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International Art and Cultural Heritage

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The year 2012 saw activity in the realm of ratifications and accessions to the cultural heritage-related conventions, as well as implementation of these instruments.¹ Litigation involving the disposition of art works allegedly looted during the Holocaust continued, focusing in particular on whether actions for recovery of such art works should be barred under either the equitable defense of laches or California's revised statute of limitations. Finally, California's statute granting artists a resale royalty right was declared unconstitutional because of conflict with the Commerce Clause.

I. International Conventions and Agreements

A. NEW STATES PARTIES

The year 2012 saw an increase in the number of nations ratifying the array of cultural heritage-related international conventions. Kazakhstan, Palestine, and Swaziland ratified or accepted the 1970 United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import,

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1. For developments during 2011, see David Bright et al., *International Art and Cultural Heritage*, 46 INT'L LAW. 405 (2012). For developments during 2012, see Patty Gerstenblith, *International Art and Cultural Heritage*, 45 INT'L LAW. 395 (2011).

Export and Transfer of Ownership of Cultural Property.² Colombia was the only nation to ratify the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects during 2012, bringing the number of States Parties to thirty-three.³ The UNESCO World Heritage Center inscribed twenty-six new properties on its World Heritage List.⁴ Of these, twenty are cultural sites, five are natural sites, and one is a mixed cultural-natural site.

Angola, Palestine, and Benin ratified the oldest convention that addresses exclusively cultural heritage protection, the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.⁵ Benin and Palestine also ratified the First Protocol to the 1954 Hague Convention, which addresses the status of movable cultural objects taken from occupied territory,⁶ while Poland, Palestine, Benin, and Mali ratified the Second Protocol.⁷ It is ironic that Mali ratified this instrument at a time when its cultural heritage has been exposed to great threat and destruction due to the military coup and subsequent incursions of al-Qaeda affiliated groups into the northern region that have engaged in intentional destruction of cultural sites.⁸ This area includes Timbuktu, a World Heritage site with mosques of the fourteenth through sixteenth centuries, large number of saints' tombs, and library collections of Islamic manuscripts.⁹

B. IMPLEMENTATION OF THE 1970 UNESCO CONVENTION

In June 2012, UNESCO sponsored what was only the second meeting of States Parties of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import,

2. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> (last visited Feb. 12, 2013). In late 2011, Palestine ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. *Convention on the Protection of the Underwater Cultural Heritage*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E> (last visited Feb. 12, 2013).

3. *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, UNIDROIT, <http://unidroit.org/english/implementation/i-95.pdf> (last visited Feb. 12, 2013).

4. *New Inscribed Properties - 2012*, UNESCO, <http://whc.unesco.org/en/newproperties> (last visited Feb. 12, 2013). Singapore was the only nation to ratify the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage during 2012, while Palestine ratified it in late 2011 and had its first site, the Church of the Nativity and Pilgrimage Route in Bethlehem, inscribed on the List in 2012. See *Birthplace of Jesus: Church of the Nativity and the Pilgrimage Route, Bethlehem*, UNESCO, <http://whc.unesco.org/en/list/1433> (last visited Feb. 12, 2013). See also *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13055&language=E> (last visited Feb. 12, 2013).

5. *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E> (last visited Feb. 12, 2013).

6. *Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=15391&language=E> (last visited Feb. 12, 2013).

7. *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E> (last visited Feb. 12, 2013).

8. Robyn Dixon, *ICC Asked to Investigate Violence by Mali Rebels*, L.A. TIMES, July 19, 2012, at A7.

9. See *Timbuktu*, UNESCO, <http://whc.unesco.org/en/list/119> (last visited Feb. 12, 2013).

Export and Transfer of Ownership of Cultural Property.¹⁰ Expert reports on regional implementation of the Convention were presented, but much of the meeting was devoted to issues of improving implementation among market states, creating a Subsidiary Committee, and planning for meetings of the States Parties to be held more frequently.¹¹ The goals of the Subsidiary Committee include promoting the Convention's objectives, reviewing national reports concerning implementation, and aiding in capacity-building to combat illegal trafficking in cultural property.¹²

Acting under its legislation implementing the 1970 UNESCO Convention, the Convention on Cultural Property Implementation Act (CPIA),¹³ between late 2011 and 2012 the United States extended its bilateral agreements (Memoranda of Understanding) with Bolivia,¹⁴ Peru,¹⁵ Cyprus,¹⁶ Mali,¹⁷ and Guatemala¹⁸ for additional five-year periods. These agreements, which impose restrictions on the importation of archaeological and ethnographic materials into the United States, are in effect for five years but may be extended in five-year increments if the conditions that justified the initial agreement still pertain.¹⁹

C. ANCIENT COIN COLLECTORS GUILD (ACCG) v. U.S. CUSTOMS AND BORDER PROTECTION

In 2009, the Ancient Coin Collectors Guild (ACCG) initiated a test case of the application of import restrictions to ancient coins originating in Cyprus and China.²⁰ The

10. *Second Meeting of States Parties to the 1970 Convention*, UNESCO, <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/meetings/meetings-of-states-parties/2msp-1970-convention/#c288212> (last visited Feb. 13, 2013).

11. *Id.*

12. *Subsidiary Committee*, UNESCO, <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/meetings/subsidiary-committee/#c350973> (last visited Feb. 13, 2013).

13. 19 U.S.C. §§ 2601-13 (2006).

14. *U.S. Bilateral Agreement with Bolivia*, UNESCO, <http://exchanges.state.gov/heritage/culprop/blfact.html> (last visited Feb. 13, 2013) (covering pre-Columbian archaeological material and Colonial and Republican period ethnological materials).

15. *U.S. Bilateral Agreement with Peru*, UNESCO, <http://exchanges.state.gov/heritage/culprop/pefact.html> (last visited Jan. 21, 2013) (covering pre-Columbian archaeological materials and Colonial ethnological materials).

16. *U.S. Bilateral Agreement with Cyprus*, UNESCO, <http://exchanges.state.gov/heritage/culprop/cyfact.html> (last visited Feb. 13, 2013) (covering pre-Classical and Classical period archaeological objects and ritual ethnological material of the post-Byzantine period, c. 1500–1850 A.D.).

17. *U.S. Bilateral Agreement with Mali*, UNESCO, <http://exchanges.state.gov/heritage/culprop/mlfact.html> (last visited Feb. 13, 2013) (covering archaeological material dating from the Paleolithic Era to approximately the mid-eighteenth century).

18. *U.S. Bilateral Agreement with Guatemala*, UNESCO, <http://exchanges.state.gov/heritage/culprop/gtfact.html> (last visited Feb. 13, 2013) (covering pre-Columbian archaeological artifacts and certain categories of ecclesiastical ethnological material dating from approximately A.D. 1524 to 1821).

19. 19 U.S.C. § 2602(b) (2006).

20. *See* Extension of Import Restrictions Imposed on Objects and Material from Cyprus, 72:134 Fed. Reg. 38,470 (July 13, 2007), available at <http://eca.state.gov/files/bureau/cy2007dlfrn.pdf>; Import Restrictions Imposed on Certain Archaeological Material from China, 74:11 Fed. Reg. 2838 (Jan. 16, 2009), available at <http://eca.state.gov/files/bureau/ch2009dlfrn.pdf>. Ancient coins were later included in the bilateral agreements with Greece and with Italy. *See* Import Restrictions on Certain Archaeological and Ethnological Ma-

ACCG arranged for the import in April 2009 through Baltimore, Maryland, of unprovenanced coins that fit Cypriot and Chinese designated coin types that are subject to import restriction.²¹ Following seizure of these coins, the ACCG filed a lawsuit against several federal agencies, including the Department of Homeland Security and the Department of State, challenging the validity of these import restrictions on several grounds. The District Court for the District of Maryland dismissed the ACCG's complaint,²² on the grounds that actions taken by an agency pursuant to delegated presidential authority are not subject to review under the Administrative Procedure Act²³ and that neither the Department of State nor Customs and Border Patrol had exceeded their authority under the CPIA or on any other legal basis.²⁴

On appeal, the Fourth Circuit affirmed the district court's dismissal of ACCG's suit.²⁵ The court declined to engage in "a searching substantive review of the State Department's diplomatic negotiations," believing such a review would be "singularly inappropriate" in light of the sensitive area of foreign affairs and Congress's delegation to the Executive of significant discretion.²⁶ In particular, the Fourth Circuit rejected ACCG's argument that any eventual import restrictions imposed under the CPIA should be limited to only those items (if any) that the requesting nation listed in its request.²⁷ The court viewed this as adding a requirement to the CPIA and placing an additional burden on the requesting nation that is not present in the statute. For the same reason, the court rejected the ACCG's argument that the Federal Register Notice announcing receipt of a request needed to include the specific object types for which protection was sought.²⁸

In discussing the requirement that an object on the designated list of a bilateral agreement be "first discovered" in the requesting nation, the Fourth Circuit adopted the reasoning of the district court that, once the United States has met its burden of establishing that the object is of a type appearing on the designated list, the importer bears the burden of establishing that the object is eligible to be imported into the United States.²⁹ The court concluded that "the importer need not document every movement of its articles since ancient times. It need demonstrate only that the articles left the country that has requested import restrictions before those restrictions went into effect or more than ten

terial from Greece, 76:231 Fed. Reg. 74,691 (Dec. 1, 2011), available at <http://eca.state.gov/files/bureau/gr2011dlfrn.pdf>; Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy, 76:12 Fed. Reg. 3012 (Jan. 19, 2011), available at <http://eca.state.gov/files/bureau/it2011dlfrn.pdf>. For further background, see Bright et al., *supra* note 1, at 405.

21. Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., 801 F. Supp. 2d 383, 394 (D. Md. 2011).

22. *Id.* at 418.

23. *Id.* at 401-04 (citing Franklin v. Massachusetts, 505 U.S. 788 (1992)). The ACCG's allegations included that the actions of the State Department and Customs in including coins of the Cypriot and Chinese type on the respective designated lists were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the Administrative Procedure Act. See 5 U.S.C. § 706(2)(A) (2006).

24. See *Ancient Coin*, 801 F. Supp. 2d at 405-16. The ACCG sought judicial review on several bases, including "nonstatutory" or ultra vires review and under the court's "inherent equitable powers to remedy constitutional violations." *Id.* at 411.

25. Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., 698 F.3d 171, 185 (4th Cir. 2012).

26. *Id.* at 179.

27. *Id.* at 180.

28. *Id.* at 180-81.

29. *Id.* at 182.

years before the date of import.”³⁰ Finally, in response to the ACCG’s claim that the agency actions violated the APA, the court held that, even assuming that the Department of State was acting here as an agency for APA purposes, “none of its actions were remotely arbitrary or capricious” or in any other way violated enacted law.³¹ This decision provides answers to the substantive questions of whether ancient coins can be subjected to import restrictions under the CPIA and whether the placement of ancient coins on the designated lists for the bilateral agreements with China and Cyprus was a legitimate action under the CPIA. The government must now seek forfeiture of these particular coins and the ACCG will have an opportunity to present a defense provided in the CPIA.³²

II. Civil Forfeiture: The Mask of Ka-Nefer-Nefer

The limits of the U.S. government’s power to forfeit cultural artifacts were tested in *United States v. Mask of Ka-Nefer-Nefer*,³³ in which a federal court dismissed the government’s attempt to forfeit an ancient Egyptian funerary mask. Three millennia ago, a noblewoman from the court of Pharaoh Ramses II died and was buried in a tomb. Her unummified body was adorned with a funerary mask³⁴ depicting a dark-skinned woman with a long nose and a curious smile. Egyptologist Zakaria Goneim discovered the mask in 1952 while excavating on the Saqqara necropolis.³⁵

In 1998, the St. Louis Art Museum decided to purchase the mask. While conducting its due diligence before the purchase, the museum obtained an ownership history from Phoenix Ancient Art (Phoenix), the dealer selling the mask. This ownership history revealed that the mask was discovered in 1952 during excavations carried out by the Egyptian Antiquities Service at the Saqqara necropolis. In the early 1960s, the mask was part of the Kaloterna private collection, during which time it was purchased by Ms. Zuzi Jelinek (Jelinek), a Croatian collector living in Switzerland, who sold the mask to Phoenix in 1995.³⁶

The museum arranged for a package containing the description of the mask, photos, and a letter explaining the museum’s intention to purchase the mask to be hand-delivered to Dr. Saleh, Director of the Egyptian Museum in Cairo.³⁷ In the letter, the museum asked Dr. Saleh if he was familiar with the mask or if he knew of any parallels to the mask.³⁸ After several unreturned phone calls, e-mails, and letters, the museum received a hand-written fax from Dr. Saleh, in which he declined to identify the mask as stolen or

30. *Id.* at 183.

31. *Id.* at 184.

32. See 19 U.S.C. § 2609(a) (2006).

33. First Amended Verified Complaint, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11-cv-00504 (E.D. Mo. June 8, 2012), ECF No. 49-1 [hereinafter *Forfeiture Complaint*].

34. MOHAMMED ZAKARIA GONEIM, *THE BURIED PYRAMID* 55 (1956).

35. *Forfeiture Complaint*, *supra* note 33, ¶ 16.

36. Complaint ¶ 11, *Art Museum Subdistrict of the Metro Zoological Park & Museum Dist. v. United States*, No. 4:11-cv-291 (E.D. Mo. Feb. 15, 2011) [hereinafter *Declaratory Judgment Complaint*]. The Declaratory Judgment Complaint, filed by the museum in anticipation of the *Forfeiture Complaint*, was dismissed before the court’s decision on the *Forfeiture Complaint*. See *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11-cv-00504, 2012 WL 1094658 (E.D. Mo. Mar. 31, 2012).

37. *Id.* ¶ 13.

38. *Id.*

otherwise improperly held, but advised the museum to consult an American museum with a similar collection of objects to get further advice.³⁹

The museum's counsel hired a Swiss attorney who was able to confirm that a Suzana Jelinek resided at the address provided by Phoenix. They also checked with the Art Loss Register, INTERPOL, and the International Foundation for Art Research to see if the mask was listed in their respective databases of stolen art, and no records were found. Thereafter, the museum received the results of an independent investigation of the mask's provenance conducted by a scholar, which indicated the mask had in all likelihood left Egypt lawfully under then-applicable Egyptian law.⁴⁰ The museum purchased the mask for US \$499,000⁴¹ and put it on exhibition, where it remains to this day.

An investigation conducted by the U.S. government led to a different story about the mask's history. The mask was excavated at Saqqara, Egypt in 1952, placed in storage in Saqqara following its excavation where it remained until 1959, and then was "packed for shipping" to Cairo in preparation for an exhibit in Tokyo, Japan.⁴² The mask was "received by police guards" in Cairo in July 1959, but instead of travelling to Tokyo, it remained in Cairo until 1962 when it was transferred back to Saqqara.⁴³ The mask was removed from Saqqara in 1966 and traveled to Cairo in "box number fifty-four," the "last documented location of the mask in Egypt."⁴⁴ In 1973, an inventory was taken of box number fifty-four, whereupon it was discovered the mask was missing.⁴⁵

In March 2011, the U.S. government filed an *in rem* forfeiture complaint against the mask based upon a violation of the Tariff Act of 1930, which provides, in relevant part, that "[m]erchandise which is introduced or attempted to be introduced into the United States contrary to law . . . shall be seized and forfeited if it . . . is stolen, smuggled, or clandestinely imported or introduced."⁴⁶ The U.S. government alleged that there was probable cause to believe that the Mask was stolen sometime between 1966 and 1973.⁴⁷ In response, the museum moved to dismiss, claiming that the government must prove likelihood of success on all elements of its cause of action and that the object could not be considered "stolen" without some evidence of theft.⁴⁸

The court granted the museum's motion, finding that the government's complaint failed to state sufficiently detailed facts to support a reasonable belief that the government would be able to meet its burden of proof at trial, as required by U.S. Federal Rule of Civil Procedure Supplemental Rule G(2)(f).⁴⁹ The court explained that the complaint did not provide a factual statement of theft, smuggling, or clandestine importation.⁵⁰ Rather, the

39. *Id.*

40. *Id.*

41. Forfeiture Complaint, *supra* note 33, ¶ 45.

42. *Id.* ¶¶ 17-18.

43. *Id.* ¶¶ 20-21.

44. *Id.* ¶¶ 22-23.

45. *Id.* ¶¶ 24-25.

46. 19 U.S.C.A. § 1595a(c) (2006).

47. Forfeiture Complaint, *supra* note 33, ¶ 27.

48. Claimant's Motion to Dismiss, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11-cv-00504, at 4-8 (filed May 4, 2011), ECF No. 14.

49. *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11-cv-00504, 2012 WL 1094658, at *7 (E.D. Mo. Mar. 31, 2012).

50. *Id.* at *7-8.

complaint merely stated that the mask was found to be “missing” from Egypt in 1973. More specifically, the court outlined that the government’s complaint was lacking:

(1) an assertion that the Mask was actually stolen; (2) factual circumstances relating to when the Government believes the Mask was stolen and why; (3) facts relating to the location from which the Mask was stolen; (4) facts regarding who the Government believes stole the Mask; and (5) a statement or identification of the law which the Government believes applies under which the Mask would be considered stolen and/or illegally exported.⁵¹

Although the United States alleged that “the register did not document that the Mask was sold or given to a private party during the time frame of 1966 to 1973,” the court held that the complaint was conclusory and completely devoid of any facts showing that the mask was stolen and then smuggled out of Egypt.⁵² The United States has appealed the decision.⁵³

III. Legal Developments Concerning Art Works Looted During the Holocaust

A. CALIFORNIA STATUTE OF LIMITATIONS

In 2012, two significant cases pending in the U.S. District Court for the Central District of California were dismissed under the foreign affairs doctrine of the United States. The first case involved a diptych painting by Lucas Cranach the Elder, titled “Adam and Eve,” which is currently owned by the Norton Simon Museum of Art in Pasadena, California.⁵⁴

In 1931, the diptych was sold to a Dutch art dealer, Jacques Goudstikker, at an auction held by the Soviet Union. Goudstikker fled Holland in 1940 to avoid the Nazis, and his art collection was looted by Herman Göring and Alois Miedl. At the end of World War II, the painting was recovered by the Allies and returned to Holland.

In 1961, the painting was purchased from Holland by George Stroganoff-Scherbatoff, who sold the painting to the Norton Simon Museum approximately ten years later. In 2007, Marei von Saher, one of Goudstikker’s heirs, filed suit against the Norton Simon Museum seeking the return of the painting. The Norton Simon Museum moved to dismiss her suit. The motion was granted by the district court, finding that California’s statute of limitations for Holocaust-era artwork was facially unconstitutional under the foreign affairs doctrine and otherwise time-barred.⁵⁵

Von Saher appealed, and the Ninth Circuit affirmed in part, reversed in part, and remanded the case.⁵⁶ During the pendency of that appeal, California amended its statute of

51. *Id.* at *8.

52. *Id.* at *7-8.

53. Notice of Appeal, *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11-cv-00504 (E.D. Mo. June 29, 2012), ECF No. 55.

54. *Von Saher v. Norton Simon Museum of Art*, No. CV 07-2866-JFW, 2007 WL 4302726, at *3 (C.D. Cal. Oct. 18, 2007), *rev’d in part*, 592 F.3d 954 (9th Cir. 2010).

55. *Id.* at *3.

56. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1019 (9th Cir. 2009).

limitations for all art theft claims in 2010, extending the statute of limitations from three years to six years if an action is brought against a gallery, auctioneer, dealer or museum and clarifying that these claims do not start with constructive discovery, but with actual discovery.⁵⁷ Von Saher also appealed to the U.S. Supreme Court in 2010 for a writ of certiorari, but that appeal was denied.⁵⁸ Von Saher filed an amended petition in 2011, relying on the amended statute of limitations, and the Norton Simon Museum moved to dismiss. The district court granted that motion in 2012.⁵⁹

The district court discussed that two theories exist upon which courts may rely to declare state laws to be unconstitutional or preempted under the foreign affairs doctrine: conflict preemption and field preemption.⁶⁰ While the Ninth Circuit, in its earlier decision involving the *von Saher* case and a previous version of the California statute of limitations, found that conflict preemption did not apply and relied upon field preemption,⁶¹ the district court found that conflict preemption barred von Saher's claims under the amended California law.⁶² Conflict preemption exists where a state law conflicts with federal foreign policy and the state law interferes with the goals and execution of that federal policy.⁶³

The district court has an obligation to follow the law of the case doctrine, except in limited circumstances.⁶⁴ The district court determined that the evidence on remand differed significantly from the evidence on appeal, therefore it could differ from the decision reached by the Ninth Circuit.⁶⁵ The difference in evidence came from the brief filed by the Solicitor General in von Saher's petition for a writ of certiorari.⁶⁶ The district court concluded that the U.S. policy of external restitution and respect for the restitution proceedings of other nations directly conflicts with the relief sought by von Saher, namely that restitution occur under California law. The district court reached its holding

with great reluctance . . . realizing the effect that this decision may have on victims of the holocaust and their descendants. As the Court stated in its previous order, there are no words which can adequately describe the atrocities suffered by the victims of the Holocaust, which continue to have an effect on those victims and their descendants today.⁶⁷

The second case involved the theft of a painting by Camille Pissarro titled *Rue Saint-Honore, après-midi, effet de pluie*.⁶⁸ Lilly Cassirer Neubauer had owned the painting, but was forced to surrender it to the Nazis in exchange for an exit visa to leave Germany

57. See CAL. CIV. PROC. CODE § 354.3 (West 2012), *invalidated by* Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044, 1049 (C.D. Cal. 2012).

58. Von Saher v. Norton Simon Museum of Art at Pasadena, 131 S. Ct. 3055 (2011) (mem.) (denying certiorari).

59. *Von Saher*, 862 F. Supp. 2d at 1049.

60. *Id.*

61. *Von Saher*, 578 F.3d at 1019.

62. *Von Saher*, 862 F. Supp. 2d at 1050.

63. *Id.*

64. *Id.* at 1050-51.

65. *Id.* at 1051.

66. *Id.*

67. *Id.* at 1053.

68. Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157 (C.D. Cal. 2006).

during World War II. Neubauer obtained compensation for the painting from the U.S. Court of Restitution Appeals of the Allied High Commission for Germany and the German courts. Her great-grandchildren, the plaintiffs in this case, along with the United Jewish Federation of San Diego County, alleged that they only learned of the painting's whereabouts in 2000. When the defendants refused to return the painting, the plaintiffs filed suit. Unlike the *von Saher* litigation, the district court here found that field preemption applied to the Pissarro painting.⁶⁹

Even if the federal government has not taken action on a foreign policy issue, a state is not free to make foreign policy of its own on that issue.⁷⁰ Field preemption analysis asks if a state has addressed traditional state responsibility or infringed on a foreign affairs power that is reserved by the Constitution to the federal government.⁷¹ The case survived a motion to dismiss, which was affirmed in part and reversed in part and reheard en banc, before the *von Saher* decision. As a result of the *von Saher* decision, defendant filed a new motion to dismiss that was granted on the basis of preemption, with prejudice and without leave to amend.⁷² Plaintiffs filed an Amended Notice of Appeal with the Ninth Circuit on July 23, 2012.

B. NEW YORK DEFENSE OF LACHES: *Bakalar v. Vavra*

The Second Circuit resolved a longstanding dispute regarding title to an Egon Schiele drawing, *Seated Woman with Bent Left Leg (Torso)*. In a Summary Order not selected for publication in the *Federal Reporter*, the Second Circuit affirmed the district court's award of the drawing to the plaintiff, David Bakalar, based on laches.⁷³

This "labyrinthine proceeding" began in 2005 when Bakalar filed an action in the Southern District of New York seeking declaratory judgment against defendants Milos Vavra and Leon Fischer.⁷⁴ The 1917 drawing in dispute belonged to Franz Friedrich Grunbaum, a Viennese cabaret performer who died at Dachau in 1941. In 1956, Mathilde Lukacs-Herzl, Grunbaum's sister-in-law, sold the drawing to a Swiss art gallery. Later that year, the Swiss gallery sold the drawing to a gallery in New York. Bakalar purchased the drawing from the New York gallery in 1964, and, in 2004, he consigned the drawing to Sotheby's for sale. Sotheby's froze the sale when Vavra and Fischer, Grunbaum's heirs, challenged Bakalar's title.

In 2008, the district court, applying Swiss law, found in favor of Bakalar.⁷⁵ On appeal, the Second Circuit vacated the decision and remanded for consideration of the issues under New York law.⁷⁶ The Second Circuit also directed the district court to consider the

69. *Id.* at 1168.

70. *Id.*

71. *Id.*

72. Cassirer v. Thyssen-Bornemisza Collection Found., No. 2:05-cv-03459-GAF-E, at 4, 18 (filed May 24, 2012), ECF No. 159.

73. *Bakalar v. Vavra*, No. 11-4042-cv, 2012 WL 4820801 (2d Cir. Oct. 11, 2012).

74. *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 294 (S.D.N.Y. 2011). This litigation also has been discussed in previous editions of this publication. See Bright et al., *supra* note 1, at 415-17; Gerstenblith, *supra* note 1, at 403-04.

75. *Bakalar v. Vavra*, No. 05 Civ. 3037, 2008 WL 4067335, at *7 (S.D.N.Y. Sept. 2, 2008).

76. *Bakalar v. Vavra*, 619 F.3d 136, 143-44 (2d Cir. 2010) (noting that under New York law, unlike under Swiss law, a thief may not pass good title; therefore, choice of law may determine outcome). See also *id.* at 147

plaintiff's laches defense should it determine that the defendants prevailed on the issue of title.⁷⁷

On remand, the district court found that, based upon the record, it could reasonably infer that the drawing had *not* been seized by the Nazis.⁷⁸ The court then considered, and rejected, each of the theories advanced as to how Lukacs-Herzl might have acquired the drawing and conveyed title to the Swiss gallery. Thus, the court concluded that Bakalar had failed to establish good title to the drawing. Nevertheless, Bakalar prevailed on his laches defense. The court found that Vavra's and Fischer's ancestors knew or should have known of their potential intestate rights to Grunbaum's property and that both Vavra and Fischer were "bound by the knowledge of their respective families."⁷⁹ The court also found that the nearly fifty-year delay in bringing this action had prejudiced Bakalar.

The Second Circuit summarily rejected each of the defendants' arguments on appeal. First, the court held that, given Bakalar's ability to trace provenance to Grunbaum's sister-in-law, the defendants had failed to demonstrate that the district court's finding that the drawing had not been stolen was clearly erroneous.⁸⁰ Second, the court affirmed the lower court's decision to impute knowledge of potential intestate rights to the defendants' ancestors, observing that "it was obviously necessary for the court to do just that" because "the alternative was to reset the clock for each successive generation."⁸¹ Finally, the Second Circuit agreed that the deaths of at least two generations of family members had prejudiced Bakalar by depriving him of key witnesses.

To what extent the Second Circuit's affirmation of the district court's "expansive application of laches"⁸² will impose additional hurdles to the recovery of stolen artwork remains to be seen. The "inevitable vagaries in property rights arising from the Holocaust, World War II, and the subsequent political and economic turmoil"⁸³ make it difficult for potential claimants to establish that their ancestors—family members that they may have never known, who may have lived in war-ravaged cities and towns, or who were trapped in Soviet-controlled Europe—were suitably diligent. Memories have faded, and documents have been lost. Of course, the same applies to good faith purchasers who must establish provenance, and allowing the laches clock to reset upon each generation would operate to the detriment of such purchasers who, like Bakalar, possessed the artwork for decades. No matter how laches is applied in cases like this, "it will work a certain inequity on the losing

(citing *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991) (holding that in New York, a good faith purchaser of artwork bears the burden of establishing that the work was not stolen)).

77. *Id.*

78. *Bakalar*, 819 F. Supp. 2d at 299 n.4 (noting that the "determination that the Nazis did not seize the [d]rawing based on [Lukac's possession of the drawing in Switzerland] is not speculation. It is an entirely appropriate inference supported by a preponderance of the evidence").

79. *Id.* at 305.

80. *Bakalar*, 2012 WL 4820801, at *1 ("Vavra and Fischer's hypothesis — that the Nazis stole the [d]rawing from Grunbaum only to subsequently return or sell it to his Jewish sister-in-law — does not come close to showing that the district court's finding was clearly erroneous.")

81. *Id.* at *2. In upholding the laches ruling, the Second Circuit also distinguished between the statute of limitations and laches defenses. *Id.* Specifically, in rejecting defendants' argument that their families had no legal duty of diligence because they did not know where the drawing was located, the court expressly held that, while diligence in locating property is not relevant to a statute of limitations analysis, it is relevant to a laches analysis. *Id.* (citing *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 182 (2d Cir. 2000)).

82. Bright et al., *supra* note 1, at 417.

83. *Bakalar*, 819 F. Supp. 2d at 305-06.

party,” and courts will remain “in the unenviable position of determining who gets the artwork, and who will be left with nothing despite a plausible claim of being unfairly required to bear the loss.”⁸⁴

IV. California Royalty Rights Act Struck Down

The California Resale Royalties Act (CRRA or Act)⁸⁵ was struck down in its entirety this year when the U.S. District Court for the Central District of California found that the statute violated the Commerce Clause of the United States Constitution⁸⁶ by explicitly controlling commerce “wholly outside the boundaries’ of California.”⁸⁷ The court was presented with the question of the CRRA’s constitutionality when ruling on a joint motion to dismiss two separate class actions brought by a collection of artists and their heirs against Sotheby’s, Inc. and Christies, Inc.⁸⁸ The class action suits sought to enforce the CRRA against these famous auction houses, both of which reside in New York. In granting the joint motion to dismiss, the court struck down the CRRA as unconstitutional and invalidated the only legislation in the United States that granted artists a *droit de suite*, or a right to royalties on futures sales of their work.

Since it was enacted in 1977, the CRRA has provided artists the right to receive a percentage of the sale price of their works of fine art from the seller when either the seller resides in California, or the sale takes place in California.⁸⁹ The Act defines an artist as “the person who creates a work of art and who, at the time of resale, is a citizen of the United States, or a resident of the state who has resided in the state for a minimum of two years.”⁹⁰ The Act also provides artists with a right to enforce its provisions, stating that, if a royalty triggered by the Act is not paid, “the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer.”⁹¹

In reviewing the constitutionality of the CRRA, the court applied the U.S. Supreme Court’s dormant Commerce Clause jurisprudence, which limits the power of the states by holding that “[s]tates do not have the ‘power [to] unjustifiably . . . discriminate against or burden the interstate flow of articles of commerce.’”⁹² The court noted that a statute will be held invalid as violating the dormant Commerce Clause if it “directly controls commerce occurring wholly outside the boundaries of a State” and thereby “exceeds the inherent limits of the enacting State’s authority.”⁹³ The court determined that the activity regulated by the CRRA is activity subject to federal control as (1) works of fine art constitute things in interstate commerce, and (2) the Act itself is an economic regulation with a

84. *Id.* at 305.

85. CAL. CIV. CODE § 986 (West. 2012), *invalidated by* Estate of Graham v. Sotheby’s, 860 F. Supp. 2d 1117 (C.D. Cal. 2012).

86. U.S. CONST. art. I, § 8, cl. 3.

87. *Estate of Graham*, 860 F. Supp. 2d at 1125.

88. *Id.* at 1119.

89. CAL. CIV. § 986(a) (emphasis added).

90. *Id.* § 986(c)(1).

91. *Id.* §986(a)(3).

92. *Estate of Graham*, 860 F. Supp. 2d at 1122 (quoting Conservation Force, Inc. v. Manning, 301 F.3d 985, 991 (9th Cir. 2002)).

93. *Id.* at 1124 (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

substantial effect on interstate commerce.⁹⁴ Finding the dormant Commerce Clause applicable to the CRRA, the court then held that by explicitly regulating applicable sales of fine art occurring wholly outside California, so long as the seller resides in California, the Act had “the ‘practical effect’ of . . . control[ling] conduct beyond the boundaries of the State”⁹⁵ and constituted a per se violation of the Commerce Clause.

In its final review of the CRRA, the court held that the portions of the Act that violated the Commerce Clause could not be severed and that the entire Act had to be struck down as unconstitutional. Reviewing the legislative history of the CRRA, the court noted that the offending sections of the Act were specifically added to the proposed bill by amendment, leading the court to conclude “that the California legislature ‘would not have enacted’ the CRRA without its extraterritorial reach,” and therefore those sections could not be severed from the rest of the Act.⁹⁶

94. *Id.* at 1123 (stating “[w]hen the number of art sale transactions throughout the United States that the CRRA purports to regulate are considered in the aggregate, the Court finds little doubt that the CRRA has a ‘substantial effect’ on interstate commerce such that Congress could regulate the activity”) (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003)).

95. *Id.* at 1124 (quoting *Healy*, 491 U.S. at 336).

96. *Id.* at 1126 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976)).