

2015

International Art and Cultural Heritage

Jacqueline Farinella

Alexandra Perloff-Giles

Kevin Ray

Musetta C. Durkee

Michael McCullough

See next page for additional authors

Recommended Citation

Jacqueline Farinella et al., *International Art and Cultural Heritage*, 49 ABA/SIL YIR 327 (2015)
<https://scholar.smu.edu/til/vol49/iss0/25>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Art and Cultural Heritage

Authors

Jacqueline Farinella, Alexandra Perloff-Giles, Kevin Ray, Musetta C. Durkee, Michael McCullough, Amanda A. Rottermund, and Kathleen A. Nandan

International Art and Cultural Heritage

JACQUELINE FARINELLA, ALEXANDRA PERLOFF-GILES, KEVIN RAY,
MUSETTA C. DURKEE, MICHAEL McCULLOUGH, AMANDA A. ROTTERMUND,
AND KATHLEEN A. NANDAN*

I. Conflict Preemption in Restitution Claims: *Von Saher v. Norton Simon Museum of Art*

On June 6, 2014, the U.S. Court of Appeals for the Ninth Circuit delivered the latest chapter in Marei von Saher's battle to reclaim a 16th-century diptych by Lucas Cranach the Elder.¹ The two wooden panels depicting Adam and Eve were confiscated by Nazis in World War II from Von Saher's relatives and are now in the collection of the Norton Simon Museum in Pasadena, California. In 2010, the Ninth Circuit had previously affirmed the lower court's dismissal of the action, holding that the California Code of Civil Procedure section 354.3, on which Von Saher had relied, was unconstitutional on the basis of field preemption.² In its second appearance in the Ninth Circuit, Von Saher's action to recover the art work has had more success, and this summer the Ninth Circuit reversed the district court's decision, which had dismissed Von Saher's claims for replevin and conversion as conflicting with the United States's express federal policy on recovery of Nazi-looted art and, thus, were barred by conflict preemption.³ The Ninth Circuit ruled that Von Saher's claim that she was the rightful owner of the work was not preempted as conflicting with federal foreign policy and remanded to the district court to address,

* Jacqueline Farinella is Director and Senior Associate Counsel at The Depository Trust & Clearing Corporation, and Co-Chair of the International Art & Cultural Heritage Law Committee (Editor). Alexandra Perloff-Giles is a student at Yale Law School (Part I). Kevin Ray is of Counsel, Greenberg Traurig LLP, and Co-Chair of the International Art & Cultural Heritage Law Committee (Part II and Editor). Musetta C. Durkee is an associate at Wilmer Cutler Pickering Hale and Dorr LLP (Part III). Michael McCullough is partner at Pearlstein & McCullough LLP, and Co-Vice-Chair of the International Art & Cultural Heritage Law Committee (Part IV). Amanda A. Rottermund is with Pearlstein & McCullough (Part IV). Kathleen A. Nandan is counsel at Reed Smith LLP (Part V). We want to thank Alexis Scott for her assistance in editing and reviewing the article.

1. *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712, 714 (9th Cir. 2014) [hereinafter *Von Saher II*].

2. Cal. Civ. Proc. Code § 354.3 (West 2002); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 957 (9th Cir. 2010) [hereinafter *Von Saher I*].

3. *Von Saher v. Norton Simon Museum of Art*, 862 F. Supp. 2d 1044, 1053 (C.D. Cal. 2012).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

328 THE YEAR IN REVIEW

among other issues, the issue of whether the case implicated the act of state doctrine.⁴ The museum submitted a petition for rehearing *en banc*, which was denied, and has since filed a petition for *writ of certiorari* to the Supreme Court of the United States.⁵

Painted in 1530, the Cranach diptych at issue in this case hung in the Church of the Holy Trinity in Kiev, Ukraine until its removal by Soviet authorities in 1927.⁶ In 1931, Dutch-Jewish art dealer Jacques Goudstikker purchased the diptych at a Soviet-sponsored auction of works previously owned by the Stroganoff family.⁷ Goudstikker, along with his wife, Desi, and son, Edo, fled the Nazis in 1940, leaving behind over 1,200 artworks.⁸ Goudstikker died in transit, and his heirs inherited the collection.⁹ Back in the Netherlands, however, the artworks were transferred to Nazi officials Herman Göring and Alois Miedl in a forced sale and under illegal contracts executed by unauthorized gallery employees.¹⁰

At the end of the war, the United States returned the recovered Goudstikker collection to the Dutch government to be held in trust for Goudstikker's heirs.¹¹ When Desi Goudstikker returned to the Netherlands in 1946, however, she was informed that the Dutch government had characterized the war-time sale of the works as "voluntary," barring her recovery under the government's post-war Restitution of Legal Rights Decree and requiring her to pay for the return of the recovered property.¹² Desi ultimately settled with the Dutch government to recover certain property sold to Miedl but did not make an official claim for the paintings sold to Göring, viewing the proceedings as unfair and stacked against her.¹³

In 1966, the Dutch government transferred the paintings to George Stroganoff-Scherbatoff, who claimed that the Soviet Union had wrongly seized the works from his family during the Bolshevik seizure in the 1920s and had unlawfully sold the works to Goudstikker in 1931.¹⁴ Norton Simon, founder of the Norton Simon Museum of Art, purchased the Cranach paintings from Stroganoff-Scherbatoff in 1971.¹⁵ Marei von Saher, who married Goudstikker's son Edo, is Goudstikker's sole living heir.¹⁶

The litigation began in May 2007 when Von Saher sued the museum for return of the artwork under California Code of Civil Procedure section 354.3, which provided a right

4. Von Saher II, 754 F.3d at 727.

5. Email from Leslie C. Denk, Dir. of Pub. Affairs, Norton Simon Museum, to author (Nov. 13, 2014, 5:30 P.M. EST) (on file with author).

6. Von Saher II, 754 F.3d at 715.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 716.

12. Von Saher v. Norton Simon Museum of Art, 754 F.3d 712, 714 (9th Cir. 2014).

13. *Id.* at 716-17; Advisory Comm. on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, General research findings (2002) (A report issued by the Ekkart Committee, established in 1999 by the Dutch government to investigate the provenance of art in the custody of the Netherlands, confirmed that the Dutch postwar restitution process for Jewish claimants was "legalistic, bureaucratic, cold and even callous").

14. Von Saher II, 754 F.3d at 718. See also Stroganoff-Scherbatoff v. Weldon, 420 F.Supp 18, 19 (S.D.N.Y. 1976).

15. Von Saher II, 754 F.3d at 718.

16. *Id.* at 717.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

ART & CULTURAL HERITAGE 329

of action for recovery of artwork from museums or galleries if such artwork was confiscated during the Holocaust and set a deadline for claims of December 31, 2010.¹⁷ In that initial case, the district court dismissed Von Saher's claim on the basis of field preemption, holding that section 354.3 of the California Code unconstitutionally violated the federal government's exclusive authority in the area of foreign affairs.¹⁸ On appeal, the Ninth Circuit affirmed this decision also on the basis of field preemption.¹⁹ Von Saher appealed the dismissal to the U.S. Supreme Court, but was denied *certiorari*. In February 2010, the California legislature amended section 338(c) of the California Code of Civil Procedure, regarding the statute of limitations for civil actions, extending the statute of limitations from three to six years after actual discovery by the claimant for claims concerning the recovery of fine art from "a museum, gallery, auctioneer, or dealer," and made this amendment specifically retroactive.²⁰ The amended statute notably removed reference to the Holocaust.²¹ On this basis, Von Saher filed an amended complaint in November 2011 in the district court. The museum answered by arguing exclusively that the claims are barred on the basis of conflict preemption, *i.e.* that the state law was in conflict with federal foreign policy. The district court again agreed with the museum and dismissed the action in March 2012.²² Von Saher appealed this decision to the Ninth Circuit.

This time the Ninth Circuit reversed the district court's decision, in a 2–1 opinion authored by Judge Dorothy Nelson, holding that the matter was a dispute between private parties and not barred by the foreign affairs doctrine on the basis of conflict preemption.²³ The museum had asserted that "Von Saher's claims for replevin and conversion" were in conflict with federal policy on the restitution of Nazi-looted art.²⁴ Under this theory, the museum argued state power must yield to federal government policy to ensure uniformity in the area of foreign affairs, particularly where there is clear conflict between the state and the federal policy.²⁵

In evaluating the museum's claim of conflict preemption, the Ninth Circuit looked to the 1998 Washington Conference Principles on Nazi Confiscated Art and the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues, both of which the United States and the Netherlands signed, indicating the U.S. foreign policy "commitment to respect the finality of 'appropriate actions' taken by foreign nations to facilitate" restitution of Nazi-looted art.²⁶ The Ninth Circuit held that such foreign policy was inapplicable in this instance because the artwork at issue was never subject "to postwar internal restitution proceedings in the Netherlands."²⁷ Because Desi Goudstikker never initiated

17. Civ. Proc. § 354.3.

18. *Von Saher v. Norton Simon Museum of Art*, No. CV 07-2866 JFW, 2007 WL 4302726, at *3 (C.D. Cal. Oct. 18, 2007).

19. *Von Saher I*, 592 F.3d at 957.

20. Cal. Civ. Proc. Code §§ 338(c)(3)(A), (B) (West 2010).

21. *Compare* Civ. Proc. § 354.3, *with* Civ. Proc. §§ 338(c)(3)(A), (B).

22. *Von Saher*, 862 F. Supp. 2d at 1053.

23. *Von Saher II*, 754 F.3d at 725.

24. *Id.* at 720.

25. *Id.* at 721–23, 719 (quoting *Am. Ins. Ass'n v. Garamendi*, 531 U.S. 396, 421 (2003)).

26. *Id.* at 721. The Ninth Circuit's ruling in this case is the first to consider that the Washington Principles constitute U.S. foreign policy and that private restitution claims "are consistent with that policy[.]" *Von Saher v. Norton Simon Museum of Art*, 82 U.S.L.W. 1944, 1 (U.S. June 17, 2014).

27. *Von Saher II*, 754 F.3d at 721.

SPRING 2015

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

330 THE YEAR IN REVIEW

recovery claims for “Adam” and “Eve,” the paintings were never subject to Dutch restitution proceedings and therefore Von Saher’s legal claims do not interfere with the finality of any foreign proceedings. Nor, according to the Ninth Circuit, did Von Saher’s claims conflict with the internal restitution proceedings conducted by the Netherlands in 1998–99 and 2004–06, because the Netherlands had already divested itself of the diptych by then when it transferred the paintings to Stroganoff-Scherbatoff in 1971.²⁸

The significance of this case, which follows the Ninth Circuit’s similar December 2013 decision in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, is that, where it had previously found that the statute of limitations under section 354.3 of the California Code of Civil Procedure—providing a right of action for recovery of art confiscated during the Holocaust—was preempted by federal foreign policy, it did not find the revised statute of limitations for claims for recovery of art—which excluded reference to the Holocaust—as preempted; although both statutes arguably have a similar effect.²⁹ The decision in *Von Saher II* also indicates the Ninth Circuit’s reluctance to consider claims for restitution of artwork allegedly seized by the Nazis as preempted by American foreign policy interests, and could have significant implications for future, similar restitution claims.

The battle, however, is not yet over for Von Saher. The Ninth Circuit remanded the case to the district court to decide whether the case implicates the act of state doctrine, under which the activities of one nation within its own borders cannot be challenged in another nation’s courts.³⁰ If the Dutch government’s 1966 “restitution” of the works to the Stroganoff heir “constituted an official act of a sovereign” state, the district court may find that Von Saher’s claims are barred by the act of state doctrine.³¹ While the U.S. Supreme Court has held that an exception to the act of state doctrine may exist in the context of “purely commercial acts . . . where foreign governments . . . exercise only those powers that can be exercised by private citizens,”³² the Ninth Circuit has never reached the question of whether a commercial exception applies in cases of restitution claims and declined to do so here.³³

In its decision, the Ninth Circuit also referenced the Hickenlooper Amendment, which “provides that the act of state doctrine does not apply to” confiscations “after January 1, 1959, by an act of state in violation of international law.”³⁴ Therefore, if the district court finds that the Dutch government’s 1966 transfer of the diptych constituted a confiscation of Desi Goudstikker’s property, the act of state doctrine may not be appropriate, under application of the Hickenlooper Amendment. The act of state doctrine and the applicability of any possible exceptions will be developed on remand to the district court.³⁵

28. *Id.*

29. See *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613 (9th Cir. 2013).

30. *Von Saher II*, 754 F.3d at 725 (quoting *Undershill v. Hernandez*, 168 U.S. 250, 252 (1897); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918)).

31. *Id.* at 726.

32. *Id.* at 726–27 (quoting *Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682, 695 (1976)).

33. *Id.* at 727.

34. *Id.* (citing 22 U.S.C. § 2370(e)(2)).

35. For an argument that Dutch property law gave Stroganoff-Scherbatoff good title to the diptych, see Bert Demarsin, *The Third Time is Not Always A Charm: The Troublesome Legacy of a Dutch Art Dealer: The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ARTS & ENT. L.J. 255, 310–12 (2010).

II. Preserving a Faltering Arts Institution: The Corcoran Gallery of Art

In August 2014, a D.C. Superior Court judge approved a controversial plan by the Corcoran Gallery of Art (Corcoran) to merge with the National Gallery of Art (National Gallery) and George Washington University (GWU), to save it and its art school from closure due to on-going financial struggles.

Founded in 1869, the Corcoran was the oldest art museum in the District of Columbia, and one of the oldest art museums in the United States.³⁶ Financier and industrialist William Corcoran formed the Corcoran as a charitable trust.³⁷ A few years after the gallery was established, the trustees created the Corcoran College of Art (later renamed the Corcoran College of Art + Design). Although the Corcoran's deed of trust did not mention an art school, Mr. Corcoran approved of the change, and provided additional funding in support of the art school's creation.³⁸ The Corcoran's endowment and fundraising had never been robust.³⁹ As its financial condition worsened, its trustees discussed a possible move of the institution to Alexandria, Virginia, which added to community concerns regarding the institution's finances. In 2013, the trustees "announce[d] a plan to explore a partnership with University of Maryland."⁴⁰ The University of Maryland proposal failed when it became clear that the university would not assume the Corcoran's debts, but preferred to establish a partnership with the Corcoran and planned instead to extend a loan to it.⁴¹

The Corcoran first proposed a plan to partition the art gallery from the art school in February 2014.⁴² Under the proposal, the Corcoran would contribute the greater part of its collection to the National Gallery, and contribute the art school (along with the Flag Building, where it is located, and certain artworks in its collection) to George Washington University (GWU).⁴³ On June 17, 2014, the Corcoran trustees filed a Petition for Cy Pres Determination,⁴⁴ seeking authorization to enter into agreements with the National Gallery and GWU to carry out this plan. On July 2, certain faculty, current and former students, and donors of the Corcoran College of Art + Design filed a Complaint and Petition to Intervene in Cy Pres Proceedings.⁴⁵ The intervenors objected to the proposed agreements with the National Gallery and GWU, and instead proposed two alternatives—the former University of Maryland proposal, and a proposal providing for an aggressive

36. Petition for Cy Pres Determination, at 2, Tr. Of the Corcoran Gallery of Art v. District of Columbia, No. 14-0003745, (D.C. Super. Ct. filed June 17, 2014) [hereinafter Cy Pres Petition].

37. *Id.*

38. *Id.* at 3–4.

39. See David Montgomery, *Corcoran Gallery: Why Don't Donors Give?*, WASH. POST (July 20, 2012), http://www.washingtonpost.com/entertainment/museums/corcoran-gallery-why-dont-donors-give/2012/07/19/gJQAJkNGyW_story.html; see also Lonae O'Neal Parker & Jacqueline Trescott, *A Corcoran Gallery of Art Timeline*, WASH. POST (Feb. 19, 2014), http://www.washingtonpost.com/entertainment/museums/a-corcoran-gallery-of-art-timeline/2014/02/19/b5d54c70-998e-11e3-80ac-63a8ba7f7942_story.html.

40. Parker, *supra* note 37, at 4.

41. Cy Pres Petition, *supra* note 35, at 9–10.

42. Parker, *supra* note 37, at 4.

43. Cy Pres Petition, *supra* note 35, at 11; Parker, *supra* note 37, at 4.

44. Cy Pres Petition, *supra* note 35, at 14–15.

45. Save the Corcoran's Partially Opposed Motion to Intervene in Cy Pres Proceedings, at 18–19, Tr. of the Corcoran Gallery of Art v. District of Columbia, No. 2014 CA 003745 B (D.C. Super. Ct. filed July 2, 2014).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

332 THE YEAR IN REVIEW

fundraising campaign. The intervenors argued that either alternative would be closer to the Corcoran's charitable purpose in forming the institution, because it would preserve the independence of the Corcoran.

The terms of a charitable trust may be modified via either of two equitable doctrines, *cy pres* and equitable deviation. "*Cy pres*" is an abbreviation of "*cy pres comme possible*" (as near as possible), and alters the substantive purposes of a charitable trust.⁴⁶ "Equitable deviation," by contrast, allows a court only to modify the administrative provisions of a trust under changed circumstances.⁴⁷ In the District of Columbia, petitions to modify or terminate a charitable trust under the doctrine of *cy pres* are governed by Uniform Trust Code section 19-1304.13, which provides, in pertinent part, "[t]he court may apply *cy pres* to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes."⁴⁸

In this case, the court required the Corcoran trustees to show both that the trust's charitable purpose has become impracticable or impossible to achieve, and that the proposed modification is "as near as possible to the settlor's original charitable purpose."⁴⁹ Although "impracticable" is not defined, the court required the trustees to demonstrate that "it would be unreasonably difficult, and that it is not viable or feasible, to carry out the current terms and conditions of the trust."⁵⁰ In the court's view, the trustees met this burden "because the Corcoran (i) had been operating at a deficit for a majority of the prior thirteen years, (ii) had incurred deficits even while deferring spending on maintenance of the Flagg Building, . . . (iii) cannot not alleviate its financial state by deaccessioning artworks from the collection (without risking Association of Art Museum Directors (AAMD) sanctions and loss of American Alliance of Museums (AAM) accreditation), and (iv) cannot within a reasonable time period, succeed with alternative fundraising."⁵¹

The court concluded that the GWU/National Gallery proposal was "consistent with Mr. Corcoran's intent and effectuates that intent as nearly as possible in light of the Corcoran's current financial condition."⁵² The court explained:

[u]nder the GW[U]/NGA proposal, the Flagg Building will be renovated, the school will continue and be strengthened by its partnership with a financially sound university, both the school and a significant portion of the collection will remain in the Flagg Building, and a gallery, although smaller, will remain open to the public in the Flagg Building, all results that are consistent with Mr. Corcoran's intent.⁵³

Although the dissolution of "the Corcoran as an independent institution is far from Mr. Corcoran's original charitable purpose, the court emphasized that the result was nevertheless nearer to that purpose than what other available options would have afforded."⁵⁴

46. See Alberto B. Lopez, *A Reevaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307, 1308 (2010).

47. *Id.*

48. D.C. Code § 19-1304.13 (2004).

49. Trustees of the Corcoran Gallery of Art v. Dist. of Columbia, No. 14-CA-3745 B, slip op. at 35 (Super. Ct. D.C. Aug. 18, 2014) (mem. op.).

50. *Id.* at 38-39.

51. Kevin P. Ray, *When A Museum Falters: The Corcoran Gallery of Art*, GREENBERG TRAURIG (Nov. 4, 2014), <http://www.gtlaw-culturalassets.com/2014/11/when-a-museum-falters-the-corcoran-gallery-of-art/>.

52. Trustees of the Corcoran Gallery of Art, No. 14-CA-3745 B at 84.

53. *Id.* at 71-72.

54. Ray, *supra* note 51.

III. Museum Due Diligence and Repatriation Efforts: Museum of Fine Arts, Boston Returns Cultural Objects to Nigeria

In June 2014, the Museum of Fine Arts, Boston (MFA) reached an agreement with Nigeria's National Commission of Museums and Monuments Nigeria (NCMM) to voluntarily repatriate eight objects from its collection.⁵⁵ The agreement, as well as the initiative taken by the MFA to uncover the provenance of the objects, put the museum at the forefront of institutions as part of a growing trend to exercise due diligence around acquisitions.

Based on proactive research conducted by MFA's provenance curator, Victoria Reed, of more than 300 objects bequeathed to the MFA by museum benefactors William and Bertha Teel, the MFA concluded that at least eight objects were illegally removed from Nigeria before entering the United States.⁵⁶ The objects include terracotta figures that are generally known to be at high risk for theft and looting, as well as other figures that were likely stolen and illegally exported.⁵⁷

The Teels' gift to the MFA included access to the Teels' papers regarding the objects' ownership histories, and the museum consistently emphasized that there was no reason to doubt that the Teels acquired all of these objects in good faith, and were not implicating the Teels in any wrongdoing.⁵⁸ In her research, Reed focused on documents authorizing sales and transfers of the objects, and determined, with the help of Nigerian authorities, that "several documents which purportedly authorized their sale and export were forged."⁵⁹ Reed also relied on the International Council of Museums "Red List,"⁶⁰ which highlights works at high risk for looting and illegal sales, to identify two specific works in the collection acquired from the Teels.⁶¹ Once it was determined that the eight works had been acquired under dubious title and authority, the MFA contacted the NCMM to ask for permission to acquire the works, despite their unclear history.⁶² After the NCMM refused, the NCMM and MFA entered into negotiations to repatriate the objects to Nigeria.⁶³ Unique to the MFA's approach in this case is that the museum's efforts to uncover

55. *Museum of Fine Arts, Boston, Transfers Eight Antiquities to Nigeria*, RUTGERS SCHOOL OF ARTS AND SCIENCES (June 26, 2014), <http://chaps.rutgers.edu/news/news/2014-mfa-boston-repatriation-nigeria.html> [hereinafter RUTGERS]. "The objects include (1) Head, African, Edo peoples, Nigeria, Benin kingdom, about 1750; (2) Memorial screen (duen fubara), African, Ijaw Kalabari peoples, Nigeria, late 19th century; (3) Head, African, Nok peoples, Nigeria, About 500 B.C.–A.D. 200; (4) Head of an Oba Edo peoples, Benin Kingdom, Nigeria, 19th century; (5) Male Figure, African, Nok peoples. Nigeria, About 500 B.C.–A.D. 200; (6) Portrait head, African, Yoruba peoples, Ife Kingdom, Nigeria, 12th–14th century; (7) Oron Ancestral Figure (Ekpu), Oron peoples, southeastern Nigeria; (8) Altar figure, Benin peoples, Nigeria." *Id.*

56. *See id.* *See also* Geoff Edgers, *Museum of Fine Arts Returns 8 Artifacts to Nigeria*, THE BOSTON GLOBE (June 26, 2014), <http://www.bostonglobe.com/lifestyle/style/2014/06/26/museum-fine-arts-returns-artifacts-nigeria/z2RenPtuhh9qyPoSi05fRO/story.html>; Tom Mashberg, *Museum of Fine Arts in Boston Returns Art to Nigeria*, N.Y. TIMES (June 26, 2014, 4:26 PM), http://artsbeat.blogs.nytimes.com/2014/06/26/museum-of-fine-arts-in-boston-returns-art-works-to-nigeria/?_r=0.

57. RUTGERS, *supra* note 55.

58. *See id.*

59. Mashberg, *supra* note 56.

60. *See Red List, the Looting of African Archaeological Objects*, INT'L COUNCIL OF MUSEUMS (2000), http://icom.museum/fileadmin/user_upload/images/Redlists/Africa/Red_List_Africa2.pdf.

61. Edgers, *supra* note 56.

62. Andrea Shea, *The Boston MFA Returns 8 Looted Antiquities to Nigeria*, THE ARTERY (June 26, 2014), <http://artery.wbur.org/2014/06/26/mfa-returns-antiquities-nigeria>.

63. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

334 THE YEAR IN REVIEW

the provenance of the objects did not follow a legal claim by the Nigerian government to repatriate the objects, but was instead undertaken voluntarily.

Laws governing the repatriation of looted or impermissibly exported art objects, artifacts, and antiquities can be found under both international treaties and domestic acts implementing those treaties.⁶⁴ While Nigeria is a party to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNESCO's National Program Officer of Culture has recently warned that Nigeria, in particular, must protect its cultural property from looting by taking steps to ensure implementation and enforceability of international convention protections within Nigeria's legal framework.⁶⁵ Notably, Nigeria has not applied for import restrictions for cultural property under the United States's Convention on Cultural Property Implementation Act.⁶⁶

While there has been a shift in recent decades at art museums and institutions toward repatriating objects to their countries of origin when the provenance of those objects are dubious, the MFA's actions in voluntarily examining the provenance of objects, especially prior to any legal claim, are a rare example of the provenance research being undertaken by acquiring museums. Museums that take these proactive steps safeguard the integrity of their collections,⁶⁷ and voluntarily take responsibility for protecting and respecting heritage from cultures across the globe.⁶⁸

IV. Regulating Trafficking in Ivory Objects Through Director's Order 210 Under the Endangered Species Act of 1973

On February 25, 2014, in an effort to limit trade in African elephant ivory in the United States and combat the ongoing poaching crisis in Africa, Director Daniel M. Ashe of the United States Fish and Wildlife Service (Service) issued Director's Order No. 210 (Order 210).⁶⁹ Order 210 prohibits the commercial importation of objects containing African elephant ivory, and allows for the continued importation of non-commercial shipments of

64. See generally Carol A. Roehrenbeck, *Repatriation of Cultural Property—Who Owns the Past? An Introduction to Approaches and Selected Statutory Instruments*, 38 INT'L J. OF LEGAL INFO. 185-200 (Summer 2010), <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1216&context=ijli>.

65. See *id.*; *Nigeria: UNESCO Warns Nigeria Against Cultural Extinction*, DAILY INDEPENDENT (LAGOS) (July 8, 2014), <http://allafrica.com/stories/201407090081.html> (noting that UNESCO's National Program Officer of Culture told Nigerian news outlet that Nigeria needed to take efforts to domesticate conventions that would help Nigeria in protecting cultural artifacts and heritage, stating that "[a]lthough, it is a collective responsibility, but government must do what it takes by domesticating the convention that will preserve the country's works").

66. *Eight Teel Gifts Returned to Nigeria by MFA Boston*, COMMITTEE FOR CULTURAL POLICY, <http://committeeforculturalpolicy.org/eight-teel-gifts-returned-to-nigeria-by-mfa-boston/> (last visited Jan. 16, 2015).

67. In addition to forged export documents and looting, there is also a robust forgery market for African antiquities. See Michael Brent, *Faking African Art*, 54 ARCHEOLOGY 1 (Jan./Feb. 2001), <http://www.coupdefoudre.com/CurrentArticle/TerracottaForgeries.html>.

68. There are counter-voices to repatriation, arguing that some nations cannot safeguard the artifacts (due to war and/or lack of preservation equipment and expertise) and/or use these artifacts to bolster nationalist fervor. See James Cuno, *Culture Wars: The Case Against Repatriating Museum Artifacts*, FOREIGN AFFAIRS (Nov./Dec. 2014), <http://www.foreignaffairs.com/articles/142185/james-cuno/culture-war>.

69. DEP'T OF THE INTERIOR, DIRECTOR'S ORDER NO. 210, GUIDANCE ON THE ANTIQUE EXCEPTION UNDER THE ENDANGERED SPECIES ACT (ESA) at App. A (2014).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

ART & CULTURAL HERITAGE 335

objects that fit within certain designated exceptions (i.e., musical instruments legally acquired prior to February 26, 1976).⁷⁰ In doing so, Order 210 reversed a thirty-two-year interpretation of the exception for antique articles (Antiques Exception) in the Endangered Species Act of 1973 (ESA)⁷¹ by re-interpreting the designated port requirement in ESA Section 10(h), a provision that prohibits the importation of objects other than through certain designated ports, and banned the interstate sale and transport of objects containing ESA-listed species that were either (a) made in the United States, or (b) imported prior to the establishment of the designated port system in 1982.⁷²

The Endangered Species Preservation Act (ESPA), the predecessor to the ESA, was passed in 1966 to provide a means for listing native animal species as endangered and giving them limited protection.⁷³ The ESPA allowed the Departments of Interior, Agriculture, and Defense to protect listed species and preserve the species' habitats.⁷⁴ In 1969, Congress amended the ESPA through the Endangered Species Conservation Act of 1969 (ESCA).⁷⁵ The ESCA's purpose was to provide additional protection for species in danger of worldwide extinction by prohibiting their importation and subsequent sale in the United States. The designated port requirement was first enacted into legislation in Section 4(d) of the ESCA, which provides that, "importation of such fish or wildlife into any port in the United States, except those . . . designated, shall be prohibited after the effective date of such designations . . ." ⁷⁶ Section 4(d) applied prospectively to imports into a designated port and not to materials imported prior to the effective date of designation or to domestically made materials.⁷⁷

During a 1973 conference in Washington, D.C., eighty nations signed the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁷⁸ CITES's purpose is to monitor, and in some cases restrict, international commerce in species of plants and animals believed to be harmed by trade. In response to this international effort, Congress passed the ESA in 1973 to strengthen the regulatory regime started in the ESCA. However, the ESA as passed in 1973 did not contain an exception for the trade in antiques. On September 19, 1978, the House Subcommittee on Fisheries and Wildlife Conservation and the Environment considered a bill in an open markup session to amend the ESA. According to the transcript of the Open Session, the Antique Exception was introduced with the intent to exempt articles manufactured before 1830, such as jewelry, that contained materials from endangered species.⁷⁹ When adopted, Section

70. *Id.*

71. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (current version at 16 U.S.C. § 1531 (2002)).

72. *Id.* at 257.

73. See Endangered Species Preservation Act, Pub. L. No. 89-669 (1966) (amended 1969).

74. *Id.*

75. See Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

76. *Id.* § 4(d).

77. See *id.*

78. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

79. *Endangered Species Act Amendments of 1978: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. of Merchant Marine and Fisheries, 1978 Leg., 95th Sess.* (transcript of Open Session, Sep. 19, 1978).

SPRING 2015

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

336 THE YEAR IN REVIEW

7(h)(1) of the Endangered Species Act Amendments of 1978 (ESAA-78)⁸⁰ created what is now known as the Antiques Exception, which excluded from the ESA in Section 10(h) any article which: (a) was made before 1830; (b) is composed in whole or in part of any listed endangered or threatened species; (c) has not been repaired or modified with any part of any such species after the date of the Act; and (d) is entered at a designated port.⁸¹ Later, the Endangered Species Act Amendments of 1982 replaced the 1830 test date with a rolling 100-year test and defines antique materials as those “not less than 100 years of age,” in order to harmonize the Antiques Exception with the U.S. Tariff Schedule’s definition of ‘antique.’⁸²

Order 210 was issued to curtail the Service’s practice of exempting antiques containing African elephant ivory from the moratorium on imports imposed by the African Elephant Conservation Act of 1989 (AECA).⁸³ In issuing Order 210, the Service took the view that allowing the continued importation of antique African elephant ivory contributed to the continued threat against African elephants because forged paperwork and other abuses created a “loophole” for unscrupulous traders.⁸⁴ Order 210 also shifted the burden to sellers of objects in interstate commerce to prove that objects containing African elephant ivory were purchased before the AECA import moratorium was instituted 1990 or that the object containing Asian elephant ivory and other endangered species fall within the Antiques Exception under the ESA. Given that these documentation requirements are a new practice, Order 210 caused significant public outcry, particularly among musicians, antique dealers, gun collectors, and others.⁸⁵

Following discussions with art market stakeholders, the Service amended Order No. 210 on May 15, 2014 (Amended Order). The Amended Order provides that the Service, in its enforcement discretion, will not enforce the designated port requirement against bona fide antiques imported prior to 1982 and articles that were created in the United States and never imported. The FAQs and other materials accompanying the Amended Order state that the Service’s revised position on the Antiques Exception is based on the view that, among other things, the limited exception for the trade in certified antiques does not contribute to the demand for freshly poached elephant ivory.

V. International Art Smuggling: Update on Subhash Kapoor

Events following Subhash Kapoor’s 2011 arrest in Germany and 2012 extradition to India continued to unfold in 2014.⁸⁶ Kapoor is alleged to have illegally trafficked in stolen

80. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978) (current version at 16 U.S.C. § 1531 et seq.).

81. 16 U.S.C. § 1539(h) (1980) (prior to 1982 amendment).

82. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 6, 96 Stat. 1412 (1982) (current version at 16 U.S.C. § 1531 et seq.).

83. *Fish and Wildlife Service Tightens Restrictions on Imports Under the Endangered Species Act*, COVINGTON (Apr. 1, 2014), http://www.cov.com/files/Publication/acc367b7-60ac-47cf-b8fa-b7e35a331b8f/Presentation/PublicationAttachment/99f1169b-83e1-4808-b416-b89427bccd19/Fish_and_Wildlife_Service_Tightens_Restrictions_on_Imports_Under_Endangered_Species_Act.pdf.

84. *See generally id.*

85. *See id.*

86. Kapoor’s arrest and extradition as well as the United States authorities’ 2012 seizures of cultural property valued in excess of \$100 million USD has generated substantial press, largely outside of the United States, which provides a useful background and introduction to the allegations against Kapoor and his associ-

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

ART & CULTURAL HERITAGE 337

antiquities looted from temples throughout India, through both his Manhattan gallery and import business, Art of the Past and Nimbus Import/Export.⁸⁷

In December 2013, Art of the Past's manager, Aaron Freedman, pleaded guilty to multiple counts of possession of stolen property in Manhattan Supreme Court and admitted that he, on behalf of Kapoor, arranged for the shipment of stolen antiquities and manufactured false provenances for illicit cultural property.⁸⁸ Freedman, who agreed to cooperate with the investigation against Kapoor, has not yet been sentenced.⁸⁹

Kapoor's trial in India, which was scheduled to begin in March 2014, has been repeatedly adjourned.⁹⁰ Although Kapoor continues to maintain his innocence, to date, three of the museums that purchased antiquities from Kapoor—the Australia National Gallery, the Art Gallery of New South Wales, and the Toledo Museum of Art—have returned those antiquities to the Indian government, conceding that the objects in question appear to have been stolen.

Australian Prime Minister Tony Abbott returned the two idols that were held by Australian museums to the Indian government in September 2014. In 2008, the Australia National Gallery, located in Canberra, purchased a bronze statue known as Shiva as Lord of the Dance (Nataraja) from Kapoor for US\$5 million.⁹¹ The statue, originating from the Chola dynasty (11–12th century) and from Tamil Nadu in India is now believed to be that of Shiva Nataraja, stolen between 2005 and 2006 from the Brihadeeswara Temple in Sripurathan (approximately 300 km from Chennai).⁹² A civil lawsuit filed by the Australia National Gallery against Kapoor is still pending.⁹³ Prime Minister Abbott also re-

ates. See, e.g., Damayanti Datta, *Mystery of The Missing Gods*, INDIA TODAY (April 11, 2014), <http://indiatoday.intoday.in/story/brihadeeswara-temple-sripurathan-shiva-nataraja/1/355127.html>; Adam Matthews, *The Man Who Sold the World*, GQ INDIA (Dec. 5, 2013), <http://www.gqindia.com/get-smart/pop-culture/man-who-sold-world>; Narayan Lakshman, *Exposing a Multidecade Smuggling Operation*, THE HINDU (Nov. 11, 2012), <http://www.thehindu.com/news/national/exposing-a-multidecade-smuggling-operation/article4085700.ece>; Jason Felch, *Shiva Goes Home: Australia's Prime Minister Returns Looted Kapoor Idols to India* (Sept. 4, 2014), <http://chasingaphrodite.com/tag/subhash-kapoor/>. For an update on the collection of artwork found in the possession of German national, Cornelius Gurlitt, see the 2014 ABA YIR Europe article.

87. Like many countries with a rich archaeological heritage, India has enacted laws governing trade in its cultural patrimony. Specifically, Indian law prohibits the export of cultural property created more than 100 years ago. See Antiquities and Art Treasures Act of 1972, Act. No. 52 of 1972, available at http://asi.nic.in/pdf_data/8.pdf

88. Tom Mashberg, *Assistant to Accused Antiquities Smuggler Pleads Guilty*, N.Y. TIMES (Dec. 3, 2013, 10:09 PM), http://artsbeat.blogs.nytimes.com/2013/12/04/assistant-to-accused-antiquities-smuggler-pleads-guilty-to-possessing-looted-items/?_r=1.

89. See *id.*

90. See Michaela Boland, *Subhash Kapoor's Dancing Shiva Plea to Attorney General George Brandis*, THE AUSTRALIAN (Oct. 28, 2014 12:00 AM), <http://www.theaustralian.com.au/arts/visual-arts/subhash-kapoors-dancing-shiva-plea-to-attorneygeneral-george-brandis/story-fnm1cx8m-1227104068555>; see also *Australia Returns Two Stolen Ancient Priceless Idols to India*, IBN LIVE, (Sept. 5, 2014 10:59 AM), <http://ibnlive.in.com/news/australia-returns-two-stolen-ancient-priceless-idols-to-india/496426-62-128.html>.

91. *India Asks Australian Gallery to Return Stolen Nataraja Idol*, THE HINDU (Mar. 26, 2014), <http://www.thehindu.com/news/international/world/india-asks-australian-gallery-to-return-stolen-nataraja-idol/article5834817.ece>.

92. See Damayanti Datta, *Mystery of The Missing Gods*, INDIA TODAY (Apr. 11, 2014), <http://indiatoday.intoday.in/story/brihadeeswara-temple-sripurathan-shiva-nataraja/1/355127.html>.

93. Shortly before the Indian government's March 2014 request for repatriation of the statues, in February 2014, the National Gallery commenced a civil action against Art of the Past, Kapoor, and Freedman in New York State Supreme Court. *National Gallery of Australia v. Art of the Past, Inc.*, 650395/2014 (Sup. Ct.

SPRING 2015

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

338 THE YEAR IN REVIEW

turned to India a stone Ardhanarishvara, purchased by the Art Gallery of New South Wales from Kapoor in 2004.⁹⁴ The statue, which depicts Shiva in half female form, dates to the 10th century and, like the Shiva Nataraja, is alleged to have been stolen from a temple in Tamil Nadu.⁹⁵

In October 2014, the Toledo Museum of Art announced that it would return to the Indian government a bronze statue of Ganesha, a Hindu deity, purchased from Kapoor in 2006. The museum stated that it began an inquiry into the Ganesha's provenance upon its July 2013 receipt of an Indian police report with photographs of idols stolen from Sripuranthan Village in Tamil Nadu, including an image of a Ganesha figure that closely resembled the Ganesha purchased by the museum from Art of the Past.⁹⁶ The museum noted that the Ganesha's provenance, as well as the provenance of other items acquired from Kapoor, appeared to have been falsified.⁹⁷ The investigation into Kapoor and his activities continues both in the United States and abroad.

N.Y.C.). The complaint, which includes claims of fraud, unjust enrichment, and breach of contract in connection with the Museum's purchase of the Shiva Nataraja statue, remains pending. *Id.* According to the electronic docket, none of the defendants have answered the complaint: the plaintiff was granted additional time to serve Kapoor, who remains incarcerated in an Indian prison pending trial, and Freedman's time to answer has been extended several times by stipulation. *Id.*

94. See Sid Maher, *Narendra Modi Says India Deeply Grateful for Return of Stolen Shivas*, THE AUSTRALIAN (Sept. 6, 2014), <http://www.theaustralian.com.au/arts/visual-arts/narendra-modi-says-india-deeply-grateful-for-return-of-stolen-shivas/story-fn9d3avm-1227049811026>; see also *Australian PM Tony Abbott Returns 11th Century Stolen Idols to Modi*, THE TIMES OF INDIA (Sept. 5, 2014), <http://timesofindia.indiatimes.com/india/Australian-PM-Tony-Abbott-returns-11th-century-stolen-idols-to-Modi/articleshow/41807643.cms>.

95. See *Australian PM Tony Abbott Returns 11th Century Stolen Idols to Modi*, *supra* note 94.

96. See *Kapoor Acquisitions*, TOLEDO MUSEUM OF ART, <http://www.toledomuseum.org/provenance/kapoor-acquisitions/>.

97. *Id.*; see also M. Kalyanaram, *Stolen Ganesha in US to Return Soon*, THE TIMES OF INDIA (Oct. 4, 2014 7:05 AM), <http://timesofindia.indiatimes.com/city/chennai/Stolen-Ganesha-in-US-to-return-soon/articleshow/44279190.cms>; Roneisha Mullen, *Bronze Statue on Display at Toledo Museum of Art Being Returned to Government of India*, TOLEDO BLADE (Oct. 2, 2014), <http://www.toledoblade.com/Art/2014/10/02/1-000-year-old-statue-on-display-at-Toledo-Museum-of-Art-being-returned-to-Government-of-India.html>; Jason Felch, *Trouble in Toledo: Feds Investigate Stolen Ganesha, Other Objects from Kapoor at Toledo Museum*, CHASING APHRODITE (Feb. 24, 2014), <http://chasingaphrodite.com/2014/02/24/trouble-in-toledo-documents-show-museum-bought-stolen-ganesh-from-kapoor/>.

VOL. 49

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**