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## International Art and Cultural Heritage

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## International Art and Cultural Heritage

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### I. Restitution of Nationalized Cuban Cultural Property

In Spring 2019, President Trump lifted the suspension of Title III of the Helms-Burton Act (the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-6091), twenty-three years after President Clinton signed it into law.<sup>1</sup> Title III creates a private cause of action and authorizes U.S. nationals and those otherwise subject to U.S. jurisdiction with claims to property confiscated by the Cuban government to file suit in U.S. courts against both the Cuban government and non-Cuban entities that may be “trafficking” in the confiscated property.<sup>2</sup>

When the Helms-Burton Act was signed into law in 1996, it granted the president the authority to suspend the lawsuit provisions for periods of up to six months to promote the national interest of the United States and to expedite a transition to democracy in Cuba.<sup>3</sup> President Clinton and every president since have exercised that suspension authority, until President Trump. Announced in April 2019, the lifting of the suspension was intended to choke off foreign investment in Cuba, and thus raise the pressure on the island nation to back off its support for Venezuelan President Nicolás Maduro.<sup>4</sup>

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1. Alex Daughtery & Michael Wilner, *Trump will allow Cuban Americans to sue for confiscated property in Cuba*, MIAMI HERALD (Apr. 17, 2019), <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article229321599.html>.

2. *See id.* Under this Act, a non-U.S. company that “traffics in property which was confiscated by the Cuban Government on or after January 1, 1959,” can be sued in U.S. federal court. 22 U.S.C. § 6082(a)(1)(A). In other words, this Act aims to create jurisdiction over non-U.S. entities who do business in Cuba, so long as they also have jurisdictional ties to the United States.

3. *What is the Helms-Burton Act, and why does Article III matter?*, TRT WORLD para. 6 (Mar. 14, 2019), <https://www.trtworld.com/americas/what-is-the-helms-burton-act-and-why-does-article-iii-matter-24946>.

4. Uri Friedman & Kathy Gilsinan, *Trump’s Venezuela Policy: Slow Suffocation*, THE ATLANTIC para. 10–12 (Apr. 17, 2019), <https://www.theatlantic.com/politics/archive/2019/04/trump-administration-announces-arcane-new-sanctions/587398/>.

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Following the announcement, companies rushed to file suit in U.S. federal courts, alleging that works of art and other collectors' items could form the basis of claims under Title III. To be eligible to sue under Title III, the property at issue must have been valued at \$50,000 or more at the time it was seized (around \$400,000 in today's dollars), and the potential defendant must be using the property for commercial activity or otherwise benefiting from the confiscated property.<sup>5</sup>

Cuba in the 1950s was home to dozens of extremely wealthy families and patrons of the arts, whose collections were seized from their private homes, catalogued, and disbursed.<sup>6</sup> Paintings, public sculpture, architecture, books, and decorative arts were confiscated. Some were placed in Cuba's museums and in the private homes of government officials, while others were sold abroad through private dealers and at auction.<sup>7</sup> The Cuban National Heritage Trust estimates that more than a million artworks, books, jewels, pieces of furniture, and other works of art were sent out of Cuba for sale abroad in the decades since 1960.<sup>8</sup> The lifting of the suspension of Title III represents a unique opportunity to reclaim this huge pool of cultural property.

Two types of Title III claims can be brought: certified and uncertified claims.<sup>9</sup> "Certified claims" apply to U.S. persons and companies who were American citizens or otherwise subject to U.S. jurisdiction at the time their property was confiscated, and who then submitted claims that were evaluated and certified by the U.S. Justice Department's Foreign Claims Settlement Commission ("FCSC").<sup>10</sup> The FCSC has certified nearly 6,000 claims of U.S. citizens and companies relating to the nationalization of property in Cuba.<sup>11</sup> Meanwhile, "uncertified" claims apply to individuals and companies who were nationals of Cuba (or any other country, except the United States) at the time their property was confiscated, and who later became naturalized or incorporated respectively, in the United States.<sup>12</sup>

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5. Carmen Sesin, *Claims under Cuban seized-property law are fewer than expected*, NBC NEWS (June 3, 2019), <https://www.nbcnews.com/news/latino/claims-under-cuban-seized-property-law-are-fewer-expected-n1010961>.

6. Mari-Claudia Jiménez, *The Future: Restituting Looted Cuban Art*, ASS'N FOR THE STUDY OF THE CUBAN ECON. (Nov. 30, 2009), [https://www.ascecuba.org/asce\\_proceedings/restituting-looted-cuban-art/](https://www.ascecuba.org/asce_proceedings/restituting-looted-cuban-art/).

7. JOSEPH L. SCARPACI & ARMANDO H. PORTELA, *CUBAN LANDSCAPES: HERITAGE, MEMORY AND PLACE* 103 – 04, (Guilford Press, 2009).

8. *See id.* Many of these works were sold abroad following the dissolution of the Soviet Union in 1989, so Cuba could raise capital from abroad. One impediment to restituting these works is that many were sold underground.

9. U.S. FOREIGN CLAIMS SETTLEMENT COMM'N, SEC. II COMPLETION OF THE CUBAN CLAIMS PROGRAM UNDER TITLE V OF THE INT'L CLAIMS SETTLEMENT ACT OF 1949 98 (1972).

10. *Id.*

11. *Id.*

12. *Id.*

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Exxon Mobil was one of the first companies to file suit based on an FCSC-certified claim. It brought a claim against two Cuban companies, both affiliated with the Cuban government, in federal court in Washington, D.C., for use of an oil refinery and other properties seized by the Castro regime in 1960.<sup>13</sup> Exxon alleges the FCSC certificate proves its ownership of the refinery and other property said to be worth nearly half a billion dollars today.<sup>14</sup>

Cuba maintains that the activation of Title III is a violation of international law, due to its “flagrant extraterritoriality.”<sup>15</sup> As such, it has indicated it will consider all demands under Helms-Burton to be null. Indeed, for a time, the Cuban government did not respond to the Exxon lawsuit. Recently, however, it changed course.<sup>16</sup> In October of last year, the Cuban companies filed a motion to dismiss, arguing that they are immune from suit under the Foreign Sovereign Immunities Act.<sup>17</sup> The Cuban companies have also made an argument under the due process clause of the U.S. Constitution, claiming that the requirements for personal jurisdiction in U.S. courts are not met.<sup>18</sup>

Another of the first wave of cases filed under Title III is against Carnival Corporation.<sup>19</sup> Havana Docks Corp., the previous owner of the seaport in Havana claims that Carnival is trafficking in stolen property by using the terminal, which was confiscated in 1960.<sup>20</sup> Carnival initially argued that Havana Docks had only a temporary property interest in the port, which expired in 2004.<sup>21</sup> In other words, at the time Carnival began using the port in 2016, the allegedly “trafficked” property rightfully belonged to the Cuban government, not the plaintiff.<sup>22</sup> After a series of procedural zigzags, the federal judge held that Havana Docks had been granted a ninety-nine-year leasehold interest, not a leasehold interest ending in 2004, and that plaintiff is thus eligible to pursue a remedy under Title III if it files an amended

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13. Complaint at 2, *Exxon Mobil Corp. v. Corporacion CIMEX S.A.*, No. 1:19-CV-01277 (D.D.C. May 2, 2019) ECF No. 1.

14. *Id.* at 9.

15. Jorge Ruiz Miyares, *Cuba rejects U.S. announcement on Title III of Helms-Burton Law*, RADIO HAVANA CUBA (Jan. 16, 2019), <http://www.radiohc.cu/en/noticias/nacionales/181213-cuba-rejects-us-announcement-on-title-iii-of-helms-burton-law>.

16. The impetus behind Cuba’s change of heart may be that it would be against Cuba’s interests for a global entity like Exxon to have a U.S. federal court default judgment it can use to seize Cuba’s assets in countries around the world.

17. Memorandum of Points and Authorities in Support of Motion to Dismiss, *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, No. 1:19-CV-01277, at 7–29 (D.D.C. Oct. 8, 2019).

18. *Id.* at 30.

19. Complaint at 1, *Havana Docks Corp. v. Carnival Corp.* No. 1:19-CV-21724 (S.D. Fla. May 1, 2019) ECF No. 1.

20. *Id.* at 3.

21. *Id.* at 2.

22. *Id.* at 5.

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complaint. In other words, the court found that there is a remedy available to plaintiff under Title III.<sup>23</sup>

In another case against Carnival, Javier Garcia-Bengochea, a Cuban-born neurosurgeon who now resides in Florida, is asserting ownership to two docks in Santiago de Cuba.<sup>24</sup> Carnival sought a motion to dismiss, but the district court judge ruled that the plaintiff's ownership claim involves factual determinations that are not appropriate to decide at the motion to dismiss stage.<sup>25</sup> Carnival is now arguing that Garcia-Bengochea does not actually own the claim on which he is suing, and that even if he does, he did not acquire ownership until after 2000, which would be too late for him to be able to sue under Title III, which allegedly sets March 12, 1996 as the date by which plaintiffs must acquire ownership of a claim to any property confiscated by that point.<sup>26</sup>

The Garcia-Bengochea family has claims to other confiscated property. Notably, the family's art collection was nationalized and placed in the Havana Museum of Fine Arts.<sup>27</sup> The collection includes a work by Francesco Guardi, an eighteenth-century painter in the Venetian School.<sup>28</sup> While the location of this piece is known—a few years ago, the painting was seen hanging in the Havana Museum of Fine Arts<sup>29</sup>—the family's other artworks have been loaned to museums in the United States or sold abroad, and their locations are unknown. The family claims, for example, that both the Metropolitan Museum of Art and the Smith College Museum of Art have executed loans of the family's pieces from the Havana Museum.<sup>30</sup> But it is unclear if any of the works are currently on loan in the United States. The family may now have a means to try to reclaim their stolen art.

The statute defines trafficking broadly, i.e., as “knowingly and intentionally” selling, transferring, disposing of or engaging “in commercial activity,” without the authorization of a U.S. national with a claim to that

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23. Omnibus Order at 28, *Havana Docks Corp. v. Carnival Corp.* No. 1:19-CV-21724 (S.D. Fla. Apr. 20, 2020) ECF No. 79.

24. Complaint at 3, *Garcia-Bengochea v. Carnival Corp.*, No. 1:19-CV-21725 (S.D. Fla. May 2, 2019), ECF No. 1.

25. Order Denying Carnival Corporation's Motion to Dismiss at 9, *Garcia-Bengochea v. Carnival Corp.*, No. 1:19-CV-21725 (S.D. Fla. Aug. 26, 2019), ECF No. 41.

26. Motion for Judgment on the Pleadings, *Garcia-Bengochea v. Carnival Corp.*, No. 1:19-CV-21725, at 6 (S.D. Fla. Nov. 15, 2019); see also 22 U.S.C. § 6082(a)(4)(B).

27. David D'Arcy, *Cuba refuses to return seized art despite thaw in relations with US*, ART NEWSPAPER (Feb 23, 2015), <https://www.lootedart.com/news.php?r=R4HO2E603731>.

28. *Id.*

29. David D'Arcy, *Trump opens door to restitution claims on art seized by Cuba*, ART NEWSPAPER (Aug. 30, 2019), <https://www.theartnewspaper.com/news/trump-opens-door-to-restitution-claims-on-art-seized-by-cuba>. In the past, Cuban officials have said the Guardi work was a gift from the family and have refused to return it.

30. *Future of Property Rights in Cuba: Hearing Before the Subcomm. On the Western Hemisphere of the H. Comm. on Foreign Affairs*, 114th Cong. 29 (2015) (statement of Javier Garcia-Bengochea, M.D., Certified Claimant).

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property.<sup>31</sup> Thus, not only do those who sell, transfer, purchase, or rent the property in question face exposure under the law, but so too does anyone who engages in, or benefits from, commercial or investment activity which involves a nationalized property. “Knowingly” is defined, in turn, to include those who either act with actual knowledge that a property was confiscated or have reason to know it was confiscated.<sup>32</sup> The only specified exceptions to the definition of “traffic” relate to providing certain telecommunication services to Cuba, transactions involving publicly traded securities, transactions incident to lawful travel to Cuba, or actions taken by private Cuban-resident citizens.<sup>33</sup>

So far, no lawsuits have been filed to recover works of art under Title III, but attorneys and art experts have been preparing for this moment for decades. In the mid-2000s, spurred by sales of suspected confiscated art at Christie’s and Sotheby’s, the auction houses adopted guidelines for when a specialist suspects a consigned work might have been dislocated during or after the Revolution.<sup>34</sup> Sotheby’s has even entered into a specific agreement with the Fanjuls, a Cuban family who fled following the Revolution, leaving behind an important collection of art, including many paintings by Spanish Impressionist Joaquin Sorolla y Bastida.<sup>35</sup> Under the guidelines, should Sotheby’s “unwittingly come into possession of any suspect works, [it] will notify the family and maintain possession of such property until any title issues have been resolved.”<sup>36</sup>

Restituting art nationalized by the Castro regime poses legal questions that are distinct from those that lawyers have wrestled with for decades in seeking the return of art looted during World War II. In Europe, museums such as the Louvre and private collections were sacked by the occupation troops, whereas in Cuba, many of the most valuable collections were simply abandoned as their owners fled the island in the wake of Castro’s rise to power. Another difference between a claim for a Nazi-looted artwork and a claim for an artwork nationalized by a Communist government is that the United States and the Allies never recognized the Nazi regime as an official government. Moreover, the Cuban government today considers all the artworks nationalized in 1959 and after to be part of Cuba’s national heritage.<sup>37</sup>

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31. Michael Carter & Drew Marrocco, *The Helms-Burton Act: Maintaining Compliance with U.S. Regulations and Sanctions*, CORP. COMPLIANCE INSIGHTS (June 25, 2019), <https://www.corporatecomplianceinsights.com/helms-burton-compliance-sanctions/>.

32. *Id.*

33. *Id.* at n.2.

34. Sotheby’s Guidelines Relating to the Handling of Art Confiscated from the Gomez-Mena Family (on file with author).

35. Judd Tully, *A New Cuban Front*, JUDD TULLY: ART CRITIC AND JOURNALIST BLOG (Mar. 1, 2015), <https://juddtully.net/articles/a-new-cuban-front/>.

36. *Id.*

37. Rui Ferreira, *Helms-Burton Act also covers works of art and other properties*, ON CUBA NEWS (Sept. 17, 2019), <https://oncubanews.com/en/cuba-usa/helms-burton-act-also-covers-works-of-art-and-other-properties/>.

But one thing is the same: like the Nazi-occupied countries, Cuba needs to face the issue of restitution head on before it can fully recover from Castro's dictatorial regime and join the global economy and community.<sup>38</sup>

## II. Illicit Trade in Cultural Property

The United Nations has now joined many others in warning that the illicit trade in cultural property is undermining "international peace and security" by funding crime and conflict.<sup>39</sup> Security Council Resolution 2347 of 2017 once again confirmed that Daesh, Al-Qaida, and other violent extremist groups were financing themselves through "the looting and smuggling of cultural property," using proceeds "to support their recruitment efforts and to strengthen their operational capability to organize and carry out terrorist attacks."<sup>40</sup> This unanimous and binding resolution further ordered all member states to prohibit the cross-border trade in cultural objects from "a context of armed conflict, notably from terrorist groups," which lacked "clearly documented and certified provenance."<sup>41</sup>

Restricting imports and exports of undocumented pieces aims to fight the illicit trade without hurting legitimate collectors, market actors, or museums. As with all global problems, all nations have a role to play, from so-called "countries of origin" to "demand countries." But given their combined \$50 billion art market,<sup>42</sup> making up some seventy-six percent<sup>43</sup> of the global total, the United States and the European Union ("EU") have a particular opportunity.<sup>44</sup>

During 2019, progress on this front by both Washington, D.C. and Brussels was made to close borders to illegal traffic, while better protecting their own consumers and markets. By the start of 2019, the U.S. Congress had already restricted imports of undocumented cultural objects from Iraq

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38. Jiménez, *supra* note 6, ¶ 17.

39. S.C. Res. 2347 ¶ 6 (Introductory Statement) (Mar. 24, 2017).

40. *Id.* ¶ 8.

41. S.C. Res. 2347, *supra* note 39, ¶ 8. Resolution 2347 did not limit its prohibitions to cultural property from any particular countries, as had Resolutions 2199 and 2253 of 2015, which focused on Daesh, the Al-Nusrah Front, and other groups associated with Al-Qaida in Iraq and Syria. The United States gave its full support to Resolutions 2199 and 2347, and even co-sponsored Resolution 2253 with the Russian Federation.

42. See Clare McAndrew, *The Art Market 2019*, Art Basel, 28–29, 43, <https://www.artbasel.com/about/initiatives/the-art-market>. For 2018, global art market sales reached \$67.4 billion. Sales in the U.S. totaled \$29.9 billion, with sales in the EU totaling just over \$20 billion.

43. See *id.* at 29, 36, 39. In 2018, the U.S. was the largest art market globally, accounting for forty-four percent of world sales by value. The EU (including the United Kingdom) accounted for thirty-two percent of sales by value. The EU without the U.K. would have accounted for eleven percent of sales by value.

44. The statistics in this paragraph refer to the legitimate art market. There are no concrete global statistics on the illicit trade in art, let alone the subset of antiquities, but law enforcement seizures hint at its massive scale and reach.

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and Syria through legislation,<sup>45</sup> while the State Department had done the same for seventeen other countries through bilateral agreements.<sup>46</sup>

The latter memoranda of understanding (MOUs) were achieved through the Convention on Cultural Property Implementation Act (CCPIA),<sup>47</sup> which, as the name suggests, implements into U.S. law the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention).<sup>48</sup> The CCPIA grants the president authority to join the treaty's other State Parties in agreement, which prospectively restrict the import of their undocumented archaeological and ethnological objects into the United States, while promoting responsible cultural cooperation and exchange.<sup>49</sup> Objects that are legally exported, or even those that were *illegally* exported before an MOU, are not impacted (but may be covered by other law).

2019 was an active year for these agreements. The State Department entered into two new MOUs (with Ecuador and Algeria), renewed three existing agreements (Honduras, Bulgaria, and China),<sup>50</sup> and considered new requests from four countries (Chile, Jordan, Morocco, and Yemen),<sup>51</sup> as well

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45. The Emergency Protection for Iraqi Cultural Antiquities Act, Pub. L. No. 108-429, 118 Stat. 2434, 2599-2600 (2004) restricted imports of undocumented cultural objects from Iraq. The Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, 130 Stat. 369 (2016) restricted imports of undocumented cultural objects from Syria.

46. See Bureau of Educ. and Cultural Affairs, *Current Import Restrictions*, U.S. DEP'T OF ST., <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions>, (last visited Nov 22, 2019). The Antiquities Coalition, of which the author serves as Executive Director, has long supported these agreements. A full and current list of them is available at the State Department website.

47. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, tit. 3, 96 Stat. 2328, 2350-2363 (1983) (codified as amended at 19 U.S.C. §§ 2601-2613).

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

49. In addition to being a State Party to the treaty, the CCPIA requires the following: (1) The cultural patrimony of the requesting country is in jeopardy from pillage; (2) The requesting country has taken measures to protect its cultural patrimony; (3) U.S. import restrictions, either alone or in concert with actions taken by other market nations, would be of substantial benefit in deterring the serious situation of pillage; and (4) Import restrictions would promote the interchange of cultural property among nations for scientific, cultural, and educational purposes. The only criterion for an agreement's extension is whether those same four conditions, which justified the original bilateral agreement, are still present.

50. See *Current Import Restrictions*, *supra* note 46.

51. See Meeting Announcements for Chile and Jordan, Bureau of Educ. and Cultural Affairs, <https://eca.state.gov/highlight/cultural-property-advisory-committee-meeting-april-1-3>; Meeting Announcements for Yemen and Morocco, Bureau of Educ. and Cultural Affairs, <https://eca.state.gov/highlight/cultural-property-advisory-committee-meeting-october-29-30>.



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as a renewal request (El Salvador),<sup>52</sup> the results of which are still pending. It also announced another request to be considered in 2020 (Turkey).<sup>53</sup>

Despite these impressive statistics, American borders remain open to many feared looting and trafficking hotspots, including some with a documented connection to criminal and terrorist financing, such as Afghanistan, India, and Pakistan. Moreover, the country-by-country approach can be burdensome, both on Washington and the requesting government (explaining the remaining gaps in coverage). For this reason, some of the now 140 of State Parties to the 1970 UNESCO Convention<sup>54</sup> have taken another route, implementing rules prohibiting the import of cultural materials illegally exported from other treaty signatories and beyond.

This course has been taken in 2019 by the EU, arguably setting a global standard. On April 17, the European Parliament, the EU's legislative branch, passed Regulation 2019/880 on "the introduction and the import of cultural goods."<sup>55</sup> Like the CCPIA in the United States, Regulation 880 complements the 1970 UNESCO Convention. It subjects cultural objects to uniform import controls throughout the EU, and moreover, prohibits "the introduction of [those] removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country."<sup>56</sup>

Importantly, Regulation 880 only applies to cultural property from non-EU States (other rules already cover the internal market),<sup>57</sup> but its expected impact is significant nonetheless. As a regulation—in contrast to a directive—880 is binding and self-executing.<sup>58</sup> Therefore, all twenty-eight Member States had to apply it automatically and uniformly in its entirety as soon as it entered into force on June 27, 2019.<sup>59</sup>

In addition to its blanket prohibition against the introduction of illegally removed cultural goods, Regulation 880 creates two additional tiers of

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52. See Meeting Announcements for El Salvador, Bureau of Educ. and Cultural Affairs, <https://eca.state.gov/highlight/cultural-property-advisory-committee-meeting-july-23-24>.

53. See Notice of Receipt of Request for Turkey, 84 Fed. Reg. 52550 (Oct. 2, 2019), <https://www.federalregister.gov/documents/2019/10/02/2019-21359/notice-of-receipt-of-request-from-the-government-of-the-republic-of-turkey>.

54. The Convention has been ratified by 140 UNESCO Member States. See *States Parties*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/>.

55. Commission Regulation 2019/880 of the European Parliament and of the Council of 17 April 2019 on the Introduction and the Import of Cultural Goods, 2019 O.J. (L 151) 1 (EU).

56. *Id.* art. 3(1).

57. These are primarily Council Regulation 116/2009, 2008 (L 39) 1 (EC) and Council Directive 2014/60/EU, 2014 O.J. (L 159) 1, 2 (EC).

58. See TFEU art. 288, June 7, 2016 O.J. (C 202) 171. Article 288 of the Treaty on the Functioning of the European Union lays out the differences between EU regulations, directives, decisions, recommendations, and opinions.

59. Under Article 15, Regulation 880 would enter force twenty days after its publication in the *Official Journal of the European Union*, which took place on June 7, 2019.

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objects, with different rules for each. The first additional tier is limited to cultural property removed from archaeological sites and monuments that are over 250 years old regardless of value.<sup>60</sup> For these, with just a few exceptions, the EU will demand an import license, the application for which will in turn require proof of previous legal export.<sup>61</sup>

The second additional tier includes broader categories of cultural objects, not just antiquities but also fine art, ethnological artifacts, and manuscripts that are over 200 years old and have a minimum value of at least €18,000.<sup>62</sup> These items will not require an import license, but an “importer statement,” again confirming previous lawful export.<sup>63</sup> But for both of these additional tiers, these requirements lessen if the country of origin cannot be determined or if an object was exported prior to the date the UNESCO Convention entered into force (1972).<sup>64</sup> Then, the importer need only document that the piece was lawfully exported from its prior country at the time, so long as it was there for over five years.

The European Commission, the EU’s executive branch, is still determining how this regulation will work in practice, what will count as proof of export, and who will track this information. So, while the regulation has indeed officially entered force, specific provisions will take time to implement. From December 2020 forward, the introduction of unlawfully removed cultural property will be prohibited in the EU, while other provisions will take effect from June 2025.<sup>65</sup>

These approaches all recognize that international borders are law enforcement’s best defense against any illicit trade, including trade in cultural property. In 1970, the UNESCO Convention put the art world on notice that measures like those described above were possible. Arguably it should not have taken half a century for them to be realized. Those concerned about undue regulation should take comfort in an important fact: Resolution 2347, the U.S. laws and agreements, and even EU Regulation 880 require nothing more of the art market and museum community than most of their own existing ethical policies and guidelines. Proof of provenance, good title, and legal export are all good business and collecting practices, which will only strengthen the legitimate trade in cultural objects and protect it from being misused by criminals and terrorists.

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60. Coincidentally (or not) 250 years old is the same threshold for “archaeological materials” under the CCPIA. 2010 A.B.A. Sec. of Int’l L. Vol. II, Issue No. I, at 21.

61. See Commission Regulation 2019/880, art. 4 for details on the import license requirements and Part B of the Annex for the goods covered.

62. See Regulation 880, art. 5 for details on the importer statement requirements and Part C of the Annex for the goods covered.

63. *Id.* art. 5(1).

64. 2019 O.J. (L 151) 2.

65. See *id.* art. 16.

### III. Restitution of Nazi-Era Looted Art

Two disputes, both originating in New York, both involving art works taken during the Holocaust, and both involving application of the equitable defense of laches, were decided in 2019: one in New York State court and the other in the Court of Appeals for the Second Circuit. In both cases, the Holocaust Expropriated Art Recovery Act of 2016 (the HEAR Act) preempted a statute of limitations defense.<sup>66</sup> Both cases therefore turned on an analysis of laches. Despite these superficial similarities, in one case laches was held to bar the claim, while in the other, laches was held not to be a bar.

*Reif v. Nagy* involved two drawings by the artist, Egon Schiele, *Woman Hiding Her Face* and *Woman in a Black Pinafore*.<sup>67</sup> The famed Viennese cabaret artist and art collector, Franz Friedrich (“Fritz”) Grunbaum, owned the two drawings before the Second World War.<sup>68</sup> The Nazis arrested Grunbaum in March 1938 and murdered him at Dachau in June 1941.<sup>69</sup> His wife, Elizabeth, was murdered in a death camp in October 1942.<sup>70</sup>

An earlier case, *Bakalar v. Vavra*, addressed the fate of a different Schiele drawing, *Woman with Bent Leg*, from Grunbaum’s collection.<sup>71</sup> According to the facts as stated by the court in *Bakalar*, Elizabeth’s sister, Mathilde Lukacs, sold the drawing to a Swiss art dealer in 1956, although the court never explained how Lukacs came into possession of the drawing; Bakalar, the current possessor, traced his title to that Swiss gallery.<sup>72</sup> The district court found that it could not determine whether the drawing was stolen or whether Lukacs, as Elizabeth’s sister and an heir, had title to the drawing and was therefore able to convey title to the Swiss dealer.<sup>73</sup> Nonetheless, finding that the current claimants’ predecessors in title had failed to pursue a timely claim, the *Bakalar* court held that the affirmative defense of laches

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66. Pub. L. No. 114-308, § 5(c), 130 Stat. 1524 (2016).

67. *Reif v. Nagy*, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019).

68. *Id.* at 7.

69. *Id.* at 10.

70. *Id.*

71. *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff’d*, 500 Fed. Appx. 6 (2d Cir. 2012), *cert. denied*, 569 U.S. 968 (2013). In an earlier phase of the *Bakalar* proceedings, the district court held that Swiss law applied. The Second Circuit reversed, holding that the court should apply New York law. Still earlier litigation involved a different Schiele work, *Dead City III*, from the Grunbaum collection. The Manhattan District Attorney had seized the work, which was on temporary exhibit at the Museum of Modern Art, in New York, but the New York Court of Appeals ultimately quashed the subpoena and the painting returned to the Leopold Foundation in Vienna. *Matter of Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 719 N.E.2d 897 (1999).

72. *Bakalar*, 819 F. Supp. 2d at 297–303.

73. *Id.* at 298–99, 302. According to New York law, the burden of proving that the drawing was not stolen fell on the current possessor, Bakalar, rather than on the claimants, Vavra and Fischer, who were (respectively) the heirs of Fritz and Elizabeth, to prove that the drawing was stolen. However, the district court also found by a preponderance of the evidence that the drawing was not stolen.

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barred the claim of the Grunbaum heirs.<sup>74</sup> In particular, the court referred to the loss of testimony of the central figure of Mathilde Luckacs as to how she obtained possession of the drawing and whether she owned it.<sup>75</sup>

The court in *Reif v. Nagy* cast the factual background of the two drawings at issue in this case differently. The court concluded that Lukacs could not have obtained possession of the drawings but, rather, the drawings had been stolen during the War and subsequently passed to the Swiss gallery.<sup>76</sup> On the basis that under New York law, as is true of all jurisdictions in the United States, a thief cannot transfer title to stolen property, the court held that the current possessor, the art dealer Richard Nagy, did not have title.<sup>77</sup>

Proper application of the laches defense requires that the claimant has unreasonably delayed in bringing the claim and that this delay has caused legal prejudice to the current possessor. This harm can be either evidentiary-based or expectations-based.<sup>78</sup> In contrast to the decision in *Bakalar*, this court held that the defense of laches did not bar the current claim.<sup>79</sup> Nagy acquired a fifty percent interest in *Woman in a Black Pinafore* in 2013 following the Second Circuit's decision in *Bakalar*.<sup>80</sup> He acquired *Woman Hiding Her Face* at almost the same time.<sup>81</sup> The sale agreement for this second work warned that title was subject to dispute by Grunbaum's heirs, and Nagy acknowledged that he would have no claim against the seller if his title were declared invalid.<sup>82</sup> The court concluded that Nagy could not demonstrate any loss of evidence following his acquisition of the works, he was on notice of the claims of the Grunbaum estate before he purchased the works, and that he purchased the works at a substantial discount.<sup>83</sup> Therefore, regardless of whether the claimants might have delayed in bringing their claim, Nagy could not demonstrate legal prejudice based on either reliance or a loss of evidence due to any delay, an essential element in establishing a laches defense.<sup>84</sup>

The second case, *Zuckerman v. Metropolitan Museum of Art*, involved a Picasso painting, *The Actor*, donated by Thelma Chrysler Foy to the Metropolitan Museum of Art in 1952.<sup>85</sup> The painting belonged to Paul and Alice Leffmann before the Second World War.<sup>86</sup> The district court held

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74. *Id.* at 305–06.

75. *Id.* at 306.

76. *Reif*, 106 N.Y.S.3d at 21.

77. *Id.*

78. *See, e.g.,* *Vineberg v. Bissonnette*, 548 F.3d 50, 57 (1st Cir. 2008); *see also* *Matter of Flamenbaum*, 1 N.E.3d 782, 784 (2013).

79. *Reif*, 106 N.Y.S.3d at 22.

80. *Id.* at 13.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 22.

85. *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 186 (2d Cir. 2019), *cert. denied*, No. 19-942, 2020 WL 981838 (U.S. Mar. 2, 2020).

86. *Id.* at 307.

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that the plaintiff failed to establish the elements for voiding a contract on the ground of economic duress.<sup>87</sup> The Second Circuit affirmed but did not address this issue. Instead, the Second Circuit held that the claim was barred by laches, concluding that the plaintiff's delay in attempting to recover a well-known painting that was publicly held since 1952 was unreasonable; it assumed that the prejudice caused to the Met was obvious, stating the prejudice is "evident on the face of Zuckerman's complaint."<sup>88</sup>

The court first concluded that the HEAR Act did not preempt the equitable defenses.<sup>89</sup> The court acknowledged that under Supreme Court precedent,<sup>90</sup> if Congress establishes a statute of limitations, laches cannot then be invoked.<sup>91</sup> But the court held that this general approach did not apply here. While an earlier version of the HEAR Act would have explicitly preempted any defense at law or equity, the enacted version omitted any reference to equitable defenses, and the Senate Committee Report expressly stated that laches remained a viable defense.

Although the court noted Congress's goals in enacting the HEAR Act, perpetuating availability of the laches defense means that uniformity will not be achieved. The defense will hinder the return of artworks taken during the Holocaust. By allowing current possessors to continue to rely on technical defenses, it undermines resolution of claims on a substantive basis, a key element in achieving a just and fair resolution. Nonetheless, and perhaps ironically, the Second Circuit concluded that allowing the laches defense to proceed was a means of achieving a "just and fair" resolution.<sup>92</sup>

Rather than remanding the case for findings of fact, the appellate court concluded that laches barred the claim, giving short shrift to the prejudice element. The court gave few specifics as to the types of evidence that had been lost and pointed to no evidence of any expectations-based prejudice.<sup>93</sup> The court seemed to weigh neither the post-war circumstances nor the role that the Metropolitan's incomplete provenance statements may have played in the difficulty that the Leffmanns may have had in locating the painting and in the museum's possible unclean hands. More important, however, is the appellate court's decision to resolve a fact-intensive issue itself when the

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87. *Id.* at 318–20 (applying New York law).

88. *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 190 (2d Cir. 2019), *cert. denied*, No. 19-942, 2020 WL 981838 (U.S. Mar. 2, 2020).

89. *Id.* at 192.

90. *Id.* at 195–96 (citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2015); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017)).

91. *Id.*

92. *Id.* at 196.

93. *Zuckerman*, 928 F.3d at 194–95. The lower court's statement that Foy's good faith in purchasing the painting would have been a defense available to the Metropolitan was misplaced, as good faith is not relevant to a determination of whether a thief can transfer title to stolen property under New York law; *see, e.g., Reif*, 106 N.Y.S.3d at 21.

district court had not addressed laches and laches is normally considered inappropriate to resolve on a motion to dismiss.<sup>94</sup>

This result stands in sharp contrast to the outcome in *Reif v. Nagy*. In the latter case, the possessor's acceptance of the risk that he might have to relinquish the drawings to the Grunbaum's heirs demonstrates the lack of prejudice caused through any delay. In *Zuckerman*, however, the court accepted the possessor's claim of prejudice without requiring the possessor to establish it at trial, thus frustrating Congress's goals in enacting the HEAR Act and obfuscating the required elements of a laches defense.

#### IV. Picasso, Art Publishing, and Fair Use

Since the development of intellectual property laws, art and copyright have been intimate companions. In the world of art historical publishing, an interesting conflict surfaced between U.S. copyright law and French copyright law. In *de Fontbrune v. Wofsy*,<sup>95</sup> the United States District Court for the Northern District of California considered, among other things, the question of whether the absence of any defense of fair use under French copyright law rendered recognition of a French money judgment for copyright infringement improper and repugnant to U.S. law and public policy.

The underlying facts of the case are largely undisputed. Beginning in the 1930s, Christian Zervos,<sup>96</sup> an art critic and the publisher of the influential *Cahiers d'Art*, began documenting the work of his friend, Pablo Picasso. The project continued through Zervos's life (he died in 1970), and resulted in more than 16,000 photographs, which he published in a 33-volume Picasso catalogue raisonné.<sup>97</sup> Its last volume was published in 1978, and the set was long out of print and unavailable until it was reprinted in 2010.<sup>98</sup> Beginning in 1995, defendant Alan Wofsy began his own publishing project titled "The

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94. In *U.S. v. Portrait of Wally*, the district court stated that "[t]o show laches . . . would involve a fact-intensive inquiry into the conduct and background of both parties in order to determine the relative equities. Such issues are often not amenable to resolution on a motion for summary judgment, let alone a motion to dismiss." 2002 U.S. Dist. LEXIS 6445, at \*69–70 (S.D.N.Y. 2002) (citations omitted). In *Schoeps v. Museum of Mod. Art*, the district court stated that "the fact-intensive question of whether laches bars [the claim]" required an evidentiary hearing and a determination on whether the museums knew the paintings were misappropriated. 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009); see also Stephanie Drawdy, *Claims for the Return of Holocaust Art: Scope of the US HEAR Act*, 24 ART, ANTIQUITY AND LAW 285, 288 (2019).

95. *de Fontbrune v. Wofsy*, 409 F. Supp. 3d 823 (N.D. Cal. 2019).

96. See Christian Zervos (called Kristos), *Index of Historic Collectors and Dealers of Cubism*, LEONARD A. LAUDER RES. CTR. FOR MOD. ART, <https://www.metmuseum.org/art/libraries-and-research-centers/leonard-lauder-research-center/research/index-of-cubist-art-collectors/zervos>.

97. George Stolz, *The \$20,000 Picasso Catalogue the Art World Was Waiting For*, ARTNEWS, (June, 3, 2014), <https://www.artnews.com/art-news/market/zervos-picasso-catalogue-reprinted-and-priced-at-20-thousand-dollars-2446/>.

98. *Id.*

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Picasso Project,”<sup>99</sup> which he describes as a “comprehensive illustrated catalogue,” and which included 1,492 of the Zervos photographs.

In 1996, Vincent Sicre de Fontbrune and others, who were at that time the holders of the copyright to the Zervos photographs, brought suit in Paris against Wofsy for copyright infringement.<sup>100</sup> In September 2001, the Cour d’Appel de Paris entered judgment in favor of the plaintiffs holding that Wofsy’s use of the Zervos photographs was an infringing use.<sup>101</sup> The court prohibited Wofsy from any future use of the photographs, including distribution of The Picasso Project containing them. The prohibition was “subject to an astreinte of 10,000 francs per [future] violation.”<sup>102</sup> Under French law, an astreinte is a pecuniary penalty employed to enforce compliance with an injunction.

The plaintiffs subsequently assigned their rights to the Zervos copyrights to a third party. The right to enforce the astreinte, however, was not included in that assignment. A decade later when copies of The Picasso Project were found in France, the plaintiffs brought suit against Wofsy to enforce the astreinte.<sup>103</sup> Although Wofsy was not served with the summons and complaint, the court entered judgment against him in the amount of € 2 million.<sup>104</sup> At that time, the plaintiffs also attempted to file a new copyright infringement action against Wofsy. The court, however, rebuffed that suit on the grounds that the plaintiffs, no longer the owners of the copyrights, lacked standing to bring such an action.

In 2013, the plaintiffs sought to have the astreinte judgment recognized under California law. On cross motions for summary judgment, the District Court considered: (a) whether the French court had personal jurisdiction, (b) whether the French court had subject matter jurisdiction, (c) whether the defendant received sufficient notice, (d) whether the judgment was obtained by fraud, (e) whether the judgment or its enforcement would be repugnant to the public policy of California law or U.S. law, (f) whether the judgment conflicted with another final and conclusive judgment, (g) whether the judgment was rendered in circumstances that raised substantial doubt about the integrity of the rendering court with respect to the judgment, and (h) whether the foreign proceeding was compatible with the requirements of due process of law.<sup>105</sup> The court found in favor of recognizing the judgment on all but one of these questions, but held in favor of the defendant on the question of whether the recognition of the astreinte would be repugnant to

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99. Catalogue of Picasso’s Paintings, Watercolors, Drawings and Sculpture, ART-BOOKS.COM, <https://www.art-books.com/the-picasso-project.php>.

100. *Wofsy*, 409 F. Supp. 3d at 829.

101. *Id.*

102. *Id.*

103. Sheppard Mullin, *French Picasso Judgment is Abstract Expression to U.S. Law*, ART L. BLOG (Sept. 23, 2019), <https://www.artlawgallery.com/2019/09/articles/international-issues/french-picasso-judgement-abstract-expression/>.

104. *Id.*

105. 409 F. Supp. 3d at 829.

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U.S. law. At issue was the question of whether Wofsy's use of Zervos's photographs was fair under U.S. law.

The court first considered the basis on which a court may decline to recognize a foreign judgment. The California Uniform Foreign Money Judgments Recognition Act provides that a court is not required to recognize a foreign judgment if it "or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of [California] or of the United States."<sup>106</sup> But the standard for declining to recognize a foreign judgment on the basis of repugnancy "measures not simply whether the foreign judgment or cause of action is contrary to our public policy, but whether either is so offensive to our public policy as to be prejudicial to recognized standards of morality and to the general interests of the citizens."<sup>107</sup>

Noting that the Second Circuit, in considering this issue in the context of the differences between French and U.S. copyright law, had analyzed "the fair use exception for activity protected by the First Amendment," the court observed that the recognition acts enacted by the various states (including both California and New York) derive from the same source and all explicitly strive to "promote uniformity of the law with respect to its subject matter among states that enact it."<sup>108</sup> Therefore, while the Second Circuit decision was not binding upon the court, it was acknowledged to be persuasive precedent. As the Second Circuit had done previously, the court first identified the constitutional protections at issue and then determined whether French copyright law provided "comparable protections."<sup>109</sup>

The court acknowledged that U.S. copyright law's fair use doctrine derives from and is supported by the First Amendment.<sup>110</sup> The threshold question, however, was whether Wofsy's use of the Zervos photographs was indeed fair use. The court identified the four factors that courts employ in evaluating a party's fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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 new use upon the potential market for or value of the copyrighted work.<sup>111</sup>

The court considered each factor in turn. The first factor was not disputed by the parties. With respect to the first factor (purpose and character of the use), the court accepted the defendants' characterization of

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106. Cal. Civ. Proc. Code § 1716(c)(1)(C).

107. *Wofsy*, 409 F. Supp. 3d at 840 (quoting *Ohno v. Yasuma*, 723 F.3d 984, 1002 (9th Cir. 2013)).

108. *Id.*

109. *Id.* at 841.

110. *Id.* at 840.

111. *Id.* at 841.



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The Picasso Project as educational in nature, with an audience of libraries, academic institutions, art collectors, and auction houses. The publication's commercial nature did not invalidate its educational purpose, and the court concluded that this factor weighed strongly in favor of fair use.<sup>112</sup>

The second factor, the nature of the copyrighted work, was more problematic. The defendants argued that Zervos's photographs were documentary in nature and unoriginal. The plaintiffs insisted upon the photographs' originality and creativity. Reasoning that, while the photographs were produced for a catalogue raisonné and were intended to "faithfully reproduce an artist's work, not to showcase the original artistic expression of the photographer," the court nevertheless found that this factor weighed slightly against fair use.<sup>113</sup>

Analyzing the third factor, portion and substantiality of the use, the court found this factor weighed in favor of fair use. Wofsy used only 1,492 out of more than 16,000 photographs (less than 10 percent).<sup>114</sup> And on the fourth factor, the effect on the market for the original, the court again found that it weighed strongly in favor of fair use. By virtue of their pricing, the two publications had vastly different audiences. Wofsy's The Picasso Project sold for \$150 per volume (with a complete set selling for less than \$4,000).<sup>115</sup> The original Zervos catalogue, which had long been out of print, sold for many multiples of that amount (as high as more than \$100,000). The court seemed to regard the Zervos catalogue (and even its considerably less expensive reprint, which was priced at \$20,000) as collectors' items rather than as educational or even scholarly tools.

As the Second Circuit had done previously, the *de Fontbrune* court noted that French copyright law has no provision for either a defense or exception that would be comparable to fair use. For purposes of U.S. law and policy, recognizing French infringement judgments would have the effect of erasing fair use and the First Amendment considerations it embodies. The court concluded that the *astreinte* judgment was repugnant to California and U.S. law and public policy and thus would not be recognized.<sup>116</sup>

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112. *Id.* at 842.

113. *Wofsy*, 409 F. Supp. 3d at 842.

114. *Id.* at 842-43.

115. *Id.* at 843.

116. *Id.* at 840.