. The defendant objected to certain of this testimony on hearsay and “due process” grounds, as well as on the ground that the underlying Egyptian documents that General Ali El Sobky summarized were not made available to the defendant. However, a “court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” Rule 26.1, Fed.R.Crim.P. At the November 20 hearing, the Court reserved on defendant's objections until the defendant had been provided with the underlying documents and had had a further opportunity to brief his objections. This having been done (see, e.g., Government's letter of December 18, 2001 and attachments thereto), the Court hereby determines that the objected-to evidence shall be received. It may also be noted that, even if the Court were to exclude this evidence, that would in no way change the result, since the provisions of Law 117 transferring ownership and right to possession to the state (which, contrary to defendant's argument, the Court finds to be unambiguous) must be presumed to be in force unless the defendant comes forward with at least some material evidence to the contrary—which, as noted, he has wholly failed to do. It is clear, therefore, that Law 117, far from being a disguised licensing scheme or export regulation, is precisely what it purports to be: a transfer of ownership of Egyptian antiquities to the state, effective 1983. As for defendant's second argument—to the effect that American law does not, or should not, recognize the kind of “special” property interest created by “patrimony” laws like Law 117, see United States v. McClain, 545 F.2d 988, 994 (5th Cir.1977) (Wisdom, J.) (rejecting such an argument)—it should first be noted that section 2315, which expressly refers to foreign commerce, has consistently “been applied to thefts in foreign countries and subsequent transportation into the United States,” McClain, 545 F.2d at 994 (citing cases): an implicit recognition of the interest of the United States in deterring its residents from dealing in the spoils of foreign thefts. In effectuating this policy, why should it make any difference that a foreign nation, in order to safeguard its precious cultural heritage, has chosen to assume ownership of those objects in its domain that have historical or archeological importance, rather than leaving them in private hands? FN5 If an American conspired to steal the Liberty Bell and sell it to a foreign collector of artifacts, there is *no question* he could be prosecuted under section 2315. Mutatis mutandis, the same is true when, as here alleged, a United States resident conspires to steal Egypt's antiquities. FN5 Egyptian law, like United States law, requires just compensation for takings, tr. A57. Accordingly, Law 117 expressly provides for full compensation to those who owned Egyptian antiquities prior to the state's assumption of ownership in 1983 or, even thereafter, to those whose land the state chooses to take by eminent domain in order to preserve the immovable antiquities upon it. See, e.g., Arts. 7, 13, 14, 16, 25. Furthermore, even those persons who discover antiquities after 1983 and are therefore on notice of the state's ownership qualify, in the discretion of the Antiquities Authority,
for financial rewards for their efforts. See Arts. 23, 24. To be sure, even if the Government proves the defendant knew he was importing antiquities that were smuggled out of Egypt—an act that may not be inherently violative of United States law and policy, see McClain, 545 F.2d at 996—there may still be a jury question as to whether he knew he was dealing in stolen goods, an essential element of a section 2315 violation. But the indictment alleges he possessed such knowledge, and the Government asserts that it will prove, inter alia, that the defendant knew that at least two of the items he conspired to import had been stolen from the Antiquities Police. This is more than sufficient for purposes of the present motion.

[2] Finally, as for defendant's argument that the Cultural Property Implementation Act of 1983, a civil customs law, somehow supersedes section 2315 when applied to the same subject matter, suffice to say that there is nothing in the language or the history of the Cultural Property Implementation Act to support this unlikely result. On the contrary, the Senate, in reporting out the Cultural Property Implementation Act, expressly stated that the Act “neither pre-empts state law in any way, nor modifies any Federal or State remedies ....” S.Rep.No. 97-564, at 25 (2d Sess.1982). Nor, indeed, is there any inconsistency between the application of the Cultural Property Implementation Act and the application of section 2315 to the “cultural property” involved in this case. See United States v. Stephenson, 895 F.2d 867, 872 (2d Cir.1990). The Cultural Property Implementation Act, rather than banning the importation of all cultural property exported in violation of foreign law, takes a more nuanced and complicated approach to when and under what circumstances such property can be imported into the United States; but this is because the Act is chiefly concerned with balancing foreign and domestic import and export laws and policies, not with deterring theft. Section 2315, by contrast, only applies in cases of intentional theft and knowing disposal of stolen goods, a situation in which even the primary academic proponent of the Cultural Property Implementation Act has stated that criminal prosecution is appropriate. See Paul M. Bator, An Essay on the International Trade in Art, 34 Stan. L.Rev. 275, 353 (1982). While defendant raises still other arguments in support of his motion to dismiss the indictment, the Court finds them sufficiently meritless as not to warrant discussion here. FN6 FN6. For example, the fact that an Egyptian court, in connection with a criminal prosecution of certain of defendant's coconspirators, did not name the defendant as a co-conspirator, in no way constitutes, as defendant here argues, a judicial determination of defendant's innocence binding on this Court. Defendant, indeed, was not even a party to the other proceeding. Accordingly, the Court, confirming its Order of December 27, 2001, hereby denies defendant's motion to dismiss the indictment.

SO ORDERED.

BONNICHSEN v. UNITED STATES
United States Court of Appeals, Ninth Circuit.

Robson BONNICHSEN; C. Loring Brace; George W. Gill; C. Vance Haynes, Jr.;
Richard L. Jantz; Douglas W. Owsey; Dennis J. Stanford; D. Gentry Steele,
Plaintiffs-Appellees, v. UNITED STATES of America; United States Army;
United States Army Corps of Engineers; David A. Fastabend; Francis P. McManamon;
Edward J. Kertis; Thomas E. White; Gale A. Norton; Craig Manson; Robert B.
Flowers; National Park Service; United States Department of the Interior,
Defendants-Appellants,

Nez Perce Tribe of Idaho; Confederated Tribes of the Umatilla Indian Reservation;
Confederated Tribes & Bands of the Yakama Nation; Confederated Tribes of the
Colville Reservation, Defendants-Intervenors. v. United States of America; United
States Army; United States Army Corps of Engineers; David A. Fastabend; Francis
P. McManamon; Edward J. Kertis; Thomas E. White; Gale A. Norton; Craig
Manson; Robert B. Flowers; National Park Service; United States Department of the
Interior, Defendants, Nez Perce Tribe of Idaho; Confederated Tribes of the Umatilla
Indian Reservation; Confederated Tribes & Bands of the Yakama Nation;
Confederated Tribes of the Colville Reservation, Defendants-Intervenors-Appellants.

02-35994, 02-35996. Nos.

Decided: February 4, 2004

Before ALDISERT, GRABER, and GOULD, Circuit Judges.* Ellen J.
Durkee, Environment & Natural Resources Division, Department of Justice,
Washington, D.C., for the defendants-appellants. Thomas P. Schlosser and Rob Roy
Smith, Morisset, Schlosser, Jozwiak & McGaw, Seattle, Washington, Melissa
Campobasso, Nespelem, Washington, for intervenor-appellant Confederated Tribes
of the Colville Reservation. Naomi Stacy, Pendleton, Oregon, for intervenor-appellant
Confederated Tribes of the Umatilla Indian Reservation. David J. Cummings, Lapwai,
Idaho, for intervenor-appellant Nez Perce Tribe. Thomas Zeilman and Tim Weaver,
Toppenish, Washington, for intervenor-appellant Yakama Nation. Joseph P. Siofele,
Pro Se, Moreno Valley, California, appellant. Alan L. Schneider, Portland, Oregon;
Paula A. Barran, Barran Liebman, LLP, Portland, Oregon, for the plaintiffs-appellees.
Bradley K. Baker, Porter, Wright, Morris & Arthur, LLP, Columbus, Ohio, for the
amicus Ohio Archaeological Council. S. Shawn Stephens, Locke Liddell & Sapp,
LLP, Houston, Texas; Joe H. Thrash, Assistant Attorney General, Austin, Texas, for
the amicus Texas Historical Commission. Walter Echo-Hawk, Native
American Rights Fund, Boulder, Colorado; Jack F. Trope, Association of American
Indian Affairs, Rockville, Maryland, for the amici Association of American Indian
Affairs and Morning Star Institute. Michael J. Fanelli, Covington & Burling,
Washington, D.C., for the amicus Society for American Archaeology. Sherry Hutt,
Pro Se, Paradise Valley, Arizona, amicus. Ellis J. Neiburger, Waukegan, Illinois, for
the amicus Ethnic Minority Council of America. Christopher A. Amato, Albany,
New York; Joseph J. Heath, Syracuse, New York, for the amicus Haudenosaunee Standing
Committee on Burial Rules and Regulations. Dr. Andrei Simic, Pro Se, Los Angeles,
California; Dr. Harry Glynn Custred, Jr., Pro Se, Hayward, California, amici.
Timothy Sandefur, Sacramento, California, for the amicus Pacific Legal Foundation.
Dr. Ives Goddard, Pro Se, Washington, D.C.; Dr. William Shipley, Pro Se, Santa
Cruz, California, amici.
This is a case about the ancient human remains of a man who hunted and lived, or at least journeyed, in the Columbia Plateau an estimated 8340 to 9200 years ago, a time predating all recorded history from any place in the world, a time before the oldest cities of our world had been founded, a time so ancient that the pristine and untouched land and the primitive cultures that may have lived on it are not deeply understood by even the most well-informed men and women of Seeking the opportunity of study, a group of scientists as our age.  Plaintiffs in this case brought an action against, inter alia, the United States Department of the Interior, challenging various Indian tribes' claim to one of the most important American anthropological and archaeological discoveries of the late twentieth century, and challenging the Interior Department's decision honoring the tribes' The discovery that launched this contest was that of a human skeleton, estimated by carbon dating to be 8340 to 9200 years old, known popularly and commonly as “Kennewick Man,” but known as “the Ancient One” to some American Indians who now inhabit regions in Washington, Idaho, and Oregon, roughly proximate to the site on the Columbia River at Kennewick, Washington. From the perspective of the scientists where the bones were found, Plaintiffs, this skeleton is an irreplaceable source of information about early New World populations that warrants careful scientific Yet, from the inquiry to advance knowledge of distant times, perspective of the intervenor-Indian tribes the skeleton is that of an ancestor who, according to the tribes' religious and social traditions, should be buried immediately without further testing.

Plaintiffs filed this lawsuit seeking to stop the transfer of the skeleton by the government to the tribes for burial, and the district court held in favor of the scientists-Plaintiffs. The Secretary of the Interior and the intervenor-Indian tribes appeal. 1291 and affirm the judgment. We have jurisdiction under 28 U.S.C. § of the district court barring the transfer of the skeleton for immediate burial and instead permitting scientific study of the skeleton.

I

In July 1996, teenagers going to a boat race discovered a human skull and bones near the shore of the Columbia River just outside Kennewick, Washington. The remains were found on federal property under the management of the United States Army Corps of Engineers (“Corps”) and, at the request of the county coroner, were removed for analysis by an anthropologist, Dr. James Chatters, pursuant to an Archaeological Resources Protection Act Because of 470aa-470mm, permit. of 1979 (“ARPA”), 16 U.S.C. §§ physical features such as the shape of the skull and facial bones, anthropologists at first thought the remains were those of an early But the anthropologists then found a stone European settler. The projectile point embedded in the skeleton's upper hip bone. object's design, when viewed with x-rays and CT scans of the hip, resembled a style that was common before the documented arrival of Further study of the remains revealed Europeans in the region. characteristics unlike those of a European settler, yet also inconsistent with any American Indian remains previously documented in A minute quantity of metacarpal bone was radiocarbon dated. 8340 and 9200 years old.

The skeleton attracted attention because some of its physical features, such as the shape of the face and skull, differed from those of modern Many scientists believed
the discovery might shed light on the origins of humanity in the Americas. Dr. Douglas Owsley, Division Head for Physical Anthropology at the Smithsonian Institution in Washington, D.C., made arrangements for Dr. Chatters to bring this important find to the Smithsonian's National Museum of Natural History for further study.

Indian tribes from the area of the Columbia River opposed scientific study of the remains on religious and social grounds. Four Indian groups (the “Tribal Claimants”) demanded that the remains be turned over to them for immediate burial. Based on the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. § 3001 et seq. and the Tribal Claimants, seized the remains on September 10, 1996, shortly before they could be transported to the Smithsonian. The Corps also ordered an immediate halt to DNA testing, which was being done using the remainder of the bone sample that had been submitted earlier for radiocarbon dating. After investigation, the Corps decided to give the remains to the Tribal Claimants for burial as required by NAGPRA, the Corps published a “Notice of Intent to Repatriate Human Remains” in a local newspaper on September 17, 1996, and September 24, 1996.

The scientists and others, including the Smithsonian Institution, objected to the Corps' decision, arguing that the remains were a rare discovery of national and international significance. In late September and early October 1996, several scientists asked Major General Ernest J. Herrell, Commander of the Corps' North Pacific Division, to allow qualified scientists to study the remains.

The scientists did not convince the Corps to permit them to study the remains, and commenced this litigation on October 16, 1996, in the United States District Court for the District of Oregon. In an opinion issued June 27, 1997, the district court denied the Corps' motion for summary judgment, finding that the Corps had “acted before it had all of the evidence,” “did not fully consider or resolve certain difficult legal questions,” and “assumed facts that proved to be erroneous.” The district court vacated the Corps' earlier decision on disposition of the remains and remanded the case to the Corps for further proceedings. Without prejudice, plaintiffs' motion to study the remains and directed the Corps to consider, on remand, “whether to grant plaintiffs' request [under ARPA] for permission to study the remains.”

On March 24, 1998, the Corps and the Secretary of the Interior entered into an agreement that effectively assigned to the Secretary responsibility to decide whether the remains were “Native American” under NAGPRA, and to determine their proper disposition. Department of the Interior then assumed the role of lead agency on this case.

Almost two years after this matter was remanded, the Secretary's experts began to examine the remains in detail. Experts estimated that Kennewick Man was 5′9″ to 5′10″ tall, 45 to 50 years of age when he died, and 15 to 20 years old when the projectile point became embedded in his hip. From non-destructive examination of the skeleton alone, when Kennewick Man died,
analysis of sediment layers where the skeleton was Man lived. found supported the hypothesis that the remains dated back not less than 7600 years ago and Kennewick Man could have lived more than 9000 years ago (the date indicated by the initial radiocarbon dating of the skeleton). Corps' decision to bury the discovery site in April 1998 prevented completion of those studies.10

The experts compared the physical characteristics of the remains—e.g., measurements of the skull, teeth, and bones—with corresponding measurements from other skeletons. remains were unlike those of any known present-day population, American Indian or otherwise.

The Secretary's experts cautioned, however, that an apparent lack of physical resemblance between the Kennewick Man's remains and present-day American Indians did not completely rule out the possibility that the remains might be biologically ancestral to Moreover, although Kennewick Man's morphological traits did not closely resemble those of modern American Indian populations, the Secretary's experts noted that Kennewick Man's physical attributes are generally consistent with the very small number of human remains from this period that have been found in North America.

Relying solely on the age of the remains and the fact that the remains were found within the United States, on January 13, 2000, the Secretary pronounced Kennewick Man's remains “Native American” within NAGPRA's. And on September 25, 2000, the Secretary determined that a meaning. preponderance of the evidence supported the conclusion that the Kennewick remains were culturally affiliated with present-day Indian For this reason, the Secretary announced his final decision to award Kennewick Man's remains to a coalition of the Tribal Claimants. The Corps and the Secretary also denied Plaintiffs' request to study the remains.

Plaintiffs filed an amended complaint in the district court. The district court again court challenging the Secretary's decisions. As pertinent to this appeal, the district ruled in Plaintiffs' favor. court vacated the Secretary's decisions as contrary to the 706(2)(A) (“APA”), on the Administrative Procedure Act, 5 U.S.C. § ground that the Secretary improperly concluded that NAGPRA applies. The district court also held Bonnichsen III, 217 F.Supp.2d 1138-39. that, because NAGPRA did not apply, Plaintiffs should have the opportunity to study Kennewick Man's remains under ARPA. Defendants and the Tribal Claimants appealed, and we stayed the district court's order granting Plaintiffs-scientists' study of the remains pending our decision herein.12

II

We The Tribal Claimants argue first address an issue of jurisdiction. that we lack jurisdiction because: (1) Plaintiffs' alleged injuries are not “redressable” by court action, and (2) Plaintiffs lack standing to bring claims alleging violations of NAGPRA because Plaintiffs do not seek to invoke interests within the “zone of interests” protected by NAGPRA.

A
As a general rule, the three constitutional standing requirements are imposed by the “case” or “controversy” provision of Article III:

that the plaintiff have suffered an (1) “injury in fact” ; (2) that there be a causal connection between the injury and the conduct complained of ; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). The Tribal Claimants do not dispute that Plaintiffs meet the first two constitutional standing requirements, but the Tribal Claimants argue that Plaintiffs do not and we so hold. The Tribal Claimants contend that meet the third requirement. Plaintiffs cannot show that the alleged injury, losing the opportunity to study Kennewick Man's remains, would be redressed by a favorable court decision because, the Tribal Claimants contend, NAGPRA, not ARPA, applies to this case, precluding redress of Plaintiffs' alleged injury. Stated another way, Defendants' theory is that Plaintiffs' injury is not redressable because Plaintiffs are not entitled to relief.

The question in deciding whether a plaintiff's injury is redressable is not whether a favorable decision is likely but whether a favorable decision likely will redress a plaintiff's injury. deciding whether a plaintiff's injury is redressable, courts assume See Hall v. Norton, 266 F.3d that plaintiff's claim has legal merit. 969, 976-77 (9th Cir.2001) (“The purpose of the standing doctrine is to ensure that the plaintiff has a concrete dispute with the defendant, not that the plaintiff will ultimately prevail against the defendant.”). Were the rule otherwise, courts would never have jurisdiction to entertain a lawsuit that appeared, at the pleading stage, and before such a rule evidence was considered, likely to fail on the merits. would be illogical.

Here, if NAGPRA does not apply (as we must assume in determining whether Plaintiffs have standing), ARPA applies, Kennewick Man's remains are of per the district court's ruling. archaeological significance and were collected pursuant to an ARPA. Neither Appellant disputes that ARPA gives Plaintiffs the permit opportunity to study Kennewick Man's remains if NAGPRA does not apply. We conclude that it is likely that Plaintiffs' injury will be redressed by a favorable decision on the NAGPRA issue, and thus Plaintiffs have constitutional standing.

B

Second, the Tribal Claimants argue that Plaintiffs lack standing to bring claims alleging violations of NAGPRA because Plaintiffs do not seek to invoke interests within the The Tribal Claimants urge “zone of interests” that NAGPRA protects, that Congress enacted NAGPRA only with the interests of American Indians in mind, so only American Indians or Indian tribes can file suit. We reject this argument. alleging violations of NAGPRA.

The “zone of interests” test invoked by the Tribal Claimants is a judge-made “prudential standing requirement,” independent of the three immutable constitutional standing requirements of Article III. See Bennett, 520 U.S. at 163, 117 S.Ct. 1154. of interests test, see id., and Congress
did exactly that in NAGPRA's 3013. That statute, 25 U.S.C. § broadly worded "enforcement" section, provides that "[t]he United States district courts shall have jurisdiction over any action brought by any person alleging a violation Section 3013 by its terms broadly confers jurisdiction on the courts to hear "any action" brought by "any person alleging a violation.""

The Supreme Court has held that such broad statutory language effectively negates the prudential zone of interests test. In Bennett, the Court decided "to take the term 'any person' at face value," and held that "any person" could enforce the Endangered Species Act, which provides that "any person may commence a civil suit on his own behalf to enjoin any person alleged to be in violation of any provision of this chapter." 520 U.S. at 165 & In 1540(g). In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210-11, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), the Court held that standing was expanded to the full extent permitted under Article III by the Civil Rights Act of 1968. That statute provided, “[a]ny person who claims to have been injured by a discriminatory housing practice” may sue. 3610(a) (1986 ed.) (emphasis added). U.S.C. §

Like the statutes of NAGPRA contains the broad "any person" formulation and includes no textual limitation on federal court jurisdiction. Moreover, § court jurisdiction. restrictive formulations Congress sometimes uses to limit standing. 298(b)(authorizing suit only by "competitors, See, e.g., 15 U.S.C. § 3013 does not limit jurisdiction to suits brought by American Indians or "Any person" means exactly that, and may not be interpreted restrictively to mean only "any American Indian person" or "any Indian Tribe." 13

It is true that Plaintiffs are seeking to prevent the Secretary from repatriating human remains, rather than to compel the Secretary to repatriate them. The formulation applies to all causes of action authorized by § only to actions against the Secretary asserting underenforcement of NAGPRA, but also to actions against the Secretary asserting overenforcement. See Bennett, 520 U.S. at 166, 117 S.Ct. 1154("[T]he over-enforcement. ‘any person’ formulation applies to all the causes of action authorized by [the Endangered Species Act] not only to actions against the Secretary asserting underenforcement but also to actions against the We conclude that we have jurisdiction over Plaintiffs' claims that NAGPRA was violated. 14

III

Our review of the Secretary's decision to transfer Kennewick Man to the Tribal Claimants is governed by the APA, which instructs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." NAGPRA vests "ownership or control" of newly discovered Native American human remains in the decedent's lineal descendants or, if lineal descendants cannot be ascertained, in a tribe "affiliated" with the remains. The first inquiry is whether human remains are Native American within the statute's meaning. If the remains are not Native
American, then NAGPRA does not apply. However, if the remains are Native American, then NAGPRA applies, triggering the second inquiry of determining which persons or tribes are most closely affiliated with the remains.

The parties dispute whether the remains of Kennewick Man constitute Native American remains. NAGPRA defines human remains as “Native within NAGPRA’s meaning. American” if the remains are “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” The text of the relevant statutory clause is written in the present tense (“of, or relating to, a tribe, people, or culture that is Thus the statute unambiguously requires that human indigenous”). remains bear some relationship to a presently existing tribe, people, or culture to be considered Native American.

It is axiomatic that, in construing a statute, courts generally give words not defined in a statute their “ordinary or natural meaning.” Alvarez-Sanchez, 511 U.S. 350, 357, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994); see also Williams v. Taylor, 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (holding that courts “give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import”) (internal quotation marks omitted).

In the context of NAGPRA, we conclude that Congress's use of the present tense is significant. R. Pence and D. Emery, A Grammar of Present Day English 262(2d ed.1963). by using the phrase “is indigenous” in the present tense, referred to We must presume that presently existing tribes, peoples, or cultures. Congress gave the phrase “is indigenous” its ordinary or natural meaning. conclude that Congress was referring to presently existing Indian tribes when it referred to “a tribe, people, or culture that is indigenous to the United States.”

NAGPRA also protects graves of persons not shown to be of current tribes in that it protects disjunctively remains “of, or relating to” current Thus, NAGPRA extends to all remains that relate to a indigenous tribes. tribe, people, or culture that is indigenous to the United States, see 3001(9) (defining human remains as Native American if they are “of, or relating to, a tribe, people, or culture that is indigenous to the United States”) (emphasis added).

Our conclusion that NAGPRA's language requires that human remains, to be considered Native American, bear some relationship to a presently existing tribe, people. As regards newly discovered or culture accords with NAGPRA's purposes. human remains, NAGPRA was enacted with two main goals: to respect the burial traditions of modern-day American Indians and to protect the by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves and See H.R.Rep. No. the study or the display of their ancestors' remains. 101-877, at 4369 (1990) (“For many years, Indian tribes have attempted to have the remains and funerary objects of their ancestors returned to them.”) (emphasis added).
Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains. Yet, that would be the result under the Secretary's construction of the statute, which would give Native American status to any remains found within the United States regardless of age and regardless of lack of connection to existing indigenous tribes. The exhumation, study, and display of ancient human remains that are unrelated to modern American Indians was not a target of Congress's aim, nor was it precluded by NAGPRA.

NAGPRA was also intended to protect the dignity of the human body after death by ensuring that Native American graves and remains be treated with respect. See S.Rep. No. 101-473, at 6 (1990) (“The Committee believes that human remains must at all times be treated with dignity and respect.”); H.R.Rep. No. 101-877, at 4372 (1990) (“Some Indian representatives testified that the spirits of their ancestors would not rest until they are returned to their homeland.”) (emphasis added). requiring the return to modern-day American Indians of human remains that bear some significant relationship to them.

Despite the statute's language and legislative history, the Secretary argues that the district court's interpretation “improperly collapses” NAGPRA's first inquiry (asking whether human remains are Native American) into NAGPRA's second inquiry (asking which American Indians or Indian tribe the remains are most closely affiliated to). The district court's interpretation of a specific Indian tribe. Because the NAGPRA preserves the statute's two distinct inquiries. record shows no relationship of Kennewick Man to the Tribal Claimants, the district court was correct in holding that NAGPRA has no application.

The Secretary finally argues that, under Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we must defer to the Secretary's construction of the statute by regulation has defined “Native American” to mean “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” regulation, enacted through notice and comment rulemaking, defines Native American exactly as NAGPRA defines it, with one critical exception: the regulation omits the present tense phrase “that is.” Compare 25 U.S.C. § 10.2(d) (“a culture that is indigenous to the United States”) (emphasis added) with 43 C.F.R. § 10.2(d) (“a tribe, people, or culture that is indigenous to the United States”) (emphasis added). We hold, for the reasons discussed above, that NAGPRA's requirement that Native American remains bear some relationship to a presently existing tribe, people, or culture is unambiguous, and that the Secretary's contrary interpretation therefore is not owed Chevron deference. 467 U.S. at 842-43, 104 S.Ct. 2778 (“If the intent of Congress is clear, that is the end of the matter: for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”); see also Wilderness
Soc'y v. United States Fish & Wildlife Serv., No. 01-35266, 353 F.3d 1051, 1061,
2003 WL 23025466, at *6 (9th Cir. Dec.30, 2003) (en banc) (“If, under these canons,
or other traditional means of determining Congress's intentions, we are able to
determine that Congress spoke clearly ., then we may not defer to the[agency's]
Moreover, the Secretary's regulation contrary interpretation.”). conflicts with
NAGPRA's plain language and so is invalid for that See Whitman v. Am. Trucking
Ass'ns, 531 U.S. 457, 481, 121 reason. S.Ct. 903, 149 L.Ed.2d 1 (2001) (holding that
Chevron deference is due only to a “reasonable interpretation made by the
administrator of an agency”) (emphasis added) (internal quotation marks omitted);
L.Ed.2d 134 (1989) (“[N]o deference is due to agency interpretations at odds with the
plain language of the statute Finally, the common maxim of statutory construction
that we itself.”). must give effect, if possible, to every word Congress used is fatal to
the Secretary's attempt to amend NAGPRA by removing the phrase “that See
Bennett, 520 U.S. at 173, 117 S.Ct. 1154 (“It is the is.” ‘cardinal principle of
statutory construction’ [that courts must] give We hold effect, if possible, to every
clause and word of a statute.’”). 10.2(d), NAGPRA requires that human that,
notwithstanding 43 C.F.R. § remains bear a significant relationship to a presently
existing tribe, The district court did not err in reaching that conclusion.

Our analysis is strengthened by contrasting the statutory definition of the adjective
“Native American” to the statutory definition of the noun “Native 3001(9), “ ‘Native
American’ means of, or relating Under § Hawaiian.” to, a tribe, people or culture
that is indigenous to the United States.” 3001(10), “ ‘Native Hawaiian’ means any
Under § (Emphasis added). individual who is a descendant of the aboriginal people
who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.”

The “United Owings v. Speed, States” is a political entity that dates back to 1789. This term supports 18 U.S. (5 Wheat.) 420, 423, 5 L.Ed. 124 (1820) that Congress's use of the present tense (“that is indigenous”) referred to tribes, peoples, and cultures that exist in modern times, not to those that may have existed thousands of years ago but who do not exist. By contrast, when Congress chose to harken back to earlier times, it described a geographic location (“the area that now constitutes the State of Hawaii”) rather than a political entity (“the United States”).

Our conclusion that NAGPRA requires human remains to bear some relationship to a presently existing tribe, people, or culture to be considered “Native American” is also reinforced by how NAGPRA defines “sacred objects” as “specific ceremonial objects.” An artifact to be deemed a “sacred object” must be connected to the practice of an American Indian religion by present-day peoples. Consistent with our reading of “Native American”, that is, just as there must be a relationship between an artifact and a presently existing peoples for the artifact to be a “sacred object” under NAGPRA, there must be a relationship between a set of remains and a presently existing tribe, people, or culture for those remains to be “Native American” under NAGPRA.

Although NAGPRA does not specify precisely what kind of a relationship or precisely how strong a relationship ancient human remains must bear to modern Indian groups to qualify as Native American, NAGPRA's legislative history provides some guidance on. The House Committee on Interior emphasized in its report on NAGPRA that the statute was being enacted with modern-day American Indians' identifiable ancestors in mind. (“Indian representatives testified that the spirits of their ancestors would not rest until they are returned to their homeland.”) (emphasis added); id. at 4369 (“For many years, Indian tribes have attempted to have the remains and funerary objects of their ancestors returned to. Human remains that are 8340 to 9200 years them.”) (emphasis added)). Old and that bear only incidental genetic resemblance to modern-day American Indians, along with incidental genetic resemblance to other peoples, cannot be said to be the Indians' “ancestors” within Congress's control meaning. Congress enacted NAGPRA to give American Indians control over the remains of their genetic and cultural forebears, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture.

The age of Kennewick Man's remains, given the limited studies to date, makes it almost impossible to establish any relationship between the remains and presently existing American. We cannot give credence to an interpretation of NAGPRA advanced by the government and the Tribal Claimants that would apply its provisions to remains that have at most a tenuous, unknown, and unproven connection, asserted solely because of the geographical location of the find.
Finally, we address the Secretary's determination that Kennewick Man's remains are Native American, as defined by NAGPRA. The Secretary's decision if it was “arbitrary” or “capricious” because the decision was based on inadequate factual support. We review the full agency record to determine whether substantial evidence supports the agency's decision that Kennewick Man is “Native American.” Here, after reviewing the record, we conclude that the record does not contain substantial evidence that Kennewick Man's remains are Native American within NAGPRA's meaning.

The administrative record contains no evidence—let alone substantial evidence—that Kennewick Man's remains are connected by some special or significant genetic or cultural relationship to any presently existing indigenous tribe, people, or culture. An examination of the record demonstrates the absence of evidence that Kennewick Man and modern tribes share significant genetic or cultural features.

No cognizable link exists between Kennewick Man and modern Columbia. When Kennewick Man's remains were discovered, local Plateau Indians coroners initially believed the remains were those of a European, not a Native American, because of their appearance. Later testing by Native American scientists demonstrated that the cranial measurements and features of Kennewick Man most closely resemble those of Polynesians and southern Asians, and that Kennewick Man's measurements and features differ significantly from those of any modern Indian group living in North America.

Scant or no evidence of cultural similarities between Kennewick Man and modern Indians exists. One of the Secretary's experts, Dr. Kenneth Ames, reported that “the empirical gaps in the record preclude establishing cultural continuities or discontinuities, particularly before about 5000 B.C.” Dr. Ames noted that, although there was overwhelming evidence that many aspects of the “Plateau Pattern” were present between 1000 B.C. and A.D. 1, “the empirical record precludes establishing cultural continuities or discontinuities across. He noted that the available evidence is increasingly remote periods.”

Dr. Ames' conclusions about the impossibility of establishing cultural continuity between Kennewick Man and modern Indians is confirmed by other evidence that the Secretary credited. For example, the Secretary acknowledges that the record shows that there were no villages or permanent settlements in the Columbia Plateau region 9000 years ago and that human populations then were small and nomadic, traveling long distances in search of food and raw materials. The Secretary's experts determined, and the Secretary acknowledged, that it was not until 2000 to 3000 years ago that populations began to settle into the villages and bands that may have been the antecedents of modern Indian tribes something like those encountered by European
As the Secretary summarized, “[c]ultural settlers and colonists. discontinuities are suggested by evidence that the cultural group existing 8500-9500 years ago was likely small in size and highly mobile while the Plateau culture consisted of larger, more sedentary groups.”

The Secretary also acknowledges that “there is very little evidence of burial patterns during the 9500-8500 period and significant temporal gaps exist in the mortuary record for other periods.” assume that Kennewick Man was part of a stable social group living in the area, it still would be impossible to say whether his group's burial practices were related to modern tribes' burial practices. Secretary also noted that “the linguistic analysis was unable to provide reliable evidence for the 8500-9500 period.”

The Secretary's only evidence, perhaps, of a possible cultural relationship between Kennewick Man and modern-day American Indians comes in the form of oral histories. Dr. Daniel Boxberger, one of the Secretary's experts, concluded that modern day Plateau tribes' oral histories-some of which can be interpreted to refer to ancient floods, volcanic eruptions, and the like—are “highly suggestive of long-term establishment of the present-day tribes.” traditions showed no necessary tale of a superseding migration with evidence in the record newer peoples displacing older ones. demonstrates that oral histories change relatively quickly, that oral histories may be based on later observation of geological features and deduction (rather than on the first teller's witnessing ancient events), and that these oral histories might be from a culture or group other than the one to which Kennewick Man belonged. relied upon by the Secretary's expert, Dr. Boxberger, entail some published accounts of Native American folk narratives from the Columbia Plateau region, and statements from individual tribal members. conclude that these accounts are just not specific enough or reliable enough or relevant enough to show a significant relationship of the Tribal Claimants with Kennewick Man. Because oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins, we do not think that the oral traditions of interest to Dr. Boxberger were adequate to show the required significant relationship of the Kennewick Man's remains to the Tribal Claimants. As the district court observed, 8340 to 9200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions.

Considered as a whole, the administrative record might permit the Secretary to conclude reasonably that the Tribal Claimants' ancestors have lived in the region for a very long time. However, because Kennewick Man's remains are so old and long time, the information about his era is so limited, the record does not permit the Secretary to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing tribes, people, or cultures. Man's remains are not Native American human remains within the meaning of NAGPRA and that NAGPRA does not apply to them. Kennewick Man's remains by Plaintiffs-scientists may proceed pursuant to ARPA.
We remand to the district court for further proceedings consistent with this opinion.

AFFIRMED.

FOOTNOTES

1. Plaintiff Plaintiffs are experts in their respective fields. Bonnichsen is Director of the Center for the Study of the First Americans at Oregon State University. Biological Anthropology at the University of Michigan Museum of Anthropology. Plaintiff Brace is Curator of Biological Anthropology at the University of Michigan Museum of Anthropology. Plaintiff Owsley is division head for anthropology professors. physical anthropology at the Smithsonian Institution's National Museum. Plaintiff Stanford is Director of the Division of Natural History. Smithsonian's Paleo Indian Program.

2. The Tribal Claimants-present in this appeal as intervenors-are the Confederated Tribes & Bands of the Yakama Indian Nation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Colville Reservation.

3. We use the term “American Indian” because the definition of “Native American,” as used in Native American Graves Protection and Repatriation Act, is a disputed issue in this appeal.


5. Our rendition of the facts is adapted from the district court's third published opinion in this case. No party on appeal disputes the district court's findings of fact, which are supported by the administrative record.

6. Human skeletons this old are rare in the Western Hemisphere, and most have consisted of only fragmental remains. that less than twelve securely dated human crania older than 8000 years. By contrast, about 90 percent of have been found in the United States. Dr. Chatters testified this skeleton was recovered in good condition. It in an affidavit: “The Kennewick Man skeleton is virtually intact. lacks only the sternum and a few small nondiagnostic bones of the hands. Although some of the ribs and other long bones are and the feet. The skull and the lower jaw are fragmental, they can be reconstructed. The bones of the skeleton are complete and are not deformed. extremely well preserved, with only minor surface mineralization and little if any evidence of decay.”

7. The Smithsonian Institution in Washington, D.C., is the world's largest museum complex, with fourteen museums in the District of Columbia and The National
Museum of Natural History, over 90 affiliate museums. part of the Smithsonian Institution, was established in 1910 and “is home to about 185 professional natural history scientists, the largest group of scientists dedicated to the study of the natural and cultural National Museum of Natural History Research history in the world.” & Collections Home Page, http://www.mnh.si.edu/rc/.

8. For example, the Tribal Claimants urged that “[w]hen a body goes into the ground, it is meant to stay there until the end of time. remains are disturbed and remain above the ground, their spirits are at unrest. To put these spirits at ease, the remains must be returned to Bonnichsen III, 217 F.Supp.2d at the ground as soon as possible.” We note 1121 (quoting Joint Tribal Amici Memorandum (1997) at 4-5). that the Ethnic Minority Council of America, in its amicus brief, urges that: “Potential descendants [of Kennewick Man] may not be members of the Joint Tribal Claimants or believe in the expressed ‘Indian’ religious interpretations made by the political leaders of the tribes.” Further, as suggested by amicus Ohio Archaeological Council, in the absence of a conclusive determination of cultural affiliation, the Tribal Claimants cannot establish that permitting Plaintiffs-scientists to study the Kennewick Man's remains offends their religious views or customs.

9. The parties agreed that the magistrate judge's determinations would be We refer to the final and not subject to review by the district court. opinions of the magistrate judge as that of the district court.

10. The Corps buried the discovery site of the remains under approximately two million pounds of rubble and dirt, topped with 3700 willow, dogwood, The lengthy administrative record that and cottonwood plants. Defendants filed with the district court documents only a portion of the process by which the decision to bury the site was made. Nevertheless, that record suggested to the district court that the Corps' primary objective in covering the site was to prevent additional remains or artifacts from being discovered, not to “preserve” the site's archaeological value or to remedy a severe erosion control problem as Burial Defendants represented. Bonnichsen III, 217 F.Supp.2d at 1125. of the discovery site hindered efforts to verify the age of Kennewick Man's remains, and effectively ended efforts to determine whether other artifacts are present at the site which might shed light on the relationship between the remains and contemporary American Indians. at 1126.

11. The district court also held that even if NAGPRA applied: (1) the remains were not “culturally affiliated” with the Tribal Claimants; (2) only an individual Indian tribe-not a coalition of Indian tribes-could be a proper claimant under NAGPRA; and (3) the Tribal Claimants' alleged “aboriginal occupation” of the discovery site was not a proper Bonnichsen III, 217 reason to give the Tribal Claimants the remains. Because we conclude infra that NAGPRA does not F.Supp.2d at 1158. apply to Kennewick Man's remains, we do not need to reach and we do not review these additional holdings of the district court.

12. An additional appellant, Joseph P. Siofele, argues that Kennewick Man's remains are Polynesian, that Siofele is Kennewick Man's descendant, and Siofele appeals that Kennewick Man's remains properly belong to him. pro se from the district court's denial of his untimely motion to We resolve Siofele's appeal in a separate disposition. intervene.
13. The Tribal Claimants rely on an out-of-circuit district court decision, Idrogo v. United States Army, 18 F.Supp.2d 25 (D.D.C.1998), for the proposition that non-Indian plaintiffs lack standing to bring lawsuits alleging violations of NAGPRA because they are not within the statute's But Idrogo does not stand for this broad zone of interests proposition and is not persuasive to us in support of the claimed Rather, Idrogo merely held that a particular plaintiff restriction bearing no relation to the Apache warrior Geronimo could not sue for the “return” of Geronimo’s remains because that plaintiff did not satisfy In Idrogo, Id. at 27 the constitutional injury-in-fact requirement. neither the prudential standing requirements nor the zone-of-interests And unlike Plaintiffs here, the Idrogo plaintiff test was at issue. had not alleged any interest in studying the remains.

14. Even if NAGPRA did not confer jurisdiction over Plaintiffs’ claims, the See APA’s “generous review provisions” would confer jurisdiction. Clarke v. Sec. Indus. Ass’n, 479 U.S. 388, 400 n. 16, 107 S.Ct. 750, 93 The APA provides a right to judicial review of all L.Ed.2d 757 (1987). “final agency action for which there is no other adequate remedy in The interests Plaintiffs seek to protect are 704. 5 U.S.C. § court.” “arguably within the zone of interests to be protected or regulated” by See Bennett, 520 U.S. at 175, 117 S.Ct. 1154 3002(a). NAGPRA § (holding that under an APA claim one looks to substantive statutes to determine whether zone-of-interests test is met). not intended merely to benefit American Indians, but rather to strike a balance between the needs of scientists, educators, and historians on Plaintiffs’ claim the one hand, and American Indians on the other. 3002(a) is that they are victims of a mistaken over-enforcement of § within the provision’s zone of interests.

15. The Supreme Court has found Congress's use of the present tense to be Smithfield Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 59, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) (holding that Congress's use of the 1365 meant that citizens could not maintain present tense in 33 U.S.C. § a suit for past violations of the Clean Water Act) (superceded in Federal appellate courts have made irrelevant part by statute). Medberry v. Butler, 185 F.3d 1189, 1193 (11th similar observations. 1915(g) Cir.1999) (“Congress' use of the present tense in [28 U.S.C.] § confirms that a prisoner's allegation that he faced imminent danger sometime in the past is an insufficient basis to allow him to proceed in forma pauperis pursuant to the imminent danger exception to the statute”); Malik v. McGinnis, 293 F.3d 559, 562 (2d Cir.2002) (same); Abdul-Akbar v. McKelvie, 239 F.3d 307, 313 (3d Cir.2001) (same).

16. The Secretary argues that “[i]n common parlance, the words ‘is’ and ‘was’ are appropriately used interchangeably when referring to tribes, peoples and cultures that existed in the past but are being spoken of in The Secretary offers no Gov't Opening Brief at 31. the present.” support for this assertion, and we decline to accept it as an accurate description of the intent of Congress in this case as we interpret Our holding is 1 NAGPRA. imited to a determination that Congress was referring to presently existing Indian tribes when it referred to “a We tribe, people, or culture that is indigenous to the United States.” do not foreclose the possibility that, in any other statute, Congress's use of the present tense, in the context of a different statute, with
different statutory language, structure, and purposes, could implicate a time period other than the present.

17. At oral argument, the government urged that its interpretation of remains as Native American when found within the United States would apply even to remains as old as 100,000 or 150,000 years, close to the dawn of homo sapiens. It said that if remains of a mythical first man and woman, an “Adam and Eve,” were found in the United States, those remains would be “Native American” under the government's interpretation of NAGPRA. The government's unrestricted interpretation based solely on geography, calling any ancient remains found in the United States “Native American” if they predate the arrival of Europeans has no principle of limitation. This does not appear to us to be what Congress had in mind. Nor does the legislative history support NAGPRA coverage of bones of such great antiquity.

18. Because this aspect of NAGPRA is unambiguous, we need not resort to the “Indian canon of construction,” under which “doubtful expressions” in legislation passed for the benefit of Indian tribes are resolved in See South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986).

19. See Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367, 1374-75 (9th Cir.1995) (“When the arbitrary and capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test.”) (internal quotation marks omitted), rev’d on other grounds, 521 U.S. 457, 118 S.Ct. 2130, 138 L.Ed.2d 585 (1997). We consider the record as a whole, weighing both the evidence (1971). We consider the record as a whole, weighing both the evidence (1971). We consider the record as a whole, weighing both the evidence (1971). We consider the record as a whole, weighing both the evidence (1971). We consider the record as a whole, weighing both the evidence (1971). We consider the record as a whole, weighing both the evidence (1971). We consider the record as a whole, weighing both the evidence (1971). We consider the record as a whole, weighing both the evidence (1971).

20. In so holding, we necessarily determine that no reasonable person could conclude by a preponderance of the evidence on this record that Kennewick Man is “Native American” under NAGPRA. See Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366-67, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) (holding that under the substantial evidence standard the reviewing court “must decide whether on this record it would have been possible for a reasonable jury to reach the [agency's] conclusion.”).

21. As pointed out by amici Texas Historical Commission, under the framework proposed by the government and the Tribal Claimants, as soon as any remains are determined to be pre-Columbian, any study or testing of such remains would have to stop. This blanket prohibition could result in improper disposition of remains to parties wholly unrelated to the remains.

22. In a letter announcing his final decision that Kennewick Man is Native American, the Secretary acknowledged this discontinuity: “That the morphological characteristics of the remains differ from modern day Indian tribes may indicate a
cultural discontinuity between the two groups, or may indicate that the cultural group associated with the Kennewick Man may have subsequently intermixed with other groups migrating into or through the region, leading to changes in the morphological characteristics of the group.

23. We find of considerable help the explanations of the uses and limits on oral narratives as explained and documented with scholarly authority by amicus curiae Dr. Andrei Simic, Professor of Anthropology at the University of Southern California, in Los Angeles since 1971 who has specialized in study of the role of folklore and oral tradition in developing cultural identity of ethnic groups, and Dr. Harry Glynn Custred, Jr., Professor of Anthropology at California State University in Hayward since 1971, who teaches anthropology, linguistics, and folklore and who has written on the subject of oral traditions.

24. As pointed out by amici Texas Historical Commission, Plaintiffs-scientists plan to engage in the following general types of testing: (1) morphometric cranial and post-cranial measurements comparing the Kennewick Man's remains with other populations; (2) dental characteristic studies; (3) DNA studies; and (4) diet analysis.

GOULD, Circuit Judge:

AUTOCEPHALOUS GREEK–ORTHODOX CHURCH OF CYPRUS and The Republic of Cyprus, Plaintiffs–Appellees,
v.
GOLDBERG AND FELDMAN FINE ARTS, INC., and Peg Goldberg, Defendants–Appellants.
No. 89–2809.
Rehearing and Rehearing En Banc Denied Nov. 21, 1990.

Republic of Cyprus and Church of Cyprus brought suit to recover mosaics which had been stolen from Greek-Orthodox church and ultimately purchased by museum owner. The United States District Court for the Southern District of Indiana, Indianapolis Division, 717 F.Supp. 1374, James E. Noland, Senior District Judge, awarded possession of mosaics to Cyprus, and museum owner appealed. The Court of Appeals, Bauer, Chief Judge, held that: (1) requirements for diversity jurisdiction were met; (2) Indiana law applied; (3) action was timely; (4) Cyprus was entitled to possession of the mosaics; and (5) confiscatory decrees of occupying Turkish forces did not divest church of its claim of title. Affirmed.

Cudahy, Circuit Judge, filed concurring

Before BAUER, Chief Judge, and CUDAHY, Circuit Judge, and PELL, Senior Circuit Judge.
There is a temple in ruin stands,
Fashion'd by long forgotten hands;
Two or three columns, and many a stone,
Marble and granite, with grass o'ergrown!
Out upon Time! it will leave no more
Of the things to come than the things before!
Out upon Time! who for ever will leave
But enough of the past and the future to grieve
O'er that which hath been, and o'er that which must be:
What we have seen, our sons shall see;
Remnants of things that have pass'd away,
Fragments of stone, rear'd by creatures of clay!

from The Siege of Corinth,
George Gordon (Lord Byron) FN1
FN1. Reprinted in The Complete
Poetical Works of Byron 384–96
(Cambridge ed. 1933).

Byron, writing here of the Turkish invasion of Corinth in 1715, could as well have been describing the many churches and monuments that today lie in ruins on Cyprus, a small, wartorn island in the eastern corner of the Mediterranean Sea. In this appeal, we consider the fate of several tangible victims of Cyprus' turbulent history: specifically, four Byzantine mosaics created over 1400 years ago. The district court awarded possession of these extremely valuable mosaics to plaintiff-appellee, the Autocephalous Greek–Orthodox Church of Cyprus (“Church of Cyprus” or “Church”). Autocephalous Greek–Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F.Supp. 1374 (S.D.Ind.1989). Defendants-appellants, Peg Goldberg and Goldberg & Feldman Fine Arts, Inc. (collectively “Goldberg”), claim that in so doing, the court committed various reversible errors. We affirm.

I. Background
In the early sixth century, A.D., a large mosaic was affixed to the apse of the Church of the Panagia Kanakaria (“Kanakaria Church”) in the village of Lythrankomi, Cyprus. The mosaic, made of small bits of colored glass, depicted Jesus Christ as a young boy in the lap of his mother, the Virgin Mary, who was seated on a throne. Jesus and Mary were attended by two archangels and surrounded by a frieze depicting the twelve apostles. The mosaic was displayed in the Kanakaria Church for centuries, where it became, under the practices of Eastern Orthodox Christianity, sanctified as a holy relic. It survived both the vicissitudes of history, see
Autocephalous, 717 F.Supp. at 1377 (discussing the period of Iconoclasm during which many religious *280 artifacts were destroyed), and, thanks to restoration efforts, the ravages of time.
FN2  For more on the history, significance and restoration of the Kanakaria mosaic, see A. Megaw & E. Hawkins, The Church of the Panagia Kanakaria at Lythrankomi in Cyprus: Its Mosaics and Frescoes (1977).

Testimony before Judge Noland established that the Kanakaria mosaic was one of only a handful of such holy Byzantine relics to survive into the twentieth century. Sadly, however, war came to Cyprus in the 1970s, from which the mosaic could not be spared.
The Cypriot people have long been a divided people, approximately three-fourths being of Greek descent and Greek–Orthodox faith, the other quarter of Turkish descent and Muslim faith. FN3 No sooner had Cyprus gained independence from British rule in 1960 than this bitter division surfaced. Civil disturbances erupted between Greek and Turkish Cypriots, necessitating the introduction of United Nations peacekeeping forces in 1964. (U.N. forces still remain in Cyprus.) Through the 1960s, the Greek Cypriots, concentrated in the southern part of the island, became increasingly estranged from the Turkish Cypriots, concentrated in the north. FN4 FN3.

FN3. For a full treatment of the preindependence history of Cyprus, see Hill, A History of Cyprus (4 vols.) (1949).

FN4. This anxious period of Cypriot history is examined in T. Ehrlich, Cyprus, the “Warlike Isle”: Origins and Elements of the Current Crisis, 18 Stan. L. Rev. 1021 (1966). The tensions erupted again in 1974, this time with more violent results. In July, 1974, the civil government of the Republic of Cyprus was replaced by a government controlled by the Greek Cypriot military. In apparent response, on July 20, 1974, Turkey invaded Cyprus from the north. By late August, the Turkish military forces had advanced to occupy approximately the northern third of the island. The point at which the invading forces stopped is called the “Green Line.” To this day, the heavily-guarded Green Line bisects Nicosia, the capital of the Republic, and splits the island from east to west.

The Turkish forces quickly established their own “government” north of the Green Line. In 1975, they formed what they called the “Turkish Federated State of Cyprus” (“TFSC”). In 1983, that administration was dissolved, and the “Turkish Republic of Northern Cyprus” (“TRNC”) was formed. These “governments” were recognized immediately by Turkey, but all other nations in the world—including the United States—have never recognized them, and continue to recognize the Republic of Cyprus (“Republic”), plaintiff-appellee in this action, as the only legitimate government for all Cypriot people. The Turkish invasion led to the forced southern exodus of over one-hundred thousand Greek Cypriots who lived in northern Cyprus. Turkish Cypriots living in southern Cyprus (and tens of thousands of settlers from mainland Turkey) likewise flooded into northern Cyprus, resulting in a massive exchange of populations. Lythrankomi is in the northern portion of Cyprus that came under Turkish rule. Although the village and the Kanakaria Church were untouched by the invading forces in 1974, the villagers of Greek ancestry were soon thereafter “enclaved” by the Turkish military. Despite the hostile environment, the pastor and priests of the Kanakaria Church continued for two years to conduct religious services for the Greek Cypriots who remained in Lythrankomi. Hardy as they must have been, these clerics, and virtually all remaining Greek Cypriots, were forced to flee to southern Cyprus in the summer of 1976. Church of Cyprus officials testified that they intend to re-establish the congregation at the Kanakaria Church as soon as Greek Cypriots are permitted to return safely to Lythrankomi. (Thirty-five thousand Turkish troops remain in northern Cyprus.) FN5 FN5. A fascinating, first-hand account of current conditions in Cyprus appears in Weaver, Report from Cyprus, The New Yorker, Aug. 6, 1990, pp. 65–81. When the priests evacuated the Kanakaria Church in 1976, the mosaic was still intact. In the late 1970s, however, Church of Cyprus officials received increasing reports that Greek Cypriot churches and monuments in northern Cyprus were being attacked and vandalized, their contents stolen or destroyed. (Such reports were necessarily sketchy and unverifiable as officials from the Republic and Church of Cyprus have been denied access to northern
Cyprus.) In November, 1979, a resident of northern Cyprus brought word to the
Republic's Department of Antiquities that this fate had also befallen the
Kanakaria Church and its mosaic. Vandals had plundered the church, removing
anything of value from its interior. The mosaic, or at least its most recognizable and
valuable parts, had been forcibly ripped from the apse of the church. Once
a place of worship, the Kanakaria Church had been reduced to a stable for farm
animals. Upon learning of the looting of the Kanakaria Church and the loss of its
mosaics (made plural by the vandals' axes), the Republic of Cyprus took immediate
steps to recover them. As discussed in greater detail in Judge Noland's opinion, see
717 F.Supp. at 1380, these efforts took the form of contacting and seeking
assistance from many organizations and individuals, including the United Nations
Educational, Scientific and Cultural Organization (“UNESCO”); the International
Council of Museums; the International Council of Museums and Sites; Europa Nostra
(an organization devoted to the conservation of the architectural heritage of Europe);
the Council of Europe; international auction houses such as Christie's and Sotheby's;
Harvard University's Dumbarton Oaks Institute for Byzantine Studies; and the
foremost museums, curators and Byzantine scholars throughout the world. The
Republic's United States Embassy also routinely disseminated information about lost
cultural properties to journalists, U.S. officials and scores of scholars, architects and
collectors in this country, asking for assistance in recovering the mosaics. The overall
strategy behind these efforts was to get word to the experts and scholars who
would probably be involved in any ultimate sale of the mosaics. These individuals, it
was hoped, would be the most likely (only?) actors in the chain of custody of stolen
cultural properties who would be interested in helping the Republic and Church of
Cyprus recover them. The Republic's efforts have paid off. In recent years, the
Republic has recovered and returned to the Church of Cyprus several stolen
relics and antiquities. The Republic has even located frescoes and other works taken
from the Kanakaria Church, including the four mosaics at issue here. These four
mosaics, each measuring about two feet square, depict the figure of Jesus,
the busts of one of the attending archangels, the apostle Matthew and the apostle
James. To understand how these pieces of the Kanakaria mosaic resurfaced, we must
trace the actions of appellant Peg Goldberg and the other principals through whose
hands they passed in 1988.

Peg Goldberg is an art dealer and gallery operator. Goldberg and Feldman Fine Arts,
Inc., is the Indiana corporation that owns her gallery in Carmel, Indiana. In the
summer of 1988, Peg Goldberg went to Europe to shop for works for her gallery.
Although her main interest is 20th century paintings, etchings and sculptures,
Goldberg was enticed while in The Netherlands by Robert Fitzgerald, another Indiana
art dealer and “casual friend” of hers, to consider the purchase of “four early Christian
mosaics.” In that connection, Fitzgerald arranged a meeting in Amsterdam for July
1st. At that meeting, Fitzgerald introduced Goldberg to Michel van Rijn, a Dutch art
dealer, and Ronald Faulk, a California attorney. Van Rijn and Faulk were
strangers to Goldberg. All she knew about them was what she learned in their few
meetings, which included the fact that van Rijn, a published expert on Christian icons
(she was given a copy of the book), had been convicted by a French court for art
forgery; that he claimed to be a descendant of both Rembrandt and Rubens; and
that Faulk was in Europe to represent Fitzgerald and van Rijn.

At that first meeting in Amsterdam on July 1, 1988, van Rijn showed Goldberg
photographs of the four mosaics at issue in *282 this case and told her that the seller
wanted $3 million for them. Goldberg testified that she immediately “fell in love” with the mosaics. Van Rijn told her that the seller was a Turkish antiquities dealer who had “found” the mosaics in the rubble of an “extinct” church in northern Cyprus while working as an archaeologist “assigned (by Turkey) to northern Cyprus.” (Goldberg knew of the Turkish invasion of Cyprus and of the subsequent division of the island.) As to the seller, Goldberg was also told that he had exported the mosaics to his home in Munich, Germany, with the permission of the Turkish Cypriot government, and that he was now interested in selling the mosaics quickly because he had a “cash problem.” Goldberg was not initially given the seller's identity. Goldberg also learned that Faulk, on behalf of Fitzgerald and van Rijn, had already met with this as-yet-unidentified seller to discuss the sale of these mosaics. Her interest quite piqued, Goldberg asked Faulk to return to Munich and tell the seller—whose identity, she would eventually learn, was Aydin Dikman—that she was interested. Faulk dutifully took this message to Dikman in Munich, and returned to Amsterdam the following day. Faulk returned from that meeting with a contract he signed as agent for van Rijn to purchase the mosaics from Dikman for $350,000. When Goldberg met with Faulk on July 2, she was not told of this contract, however. Faulk merely informed her that Dikman still had the mosaics (though he was “actively negotiating with another buyer”), and that, in Faulk's opinion the export documents he had been shown by Dikman were in order. Faulk apparently showed Goldberg copies of a few of these documents, none of which, of course, were genuine, and at least one of which was obviously unrelated to these mosaics. See Autocephalous, 717 F.Supp. at 1382. The next day (all of this happening rather fast), the principals gathered again in Amsterdam. Goldberg, van Rijn, Fitzgerald and Faulk agreed to “acquire the mosaics for their purchase price of $1,080,000 (U.S.).” The parties agreed to split the profits from any resale of the mosaics as follows: Goldberg 50%; Fitzgerald 22.5%; van Rijn 22.5%; and Faulk 5%. A document to this effect was executed on July 4, 1988, which document included a provision reading, “This agreement shall be governed by and any action commenced will be pursuant to the laws of the state of Indiana.” In those hectic early days of July, Goldberg contacted Otto N. Frenzel III, a friend and highranking officer at the Merchants National Bank of Indianapolis (“Merchants”), and requested a loan from Merchants of $1.2 million for the purchase of the mosaics. She told Frenzel that she needed $1,080,000 to pay van Rijn and the others, and she required the additional $120,000 to pay for expenses, insurance, restoration and the like. Merchants assured her that financing could be arranged, if she could provide appraisals and other documents substantiating the transaction. With Fitzgerald's and van Rijn's help, Goldberg obtained the appraisals (all three of which valued the mosaics at between $3 and $6 million), and sent them to Merchants. That done, she and Fitzgerald hurried to Geneva, Switzerland, for the transfer of the mosaics, which was to take place on July 5. After arriving in Switzerland, Goldberg learned that her requested loan had been approved by Merchants and the money would be forthcoming, though a few days behind schedule. Her financing secured, Goldberg proceeded to the July 5 meeting as scheduled. She could not yet turn over the money, but she wanted to get a look at what she was buying. The July 5 meeting was held in the “free port” area of the Geneva airport, an area reserved for items that have not passed through Swiss customs. Faulk and Dikman arrived from Munich with the mosaics, which were stored in crates. Dikman introduced himself to Goldberg and then left; this brief exchange was the only time the two would meet. Goldberg then inspected the four
mosaics. She testified that she “was in awe,” and that, despite some concern about the mosaics' deteriorating condition, she wanted them “more than ever.”

*283 During the few days that Goldberg waited in Switzerland for the money to arrive from Merchants, she placed several telephone calls concerning the mosaics. She testified that she wanted to make sure the mosaics had not been reported stolen, and that no treaties would prevent her from bringing the mosaics into the United States. She called UNESCO's office in Geneva and inquired as to whether any treaties prevented “the removal of items from northern Cyprus in the mid- to late-1970s to Germany,” but did not mention the mosaics. She claims also to have called, on advice from an art dealer friend of hers in New York, the International Foundation for Art Research (“IFAR”), an organization that collects information concerning stolen art. She testified that she asked IFAR whether it had any record of a claim to the mosaics, and that, when she called back later as instructed, IFAR told her it did not. Judge Noland clearly doubted the credibility of this testimony, noting, among other things, that neither Goldberg nor IFAR have any record of any such search. (A formal IFAR search involves a fee and thus generates a bill that would serve as proof that a search was performed.) Autocephalous, 717 F.Supp. at 1403. Judge Noland also questioned Goldberg's testimony that she telephoned customs officials in the United States, Switzerland, Germany and Turkey. Id. The only things of which Judge Noland was sure was that Goldberg did not contact the Republic of Cyprus or the TRNC (from one of whose lands she knew the mosaics had come); the Church of Cyprus; “Interpol,” a European information-sharing network for police forces; nor “a single disinterested expert on Byzantine art.” Id. At 1403–04. However Goldberg occupied her time from July 5 to July 7, on the latter date the money arrived. Goldberg took the $1.2 million, reduced to $100 bills and stuffed into two satchels, and met with Faulk and Fitzgerald at the Geneva airport. As arranged, Goldberg kept $120,000 in cash and gave the remaining $1,080,000 to Faulk and Fitzgerald in return for the mosaics. Faulk and Fitzgerald in turn split the money with van Rijn, Dikman and their other cohorts as follows: $350,000 to Dikman (as per Faulk and van Rijn's prior agreement with him); $282,500 to van Rijn; $297,500 to Fitzgerald; $80,000 to Faulk; and $70,000 to another attorney in London. Along with the mosaics, Goldberg received a “General bill of sale” issued by Dikman to Goldberg and Feldman Fine Arts, Inc. The following day, July 8, 1988, Goldberg returned to the United States with her prize. Back home in Indiana, Goldberg took what she had left of her $120,000 cut and deposited it into several of her business and personal bank accounts. After paying for the insurance and shipment of the mosaics, as well as a few unrelated art purchases, that sum amounted to approximately $70,000. Her friends and business associates in Indiana soon took quite an interest in her purchase; literally. For large sums of money, Frenzel, Goldberg's well-placed friend at Merchants, and another Indiana resident named Dr. Stewart Bick acquired from van Rijn and Fitzgerald substantial interests in the profits from any resale of the mosaics. Peg Goldberg's efforts soon turned to just that: the resale of these valuable mosaics. She worked up sales brochures about them, and contacted several other dealers to help her find a buyer. Two of these dealers' searches led them both to Dr. Marion True of the Getty Museum in California. When told of these mosaics and their likely origin, the aptly-named Dr. True explained to the dealers that she had a working relationship with the Republic of Cyprus and that she was duty-bound to contact Cypriot officials about them. Dr. True called Dr. Vassos Karageorghis, the Director of the Republic's Department of Antiquities and one of the primary Cypriot officials involved in the
worldwide search for the mosaics. Dr. Karageorghis verified that the Republic was in fact hunting for the mosaics that had been described to Dr. True, and he set in motion the investigative and legal machinery that ultimately resulted in the Republic learning that they were in Goldberg's possession in Indianapolis. After their request for the return of the mosaics was refused by Goldberg, the Republic of Cyprus and the Church of Cyprus (collectively “Cyprus”) brought this suit in the Southern District of Indiana for the recovery of the mosaics. Judge Noland bifurcated the possession and damages issues and held a bench trial on the former. In a detailed, thorough opinion (that occupies thirty-one pages in the Federal Supplement), Judge Noland awarded possession of the mosaics to the Church of Cyprus. Goldberg filed a timely appeal.

II. Analysis
   A. Jurisdiction

   Subject matter jurisdiction in this action was based on diversity of citizenship under 28 U.S.C. § 1332(a)(2), which vests jurisdiction in the federal district courts for actions of sufficient value between “citizens of a State, and foreign states or citizens or subjects thereof.” Judge Noland found that the requirements of this subsection were met based on the following citizenships: In 1988, Congress amended 28 U.S.C. § 1332, changing, among other things, the language of § 1332(a)(2). Because Cyprus filed this action before May 18, 1989 (the effective date of the 1988 amendments), the pre-amended version of 28 U.S.C. § 1332(a) applies. Plaintiff the Republic of Cyprus is a sovereign nation located on the island of Cyprus in the Mediterranean Sea. Plaintiff Autocephalous Greek–Orthodox Church of Cyprus is a religious organization with its principal offices in Nicosia, Cyprus. Defendant Goldberg and Feldman Fine Arts, Inc. is a corporation organized and existing under the laws of the state of Indiana, with its principal place of business in Carmel, Indiana. Defendant Peg Goldberg is a citizen of the state of Indiana. Autocephalous, 717 F.Supp. at 1377. Goldberg did not question these facts before the district court, nor in her original jurisdictional statement and briefs filed in this court. Cyprus, for its part, asserted in its jurisdictional statement that “the Church of Cyprus is a citizen and subject of the Republic of Cyprus, and is a religious corporation under Cypriot law, maintains its principle [sic] place of business in Cyprus, and is empowered to own, regulate and administer property.” Appellees' Brief at 2 (citing record references). Goldberg has since filed an “Amendment to Jurisdictional Statement and Suggestion of Jurisdictional Issue,” stating that she “has now concluded that the record does not appear to support diversity jurisdiction because the record does not address the legal status and the citizenship of [the Church of Cyprus].” She alleges that, because “she has been unable to locate evidence in the record to establish that the Church of Cyprus is incorporated under the laws of any foreign state or that the Church should be considered a ‘citizen or subject’ of a foreign state,” the Church should be considered an unincorporated association whose citizenship includes all jurisdictions of which its members are citizens. Cf. Hummel v. Townsend, 883 F.2d 367 (5th Cir.1989). Goldberg recommends at least a remand for further proceedings as to the citizenship of all of the Church's members (if any are domiciled in Indiana, the argument goes, diversity is destroyed), and at best a remand with directions to dismiss for lack of jurisdiction. Neither option is warranted. We note that the belated nature of Goldberg's “discovery” of this jurisdictional issue does not foreclose our review, as the lack of subject matter jurisdiction may be raised at any stage in the case by any party, including this court on its own motion.
See Fed.R.Civ.P. 12(h)(3); Insurance Corporation of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 701–02, 102 S.Ct. 2099, 2103–04, 72 L.Ed.2d 492 (1982). But see Buethe v. Britt Airlines, Inc., 787 F.2d 1194, 1196 (7th Cir.1986) (diversity jurisdiction established where “essential facts” regarding citizenship were adequately alleged and there was no “persuasive reason” to think allegations were false); Kanzelberger v. Kanzelberger, 782 F.2d 774, 777 (7th Cir.1986) (“We do not suggest that the district court or this court must always or even often conduct an inquest on jurisdiction.”). Goldberg’s argument substantially misstates the issue. The primary question here is not whether the Church of Cyprus is incorporated under the laws of Cyprus. Proving that it is incorporated under Cypriot law is indeed one method for the Church to establish that it is a “citizen or subject” of Cyprus, see Panalpina Welttransport GMBH v. Geosource, Inc., 764 F.2d 352, 354 (5th Cir.1985) (“A corporation incorporated in a foreign country is a citizen of that country for diversity purposes.”) (citing, inter alia, National Steamship Co. v. Tugman, 106 U.S. 118, 1 S.Ct. 58, 27 L.Ed. 87 (1882)); but it is only one method. The primary issue here is whether the record contains sufficient evidence that, under the laws of the Republic of Cyprus, the Church is considered a juridical entity distinct from its members, regardless of its corporate status. See Puerto Rico v. Russell & Co., 288 U.S. 476, 479–82, 53 S.Ct. 447, 448–49, 77 L.Ed. 903 (1933); Cohn v. Rosenfeld, 733 F.2d 625, 628–30 (9th Cir.1984). We stress that the citizenship status generally attributed to religious organizations under American law, as well as the characteristics of and requirements for the corporate form under American law, are irrelevant. As we stated in Sadat v. Mertes, 615 F.2d 1176, 1183 (7th Cir.1980): The generally accepted test for determining whether a person is a foreign citizen for purposes of 28 U.S.C. § 1332(a)(2) is whether the country in which citizenship is claimed would so recognize him. This is in accord with the principle of international law that “it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to citizenship.” (quoting United States v. Wong Kim Ark, 169 U.S. 649, 668, 18 S.Ct. 456, 464, 42 L.Ed. 890 (1898)). See generally 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d, §§ 3604 & 3611 (1984). [1] Cyprus presented the following evidence to the district court: 1) the Constitution of the Republic of Cyprus recognizes the existence of the Autocephalous Greek–Orthodox Church of Cyprus and grants to it the “exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter;” 2) under the “Immovable Property (Tenure, Registration and Valuation) Law” of the Republic of Cyprus, a “religious corporation”—defined as a “religious establishment or religious institution belonging to any denomination and any throne, church, chapel, monastery, mosque, tekye, shrine or synagogue”—may own and register property; and 3) the Church of Cyprus registered the Kanakaria Church in the Land Registry Office of the Republic of Cyprus pursuant to this statute. (As to this last point, see Autocephalous, 717 F.Supp. at 1397, wherein Judge Noland discusses and describes the certificate of registration.) FN8 We conclude that this evidence sufficiently established that the Church is recognized under and by the laws of the Republic of Cyprus as a distinct juridical entity, and thus is a “citizen or subject” of that state. Cf. Puerto Rico, 288 U.S. at 481–82, 53 S.Ct. at 449 (concluding that a Puerto Rican entity known as a sociedad en comandita is a “juridical person” for purposes of federal jurisdiction because the Puerto Rican Code, among other things, gives sociedades the power to contract, own property, transact business and sue or be sued in its own name); Cohn, 733 F.2d at
(concluding that Liechtenstein regards its \textit{anstalts} as “juridical persons” for purposes of diversity jurisdiction based on similar factors). \textit{See also} Swan \textit{v. First Church of Christ, Scientist}, 225 F.2d 745, 747–48 (9th Cir.1955) (Though state law vested in the religious organizations at issue powers “far more limited than those found in the Puerto Rican \textit{Sociedad},” the organizations should be treated as state corporations for purposes of diversity jurisdiction because state law provided that they were to be “deemed bodies corporate for the purpose of taking and holding ... real or personal property,” and other limited purposes). FN8. As Cyprus has noted, that the Republic and the Church brought this suit as co-plaintiffs is also witness to the Republic's acceptance of the Church's right to sue (and be sued) in its own name. *286

B. Choice of Law

[2] As a federal court sitting in diversity, the district court was obligated to (and did) apply the law of the state in which it sat—Indiana. \textit{See Erie R.R. Co. v. Tompkins}, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). This included Indiana law as to which body of substantive law to apply to the case, i.e. Indiana's choice of law rules. \textit{See Consolidated Rail Corp. v. Allied Corp.}, 882 F.2d 254, 255 (7th Cir.1989) (citing \textit{Klaxon Co. v. Stentor Elec. Mfg. Co.}, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). From his analysis and application of Indiana rules and decisions regarding choice of law, Judge Noland concluded that Indiana would choose to apply its own substantive law to this case. \textit{Autocephalous}, 717 F.Supp. at 1393–95. This ruling actually contained two parts. First, Judge Noland applied the two-step “most significant contacts” test used by Indiana courts for choice of law in Indiana tort cases. \textit{See Hubbard Mfg. Co., Inc. v. Greeson}, 515 N.E.2d 1071 (Ind.1987). Second, with the help of the trial testimony of an expert in the law of Switzerland, Judge Noland looked to Swiss choice of law principles and determined that they, too, dictate that Indiana substantive law should control. On appeal, Goldberg claims that both of these determinations were in error. Because we find Judge Noland's analysis under Indiana law to be free of error,FN9 we affirm his conclusion that Indiana law applies without reaching his discussion of Swiss law. FN9. We must employ a mixed standard of review as to this determination by Judge Noland. His conclusions as to the relevant Indiana choice of law principles, as legal conclusions, would ordinarily be reviewed \textit{de novo}. \textit{See, e.g., Forum Corp. of America v. Forum, Ltd.}, 903 F.2d 434, 438 (7th Cir.1990). As we have often stated, however, we give an extra measure of deference in diversity cases to the district judge's interpretation of the law of the state in which he sits. \textit{See PPG Indus., Inc. v. Russell}, 887 F.2d 820, 823 (7th Cir.1989) (citing cases); \textit{Goldstick v. ICM Realty}, 788 F.2d 456, 466 (7th Cir.1986) (same). Judge Noland's findings as to the facts necessary to resolve this issue, as well as his application of the law to these facts, will be reversed only upon a showing of clear error. \textit{See Forum}, 903 F.2d at 438 (clearly erroneous standard for factual findings under Fed.R.Civ.P. 52(a)); \textit{David Berg and Co. v. Gatto Int'l Trading Co., Inc.}, 884 F.2d 306, 309 (7th Cir.1989) (clearly erroneous standard for district court's application of law to fact). The district court properly considered Cyprus' suit to recover the mosaics a replevin action, long recognized in Indiana law as the proper legal action for the recovery of wrongfully detained personal property. \textit{See 25 Indiana Law Encyclopedia (“I.L.E.”) Replevin §§ 1, 2 & 11 (West 1960). The district court could find no Indiana case dealing specifically with choice of law in replevin actions, nor can we. Thus, we will look (as did Judge Noland) to the choice of law principles Indiana generally applies in tort cases. FN10 FN10. We chose tort principles because, as it is invoked by Cyprus, replevin, a free-standing cause of
action in Indiana, is identical in all relevant respects to a tort claim for conversion. Compare 25 I.L.E. Replevin § 45 (plaintiff's burden in replevin claim) with Noble v. Moistner, 388 N.E.2d 620, 621–22 (Ind.App.1979) (elements of conversion claim). We note that Goldberg claims error in Judge Noland's decision similarly to look to tort principles, and expends a great deal of effort arguing conflict of laws principles used in actions involving the transfer of chattels, which is apparently how this action would be characterized under Swiss law. As to the application of Indiana law and principles, Goldberg's argument entirely misses the mark. In Hubbard, 515 N.E.2d 1071, the Indiana Supreme Court modified Indiana's traditional lex loci delicti commissi rule for choice of law in tort cases. Under the traditional rule, the court chose the law of the state in which occurred “the last event necessary to make an actor liable,” most times meaning the place of injury. Id. at 1073. See also Consolidated Rail, 882 F.2d at 256. Citing the often anomalous results that can obtain from the rigid application of this rule, as well as the recent trend away from it, the court in Hubbard declared that the lex loci rule should be applied only when the place of the tort is also the place with the most significant contacts. When the place of the tort bears little connection to the legal action, the court declared, the following factors should be considered: *287 1) the place where the conduct causing the injury occurred; 2) the residence or place of business of the parties; and 3) the place where the relationship is centered. Id. at 1073–74 (citing Restatement (Second) of Conflicts of Laws § 145(2) (1971)). See also Tompkins v. Isbell, 543 N.E.2d 680 (Ind.App.1989) (discussing and applying Hubbard approach). Thus, the court established a two-step test, the first inquiry focusing on the contacts between the place of the wrong and the legal action. If these contacts are significant, the lex loci rule should be applied; if not, the court should move to the second inquiry, which focuses on which jurisdiction has the most significant contacts. In this case, Judge Noland first determined that Switzerland—“the place of the wrong” because it was at the Geneva airport that Goldberg took possession and control of the mosaics—bears little connection to Cyprus’ cause of action. Autocephalous, 717 F.Supp. at 1393–94. He reached this conclusion based on his findings regarding the following facts: no Swiss citizen has or ever had an interest in this action, as none of the parties, actors in the transaction, or past or current interest-holders are Swiss citizens; and the temporal and geographical connection between the mosaics and Switzerland were “fortuitous and transitory,” as the mosaics were on Swiss soil for only four days, never passed through Swiss customs (they remained in the “free port” area of the Geneva airport), and never otherwise entered the Swiss stream of commerce. Goldberg has failed to establish error in either these factual findings or the conclusion based thereon, choosing instead to reiterate Swiss “connections” considered and rejected by Judge Noland (e.g. the money Peg Goldberg paid for the mosaics was wired to her through a Swiss bank), and to cite us to an Indiana court's application of the lex loci doctrine in a factually inapposite case. Tompkins, 543 N.E.2d at 681–82 (law of place of tort applied in auto collision case where “the place of the tort has extensive connection with the legal action”). Thus, we agree that in this case an Indiana court would find Switzerland's contacts too attenuated to apply the lex loci rule, and thus would proceed to the second step of the analysis. Cf. Hubbard, 515 N.E.2d at 1074 (events in Illinois unrelated to the action do not equal significant contacts). Moving to step two of the Hubbard approach, the contacts between the action and the two contending jurisdictions (Indiana and Switzerland) must be reviewed, with special attention given to the Second Restatement factors. Applying this approach, Judge Noland noted the following facts
that weigh in favor of applying Indiana law: the defendants, those who financed and
effectuated the transfer of the mosaics, and those who now hold the principal monetary
interests in the mosaics are all Indiana citizens; the money used to purchase the
mosaics came from an Indiana bank; the agreement among Goldberg, Fitzgerald, van
Rijn and Faulk stipulates that Indiana law will apply, indicating Goldberg's reliance
on the law of her home state; and the mosaics are presently being held in Indiana,
where they have been stored since they entered the U.S. in July, 1988. Based on our
review of these and other facts as found by Judge Noland, we agree with his
conclusion that Indiana has the more significant contacts with and interest in this
action. Thus, Indiana law and rules govern every aspect of this action, from the statute
of limitations issues through the application of the substantive law of replevin.

C. Statute of Limitations

With great zeal, Goldberg has from the beginning of this action challenged the
timeliness of Cyprus' complaint. Under Indiana's statute of limitations for replevin
actions, Cyprus had six years from the time its cause of action accrued in which to sue
for the recovery of the mosaics. Ind.Code § 34–1–2–1 (1982). Though the exact
date of the looting of the Kanakaria Church is unknown, it is agreed that Cyprus first
learned of the theft of their mosaics in November, 1979. It is also agreed that Cyprus
first learned that the mosaics were *288 in Goldberg's possession in late 1988. If
Cyprus' cause of action accrued on the former date, their complaint, filed in March,
1989, was untimely. If, on the other hand, it accrued on the latter date (or at any other
point after March, 1983), their complaint was timely. Thus, the dispositive
determination is when did Cyprus' cause of action “accrue” within the meaning of
Indiana's limitations statute. The determination of when Cyprus' cause of action
accrued involves the interpretation of Indiana authorities and their application to the
facts of this case. As we state above, supra at note 9, we give substantial deference to
the district court's resolution of such issues, as we assume that the district court has
greater expertise in interpreting and applying the law of the state in which it sits. Our
review of Judge Noland's statute of limitations analysis convinces us that he has here
proved true that assumption. [3] As Judge Noland noted, it is wellestablished in
Indiana law that it is the courts' responsibility to determine, based on the facts of
each case, when the cause of action accrues. See, e.g., Burks v. Rushmore, 534 N.E.2d
1101, 1103 (Ind.1989). In carrying out this responsibility, Indiana courts start with
the following general rule: a cause of action accrues when the plaintiff ascertains, or by
due diligence could ascertain, actionable damages. Burks, 534 N.E.2d at 1103–04
(citing, inter alia, Barnes v. A.H. Robbins Co., Inc., 476 N.E.2d 84 (Ind.1985)).
Several Indiana decisions have recognized, as a corollary to this general rule, a
“discovery rule” for the accrual of a cause of action; to wit, “the statute of limitations
commences to run ‘from the date plaintiff knew or should have discovered that
she suffered an injury or impingement, and that it was caused by the product or act of
another.’ ” Burks, 534 N.E.2d at 1104 (quoting Barnes, 476 N.E.2d at 87–88).
Although the first enunciation of the discovery rule was quite guarded, see Barnes,
476 N.E.2d at 87, Indiana courts have since evidenced a willingness to extend it to
new types of cases and situations. See, e.g., Covalt v.Carey Canada, Inc., 543 N.E.2d
382 (Ind.1989); Burks, 534 N.E.2d at 1103–04; Groen v. Elkins, 551 N.E.2d 876, 879
(Ind.App.1990). See also Walters v. Owens–Corning Fiberglass Corp., 781 F.2d 570,
572 (7th Cir.1986). Apart from but related to the discovery rule, Indiana recognizes,
by both statute and case law, the doctrine of fraudulent concealment. Under this
doctrine, a defendant who has by deceit or fraud prevented a potential plaintiff from
learning of a cause of action cannot take advantage of his wrongdoing by raising the
statute of limitations as a bar to plaintiff's action. See Ind.Code § 34–1–2–9 (1982); Burks, 534 N.E.2d at 1104. FN11 FN11 Judge Noland also discusses the doctrine, recognized by Indiana courts, of equitable estoppel. Autocephalous, 717 F.Supp. at 1388. As this doctrine is identical in all respects relevant here to the statutory doctrine of fraudulent concealment, see, e.g., Spoljaric v. Pangan, 466 N.E.2d 37, 44–45 (Ind.App.1984); Weinstock v. Ott, 444 N.E.2d 1227, 1235–36 (Ind.App.1983), and as the application of the discovery rule alone adequately resolves the issue in this case, we will not explore further this equitable doctrine. Central to both the discovery rule and the doctrine of fraudulent concealment is the determination of the plaintiff's diligence in investigating the potential cause of action. See Burks, 534 F.2d at 1104 (under discovery rule, statute begins to run when damage was "ascertained or ascertainable by due diligence"); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891, 896 (1956) (despite fraudulent concealment, if plaintiff was not reasonably diligent in discovering fraud “the statute will run from the time discovery ought to have been made”). [4] Applying these Indiana rules and principles to this case, and unguided by any directly analogous Indiana precedent, Judge Noland concluded that an Indiana court would find that Cyprus' action was timely filed. Autocephalous, 717 F.Supp. at 1388–93. His primary ground for so concluding was his determination that, under a discovery rule, Cyprus' cause of action did not accrue until Cyprus learned from Dr. True that the mosaics were in Goldberg's possession in Indiana. In so holding, he looked not only to Indiana cases but also to general discovery rule principles, see 51 Am.Jur.2d Limitation of Actions § 146 (1970); 54 C.J.S. Limitation of Actions § 87 (1987); and to O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980), a decision of the New Jersey Supreme Court addressing the accrual of a cause of action in the context of a replevin action involving a work of art. (In O'Keeffe, the court held that artist Georgia O'Keeffe's cause of action for replevin of three paintings stolen from a gallery in 1946 accrued “when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings.” 416 A.2d at 870.) Further, Judge Noland found, as a necessary precondition to the application of the discovery rule, that Cyprus exercised due diligence in searching for the mosaics. Thus, Judge Noland ruled that Cyprus was not, nor reasonably should have been, on notice as to the possessor or location of the mosaics until late 1988. Autocephalous, 717 F.Supp. at 1389–91. Goldberg attacks Judge Noland's discovery rule analysis on two grounds. First, she charges that in applying the discovery rule in this case Judge Noland “announced a new rule of Indiana law in conflict with established Indiana limitations principles.” Not so. Judge Noland applied legal principles set out in Indiana cases, and generally accepted elsewhere, to a new situation not yet addressed by the Indiana courts, exactly what a district court sitting in diversity is obligated to do when presented with a novel issue under state law. See 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4507 (1984). Further, his conclusion that in this case the operative “discovery” had to include the identity of the holder of the mosaics is eminently sound. In the context of a replevin action for particular, unique and concealed works of art, a plaintiff cannot be said to have “discovered” his cause of action until he learns enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that “other” is. See O'Keeffe, 416 A.2d at 869–70. Further, we note that any “laziness” this rule might at first blush invite on the part of plaintiffs is heavily tempered by the requirement that, all the while, the plaintiff must exercise due diligence to investigate the theft and recover the works. Second, Goldberg attacks Judge Noland's due
diligence finding. Specifically, she argues that Cyprus failed to contact several organizations it should have, particularly IFAR and Interpol. She also repeats the argument she made to Judge Noland that events occurring before the end of 1983 should have started the clock ticking on Cyprus' cause of action, with particular emphasis on an article that appeared in a Turkish newspaper. We note first that the due diligence determination is, as Judge Noland noted, highly “fact-sensitive and must be decided on a case-by-case basis.” *Autocephalous*, 717 F.Supp. at 1389. Although Goldberg cites some support for a *de novo* standard of review on this issue, *see* *DeWeerth v. Baldinger*, 836 F.2d 103, 110 (2d Cir.1987), cert. denied, 486 U.S. 1056, 108 S.Ct.2823, 100 L.Ed.2d 924 (1988), we ordinarily review determinations such as this, which involve the application of law to facts, under the “clearly erroneous” standard. *See supra* at note 9. *See also Mucha v. King*, 792 F.2d 602, 604–06 (7th Cir.1986). Further, in this case the assessment of Cyprus' diligence necessarily involves a contextual analysis of “a particular and nonrecurring set of historical events,” *Mucha*, 792 F.2d at 605, as well as an assessment of the credibility of the various witnesses who testified as to what Cypriot officials knew and when they knew it. Thus, there is substantial support for a very deferential standard of review. *Cf.* *290 Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F.2d 1321, 1325–27 (5th Cir.1987) (due diligence finding reviewed under clearly erroneous standard). Under any standard of review, however, Judge Noland's due diligence determination must be affirmed. *FN12*. Note that any events occurring after 1983, including the acquisition in 1984 by the Menil Foundation in Texas of other Kanakaria mosaic fragments and frescoes from Dikman (of which Goldberg makes much), even if they triggered the accrual of Cyprus' six-year statute of limitations, would not make Cyprus' March, 1989 complaint untimely. The record evidence (summarized above) makes it clear that, although the Republic of Cyprus may not have contacted all the organizations Goldberg in hindsight would require, it took substantial and meaningful steps, from the time it first learned of the disappearance of the mosaics, to locate and recover them. The efforts by the Republic's officials, targeted at the likely points of sale of the mosaics, were sweeping and consistent with trade practices. Indeed, one expert, a curator from The Walters Art Gallery in Baltimore, Maryland, testified at trial that Cyprus “stands apart” in its efforts to recover stolen cultural properties. *Autocephalous*, 717 F.Supp. at 1389 (quoting testimony of Dr. Vikan). As to Goldberg's repetition here of her arguments regarding the article in the Turkish publication and the other events, the record adequately supports Judge Noland's conclusion that these events did not nor should not have put Cyprus on notice as to a possible cause of action. The article, which fingered Dikman as a man wanted in Cyprus and Turkey for smuggling artifacts and later mentioned the mosaics from the Kanakaria Church, did not reveal that Dikman might be in possession of the mosaics from the Kanakaria Church. What's more, the record reveals that, upon learning of such Turkish press reports, Cyprus redoubled its efforts at notification and recovery. In sum, then, Judge Noland's conclusion that Cyprus was duly diligent and should not have discovered its cause of action before late 1988 stands on firm factual footing. Goldberg's fervent attack on this conclusion at most establishes that an alternative view of the evidence was plausible, which is not enough to merit our disturbing it. Judge Noland backstopped his discovery rule analysis by also applying the doctrine of fraudulent concealment to the facts of this case. From that application, Judge Noland concluded that the statute of limitations on Cyprus' action was tolled until at least the end of 1983, and thus Cyprus' March, 1989 complaint was timely. *Autocephalous,*
717 F.Supp. at 1391–93. Goldberg takes issue with this conclusion, arguing, inter alia, that it is counter to Indiana law as expressed in Landers v. Evers, 107 Ind.App. 347, 24 N.E.2d 796 (1940), a case Judge Noland distinguished on the ground that, in Landers, the court found that the plaintiff did not exercise due diligence. Because we find no error in Judge Noland's analysis and application of the discovery rule, we need not and will not pass on the fraudulent concealment issue. Similarly, because we find no error in Judge Noland's determination that Cyprus was duly diligent and their action timely filed, we agree with his decision to reject without further discussion Goldberg's laches and estoppel arguments, and we follow the same prudent course.

D. The Merits of the Replevin Claim

[5] Under Indiana law, replevin is an action at law “whereby the owner or person claiming the possession of personal goods may recover such personal goods where they have been wrongfully taken or unlawfully detained.” 25 I.L.E. Replevin § 1. “The gist of the action is the defendant's unlawful detention of the plaintiff's property. The issue litigated is the present right to the possession of the property in controversy, and the purpose of the action is to determine who shall have possession of the property sought to be replevied.” Id. at § 2 (citations omitted). See also State Exchange Bank of Culver v. Teague, 495 N.E.2d 262, 266 (Ind.App.1986). To recover the item sought to be repleived, (which is the primary remedy in a replevin action, see Kegerreis v. Auto–Owners Insurance Co., 484 N.E.2d 976, 982 (Ind.App.1985)), the plaintiff must establish three elements: “his title or right to possession, that the property is unlawfully detained, and that the defendant wrongfully holds possession.” 25 I.L.E. Replevin § 42 (citations omitted). See also Snyder v. International Harvester Credit Corp., 147 Ind.App. 364, 261 N.E.2d 71, 73 (1970).

*291 [6] Judge Noland applied these elements to the facts of this case and determined that Cyprus had met its burden as to each. Autocephalous, 717 F.Supp. at 1397–1400. Our review of this application of Indiana law to the facts convinces us that it is free of error: 1) the Kanakaria Church was and is owned by the Holy Archbishopic of the Church of Cyprus, a selfheaded (hence “Autocephalous”) church associated with the Greek–Orthodox faith; 2) the mosaics were removed from the Kanakaria Church without the authorization of the Church or the Republic (even the TRNC’s unsuccessful motion to intervene claimed that the mosaics were improperly removed); and 3) Goldberg, as an ultimate purchaser from a thief, has no valid claim of title or right to possession of the mosaics.FN13 FN13. The only allegation of error as to this analysis raised by Goldberg regards the first element. Goldberg claims that certain decrees of the Turkish administration in northern Cyprus stripped the Church of its claim of title to the Kanakaria Church and any movable property contained therein or taken therefrom. This allegation is discussed in a separate section below. We note that Judge Noland again backstopped his conclusion, this time conducting an alternative analysis under Swiss substantive law. See Autocephalous, 717 F.Supp. at 1400–04. Briefly, the court concluded that the Church had superior title under Swiss law as well, because Goldberg could not claim valid title under the Swiss “good faith purchasers” notion having only made a cursory inquiry into the suspicious circumstances surrounding the sale of the mosaics. (Under Indiana law, such considerations are irrelevant because, except in very limited exceptions not applicable here, a subsequent purchaser (even a “good faith, bona fide purchaser for value”) who obtains an item from a thief only acquires the title held by the thief; that is, no title. 6 I.L.E. Conversion § 15.) As we state above, Indiana law controls every aspect of this
action. Thus, Judge Noland's extensive (and quite interesting) discussion of Swiss law, as well as Goldberg's lengthy attack thereon, need not be reviewed. Cyprus adequately established the elements of replevin under Indiana law, on which ground alone we affirm the district court's decision to award the possession of the mosaics to the Church of Cyprus.

E. The Effect of the TFSC Edicts

Finally, Goldberg argues that several decrees of the TFSC (the entity established in northern Cyprus by the Turkish military immediately after the 1974 invasion) divested the Church of title to the mosaics. FN14 Goldberg asks us to honor these decrees under the notion that in some instances courts in the United States can give effect to the acts of nonrecognized but "de facto" regimes if the acts relate to purely local matters. See Restatement (Third) of the Foreign Relations Law of the United States ("Third Restatement") § 205(3) (1987); FN15 Salimoff v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933) (Under Soviet law, U.S.S.R. nationalization decree effective to pass title to oil within Russia despite fact that U.S.S.R. was not yet recognized by the U.S.). The TFSC decrees at issue, all propagated in 1975, are principally these: 1) the "Abandoned Movable Property Law," which provided that all movable property within the boundaries of the TFSC abandoned by its owner because of the owner's "departure" from northern Cyprus "as a result of the situation after 20th July 1974" now belongs to the TFSC "in the name of the Turkish Community" and that the TFSC "is responsible for the possession and control of such property;" and 2) the "Antiquities Ordinance," which provided that all religious buildings and antiquities, including specifically "synagogues, basilicas, churches, monasteries and the *292 like," located north of the Green Line, as well as any and all "movable antiquities" contained therein, are now the property of the TFSC. FN16 Because these decrees were enacted before the Kanakaria Church was looted and its mosaics stolen, the argument concludes, the Church cannot here claim to hold title to the mosaics. FN14 Judge Noland ignored these decrees, presented to him at the latter stages of the trial and in a lengthy posttrial submission, as irrelevant. FN15. This Restatement section provides: [C]ourts in the United States ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only. FN16. We note that Cyprus has raised arguments that cast substantial doubt on the actual meaning and effect of these and other TFSC decrees, even should we decide to apply them. For the purposes of disposing of Goldberg's argument, however, we will assume that the TFSC decrees actually mean what Goldberg represents them to mean. It is helpful to note at the outset what is not being claimed here. First, Goldberg does not (and cannot) suggest that this court should pass on the validity of the Turkish administration in northern Cyprus. We repeat here precepts that are well established in the law of this country: [T]he conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power [is] not subject to judicial inquiry or decision, ... [and] who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts[.] United States v. Belmont, 301 U.S. 324, 328, 57 S.Ct. 758, 759–60, 81 L.Ed. 1134 (1937) (citing Oetjen v. Central Leather Co., 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918)). Indeed, Goldberg herself supports the district court's decision to deny the TRNC's motion to intervene in this case, which decision was based on the TRNC's continued status as a nonrecognized entity. See Third Restatement § 205(1) (entity not
recognized as a state ordinarily denied access to U.S. courts); Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977). Second, this is not a case in which one party is claiming title under the laws of a state that has been entirely displaced, and the other is claiming title under the laws of the new, displacing regime. All Goldberg can hope to gain from the invocation of these TFSC edicts is a finding that the Church's claim of title is defective; she has no plausible claim of valid title in herself based on these edicts. This fact sets this case apart from the cases cited by Goldberg, including Salimoff, 186 N.E. 679 (plaintiff Russian nationals claimed title to property under laws of the old Russian Empire and defendant U.S. companies claimed title due to purchase from Soviet government, which seized the property pursuant to nationalization decree); and The Denny, 127 F.2d 404 (3d Cir. 1942) (dispute between Lithuanian citizens wherein both claimed right to possess property as agents under Lithuanian law, one relying on the effect of nationalization decrees of the Lithuanian Soviet Socialist Republic, the other on pre-nationalization law). See also Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd., 1 Q.B. 205 (C.A. 1977), aff'd, A.C. 508 (H.L. 1978) (House of Lords declined to allow suit which would require British courts to determine who had the superior claim of title to hotels in northern Cyprus as between the pre-invasion owners or the owners recognized and protected by the Turkish administration). [7] What Goldberg is claiming is that the TFSC's confiscatory decrees, adopted only one year after the Turkish invasion, should be given effect by this court because the TFSC and its successor TRNC should now be viewed as the “de facto” government north of the Green Line. This we are unwilling to do. We draw on two lines of precedent as support for our decision. First, we note that, contrary to the New York court's decision in Salimoff, 186 N.E. 679, several courts of the same era refused to give effect to the nationalization decrees of the as yet-unrecognized Soviet Republics. These courts relied on a variety of grounds, including especially the fact that the political branches of our government still refused to recognize these entities. See, e.g., Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000, 1002-04 (D.C. Cir. 1951) (also stating as a possible alternative ground the following view: “since the nationalization decrees here involved were confiscatory and thus contrary to the public policy of this country, our courts would in no event give them effect,” and citing cases); The Maret, 145 F.2d 431, 442 (3d Cir. 1944) (“[N]o valid distinction can be drawn between the political or diplomatic act of nonrecognition of a sovereign and nonrecognition of the decrees or acts of that sovereign.... Nonrecognition of a foreign sovereign and nonrecognition of its decrees are to be deemed to be as essential a part of the power confided by the Constitution to the Executive for the conduct of foreign affairs as recognition.”) (citing United States v. Pink, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942)). Similarly, as regards the Turkish administration in northern Cyprus, the United States government (like the rest of the non-Turkish world) has not recognized its legitimacy, nor does our government “recognize that [the Turkish administration] has functioned as a de facto or quasi government ..., ruling within its own borders.” Salimoff, 186 N.E. at 682 (relying on the fact that the U.S. government had so “recognized” the Soviet government). Second, we are guided in part by the post-Civil War cases in which courts refused to give effect to property-affecting acts of the Confederate state legislatures. In one such case, Williams v. Bruffy, 96 U.S. 176, 24 L.Ed. 716 (1878), the Supreme Court drew a helpful distinction between two kinds of “de facto” governments. The first kind “is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places, so as to
represent in fact the sovereignty of the nation.” *Id.* at 185. This kind of *de facto* government, the Court explained, “is treated as in most respects possessing rightful authority, ... [and] its legislation is in general recognized.” *Id.* The second kind of *de facto* government “is such as exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success.... If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation.” *Id.* at 186. (The Court held that the Confederacy was a government of the second type that ultimately failed.) Goldberg argues that the TFSC and its successor TRNC have achieved the level of “ultimate success” contemplated by this standard, because they have maintained control of the territory north of the Green Line for over fifteen years. We will not thus equate simple longevity of control with “ultimate success.” The Turkish forces, despite their best efforts, did not completely supplant the Republic nor its officers. Instead, the TFSC and the TRNC, neither of which has ever been recognized by the non-Turkish world, only acceded to the control of the northern portion of Cyprus. The Republic of Cyprus remains the only recognized Cypriot government, the sovereign nation for the entire island. Rejecting Goldberg's invitation to delve any further into facts and current events which are not of record in this proceeding, we conclude that the confiscatory decrees proffered by Goldberg do not divest the Church of its claim of title. 

III. Conclusion

As Byron's poem laments, war can reduce our grandest and most sacred temples to mere “fragments of stone.” Only the lowest of scoundrels attempt to reap personal gain from this collective loss. Those who plundered the churches and monuments of war-torn Cyprus, hoarded their relics away, and are now smuggling and selling them for large sums, are just such blackguards. The Republic of Cyprus, with diligent effort and the help of friends like Dr. True, has been able to locate several of these stolen antiquities; items of vast cultural, religious (and, as this case demonstrates, monetary) value. Among such finds are the pieces of the Kanakaria mosaic at issue in this case. Unfortunately, when these mosaics surfaced they were in the hands not of the most guilty parties, but of Peg Goldberg and her gallery. Correctly applying Indiana law, the district *294* court determined that Goldberg must return the mosaics to their rightful owner: the Church of Cyprus. Goldberg's tireless attacks have not established reversible error in that determination, and thus, for the reasons discussed above, the district court's judgment is *AFFIRMED.*

Lest this result seem too harsh, we should note that those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means by which to protect themselves. Especially when circumstances are as suspicious as those that faced Peg Goldberg, prospective purchasers would do best to do more than make a few lastminute phone calls. As testified to at trial, in a transaction like this, “All the red flags are up, all the red lights are on, all the sirens are blaring.” *Autocephalous, 717 F.Supp.* at 1402 (quoting testimony of Dr. Vikan). In such cases, dealers can (and probably should) take steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like. If Goldberg would have pursued such methods, perhaps she would have discovered in time what she has now discovered too late: the Church has
a valid, superior and enforceable claim to these Byzantine treasures, which therefore must be returned to it.

CUDAHY, Circuit Judge, concurring:

I.

Although I concur in all respects in the excellent majority opinion, there are two points that I believe merit elucidation. The first of these involves the difficult problem of the time of accrual of the cause of action in replevin. The majority opinion affirms the holding of the district court, based on its interpretation of Indiana law, that the plaintiff's cause of action does not accrue until it has, or reasonably should have, discovered the location of the stolen property—in this case the Cypriot mosaics. Although we accept the district court's construction of Indiana law, it is unnecessary to rely solely upon this application of the discovery rule. For, as a recent study of the law of missing property demonstrates, whenever the possessor of lost or stolen personal property commits “fraud in the concealment,” the statute of limitations does not run against the original owner until that owner has actual knowledge of the location of the property and of the identity of the possessor. FN1 FN1. Gerstenblith, The Adverse Possession of Personal Property, 37 Buffalo L.Rev. 119, 127 (1989).

This concept is analogous to the requirement that one who asserts a statute of limitations defense against an action for the recovery of real property must have possessed the property in an “open and notorious” manner. Because it is difficult to assess openness of possession in the realm of personal property, courts have required good faith on the part of the possessor to satisfy, or substitute for, the openness requirement. Most courts considering this problem have thus concluded that the statute of limitations should not run against an original owner who lacks the facts necessary to institute suit as long as the property is held by the original thief or by a subsequent holder acting in bad faith. FN2 FN2. See, e.g., Frye v. Commonwealth Inv. Co., 107 Ga.App. 739, 741, 131 S.E.2d 569, 571, aff'd, 219 Ga. 498, 134 S.E.2d 39 (1963); Commercial Union Ins. Co. v. Connolly, 183 Minn. 1, 6, 235 N.W. 634, 636 (1931); Lightfoot v. Davis, 198 N.Y. 261, 266, 91 N.E. 582, 583–84 (1910). See generally Gerstenblith, supra note 1, at 126–31.

The “demand and refusal” rule applied by the New York courts, however, constitutes one exception to this general approach. Under the “demand and refusal” rule, the statute of limitations for a replevin action does not run until the original owner makes a demand of the current possessor for the return of the property and the possessor refuses. See, e.g., De Weerth v. Baldinger, 836 F.2d 103 (2d Cir.1987), cert. denied, 486 U.S. 1056, 108 S.Ct. 2823, 100 L.Ed.2d 924 (1988); Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir.1982); Menzel v. List, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1964), and 49 Misc.2d 103, 267 N.Y.S.2d 804 (Sup.Ct.1966), modified on other grounds, 516, 279 N.Y.S.2d 608 (1967), modification rev'd, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969). An old Indiana decision, in fact, holds that the original owner of stolen property cannot sue the good faith possessor for conversion until the owner has made a demand upon the possessor for the return of the property. See Wood v. Cohen &Another, 6 Ind. 455 (1855). The original purpose of this rule was to protect the good faith possessor who, upon learning of the original theft, would presumably return the property to the rightful owner voluntarily and without need for litigation. Some courts adopt a slightly different approach—the O'Keeffe “discovery” rule—emphasizing the due diligence of the original owner, as in O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980), rather than lack of good faith
on the part of the possessor. In *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir.1987),
the Second Circuit, exercising its diversity jurisdiction and interpreting New York
law, found that New York's "demand and refusal" rule incorporates the requirement
that the original owner exercise reasonable diligence in locating the stolen
property. In a recent statement on the subject by a New York court, however,
the defense was characterized as one of laches, rather than as a statute of limitations
bar. The laches defense required a showing of prejudice to the defendant by the delay
as well as knowledge or imputed knowledge on the part of the plaintiff and a showing
of reasonableness of the plaintiff's conduct under the particular circumstances. See
(N.Y.App.Div.1990), leave to appeal to the N.Y. Court of Appeals granted,
the trial court, was reluctant to conclude that the defendant was prejudiced by any
asserted delay by the plaintiff even though the defendant was arguably a good faith
purchaser of the stolen art works. The court there stated that the "defendant's
vigilance is as much in issue as plaintiff's diligence." 153 A.D.2d at 152, 550
N.Y.S.2d at 623. The emphasis in the present case on Cyprus' diligence should also be
tempered by the plaintiff's lack of good faith, as found by Judge Noland. Lack of good
faith minimizes the likelihood of prejudice to the decision, a judge in the Southern
District of New York recently denied a motion to dismiss by the defendant in
a suit in which the Turkish government is attempting to recover various
archaeological materials from the Metropolitan Museum of Art. Judge
Broderick denied defendant's motion based on the statute of limitations, so that the
issues of prejudice allegedly caused by plaintiff's delay and the defendant's good faith
could be extensively considered. See N.Y. Times, July 20, 1990, at C 25, col. 1.
If a good faith requirement were applied to the facts of the case before us, the *295
statute of limitations would not have begun to run so long as the mosaics were in the
hands of Dikman, the original thief. Nor would Goldberg's purchase of the mosaics in
July 1988 have triggered the running of the statute. As Judge Noland pointed out,
Goldberg undertook only a cursory inquiry into Dikman's ability to convey good title
under circumstances which should have aroused the suspicions of a wholly innocent
and reasonably prudent purchaser. She thus does not appear to have been a good faith
purchaser. Under the foregoing analysis, the cause of action would not have accrued
until later in 1988, when Cyprus first ascertained the location of the mosaics and
the identity of the current possessor. This approach, which seems equitable to me,
thus poses no bar to a cause of action for replevin of the mosaics. An owner should
not be at risk under the statute of limitations until she has actual knowledge or the
property has passed into innocent hands.

II.

A second and unrelated, but important, aspect of this case involves the treatment of
the cultural heritage of foreign nations under international and United States law. The
United States has both acceded to international agreements and enacted its own
statutes regarding the importation of cultural property. These regulatory efforts have
encompassed transfers of property during both wartime and peacetime and apply
whether the property was originally stolen or "merely" illegally exported from the
country of origin. The two most significant international agreements that attempt to
protect cultural property are the 1954 Convention on the Protection of Cultural
Property in the Event of Armed Conflict (the "1954 Hague Convention"), 249
U.N.T.S. 215 (1956), and the UNESCO Convention on the Means of Prohibiting and
Preventing the Illicit Transport, Export and Transfer of Ownership of Cultural
Property (the “UNESCO Convention”), 823 U.N.T.S. 231 (1972). Under both these multinational treaties, as well as under the United States' Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601 et seq. (1983), the Cypriot mosaics would be considered cultural property warranting international protection. For example, Article I of the UNESCO Convention defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to one or more of the following categories: (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old ....;(g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material....” The 1954 Hague Convention may be applicable to the case before us given the incursion of Turkish armed forces into Cyprus in 1974 and our ongoing refusal to recognize the government established in the northern part of Cyprus. The 1954 Hague Convention, which is but the most recent multilateral agreement in a 200–year history of international attempts to protect cultural property during wartime, prohibits the destruction or seizure of cultural property during armed conflict, whether international or civil in nature, and during periods of belligerent occupation. The Hague Convention also applies to international trafficking during peacetime in cultural property unlawfully seized during an armed conflict. The attempt of the government established in northern Cyprus by the Turkish military to divest the Greek Cypriot church of ownership of the mosaics might be viewed as an interference of the sort contemplated by the 1954 Hague Convention. If this were the case, the acts and decrees of the northern Cyprus government divesting title to this cultural property would not demand the deference of American courts. FN3. For more detailed discussion of this two hundred year development, see Bassiouni, Reflections on Criminal Jurisdiction in International Protection of Cultural Property, 10 Syracuse J. of Int'l Law and Commerce 281, 287–97 (1983). The second international agreement, the UNESCO Convention, focuses on private conduct, primarily during peacetime, and thus is also applicable to the theft and removal of the mosaics from Cyprus. FN4 Article 7 of that Convention requires signatory nations: FN4. For a more detailed discussion of the UNESCO Convention, see Jora, The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit from Ineffective Laws Governing Cultural Property? 13 Brooklyn J. Int'l L. 55, 62–66 (1987), and for discussion of the United States' implementation of the UNESCO Convention, see Note, Harmonious Meeting: the McClain Decision and the Cultural Property Implementation Act, 19 Cornell Int'l L.J. 311, 318–21 (1986). (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported....; (b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party ..., provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property ..., provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.... It is clear that the mosaics in the case before us were stolen (under any reasonable definition of that word) from a religious institution and that the mosaics were extensively documented by the Dumbarton Oaks publication as belonging to the Kanakaria Church. While the UNESCO Convention
seems to contemplate primarily measures to be implemented by the executive branch of a government through its import and export rules and policies, the judicial branch should certainly attempt to reflect in its decisionmaking the spirit as well as the letter of an international agreement to which the United States is a party. The UNESCO Convention, although ratified by Congress in 1972, was not formally implemented in the United States until the enactment of the Cultural Property Implementation Act in 1983. The Cultural Property Implementation Act, 19 U.S.C. §§ 2601 – 2613, focuses primarily on implementation of Articles 7(b) and 9 of the UNESCO Convention, which call for concerted action among nations to prevent trade in specific items of cultural property in emergency situations. The delay in the enactment of the Cultural Property Implementation Act apparently was caused, in part, by pressure from art dealers and traders, who argued that if the United States undertook unilateral import controls, illegal cultural property would simply be sold to those art market countries lacking similar import controls. In fact, the Cultural Property Implementation Act was perhaps finally enacted only because it was perceived as a restraint of sorts on certain Customs officers. These officials had deemed all archaeological materials that a foreign country had claimed were “stolen” to be subject to seizure under the National Stolen Property Act, 18 U.S.C. § 2311 et seq. (1934). The Cultural Property Implementation Act, therefore, emphasized the need for concerted action and, in particular, seemed to prefer action resulting from bilateral treaties between the United States and the affected source countries. Such treaties have now been put into effect with a few countries, including Mexico, Guatemala and Peru. As indicated, the Cultural Property Implementation Act addresses primarily the question of import controls and, in section 2607, prohibits the importation into the United States of any “cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution....” This section is not directly applicable here, first, because the mosaics were stolen after the effective date of the statute and, second, because the statute is directed at import controls rather than replevin suits. Nonetheless, the policy that the Act embodies is clear: at the very least, we should not sanction illegal traffic in stolen cultural property that is clearly documented as belonging to a public or religious institution. This is particularly true where this sort of property is “important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.” 19 U.S.C. § 2601(2)(C)(ii)(II). Focusing on a relatively short segment of what might otherwise be considered its “history,” the United States chooses sometimes to ignore the ancient cultural heritage of the land which it now occupies. But a short cultural memory is not an adequate justification for participating in the plunder of the cherished antiquities that play important roles in the histories of foreign lands. The UNESCO Convention and the Cultural Property Implementation Act constitute an effort to instill respect for the cultural property and heritage of all peoples. The mosaics before us are of great intrinsic beauty. They are the virtually unique remnants of an earlier artistic period and should be returned to their homeland and their rightful owner. This is the case not only because the mosaics belong there, but as a reminder that greed and callous disregard for the property, history and culture of others cannot be countenanced by the world community or by this court.
ORDER GRANTING JOINT MOTION TO DISMISS

JACQUELINE H. NGUYEN, Circuit Judge.

This matter comes before the Court on Defendants Sotheby's, Inc. ("Sotheby's") and Christie's, Inc.'s ("Christie's") (collectively, "Defendants") Joint Motion to Dismiss ("Jt. Mot."). (2:11-cv-8604-JHN-FFM, docket no. 17.)[1] The Court has read and considered the briefs filed by the parties in this matter. The Court has also considered the oral argument that took place on March 12, 2012.

For the reasons herein, the Joint Motion is GRANTED with prejudice.

I.
BACKGROUND

Defendants are world-renowned auction houses. Sotheby's is a New York corporation, with its principal place of business in New York. (Sotheby's Compl. ¶ 5; Jt. Mot. 10.) Christie's is also a New York corporation, with its principal place of business in New York. (Christie's Compl. ¶ 6; Jt. Mot. 10.)

On October 18, 2011, Plaintiffs — a collection of artists and their heirs — brought the instant Class Action Complaints (the "Complaints"), alleging that Defendants failed to comply with the California Resale Royalties Act ("CRRA"), Cal. Civ.Code § 986. Specifically, Plaintiffs allege, inter alia, that Defendants — acting as the agents for California sellers — sold works of fine art at auction but failed to pay the appropriate resale royalty provided for under the CRRA. (Sotheby's Compl. ¶¶ 9-12.)

On January 12, 2012, Defendants filed a Joint Motion to Dismiss the Complaints, arguing that the Court should strike down the CRRA because it (1) violates the Commerce Clause of the United States Constitution; (2) effects a taking of private
property in violation of the United States and California constitutions; and (3) is preempted by the Copyright Act of 1976. (Jt. Mot. 7, 17, 24.) Because the Court finds that the CRRA "cannot withstand Commerce Clause scrutiny," Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638 (9th Cir. 1993), it need not address Defendants' preemption and Takings Clause arguments.

II. LEGAL STANDARD

A defendant may seek dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." Fed. R.Civ.P. 12(b)(6). In evaluating a motion to dismiss, the Court generally cannot consider material outside the complaint, such as facts presented in briefs, affidavits, or discovery materials, unless such material is alleged in the complaint or judicially noticed. McCalip v. De Legarret, No. 08-2250, 2008 WL 3891254, at *1-2, 2008 U.S. Dist. LEXIS 87870, at *4 (C.D.Cal. Aug. 18, 2008); see also Jacobson v. AEG Capital Corp., 50 F.3d 1493, 1496 (9th Cir. 1995). The Court must accept as true all material factual allegations in the complaint and construe them in the light most favorable to the plaintiff. Nursing Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1229 (9th Cir. 2004). However, this tenet is inapplicable to legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). The Court need not accept as true "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Id. The Court, based on judicial experience and common sense, must determine whether a complaint plausibly states a claim for relief. Id. at 1950.

III. DISCUSSION

Defendants argue that by purporting to regulate transactions that take place wholly outside of California, the CRRA violates the Commerce Clause of the United States Constitution. (Jt. Mot. 7); U.S. Const. art. I, § 8, cl. 3. The Court conducts its analysis mindful of the "time-honored presumption" that "[e]very legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established." Reno v. Condon, 528 U.S. 141, 148, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000); Close v. Glenwood Cemetery, 107 U.S. 466, 475, 2 S.Ct. 267, 27 L.Ed. 408 (1883).

A. The CRRA

The CRRA provides for a droit de suite, or resale royalty right, for fine artists. Cal. Civ.Code § 986. The droit de suite creates a "continuing remunerative relationship between a visual artist and his creation," by providing the artist with a right to a royalty payment — consisting of a percentage of an original work's resale price — each time the "original, tangible embodiment" of the artist's work is resold. Elliot Alderman, Resale Royalties in the United States for Fine Visual Artists: An Alien Concept, 40 J. Copyright Soc'y U.S.A. 265, 267 (1992); 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8C.04[A][1] (2011) [hereinafter "Nimmer"][2]
The CRRA provides that "[w]henever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale." Cal. Civ.Code § 986(a). An artist can waive the right to this royalty "only by a contract in writing providing for an amount in excess 1121*1121 of 5 percent of the amount of such sale." Id. The CRRA excludes any resale where the gross sales price is less than $1,000. Id. § 986(b)(2).

The CRRA defines a work of "[f]ine art" as "an original painting, sculpture, or drawing, or an original work of art in glass." Id. § 986(c)(2). An "[a]rtist" is defined as "the person who creates a work of fine art and who, at the time of resale, is a citizen of the United States, or a resident of the state who has resided in the state for a minimum of two years." Id. § 986(c)(1). Therefore, the CRRA applies to all artists who are U.S. citizens, regardless of the state in which they reside. Here, for example, Plaintiff Chuck Close resides in New York. (Sotheby's Compl. ¶ 3; Christie's Compl. ¶ 4.)

The CRRA additionally requires the seller's agent to effect payment of the resale royalty. Cal. Civ.Code § 986(a)(1). Specifically, the CRRA provides that "[w]hen a work of fine art is sold at an auction or by a gallery, dealer, broker, museum or other person acting as the agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist." Id.

If the agent is unable to locate the artist within 90 days, the agent must pay the applicable royalty to the California Arts Council, which is then required to search for the artist for seven years. After that time, if the artist is not located, the funds pass to the California Arts Council for "use in acquiring fine art." Id. §§ 986(a)(3), (a)(5). If the seller or the seller's agent fails to pay the appropriate royalty, "the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer." Id. § 986(a)(3). The heirs of a deceased artist may assert the artist's rights under the CRRA for 20 years after the artist's death. Id. § 986(a)(7). The CRRA excludes any resale for "a gross sales price of less than one thousand dollars ($1,000)" or "a gross sales price less than the purchase price paid by the seller." Id. § 986(b)(2), (b)(4).


Notably, several attempts by Congress to introduce resale royalty legislation have failed. Reddy at 511; see also U.S. Copyright Office, Droit de Suite: The Artist's Resale Royalty (1992) [hereinafter "Report"]. In December 1992, the Copyright Office issued a report concluding that it was "not persuaded that sufficient economic and copyright policy justification exists to establish droit de suite in the United States." Report at 149; see also Nimmer at § 8C-13. Other states, including New
York, have considered similar legislation, but have not adopted any measure creating a resale royalty right for visual artists. (See, e.g., Russell Decl., Ex. 23, at 693-716.)

1122*1122 B. The Commerce Clause

The Commerce Clause of the United States Constitution states: "The Congress shall have Power ... To regulate Commerce ... among the several States ..." U.S. Const. art. I, § 8, cl. 3. "Although the Commerce Clause is phrased as an affirmative grant of regulatory power to Congress, the Supreme Court ... has long interpreted the Clause to have a 'negative aspect,' referred to as the dormant Commerce Clause...." Conservation Force, Inc. v. Manning, 301 F.3d 985, 991 (9th Cir.2002). The Supreme Court's dormant Commerce Clause jurisprudence holds that States do not have the "power [to] unjustifiably ... discriminate against or burden the interstate flow of articles of commerce." Id. (quoting Or. Waste Sys., Inc. v. Dept of Env't, Quality, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)). The dormant Commerce Clause is thus a "limitation upon the power of the States." Edgar v. MITE Corp., 457 U.S. 624, 640, 102 S.Ct. 2629, 2673 L.Ed.2d 269 (1982) (quoting Great Atl. & Pac. Tea Co., Inc. v. Cottrell, 424 U.S. 366, 370-71, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976)). While "not every exercise of state power with some impact on interstate commerce is invalid," a state law must even-handedly regulate to "effectuate a legitimate public interest," and its impact on interstate commerce must only be "incidental." Id. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)).

C. Applicability of the Dormant Commerce Clause

As an initial matter, although Plaintiffs rely heavily upon the Ninth Circuit's decision in Morseburg v. Balyon, 621 F.2d 972 (9th Cir.1980), arguing that it "rejected constitutional challenges brought against the [CRRA]," the Court finds that Morseburg does not control here. (Opp'n 1.) Morseburg did not involve a dormant Commerce Clause challenge to the CRRA; rather, it involved preemption, Contracts Clause, and due process challenges. Morseburg, 621 F.2d at 974-75. Moreover, the Morseburg court explicitly stated that its decision "concern[ed] the preemptive effect of the 1909 [Copyright] Act only." Id. at 975 (emphasis added). As such, the Court addresses the dormant Commerce Clause issue as one of first impression and is not bound by Morseburg.

A state statute implicates the dormant Commerce Clause if the activity it regulates could likewise be regulated by Congress. Manning, 301 F.3d at 993. Thus, the Court must first determine whether the CRRA regulates an activity subject to federal control. See id. at 992. The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power." United States v. Lopez, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). Congress may regulate (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, 1123*1123 or persons or things in interstate commerce; and (3) "those activities that substantially affect interstate commerce." Id. at 558-59, 115 S.Ct. 1624.
1. Works of Fine Art Constitute "Things" in Interstate Commerce

First, the Court finds that where works of fine art are sold from one state into another, each piece of fine art itself constitutes a "thing" in interstate commerce. Therefore, Congress may regulate such transactions under the Commerce Clause. See Lopez, 514 U.S. at 558-59, 115 S.Ct. 1624.

2. The CRRA Substantially Affects Interstate Commerce

Second, the Court finds that the CRRA substantially affects interstate commerce. One factor that a Court should "consider when evaluating whether a law has a `substantial effect' on interstate commerce [is]... whether the statute has anything to do with `commerce or any sort of economic enterprise, however broadly one might define those terms.'" San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1174 (9th Cir.2011) (quoting Lopez, 514 U.S. at 561, 115 S.Ct. 1624). This factor is surely met. In fact, the Ninth Circuit has specifically described the CRRA as "an economic regulation to promote artistic endeavors generally." Morseburg, 621 F.2d at 979 (emphasis added).

The Supreme Court has held that Congress may exercise its Commerce Clause power so long as "in the aggregate the economic activity in question would represent a general practice ... subject to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003) (alteration in original) (quotation marks and citation omitted); see also San Luis, 638 F.3d at 1175 ("When a statute is challenged under the Commerce Clause, courts must evaluate the aggregate effect of the statute (rather than an isolated application)...."). When the number of art sale transactions throughout the United States that the CRRA purports to regulate are considered in the aggregate, the Court finds little doubt that the CRRA has a "substantial effect" on interstate commerce such that Congress could regulate the activity. Citizens Bank, 539 U.S. at 56-57, 123 S.Ct. 2037. Therefore, the Court finds that the dormant Commerce Clause applies to the CRRA.

D. Whether the CRRA Violates the Dormant Commerce Clause

Although the Court has concluded that the CRRA implicates the dormant Commerce Clause, this "does not answer the question of whether the [CRRA] violates the dormant Commerce Clause." Manning, 301 F.3d at 995 (emphasis added).

The Supreme Court has "outlined a two-tiered approach" to analyzing state economic regulations under the dormant Commerce Clause:

When a statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1189 (9th Cir.1990) (quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579,
Therefore, the Court "must first ask whether the Statute: 1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors instate economic interests over out-of-state interests." Miller, 10 F.3d at 638. If it does any of these things, "it violates the Commerce Clause per se, and we must strike it down without further inquiry." Id.

1. The CRRA Violates the Commerce Clause Per Se

The Supreme Court has held that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." Healy v. Beer Institute, Inc., 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989). This is so "whether or not the commerce has effects within the state." Id. The Ninth Circuit has held that "[s]uch a statute is invalid per se, regardless of whether the state intended to inhibit interstate commerce." Valley Bank, 914 F.2d at 1190. The "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." Healy, 491 U.S. at 336, 109 S.Ct. 2491 (quoting Edgar, 457 U.S. at 642-43, 102 S.Ct. 2629 (1982) (plurality opinion)).

The Court finds that the CRRA explicitly regulates applicable sales of fine art occurring wholly outside California. See Cal. Civ.Code § 986(a). Under its clear terms, the CRRA regulates transactions occurring anywhere in the United States, so long as the seller resides in California. Id. Even the artist — the intended beneficiary of the CRRA — does not have to be a citizen of, or reside in, California. Cal. Civ.Code § 986(c)(1).

The following example illustrates the CRRA's problematic reach: Assume a California resident places a painting by a New York artist up for auction at Sotheby's in New York, and at the auction a New York resident purchases the painting for $1,000,000. In such a situation, the transaction that the CRRA regulates — the one between the New York auction house and the New York purchaser — occurs wholly in New York. Despite the fact that even the artist receiving the royalty is a New York resident, the CRRA reaches out to New York and regulates the transaction by mandating that Sotheby's (1) withhold $50,000 (i.e., 5% of the auction sale price); (2) locate the artist; and (3) remit the $50,000 to the New York artist. Cal. Civ. Code § 986(a)(1). Should Sotheby's in New York fail to comply, the New York artist may bring a legal action under California law (the CRRA) to recover the applicable royalty. Cal. Civ.Code § 986(a)(3). If the artist cannot be located, Sotheby's must send the money withheld in the transaction to the California Arts Council. Id.

California's own Legislative Counsel recognized this problem with the CRRA when the law was being considered in August of 1976. (Russell Decl. Ex. 5, at 32.) In an opinion letter, Legislative 1125 Counsel George H. Murphy wrote that "[w]hile the state has a legitimate local interest in furthering the fiscal rights of artists within this state, we find little such interest where the artist resides out of the state or country." (Id.) The Legislative Counsel further advised that the application of the
CRRA to "out-of-state sales ... would be invalid under the commerce clause." (Id. at 31.)

Plaintiffs' reliance on S.D. Myers is misplaced. (Opp'n to Jt. Mot. at 12.) In S.D. Myers, the Ninth Circuit confronted a wholly different set of facts. There, a San Francisco ordinance required that "contractors with the City provide nondiscriminatory benefits to employees with registered domestic partners." 253 F.3d at 465. An Ohio-based company filed suit, arguing that the ordinance was invalid under, inter alia, the Commerce Clause. Id. at 466. In upholding the statute from the Commerce Clause challenge, the Ninth Circuit relied on the fact that "the Ordinance [would] affect an out-of-state entity only after that entity [had] affirmatively chosen to subject itself to the Ordinance by contracting with the City." Id. at 469. The Court found important that the Ordinance was imposed only by an affirmative contract, "rather than by legislative fiat." Id.[7]

Here, on the other hand, the Complaints contain no allegation that Defendants affirmatively chose to be governed by California law. Instead, Defendants, both New York corporations, find themselves subject to the law of California by virtue of selling art that is owned by a California seller — even if the transaction takes place wholly in New York, and even if the beneficiary of the 5% royalty is a New York artist. Cal. Civ.Code § 986(c)(1).

For these reasons, the Court finds that the CRRA has the "practical effect" of controlling commerce "occurring wholly outside the boundaries" of California even though it may have some "effects within the State." Healy, 491 U.S. at 336, 109 S.Ct. 2491. Therefore, the CRRA violates the Commerce Clause of the United States Constitution.

E. The Entire Statute Must Fall

Although the CRRA contains a severability provision, the Court nonetheless agrees with Defendants that the offending portions of the CRRA cannot be severed, and thus the entire statute must fall. Cal Civ.Code § 986(e) ("If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable."); (Jt. Reply 12).

1126*1126 The Supreme Court has held that "a court should refrain from invalidating more of [a] statute than is necessary." Regan v. Time, Inc., 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984). The established standard for determining severability is: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Miller, 10 F.3d at 640 (emphasis omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 108-109, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam)). In Alaska Airlines, Inc. v. Brock, the Supreme Court elaborated on this standard, holding that "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress [i.e., the legislature]." 480 U.S. 678, 685, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987).
The legislative history of the CRRA, debated as Assembly Bill 1391, reveals that the legislature abandoned the initial version of the CRRA that purported to regulate only sales that took place in California. (See Russell Decl. Ex. 1.)

Assembly Bill 1391, as introduced on April 2, 1975, provided for a resale royalty only where "an original work of fine art [was] sold at an auction or by a gallery or museum in California." (Russell Decl. Ex. 1, at 8) (emphasis added). The bill was then amended, to ensure the CRRA applied "[w]henever a work of fine art [was] sold and the buyer or the seller resides in California or the sale takes place in California." (Russell Decl. Ex. 4, at 22) (emphasis in original). The bill was then amended again, deleting the reference to California buyers, but continuing to require a resale royalty for sales outside of California where the "seller resides in California." (Russell Decl. Ex. 6, at 34.) After the initial introduction of the bill, all amended versions were consistent in one respect: they applied to sales taking place outside California so long as the seller resided in California.

Moreover, the legislature endorsed the CRRA's extraterritorial reach, despite the fact that California's Legislative Counsel advised both Assemblyman Sieroty and then-Governor Brown, in opinion letters, that the bill "would constitute an undue burden on interstate commerce in contravention of the Federal Constitution in its application to sales which occur outside the State of California." (Id. Ex. 5, at 26; Ex. 7, at 42.) As Defendants pointed out in oral argument, the reason for the legislature's decision seems obvious: were the CRRA to apply only to sales occurring in California, the art market would surely have fled the state to avoid paying the 5% royalty. (Docket no. 39 at 21:10-17.)

For these reasons, the Court finds that the California legislature "would not have enacted" the CRRA without its extraterritorial reach. Buckley, 424 U.S. at 108-109, 96 S.Ct. 612. Were the Court merely to sever the extraterritorial provisions of the statute, it would create a law that the legislature clearly never intended to create. The Court declines to do so.

Therefore, the Court finds that the CRRA must fall in its entirety.

IV. CONCLUSION

For the foregoing reasons, the Court finds that the California Resale Royalties Act, Cal. Civ.Code § 986, violates the Commerce Clause of the United States Constitution. Because the Court finds that the offending provisions cannot be severed, the entire statute is struck down. Therefore, Defendants' Joint Motion to Dismiss the Complaints (docket no. 17) is 1127*1127 GRANTED with prejudice, as amendment would be futile.

IT IS SO ORDERED.

[1] All citations to the docket in this opinion are to the 2:11-cv-8604-JHN-FFM docket, unless otherwise stated.
The *droit de suite* is best understood as an "attempt to equalize the copyright status of fine artists" with that of authors and composers. Nimmer, § 8C.04[A][1]. For while authors and composers are compensated each time their works are performed or reproduced, visual artists "create one-of-a-kind objects, which cannot be copied," and thus receive their income from a work almost solely from its initial sale. Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty*, 15 Loy. L.A. Ent. L. Rev. 509, 517 (1995).

According to commentators and news reports, enforcement of the CRRA has been spotty. The *New York Times* recently reported that, since the CRRA was passed in 1977, approximately 400 artists have received a total of $328,000 in resale royalties. Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. Times, Nov. 1, 2011, http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=all (last viewed, January 24, 2012). A 1986 survey of artists conducted by the Bay Area Lawyers for the Arts found that 32% of respondents "said dealers had refused to give them the name or address of the buyer or even the resale price, despite their right under the [CRRA] to assign collection of the royalty to another." Reddy at 523.

The Court also notes that its decision in *Baby Moose Drawings, Inc. v. Valentine*, No. 11-00697, 2011 WL 1258529 (C.D.Cal. Apr. 1, 2011), a case also involving a challenge to the CRRA, was decided solely on preemption grounds — indeed the parties did not fully brief the issue of whether the CRRA violated the Commerce Clause — and thus is not relevant to the instant dormant Commerce Clause challenge.

Notably, the CRRA does not purport to regulate any potential agreement between a seller and the seller's agent; rather, it solely regulates the actual sale.

The Court received Defendants' Request for Judicial Notice (docket no. 18). The Court grants the Request to take judicial notice of the legislative history of the CRRA, including, *inter alia*, prior versions of the bill, amendments, committee reports, and the written recommendations of the legislative counsel. See, e.g., *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226-27, 79 S.Ct. 274, 3 L.Ed.2d 257 (1959) (taking judicial notice of, and analyzing, legislative history of a bill); *Chaker v. Crogan*, 428 F.3d 1215, 1223 n. 8 (9th Cir. 2005) (same); *In re Reeves*, 35 Cal.4th 765, 777 n. 15, 28 Cal.Rptr.3d 4, 110 P.3d 1218 (2005) (same). The Court declines to take judicial notice of any other documents as they are unnecessary to this decision.

The Court, however, does not rely upon the judicially noticed documents in reaching its conclusions on the constitutionality of the CRRA. It uses them simply for the purpose of adding context to the analysis, and in considering severability. See, e.g., *Traverso v. People ex rel. Dep't of Transp.*, 46 Cal.App.4th 1197, 1206, 1209 n. 11, 54 Cal.Rptr.2d 434 (1996); *People v. Soto*, 51 Cal.4th 229, 239-40, 119 Cal.Rptr.3d 775, 245 P.3d 410 (2011); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-17, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

Plaintiffs' reliance on *Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1224 (9th Cir.2003), is similarly misplaced. There, as in *S.D. Myers*, the Ninth Circuit relied on the fact that the relevant state law applied only "because the parties chose to be governed by California law" in a contract. *Id.* at 1224.
The backdrop for this replevin action (see, CPLR art 71) is the New York City art market, where masterpieces command extraordinary prices at auction and illicit dealing in stolen merchandise is an industry all its own. The Solomon R. Guggenheim Foundation, which operates the Guggenheim Museum in New York City, is seeking to recover a Chagall gouache worth an estimated $200,000. The Guggenheim believes that the gouache was stolen from its premises by a mailroom employee sometime in the late 1960s. The appellant Rachel Lubell and her husband, now deceased, bought the painting from a well-known Madison Avenue gallery in 1967 and have displayed it in their home for more than 20 years. Mrs. Lubell claims that before the Guggenheim's demand for its return in 1986, she had no reason to believe that the painting had been stolen.

On this appeal, we must decide if the museum's failure to take certain steps to locate the gouache is relevant to the appellant's Statute of Limitations defense. In effect, the appellant argues that the museum had a duty to use reasonable diligence to recover the gouache, that it did not do so, and that its cause of action in replevin is consequently barred by the Statute of Limitations. The Appellate Division rejected the appellant's argument. We agree with the Appellate Division that the timing of the museum's demand for the gouache and the appellant's refusal to return it are the only relevant factors in assessing the merits of the Statute of Limitations defense. We see no justification for undermining the clarity and predictability of this rule by carving out an exception where the chattel to be returned is a valuable piece of art. Appellant's affirmative defense of laches remains viable, however, and her claims that the museum did not undertake a reasonably diligent search for the missing painting will enter into the trial court's evaluation of the merits of that defense. Accordingly, the order of the Appellate Division should be affirmed.

The gouache, known alternately as Menageries or Le Marchand de Bestiaux (The Cattle Dealer), was painted by Marc Chagall in 1912, in preparation for an oil
painting also entitled *Le Marchand de Bestiaux*. It was donated to the museum in 1937 by Solomon R. [Guggenheim](#).

The museum keeps track of its collection through the use of "accession cards," which indicate when individual pieces leave the museum on loan, when they are returned and when they are transferred between the museum and storage. The museum lent the painting to a number of other art museums over the years. The last such loan occurred in 1961-1962. The accession card for the painting indicates that it was seen in the museum on April 2, 1965. The next notation on the accession card is undated and indicates that the painting could not be located.

Precisely when the museum first learned that the gouache had been stolen is a matter of some dispute. The museum acknowledges that it discovered that the painting was not where it should be sometime in the late 1960s, but claims that it did not know that the painting had in fact been stolen until it undertook a complete inventory of the museum collection beginning in 1969 and ending in 1970. According to the museum, such an inventory was typically taken about once every 10 years. The appellant, on the other hand, argues that the museum knew as early as 1965 that the painting had been stolen. It is undisputed, however, that the [Guggenheim](#) did not inform other museums, galleries or artistic organizations of the theft, and additionally, did not notify the New York City Police, the FBI, Interpol or any other law enforcement authorities. The museum asserts that this was a tactical decision based upon its belief that to publicize the theft would succeed only in driving the gouache further underground and greatly diminishing the possibility that it would ever be recovered. In 1974, having concluded that all efforts to recover the gouache had been exhausted, the museum's Board of Trustees voted to "deaccession" the gouache, thereby removing it from the museum's records.

Mr. and Mrs. [Lubell](#) had purchased the painting from the Robert Elkon Gallery for $17,000 in May of 1967. The invoice and receipt indicated that the gouache had been in the collection of a named individual, who later turned out to be the museum mailroom employee suspected of the theft. They exhibited the painting twice, in 1967 and in 1981, both times at the Elkon Gallery. In 1985, a private art dealer brought a transparency of the painting to Sotheby's for an auction estimate. The person to whom the dealer showed the transparency had previously worked at the Guggenheim and recognized the gouache as a piece that was missing from the museum. She notified the museum, which traced the painting back to the defendant. On January 9, 1986, Thomas Messer, the museum's director, wrote a letter to the defendant demanding the return of the gouache. Mrs. [Lubell](#) refused to return the painting and the instant action for recovery of the painting, or, in the alternative, $200,000, was commenced on September 28, 1987.

In her answer, the appellant raised as affirmative defenses the Statute of Limitations, her status as a good-faith purchaser for value, adverse possession, laches, and the museum's culpable conduct. The museum moved to compel discovery and inspection of the gouache and the defendant cross-moved for summary judgment. In her summary judgment papers, the appellant argued that the replevin action to compel the return of the painting was barred by the three-year Statute of Limitations because the museum had done nothing to locate its property in the 20-year interval between the theft and the museum's fortuitous discovery that the painting was in Mrs. [Lubell's](#)
possession. The trial court granted the appellant's cross motion for summary judgment, relying on DeWeerth v Baldinger (836 F.2d 103), an opinion from the United States Court of Appeals for the Second Circuit. The trial court cited New York cases holding that a cause of action in replevin 317*317 accrues when demand is made upon the possessor and the possessor refuses to return the chattel. The court reasoned, however, that in order to avoid prejudice to a good-faith purchaser, demand cannot be unreasonably delayed and that a property owner has an obligation to use reasonable efforts to locate its missing property to ensure that demand is not so delayed. Because the museum in this case had done nothing for 20 years but search its own premises, the court found that its conduct was unreasonable as a matter of law. Consequently, the court granted Mrs. Lubell's cross motion for summary judgment on the grounds that the museum's cause of action was time barred.

The Appellate Division modified, dismissing the Statute of Limitations defense and denying the appellant's cross motion for summary judgment. The Appellate Division held that the trial court had erred in concluding that "delay alone can make a replevin action untimely" (153 AD2d 143, 149). The court stated that the appellant's lack of diligence argument was more in the nature of laches than the Statute of Limitations and that as a result, the appellant needed to show that she had been prejudiced by the museum's delay in demanding return of the gouache (id.). The court also held that summary judgment was inappropriate because several issues of fact existed, including whether the museum's response to the theft was unreasonable, when the museum first realized that the gouache was missing, whether the museum had been stolen, whether it was unreasonable for the museum not to have taken certain steps after it realized that the gouache was missing but before it realized that it had been stolen, and when the museum learned of the defendant's possession of the gouache (id., at 151-152). The Appellate Division granted leave to this Court, certifying the following question: "Was the order of this Court, which modified the order of the Supreme Court, properly made?" We answer this certified question in the affirmative.

New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value (see, Saltus & Saltus v Everett, 20 Wend 267, 282). There is a three-year Statute of Limitations for recovery of a chattel (CPLR 214 [3]). The rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the 318*318 chattel refuses to return it (see, e.g., Goodwin v Wertheimer, 99 N.Y. 149, 153; Cohen v Keizer, Inc., 246 App Div 277). Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful (see, e.g., Gillet v Roberts, 57 N.Y. 28, 30-31; Menzel v List, 49 Misc 2d 300, 304-305, mod as to damages 28 AD2d 516, revd as to modification 24 N.Y.2d 91). Although seemingly anomalous, a different rule applies when the stolen object is in the possession of the thief. In that situation, the Statute of Limitations runs from the time of the theft (see, Sporn v MCA Records, 58 N.Y.2d 482, 487-488), even if the property owner was unaware of the theft at the time that it occurred (see, Varga v Credit Suisse, 5 AD2d 289, 292-293, affd 5 N.Y.2d 865).
In *DeWeerth v Baldinger (supra)*, which the trial court in this case relied upon in granting Mrs. Lubell's summary judgment motion, the Second Circuit took note of the fact that New York case law treats thieves and good-faith purchasers differently and looked to that difference as a basis for imposing a reasonable diligence requirement on the owners of stolen art. Although the court acknowledged that the question posed by the case was an open one, it declined to certify it to this Court (see, 22 NYCCR 500.17), stating that it did not think that it "[would] recur with sufficient frequency to warrant use of the certification procedure" (836 F2d, at 108, n 5).

Actually, the issue has recurred several times in the three years since *DeWeerth* was decided (see, e.g., *Republic of Turkey v Metropolitan Museum of Art*, No. 87 Civ 3750 [VLB], slip opn [SD NY July 16, 1990]), including the case now before us. We have reexamined the relevant New York case law and we conclude that the Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations.

While the demand and refusal rule is not the only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to the true owners of stolen property. Less protective measures would include running the three-year statutory period from the time of the theft even where a good-faith purchaser is in possession of the stolen chattel, or, alternatively, calculating the statutory period from the time that the good-faith purchaser obtains possession of the chattel (see generally, Weil, *Repose*, 8 IFAR [Intl Found for Art Research] Rep, at 6-7 [Aug.-Sept. 1987]). Other States that have considered this issue have applied a discovery rule to these cases, with the Statute 319*319 of Limitations running from the time that the owner discovered or reasonably should have discovered the whereabouts of the work of art that had been stolen (see, e.g., *O'Keefe v Snyder*, 83 NJ 478, 416 A2d 862; Cal Civ Proc Code § 338 [c]).

New York has already considered — and rejected — adoption of a discovery rule. In 1986, both houses of the New York State Legislature passed Assembly Bill 11462-A (Senate Bill 3274-B), which would have modified the demand and refusal rule and instituted a discovery rule in actions for recovery of art objects brought against certain not-for-profit institutions. This bill provided that the three-year Statute of Limitations would run from the time these institutions gave notice, in a manner specified by the statute, that they were in possession of a particular object. Governor Cuomo vetoed the measure, however, on advice of the United States Department of State, the United States Department of Justice and the United States Information Agency (see, 3 U.S. Agencies Urge Veto of Art-Claim Bill, NY Times, July 23, 1986, at C15, col 1). In his veto message, the Governor expressed his concern that the statute "[did] not provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum's acquisition and take action to recover it before their rights are extinguished." The Governor also stated that he had been advised by the State Department that the bill, if it went into effect, would have caused New York to become "a haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill."

The history of this bill and the concerns expressed by the Governor in vetoing it, when considered together with the abundant case law spelling out the demand and refusal rule, convince us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty
of reasonable diligence. Our case law already recognizes that the true owner, having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property (see, e.g., Heide v Glidden Buick Corp., 188 Misc 198). Here, however, where the demand and refusal is a substantive and not a procedural element of the cause of action (see, Guggenheim Found. v Lubell, 153 AD2d, at 147; Menzel v List, 22 AD2d 647; compare, CPLR 206 [where a demand is necessary to entitle a person to commence an action, the time to commence that action is measured from when the right to make demand is complete]), it would not be prudent to extend that case law and impose the additional duty of diligence before the true owner has reason to know where its missing chattel is to be found.

Further, the facts of this case reveal how difficult it would be to specify the type of conduct that would be required for a showing of reasonable diligence. Here, the parties hotly contest whether publicizing the theft would have turned up the gouache. According to the museum, some members of the art community believe that publicizing a theft exposes gaps in security and can lead to more thefts; the museum also argues that publicity often pushes a missing painting further underground. In light of the fact that members of the art community have apparently not reached a consensus on the best way to retrieve stolen art (see, Burnham, Art Theft: Its Scope, Its Impact and Its Control), it would be particularly inappropriate for this Court to spell out arbitrary rules of conduct that all true owners of stolen art work would have to follow to the letter if they wanted to preserve their right to pursue a cause of action in replevin. All owners of stolen property should not be expected to behave in the same way and should not be held to a common standard. The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property. We conclude that it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all of these variables and that would not unduly burden the true owner.

Further, our decision today is in part influenced by our recognition that New York enjoys a worldwide reputation as a preeminent cultural center. To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work unless the true owner was able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser.

321*321Despite our conclusion that the imposition of a reasonable diligence requirement on the museum would be inappropriate for purposes of the Statute of Limitations, our holding today should not be seen as either sanctioning the museum's conduct or suggesting that the museum's conduct is no longer an issue in this case. We agree with the Appellate Division that the arguments raised in the appellant's summary judgment papers are directed at the conscience of the court and its ability to bring equitable considerations to bear in the ultimate disposition of the painting. As noted above, although appellant's Statute of Limitations argument fails, her contention
that the museum did not exercise reasonable diligence in locating the painting will be considered by the Trial Judge in the context of her laches defense. The conduct of both the appellant and the museum will be relevant to any consideration of this defense at the trial level, and as the Appellate Division noted, prejudice will also need to be shown (153 AD2d, at 149). On the limited record before us there is no indication that the equities favor either party. Mr. and Mrs. Lubell investigated the provenance of the gouache before the purchase by contacting the artist and his son-in-law directly. The Lubells displayed the painting in their home for more than 20 years with no reason to suspect that it was not legally theirs. These facts will doubtless have some impact on the final decision regarding appellant's laches defense. Because it is impossible to conclude from the facts of this case that the museum's conduct was unreasonable as a matter of law, however, Mrs. Lubell's cross motion for summary judgment was properly denied.

We agree with the Appellate Division, for the reasons stated by that court, that the burden of proving that the painting was not stolen properly rests with the appellant Mrs. Lubell. We have considered her remaining arguments, and we find them to be without merit. Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Order affirmed, etc.

83 N.J. 478
416 A.2d 862

Georgia O'KEEFFE, Plaintiff-Respondent,
v.
Barry SNYDER, d/b/a Princeton Gallery of Fine Art, Defendant-Appellant,
and
Ulrich A. Frank, Third Party Defendant-Appellant.

Supreme Court of New Jersey.
Decided July 17, 1980.

Joel H. Sterns, Trenton, for defendant-appellant Barry Snyder, d/b/a Princeton Gallery of Fine Art (Sterns, Herbert & Weinroth, Trenton, attorneys; Mark D. Schorr and William J. Bigham, Trenton, on briefs).

Thomas C. Jamieson, Jr., Trenton, for third party defendant-appellant Ulrich A. Frank (Jamieson, McCardell, Moore, Peskin & Spicer, Trenton, attorneys).

Roger A. Lowenstein, Roseland, for plaintiff-respondent (Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan, Roseland, attorneys; Roger A. Lowenstein and Lee Hilles Wertheim, Roseland, on briefs).

The opinion of the court was delivered by

POLLOCK, J.
This is an appeal from an order of the Appellate Division granting summary judgment to plaintiff, Georgia O'Keeffe, against defendant, Barry Snyder, d/b/a Princeton Gallery of Fine Art, for replevin of three small pictures painted by O'Keeffe. O'Keeffe v. Snyder, 170 N.J.Super. 75, 405 A.2d 840 (1979). In her complaint, filed in March, 1976, O'Keeffe alleged she was the owner of the paintings and that they were stolen from a New York art gallery in 1946. Snyder asserted he was a purchaser for value of the paintings, he had title by adverse possession, and O'Keeffe's action was barred by the expiration of the six-year period of limitations provided by N.J.S.A. 2A:14-1 pertaining to an action in replevin. Snyder impleaded third party defendant, Ulrich A. Frank, from whom Snyder purchased the paintings in 1975 for $35,000.

The trial court granted summary judgment for Snyder on the ground that O'Keeffe's action was barred because it was not commenced within six years of the alleged theft. The Appellate Division reversed and entered judgment for O'Keeffe. A majority of that court concluded that the paintings were stolen, the defenses of expiration of the statute of limitations and title by adverse possession were identical, and Snyder had not proved the elements of adverse possession. Consequently, the majority ruled that O'Keeffe could still enforce her right to possession of the paintings.

The dissenting judge stated that the appropriate measurement of the period of limitation was not by analogy to adverse possession, but by application of the "discovery rule" pertaining to some statutes of limitation. He concluded that the six-year period of limitations commenced when O'Keeffe knew or should have known who unlawfully possessed the paintings, and that the matter should be remanded to determine if and when that event had occurred.

We granted certification to consider not only the issues raised in the dissenting opinion, but all other issues. We reverse and remand the matter for a plenary hearing in accordance with this opinion.

I

The record, limited to pleadings, affidavits, answers to interrogatories, and depositions, is fraught with factual conflict. Apart from the creation of the paintings by O'Keeffe and their discovery in Snyder's gallery in 1976, the parties agree on little else.

O'Keeffe contended the paintings were stolen in 1946 from a gallery, An American Place. The gallery was operated by her late husband, the famous photographer Alfred Stieglitz.

An American Place was a cooperative undertaking of O'Keeffe and some other American artists identified by her as Marin, Hardin, Dove, Andema, and Stevens. In
1946, Stieglitz arranged an exhibit which included an O'Keeffe painting, identified as Cliffs. According to O'Keeffe, one day in March, 1946, she and Stieglitz discovered Cliffs was missing from the wall of the exhibit. O'Keeffe estimates the value of the painting at the time of the alleged theft to have been about $150.

About two weeks later, O'Keeffe noticed that two other paintings, Seaweed and Fragments, were missing from a storage room at An American Place. She did not tell anyone, even Stieglitz, about the missing paintings, since she did not want to upset him.

Before the date when O'Keeffe discovered the disappearance of Seaweed, she had already sold it (apparently for a string of amber beads) to a Mrs. Weiner, now deceased. Following the grant of the motion for summary judgment by the trial court in favor of Snyder, O'Keeffe submitted a release from the legatees of Mrs. Weiner purportedly assigning to O'Keeffe their interest in the sale.

O'Keeffe testified on depositions that at about the same time as the disappearance of her paintings, 12 or 13 miniature paintings by Marin also were stolen from An American Place. According to O'Keeffe, a man named Estrick took the Marin paintings and "maybe a few other things." Estrick distributed the Marin paintings to members of the theater world who, when confronted by Stieglitz, returned them. However, neither Stieglitz nor O'Keeffe confronted Estrick with the loss of any of the O'Keeffe paintings.

There was no evidence of a break and entry at An American Place on the dates when O'Keeffe discovered the disappearance of her paintings. Neither Stieglitz nor O'Keeffe reported them missing to the New York Police Department or any other law enforcement agency. Apparently the paintings were uninsured, and O'Keeffe did not seek reimbursement from an insurance company. Similarly, neither O'Keeffe nor Stieglitz advertised the loss of the paintings in Art News or any other publication. Nonetheless, they discussed it with associates in the art world and later O'Keeffe mentioned the loss to the director of the Art Institute of Chicago, but she did not ask him to do anything because "it wouldn't have been my way." O'Keeffe does not contend that Frank or Snyder had actual knowledge of the alleged theft.

Stieglitz died in the summer of 1946, and O'Keeffe explains she did not pursue her efforts to locate the paintings because she was settling his estate. In 1947, she retained the services of Doris Bry to help settle the estate. Bry urged O'Keeffe to report the loss of the paintings, but O'Keeffe declined because "they never got anything back by reporting it." Finally, in 1972, O'Keeffe authorized Bry to report the theft to the Art Dealers Association of America, Inc., which maintains for its members a registry of stolen paintings. The record does not indicate whether such a registry existed at the time the paintings disappeared.
In September, 1975, O'Keeffe learned that the paintings were in the Andrew Crispo Gallery in New York on consignment from Bernard Danenberg Galleries. On February 11, 1976, O'Keeffe discovered that Ulrich A. Frank had sold the paintings to Barry Snyder, d/b/a Princeton Gallery of Fine Art. She demanded their return and, following Snyder's refusal, instituted this action for replevin.

Frank traces his possession of the paintings to his father, Dr. Frank, who died in 1968. He claims there is a family relationship by marriage between his family and the Stieglitz family, a contention that O'Keeffe disputes. Frank does not know how his father acquired the paintings, but he recalls seeing them in his father's apartment in New Hampshire as early as 1941-1943, a period that precedes the alleged theft. Consequently, Frank's factual contentions are inconsistent with O'Keeffe's allegation of theft. Until 1965, Dr. Frank occasionally lent the paintings to Ulrich Frank. In 1965, Dr. and Mrs. Frank formally gave the paintings to Ulrich Frank, who kept them in his residences in Yardley, Pennsylvania and Princeton, New Jersey. In 1968, he exhibited anonymously Cliffs and Fragments in a one day art show in the Jewish Community Center in Trenton. All of these events precede O'Keeffe's listing of the paintings as stolen with the Art Dealers Association of America, Inc. in 1972.

Frank claims continuous possession of the paintings through his father for over thirty years and admits selling the paintings to Snyder. Snyder and Frank do not trace their provenance, or history of possession of the paintings, back to O'Keeffe.

As indicated, Snyder moved for summary judgment on the theory that O'Keeffe's action was barred by the statute of limitations and title had vested in Frank by adverse possession. For purposes of his motion, Snyder conceded that the paintings had been stolen. On her cross motion, O'Keeffe urged that the paintings were stolen, the statute of limitations had not run, and title to the paintings remained in her.

II

The Appellate Division accepted O'Keeffe's contention that the paintings had been stolen. However, in his deposition, Ulrich Frank traces possession of the paintings to his father in the early 1940's, a date that precedes the alleged theft by several years. The factual dispute about the loss of the paintings by O'Keeffe and their acquisition by Frank, as well as the other subsequently described factual issues, warrant a remand for a plenary hearing. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 110 A.2d 24 (1954).

In reversing the cross motions for summary judgment, the Appellate Division erred in accepting one of two conflicting versions of material fact: the theft of the paintings in March, 1946 as asserted by O'Keeffe as against the possession of the paintings by the Frank family since the early 1940's. Instead of recognizing the
existence of this controversy, the Appellate Division misconstrued Snyder's concession that the paintings had been stolen. That concession was made to enable the trial court to determine Snyder's motion for summary judgment that title had passed by adverse possession. The concession was not available to resolve O'Keeffe's cross motion for summary judgment. Hence, there is an issue of material fact, whether the paintings were stolen, that compels remand for trial.

Without purporting to limit the scope of the trial, other factual issues include whether (1) O'Keeffe acquired title to Seaweed by obtaining releases from the legatees of Mrs. Weiner; (2) the paintings were not stolen but sold, lent, consigned, or given by Stieglitz to Dr. Frank or someone else without O'Keeffe's knowledge before he died; and (3) there was any business or family relationship between Stieglitz and Dr. Frank so that the original possession of the paintings by the Frank family may have been under claim of right.

III

On the limited record before us, we cannot determine now who has title to the paintings. That determination will depend on the evidence adduced at trial. Nonetheless, we believe it may aid the trial court and the parties to resolve questions of law that may become relevant at trial.

Our decision begins with the principle that, generally speaking, if the paintings were stolen, the thief acquired no title and could not transfer good title to others regardless of their good faith and ignorance of the theft. Joseph v. Lesnevich, 56 N.J.Super. 340, 346, 153 A.2d 349 (App.Div.1959); Kutner Buick, Inc. v. Strelecki, 111 N.J.Super. 89, 97, 267 A.2d 549 (Ch.Div.1970); see Ashton v. Allen, 70 N.J.L. 117, 119, 56 A. 165 (Sup.Ct.1903). Proof of theft would advance O'Keeffe's right to possession of the paintings absent other considerations such as expiration of the statute of limitations.

Another issue that may become relevant at trial is whether Frank or his father acquired a "voidable title" to the paintings under N.J.S.A. 12A:2-403(1). That section, part of the Uniform Commercial Code (U.C.C.), does not change the basic principle that a mere possessor cannot transfer good title to others in certain circumstances. N.J.S.A. 12A:2-403(1). If the facts developed at trial merit application of that section, then Frank may have transferred good title to Snyder, thereby providing a defense to O'Keeffe's action. [416 A.2d 868] No party on this appeal has urged factual or legal contentions concerning the applicability of the
U.C.C. Consequently, a more complete discussion of the U.C.C. would be premature, particularly in light of our decision to remand the matter for trial.

On this appeal, the critical legal question is when O'Keeffe's cause of action accrued. The fulcrum on which the outcome turns is the statute of limitations in N.J.S.A. 2A:14-1, which provides that an action for replevin of goods or chattels must be commenced within six years after the accrual of the cause of action.

The trial court found that O'Keeffe's cause of action accrued on the date of the alleged theft, March, 1946, and concluded that her action was barred. The Appellate Division found that an action might have accrued more than six years before the date of suit if possession by the defendant or his predecessors satisfied the elements of adverse possession. As indicated, the Appellate Division concluded that Snyder had not established those elements and that the O'Keeffe action was not barred by the statute of limitations.

Since the alleged theft occurred in New York, a preliminary question is whether the statute of limitations of New York or New Jersey applies. The New York statute, N.Y. Civ. Prac. Law § 214 (McKinney), has been interpreted so that the statute of limitations on a cause of action for replevin does not begin to run until after refusal upon demand for the return of the goods. Menzel v. List, 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup.Ct.1966), aff'd as modified, 28 A.D.2d 516, 279 N.Y.S.2d 608 (App.Div.1966), third party claim reversed on other grounds, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (Ct.App.1969). Here, O'Keeffe demanded return of the paintings in February, 1976. If the New York statute applied, her action would have been commenced within the period of limitations.

The traditional rule to determine which of two statutes of limitations is applicable is that the statute of the forum governs unless the limitation is a condition of the cause of action. See Marshall v. Geo. M. Brewster & Son, Inc., 37 N.J. 176, 180 A.2d 129 (1962). However, this Court has discarded the mechanical rule that the statute of limitations of the forum must be employed in every suit on a foreign cause of action. Heavner v. Uniroyal, Inc., 63 N.J. 130, 140-141, 305 A.2d 412 (1973). Heavner set out five requirements for barring an action by applying a statute of limitations other than the appropriate New Jersey statute: (1) the cause of action arose in the other state; (2) the parties are all present in and amenable to jurisdiction in the other state; (3) New Jersey has no substantial interest in the matter; (4) the substantive law of the other jurisdiction is applicable, and (5) the limitations' period of the other jurisdiction has expired at the time of the commencement of the suit in New Jersey. Id. at 141, 305 A.2d 412. The Heavner rule provides a limited and special exception to the general rule that the rule of the forum determines the applicable period of limitations. Raskulinecz v. Raskulinecz, 141 N.J.Super. 148, 153, 357 A.2d 330 (Law
In the present case, none of the parties resides in New York and the paintings are located in New Jersey. On the facts before us, it would appear that the appropriate statute of limitations is the law of the forum, N.J.S.A. 2A:14-1. On remand, the trial court may reconsider this issue if the parties present other relevant facts.

IV


To avoid harsh results from the mechanical application of the statute, the courts have developed a concept known as the discovery rule. Lopez v. Swyer, 62 N.J. 267, 273-275, 300 A.2d 563 (1973); Prosser, The Law of Torts (4th ed. 1971), § 30 at 144-145; 51 Am.Jur.2d, Limitation of Actions, § 146 at 716. The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of due diligence, facts which form the basis of a cause of action. Burd v. New Jersey Telephone Company, 76 N.J. 284, 291-292, 386 A.2d 1310 (1978). The rule is essentially a principle of equity, the purpose of which is to mitigate unjust results that otherwise might flow from strict adherence to a rule of law. Lopez, supra, 62 N.J. at 273-274, 300 A.2d 563.

Similarly, we conclude that the discovery rule applies to an action for replevin of a painting under N.J.S.A. 2A:14-1. O'Keeffe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings. See N. Ward, Adverse Possession of Loaned or Stolen Objects Is Possession Still 9/10ths of the law?, published in Legal Problems of Museum Administration (ALI-ABA 1980) at 89-90.
We leave to the discretion of the trial judge whether to conduct a preliminary hearing to determine whether O’Keeffe is entitled to the benefit of the discovery rule. Ordinarily that determination would be made in a preliminary hearing out of the presence of the jury. Lopez, supra, 62 N.J. at 275, 300 A.2d 563. But if much of the evidence adduced at the hearing will be the same as that adduced at trial, the judge may elect to receive the evidence in the course of the trial and decide the limitations question at the end of the plaintiff’s case or at the conclusion of all evidence. If that procedure is adopted, the trial judge should exclude the jury when the anticipated evidence relates only to the limitations issue, as receipt of that evidence in the presence of the jury might prejudice another party. Id. at 275 n. 3, 300 A.2d 563.

In determining whether O’Keeffe is entitled to the benefit of the discovery rule, the trial court should consider, among others, the following issues: (1) whether O’Keeffe used due diligence to recover the paintings at the time of the alleged theft and thereafter; (2) whether at the time of the alleged theft there was an effective method, other than talking to her colleagues, for O’Keeffe to alert the art world; and (3) whether registering paintings with the Art Dealers Association of America, Inc. or any other organization would put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner.

V

The acquisition of title to real and personal property by adverse possession is based on the expiration of a statute of limitations. R. Brown, The Law of Personal Property (3d ed. 1975), § 4.1 at 33 (Brown). Adverse possession does not create title by prescription apart from the statute of limitations. Walsh, Title by Adverse Possession, 17 N.Y.U.L.Q.Rev. 44, 82 (1939) (Walsh); see Developments in the Law Statutes of Limitations, 63 Harv.L.Rev. 1177 (1950) (Developments).

To establish title by adverse possession to chattels, the rule of law has been that the possession must be hostile, actual, visible, exclusive, and continuous.

Other problems with the requirement of visible, open, and notorious possession readily come to mind. For example, if jewelry is stolen from a municipality in one county in New Jersey, it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality. Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor.

The problem is even more acute with works of art. Like many kinds of personal property, works of art are readily moved and easily concealed. O’Keeffe argues that nothing short of public display should be sufficient to alert the true owner and start the statute running. Although there is merit in that contention from the perspective of
the original owner, the effect is to impose a heavy burden on the purchasers of paintings who wish to enjoy the paintings in the privacy of their homes.

In the present case, the trial court and Appellate Division concluded that the paintings, which allegedly had been kept in the private residences of the Frank family, had not been held visibly, openly, and notoriously. Notwithstanding that conclusion, the trial court ruled that the statute of limitations began to run at the time of the theft and had expired before the commencement of suit. The Appellate Division determined it was bound by the rules in Redmond and reversed the trial court on the theory that the defenses of adverse possession and expiration of the statute of limitations were identical. Nonetheless, for different reasons, the majority and dissenting judges in the Appellate Division acknowledged deficiencies in identifying the statute of limitations with adverse possession. The majority stated that, as a practical matter, requiring compliance with adverse possession would preclude barring stale claims and acquiring title to personal property. O'Keeffe, supra, 170 N.J.Super. at 86, 405 A.2d 840. The dissenting judge feared that identifying the statutes of limitations with adverse possession would lead to a "handbook for larceny". Id. at 96, 405 A.2d 840. The divergent conclusions of the lower courts suggest that the doctrine of adverse possession no longer provides a fair and reasonable means of resolving this kind of dispute.

The problem is serious. According to an affidavit submitted in this matter by the president of the International Foundation for Art Research, there has been an "explosion in art thefts" and there is a "worldwide phenomenon of art theft which has reached epidemic proportions".

The limited record before us provides a brief glimpse into the arcane world of sales of art, where paintings worth vast sums of money sometimes are bought without inquiry about their provenance. There does not appear to be a reasonably available method for an owner of art to record the ownership or theft of paintings. Similarly, there are no reasonable means readily available to a purchaser to ascertain the provenance of a painting. It may be time for the art world to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting. An efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of adverse possession with all of its uncertainties. L. DuBoff, The Deskbook of Art Law at 470-472 (Fed.Pub.Inc.1977). Although we cannot mandate the initiation of a registration system, we can develop a rule for the commencement and running of the statute of limitations that is more responsive to the needs of the art world than the doctrine of adverse possession.
We are persuaded that the introduction of equitable considerations through the
discovery rule provides a more satisfactory response than the doctrine of adverse
possession. The discovery rule shifts the emphasis from the conduct of the possessor
to the conduct of the owner. The focus of the inquiry will no longer be whether the
possessor has met the tests of adverse possession, but whether the owner has acted
with due diligence in pursuing his or her personal property.

For example, under the discovery rule, if an artist diligently seeks the recovery of
a lost or stolen painting, but cannot find it or discover the identity of the possessor, the
statute of limitations will not begin to run. The rule permits an artist who uses
reasonable efforts to report, investigate, and recover a painting to preserve the rights
of title and possession.

Properly interpreted, the discovery rule becomes a vehicle for transporting
equitable considerations into the statute of limitations for replevin, N.J.S.A. 2A:14-1.
In determining whether the discovery rule should apply, a court should identify,
evaluate, and weigh the equitable claims of all parties. Lopez, supra, 62 N.J. at 274,
300 A.2d 563. If a chattel is concealed from the true owner, fairness compels tolling
the statute during the period of concealment. See Lopez, supra, 62 N.J. at 275 n. 2,
300 A.2d 563; Developments, supra, 1220 (1950). That conclusion is consistent with
tolling the statute of limitations in a medical malpractice action where the physician is
guilty of fraudulent concealment. See Tortorello v. Reinfeld, 6 N.J. 58, 67, 77 A.2d

It is consistent also with the law of replevin as it has developed apart from the
discovery rule. In an action for replevin, the period of limitations ordinarily will run
against the owner of lost or stolen property from the time of the wrongful taking,
absent fraud or concealment. Where the [416 A.2d 873] chattel is fraudulently
concealed, the general rule is that the statute is tolled. 51 Am.Jur.2d, Limitation of
Actions, § 124 at 693; 54 C.J.S. Limitations of Actions, § 119 at 23; Annotation,
"When statute of limitations commences to run against action to recover, or for
conversion of, property stolen or otherwise wrongfully taken," 136 A.L.R. 658, 661-
665 (1942); see Dawson, Fraudulent Concealment and Statutes of Limitation, 31
Mich.L.Rev. 875 (1933); Annotation, "What constitutes concealment which will
prevent running of statutes of limitations," 173 A.L.R. 576 (1948); Annotation,
"When statute of limitations begins to run against action for conversion of property by
theft," 79 A.L.R.3d 847, § 3 at 853 (1975); see also Dawson, Estoppel and Statutes of

A purchaser from a private party would be well-advised to inquire whether a
work of art has been reported as lost or stolen. However, a bona fide purchaser who
purchases in the ordinary course of business a painting entrusted to an art dealer
should be able to acquire good title against the true owner. Under the U.C.C. entrusting possession of goods to a merchant who deals in that kind of goods gives the merchant the power to transfer all the rights of the entruster to a buyer in the ordinary course of business. N.J.S.A. 12A:2-403(2). In a transaction under that statute, a merchant may vest good title in the buyer as against the original owner. See Anderson, supra, § 2-403:17 et seq. The interplay between the statute of limitations as modified by the discovery rule and the U.C.C. should encourage good faith purchases from legitimate art dealers and discourage trafficking in stolen art without frustrating an artist's ability to recover stolen art works.

The discovery rule will fulfill the purposes of a statute of limitations and accord greater protection to the innocent owner of personal property whose goods are lost or stolen. Accordingly, we overrule Redmond v. New Jersey Historical Society, supra, and Joseph v. Lesnevich, supra, to the extent that they hold that the doctrine of adverse possession applies to chattels.

By diligently pursuing their goods, owners may prevent the statute of limitations from running. The meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property. For example, with respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to art work of greater value, it may be reasonable to expect an owner to do more. In practice, our ruling should contribute to more careful practices concerning the purchase of art.

The considerations are different with real estate, and there is no reason to disturb the application of the doctrine of adverse possession to real estate. Real estate is fixed and cannot be moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of open, notorious, visible, hostile, continuous acts of possession on it.

Our ruling not only changes the requirements for acquiring title to personal property after an alleged unlawful taking, but also shifts the burden of proof at trial. Under the doctrine of adverse possession, the burden is on the possessor to prove the elements of adverse possession. Wilomay Holding Co. v. Peninsula Land Co., 36 N.J.Super. 440, 443, 116 A.2d 484 (App.Div.1955), certif. den. 19 N.J. 618, 118 A.2d 128 (1955). Under the discovery rule, the burden is on the owner as the one seeking the benefit of the rule to establish facts that would justify deferring the beginning of the period of limitations. See Lopez, supra, 62 N.J. at 276, 300 A.2d 563.

VI

Read literally, the effect of the expiration of the statute of limitations under N.J.S.A. 2A:14-1 is to bar an action such as replevin. The statute does not speak of
divesting the original owner of title. By its terms the statute cuts off the remedy, but not the right of title. Nonetheless, the [416 A.2d 874] effect of the expiration of the statute of limitations, albeit on the theory of adverse possession, has been not only to bar an action for possession, but also to vest title in the possessor. There is no reason to change that result although the discovery rule has replaced adverse possession. History, reason, and common sense support the conclusion that the expiration of the statute of limitations bars the remedy to recover possession and also vests title in the possessor.

Professor Brown explains the historical reason for construing the statute of limitations as barring the right of title as well as an action for possession:
The metamorphosis of statutes simply limiting the time in which an action may be commenced into instrumentalities for the transfer of title may be explained perhaps by the historical doctrine of disseisin which, though more customarily applied to land, was probably originally controlling as to chattels also. By this doctrine the wrongful possessor as long as his possession continued, was treated as the owner and the dispossessed occupant considered merely to have a personal right to recapture his property if he could. (Brown, supra, § 4.1 at 34)


Before the expiration of the statute, the possessor has both the chattel and the right to keep it except as against the true owner. The only imperfection in the possessor's right to retain the chattel is the original owner's right to repossess it. Once that imperfection is removed, the possessor should have good title for all purposes. Ames, The Disseisin of Chattels, 3 Harv.L.Rev. 313, 321 (1890) (Ames). As Dean Ames wrote: "An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand." Id. at 319.

Recognizing a metaphysical notion of title in the owner would be of little benefit to him or her and would create potential problems for the possessor and third parties. The expiration of the six-year period of N.J.S.A. 2A:14-1 should vest title as effectively under the discovery rule as under the doctrine of adverse possession.

To summarize, the operative fact that divests the original owner of title to either personal or real property is the expiration of the period of limitations. In the past, adverse possession has described the nature of the conduct that will vest title of a chattel at the end of the statutory period. Our adoption of the discovery rule does not change the conclusion that at the end of the statutory period title will vest in the possessor.
We next consider the effect of transfers of a chattel from one possessor to another during the period of limitation under the discovery rule. Under the discovery rule, the statute of limitations on an action for replevin begins to run when the owner knows or reasonably should know of his cause of action and the identity of the possessor of the chattel. Subsequent transfers of the chattel are part of the continuous dispossession of the chattel from the original owner. The important point is not that there has been a substitution of possessors, [416 A.2d 875] but that there has been a continuous dispossession of the former owner.

Professor Ballantine explains:
Where the same claim of title has been consistently asserted for the statutory period by persons in privity with each other, there is the same reason to quiet and establish the title as where one person has held. The same flag has been kept flying for the whole period. It is the same ouster and disseisin. If the statute runs, it quiets a title which has been consistently asserted and exercised as against the true owner, and the possession of the prior holder justly enures to the benefit of the last. (H. Ballantine, Title by Adverse Possession, 32 Harv.L.Rev. 135, 158 (1919))

The same principle appears in the Restatement (Second) of Torts:
In some cases, the statute of limitations begins to run before the defendant took possession as when a previous taker converted the chattel and later transferred possession to the defendant. (Restatement (Second) of Torts 2d § 899 at 442 (1977))

For the purpose of evaluating the due diligence of an owner, the dispossession of his chattel is a continuum not susceptible to separation into distinct acts. Nonetheless, subsequent transfers of the chattel may affect the degree of difficulty encountered by a diligent owner seeking to recover his goods. To that extent, subsequent transfers and their potential for frustrating diligence are relevant in applying the discovery rule. An owner who diligently seeks his chattel should be entitled to the benefit of the discovery rule although it may have passed through many hands. Conversely an owner who sleeps on his rights may be denied the benefit of the discovery rule although the chattel may have been possessed by only one person.

We reject the alternative of treating subsequent transfers of a chattel as separate acts of conversion that would start the statute of limitations running anew. At common law, apart from the statute of limitations, a subsequent transfer of a converted chattel was considered to be a separate act of conversion. In his dissent, Justice Handler seeks to extend the rule so that it would apply even if the period of limitations had expired before the subsequent transfer. Nonetheless, the dissent does not cite any authority that supports the position that the statute of limitations should run anew on an act of conversion already barred by the statute of limitations.
Adoption of that alternative would tend to undermine the purpose of the statute in quieting titles and protecting against stale claims. Brown, supra, § 4.3 at 38.

The majority and better view is to permit tacking, the accumulation of consecutive periods of possession by parties in privity with each other. Lesnevich, supra, 56 N.J.Super. at 357, 153 A.2d 349; see also O'Connell v. Chicago Park Dist., 376 Ill. 550, 34 N.E.2d 836 (1941); Brown, supra, § 18-39; Walsh, supra at 84; Comment, 14 Rut.L.Rev. 443, 444-445 (1960).

In New Jersey tacking is firmly embedded in the law of real property. O'Brien v. Bilow, 121 N.J.L. 576, 578-579, 3 A.2d 641 (E. & A.1938). The rule has been applied also to personal property.

Treating subsequent transfers as separate acts of conversion could lead to absurd results. As explained by Dean Ames:

The decisions in the case of chattels are few. As a matter of principle, it is submitted this rule of tacking is as applicable to chattels as to land. A denial of the right to tack would, furthermore, lead to this result. If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller's tort, the disposed owner's right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted if there had been no sale. In other words, an innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself, a conclusion as shocking in point of justice as it would be anomalous in law. (Ames, supra at 323, footnotes omitted)

It is more sensible to recognize that on expiration of the period of limitations, title passes from the former owner by operation of the statute. Needless uncertainty would result from starting the statute running anew merely because of a subsequent transfer. 3 American Law of Property, § 15.16 at 837. It is not necessary to strain equitable principles, as suggested by the dissent, to arrive at a just and reasonable determination of the rights of the parties. The discovery rule permits an equitable accommodation of the rights of the parties without establishing a rule of law fraught with uncertainty.

VIII

O'Keeffe is a distinguished American artist, now 92 years old and living in New Mexico. In this proceeding, she has been deposed in her attorney's office in New York City. At oral argument, we were informed that she had visited New York recently for reasons unrelated to the litigation. Nonetheless, if, because of her age, O'Keeffe is unable to travel to New Jersey for trial, an appropriate application
may be made to the trial court to perpetuate her testimony. Furthermore, we direct the
trial court to expedite both discovery proceedings and the trial.

We reverse the judgment of the Appellate Division in favor of O'Keeffe and
remand the matter for trial in accordance with this opinion.

SULLIVAN, J., dissenting.

I do not see the need for a remand. We have plaintiff Georgia O'Keeffe's
affidavit and deposition concerning the paintings, defendant Barry Snyder's affidavit
as to the circumstances under which he acquired possession of them and the
deposition of third party defendant Ulrich A. Frank. Apparently, the parties felt that
there was nothing further needed, as cross-motions for summary judgment were
made.

Plaintiff is a famous artist and the creator of the three paintings in suit. These
paintings were in her possession located in an art studio run by her husband Alfred
Stieglitz. In 1946 she and her husband noticed that one of the paintings, then on
display, was missing from the wall on which it was hung. Plaintiff recalled that she
and Stieglitz talked about "the picture being gone" although she did not remember
exactly what was said. Plaintiff also testified that Stieglitz spoke "a good deal" about
the missing picture to everyone who came into the studio.

Shortly thereafter plaintiff discovered that two other paintings of hers, not on
display, were also missing. She did not notify the police as she was certain that they
could not or would not do anything as the paintings had small monetary value at the
time, but she and Stieglitz did speak to friends and acquaintances in art circles about
the theft. She said that since "the word was out" in art circles in New York about the
stolen paintings she and her husband hoped that some clue as to the identity of the
thief would be known. She felt that all she could do was wait and see if some
information would come concerning the paintings' whereabouts. In 1972, shortly after
the Art Dealers Association of America, Inc. (Association) came into existence and
established a registry of stolen paintings, the loss of the three paintings was reported
to the Association which listed them as stolen on its registry.

In late 1975, plaintiff learned that the paintings were on consignment to an art
gallery in New York and in February 1976 she discovered that they were in the
possession of defendant Barry Snyder, a Princeton art dealer. She immediately
demanded their return and, following refusal, instituted the present suit.

Snyder had purchased the pictures from Ulrich A. Frank, the third party
defendant, in March 1975. In his affidavit filed in the cause, Snyder, although a
professional art dealer, stated that he was unaware of the registry of stolen paintings
maintained by the Association which showed the paintings as stolen at the time he
purchased them. Although he paid $35,000 for them, Snyder made no attempt to
authenticate the paintings or verify ownership this in spite of the fact that Frank, who had acquired possession of them by gift from Dr. Frank, his late father, did not know how his father had come by the paintings.

Now that his motion for summary judgment has been lost, defendant Snyder suggests speculative possibilities that he says merit inquiry even though there is nothing in the record to support them. I see no substance in any of them, and a remand as prejudicial to plaintiff who is now more than 92 years of age.

She created these paintings. They were in her possession when they disappeared from her husband's art gallery in 1946. She did not learn of their whereabouts until late 1975 when they were offered for sale. She immediately started suit to recover them as soon as she was able to identify the person [416 A.2d 878] who had possession of them. Under these circumstances the six-year statute of limitations for bringing an action in replevin, N.J.S.A. 2A:14-1, was tolled and plaintiff, as the rightful owner, is entitled to a judgment in her favor.

I have no quarrel with most of the legal principles set forth in the majority opinion. We part company in the manner in which they have been applied to the undisputed facts of this case. I would affirm the Appellate Division ruling in its entirety.

HANDLER, J., dissenting.

The Court today rules that if a work of art has been stolen from an artist, the artist's right to recover his or her work from a subsequent possessor would be barred by the statute of limitations if the action were not brought within six years after the original theft. This can happen even though the artist may have been totally innocent and wholly ignorant of the identity of the thief or of any intervening receivers or possessors of the stolen art. The Court would grudgingly grant some measure of relief from this horrendous result and allow the artist to bring suit provided he or she can sustain the burden of proving "due diligence" in earlier attempting to retrieve the stolen artwork. No similar duty of diligence or vigilance, however, is placed upon the subsequent receiver or possessor, who, innocently or not, has actually trafficked in the stolen art. Despite ritualistic disavowals, the Court's holding does little to discourage art thievery. Rather, by making it relatively more easy for the receiver or possessor of an artwork with a "checkered background" to gain security and title than for the artist or true owner to reacquire it, it seems as though the Court surely will stimulate and legitimatize art thievery.

I believe that there is a much sounder approach in this sort of case than one that requires the parties to become enmeshed in duplicate or cumulative hearings that focus on the essentially collateral issues of the statute of limitations and its possible tolling by an extended application of the discovery doctrine. The better approach, I
would suggest, is one that enables the parties to get to the merits of the controversy. It would recognize an artist's or owner's right to assert a claim against a newly-revealed receiver or possessor of stolen art as well as the correlative right of such a possessor to assert all equitable and legal defenses. This would enable the parties to concentrate directly upon entitlement to the artwork rather than entitlement to bring a lawsuit. By dealing with the merits of the claims instead of the right to sue, such an approach would be more conducive to reconciling the demands for individual justice with societal needs to discourage art thievery. In addition, such a rule would comport more closely with traditional common law values emphasizing the paramountcy of the rights of a true owner of chattels as against others whose possession is derived from theft. Simultaneously, it would acknowledge that the claims of the true owner as against subsequent converters may in appropriate circumstances be counterbalanced by equitable considerations.

I therefore dissent.

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678 F.2d 1150 (1982)
KUNSTSAMMLUNGEN ZU WEIMAR, Plaintiff-Intervenor-Appellee,
and
Elisabeth Mathilde Isidore Erbgrossherzogin Von Sachsen-Weimar-Eisenach
(Grand Duchess of Saxony-Weimar), Plaintiff-Intervenor-Appellant, and
Federal Republic of Germany, Original Plaintiff,
v.
Edward I. ELICOFON, Defendant-Appellant.
Nos. 446, 535, Dockets 81-7542, 81-7544.

United States Court of Appeals, Second Circuit.

Argued March 25, 1982.
Decided May 5, 1982.

Before FEINBERG, Chief Judge, and MANSFIELD and OAKES, Circuit Judges.

MANSFIELD, Circuit Judge:

In this diversity suit involving two foreign countries (East Germany and West Germany), a foreign national, and an American citizen, we are asked to determine the
ownership of two priceless Albrecht Duerer portraits executed around 1499.\[1\] They were stolen in 1945 from a castle located in what is now East Germany and fortuitously discovered in 1966 in the Brooklyn home of Edward I. Elicofon, an American citizen, where they had been openly displayed by him to friends since his good-faith purchase 1153*1153 of them over 20 years earlier without knowledge that they were Duerers. The search for an answer to the deceptively simple question, "Who owns the paintings?", involves a labyrinthian journey through 19th century German dynastic law, contemporary German property law, Allied Military Law during the post-War occupation of Germany, New York State law, and intricate conceptions of succession and sovereignty in international law.

The Grand Duchess of Saxony-Weimar ("Grand Duchess"), who intervened as plaintiff in the lawsuit, which was initiated in 1969 by the Federal Republic of Germany ("FRG"), the government of West Germany, claims that the paintings were and remain the private property of the successive Grand Dukes of Saxony-Weimar and that title to the paintings was assigned to her by her husband Grand Duke Carl August. Kunstsammlungen zu Weimar ("KZW"), or the Weimar Art Collection, also intervened as plaintiff representing the interests of the German Democratic Republic ("GDR"), the government of East Germany, claiming that title to the paintings passed to the GDR as a successor in interest to the public property of predecessor sovereigns. Elicofon claims title based on his good faith purchase and uninterrupted possession of the paintings for 20 years.

In separate opinions, Judge Jacob Mishler of the Eastern District of New York granted summary judgment in favor of KZW and dismissed the claims of both intervenor-plaintiff Grand Duchess and defendant Elicofon. We affirm, substantially for the reasons stated in Judge Mishler's thorough and carefully reasoned opinions. See 536 F.Supp. 813 (E.D.N.Y.1978) and 536 F.Supp. 829 (E.D.N.Y.1981).

This consolidated appeal raises two distinct issues: (1) as between the Grand Duchess and KZW, who owned the Duerer paintings when they were stolen in 1945; and (2) whether Elicofon subsequently acquired valid title at the expense of the true owner, either upon his purchase or at some later time as a result of his uninterrupted good faith possession of them for 20 years from 1946 to 1966. In summarizing the facts we are guided by the principles that summary judgment is appropriate only where there is no genuine issue as to any material fact and that the inferences to be drawn "must be viewed in the light most favorable to the part[ies] opposing the motion." United States v. Diebold, 369 U.S. 654, 655, 82 S.ct. 993, 994, 8 L.Ed.2d 176 (1962).

The two Duerer paintings had been in the possession of successive Grand Dukes of Saxony Weimar since at least Goethe's time in 1824. They were part of what was known as the Grossherzogliche Kunstsammlung, or the "Grand Ducal Art Collection." By 1913 the paintings along with other art objects were displayed in the Grand Ducal Museum in Weimar. Notwithstanding the failure of the 1913 Museum catalogue to designate the Duerer paintings as privately owned by the then Grand Duke (Wilhelm Ernst), the Grand Duchess maintains that they were his personal property and continued to be the personal property of his successors. KZW contends, to the contrary, that the paintings were public property on the basis of 19th century dynastic law, a 1921 settlement between the Grand Duke Wilhelm Ernst and the newly
established Territory of Weimar (the successor sovereign of the Grand Duchy), and a 1927 settlement with the Land of Thuringia, successor to the Territory of Weimar.

Under German dynastic law in the nineteenth and early twentieth century property held by royal heads of state (e.g., grand dukes, princes, etc.) in their capacities as sovereigns was distinguished from property held in their private capacities. Personally-owned property could be disposed of freely, while property held as sovereign could be disposed of only with the express authorization of the Landtag (i.e., the Diet or Parliament) and normally passed upon the death of a grand duke to his eldest son as successor sovereign. KZW contends that the Grand Ducal Art Collection, which included the two Duerer paintings, constituted "Krongut" (roughly, 1154*1154 "crown goods"), held by the Grand Duke of Saxony Weimar as sovereign only and not in his personal capacity as private property. Therefore, it urges, when Grand Duke Wilhelm Ernst abdicated his sovereignty in November 1918 upon Germany's defeat, any rights he formerly exercised as sovereign regarding the Grand Ducal Art Collection automatically passed to the Territory of Weimar.\[2\]

The Grand Duchess responds that in 1848 the Grand Ducal Art Collection was declared to be a "Kronfideikomiss" (roughly, "family trust"), in which title was vested in the Grand Ducal family until the male line became extinct, thereby removing the Collection from the domain of property held as sovereign. However, according to KZW's German law expert, the terms "Krongut" and "Kronfideikomiss" were used interchangeably and both were subsumed under the broader classification "Kammervermoegen" (or property of the chamber), which denotes the aggregate of the property held by the sovereign in his official capacity. Under this view, title to the Duerer paintings passed to the Territory of Weimar automatically in 1918.

Subsequent to his abdication the Grand Duke Wilhelm Ernst in 1921 entered into an "Auseinandersetzungsvertrag" or settlement agreement ("1921 Agreement") with the Territory of Weimar, which defined their respective rights and obligations with respect to property held as "Kammervermoegen" and that held by him privately. Section 1 of that Agreement provided:

"The former sovereign, Grand Duke Wilhelm Ernst of Saxony, having, on November 9, 1918, for himself and his family, renounced the throne and succession to the throne in Saxe-Weimar-Eisenach for all time, the Grand Duke acknowledges a simultaneous renunciation of the payment of the civil list for the period on and after January 1, 1919 and that the entire Kammervermoegen, inclusive of the Krongut, is the exclusive property of the Territory of Weimar or its legal successor, insofar as not otherwise hereinafter expressly provided." (Citation omitted).

With respect to artwork privately owned by the Grand Duke, § 8 provided that he

"shall continue, as heretofore, to permit the public view of the objects d'art belonging to him and his family that are presently situated in public institutions and museums...."

Under § 9 these privately-owned art objects would become the property of the Territory of Weimar upon the extinction of his male line. Other sections provided for
the surrender and reservation of certain rights and privileges. Section 17 provided for a lump sum payment and annuities to descendants.\[3\]

KZW maintains that the Duerer paintings became public property in any of three ways: (1) the 1918 abdication of Wilhelm Ernst, (2) the 1921 Agreement, and (3) the 1927 Agreement, and that KZW acquired title as the successor to the Land of Thuringia.\[6\] The Grand Duchess maintains, apparently in the alternative, either that the paintings were private property whose title never passed to the Land because male heirs remain extant even today, or that, although title may have passed, she regained it when the annuities were improperly terminated in 1945.\[7\] She thus demands either the return of the paintings or the payment by the GDR of past due and future annuities.

Elicofon's claim of ownership arises out of his uninterrupted possession of the Duerer paintings from the time of his good-faith purchase of them in 1946 from an American serviceman in Brooklyn to his discovery in 1966 of the identity of the paintings. Until 1943 the Duerer paintings had remained on exhibit in a museum in Weimar, Thuringia, known as the Staatliche Kunstsammlungen zu Weimar, the predecessor to the intervenor-plaintiff KZW. To protect the exhibited artworks from anticipated bombardment, they were in 1943 stored in a nearby castle, the Schloss-Schwarzburg, located in the District of Rudolstadt in the Land of Thuringia. They remained there until stolen some time between June 12 and July 19, 1156*1156 1945. Their disappearance coincided with the withdrawal of the temporary American occupation forces which were replaced by the Russian Army on July 2, 1945.\[8\] Dr. Scheidig, the Director of the Weimar Museum from 1940 to 1967, who discovered the theft on an inspection of the castle, immediately reported the theft and thereafter engaged in diligent efforts to locate the paintings. These efforts included contacting various German museums and administrative organs, the Allied Control Council, the Soviet Military Administration, the United States State Department, and the Fogg and Germanic museums at Harvard (which were active in locating stolen art), all to no avail.

In the meantime, unbeknownst to Dr. Scheidig or the art world generally, Elicofon purchased the unsigned Duerer paintings in the spring of 1946 for $450 from a young American ex-serviceman who appeared at his Brooklyn home and claimed to have purchased the paintings in Germany. Elicofon framed and displayed them on the wall in his home along with his many other collected art objects.\[9\] In the years that followed his house was used for numerous charity functions and other large gatherings and his collection was viewed by many people, including some who were knowledgeable about art.

In May of 1966 Elicofon discovered the identity of the Duerer paintings through a friend who had recently seen them listed in a German book describing stolen art treasures of W.W. II. His discovery was publicized in a front-page article in The New York Times of May 30, 1966, and was described by one official of the Metropolitan Museum as the "discovery of the century." Thereafter the FRG, the Grand Duchess
and KZW all demanded the return of the paintings; KZW's demand was made in September 1966. These demands were refused.

In January 1969 the FRG commenced this litigation, seeking "custody of the possession of the Duerer paintings in order ultimately to restore them to the person or party who is truly and rightfully entitled to their possession." The United States submitted a "Suggestion of Interest," noting that the GDR was barred from suing since it was still not recognized by the United States, and stating that it recognized the FRG as "entitled in this litigation to represent the Weimar Museum as trustee of its interests."

In March 1969 the Grand Duchess sought and was granted leave to intervene as a plaintiff. In April 1969 KZW also moved to intervene but was denied permission to do so on the ground that it was "an arm and agency" of the then unrecognized GDR government and therefore barred from suing in our courts. Federal Republic of Germany v. Elicofon, 358 F.Supp. 747 (E.D.N.Y.1972), aff'd, 478 F.2d 231 (2d Cir. 1973), cert. denied, 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (1974).

On September 4, 1974, the United States formally recognized the GDR government, and in February 1975 Judge Mishler vacated his earlier order and permitted KZW to intervene as plaintiff. As a result, the FRG in December 1975 was granted leave to withdraw and discontinue its claim with prejudice on the ground that "prior impediments to the ability of Kunstsammlungen zu Weimar to pursue this action" had been removed. Also as a result of KZW's entry, the Grand Duchess on April 9, 1975, filed an amended complaint adding certain cross-claims against KZW for the payment of past-due and future annuities allegedly owing under the 1921 Agreement.

By decision and order dated August 24, 1978, Judge Mishler granted KZW's motion for summary judgment dismissing the Grand Duchess' claim and denied her request for an order compelling additional discovery. On the central question of title, Judge Mishler held that the 1927 Agreement, standing alone, "unequivocally established that at least from that time forward" the paintings were owned by the State. He explicitly left unresolved KZW's claims that title passed automatically in 1918 upon the Grand Duke's abdication and by virtue of the 1921 Agreement. He based his view of the 1927 Agreement on (1) the terms of § 1 of that Agreement, (2) an exchange of correspondence demonstrating that the 1927 Agreement covered the Duerer paintings, and (3) a 1973 judgment by the highest court of the FRG regarding certain other paintings in the same posture as the Duerers, which rejected the Grand Duchess' claim that the Grand Ducal Art Collection was private property. As to the Grand Duchess' claim for annuities, Judge Mishler held the claim barred by the Act of State doctrine, sovereign immunity principles, and by the provisions of 13(g) of the F.R.Civ.P. governing ancillary jurisdiction over cross-claims.

In interpreting the 1927 Agreement, Judge Mishler apparently disregarded certain summaries of German documents submitted by the Grand Duchess' attorney in an affidavit, holding that Rule 56(e) of the F.R.Civ.P. required the documents themselves or copies thereof to be attached, which they were not. These documents, contained in two Thuringian Finance and Culture Ministry files that the Grand Duchess had belatedly obtained only through discovery, reveal the course of negotiation between the Weimar Museum and the Grand Duke's heirs in the three to four years leading up
to the 1927 Agreement. Judge Mishler also denied the Grand Duchess' request, based in large part on these recently discovered documents, for an order compelling additional discovery and postponing decision on the summary judgment motion, holding that she had failed to disclose any issues of material fact to warrant further discovery under Rule 56(f) of the F.R.Civ.P.

On September 1, 1978, the Grand Duchess moved for reargument, this time attaching copies of the German documents summarized in the earlier affidavit. On September 5, 1978, Judge Mishler denied the motion, stating that it "presents no new facts ... nor raises any principles of law not considered by this court in its original disposition."

As a result of these dispositions, the only claims that remained to be adjudicated were those between Elicofon and KZW. By decision and order dated June 12, 1981, Judge Mishler denied Elicofon's motion for summary judgment dismissing the complaint and granted KZW's motion for summary judgment in its favor, thereby terminating the litigation. Judge Mishler found that the paintings were stolen between June 12 and July 19, 1945, that the GDR is entitled to assert ownership as a successor in interest to the property of either the Land of Thuringia or the Third Reich, and that KZW is a validly authorized juristic person with legal capacity to prosecute this claim on behalf of the GDR. On the central issue of title, Elicofon had claimed that he obtained good title at the time of his purchase since the paintings were initially sold by a custodian of the paintings who under German law could convey good title even though not himself in possession of good title. In the alternative Elicofon claimed that he acquired good title some time subsequent to his purchase, either under the German doctrine of "Ersitzung," under which a good faith purchaser gains title to a stolen object upon 10 years' possession without notice of defect in title, or because the New York statute of limitations had run and therefore barred KZW from bringing this suit. Judge Mishler rejected both theories and held that KZW was entitled to the paintings as their lawful owner by succession.

DISCUSSION

The Grand Duchess' Claim

For the foregoing reasons we affirm the summary judgment entered against the Grand Duchess dismissing her claims.

Elicofon's Claims

Elicofon appeals from the order denying his motion for summary judgment and granting that of KZW. First, he contends that the GDR is not a successor in interest entitled to possession of the paintings. Judge Mishler held that the GDR did succeed to the paintings as property of the Land of Thuringia, either directly by an act of the GDR in 1952 or indirectly as a successor within its territorial jurisdiction to the rights of the Third Reich, to whom the Land's property rights passed. Second, Elicofon argues that subsequent to his purchase he acquired title under the German doctrine of Ersitzung, which awards title to the holder upon 10 years uninterrupted good faith possession. Judge Mishler held that New York's interest in regulating the transfers of property located within its border (in this case for over 30 years) overrides any
interest the GDR may have in applying the policy of Ersitzung to extraterritorial
transactions. See Cousins v. Instrument Flyers, Inc., 44 N.Y.2d 698, 699, 405
N.Y.S.2d 441, 442, 376 N.E.2d 914, 915 (1978). Thus applying New York's choice of
law rules, Ersitzung is inapplicable and New York law governs, under which a
purchaser cannot acquire good title from a thief. We affirm both rulings,
substantially for the reasons stated in the district court's opinion.

**Elicofon's** third argument is that KZW is barred by New York's statute of limitations
from suing to recover the paintings. The essential facts are that in October 1966
**Elicofon** refused to comply with KZW's demand for the return of the paintings and in
April 1969 KZW moved to intervene in this action, which was begun by FRG,
thereby commencing KZW's action. See 3B Moore, Federal Practice § 24.12[1], at
503 n.7. The applicable New York statute provides a three (3) year limitation period.
N.Y.C.P.L.R. § 214(3). The question is when the limitation period began to run, or, in
other words, when KZW's claim against **Elicofon** accrued. If it accrued only upon
**Elicofon's** refusal in 1966, then the suit was timely commenced. If, on the
other hand, it accrued in 1946, when **Elicofon** bought the paintings, the action would
be barred by the then-applicable limitation period of six years unless it was tolled
by a subsequent disability before it expired. Judge Mishler held that under New York
law KZW's claim accrued in 1966 and that, even if it accrued earlier in 1946, the
then-applicable limitation period was tolled under New York's judicially-created
"non-recognition" toll because the United States did not recognize GDR until 1974,
which precluded the KZW from intervening until then. We agree with both
conclusions.

Under New York law an innocent purchaser of stolen goods becomes a wrongdoer
only after refusing the owner's demand for their return. Until the refusal the purchaser
is considered to be in lawful possession. MacDonnell v. Buffalo L., T. & S.D. Co., 193
N.Y. 92, 85 N.E. 801 (1908); Gillet v. Roberts, 57 N.Y. 28 (1874) (conversion);
Menzel v. List, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dept. 1964) and 267 N.Y.S.2d
804, 49 Misc.2d 300 (Sup.Ct.N.Y.Co.1966), modified on other grounds, 28 A.D.2d
516, 279 N.Y.S.2d 608 (1st Dept. 1967), modification rev'd, 24 N.Y.2d 91, 298
N.Y.S.2d 979, 246 N.Y.2d 742 (1969) (conversion); Cohen v. M. Keizer, Inc., 246
A.D. 277, 285 N.Y.S. 488 (1st Dept. 1936) (replevin); Restatement (Second) of Torts,
§ 229 (comment h); W. Prosser, The Law of Torts 84 (4th ed. 1971). Where the
demand requirement is *substantive*, that is, where a demand and refusal are requisite
elements of the cause of action, it accrues and the statute of limitation begins to run
only after such demand and refusal. On the other hand, where the demand is merely
*procedural*, that is, where demand and refusal are not requisite elements of the cause
of action and the defendant's actionable conduct was complete prior to demand, §
206(a) of the N.Y.C.P.L.R. governs and the limitation period begins to run when
the "right to make the demand is complete." See, e.g., Ganley v. Troy City Nat'l Bank,
98 N.Y. 487, 494 (1885); Frigi-Griffin, Inc. v. Leeds, 52 A.D.2d 805, 383 N.Y.S.2d
1975); In re Brady's Will, 286 A.D. 672, 146 N.Y.S.2d 136 (3d Dept. 1955) (all
substantive demands); Dickinson v. Mayor of New York, 92 N.Y. 584 (1883)
(procedural demand). See generally, 1 Weinstein, Korn & Miller, New York Civil
Practice ¶ 206.01, at 2-159-60 (1980). Under these principles, § 206(a) does not apply
to substantive demands, and in practice § 206(a)'s actual application "has been
extremely limited." Weinstein, Korn & Miller, supra, at ¶ 206.01 at 2-159.
Directly on point is a New York decision applying these principles to a case involving a *bona fide* purchaser of stolen art works, holding that the cause of action accrues only after demand and refusal. In *Menzel v. List, supra*, the Appellate Division clearly held that the owner's demand on a *bona fide* purchaser is substantive, that § 206(a) is inapplicable, and that the statute of limitations begins to run only upon the purchaser's refusal to return the property. See also *Durvea v. Andrews, 12 N.Y.S. 42 (2d Dept. Genl. T. 1890)*. Applying these principles here, KZW's cause of action did not accrue until October 1966 when *Elicofon* refused to comply with the demand for the return of the paintings. Since the action was begun in 1969, within the three-year limitation period, it is not barred.

*Elicofon* does not dispute that a demand must be made by the true owner upon the *bona fide* purchaser of stolen goods before suit for recovery may be brought. Nevertheless, he seeks on several grounds to avoid the conclusion reached in *Menzel*, based upon the distinction between substantive and procedural demands, maintaining that the cause of action accrued instead in 1946 upon his purchase. Under this view the statute of limitations would begin to run, and might expire, even where under established New York law the *bona fide* purchaser had yet to commit a wrong against the true owner. We decline to adopt such reasoning. We address *Elicofon*'s three major reasons for rejecting the *Menzel* holding.

First, *Elicofon* reads § 206(a) as applicable not simply where a *cause of action* exists prior to the demand, but rather where a *right to possession* exists before the demand. Therefore, he argues, since KZW's right to regain possession of the paintings from *Elicofon* existed in 1946, the statute of limitations began to run at that point. He cites no authority for this interpretation, but relies somewhat elliptically on the predecessor to § 206(a), § 410 of the Code of Civil Procedure, whose opening phrase was worded as follows: "Where a right exists, but a demand is necessary to entitle a person to maintain an action...." (Emphasis added.) He argues that, since the current § 206(a), without the underlined phrase, is not intended to have a different meaning, § 206(a) applies where a "right to possession" exists prior to demand. Such a view would eviscerate the undisputed distinction in New York law between substantive and procedural demands, since substantive demands are often if not typically made by an owner who concededly has title to the property whose return he is demanding. Indeed, the very notion of a substantive demand requirement is that, despite having a right to the property, the true owner must nevertheless demand its return and be refused before he has a *cause of action* at all against the refuser. We therefore reject *Elicofon*'s attempt to re-interpret § 206(a) to render meaningless the concept of substantive demand. Indeed, the predecessor, § 410, had been interpreted as having the same meaning as that later attributed to § 206(a). In *Dickinson v. Mayor of New York, supra*, the New York Court of Appeals had recognized the distinction between procedural and substantive demands and held § 410 applicable only to procedural demands, *92 N.Y. 584 (1883)*. See also 2 Carmody-Wait § 98, at 270 (1952) (the phrase "Where a right exists" in § 410 merely means "where a right of action or cause of action exists"); 1 Bender's Forms for the Civil Practice Acts, 12-13 n.7 (1962).

*Elicofon* next contends that New York cases decided subsequent to *Menzel* cast doubt on its continued validity and compel the different conclusion that § 206(a) is applicable to substantive demands and that therefore the cause of action arose in 1946. Of the four post-*Menzel* cases cited to us, only one involves a *bona fide* purchaser.
Stroganoff-Scherbatoff v. Weldon, 420 F.Supp. 18, 22 n.5 (S.D.N.Y.1976). We cannot accord weight to its statement contrary to Menzel since it was dictum in a gratuitous footnote which amounted to an unnecessary effort by a federal district court to interpret state law. The decision in Federal Insurance Co. v. Fries, 78 Misc.2d 805, 355 N.Y.S.2d 741 (N.Y.Civ.Ct.1974), is clearly distinguishable since it held in a mistaken delivery case (unlike a bona fide purchaser case) that the cause of action accrues upon the mistaken delivery, not upon demand. In addition, its validity is doubtful since it neither discusses the established New York substantive/procedural distinction nor alludes to Menzel, a precedent by a higher court in the same department. Similarly, we cannot accord much weight to Smith v. Driscoll, 69 A.D.2d 857, 415 N.Y.S.2d 455 (2d Dept. 1979), where in a case also not involving a bona fide purchaser the Appellate Division, in one short sentence and without any discussion of Menzel or of the substantive/procedural distinction, affirmed the lower court's dismissal of a conversion claim as time-barred, relying on Fries. Finally, in Al-Roc Product Corp. v. Union Dime Savings Bank, 74 A.D.2d 834, 425 N.Y.S.2d 525 (2d Dept. 1980), the court's one-sentence statement is a skeletal memorandum opinion that a cause of action against a wrongful possessor accrues upon the wrongful possession is dictum, since the court held that the conversion action was timely. Having reviewed these decisions, we do not alter our conclusion that Menzel and its underlying principles are controlling.

Third, Elicofoin contends that the Menzel rule should be abandoned because it favors a thief as against a bona fide purchaser, since for a thief the statute of limitations begins to run immediately upon the theft while a bona fide purchaser must wait, possibly indefinitely, for a demand from the owner. Insofar as a bad faith purchaser is treated as a thief for the purposes of the statute of limitations, Elicofoin contends that the bad faith purchaser is also preferred by the Menzel rule to the good faith purchaser. This, he argues, is anomalous, since the demand rule, whose original rationale was to ensure that the innocent purchaser would be informed of his defect in title before being made liable as a tortfeasor, Gillet v. Roberts, supra, 57 N.Y. at 34, is intended for the benefit of the innocent purchaser.

We are persuaded by the decision of the New York Court of Appeals in General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 272 N.Y.S.2d 337, 219 N.E.2d 169 (1966), that the Menzel rule does not prefer the thief or bad faith purchaser over the bona fide purchaser. In Chiappa the court held that familiar principles of equitable estoppel will prevent a wrongdoer from asserting the statute of limitations defense and thereby "take refuge behind the shield of his own wrong." 272 N.Y.S.2d at 127, 219 N.E.2d 169. But even if New York law might occasionally favor the thief or bad faith purchaser, we are charged only with applying New York law, not with remaking or improving it. As between the policy, urged by Elicofoin, of allowing the statute of limitations to run against an owner regardless of his ignorance, and tolling it indefinitely 1164*1164 against a good faith purchaser until a demand is made, we are satisfied that New York has chosen the latter course. We therefore hold that the cause of action accrued in 1966 and the statute of limitations did not begin to run until then.

Even were we to assume that under New York law KZW's cause of action accrued in 1946, we would affirm Judge Mishler's holding that the statute of limitations was tolled under New York's judicially created "non-recognition" toll until 1974, when the
United States first recognized the GDR. See Steingut v. Guaranty Trust Co., 58 F.Supp. 623 (S.D.N.Y. 1944). See also Guaranty Trust Co. v. United States, 304 U.S. 126, 136-37, 58 S.Ct. 785, 790, 82 L.Ed. 1224 (1938) (adverting to New York rule); Jacobus v. Colgate, 217 N.Y. 234, 244-45, 111 N.E. 837 (1916) (the statute does not begin to run "until the state has supplied him [the suitor] with a tribunal in which his suit may be maintained"). See also Homer Eng. Co. v. State, 12 N.Y.2d 508, 240 N.Y.S.2d 973, 191 N.E.2d 455 (1963). Since the then-applicable limitation was at least six years, the statute of limitations had not run by 1949, when the GDR government was founded, and it was thereafter tolled by our non-recognition of the GDR. See Hanger v. Abbott, 73 U.S. (6 Wall) 532, 18 L.Ed. 939 (1868) (after-arising war time disability suspends running of statute of limitations); Osbourne v. United States, 164 F.2d 767 (2d Cir. 1949). Cf. Chastener v. Kice, 270 F.Supp. 432, 439 (E.D.N.Y.1967) (after-arising disability in insanity context).

Elicofon responds that the non-recognition toll is inapplicable since from 1949 until 1974 this country recognized the FRG government as the only government entitled to speak for the entire German people. Therefore, his argument goes, under the principles of Guaranty Trust, supra, the statute of limitations was not tolled since the U.S. courts were available to the FRG as the recognized sovereign of the German State. See 304 U.S. at 137-40, 58 S.Ct. at 791. We reject the premise of this argument. The United States itself recognized the FRG only "as sovereign over its own territory and not over that of East Germany" and as not "having any territorial jurisdiction, either de facto or de jure, over East Germany." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F.Supp. 892, 900, 911 (S.D.N.Y.1968), modified on other grounds, 433 F.2d 686 (2d Cir. 1970), cert. denied, 403 U.S. 905, 91 S.Ct. 2205, 29 L.Ed.2d 680 (1971). The view of the United States is consistent with that taken by the government of West Germany, which "did not purport to exercise sovereign authority with regard to matters in East Germany, either de jure or de facto." Id. at 912.

1165*1165 Notwithstanding the GDR's disability to sue from 1949 onward, Elicofon maintains that the statute of limitations nevertheless began to run uninterrupted from 1946 because at all times thereafter the United States' courts were available to parties competent to sue on behalf of the GDR. He claims that from 1945 to 1949 the Allied Powers acting through the Allied Control Council, and from 1949 the FRG government, could have brought suit to assert the GDR's claim to the paintings on its behalf. We find no support for the proposition that the Allied Council could have brought suit in American courts to assert the interests of the predecessor of the GDR within its territorial boundary; Elicofon concedes that he is aware of no such suits. In any event the six-year limitations period would not have run by 1949, when the Allied Control Council ceased acting as the government of occupied Germany, in view of the Soviets' withdrawal from the Council. The Soviets had been empowered to act with respect to its "zone of occupation," which included Weimar. Moreover, in any such hypothetical suit the state of war that officially remained in effect until 1951 would have cast serious doubt upon the Allied Council's capacity to sue since at least technically it would be viewed as a military government in charge of an enemy and the recognized procedure for recovery of German-owned property in the United States was governed by the Trading With the Enemy Act. See Ex Parte Colonna, 314 U.S. 510, 511, 62 S.Ct. 373, 374, 86 L.Ed. 379 (1942); Trading With the Enemy Act of 1917, 50 U.S.C.App. § 2(b).
Even if the Allied Council could have brought suit on behalf of the GDR's predecessor, and it is clear that the FRG could have sued and in 1969 did sue on behalf of the GDR, at most they would have been acting as trustees for the GDR's interests. FRG's complaint, for instance, expressly states that it was suing merely to obtain "custody of the possession of the Duerer paintings in order ultimately to restore them to the person or party who is truly and rightfully entitled to their possession." The United States' "Suggestion of Interest" submitted in this litigation states that it recognizes the FRG as "entitled in this litigation to represent the Weimar Museum [i.e., KZW] as trustee of its interests." (emphasis added).

Under New York law the commencement of a prior action by a trustee or guardian does not thereby lift the disability toll accorded the beneficiary. *Carr v. Allied Aviation Service Corp.,* 40 A.D.2d 608, 335 N.Y.S.2d 914 (2d Dept. 1972); *Williams v. Bd. of Educ.,* 182 Misc. 619, 45 N.Y.S.2d 385 (S.Ct. 1943); *Wolf v. United States,* 10 F.Supp. 899 (S.D.N.Y.1935). *A fortiori* the rule governs here, where Elicofon's only claim is that the Allied Council or the FRG might or could have sued as trustee between the years 1946 and 1969. We hold, therefore, that even if the cause of action accrued in 1946 the statute of limitations was tolled and KZW's suit is timely.

Elicofon's other claims are also rejected. We affirm the district court's rejection of his argument that he acquired good title upon his purchase from a custodian of the paintings, its finding that the paintings were stolen between June 12 and July 19, 1945, its conclusion that Dr. Scheidig's efforts to locate the paintings were reasonably diligent, and its ruling that any delay in demanding the return of the paintings was reasonable and excusable as a matter of law. We also affirm the denial of Elicofon's motion to compel discovery on the grounds stated in Judge Mishler's unpublished 1166*1166 opinion dated February 23, 1976. In light of our conclusion that the German doctrine of Ersitzung is inapplicable, we do not reach Elicofon's contention that summary judgment on the proper application of Ersitzung was inappropriate in light of the controversies among the various German law experts.

Accordingly, we affirm the district court's holding that KZW is entitled to possession of the paintings, and order that the judgment entered below be enforced.

[1] The paintings are portraits of Hans Tucher and of his wife Felicitas Tucher, painted in oil on wood and measuring 28 × 24 cm. each.

[2] The claim that title automatically passed in 1918 is not inconsistent with the provisional government's issuance of a decree in 1919 sequestering all property of the Grand Ducal family, since sequestration is often used to freeze the status quo and therefore does not necessarily constitute a tacit acknowledgement that the sequestered property is privately held.

[3] Section 17 provided that the Grand Duke, beginning on January 21, 1921, would each year receive from the Territory of Weimar an annuity of 300,000 marks out of which all claims of the Grand Ducal family to civil lists, maintenance and other gratuities would be paid; that the annuity would continue to be paid to existing male descendants of the Grand Duke after his decease; that upon extinction of the male line, a reduced annuity of 100,000 marks would be paid to his female descendants; and that as further settlement for the "concessions made by the Grand Duke,
particularly in ceding highly valuable collections and objects d'art the Grand Duke shall be paid a special compensation of three million marks."

[4] By this time, about 1924, the collection was no longer called the Grand Ducal Art Collection, but rather the State Art Collection of Weimar (Staatliche Kunstsammlungen zu Weimar).

[5] Thuringia, which was created by Federal German Law of April 20, 1920, first included as a municipal association Sachsen-Weimar-Eisenach, the territory over which the Grand Dukes formerly presided. The municipal association was dissolved effective April 1, 1923, and the assets of the Weimar District became the property of the Land of Thuringia.

[6] The Grand Duchess does not make an issue of the manner in which KZW claims to have succeeded to the paintings, whether directly from the Land of Thuringia or indirectly through the Third Reich, since in either case the premise is that the Land of Thuringia and not she owns the paintings. Elicofon, however, does raise this issue as part of his claim that, although the paintings became public property, title to them did not pass to the GDR but instead to the FRG.

[7] The precise basis of the Grand Duchess' claim is somewhat ambiguous. Her amended intervenor complaint states that either the Territory of Weimar never acquired title or that it acquired title conditioned upon its continued payment of annuities provided for in the 1921 Agreement. Plaintiff Intervenor Complaint & Crossclaim (April 9, 1975) ¶ 19. The claim that title never passed is based on the theory that the Duerer paintings were privately owned and thus governed by §§ 8 and 9 of the 1921 Agreement, which provide that title passes to the Territory only when the male heirs become extinct, a condition not fulfilled even today. Her alternative claim is that although title may have passed in 1921 it was conditioned on the continued payment of annuities.

[8] Judge Mishler found that as a matter of law KZW had presented a prima facie case based largely on the testimony of Dr. Scheidig that the paintings were stolen some time between these dates and that Elicofon's attempts to rebut the proof failed. We find no reason to disturb Judge Mishler's assessment.

[9] Elicofon collected primarily oriental art and prior to W.W. II had roughly 2,000 pieces in his Brooklyn house.

[10] The decision is precedent only and not res judicata. In 1973 the Grand Duchess sued the FRG to recover three paintings stolen from the Weimar Museum in April 1921. Subsequent to their theft they were discovered in the United States, seized under the Trading With the Enemy Act, 50 U.S.C.App. §§ 1, et seq., and in 1966 pursuant to an Act of Congress delivered to the FRG in trust for the Weimar Museum. An Act to amend the Trading With the Enemy Act to provide for the transfer of three paintings to the Federal Republic of Germany in trust for the Weimar Museum, Pub.L.No. 89-619, 80 Stat. 871 (1966) (codified at 50 U.S.C.App. § 39(e)). In November 1973 the Bundesgerichtshof (FRG Supreme Court) held that the two paintings that were part of the former Grand Ducal Art Collection (the Tischbein and Terborch) became public property under the 1927 Agreement, and therefore could not
be claimed by the Grand Duchess as her private property. With respect to the third painting, a Rembrandt, that was not part of the Grand Ducal Art Collection, the German Supreme Court held that it was private property inherited by the former Grand Duchess Sophie and was specifically reserved to her by §§ 8 and 9 of the 1921 Agreement. In the Lawsuit of the Archduchess Elizabeth of Saxony Weimar Eisenach v. Federal Republic of Germany (Nov. 28, 1973).

[11] Rule 13(g) provides:

"(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counter-claim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

[12] Elicofon advanced the theory that the paintings may have been removed from the castle by Fassbender, a German architect who lived on the grounds and was allegedly a de facto custodian of the stored artwork. Elicofon maintained that under German law Fassbender could have conveyed good title even though he himself did not have title, and that the good faith purchaser or transferee could in turn have transferred good title to Elicofon. Judge Mishler discussed the German law issues at length and dismissed the argument on the grounds of German legal doctrine and the fact that evidence of Fassbender's role "is so insubstantial [that it] does not raise a genuine issue of fact." We agree.

[13] We need not decide whether the State's title to the Collection was automatically established in 1918 upon the Grand Duke's abdication, or had to await formalization in the 1921 Agreement. We rely on the 1921 and 1927 Agreements as sufficient.

[14] Section 17's provision for a lump sum payment is not at issue here, and in any event appears to be consideration only for the Grand Duke's ceding of § 8 privately-owned paintings to the State, not for his acknowledgement of public title to Krongut or Kammervermoegen.

[15] Since State title to the Collection was irrevocably acknowledged in 1921, KZW's claim of ownership in no way turns on the legality of the termination of annuity payments in 1945.

[16] There is no express statement by the Executive Branch that the doctrine need not be applied in this instance. See Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 844 (2d Cir. 1981); Empressa Cubana Exportadora, Inc. v. Lamborn & Co., 652 F.2d 231, 237-38 (2d Cir. 1981).

[17] Since the situs of the annuity claim is in Thuringia, barring that claim does not accord the expropriation decree extraterritorial effect. The only remaining claim of extraterritoriality would have to rest on the theory that KZW's title to the paintings, which were in the United States at the time of the expropriation decree, depended on our enforcing that decree in this country to bar the Grand Duchess' assertion of title.
based on termination of the annuity payments in 1945. Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965). However, since KZW's title to the paintings was perfected at least by 1927 and was not conditioned on the continued payment of annuities, its title does not depend on our enforcement of the expropriation decree abrogating its annuity obligation.

[18] Even under German law at the time of the theft transfer of valid title to Elicofon was prohibited. Allied Military Government Law No. 52 (reprinted in W. Friedmann, The Allied Military Government of Germany, 303-07 (1947)).

[19] The then-applicable limitation period was at least six years for an action at law to recover a chattel. C.P.A. § 49(4). Insofar as KZW's claim is in the nature of equitable replevin, the longer 10-year period of C.P.A. § 53 would have applied.

[20] Section 206(a) provides in pertinent part:

"Where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete...."


[22] The mistaken delivery cases seem to be noteworthy for their inconsistent results. See, e.g., F. I. duPont, Glore, Forgan & Co. v. Ladenheim, N.Y.L.J., May 20, 1975, at 2, col. 2 (App.T. 1st Dept. 1975); H. S. Equities, Inc. v. Leeds, 47 A.D.2d 815, 367 N.Y.S.2d 956 (1st Dept. 1975), affirming Special Term No. 8762/1973 (Sup.Ct.N.Y.Co. March 29, 1974). In a mistaken delivery case the rightful deliveree is likely to complain. Since the deliverer who made the mistake is known to the owner, the owner has a much greater ability to identify the wrong deliveree and locate the goods than does an owner of stolen goods. In contrast, the thief is usually unknown and the good faith purchaser, also unknown to the owner, is ignorant of both the defect in his title and the origin of the goods.

[23] Elicofon argues that under Chiappa estoppel will arise only against a wrongdoer who commits egregious, affirmative acts of concealment, which would not be satisfied if, for example, a bad faith purchaser merely displays stolen paintings in his home. We disagree with such a narrow reading of Chiappa. Fairly read, Chiappa stands for the general proposition, resting on estoppel principles, that a defendant who commits affirmative wrongdoing should not be afforded the benefits of the statute of limitations defense. See, e.g., Greenfield v. Kanwit, 87 F.R.D. 129 (S.D.N.Y.1980) (broad estoppel rationale underlies Chiappa); Clark v. United States, 481 F.Supp. 1086, 1095 (S.D.N.Y.1979) (affirmative concealment, fraud, misrepresentation or deception will toll the statute of limitations under Chiappa). Thus in Chiappa itself the Court stated that the very fact of defendant's thievery entitles plaintiff to litigate the estoppel issue, and went on to say that plaintiff may not prevail if defendant can show that plaintiff's non-discovery of the theft was due to plaintiff's own negligence or acquiescence. Significantly, the Court did not state that to prevail on the estoppel
issue the plaintiff must show egregious, affirmative acts of concealment. Id. at 128, 219 N.E.2d 169. In the instant case we have concluded that KZW is not responsible for the late discovery of the paintings' whereabouts. See pp. 1165-1166, infra.

[24] Even if such an anomaly existed, which we do not believe to be the case in view of Chiappa, a logical approach would be to toll the statute of limitations against the thief until demand and refusal, thus insuring that the thief and the good faith purchaser would be on an equal footing vis-a-vis the statute of limitations. However, the good faith purchaser would overall be more favorably treated, since unlike the thief, he is not liable for any loss or damage to the property prior to demand and refusal. Gillet v. Roberts, 57 N.Y. 28 (1874); Hovey v. Bromley, 33 N.Y.S. 400 (5th Dept. 1895).

[25] Two arguably less rigid approaches are possible. Some jurisdictions have transplanted adverse possession principles to determine when the statute of limitations begins to run against a good faith purchaser, and one commentator suggests commencing the running of the limitations period at the point when the owner either knew or should have known of the stolen property's whereabouts. Comment, "The Recovery of Stolen Art: Of Paintings, Statutes and Statutes of Limitations," 27 U.C.L.A.L.Rev. 1122 (1980). Under either approach KZW's suit would still have accrued no earlier than 1966. Courts and commentators have noted that the mere residential display of paintings may not constitute the type of open and notorious possession sufficient to afford notice to the true owner. See, e.g., O'Keeffe v. Snyder, 107 N.J.Super. 75, 405 A.2d 840 (Sup.Ct.App.Div.1979) (holding predominantly private display of stolen artworks insufficiently open and notorious), rev'd, 83 N.J. 478, 416 A.2d 862, 871-73 (1980) (noting difficulties with and rejecting application of adverse possession doctrine to chattels); Comment, supra, at pp. 1142-44 & n.86 (cases cited therein). Elicofon's private display of two unsigned paintings which remained unidentified until 1966, even if seen by many persons who visited the home, clearly did not afford KZW a reasonable opportunity to discover their whereabouts. Similarly, even if New York had a reasonable inquiry rule under which the statute of limitations begins to run when the owner knew or should have known of the stolen property's location, the GDR exercised reasonable diligence and cannot be held responsible for the late discovery of the Duerer paintings. See pp. 1165-1166, infra.

[26] The argument that the FRG exercised sovereignty over all of Germany must be distinguished from the different argument that the FRG and not the GDR is the successor in interest to the property rights of predecessor states.

[27] Indeed, the 1966 Act amending the Trading With the Enemy Act to transfer to the FRG the three paintings that later were the subject of the 1973 German Supreme Court decision (see n. 10, supra) is consistent with the view of FRG as trustee for the GDR. The amending Act added § 39(e) to the Trading With the Enemy Act, and reads in relevant part as follows:

"(e) ... the Attorney General is hereby authorized to transfer the three paintings ... to the Federal Republic of Germany, to be held in trust for eventual transfer to the Weimar Museum, Weimar, State of Thuringia, Germany, in accord with the terms of an agreement to be made between the United States and the Federal Republic of Germany. 50 U.S.C.App. § 39(e)." (Emphasis added.)
ORDER

VINCENT L. BRODERICK, District Judge.

In this action the Republic of Turkey seeks to recover artifacts in the possession of the Metropolitan Museum of Art. Plaintiff asserts that the artifacts were excavated from burial mounds in the Ushak region of Turkey in 1966 and exported to the United States in contravention of Turkish law. The Republic further claims that under Turkish law it owns all artifacts found in Turkey. Defendant has moved for summary judgment. Oral argument has been held.

As amended the complaint asserts two claims. The first claim is premised on the assumption that the Museum is a bona fide purchaser and sounds in conversion. The second claim asserts that the Museum acted in bad faith when it purchased the objects and that it concealed the illicit origin of the objects through misrepresentations and other acts of concealment.

As to plaintiff's first claim, in New York an action to recover chattel must be brought within three years of the time the action accrues. CPLR § 214(3). An action does not accrue, in the case of a good faith purchaser of personal property until the person claiming to be the owner demands the return of the property and the demand is refused. Gillet v. Roberts, 57 N.Y. 28 (1874). Thus the statutory limitations period will not begin to run until after the owner has made a demand and the possessor has refused to return the property. DeWeerth v. Baldinger, 836 F.2d 103, 106 (2d Cir.1987) (citing Menzel v. List, 22 A.D.2d 647, 253 N.Y.S.2d 43, 44 (1st Dept. 1964), on remand, 49 Misc.2d 300, 267 N.Y. S.2d 804 (N.Y.Co.Sup.Ct.1966), modified on other grounds, 28 A.D.2d 516, 279 N.Y. S.2d 608 (1st Dept.1967), modification rev'd, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969)).

Relying on DeWeerth v. Baldinger, supra, defendant argues that an owner of stolen property may not unreasonably delay making the requisite demand. In DeWeerth, the Second Circuit, interpreting New York law, creatively held that the owner has "a duty of reasonable diligence in attempting to locate stolen property, in addition to the ...
duty to make a demand for return within a reasonable time after the current possessor
is identified." Id. at 108 (footnote omitted).

Since the instant motion was submitted, the New York Appellate Division, First
Department has decided Solomon R. Guggenheim Foundation v. Lubell, 153 A.D.2d
143, 550 N.Y.S.2d 618 (1st Dep't 1990). In Guggenheim, plaintiff Museum sued for
return of a Chagall painting which was 46*46 purchased by defendant from a
reputable art dealer in 1967. Defendant argued that New York's three year statute of
limitations barred the Museum's action which was commenced in 1986.

On defendant's motion the lower court dismissed plaintiff's action as time-barred. The
court found DeWeerth to be controlling and observed that "[t]he Guggenheim's efforts
[to locate the stolen property] were minimal, much less than that of the plaintiff in the
15, 1989, p. 22, col. 3. Thus the court dismissed the action as time-barred, holding
that plaintiff failed diligently to attempt to locate the painting and that the action

On January 25, 1990 the Appellate Division reversed. 153 A.D.2d 143, 550 N.Y. S.2d
618 (1st Dep't 1990). After reviewing the facts the court discussed the inadequacy of
the Second Circuit's solution to the "anomaly" presented in DeWeerth:

[T]o eliminate the anomaly by placing the thief in the same disfavored position as the
good faith purchaser is not to eliminate the potential for stale, hard-to-defend claims
created by a rule which makes accrual depend on an act to be performed by the
plaintiff constrained only by his fortuitous acquisition of the knowledge necessary to
perform the act.

Id. 550 N.Y.S.2d at 621. In the alternative, the court proposed:

When this potentiality for staleness becomes an actuality because of the plaintiff's
inexcusable delay in performing the requisite act, or in acquainting himself with the
facts that would enable him to perform such act, an appeal can be made to the
conscience of the court to dismiss the action as untimely notwithstanding that it was
commenced within the statutory period ....

Id. The court then concluded that DeWeerth's "unreasonable delay" requirement
applied only to the equitable defense of laches. In support, the court observed that
the Second Circuit had failed to state when plaintiff had sufficient knowledge to make
a demand and therefore when the limitations period began to run. "Instead, the
dismissal in DeWeerth appears to have been based not on the lapse of any particular
period of time, but on an estoppel." Id. By characterizing this defense as laches, the
court explicitly found that a showing of prejudice as well as delay was required.

In this case, defendant argues that the Appellate Division's decision in Guggenheim is
distinguishable, urging that the decision disagrees with DeWeerth only to the extent
that the Second Circuit extended the "unreasonable delay" rule to a case where "a
plaintiff has no knowledge of the whereabouts of his stolen property, but would have
discovered its whereabouts had he exercised reasonable diligence." Defendant's
plaintiff had notice of sufficient facts to make a demand on the Met. Defendant essentially seeks to create a distinction between the rules applicable to cases where all the knowledge attributed to plaintiff is implied and cases like this one, where the Republic of Turkey allegedly had actual knowledge of the facts needed to make a demand. Defendant further argues that even if Guggenheim is controlling it is entitled to summary judgment on the defense of laches, since it has been prejudiced by the absence of witnesses and the loss of documents.

I find that Guggenheim is applicable here and that defendant's claims of delay go solely to whether the defense of laches is available and not to a defense based on the statute of limitations. Since I further find that there are genuine issues of material fact as to whether defendant was prejudiced by the alleged delay, defendant's motion is denied without prejudice.

I also deny defendant's motion as to plaintiff's second claim which assumes that defendant was not a bona fide purchaser, since genuine issues of material fact exist as to whether defendant purchased the artifacts in good faith.

The next conference in this case is scheduled for Wednesday, August 8, 1990 at 4:30PM.

SO ORDERED.

[1] The parties have submitted several letter briefs discussing the effect on the case before me of the Appellate Division's decision in the Guggenheim case.

[2] The painting was shown as part of a public exhibition in 1973.

[3] The court stated:

We agree that if actual knowledge of the whereabouts of stolen property is relevant to a determination of the timeliness of a replevin action, then, as a matter of logic, if not policy, imputed knowledge should be relevant too. Where we disagree is that these considerations have anything to do with the statute of limitations.

Id.

[4] "[W]e think it plain that the relative possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long." Id. 550 N.Y.S.2d at 622.

Marcq v Christie, Manson & Woods Limited

Case No: A3/2002/2371
Neutral Citation Number: [2003] EWCA Civ 731
2003 WL 21047577

Before: Lord Justice Peter Gibson, Lord Justice Tuckey and Lord Justice Keene

Friday 23rd May, 2003

On Appeal from Mr. Justice Jack and His Honour Judge Hallgarten Q.C. Central London County Court

Representation

- Norman Palmer and A. Piper (instructed by Ralph Davis) for the Appellant.

JUDGMENT

Lord Justice TUCKEY:

1. If a painting is unsold at auction and returned to the prospective seller who is not in fact its true owner, is the auctioneer, who has acted in good faith and without notice, liable in conversion or bailment to its owner? This question arises on appeal from Jack J. who upheld a decision by Judge Hallgarten Q.C. made in the Central London County Court that the auctioneer was not liable.

The facts

2. Judge Hallgarten Q.C.'s decision was made on an application to strike out the claimant's statement of case because it disclosed no reasonable grounds for bringing the claim. Conventionally such applications are decided on the assumption that the facts alleged by the claimant are true. In his judgment Jack J. refers to a few additional facts which were not pleaded by the claimant. We were told that this information was given to the judge orally at his request without objection from the claimant. However Mr Palmer, who appeared for the claimant below, complains that the judge should not have taken this additional information into account, although this is not one of the grounds of appeal. To avoid further controversy about this, the facts I set out below are only those which appear in the draft amended particulars of claim which were before Jack J.

3. The claimant is now and has at all material times been the owner of an oil painting known as The Backgammon Players painted by the Dutch master Jan Steen in or about 1667. The painting was stolen from the claimant's London house over Easter 1979. Its theft was reported to the police and it was registered as stolen on the Art
Loss Register before 1997. In or about July 1997 the defendants, Christies, obtained possession of the painting from a Mr Schuenemann for the purposes of selling it at auction on the terms of their conditions of business. Under this contract Christies catalogued and advertised the painting and offered it for sale at a public auction of old masters on 4th July 1997. The painting was unsold and “thereafter Christies caused and/or procured and/or permitted” the removal of the painting from their London premises and its return to Mr Schuenemann.

4. Before Judge Hallgarten Q.C. and Jack J. the claimant was able to keep open the possibility of being able to allege want of good faith and notice against Christies although no such case had been pleaded. Both judges held that irrespective of where the burden of proof lay, the claimant had to plead any case he had on these issues. He was given a final chance to do this by Jack J’s. order which said:

The claimant shall by 19th November 2002 make an application to the Central London County Court business list for permission to serve a reply out of time for the purpose of pleading want of good faith and notice annexing a draft reply to that application, failing which this action shall stand dismissed.

No such application was made and on 28th November 2002 the claim was dismissed. Mr Palmer maintains that it is still open to the claimant to contend that Christies had notice of the theft of the picture in answer to Christies' assertion that they did not. I do not agree. The claimant has had disclosure of all Christies' documents and more than ample opportunity to state his case about notice and has not done so. We must proceed therefore on the basis that Christies acted in good faith and without notice.

5. Christies' terms of business cover their contractual relationship with prospective sellers and buyers. Those relating to sellers include:

2. Christie's role as agent

2. Our sales at public auction are undertaken as agent, on behalf of the Seller ….

4. Expenses

The Seller will bear all costs relating to:

- (a) packing and shipping the Lot to us for sale;
- …
- (c) packing and shipping the Lot if it is returned to the Seller
- (d) insurance under Christie's Fine Arts Policy (explained below);
- …
- (f) catalogue illustration;
- …
- (k) a contribution to our general expenses if the Lot is not sold equal to 5% of the Insured Value

Where Insurance is arranged by us
(a) Unless we agree otherwise, the Lot will be automatically insured under Christie's Fine Arts Policy for the amount that we from time to time consider to be its appropriate value.
(b) We shall charge the Seller a sum to cover insurance, at the rate of 1% of … if the Lot is unsold, its insured value ….

6. The Seller's undertakings regarding the Lot
We shall handle the Lot, and the Buyer will purchase, on the basis of the Seller's undertakings that;
(a) the Seller is the sole owner of the Lot with an unrestricted right to transfer title to the buyer free from all third party rights or claims ….
(c) the Seller has notified us in writing … of any concerns expressed by third parties in relation to the ownership … of the Lot.

7. Sale Arrangements
(c) The Seller may not withdraw the Lot from sale without our consent ….
(d) If either we or the Seller withdraw the Lot, we shall charge the Seller a fee equal to 10% of the Insured Value, plus an amount equal to our commission if the Lot had been sold at the Insured Value, together with any applicable VAT and insurance and other expenses …

9. After the Sale
(a) Accounting
If for any reason we make payment to the Seller of the amount due before payment by the Buyer, we shall acquire complete ownership of and title in the Lot …
(d) Unsold Lot
If any Lot is unsold, or is not included in a sale, or is withdrawn from sale for any reason, it must be collected from us within 35 days after we send the Seller a notice requiring the Seller to collect it. If any such Lot remains uncollected for a period exceeding 35 days, a storage charge of £1 per item per day will apply and an additional charge will be made for insurance. The Seller will not be entitled to collect the Lot until all outstanding charges are met.
If any such Lot is not collected within 90 days after the date of the sale or the date of the notice referred to above (whichever occurs first) it may be disposed of by us as we see fit, which may involve its removal to a third party warehouse at the Seller's expense and its sale by public auction on such terms as we consider appropriate, including those relating to estimates and reserves. We shall then account to the Seller for the proceeds of sale, having deducted all amounts due.
If any Lot is bought in or otherwise unsold by auction, we are authorised as the exclusive agent for the Seller for a period of two months following the auction to sell such Lot privately for a price that will result in a payment to the
Seller of not less than the net amount — i.e. after deduction of all charges due from the Seller — to which the Seller would have been entitled had the Lot been sold at a price equal to the Reserve, or for such lesser amount as we and the Seller shall agree. In such event the Seller's obligations to us with respect to such a Lot are the same as if it had been sold at auction …

The Judgments below

6. I should start by paying tribute to both judges' judgments. They are models of industry and clarity.

7. Mr Palmer argued that Christies were strictly liable in conversion having regard to the extent of their encroachment on the claimant's rights as owner of the picture. Jack J. correctly noted that there was no reported case in which a court has had to consider the liability of an auctioneer who had simply put goods up for auction and then returned them unsold to the would-be seller. After an extensive review of the authorities he concluded (para. 41):

I deduce that there is a strong line of authority in the Court of Appeal that, for an auctioneer to be liable where he receives in good faith and without notice goods for auction from a non-owner, there must be a sale in which he is sufficiently involved followed by delivery to the purchaser. I am therefore so far against Professor Palmer's submission. So I would uphold the similar conclusion reached by Judge Hallgarten …

8. He then went on to consider whether Christies' terms of business, particularly clause 7(c), which prevents the seller from withdrawing the Lot, and 9(d), which gives Christies a lien, made any difference. Firstly he pointed out that auctioneers had always had a lien at common law and then said:

44. Secondly it is clear that the lien here was never exercised against anyone, let alone against [the claimant]. Nor did a right to exercise the lien arise. For the right would only arise after a notice had been sent requiring collection. No such notice was sent by Christies here. Even if a right of lien had been exercised by Christies against Mr Schuenemann, I think it doubtful whether that would amount to a conversion as against [the claimant] …

45. I do not consider that the fact that Christies took a right as against Mr Schuenemann to refuse to permit the picture to be withdrawn prior to auction can by itself, or if added to the other circumstances, convert what would not otherwise be a conversion, into one.

46. It was the view of Judge Hallgarten … that what matters in conversion is not the taking of powers by a bailee against his consignor but their exercise. I agree.

9. Mr Palmer had also submitted that by taking a lien coupled with a right of sale in clause 9(d) Christies received the picture as a pledge. This was conversion because section 11(2) of the Torts (Interference with Goods) Act 1977 says that:
Receipt of goods by a way of pledge is conversion if delivery of the goods is conversion.

10. The judge said there was a short answer to this submission. The circumstances in which Christies were entitled to a right of sale had never come about.

11. The judge dealt with the claim in bailment quite shortly. He records Mr Palmer's submission as being that Christies were to be treated as the bailees of the claimant. They were in the position of a finder or an unconscious bailee and as such owed duties to the claimant.

12. The judge rejected these submissions because, like Judge Hallgarten Q.C., he could not accept that the law of bailment and conversion were quite different. He derived support for this view from a passage from Lord Goff's judgment in *The Pioneer Container (1994) 2 AC 324*, 342 to which I will refer later.

Conversion

13. Mr Palmer started his submissions by reminding us of the ways in which conversion has been defined in a number of cases over the years. In those cases however there is a recognition that definition is difficult and none is exhaustive. Thus in the latest case, *Kuwait Airways Corporation v Iraqi Airways Co. (2002) UKHL 9* Lord Nicholls at para. 39 said:

Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible.

He went on to add however:

In general, the basic features of the tort are threefold. First the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference.

In the instant case the first and second of these features are present. It is the third which gives rise to the argument. Was there a sufficient encroachment on the claimant's rights as owner to amount to conversion?

14. Mr Palmer first submitted that any unauthorised possession of goods amounted to conversion with the possible exception of passive or minimal possession. But this submission flies in the face of a long line of authority which shows that possession of goods by an agent on the instructions of their apparent owner for the purpose of carrying out what have been described as ministerial acts such as storage or carriage does not amount to conversion. The possession in such cases is inconsistent with the rights of the true owner and is deliberate but does not encroach sufficiently on the owner's title to the goods. This principle was stated by Blackburn J. in *Hollins v Fowler (1874) LR 7 QB 757*, 766–767 as follows:
I cannot find it anywhere distinctly laid down but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the bona fide belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession if he was a finder of the goods or intrusted with their custody.

I do not mean to say that this is the extreme limit of the excuse but it is a principle that will embrace most of the cases which have been suggested as difficulties.

Thus a warehouseman with whom goods had been deposited is guilty of no conversion by keeping them or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner ….

And the same principle would apply to … persons “acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a caretaker, such as a wharfinger”.

15. Auctioneers do not fall within this statement of principle since they are not simply entrusted with the custody of goods but also asked to sell them. Mr Palmer submits that this makes all the difference since a sale necessarily encroaches on the true owner's title. There is, he submits, no authority which compels this court to decide in favour of Christies in this case and other authority which supports his main argument which is that if one looks at all the circumstances of this case and in particular what he described as the penetrative, invasive and retentive rights which Christies assumed over the picture under their contract terms their conduct amounted to conversion.

16. It is convenient to start by referring to the auctioneer cases which Mr Palmer submitted we should put on one side as being decisions on their own facts.

17. In *National Mercantile Bank Ltd. v Rymill* (1881) 44 LTNS 767 the plaintiff was the owner of horses the subject of a bill of sale. The grantor of the bill sold the horses privately in the defendant's auction yard and following the sale, on the grantor's instructions, the auctioneer delivered the horses to the buyer. It was held that there had been no conversion. Bramwell L.J. said that the auctioneer:

has not claimed to transfer the title and he has not purported to sell; all the dominion he exercised over the chattels was to redeliver them to the person to whom the man from whom he had received them had told him to redeliver them.

Brett and Cotton LJJ agreed that on the evidence there had been no sale by the auctioneer. This case has been criticised, mainly for the conclusion that there had been no sale by the auctioneer.

18. In *Barker v Furlong* (1891) 2 CH 172 Romer J. decided that an auctioneer who sold and delivered goods to the buyer at auction was liable. In that case the executor plaintiffs were entitled to furniture which was sent to auction without their knowledge or consent. Some of the furniture was returned unsold to the would-be seller and no claim was made against the defendant auctioneer in respect of that furniture. But he was held liable for the furniture he sold. At pages 181/2 Romer J. said:
… where, as here, the auctioneer receives the goods into his custody, and, on selling them, hands over the goods to the purchasers with a view to passing the property in them, then I think the auctioneer has converted the goods and is liable accordingly, … The general rule is that where an agent takes part in transferring the property in a chattel and it turns out that his principal has no title, his ignorance of this fact affords him no protection. I was referred to the cases of a carrier and packing agent as supporting the case of the auctioneers. But the carrier and packing agent are generally held not to have converted, because by their acts they merely purport to change the position of the goods and not the property in them.

19. Consolidated Co. v Curtis & Son (1892) 1 QB 495 was another case of an auctioneer who sold and delivered goods the subject of a bill of sale. Collins J. held that an auctioneer who sells and delivers is liable because he is acting as more than a mere broker or intermediary. Earlier in his judgment however at page 497/8 he said:

… it is not easy to draw the line at the precise point where a dealing with goods by an intermediary becomes a conversion. The difficulty is diminished by remembering that in trover the original possession was by a fiction deemed to be lawful … and some act had therefore to be shown constituting a conversion by the defendant of the chattel to his own use, some act incompatible with a recognition on his part of the continuous right of the true owner to the dominion over it. All acts, therefore, as suggested by Blackburn J. in his opinion … in Hollins v Fowler which are consistent with the duty of a mere finder such as the safeguarding by warehousing or asportation for the like purpose, may well be looked upon as entirely compatible with the right of the true owner, and, therefore, as not constituting a conversion by the defendant. It may be, as suggested by Brett J. in the same case, that the test is whether there is an intent to interfere in any manner with the title of or ownership in the chattel, not merely with the possession. The difficulty is, I think, rather in drawing the true inference from facts in particular cases than in grasping the principle. There are, however, happily many cases which fall clearly on one side or other of the line. It is clear that there can be no conversion by a mere bargain and sale without a transfer of possession. The act, unless in market overt, is merely void, and does not change the property or the possession: Lancashire Wagon Co. v Fitzhugh and per Brett J. in Hollins v Fowler. A fortiori, mere intervention as broker or intermediary in a sale by others is not a conversion.

This passage emphasises the point that it is interference with the title or ownership of the chattel which counts for conversion. Thus it is the act of delivery following sale which makes the auctioneer liable in conversion since that is what interferes with the title or ownership of the goods. A sale without delivery does not have this effect and does not therefore amount to conversion.

20. In Willis v British Car Auctions (1978) 1 WLR 438 a car on hire purchase was sold and delivered by auctioneers on the instructions of the hirer. The main issue was whether the auctioneers' liability was affected by the fact that the car had been sold under their provisional bid procedure. This court held the auctioneers liable. In his judgment Lord Denning said at page 442:

It is now, I think, well established that if an auctioneer sells goods by knocking down with his hammer at an auction and thereafter delivers them to the purchaser — then
although he is only an agent — then if the vendor has no title to the goods, both the
auctioneer and the purchaser are liable in conversion to the true owner, no matter how
innocent the auctioneer may have been in handling the goods or the purchaser in
acquiring them: see *Barker v Furlong* … and *Consolidated Co. v Curtis & Son* …
This state of law has been considered by the Law Reform Committee … in its 18th
Report (Conversion and Detinue) (1971), Cmnd. 4774 as to innocent handlers:
paragraphs 46–50. But Parliament has made no change in it: no doubt it would have
done so in the Torts (Interference with Goods) Act 1977 if it had thought fit to do so.

21. The report to which Lord Denning refers was prepared by a distinguished
committee chaired by Lord Pearson. Commenting on *National Mercantile Bank v
Rymill* at para. 41 they say:

If rightly decided, it is an authority for the proposition that a bailee escapes liability
for conversion, not only where he merely redelivers to his bailor, but where he
delivers at the bailor's directions to a third party without knowledge of any adverse
claim, though with knowledge that such delivery is in pursuance of a sale or other
disposition.

They then discuss the rule that receipt under a purported sale would amount to
conversion and justify its retention without the need for a demand:

subject to the principle that a bailee who has accounted for the goods to his bailor
should be exempt from liability to any other person (para. 43).

Turning to the problem of the innocent handler they say:

46. It is clear … that there are many cases in which the existing law imposes liability
in conversion upon an “innocent handler” of goods …. But it is not entirely clear
which acts of a handler will, and which will not, attract this liability. It has been said
that a merely ministerial handling of goods at the request of an apparent owner having
the actual control of them is not a conversion and that a handling is ministerial where
it merely changes the position of the goods and not the property in them.

After referring to Blackburn J's test in *Hollins v Fowler* they conclude:

47. Where the handler, having received goods from an apparent owner and without
knowledge of any adverse claim, merely redelivers them to the same person, we
consider that all the above tests can fairly be said to have been satisfied, and we think
that the same applies where the handler delivers the goods at the direction of the
apparent owner to a third party without knowledge of any adverse claim or that any
question of title is involved. But difficulties arise where the handler has knowledge
that a question of title is involved, as where the act he is required to do is to his
knowledge in pursuance of a sale or other disposition by the apparent owner to a third
party. In such a case, on the authority of *National Mercantile Bank v Rymill* no
liability attaches unless the defendant himself effected the sale as agent for the
apparent owner; and, although the facts of that case hardly satisfy the test propounded
by Blackburn J (whether the act done by the defendant can be said to have changed no
more than the position of the goods), we do not, on a balance of the conflicting
considerations involved, recommend a statutory reversal of this decision.
22. The auctioneer cases and the report led Jack J. to the conclusion in para. 41 of his judgment that for an auctioneer to be liable there must be a sale in which he is sufficiently involved followed by delivery to the buyer.

23. Mr Palmer submits that this conclusion was too restrictive. An auctioneer, for example, will be liable in conversion for misdelivery (see Jackson v Cochrane (1989) 2 Queensland Reports 23 at pages 25/26 where the English cases are referred to). There is also a suggestion in Cochrane v Rymill (1879) 40 LTNS 744 (an earlier case where this auctioneer sold horses and carriages the subject of a bill of sale) that simply dealing with goods amounts to conversion. This was a case however where the auctioneer took the goods as security for a loan to the grantor. They were then sold and delivered at auction and the loan was repaid from the proceeds of sale. I do not see anything in this case which was subsequently distinguished on its facts in National Mercantile Bank v Rymill which justifies any more extensive liability for auctioneers than the later cases establish. Nor does the fact that an auctioneer may be liable for misdelivery.

24. Without reference to the particular facts of this case, I agree with the judges below that the authorities indicate that an auctioneer who receives goods from their apparent owner and simply redelivers them to him when they are unsold is not liable in conversion provided he has acted in good faith and without knowledge of any adverse claim to them. Although strictly the cases do not compel this conclusion they cannot simply be put aside as Mr Palmer suggests. The auctioneer intends to sell and if he does so will incur liability if he delivers the goods to the buyer. But his intention does not make him liable; it is what he does in relation to the goods which determines liability. Mere receipt of the goods does not amount to conversion. In receiving the goods from and redelivering them to their apparent owner the auctioneer in such a case has only acted ministerially. He has in the event merely changed the position of the goods and not the property in them. This I think is a just conclusion, although I realise it may be dangerous to test issues of strict liability in this way. Nevertheless I think it would be unduly harsh if auctioneers were to be held liable in circumstances such as these.

25. So I turn to the particular facts of this case. The first question is how relevant are the contractual terms agreed between Mr Schuenemann and Christies? They govern his (and any buyer's) relationship with Christies but do not and cannot affect the legal position between the claimant and Christies. What Christies may do in exercising their contractual rights may impact upon the claimant's title but the mere existence of those rights will not.

26. Mr Palmer argues that this analysis is contrary to authority. He relied on Smith v Bridgend County Borough Council (2002) 1 AC 336 where a company had plant on a site owned by the council. When the company got into financial difficulties the council were entitled to use the plant but entered into a continuation contract with other contractors which, on completion of the contract passed title to the plant to and allowed them to remove it from the site. The case principally involved issues about fixed and floating charges but the House also had to decide whether the council had converted the plant. Mr Palmer referred us to Lord Scott's judgment at paras. 73–75 where he appears to have decided that the continuation contract itself amounted to conversion. But Lord Scott was in the minority. The majority judgment was given by
Lord Hoffmann with whom Lords Bingham, Browne-Wilkinson and Rodger agreed. At para. 39 Lord Hoffmann said:

The council consented to the removal of the plant by [the other contractor] in violation of the company's right to possession. The fact that they gave such consent in advance at a time when the company was not entitled to possession can make no difference. The consent remained effective until the moment when [the other contractor] took the plant. This was sufficient to amount to a conversion.

This gives no support to Mr Palmer's submission. I read Lord Hoffmann as saying that the conversion took place when the plant was removed and that the council were liable because it happened with their consent which had been given earlier in the continuation contract.

27. If the contract terms between Christies and Mr Schuenemann are irrelevant unless Christies' exercise of their contractual rights impacted on the claimant's title there is a simple answer to all or at least most of Mr Palmer's main argument: there is no allegation that Christies exercised a lien or power of sale or any of their other contractual rights to the detriment of the claimant's title; so his submissions based simply on the contract terms get him nowhere.

28. But lest this analysis is wrong I shall consider Mr Palmer's submissions in more detail. Looking at the contract he says it permitted Christies to catalogue, market and expose the painting for sale. The seller was not allowed to withdraw it from the sale without Christies' consent (clause 7(c)) and when it was unsold they were entitled to keep it for two months to try and sell it privately (clause 9(d)). All the while charges were being incurred for carriage, insurance and Christies' expenses (clause 4) which they could require to be paid before the picture could be collected, and if they were not they could sell it (clause 9(d)). Such an intrusion on the claimant's right to immediate possession of his picture amounts to conversion.

29. Mr Palmer referred us to three cases which he said supported these submissions by analogy. The first of these was Saleh Farid v Theodorou (C.A. unreported 30th January 1992) where the first defendant had entered into an unauthorised sale and leaseback of the claimant's car to secure a loan. The second defendant finance company admitted that they had converted the car even though they had not physically possessed it. Their involvement had “rendered them parties to the deprivation of the plaintiff's title to the car”. I do not see how this case helps Mr Palmer. Although they had not been in possession of the car the finance company had admittedly been parties to the first defendant's conversion. The car was worth very substantially more than the amount it had been “sold” for and in any event had been pledged as security for repayment of the loan.

30. The second case Michael Gerson (Leasing) Ltd. v Wilkinson (2001) QB 514 CA also involved an unauthorised sale and leaseback to a finance company. The question was whether the finance company could rely on section 24 of the Sale of Goods Act 1979 which protects buyers in good faith and without notice if the goods or their documents of title have been delivered or transferred to the buyer. Lord Justice Clarke at para. 30, with which the other two members of the court agreed, said that the effect of the sale and leaseback was that the goods must be taken to have been delivered to
the finance company because otherwise they could not have leased them back. At para. 36 he said it made “commercial sense to hold that such arrangements involve a transfer of constructive possession to the finance company” as the purchase of goods was commonly financed by sale and leaseback contracts. Mr Palmer says that this case shows that there may be a sale without actual delivery and by analogy offering (“hawking or touting” as he put it) for sale should also be considered as the equivalent of sale and delivery. I am perfectly prepared to accept that an auctioneer may be liable if following a sale his delivery of the goods to the purchaser may be constructive, but I think the analogy which Mr Palmer seeks to make is impossible. Offering something for sale is not a sale; nor does it involve any delivery, constructive or otherwise.

31. Mr Palmer's third case was *Moorgate Mercantile Co. v Finch & Read (1962) 1 QB 701 CA*. There the hirer of a car on hire purchase lent the car to the second defendant who used it to smuggle watches. He was caught and the car was forfeited by Customs. The court held that the second defendant had converted the car because what he had done would in all probability have resulted in the owners being deprived of it. He was to be taken to have intended the likely consequences of his conduct. Mr Palmer says that this case shows that you can convert goods by exposing them to risk and that is what Christies did by offering the picture for sale. I do not think this case, the result of which is entirely unsurprising, justifies any such conclusion. The car was converted when it was forfeited and the defendant was held liable because that was the natural and probable consequence of what he had done.

32. I turn then to the terms themselves. First is what Mr Palmer called “the sealed maze” which may give Christies possession of the goods for a substantial period of time. He submits that a right to subtract and enjoy a substantial possessory portion from the claimant's overall possessory right without his consent amounts in effect to a non-statutory exception to the nemo dat principle.

33. I think the simple answer to this point is that the duration of Christies' possession is of itself of no consequence. Mere possession, for however long, is immaterial. It all depends upon what else, if anything, Christies do and if that encroaches on the claimant's title. If, for example, the claimant had made a demand for the return of the picture which Christies refused they would be liable. But if such a demand was made by Mr Schuenemann and Christies, relying on their terms, refused, this would be of no consequence to the claimant.

34. The fact that Christies catalogued and offered the picture for sale and did so for reward adds nothing to the claimant's case; that is an auctioneer's business.

35. At common law an auctioneer has a lien over the goods for his costs and commission (see *Williams v Millington 1 HBL 81*). Under clause 9 (d) the seller is not entitled to collect his goods until all outstanding charges are met. As I have already said, in this case it is not alleged that Christies exercised any lien or similar right under clause 9 (d) over the picture. The need for such a right to be exercised was made clear by Millett J. in *Barclays Mercantile Business Finance Ltd. v Sibec Developments Ltd. (1992) 1 W.L.R 1253*, 1257–8 when he said:

Demand is not an essential precondition of the tort: what is required is an overt act of withholding possession from the true owner. Such an act may consist of a refusal to
deliver up the chattel on demand, but it may be demonstrated by other conduct, for example by asserting a lien. Some positive act of withholding, however, is required; so that, absent any positive conduct on the part of the defendant, the plaintiff can establish a cause of action in conversion only by making a demand.

36. If the lien was exercised in response to a demand for the picture by the claimant there is no doubt that this would amount to conversion. In *Loeschman v Machin* (1818) 2 Stark 311 Abbott J. said:

If he [the hirer of the goods] send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and that if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion.

This case is not however authority for the proposition that the exercise of a lien against the would-be seller would amount to conversion against the true owner. As Jack J. said there must be some doubt about this.

37. The other case about lien to which Mr Palmer referred was *Tear v Freebody* (1858) 4 CBNS 228 in which the surveyor to a parish was found to have taken possession of the plaintiff's materials so as to obtain an unfounded lien over them. This was therefore the overt assertion of a lien against the owner of the materials which not surprisingly was held to amount to conversion and so takes the matter no further.

38. I turn finally to consider the submission that Christies received the picture by way of pledge because of the lien and the right to sell contained in clause 9(d).

39. Halsbury's Laws of England 4th ed Reissue Volume 36 (1) at paras. 101, 103 and 104 states:

A ‘pawn’ or ‘pledge’ is a bailment of personal property as a security for some debt or engagement ….

Pawn has been described as a security where, by contract, a deposit of goods is made a security for a debt and the right to the property vests in the pawnee so far as is necessary to secure the debt; in this sense it is intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed.

The rights of the pawnee in the thing pawned are distinguishable from a common law lien in that he acquires a special property or special interest in the property pawned, whereas a person exercising a lien has only a right to detain the subject matter of the lien until he is paid, and a lien is not transferable to a third person.

40. Mr Palmer relied on the Australian case of *A.N.Z. Banking Group v Curlett* (1992) 10 ACLC 1292 where customs agents refused to deliver up goods which they were holding because they had not been paid by their customers. Their contract entitled them to a “special and general lien and pledge for monies due” over all goods which came into their possession. The bank who had a charge over the customer's assets argued that this was not a pledge. Ormiston J. in the Supreme Court of Victoria held
that it was and in doing so rejected the bank's arguments that pledge was confined to securing a loan or other advance, that the debt had to exist at the time the goods were deposited and that the deposit had to be for the sole purpose of securing the obligation in question.

41. I have no difficulty in accepting these general propositions. But the first question is, whether looking at the contract as a whole, the parties have intended that the goods should be pledged. In ANZ the clearest indication of the parties' intentions was to be found in the contract which expressly pledged the goods. There is no such expressed intention in the instant case. The deposit of the picture with Christies was for the purpose of their selling it as agents for Mr Schuenemann. If one asks whether it was also deposited for the purpose of providing security for some future debt I think the answer must be no. The court should be slow to infer such a purpose because otherwise any custodian who takes a lien over goods with a residual right to sell (as most do) would be a pledgee. Some may wish to provide expressly for this, but it should not be readily inferred from contract terms such as clause 9 (d).

42. Those terms themselves provide a further reason for saying that there is no pledge here. Assuming that it is possible to spell out a pledge simply from the right to sell, clause 9(d) only confers that right if an unsold Lot is uncollected 90 days after the sale or 35 days after notice to collect has been given. There is no right to sell before this time and no general right attaching to all goods as there was in ANZ. Looking at the language of section 11 (2) of the 1977 Act I do not think it can be said that Christies' receipt of the picture from Mr Schuenemann was a “receipt of goods by way of pledge”. At the time of receipt Christies had no power of sale whatsoever.

43. In para. 24 I concluded that generally an auctioneer who has acted in good faith and without notice is not liable in conversion if he returns unsold goods to the prospective seller. For the reasons I have given I do not think the particular facts of this case make Christies liable to the claimant in conversion either.

Bailment

44. The draft amended particulars of claim allege that Christies were in breach of their obligations “as a bailee of the claimant or as a person owing the obligations of or equivalent to those of a finder, or as an involuntary or unconscious bailee”. As such Christies are alleged to have had a variety of duties which Mr Palmer summarised in his final submissions to us as follows:

A person taking possession of goods for a limited period or purpose owes a duty to take such care as is reasonable in all the circumstances to ensure that the person who delivers has the right to do so and the person to whom he redelivers the goods has a right to receive them.

45. Mr Palmer supports these submissions with a broad plea to the merits of the claimant's case. His picture has been stolen. It has passed through the hands of international auctioneers who should at least have to explain why they did not discover it had been stolen. Auctioneers should have a strong interest in the provenance of high value portable items and not simply rely on their client's word.
Such standards are now expected as, for example, The Return of Cultural Objects Regulations SI 1994/501 and The British Art Market Federation Code 2000 show.

46. The critical question is whether any relationship of bailor and bailee or the like existed between Christies and the claimant. Such a relationship undoubtedly existed between Christies and Mr Schuenemann. But how can it be said to have existed with the claimant of whose interest in the painting Christies were wholly unaware?

47. Mr Palmer relied on a number of cases to say that it could. First he referred us to three cases of gratuitous bailment: McCowan v McCullogh (1926) 1 DLR 312 where a man mistakenly took the plaintiff's suitcase from a train, Mitchell v Ealing London B.C. (1979) QB 1 where the council stored the plaintiff's goods after they had evicted her and City Television v Conference and Training Office Ltd. (2001) EWCA Civ 1770 where the defendants came into possession of equipment stolen from the plaintiffs. Next we were referred to two cases of what Mr Palmer called constructive bailment where the interest of the owner was reasonably foreseeable: Southland Hospital Board v Perkins (1986) 1 NZLR 373, where a hospital were held to be bailees of a deceased patient's ring and Heffron v Imperial Parking Ltd. (1974) 46 DLR (3d) 642 where the owners of a parking lot were held to be bailees of the contents of a car which was stolen from the lot. Then we were referred to Parker v BA Board (1982) QB 1004 where the rights and obligations of a finder were considered. After this flurry of citation Mr Palmer submitted that there was no case since the war in which someone in the position of bailee or the like had not been found subject to some duty.

48. But this begs the question: duty to whom? None of these cases sheds light on the critical question in this case. Christies were not a gratuitous or involuntary bailee. There was no doubt as to what they were bailees of and they were not finders. They believed they were bailees for reward of Mr Schuenemann and no-one else.

49. Support for the view that a bailee must have some knowledge of the existence of his bailor is to be found in the Pioneer Container where at page 342 Lord Goff said:

Their Lordships wish to add that this conclusion … produces a result which in their opinion is both principled and just. They incline to the opinion that a sub-bailee can only be said for these purposes to have voluntarily taken into his possession the goods of another if he has sufficient notice that a person other than a bailee is interested in the goods so that it can properly be said that (in addition to his duties to the bailee) he has, by taking the goods into his custody, assumed towards that other person the responsibility for the goods which is characteristic of a bailee. This they believe to be the underlying principle.

50. Mr Palmer rightly submits that the House of Lords was not concerned with the position of a bailor who sub-bails the goods without the owner's authority. Nevertheless the statement emphasises the obvious, which is that if you are to owe duties to someone else you should know or at least have some means of knowing of his existence. We have not been referred to any authority to the contrary.

51. Mr Palmer placed considerable reliance on the decision of Staughton J. in AVX v EGM (unreported 1/7/82). In that case the defendants had agreed to the return of defective spheres of solder which they had manufactured for the plaintiffs. By
mistake, as well as returning the defective solder in one box, the plaintiffs returned twenty-one boxes of capacitors which were as the judge said “finished goods which could not, by any stretch of imagination, be said to look remotely like solder spheres”. The defendants set about scrapping the capacitors in the mistaken belief that they were their own property and mixed them with the rejected solder spheres so that it became uneconomic to retrieve them. The judge held that they were liable as unconscious bailees whose duty before dealing with the goods was to “use what is in all the circumstances of the case a sufficient standard of care to ascertain that they truly” were their own goods.

52. On the facts of that case I should have thought that there would have been no difficulty in establishing negligence without invoking any relationship of bailor and bailee. A person, who destroys goods which are self-evidently not his in the mistaken belief that they are, must be liable. In the instant case Christies asserted no personal rights of ownership over the picture and after it went unsold simply returned it to Mr Schuenemann from whom they had received it in the first place. So I do not think that AVX is authority for the proposition that an agent who receives goods from someone who is their apparent owner and later returns them to him owes any duty to their true owner to investigate title in the absence of anything to put him on enquiry.

53. Mr Palmer’s proposed duty has far reaching implications, not only for auctioneers but also for other custodians such as warehousemen and carriers whose position has been clear since the decision in Hollins v Fowler. Mr Palmer tried to allay our concern about this by saying that in many cases it might not be reasonable for such agents to have to make enquiries about their customer’s title. But this illustrates the problem. In what circumstances, for example, should a warehouseman who is asked to store a high value portable item have to make his own enquiries about his customer’s title and what enquiries should he have to make of whom?

54. If of course there are circumstances which should put the agent on enquiry then a positive case of negligence on conventional grounds can be alleged. But no such case is or, on the assumed facts, could be made here. I do not accept that the law of bailment or something akin to it can be stretched so as to found a duty of the kind alleged. Quite apart from anything else the law of conversion, which attaches strict liability in certain circumstances, has been developed over the years to provide the remedy, if any, in cases such as these. Now to invoke different principles from the law of bailment is not justified. Auctioneers such as Christies must of course take care to avoid dealing with works of doubtful title since they will be strictly liable if they sell on behalf of anyone other than the true owner, but that is not a policy reason for making them liable when they do not sell and simply return the goods to their client in good faith and without notice of the true owner’s interest.

55. For these reasons I think the Judges below were right to conclude that the claim in bailment failed.
Conclusion

56. I would therefore dismiss this appeal. There were no reasonable grounds for bringing the claim in conversion or bailment and Judge Hallgarten Q.C. and Jack J. were right to strike out the claimant's statement of case.

57. The appellant's notice says that Jack J. should not have ordered the claimant to pay all Christies' costs, but this point was not pursued by Mr Palmer, rightly in my view because there was nothing in it.

Lord Justice Keene:

I agree.

Lord Justice Peter Gibson:

I also agree.

Order: Appeal dismissed. Interim order for costs below £25,000. Cost of appeal £15,000. Payable within 28 days.

F. International Texts


The Hague, 14 May 1954
- First Protocol, The Hague, 14 May 1954

The High Contracting Parties,

Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction;

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for
all peoples of the world and that it is important that this heritage should receive international protection;

Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April, 1935;

Being of the opinion that such protection cannot be effective unless both national and international measures have been taken to organize it in time of peace;

Being determined to take all possible steps to protect cultural property;

Have agreed upon the following provisions:

Chapter I. General provisions regarding protection

Article 1. Definition of cultural property

For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

(a) 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 which, as a whole, are 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 collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.

Article 2. Protection of cultural property

For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.

Article 3. Safeguarding of cultural property

The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

Article 4. Respect for cultural property
1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.

2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

4. They shall refrain from any act directed by way of reprisals against cultural property.

5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.

**Article 5. Occupation**

1. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.

2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation.

3. Any High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Convention dealing with respect for cultural property.

**Article 6. Distinctive marking of cultural property**

In accordance with the provisions of Article 16, cultural property may bear a distinctive emblem so as to facilitate its recognition.

**Article 7. Military measures**

1. The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of
respect for the culture and cultural property of all peoples.

2. The High Contracting Parties undertake to plan or establish in peace-time, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.

Chapter II. Special protection

Article 8. Granting of special protection

1. There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centers containing monuments and other immovable cultural property of very great importance, provided that they:

(a) are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication;

(b) are not used for military purposes.

2. A refuge for movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

3. A center containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the center.

4. The guarding of cultural property mentioned in paragraph I above by armed custodians specially empowered to do so, or the presence, in the vicinity of such cultural property, of police forces normally responsible for the maintenance of public order shall not be deemed to be used for military purposes.

5. If any cultural property mentioned in paragraph 1 of the present Article is situated near an important military objective as defined in the said paragraph, it may nevertheless be placed under special protection if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic there from. In that event, such diversion shall be prepared in time of peace.

6. Special protection is granted to cultural property by its entry in the 'International Register of Cultural Property under Special Protection'. This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations for the execution of the Convention.
Article 9. Immunity of cultural property under special protection

The High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 8, from any use of such property or its surroundings for military purposes.

Article 10. Identification and control

During an armed conflict, cultural property under special protection shall be marked with the distinctive emblem described in Article 16, and shall be open to international control as provided for in the Regulations for the execution of the Convention.

Article 11. Withdrawal of immunity

1. If one of the High Contracting Parties commits, in respect of any item of cultural property under special protection, a violation of the obligations under Article 9, the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned. Nevertheless, whenever possible, the latter Party shall first request the cessation of such violation within a reasonable time.

2. Apart from the case provided for in paragraph 1 of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.

3. The Party withdrawing immunity shall, as soon as possible, so inform the Commissioner-General for cultural property provided for in the Regulations for the execution of the Convention, in writing, stating the reasons.

Chapter VI. Scope of application of the Convention

Article 18. Application of the Convention

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them.

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared, that it accepts the provisions thereof and so long as it applies them.

**Article 19. Conflicts not of an international character**

1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property.

2. The parties to the conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

3. The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict.

4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.


**Article 5 Safeguarding of cultural property**

Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.

**Article 6 Respect for cultural property**

With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:

a. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
i. that cultural property has, by its function, been made into a military objective; and

ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;

b. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;

c. the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;

d. in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

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Paris, 14 November 1970

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 12 October to 14 November 1970, at its sixteenth session,

Recalling the importance of the provisions contained in the Declaration of the Principles of International Cultural Co-operation, adopted by the General Conference at its fourteenth session,

Considering that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations,

Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting,
Considering that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export,

Considering that, to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations,

Considering that, as cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles,

Considering that the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of UNESCO’s mission to promote by recommending to interested States, international conventions to this end,

Considering that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation,

Considering that the UNESCO General Conference adopted a Recommendation to this effect in 1964,

Having before it further proposals on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, a question which is on the agenda for the session as item 19,

Having decided, at its fifteenth session, that this question should be made the subject of an international convention,

Adopts this Convention on the fourteenth day of November 1970.

Article 1

For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have
been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.

**Article 2**

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.

2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

**Article 3**

The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.

**Article 4**

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage
of each State:

(a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;

(b) cultural property found within the national territory;

(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;

(d) cultural property which has been the subject of a freely agreed exchange;

(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

**Article 5**

To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:

(a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property;

(b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage;

(c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops . . . ) required to ensure the preservation and presentation of cultural property;

(d) organizing the supervision of archaeological excavations, ensuring the preservation in situ of certain cultural property, and protecting certain areas reserved for future archaeological research;

(e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules;

(f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention;
(g) seeing that appropriate publicity is given to the disappearance of any items of
cultural property.

**Article 6**

The States Parties to this Convention undertake:

(a) To introduce an appropriate certificate in which the exporting State would specify
that the export of the cultural property in question is authorized. The certificate should
accompany all items of cultural property exported in accordance with the regulations;

(b) to prohibit the exportation of cultural property from their territory unless
accompanied by the above-mentioned export certificate;

(c) to publicize this prohibition by appropriate means, particularly among persons
likely to export or import cultural property.

**Article 7**

The States Parties to this Convention undertake:

(a) To take the necessary measures, consistent with national legislation, to prevent
museums and similar institutions within their territories from acquiring cultural
property originating in another State Party which has been illegally exported after
entry into force of this Convention, in the States concerned. Whenever possible, to
inform a State of origin Party to this Convention of an offer of such cultural property
illegally removed from that State after the entry into force of this Convention in both
States;

(b) (i) to prohibit the import of cultural property stolen from a museum or a religious
or secular public monument or similar institution in another State Party to this
Convention after the entry into force of this Convention for the States concerned,
provided that such property is documented as appertaining to the inventory of that
institution;

(ii) at the request of the State Party of origin, to take appropriate steps to recover and
return any such cultural property imported after the entry into force of this
Convention in both States concerned, provided, however, that the requesting State
shall pay just compensation to an innocent purchaser or to a person who has valid title
to that property. Requests for recovery and return shall be made through diplomatic
offices. The requesting Party shall furnish, at its expense, the documentation and other
evidence necessary to establish its claim for recovery and return. The Parties shall
impose no customs duties or other charges upon cultural property returned pursuant to
this Article. All expenses incident to the return and delivery of the cultural property
shall be borne by the requesting Party.

**Article 8**

The States Parties to this Convention undertake to impose penalties or admin-istrative
sanctions on any person responsible for infringing the prohibitions referred to under Articles 6(b) and 7(b) above.

**Article 9**

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

**Article 10**

The States Parties to this Convention undertake:

(a) To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject;

(b) to endeavour by educational means to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports.

**Article 11**

The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.

**Article 12**

The States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible, and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories.

**Article 13**

The States Parties to this Convention also undertake, consistent with the laws of each State:

(a) to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
(b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;

(c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;

(d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

**Article 14**

In order to prevent illicit export and to meet the obligations arising from the implementation of this Convention, each State Party to the Convention should, as far as it is able, provide the national services responsible for the protection of its cultural heritage with an adequate budget and, if necessary, should set up a fund for this purpose.

**Article 15**

Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned.

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**3. UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS**

(Rome, 24 June 1995)

**THE STATES PARTIES TO THIS CONVENTION,**
ASSEMBLED in Rome at the invitation of the Government of the Italian Republic from 7 to 24 June 1995 for a Diplomatic Conference for the adoption of the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects,

CONVINCED of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation,

DEEPLY CONCERNED by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information,

DETERMINED to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of the cultural heritage in the interest of all,

EMPHASISING that this Convention is intended to facilitate the restitution and return of cultural objects, and that the provision of any remedies, such as compensation, needed to effect restitution and return in some States, does not imply that such remedies should be adopted in other States,

AFFIRMING that the adoption of the provisions of this Convention for the future in no way confers any approval or legitimacy upon illegal transactions of whatever kind which may have taken place before the entry into force of the Convention,

CONSCIOUS that this Convention will not by itself provide a solution to the problems raised by illicit trade, but that it initiates a process that will enhance international cultural co-operation and maintain a proper role for legal trading and inter-State agreements for cultural exchanges,

ACKNOWLEDGING that implementation of this Convention should be accompanied by other effective measures for protecting cultural objects, such as the development and use of registers, the physical protection of archaeological sites and technical co-operation,

RECOGNISING the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector,

HAVE AGREED as follows:

CHAPTER I - SCOPE OF APPLICATION AND DEFINITION
Article 1

This Convention applies to claims of an international character for:

(a) the restitution of stolen cultural objects;

(b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter "illegally exported cultural objects").

Article 2

For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

CHAPTER II - RESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

(1) The possessor of a cultural object which has been stolen shall return it.

(2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

(3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.

(4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.

(5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation.
(6) A declaration referred to in the preceding paragraph shall be made at the time of signature, ratification, acceptance, approval or accession.

(7) For the purposes of this Convention, a "public collection" consists of a group of inventoried or otherwise identified cultural objects owned by:

(a) a Contracting State

(b) a regional or local authority of a Contracting State;

(c) a religious institution in a Contracting State; or

(d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

(8) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections.

**Article 4**

(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

(2) Without prejudice to the right of the possessor to compensation referred to in the preceding paragraph, reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation where to do so would be consistent with the law of the State in which the claim is brought.

(3) Payment of compensation to the possessor by the claimant, when this is required, shall be without prejudice to the right of the claimant to recover it from any other person.

(4) In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.
CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

(1) A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.

(2) A cultural object which has been temporarily exported from the territory of the requesting State, for purposes such as exhibition, research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit shall be deemed to have been illegally exported.

(3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:

(a) the physical preservation of the object or of its context;
(b) the integrity of a complex object;
(c) the preservation of information of, for example, a scientific or historical character;
(d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.

(4) Any request made under paragraph 1 of this article shall contain or be accompanied by such information of a factual or legal nature as may assist the court or other competent authority of the State addressed in determining whether the requirements of paragraphs 1 to 3 have been met.

(5) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this article.

Article 6

(1) The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.
(2) In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.

(3) Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide:

(a) to retain ownership of the object; or

(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees.

(4) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State, without prejudice to the right of that State to recover costs from any other person.

(5) The possessor shall not be in a more favourable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.

**Article 7**

(1) The provisions of this Chapter shall not apply where:

(a) the export of a cultural object is no longer illegal at the time at which the return is requested; or

(b) the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person.

(2) Notwithstanding the provisions of sub-paragraph (b) of the preceding paragraph, the provisions of this Chapter shall apply where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community.

**CHAPTER IV - GENERAL PROVISIONS**

**Article 8**

(1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

(2) The parties may agree to submit the dispute to any court or other competent authority or to arbitration.

(3) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the
claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.

**Article 9**

(1) Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention.

(2) This article shall not be interpreted as creating an obligation to recognise or enforce a decision of a court or other competent authority of another Contracting State that departs from the provisions of this Convention.

**Article 10**

(1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, provided that:

(a) the object was stolen from the territory of a Contracting State after the entry into force of this Convention for that State; or

(b) the object is located in a Contracting State after the entry into force of the Convention for that State.

2) The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought.

(3) This Convention does not in any way legitimise any illegal transaction of whatever nature which has taken place before the entry into force of this Convention or which is excluded under paragraphs (1) or (2) of this article, nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.

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**4. EU LAW**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the procedure referred to in Article 251 of the Treaty(2),

Whereas:

(1) The establishment of Economic and Monetary Union and the changeover to the euro have an effect on the last subparagraph under heading B of the Annex to Council Directive 93/7/EEC(3) laying down the values, expressed in ecu, of the cultural goods subject to the application of the Directive. That subparagraph lays down that the date for the conversion of such values into national currencies is to be 1 January 1993.

(2) Pursuant to Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro(4), any reference to the ecu in legal instruments became, as from 1 January 1999, a reference to the euro, after conversion at the rate of one to one. Without an amendment to Directive 93/7/EEC, and hence to the fixed exchange rate corresponding to the rate in force on 1 January 1993, the Member States having the euro as their currency would continue to apply different amounts converted on the basis of the exchange rates of 1993, and not the conversion rates irrevocably fixed on 1 January 1999, and this situation would persist as long as the conversion rule remained an integral part of the Directive.

(3) The last subparagraph under heading B of the Annex to Directive 93/7/EEC should therefore be amended in such a way that, as from 1 January 2002, the Member States having the euro as their currency directly apply the values in euro laid down in Community legislation. For the other Member States, which will continue to convert these thresholds into national currencies, an exchange rate should be adopted on an appropriate date before 1 January 2002, and provision should be made for those Member States to adapt that rate automatically and periodically in order to compensate for variations in the exchange rate between the national currency and the euro.

(4) It would appear that the value 0 (zero) under heading B of the Annex to Directive 93/7/EEC, applicable as the financial threshold for certain categories of cultural objects, could be interpreted in such a way as to jeopardise the effective application of the Directive. Whereas this value 0 (zero) means that goods belonging to the categories in question, whatever their value - even if it is negligible or zero - are to be considered "cultural objects" within the meaning of the Directive, certain authorities have interpreted it in such a way that the cultural object in question has no value at all,
thereby depriving those categories of goods of the protection afforded by the Directive.

(5) To avoid any confusion in this respect, therefore, the figure 0 should be replaced by a clearer expression which leaves no doubt as to the need to protect the goods in question,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

In the Annex to Directive 93/7/EEC, the text under heading B is hereby amended as follows:

1. The title "VALUE: 0 (zero)" shall be replaced by: "VALUE: Whatever the value"

2. The last subparagraph, relating to the conversion into national currencies of the values expressed in ecus, shall be replaced by the following: "For the Member States which do not have the euro as their currency, the values expressed in euro in the Annex shall be converted and expressed in national currencies at the rate of exchange on 31 December 2001 published in the Official Journal of the European Communities. This countervalue in national currencies shall be reviewed every two years with effect from 31 December 2001. Calculation of this countervalue shall be based on the average daily value of those currencies, expressed in euro, during the 24 months ending on the last day of August preceding the revision which takes effect on 31 December. The Advisory Committee on Cultural Goods shall review this method of calculation, on a proposal from the Commission, in principle two years after the first application. For each revision, the values expressed in euro and their countervalues in national currency shall be published periodically in the Official Journal of the European Communities in the first days of the month of November preceding the date on which the revision takes effect."

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2001. They shall immediately inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 3

This Directive shall enter into force on the 20th day following that of its publication in the Official Journal of the European Communities.
Article 4

This Directive is addressed to the Member States.

Done at Luxembourg, 5 June 2001.

A.2 COUNCIL DIRECTIVE 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas Article 8a of the Treaty provides for the establishment, not later than 1 January 1993, of the internal market, which is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty;

Whereas, under the terms and within the limits of Article 36 of the Treaty, Member States will, after 1992, retain the right to define their national treasures and to take the necessary measures to protect them in this area without internal frontiers;

Whereas arrangements should therefore be introduced enabling Member States to secure the return to their territory of cultural objects which are classified as national treasures within the meaning of the said Article 36 and have been removed from their territory in breach of the abovementioned national measures or of Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods (4); whereas the implementation of these arrangements should be as simple and efficient as possible; whereas, to facilitate cooperation with regard to return, the scope of the arrangements should be confined to items belonging to common categories of cultural object; whereas the Annex to this Directive is consequently not intended to define objects which rank as 'national treasures' within the meaning of the said Article 36, but merely categories of object which may be classified as such and may accordingly be covered by the return procedure introduced by this Directive;
Whereas cultural objects classified as national treasures and forming an integral part of public collections or inventories of ecclesiastical institutions but which do not fall within these common categories should also be covered by this Directive;

Whereas administrative cooperation should be established between Member States as regards their national treasures, in close liaison with their cooperation in the field of stolen works of art and involving in particular the recording, with Interpol and other qualified bodies issuing similar lists, of lost, stolen or illegally removed cultural objects forming part of their national treasures and their public collections;

Whereas the procedure introduced by this Directive is a first step in establishing cooperation between Member States in this field in the context of the internal market; whereas the aim is mutual recognition of the relevant national laws; whereas provision should therefore be made, in particular, for the Commission to be assisted by an advisory committee;

Whereas Regulation (EEC) No 3911/92 introduces, together with this Directive, a Community system to protect Member States' cultural goods; whereas the date by which Member States have to comply with this Directive has to be as close as possible to the date of entry into force of that Regulation; whereas, having regard to the nature of their legal systems and the scope of the changes to their legislation necessary to implement this Directive, some Member States will need a longer period,

HAS ADOPTED THIS DIRECTIVE:

Article 1

For the purposes of this Directive:

1. 'Cultural object' shall mean an object which:

- is classified, before or after its unlawful removal from the territory of a Member State, among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty,

and

- belongs to one of the categories listed in the Annex or does not belong to one of these categories but forms an integral part of:

- public collections listed in the inventories of museums, archives or libraries' conservation collection.

For the purposes of this Directive, 'public collections' shall mean collections which are the property of a Member State, local or regional authority within a Member States or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority;
- the inventories of ecclesiastical institutions.

2. 'Unlawfully removed from the territory of a Member State' shall mean:

- removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EEC) No 3911/92, or
- not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal.

3. 'Requesting Member State' shall mean the Member State from whose territory the cultural object has been unlawfully removed.

4. 'Requested Member State' shall mean the Member State in whose territory a cultural object unlawfully removed from the territory of another Member State is located.

5. 'Return' shall mean the physical return of the cultural object to the territory of the requesting Member State.

6. 'Possessor' shall mean the person physically holding the cultural object on his own account.

7. 'Holder' shall mean the person physically holding the cultural object for third parties.

Article 2

Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive.

Article 3

Each Member State shall appoint one or more central authorities to carry out the tasks provided for in this Directive.

Member States shall inform the Commission of all the central authorities they appoint pursuant to this Article.

The Commission shall publish a list of these central authorities and any changes concerning them in the C series of the Official Journal of the European Communities.

Article 4

Member States' central authorities shall cooperate and promote consultation between the Member States' competent national authorities. The latter shall in particular:

1. upon application by the requesting Member State, seek a specified cultural object which as been unlawfully removed from its territory, identifying the possessor and/or
holder. The application must include all information needed to facilitate this search, with particular reference to the actual or presumed location of the object;

2. notify the Member States concerned, where a cultural object is found in their own territory and there are reasonable grounds for believing that it has been unlawfully removed from the territory of another Member State;

3. enable the competent authorities of the requesting Member State to check that the object in question is a cultural object, provided that the check is made within 2 months of the notification provided for in paragraph 2. If it is not made within the stipulated period, paragraphs 4 and 5 shall cease to apply;

4. take any necessary measures, in cooperation with the Member State concerned, for the physical preservation of the cultural object;

5. prevent, by the necessary interim measures, any action to evade the return procedure;

6. act as intermediary between the possessor and/or holder and the requesting Member State with regard to return. To this end, the competent authorities of the requested Member States may, without prejudice to Article 5, first facilitate the implementation of an arbitration procedure, in accordance with the national legislation of the requested State and provided that the requesting State and the possessor or holder give their formal approval.

Article 5

The requesting Member State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory.

Proceedings may be brought only where the document initiating them is accompanied by:

- a document describing the object covered by the request and stating that it is a cultural object,

- a declaration by the competent authorities of the requesting Member State that the cultural object has been unlawfully removed from its territory.

Article 6

The central authority of the requesting Member State shall forthwith inform the central authority of the requested Member State that proceedings have been initiated with the aim of securing the return of the object in question.

The central authority of the requested Member State shall forthwith inform the central authorities of the other Member States.
Article 7

1. Member States shall lay down in their legislation that the return proceedings provided for in this Directive may not be brought more than one year after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder.

Such proceedings may, at all events, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State. However, in the case of objects forming part of public collections, referred to in Article 1 (1), and ecclesiastical goods in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States laying down a period exceeding 75 years.

2. Return proceedings may not be brought if removal from the national territory of the requesting Member State is no longer unlawful at the time when they are to be initiated.

Article 8

Save as otherwise provided in Articles 7 and 13, the competent court shall order the return of the cultural object in question where it is found to be a cultural object within the meaning of Article 1 (1) and to have been removed unlawfully from national territory.

Article 9

Where return of the object is ordered, the competent court in the requested States shall award the possessor such compensation as it deems fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object.

The burden of proof shall be governed by the legislation of the requested Member State.

In the case of a donation or succession, the possessor shall not be in a more favourable position than the person from whom he acquired the object by that means.

The requesting Member State shall pay such compensation upon return of the object.

Article 10

Expenses incurred in implementing a decision ordering the return of a cultural object shall be borne by the requesting Member State. The same applies to the costs of the measures referred to in Article 4 (4).

Article 11
Payment of the fair compensation and of the expenses referred to in Articles 9 and 10 respectively shall be without prejudice to the requesting Member State's right to take action with a view to recovering those amounts from the persons responsible for the unlawful removal of the cultural object from its territory.

Article 12

Ownership of the cultural object after return shall be governed by that law of the requesting Member State.

Article 13

This Directive shall apply only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993.

Article 14

1. Each Member State may extend its obligation to return cultural objects to cover categories of objects other than those listed in the Annex.

2. Each Member State may apply the arrangements provided for by this Directive to requests for the return of cultural objects unlawfully removed from the territory of other Member States prior to 1 January 1993.

Article 15

This Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen.

.................................................................

Article 19

This Directive is addressed to the Member States.

Done at Brussels, 15 March 1993.

ANNEX

Categories referred to in the second indent of Article 1 (1) to which objects classified as 'national treasures' within the meaning of Article 36 of the Treaty must belong in order to qualify for return under this Directive

1. Archaeological objects more than 100 years old which are the products of:

   - land or underwater excavations and finds,

   - archaeological sites,
- archaeological collections.

2. Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, more than 100 years old.

3. Pictures and paintings executed entirely by hand, on any medium and in any material (1).

4. Mosaics other than those in category 1 or category 2 and drawings executed entirely by hand, on any medium and in any material (1).

5. Original engravings, prints, serigraphs and lithographs with their respective plates and original posters (1).

6. Original sculptures or statuary and copies produced by the same process as the original (1) other than those in category 1.

7. Photographs, films and negatives thereof (1).

8. Incunabula and manuscripts, including maps and musical scores, singly or in collections (1).

9. Books more than 100 years old, singly or in collections.

10. Printed maps more than 200 years old.

11. Archives and any elements thereof, of any kind, on any medium, comprising elements more than 50 years old.

12. (a) Collections (2) and specimens from zoological, botanical, mineralogical or anatomical collections;

(b) Collections (2) of historical, palaeontological, ethnographic or numismatic interest.

13. Means of transport more than 75 years old.

14. Any other antique item not included in categories A 1 to A 13, more than 50 years old.

The cultural objects in categories A 1 to A 14 are covered by this Directive only if their value corresponds to, or exceeds, the financial thresholds under B.

B. Financial thresholds applicable to certain categories under A (in ecus)

VALUE: 0 (Zero)

- 1 (Archaeological objects)

- 2 (Dismembered monuments)
- 8 (Incunabula and manuscripts)
- 11 (Archives)

15 000

- 4 (Mosaics and drawings)
- 5 (Engravings)
- 7 (Photographs)
- 10 (Printed maps)

50 000

- 6 (Statuary)
- 9 (Books)
- 12 (Collections)
- 13 (Means of transport)
- 14 (Any other item)

150 000

- 3 (Pictures)

The assessment of whether or not the conditions relating to financial value are fulfilled must be made when return is requested. The financial value is that of the object in the requested Member State.

The date for the conversion of the values expressed in ecus in the Annex into national currencies shall be 1 January 1993.

(1) Which are more than fifty years old and do not belong to their originators.

(2) As defined by the Court of Justice in its Judgment in Case 252/84, as follows: 'Collectors' pieces within the meaning of Heading No 99.05 of the Common Customs Tariff are articles which possess the requisite characteristics for inclusion in a collection, that is to say, articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value.'

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission,

Whereas: …………………………………………………………………………..

HAS ADOPTED THIS REGULATION:

Article 1

Definition

Without prejudice to Member States' powers under Article 30 of the Treaty, the term ‘cultural goods’ shall refer, for the purposes of this Regulation, to the items listed in Annex I.

Article 2

Export licence

1. The export of cultural goods outside the customs territory of the Community shall be subject to the presentation of an export licence.

2. The export licence shall be issued at the request of the person concerned:

a) by a competent authority of the Member State in whose territory the cultural object in question was lawfully and definitively located on 1 January 1993;

b) or, thereafter, by a competent authority of the Member State in whose territory it is located following either lawful and definitive dispatch from another Member State, or importation from a third country, or re-importation from a third country after lawful dispatch from a Member State to that country.

However, without prejudice to paragraph 4, the Member State which is competent in accordance with points (a) or (b) of the first subparagraph is authorised not to require export licenses for the cultural goods specified in the first and second indents of category A.1 of Annex I where they are of limited archaeological or scientific interest, and provided that they are not the direct product of excavations, finds or archaeological sites within a Member State, and that their presence on the market is lawful.
The export license may be refused, for the purposes of this Regulation, where the cultural goods in question are covered by legislation protecting national treasures of artistic, historical or archaeological value in the Member State concerned.

Where necessary, the authority referred to in point (b) of the first subparagraph shall enter into contact with the competent authorities of the Member State from which the cultural object in question came, and in particular the competent authorities within the meaning of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (5).

3. The export licence shall be valid throughout the Community.

4. Without prejudice to the provisions of paragraphs 1, 2 and 3, direct export from the customs territory of the Community of national treasures having artistic, historic or archaeological value which are not cultural goods within the meaning of this Regulation is subject to the national law of the Member State of export.

Article 3

Competent authorities

1. Member States shall furnish the Commission with a list of the authorities empowered to issue export licences for cultural goods.

2. The Commission shall publish a list of the authorities and any amendment to that list in the ‘C’ series of the Official Journal of the European Union.

Article 4

Presentation of licence

The export licence shall be presented, in support of the export declaration, when the customs export formalities are carried out, at the customs office which is competent to accept that declaration.

Article 5

Limitation of competent customs offices

1. Member States may restrict the number of customs offices empowered to handle formalities for the export of cultural goods.

2. Member States availing themselves of the option afforded by paragraph 1 shall inform the Commission of the customs offices duly empowered.

The Commission shall publish this information in the ‘C’ series of the Official Journal of the European Union.

Article 6
Administrative cooperation

For the purposes of implementing this Regulation, the provisions of Regulation (EC) No 515/97, and in particular the provisions on the confidentiality of information, shall apply mutatis mutandis.

In addition to the cooperation provided for under the first paragraph, Member States shall take all necessary steps to establish, in the context of their mutual relations, cooperation between the customs authorities and the competent authorities referred to in Article 4 of Directive 93/7/EEC.

Article 7

Implementing measures

The measures necessary for the implementation of this Regulation, in particular those concerning the form to be used (for example, the model and technical properties) shall be adopted in accordance with the procedure referred to in Article 8(2).

Article 8

Committee

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

Article 9

Penalties

The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

Article 10

Reporting

1. Each Member State shall inform the Commission of the measures taken pursuant to this Regulation.

The Commission shall pass on this information to the other Member States.

2. Every three years the Commission shall present a report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Regulation.
The Council, acting on a proposal from the Commission, shall examine every three years and, where appropriate, update the amounts indicated in Annex I, on the basis of economic and monetary indicators in the Community.

Article 11

Repeal

Regulation (EEC) No 3911/92, as amended by the Regulations listed in Annex II, is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex III.

Article 12

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18 December 2008.

ANNEX

CATEGORIES OF CULTURAL OBJECTS COVERED BY ARTICLE 1

A. 1. Archaeological objects more than 100 years old which are the products of:

- excavations and finds on land or under water

- archaeological sites

- archaeological collections

2. Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, of an age exceeding 100 years

3. Pictures and paintings executed entirely by hand, on any medium and in any material (1)
4. Mosaics other than those in categories 1 or 2 and drawings executed entirely by hand, on any medium and in any material (1)

5. Original engravings, prints, serigraphs and lithographs with their respective plates and original posters (1)

6. Original sculptures or statuary and copies produced by the same process as the original (1), other than those in category 1

7. Photographs, films and negatives thereof (1)

8. Incunabula and manuscripts, including maps and musical scores, singly or in collections (1)

9. Books more than 100 years old, singly or in collections

10. Printed maps more than 200 years old

11. Archives, and any elements thereof, of any kind or any medium which are more than 50 years old

12. (a) Collections (2) and specimens from zoological, botanical, mineralogical or anatomical collections;

(b) Collections (2) of historical, palaeontological, ethnographic or numismatic interest

13. Means of transport more than 75 years old

14. Any other antique items not included in categories A.1 to A.13

(a) between 50 and 100 years old:

- toys, games

- glassware

- articles of goldsmiths' or silversmiths' wares

- furniture

- optical, photographic or cinematographic apparatus

- musical instruments

- clocks and watches and parts thereof

- articles of wood

- pottery
- tapestries
- carpets
- wallpaper
- arms

(b) more than 100 years old

The cultural objects in categories A.1 to A.14 are covered by this Regulation only if their value corresponds to, or exceeds, the financial thresholds under B.

B. Financial thresholds applicable to certain categories under A (*in ecus*)

Value: 0 (Zero)

- 1 (Archaeological objects)
- 2 (Dismembered monuments)
- 8 (Incunabula and manuscripts)
- 11 (Archives)

15 000

- 4 (Mosaics and drawings)
- 5 (Engravings)
- 7 (Photographs)
- 10 (Printed maps)

50 000

- 6 (Statuary)
- 9 (Books)
- 12 (Collections)
- 13 (Means of transport)
- 14 (Any other object)

150 000

- 3 (Pictures)
The assessment of whether or not the conditions relating to financial value are fulfilled must be made when an application for an export licence is submitted. The financial value is that of the cultural object in the Member State referred to in Article 2 (2) of the Regulation.

The date for the conversion of values expressed in *ecus* in the Annex into national currencies shall be 1 January 1993.

(1) Which are more than 50 years old and do not belong to their originators.

(2) As defined by the Court of Justice in its judgment in Case 252/84, as follows: 'Collectors’ pieces within the meaning of heading No 97.05 of the Common Customs Tariff are articles which possess the requisite characteristics for inclusion in a collection, that is to say, articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value.'

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**Summary of Conflict of Laws Issues in Art Law**

1. Jurisdiction.
   Diversity jurisdiction when one of the parties comes from another state.
   For all jurisdictional issues (e.g. statute of limitations) the law of the forum applies.

2. The substantive issues that may arise most of the time are: a) contract issues, b) tort issues, c) property issues (replevin actions). The characterization of the issue is done by the forum according to its state’s law.

3. Applicable law. In contract issues American courts will usually apply the law the parties choose. If there is no such choice then the court will determine which state has an interest in seeing its law applied. Another version of this is the search for the state which has the most significant relationship with the contract (e.g. place of the alleged contracting or where the relationship is centered; place of the alleged performance; place of the subject matter; and place(s) of incorporation and business of the parties).

   In tort issues US courts used to apply the law of the place of the tort. At present most jurisdictions follow the most significant relationship rule. Some other jurisdictions follow a governmental interests approach or comparative impairment
analysis. The specific contacts to be taken into account when assessing which state has the most significant relationship to a tort claim include: the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centered. In the EU torts are governed by the law of the place where the damage occurred, or the law of the common habitual residence of the parties, or the law they agree upon, before or after the tortious act if all parties are traders, only after the event in all other cases.

In replevin actions (actions for the recovery of a good) there are certain specific interconnected issues to remember: a) Demand and refusal rule, b) discovery rule, c) due diligence, d) laches, e) good faith, time limitations. Of course you must not forget the role of the public policy of the forum that when threatened by the application of a foreign rule of law, it will not allow such application.

Time limitations and prescription are relatives. The latter is the civil law equivalent of time limitations. Acquisitive prescription (civil law) and liberative prescription (common law) are concepts leading to the changing of the owner of a good.

Whenever you face a case with international elements, and before going through conflicts analysis, you should see whether there is an international convention regulating the issue. In such a case the convention takes precedence. In the courts of EU countries first come the international conventions, then EU rules -if they cover the issue in question- and, last, domestic law (including conflict of laws rules).

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Inde, V., (1998), *Art in the Courtroom*, Praeger


Olsburgh, C., (2005), *Authenticity in the Art Market*, Institute of Art and Law


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