

Cultural Property

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I. Introduction

Concern for the protection of cultural property persisted in 1998 as thefts and military conflicts continued to threaten the survival of the cultural heritage. Some proposed legislation in New York, which would protect purchasers of stolen and illegally exported cultural property to the detriment of international theft victims, poses a threat to efforts to curb the illegal trafficking in stolen cultural property. Further, the Congress remains impervious to the introduction of legislation implementing either the 1954 Hague Convention or the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects.

II. The 1954 Hague Convention

The 1954 Hague Convention¹ protects cultural property during military conflicts, and the United States has played a major role in enforcing the Convention. Still, although interest in United States ratification of the Convention and its Protocol continues, the United States persists in its refusal to become a party to the treaty.

III. UNESCO Convention on Protection of Underwater Cultural Heritage

The 1994 Third United Nations Convention of the Law of the Sea establishes a duty on all nations to protect underwater cultural heritage.² It recognizes the sovereignty of a coastal State to twelve nautical miles in the territorial sea. A State can enact legislation protecting submerged cultural property within its territorial sea. Further, a coastal State is authorized to exercise sovereign rights and jurisdiction over natural resources of its continental shelf, which begins at the outer limit of the territorial sea and extends seaward for at least 200 nautical miles. The problem in protecting underwater cultural heritage is that shipwrecks are not natural resources. Further, the United States is not a party to the Law of the Sea Convention.

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1. See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

2. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 12561.

The Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage sought to provide coastal state jurisdiction over the underwater heritage to the extent of its continental shelf.³ The highlight of the International Year of the Ocean (1998), led by UNESCO, was the publication of a UNESCO Draft Convention based on the Buenos Aires Draft Convention.⁴ The UNESCO Convention supports granting each coastal nation exclusive jurisdiction over underwater cultural property to the 200-mile continental shelf to create a special cultural heritage zone.

IV. Efforts to Aid Victims of Art Looting During World War II

The Association of Art Museum Directors (AAMD) issued its Statement of Purpose in 1998 in which it recognized and censured the unlawful confiscation of art during World War II.⁵ The AAMD now requires its member museums to review their collections to determine if they have stolen artworks that were plundered by the Nazis. AAMD members are urged to promptly create mechanisms coordinating full access to all documentation concerning the spoliation of art during World War II. They are to facilitate access to Nazi/World War II era provenance information for all works of art in their collections. Members of the AAMD must begin immediately to review the provenance of works in their collections in an attempt to determine whether they have unlawfully confiscated works that have not been restituted. In addition, they are encouraged to create databases by third parties to aid in the identification of unlawfully confiscated works of art that were restituted.

The AAMD developed guidelines to assist museums in resolving claims. If a member museum should determine that a work of art in its collection was confiscated illegally during the Nazi/World War II era and not restituted, the museum should make that information public. If a legitimate claimant comes forward, the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner. For future gifts, bequests, and purchases, member museums should seek representations and warranties from the seller that the seller has valid title and that the work of art is free from any claims. For such future gifts, bequests, and purchases, member museums should not acquire an object if there is evidence of unlawful confiscation and no evidence of restitution. In preparing for exhibitions, member museums should endeavor to review provenance information regarding incoming loans.

In December of 1998, the Washington Conference on Holocaust-Era Assets, consisting of forty-four nations, met at a State Department conference and developed principles to assist nations in resolving issues relating to Nazi-confiscated art.⁶ Members of the conference concluded that art confiscated by the Nazis and subsequently restituted should be identified. Resources and personnel should be made available to facilitate the identification of all confiscated art that had not been restituted. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate the pre-War owners or their heirs. Efforts should be made to establish a central registry of such information. Pre-War owners and their heirs should be encouraged to come forward and make known their

3. See James A.R. Nafziger, *The Titanic Revisited*, 30 J. MAR. L. & COM. (Apr. 1999).

4. See *id.*

5. See *Report of the AAMD Task Force on the Spoilation of Art During the Nazi World War II Era (1933-1945)* (visited Feb. 22, 1999) <<http://www.aamd.net/guideln.shtml>>.

6. See *Washington Conference Principles on Nazi-Confiscated Art: Released in Connection with the Washington Conference on Holocaust-Era Assets, Washington, D.C. (Dec. 3, 1998)* (visited Feb. 27, 1999) <http://www.state.gov/www/regions/eur/981203__heac_art_princ.html>.

claims to confiscated and unrestituted art. Steps should be taken expeditiously to achieve a just and fair solution for such art. Commissions or other bodies, which are established to identify art that was confiscated and to assist in addressing ownership issues, should have a balanced membership. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

V. Proposed Legislation affecting Cultural Property

Proposed legislation in New York would incorporate a statute into New York's Art & Cultural Affairs laws that would enable a purchaser of stolen artwork or cultural property to obtain clear title so long as the purchaser, prior to purchase, checked with a (only one) computerized registry of cultural objects to determine whether a theft victim had registered a claim to the object within three-years prior to the proposed purchase. If the theft victim had not registered a claim within the three-year period, the claimant's right of recovery would be time barred three years after the purchase. Thus, if a theft victim had not registered a claim with a particular computerized registry, the victim's rights would be time barred after six years even though the theft victim was unaware of the New York law.

The proposed New York legislation contrasts with legislation being considered at the federal level that would strengthen current New York law as set out in *Guggenheim Foundation v. Lubell*.⁷ The New York Court recognized in *Lubell* that New York law will not time bar a theft victim's claim until the claimant makes a demand on the possessor of the stolen property for its return and the possessor refuses to return the property.⁸

The Stolen Artwork Restitution Act of 1998, which was introduced in the House in June of 1998, would require a seller or purchaser of artwork with a sales price of \$5,000 or more to undertake a documented, reasonable inquiry into the ownership history of the artwork, including information from one or more missing or stolen artwork registries if there is a request to do so from an individual who can produce evidence that the artwork was stolen from that individual or from a member of the individual's family.⁹ The act stated Congress' directive that all museums and auction houses should undertake documented, reasonable, multisource inquiries with respect to artwork in their possession to determine whether any such artwork was stolen. It also stated a purpose of Congress to be that all governments in possession of artwork stolen from victims of the Holocaust should return that artwork to the rightful owners.

VI. Recent Cases Involving Stolen or Illegally Exported Cultural Property

Several important cases involving stolen or illegally exported cultural property surfaced or were litigated in 1998.

A. IN THE MATTER OF THE APPLICATION TO QUASH GRAND JURY SUBPOENA DUCES TECUM SERVED ON THE MUSEUM OF MODERN ART (EGON SCHIELE PAINTINGS)¹⁰

In *In Re Application to Quash Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, the New York Museum of Modern Art moved to quash a subpoena issued by the New

7. *Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

8. *See id.* at 429.

9. *See* H.R. 4138, 105th Cong. (1998).

10. *In Re Application to Quash Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 177 Misc.2d 985, 677 N.Y.S.2d 872 (N.Y. Sup. Ct. 1998).

York District Attorney for two paintings by the Austrian artist, Egon Schiele. The paintings were among 150 works of art displayed at the museum in an exhibition entitled "Egon Schiele: The Leopold Collection, Vienna."¹¹ The collection was on loan from the Leopold Museum of Austria. Dr. Rudolf Leopold, an avid art collector who amassed a large number of Schiele paintings, purchased the paintings after several intervening buyers following World War II. Dr. Leopold sold his collection to the Leopold Foundation of Vienna. The New York Museum of Modern Art received letters from persons who claimed the paintings were stolen during the Nazi annexation of Austria. The claimants demanded that the museum turn over the paintings to the heirs of the rightful owners.

New York cultural institutions have relied on a state law that exempts from seizure any art lent to a cultural institution by a nonresident exhibitor. Federal law provides similar protection, but extends only to works on loan from abroad.¹² The federal statute requires an application with the United States Information Agency, which must determine that the art is of "cultural significance" and that the exhibition is in the "national interest."¹³ After this determination is made and the decision is published in the *Federal Register*, the art on loan is not subject to civil or criminal process. New York museums often eliminate this "time-consuming process" and rely instead on the New York law to provide protection from seizure.¹⁴

The lower court granted the motion to quash the subpoena and ruled that the federal act did not preempt the state statute. It determined that no conflict existed between the federal and the New York statutes because both seek to advance cultural benefits to the residents of the United States and New York. It noted that the New York statute gives automatic protection to works of art, whereas the federal statute requires that one apply for protection. The court, however, was concerned with "compelling policy" issues.¹⁵ The court commented that "it is indeed troubling if museums and cultural institutions, which are sources of civilized values . . . are turning a blind eye to the exhibition of stolen art."¹⁶ Still, it noted that claimants would lose no potential rights they might have to the art and decided that claimants "cannot use a temporary exhibition in New York to avoid pursuing their claims where the art originated."¹⁷ The court's granting of the motion to quash is on appeal.

B. UNITED STATES v. AN ANTIQUE PLATTER OF GOLD¹⁸

In *United States v. An Antique Platter of Gold & Steimbardt*, the United States filed a civil forfeiture action, seeking forfeiture of a 4th century B.C. antique gold Phiale of Sicilian origin, which had allegedly been imported illegally into the United States because of materially false statements in the customs forms relating to the Phiale's country of origin. The Phiale also had allegedly been imported into the United States illegally under Italian law. Italian law provides that archaeological finds and objects of antiquity belong to the Italian state unless a party can establish private ownership of an object pursuant to a legitimate title that predates 1902, the year in which the first Italian law protecting antiquities became effective. In its motion for summary judgment, which the District Court granted, the United States contended that the

11. *Id.* at 986.

12. See 22 U.S.C.A. § 2459 (West Supp. 1998).

13. 22 U.S.C.A. § 2459 (West Supp. 1998).

14. See *In Re Application to Quash*, 177 Misc.2d. at 988.

15. *Id.* at 996.

16. *Id.*

17. *Id.*

18. See *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997).

importer of the Phiale listed its country of origin on customs forms as Switzerland instead of Italy. It alleged this was a material misstatement because identification of a country that has stringent laws to protect their cultural and artistic heritage raises a red flag to customs officials who are reviewing customs forms. Italy is such a country, but Switzerland is not. The United States alleged that truthful identification of Italy on the customs forms would have placed the Customs Service on notice that an object of antiquity, dated circa 450 B.C., was being exported from a country with strict antiquity protection laws. This information would have prevented the Phiale from entering the United States illegally.

The United States also alleged, as an alternative basis in its motion for summary judgment, that the Phiale was subject to forfeiture as stolen property imported in violation of the National Stolen Property Act.¹⁹ It cited *United States v. McClain*²⁰ and *United States v. Hollinshead*²¹ as authorities.

Upon appeal to the Second Circuit Court of Appeals, the American Association of Museums filed an amici curiae brief, in which it contended the National Stolen Property Act is implicated only if the Phiale was stolen. According to the AAM, to determine that the Phiale was stolen, the District Court had to give effect to, and enforce, Italy's patrimony laws. This is because the Phiale was taken illegally from an excavation site rather than from Italy; as the owner in possession. The AAM contends that foreign laws are not automatically enforceable in this country and may be applied only as a "matter of comity to the extent consistent with U.S. law and policy."²² The AAM pointed out that it has opposed the automatic enforcement of patrimony laws in this country since 1991 and that it was a party to a White Paper submitted to the U.S. State Department in which it urged rejection of the UNIDROIT Convention because the AAM has decided the Convention would require the United States to enforce the patrimony and export laws of other countries. The AAM contends the decision of the district court is irreconcilable with the Cultural Property Implementation Act.²³ In its amici curiae brief, the AAM states its opinion that this Act enacted into domestic law only a portion of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The AAM maintained that efforts of other countries to claim ownership of all objects discovered within their borders "represent a more 'parochial' view of cultural property and directly challenge the 'common cultural heritage' philosophy upon which our museums and society are founded."²⁴ The Phiale will remain with U.S. Customs until the lawsuit is resolved.

C. ROSENBERG V. SEATTLE ART MUSEUM²⁵

The heirs of Paul Rosenberg filed a complaint against the Seattle Art Museum for the return of a Matisse, which was donated to the Museum by the estate of Bloedel. The Bloedels purchased the painting from a gallery in New York City in 1954. Heirs of Rosenberg, a Parisian art collector and gallery owner prior to World War II, alleged that the painting was stolen by the

19. National Stolen Property Act, 18 U.S.C. § 2314 (1994).

20. *United States v. McClain*, 593 F.2d 658, 664-65 (5th Cir.), cert. denied, 444 U.S. 918 (1979).

21. *United States v. Hollinshead*, 495 F.2d 1154, 1155-56 (9th Cir. 1974).

22. See 19 U.S.C. §§ 2601-13 (1994).

23. Brief of Amici Curiae American Association of Museums, et al, in Support of the Appeal of Claimant Michael H. Steinhardt at xxxii, *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), (95 Civ. 10537 (BSJ)).

24. Brief at viii, *An Antique Platter* (95 Civ. 10537 (BSJ)).

25. *Rosenburg v. Seattle Art Museum*, No. C98-1073D (W.D. Wash. 1998).

Nazis and later possessed by the Museum without clear title. The Museum refused to return the painting pending the completion of its provenance research. If the provenance research indicates the Rosenbergs' claim is valid, the museum has indicated it will return the painting.

D. *GOODMAN V. SEARLE*²⁶

In *Goodman v. Searle*, the heirs of Friedrich Gutmann filed suit to recover a work of art by Edgar Degas which they alleged was stolen by Nazi agents, members of the Einsatzstab Rosenberg (the Nazi art looting organization), in the process of implementing Hitler's far-reaching confiscation of Jewish-owned art. They alleged that Gutmann purchased the work in 1932; that he sent it to an art dealer in Paris in 1939; that the dealer put the Degas and other paintings owned by Gutmann in storage in Paris to protect them from seizure by Germans during World War II; and, that the Degas was not found at the end of the war. Gutmann and his wife perished in Nazi death camps. Searle purchased the painting on the recommendation of Degas experts at the Art Institute of Chicago. The case was settled with Searle agreeing to donate the painting to the Art Institute. Terms of the settlement agreement required the Art Institute to have the Degas appraised and to pay the Gutmann heirs one-half of such appraised value.

26. *Goodman v. Searle*, No. 96-C-6459 (N.D. Ill. 1998).