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Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art

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Cover Page Footnote

Professor Martha Minow of Harvard Law School

ARTICLES

Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art

Kelly Diane Walton*

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INTRODUCTION

Recently, famous works of art have become a source of tension between original owners, who are Jewish Holocaust survivors and their heirs, and current good faith purchasers. This controversy is the direct result of the Nazis' art theft program. The "art collecting" that occurred during the Third Reich was a systematic program of open plunder of some of the world's most beloved and precious works of art. The Nazis stole art from all over Europe, and the total number of stolen paintings reached 249,683 as determined by the Allies in 1949.¹ Others estimate that hundreds of thousands of paintings, sculptures, and drawings, as well as millions of books, manuscripts, and other cultural artifacts were stolen from across Europe.² Experts estimate that about one-fifth of the world's art changed hands during World War II,³ and the Metropolitan Museum of Art estimated in 1945 that the value of all the art looted by the Nazis was \$2.5 billion.⁴

This Article, however, focuses on the millions of dollars in art that was stolen from the prosperous Jewish collectors of Europe and which has surfaced in the United States—either in museums,

1. See JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* 9 (1996). This book deals with the private collections of and efforts by individual Nazi officials to amass art. It contains an excellent background on the role of art in the Nazi psyche.

2. See HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* 16 (Tim Bent & Hector Feliciano trans., 1997). This book traces in detail what happened to the private collections of five Jewish families in Europe who were Nazi targets due to their extensive art collections. The book includes photographs of the art that was stolen and remains missing.

3. See Gail Russell Chaddock, *Art World Wary of New Rules for Stolen Goods*, *CHRISTIAN SCIENCE MONITOR*, Feb. 10, 1998, at 1, available in 1998 WL 2365785.

4. See Gaby Wood, *Arts: Profits and Loss*, *THE GUARDIAN*, Feb. 14, 1998, at 1, available in 1998 WL 3078752.

galleries, auction houses, or in the hands of private collectors.⁵ Although the numbers vary, it is clear that at least twenty-one thousand works were stolen from French Jews, and many others from Belgian, Dutch, and Eastern European Jews.⁶ In fact, thousands of works are still missing.⁷

The ramifications of the Nazis' stolen art program have continued since the 1940s, but only recently has worldwide attention been focused on the scope of the problem. To state the issue simply, museums, auction houses, private galleries, and private collectors are now faced with an ever-increasing number of claims from heirs of the victims of the Holocaust alleging that they hold art which was stolen by the Nazis from Jews.⁸ The art world is under intense scrutiny from the public and internally as it begins to realize its role in the trade and possession of objects that were illegally acquired in a brutal yet systematic fashion. It appears that dealers, well-respected auction houses, and collectors were all too careless in authenticating the art that flooded the market during World War II and immediately after. Some players in this tale actively corroborated with the Nazis and others simply did not ask the necessary provenance questions nor care to know how the coveted Picasso, Cranach, Raphael, or Degas had suddenly appeared on the market. All many sellers cared about was making a nice sum of cash, and all many buyers cared about was the intense satisfaction of possessing a heretofore unattainable and priceless work of art.

Throughout this Article, the term *provenance* appears. Provenance is a technical art world term meaning documentation of ori-

5. This Article does not focus on, but occasionally reference, the art that was stolen from European museums. Much of this art was actually returned by way of the Allies' collecting points. This Article also does not discuss two other current controversies: art that was stolen by the Soviet Army from Germany after the end of World War II, and art that was stolen by members of the American forces after the war.

6. See PETROPOULOS, *supra* note 1, at 186; FELICIANO, *supra* note 2, at 120-21.

7. See FELICIANO, *supra* note 2, at 6.

8. In fact, the director of the Cleveland Museum, Robert P. Bergan, stated that "[w]e're talking about hundreds of thousands of objects. I believe that for the rest of my professional career, this issue will face the museums of the world." Steven Litt, *Looted Art Spurs Ownership Debate; Countries, Museums Spar Over Works Taken by Nazis During World War II*, THE PLAIN DEALER, Mar. 1, 1998, at 1, available in 1998 WL 4122965.

gin or history of ownership. It is not exactly interchangeable with legal title, but if properly determined, should reveal the “four Ws.” One commentator has presented this as a fraction: the numerator contains who owned the art, what exhibitions and what catalogues the art has appeared in, and where the art has been, with the denominator containing the crucial “when.”⁹ The multilayered world of the art trade makes the ultimate legal question of ownership particularly thorny, made only worse by the fact that the art this Article is concerned with was stolen during a time of chaos. Sometimes claimants can produce detailed written evidence in support of their claim, other times all they have are yellowed photographs of the paintings. Still other times, all they have are memories. Multilayered transactions involving looters, smugglers, intermediaries, auctioneers, dealers, and purchasers help insulate the original guilty knowledge until in many cases, it just disappears.¹⁰

The fact that the art market has traditionally been steeped in secrecy and “gentlemanly” informality adds to the problem.¹¹ Who will shoulder the blame now that those originally to blame, the Nazi looters and their collaborators, are gone? Who will win? Who will lose? These questions are troubling enough, but increase when we realize the moral implications of the ownership of looted art in the particular context of the Holocaust.

This Article argues that the original owners and heirs of art that was stolen by the Nazis in a systematic plan to rob them of their lives, their culture, and their identity, deserve to have these works returned to them. Part I briefly summarizes the Nazis’ Art Theft

9. See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 383 n.40 (1995) (citing Jessica L. Daraby, *Current Developments in International Trade of Cultural Property: Duties of Collectors, Traders, and Claimants*, 297 PLI/PAT 659, 716 n.22 (1990)).

10. See Borodkin, *supra* note 9, at 385-86. “When not directly involved, consciences are easily washed and a bank or businessman may find the purchase of an art object (the doubtful origin of which may have become quite remote in the long series of passages) legitimate The purchaser either is unaware of the original provenance of the art work or he considers the matter to be of sole concern to the thief, intermediary, or re-seller.” Borodkin, at 386, n.54 (quoting GIULIANA LUNA, *The Protection of the Cultural Heritage: An Italian Perspective*, in PROTECTION OF THE ARTISTIC AND ARCHEOLOGICAL HERITAGE: A VIEW FROM ITALY AND INDIA 180-81 (1976)).

11. See *id.* at 385.

Program. Part II examines the current problem of stolen art involving auction houses, museums, and private galleries. Part III recounts United States case law on art theft. Part IV reviews United States legislation and pertinent statutes. Part V offers a proposed solution and maintains that the victims of the Nazis' art looting are entitled to restitution. This Article concludes that museums, galleries, auction houses, and individual purchasers, when confronted with a claim by an original owner that is determined to be valid by independent experts, or if they disagree, by a court, should return the art to the original owner, pay the owner the present value of the work, or arrange for a museum to exhibit the piece with a description of its provenance.

I. BACKGROUND ON THE NAZIS' ART THEFT PROGRAM

Adolph Hitler was undeniably one of the most evil men of all time. He was also, perhaps surprisingly, a patron of the arts as were many of the subleaders of the Third Reich, although of only certain types of art. It has been said that, "[n]ever before National Socialism had comparable financial means and political power been at the service of aesthetic activity."¹² In fact, Hitler, in addition to illegal means of acquisition, "spent more on art than anybody in the history of the world."¹³ Hitler and other top level Nazis considered themselves cultured art admirers and collectors, and art became one way in which the Nazis defined themselves.¹⁴ Being associated with great works of art became another characteristic defining the Aryan conception of moral, intellectual, and genetic superiority, and looted artworks were considered trophies.

Three others aided Hitler and sometimes competed with him as well in his efforts to influence culture. Joseph Goebbels was Reich minister for propaganda and public enlightenment, Bernhard Rust was Reich minister for science, education, and public instruction and as such oversaw museums, art schools, and other cultural institutions, and Alfred Rosenberg supervised ideology as the delegate

12. See PETROPOULOS, *supra* note 1, at 5.

13. *Id.* at 184.

14. Hitler had, it seems, always been interested in art. He was twice rejected from the Viennese *Akademie der Bildenden Künste* (art academy) in 1907-08. See *id.* at 182.

for intellectual and philosophical education.¹⁵ The confiscation of privately owned art began in 1938,¹⁶ in part for propagandistic reasons, in part for reasons related to Hitler's extreme dislike for anything of cultural significance to be owned by Jews or other "inferior" races, but also in order for the Nazi leaders to play the part of someone with a luxurious lifestyle or the trappings of power and wealth whose career could advance if he was perceived to be cultured.¹⁷ A "find" of a particularly valuable work of art in a private collection or a lesser-known museum was used to curry favor with Nazi officials.¹⁸ Throughout the research for this Article, one comes across an extraordinarily high number of photographs of Nazi leaders, usually Hitler, receiving and giving gifts of paintings. The Nazis first used art to enter the world of the traditional elite, and then to further solidify their dominance. The amounts spent and the energy that went into the Nazis' stolen art program are almost unbelievable. Careers in the Nazi regime were made and in some cases destroyed on the basis of success in confiscating art, pleasing Hitler with presents of stolen art for his private collection or for his dream of a museum which would house the world's greatest collection of art in Linz, Austria, and being perceived as successful in waging a type of war against "degenerate" and unacceptable art. The *Kunstraub* (art theft program) was carefully planned and ruthlessly precise from the beginning, complete with total funding, the creation of an unusually high number of high level positions and departments concerned with art and culture within the Nazi hierarchy, and the complicity of European museums and private dealers.

Kunstraub was carried out with the same ruthless precision as the slaughter of six million Jews, and at least to some historians, seems as if it was just as important to the Nazi regime and Hitler's conception of the ideal and cultured Aryan state.¹⁹ In fact, Hitler

15. *See id.* at 8-9.

16. *See id.* at 9.

17. *See id.* at 10.

18. *See id.* at 109.

19. *See generally* LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (Alfred A. Knopf 1995) (describing the trade in art under Nazi rule); PETROPOULOS, *supra* note 1.

was so obsessed with the stolen art programs that he alone determined the fate of almost every piece of art, a fact which seems almost inconceivable given his duties as military dictator and his attention to the annihilation of the Jews.²⁰ Works of art deemed worthy of the Reich were carefully stored, preserved, and treasured, while the lives of millions of human beings were disregarded as worthless.

Not only did the Nazis use art to enhance their image, but they also sponsored an unusually large number of art shows with themes such as *Entartete Kunst* (degenerate art) and *Reine Deutsche Kunst* (Pure German Art).²¹ Modern art was associated with Jews since it was considered to be inferior in its depictions, for example, of the human figure as unidealized, or exaggerated, (Picasso, Van Gogh, and Chagall were examples of this) and especially derided. In fact, the Nazis blamed the prominence of modern art on the supposed Jewish control of the art market and the press.²² Anti-modernism thus became linked with anti-Semitism, and modern art and the Jews became the casualties of a well-orchestrated program to link the two “unacceptables” together.

During the later 1930’s, private collections as well as Germany’s state museums and galleries were purged of all unacceptable art, which included of course modernist or abstract works, anything by Jewish artists or depicting Jewish subjects, anything which was critical of Germany, and anything that did not depict reality as the Nazis perceived it.²³ Some of the purged works were shown at the 1937 “Exhibit of Degenerate Art” which drew crowds of twenty thousand per day.²⁴ One room was described as “a representative selection from the endless supply of Jewish trash that no words can adequately describe.”²⁵ Only after the perceived approval of the German public, signified by the crowds at the show, which, as Jonathan Petropoulos points out, could have signified a sad farewell to works that would not be seen for some time, did

20. See PETROPOULOS, *supra* note 1, at 130-31.

21. See *id.* at 32-33.

22. See *id.* at 54.

23. See *id.* at 56-57.

24. See *id.* at 57.

25. See NICHOLAS, *supra* note 19, at 21.

Hitler direct Goebbels to pass a law making the confiscation of degenerate art from state collections a legal act.²⁶

Some of this art was sold privately, some was sold at a public auction in Switzerland, and some was tragically destroyed by fire in a private ceremony by the Nazis.²⁷ A “Commission for the Exploitation of Degenerate Art” was formed.²⁸ The sales attracted the famous arthouses and dealers of Europe such as Wildenstein and Seligmann who saw the potential for enormous profit in selling the works outside of Germany and perhaps acted in part to save these works from destruction or decay.²⁹ Top Nazi officials such as Goering and Goebbels themselves brokered deals to sell the confiscated art.³⁰ While the German museums were partially compensated for their losses, Jews and other “state’s enemies,” were not.³¹ In fact, many works of art, along with tapestries, rugs, and furniture stolen from Jewish families throughout Europe surfaced as presents to high ranking Nazis from other Nazis or as furnishings and decoration for Nazi offices and homes.³²

Goebbels was in charge of repatriating art from the conquered Western nations, such as France. His plans were three-fold: (1) to seize works taken by the French in the Napoleonic Wars, (2) to secure art of Germanic origin, and (3) to seize art that he considered had “Germanic character.”³³ Alfred Rosenberg, head of the *Einsatzstab Reichleiter Rosenberg* (“ERR”), was in charge of most of the art confiscation in Paris,³⁴ but Goering effectively controlled the ERR, and looted for his own collection as well as for the program overall.³⁵

Over four hundred anti-Jewish measures were passed during the Third Reich, including in 1938, the Ordinance for the Registration of Jewish Property, Ordinance for the Attachment of the Prop-

26. See PETROPOULOS, *supra* note 1, at 60.

27. See *id.* at 76.

28. See NICHOLAS, *supra* note 19, at 23.

29. See PETROPOULOS, *supra* note 1, at 78.

30. See *id.* at 79.

31. See *id.* at 80-81.

32. See *id.* at 91.

33. See *id.* at 125.

34. See FELICIANO, *supra* note 2, at 15.

35. See *id.* at 4-5, 15.

erty of the People's and State's Enemies, and the Ordinance for the Employment of Jewish Property.³⁶ In addition to these "legal" means, the Nazis routinely confiscated Jewish property without so-called legal authority. Sometimes the confiscations were marked by extreme violence, such as during *Kristallnacht*. In the early period of the Third Reich, and especially in Austria, many Jews exchanged all of their possessions, including many valuable art treasures, for exit visas.³⁷ On rare but documented occasions, Jews were released from concentration camps in exchange for paintings held by their families who had managed to flee the occupied territories.³⁸

The Gestapo, the Security Service, and a Berlin art dealer named Karl Haberstock controlled most of the confiscation of art.³⁹ Many of Germany and Austria's, as well as representatives of other countries, museum directors, art dealers, and art historians were enthusiastically complicitous in the plan and fully aware of the valid owners of the art as they stocked their collections.⁴⁰ In fact, several art historians were assigned to SS Divisions to help identify the booty.⁴¹ Hitler's grand plan for the art he considered worthy of the Reich was to assemble the greatest art collection of all time and house it in the "*Fuhrermuseum*" in Linz, Austria, Hitler's birthplace. This planned cultural complex was known as "*Sonderauftrag Linz*"—Special Project Linz.⁴² This museum, which was to be filled with Germanic treasures, as well as art from France, Italy, Spain, and other western European nations was to demonstrate the Third Reich's dominance in Europe.⁴³

A. *Stolen Art in Transit*

The Rothschilds, Seligmanns, Kanns, Wildensteins, David-Weils, Levys, Cassels, and others were very prominent Jewish

36. See PETROPOULOS, *supra* note 1, at 84.

37. See NICHOLAS, *supra* note 19, at 39.

38. See *id.* at 109.

39. See PETROPOULOS, *supra* note 1, at 87-88.

40. See *id.* at 92-94.

41. See *id.* at 110.

42. See *id.* at 90.

43. See *id.* at 248.

families with extensive art collections, and it is these families that suffered the worst from Hitler's stolen art program. For example, the Rothschilds on the whole lost more than 3,978 objects.⁴⁴ Many of these works were stored for the Linz museum, while the ones considered "degenerate" were sold or traded to French and Swiss dealers. These lowly regarded works were traded at highly disadvantageous rates to the Nazis and conversely advantageous rates to the dealers who recognized their worth and would reap enormous profits in comparison to the price paid in later years.⁴⁵

By 1944, over one-third of the art held in private collections had been stolen by the Nazis, whose art theft program in France was staffed with more than sixty people, and which had the ability to commandeer trucks, trains, and valuable fuel.⁴⁶ Art looting of Jewish collections also had the on and off support of the Vichy government.⁴⁷ There were many wealthy Jewish collectors in France who saw their assets put under the control of "provisional administrators" whose duty was to "suppress Jewish influence in the French economy."⁴⁸ These objects entered the international trade or wound up in the possession of Nazi officials. Additionally, the great art houses such as Wildenstein were "Aryanized"—bought at ridiculously low prices by officials doing Hitler's bidding.⁴⁹

The international trade in art reached peak levels across Europe and eventually spread to the United States and other places in the Americas. Adding to the confusion of a bloated art market were the players' often hidden identities, poor records, shady dealers, buyers eager to snatch up great works of art, and a custom of "no questions asked."⁵⁰ When the United States Treasury department attempted to more strictly monitor the flow of assets into the country, dealers set up offices in Havana, Mexico City, and Buenos Ai-

44. *See id.* at 131.

45. *See id.* at 134-35.

46. *See FELICIANO, supra* note 2, at 4.

47. *See id.* at 39.

48. NICHOLAS, *supra* note 19, at 161.

49. *See id.* at 161-63.

50. *See id.* at 164-65.

res.⁵¹

However, the private collections owned by Jews, particularly in France, were raided and ravaged. The Gestapo raided shops and houses, and the Nazi Currency Control Unit was soon operating the private bank vaults where so many had entrusted their collections.⁵² The Nazis soon found many of the works that had been hidden, or were led to their resting place by collaborators, moving companies, neighbors, and even trusted household servants.⁵³ Nazi officials ordered the French police to provide vans, so they could cart off the extremely valuable collections of the Wildensteins, Seligmanns, Paul Rosenbergs, and Rothschilds—whose collections figure prominently in this story as this family held property throughout Europe.⁵⁴ The Nazi elite traveled to Paris to have their pick of the newly confiscated art held at the Jeu de Palme, which became a glittering storehouse for stolen goods.⁵⁵ The entire collection was photographed and documented for Hitler as well as coded.⁵⁶ Some of the works from French Jews, which were perhaps the most prized as they included Picassos, Braques, Rembrandts, and Vermeers, were sold to unscrupulous dealers.⁵⁷ Eduoard de Rothschild's Vermeer *Astronomer*, which now hangs in the Louvre, and was dedicated in 1982, became part of Hitler's personal collection.⁵⁸

The Nazis, in response to complaints, were able to conveniently point out that the Vichy government had already declared French Jews non-citizens.⁵⁹ Finally, French officials, horrified at the truckloads of art destined for Germany, demanded to be given a legal basis for the confiscations.⁶⁰ In a document which fully

51. *See id.* at 164.

52. *See id.* at 124.

53. *See FELICIANO, supra* note 2, at 5.

54. *See NICHOLAS, supra* note 19, at 125.

55. *See id.* at 126-27.

56. *See id.* at 128.

57. *See id.* at 128-129.

58. *See FELICIANO, supra* note 2, at 47.

59. *See NICHOLAS, supra* note 19, at 126.

60. Sentiment in Paris against the Nazi looting was also strong among Resistance members and others. The French *Pour la Victoire* ran a cartoon showing Michelangelo's *Moses* about to be transported to Dachau. *See id.* at 239-40.

demonstrated the warped mindset of Hitler and the Nazi elite, the response asserted that the defeat of France was necessary to wrest control of Europe from international Jewry and that the armistice was with the true French, not Jews. Since most of the Jews living in France had come from Germany, the “safeguarding” of the art was to be considered a “small indemnity for the great sacrifices of the Reich made for the people of Europe in their fight against Jewry.” Finally, the Nazi document declared that the Hague Convention posed no obstacle, as Jews and their possessions were outside of the law, and as such could not be protected.⁶¹

The Nazis inventoried, catalogued and photographed almost all of the art they stole, including that from Jewish collectors.⁶² For example, the collection of Dr. Jaffé of the Netherlands, which was confiscated in 1940, was meticulously catalogued for Hitler, showing the provenance and recent history of the works.⁶³ However, as the ERR staff at the Jeu de Palme became more and more overwhelmed with the task of inventorying all of the confiscated art, the notation “of unknown origin” began to appear.⁶⁴

B. *The Unique Situation of France and its Museums*

Since France occupied a unique position during the Third Reich—due to both a Nazi-sympathetic Vichy government as well as to its status among the Nazi elite as so entirely cultured and sophisticated and thus spared the fate of Poland—it is not surprising that more “diplomatic” art exchanges were orchestrated. French museum officials often refused to give up anything in their prized collections unless the Nazis gave something from their collections for the national French museums in return.⁶⁵ It is unclear just how much sway or significance these demands really had, but the Nazis, in order to keep some (rapidly fading) appearance of cooperation with, instead of the more accurate control over the French, agreed to some of these deals.⁶⁶ Of course, many times these

61. *See id.* at 137.

62. *See FELICIANO, supra* note 2, at 22.

63. *See NICHOLAS, supra* note 19, at 102.

64. *See FELICIANO, supra* note 2, at 110.

65. *See NICHOLAS, supra* note 19, at 145-47.

66. *See id.* at 144.

agreements were not honored, or vastly inferior works were sent to the French after Nazi officials had already carted off their prizes.⁶⁷ Sometimes, whether unknowingly or as insult to injury, works immediately recognized as stolen from Jewish and non-Jewish collections in France alike were sent as “payment” by the Nazis.⁶⁸

Another method used by French museum officials to protect what could be protected, thus not including art previously owned by Jews, was to classify works as national treasures, and in some cases, to ask private collectors to donate their works to the *Musées Nationaux*.⁶⁹ These works were then promptly secured for “restoration,” essentially hidden. Sometimes only days before invasions and bombings, museum personnel, packers and volunteers worked day and night to secure famous and priceless paintings and sculptures by crates or by rolling. The treasures traveled to remote, and for the time being, secure areas of the countryside, and some traveled by ship to Canada, Bermuda, and the United States, where they were stored in castles, underground, in mines, and country houses that no one could have imagined contained the likes of da Vinci, Raphael, El Greco, Cranach, Voltaire and high Greek sculptures such as the *Winged Victory of Samothrace*.⁷⁰

C. *The Americans and Early Restitution*

The “Roberts Commission,” headed by Supreme Court Justice Owen Roberts (formal name was the “American Commission for the Protection and Salvage of Artistic and Historic Monuments”) was established on October 20, 1943.⁷¹ This was an attempt to educate the Allied troops in avoiding the destruction of precious art and monuments. It was only partially successful, as the Allies also pillaged, destroyed, and looted. In 1944, as it became clearer that Germany might fall, Metropolitan Museum of Art director Francis Henry Taylor was allowed to go to London to see that the United

67. *See id.* at 147.

68. *See id.*

69. *See id.* at 145.

70. *See generally id.* at 49-56 (providing fascinating details on how the treasures of the great museums of France, Italy, Poland and Britain were protected).

71. *See id.* at 234.

States was properly represented in restitution discussions.⁷²

The Army was reluctant to supply intelligence, but the Office of Strategic Services (“OSS”) was more sympathetic to investigating Nazi looting, partly because it was worried about anything that could finance a postwar survival of Nazism and because it would help in the gathering of evidence of war crimes.⁷³ By November 1944, the “Art Looting Investigative Unit” was established, with a staff of art historians recommended by the Roberts Commission.⁷⁴ Nazi art gatherers and their records were brought before the OSS after the war, and only then was the magnitude of the art looting operation fully known. The Art Looting Investigative Unit quickly discerned that very few accepted any blame, and most if not all had not inquired into the origins of the art.⁷⁵

At the end of the war, along with liberating the few survivors of the concentration camps and occupied territories, the Army became embroiled in the search for the hordes of art and riches hidden all over Europe. The joint American and British operation, the “Monuments, Fine Arts & Architecture” (“MFA&A”), was charged with recuperation and restitution, as was the French agency, the *Commission de Récupération Artistique* (“CRA”).⁷⁶ Many of the most valuable paintings, such as those of the Rothschilds and others, were found in the abandoned salt mines near Alt Aussee, in Austria where they had been transferred when the Allied bombings began.⁷⁷ Marburg, Germany became the first official American “Collecting Point.”⁷⁸ The United States Army and members of the various art commissions must surely have been astonished at the extent of Hitler’s art looting. The army coordinated the return of every work of art or treasure that could be accounted for, amounting to twelve train carloads a week, to its country of origin with much ceremony and fanfare.⁷⁹

72. See *id.* at 281.

73. See *id.* at 282.

74. See *id.*

75. See *id.* at 380.

76. See FELICIANO, *supra* note 2, at 172.

77. See *id.* at 50.

78. See NICHOLAS, *supra* note 19, at 340.

79. See *id.* at 407-09.

Some collections, such as that of the Paris Rothschilds, were found virtually intact in the Jeu de Palme in Paris or in warehouses.⁸⁰ Other owners were not so lucky and the problems were numerous. Many could not prove ownership, objects were stored haphazardly in huge and daunting warehouses, and still other objects were simply not where they had been left or taken to.⁸¹ Some works had already gone through at least one dealer's hands, or those of neighbors, soldiers, or unknown persons. Some works were falsely claimed at the collecting points, and disappeared into the hands of yet another thief or into the black market.⁸² A fascinating tale of treasure hunting throughout the Third Reich is told by Lynn Nicholas. Priceless works were found buried under rubble, in mines, in bombed out churches, in unmarked fields, and in tunnels.⁸³

The American troops found a bounty in Austria, including art, gold, and silver stolen from the Rothschilds and the David-Weils, and most importantly, the meticulous records kept by the Nazi looters (the ERR). These some twenty thousand records were in catalog card form, each detailing a confiscated work or group of works. Also found were negatives, shipping books, and even the rubber stamps with which the code names of the various collections had been marked on frames and boxes, such as "dw" for David Weill.⁸⁴ At another sight, Goering's art records were found.⁸⁵

D. *The Market in Stolen Art*

While Nazi officials visited the Jeu de Palme to have their pick of the looted art, so also did French and Swiss art dealers and German brokers, all realizing the fabulous profits to be made.⁸⁶ Some actively collaborated with the ERR, while others made deals behind the scenes. It is clear that most dealers knew exactly where

80. *See id.* at 414.

81. *See id.* at 414-15.

82. *See id.* at 436.

83. *See id.* at 362-67.

84. *See id.* at 341-42.

85. *See id.* at 344.

86. *See FELICIANO, supra* note 2, at 116-17.

the priceless collections had come from, and that they had been illegally taken. There was no pretense that these works were really “for sale” by their original owners, most of whom had escaped to safer territories. Thanks to the Nazi contempt for and ignorance of modern art, such as that of Picasso, Matisse, Cezanne, and Gauguin, many dealers made spectacular profits by bartering pieces prized by the Nazis—but worth far less in the art market—such as paintings by Dutch, Bavarian, and other Nordic painters.⁸⁷ Representatives from several prominent galleries were in close contact with the Germans and also profited from the daily sales and exchanges out of the Jeu de Palme.⁸⁸ It has been said by at least one commentator that “the war was a godsend to Paris’s art market.”⁸⁹ Art prices rose steadily throughout the war, the Paris art market was glutted with stolen art, and the wealthy had plenty of cash, but nothing to buy; thus investing in the art market became accessible and popular.⁹⁰ However, the Paris market was no longer accessible to foreign buyers, especially English speaking ones, and the dealers soon realized that the Nazi conquerors and other Germans were some of their best clients.⁹¹ Many of the deals were not recorded and unscrupulous.⁹²

Only recently, due to declassified information from various intelligence services including the United States National Archives, has detailed information surfaced about the Germans and the French art market, such as who the dealers were, and which works were involved. The Americans, British, and French collected information. Hector Feliciano, the author of *The Lost Museum*, and a missing art sleuth and reporter, found the British Schenker report to be a “gold mine.”⁹³ The Schenker papers contained information about legal and illegal transactions from 1941 to 1944, descriptions of artworks sent to the Reich, lists of German buyers as well as the

87. *See id.* at 117.

88. *See id.* at 116-117.

89. FELICIANO, *supra* note 2, at 123.

90. *See id.*

91. *See id.* at 123-24.

92. *See id.* at 127.

93. *Id.* at 128. The Schenker papers are reproduced in Feliciano’s book, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART*.

French dealers involved, and dates.⁹⁴ The report reproduces records and documents seized from the Paris offices of Schenker International Transport. German buyers and the German embassy hired Schenker to warehouse, pack, and transport confiscated art to Germany.⁹⁵ These papers show that art of suspicious origin was acquired by primarily German and Austrian museums with the help of eager French dealers, some of whom do business to this day. Some of the art has been returned, and many of the dealers were interrogated and indicted for trafficking in stolen art and for fraud by the OSS.⁹⁶ The records of testimony from those interrogated by the OSS have also provided Hector Feliciano with much information. There were so many French art dealers who did business with the Nazis that the French Association of Art Dealers decided not to provide any more information to the new government after France's liberation, for fear of reprisals against their own.⁹⁷

Switzerland, according to records recently unearthed, was far from neutral for its part in the art looting and art trafficking occurring during and after the war.⁹⁸ Switzerland's laws facilitated traffic in art and it became a haven for buyers and sellers. For example, an "owner in good faith" acquires title after five years of possession, and if a stolen painting appears at a dealer or at an auction, the person having the original claim must individually bring suit, pay his own legal costs, and must reimburse whoever bought the work before it can be returned.⁹⁹ The Swiss also did not automatically annul fraudulent transactions, as the other European countries did.¹⁰⁰ Many Swiss were awash in cash as the French, as there too did the wartime market in looted art flourish. While Swiss customs was usually very strict, there are missing records for some famous works that found their way into the Swiss art market¹⁰¹ and then sometimes disappeared into the international art

94. *See id.* at 128-29.

95. *See id.* at 128.

96. *See id.* at 133.

97. *See id.* at 169.

98. *See Nazis Hid Art Worth 23 Billion Dollars in Switzerland*, AGENCE FRANCE PRESSE, Sept. 21, 1996.

99. *See FELICIANO*, *supra* note 2, at 155.

100. *See id.* at 192.

101. *See id.* at 161.

market—not of which all is reputable.

After the war, the Swiss stifled investigation with passivity and avoidance and thus managed to protect citizens, banks, and secrets through a bureaucratic maze.¹⁰² However, the Allies sent in the same person who had compiled the Schenker report in Paris to detail the situation. Within weeks, seventy-five of the most famous and expensive works looted were traced to Swiss citizens - dealers and collectors.¹⁰³

II. THE CURRENT PROBLEM OF STOLEN ART—AUCTION HOUSES, MUSEUMS, AND PRIVATE GALLERIES

The boom in the illicit art trade is partially attributable to the economic prosperity of the 1980s, which helped create a new consumer group of wealthy business executives, drug dealers needing to launder drug money, and millionaire investors disappointed by returns in the stock market.¹⁰⁴ The current dollar value of the illicit trade in art and other treasures is reported to be third only to the illegal drug and weapons markets.¹⁰⁵ Many decry the fact that the multi-billion dollar international business of art is so unregulated.¹⁰⁶ The illicit trade in art and artifacts has been estimated in excess of one billion dollars annually, and the worldwide art market may have an annual gross turnover of as much as \$50 bil-

102. *See id.* at 191. Austria also, until recently, refused to fully acknowledge its role in the Holocaust and actively discouraged claims by Holocaust victims for looted art held in Vienna. However, in October of 1996, the Austrian government, with the help of Christie's, organized a very successful auction of the works that raised over 13.2 million dollars for Jewish victims of the Holocaust. *See* William Drozdiak, *Art Stolen by Nazis Auctioned in Vienna*, WASH. POST, Oct. 30, 1996, at A25.

103. *See* FELICIANO, *supra* note 2, at 193.

104. *See* Stephanie O. Forbes, *Securing the Future of our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L. LAW. 235 (1996).

105. *See* BORODKIN, *supra* note 9, at 377. Other commentators rank the art trade second only to drug trafficking. *See* Michael J. Kelly, *Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio Animo Ferundi/Lucrandi*, 14 DICK. J. INT'L L. 31 (1995).

106. *See* Chaddock, *supra* note 3 (citing Willi Korte, a leading lawyer and expert on repatriation of objects looted by the Nazis.). "People are required to do a title search when they buy a house or a car. It's mystifying why this hasn't become standard practice in the art world." *Id.* (quoting Tom Hamilton, a partner of Korte's in Trans-Art International).

lion.¹⁰⁷ However, the art trade has always been profitable, and there have always been buyers willing to pay top dollar for true masterpieces.

Hopefully, the reader has seen that the story is much more complicated than one of the Nazis stealing Jews' art. Disreputable and reputable characters alike figure in the massive amount of trading that occurred during and after the war. Dealers from many countries, eager to buy works at low prices, cared little for provenance information. Those sympathetic or indifferent to the Nazis did not think twice about accepting or buying art known to be stolen from Jews and others.

As was too often the case, neither sellers nor buyers exercised sufficient curiosity about the real origins of the paintings, which continues to this day. As a scholar and lawyer on these issues remarked, "[t]he most striking thing to a lawyer who comes upon the art world is how deep and uncritical is the assumption that transactions within it should normally be—are certainly *entitled* to be—secret."¹⁰⁸ Joshua J. Kaufman, executive director of the *Society to Prevent Trade in Stolen Art* remarked, "[t]his is the only business enterprise in the world where people spend tens of thousands to millions of dollars without doing any proper investigation. Before you buy a house, you do a title search. Before you buy a business, you audit the books."¹⁰⁹

The effects of the Nazis' art thievery are still plaguing valid owners, buyers, sellers, and the public today in part because of the customs of the art world. Dealers and auction houses do not usually reveal the provenance of an object that is to be sold to buyers or the public.¹¹⁰ Museums and private collectors also do not reveal this information, and in turn, generally ask as few questions as

107. See Joseph F. Edwards, *Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects*, 22 U. TOL. L. REV. 919, 921 (1991). However, the recovery rate for stolen art is only 12 percent. See also John E. Bersin, Note, *The Protection of Cultural Property and the Promotion of International Trade in Art*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 125, 147 (1992); Borodkin, *supra* note 9, at 378.

108. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 360 n.146 (1982) (emphasis in original).

109. Walter V. Robinson, *An Ignominious Legacy; Evidence Grows of Plundered Art in US*, BOSTON GLOBE, Apr. 5, 1997, at A1.

110. See Bator, *supra* note 108, at 360 n.146.

possible.¹¹¹ Those in the art trade use different operating practices, which have historically been consistent with the risks and allocations of costs in the market.¹¹² Some say that they are worried about the effects of too much information and thus both parties to a transaction assume the propriety of secrecy.¹¹³ New York Police art detective Richard Volpe states it more bluntly in saying that art thieves are successful only through negligence, complicity, or both on the part of galleries and collectors.¹¹⁴ This makes sense, since it stands to reason that demand for stolen art fuels thefts.

Documentation before art is stolen is often crucial to recovery, and in many cases, art stolen by the Nazis was either documented by the original Jewish owners or by the Nazis themselves by markings on the paintings and meticulous records. In addition, paintings were stamped with a swastika, usually in black ink, when they were confiscated or stolen. The Vermeer in the Louvre has such a stamp on the back.¹¹⁵ With this, the markings such as “ka” for Alphonse Kann, and the Nazi attention to record keeping, the Nazis inadvertently assisted in the documentation of at least the most famous and prized collections and pieces.

With the Nazis’ records and others, Hector Feliciano painstakingly details the many transactions between French and Swiss dealers and buyers of specific works of stolen art. He has traced paintings to private vaults in Switzerland, to museums all over Europe and the United States, and to auction houses such as Christie’s and Sotheby’s. But others are still missing. Still others were sold into the Soviet Union or taken by the Red Army and attention is only recently beginning to focus there.

Some paintings, with gaps in their recorded provenances, have turned up many years after the war in sales at the international auction houses, usually trustworthy in matters of provenance checking. Sometimes, a painting will be shown in an auction booklet, but if there is any warning that there is a claim upon it, the usually

111. *See id.*

112. *See* Darraby, *supra* note 9, at 669.

113. *See id.*

114. *See* James Walsh, *It’s a Steal*, TIME, Nov. 25, 1991, at 86-87.

115. *See* FELICIANO, *supra* note 2, at 15.

anonymous consignor will simply withdraw it, and the painting disappears again.¹¹⁶

There have been some success stories however. For example, a Hals painting stolen from the Schloss family in Paris surfaced in the international art market at least three times unbeknownst to the heirs. It was even on sale at Christie's in 1972, with no mention of the Nazi theft in its incomplete historical description. It reappeared in 1979 at Sotheby's, this time with a description that it had indeed been stolen by the Nazis, and that it had even been listed in the official "Catalog of French Property Stolen between 1939-1945," published by the French government. It appears that Sotheby's had done its research, but did nothing to halt the sale or contact the Schloss heirs. Then it again went on sale at Christie's in 1989, where no mention was made of its status as a piece of stolen art. One assumes that the Sotheby's catalog was not read, or worse, ignored. The painting was bought and put on sale in Paris in 1990 by a New York gallery owner, but was seized by the French police on the Schloss family's behalf. The gallery owner was reimbursed by Christie's, but the Schloss family and Christie's have been in legal disputes ever since.¹¹⁷

Another painting from the Schloss collection is alleged to be held by the Carnegie Museum of Art in Pittsburgh. It has been taken off the walls, and both sides have attempted to show provenance records claiming rightful ownership. The museum defends that the painting they have is a copy, while the whereabouts of the true Rembrandt painting is still unknown. The Schloss family has photographs of the painting hanging on the walls of their house in France before the German occupation.¹¹⁸

Finally, the Gutmann (Goodman) heirs, whose grandparents died in the concentration camps, traced a Degas to the Searle family of Searle Pharmaceuticals in 1995.¹¹⁹ They found the painting listed in a Metropolitan Museum of Art catalog.¹²⁰ Daniel Searle

116. See NICHOLAS, *supra* note 19, at 421.

117. See Feliciano, *supra* note 2, at 175-77 (discussing this story).

118. See *id.* at 177-78.

119. See *id.* at 187-89. The case also involves the Art Institute of Chicago, since Daniel Searle placed the work in the museum for study by specialists.

120. See Kevin M. Williams, *Plaintiffs Place Ad in Fight for Degas*, CHI. SUN

refused to surrender the painting claiming clear title was passed and a lawsuit was filed in a Chicago federal court, which settled in August of 1998.¹²¹ The Goodmans also settled with the seller of a work by Botticelli that had sold at Sotheby's for \$690,000.¹²² The Goodmans' lawyer asserted that Sotheby's sold the painting even after the house had been made aware in writing of the Goodmans' claim.¹²³ Sotheby's helped arrange the settlement, which resulted in the two parties sharing the proceeds of the painting's sale.¹²⁴

Art auction houses feature prominently in the story of stolen art. Under agency law, the auction house is in a fiduciary relationship with its consignors, but has no duty to the general public.¹²⁵ One example of how this works is that an auction house may, although the most respected ones usually do not, disclaim warranties as to authenticity and this uncertainty is reflected in the auction price.¹²⁶

Thousands, even millions of dollars can change hands at an auction, and the buyer does not need to be known or even present at the sale. Any imperfections in title are passed to the buyer at an auction, because the purchaser can only acquire the title that the auction house is entitled to transfer.¹²⁷

To their credit, Sotheby's recently withdrew a painting after a dispute alleging looted art arose between a professor at Cornell and

TIMES, Feb. 27, 1997, at 2.

121. Mary Abbe, *Chicago Gets Degas Pastel that Nazis Held*, STAR TRIB., Aug. 23, 1998 at 10F.

122. See Adam Zagorin, *Saving the Spoils of War*, TIME, Dec. 1, 1997, at 87.

123. See *id.* It was reported in a British newspaper that Sotheby's was sent a copy of a 1955 memo written by Rose Valland of the Louvre in which she described the Guttman paintings and stated that they were looted in Paris. See Peter Watson, *Brothers Win Battle for Art Looted by Nazis*, OBSERVER, Apr. 20, 1997, at 17.

124. See Zagorin, *supra* note 122.

125. See RESTATEMENT (SECOND) OF AGENCY, §§ 381, 384 (1957).

126. See Borodkin, *supra* note 9, at 386 n.57. A typical "condition of sale" is as follows:

The Auctioneer and the Estates assume no risk, liability or responsibility for the authenticity of the authorship of any property identified in this catalog. All merchandise is sold as is, where is, with no warranties or guarantees, whether specified or not.

Erisoty v. Rizik, No. Civ. A. 93-6215, 1995 WL 91406, at *5 (E.D. Pa. Feb. 23, 1995).

127. See Borodkin, *supra* note 9, at 386.

a descendant of Polish royalty, deciding to hold it until the court determines ownership.¹²⁸ However, as recently as 1991, a representative of Sotheby's was quoted as saying, "I [do not] think one ever knows where antiquities come from We assume that our clients have title to whatever it is they are selling."¹²⁹

Although under the U.C.C., the seller warrants good title in a sales contract, an auctioneer is merely an agent of the seller, and is not technically covered under the specific section.¹³⁰ In addition, under U.C.C. 2-312(2), warranty of title can be expressly disclaimed by the auction house in the contract and a buyer may not care enough to insist upon a warranty.¹³¹

Museums are involved in this story, too, because they themselves may have acquired stolen art or stolen art may have been donated to them.¹³² Currently, the Museum of Modern Art, the Metropolitan, the Museum of Fine Arts in Boston, the Seattle Art Museum, and the Art Institute of Chicago face claims. In Europe, particularly France, thousands of works looted by the Nazis sit in the national museums, although neither the museum or the French government owns them. This is because the works have been, according to the museums, on "provisional stay" for the last fifty years, waiting for the valid owners to claim them.¹³³ In the United

128. See Interview by Gary Tuchman, *CNN Sunday Morning: Clearing House to Reclaim Stolen Jewish Art by Nazis* (CNN television broadcast, Sept. 7, 1997) (CNN Sunday Morning Transcript No. 97090710V46).

129. See B.F. Cook, *The Archaeologist and the Art Market, Policies and Practice*, 65 *ANTIQUITY* 533, 534 (Sept. 1991).

130. See Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 *IND. L.J.* 985, 1005 (1995).

131. See *id.* Note that since 1987, auctioneers in New York have not been able to disclaim warranty of title by regulation. See N.Y. City Admin. Code § IV (McKinney 1987). However, this new rule obviously did not apply to auctions before this date. See Robert A. Weiner, *Auction Law*, 297 *PLI/PAT* 587, 650 n.24 (1990).

132. Most major museums have been involved with or seen other museums go through legal battles concerning claims of stolen art. Currently, most museums consult attorneys at the beginning of a major acquisition. If provenance information is not forthcoming or seems suspicious, museums require the dealer to sign a warranty guaranteeing good title and stating that the dealer will repay the museum for the object if there is an ownership dispute. If a museum is unclear about origin, it will usually contact the country that it believes to be the source, provide photographs, and give them a chance to claim it. See Kelly, *supra* note 105, at n.29.

133. Hector Feliciano recounts the bizarre tale of what he terms the "purgatory of

States, there are tax advantages for art donations to museums. Sometimes, individuals are willing to acquire art that a museum would be unwilling to acquire directly, so the individual acts as an intermediary and performs the customary stop in Switzerland.¹³⁴

Museums have always known that most, if not all museums possess some stolen art, despite their best intentions at times to screen out such objects.¹³⁵ At times, they have knowingly accepted art of dubious or incomplete provenance in order to acquire great works, fearing that if they do not, they will lose out to another museum that will readily accept such a work.¹³⁶ For exam-

the MNR's" (Musées Nationaux Récupération). These roughly two thousand works are housed in museums, libraries, and government institutions, and unfortunately some are in storage. Since the public knows nothing about the provenance of these pieces, Feliciano asserts that they have come to be regarded as the de facto possessions of the museums. French museum officials claim the true owners have not come forward, but Feliciano argues that the French have not made efforts to locate the owners or to even publicly display all of the paintings and acknowledge what they truly are. Efforts at restitution were made immediately after the war, and many works were returned to their owners, but many French Jewish families had been dispersed if they had not died in the camps, and had more pressing matters to attend to. Since then, efforts have stalled and Feliciano levels stinging criticism at the French. At least however, there is no statute of limitations for claiming these works. See FELICIANO, *supra* note 2, at 213-39. Chapter 15 of the book is fascinating. It recounts in detail the process Feliciano went through and the stonewalling he was met with in ascertaining the true owner of a Léger painting held by the Pompidou. However, partly because of publication of this book, France was forced to put on display the looted works. One painting has been returned to an heir of Alphonse Kann, and dozens of claims have surfaced. See Judith H. Dobrzynski, *At Lunch With Hector Feliciano—A Bulldog on the Heels of Nazi Loot*, N.Y. TIMES, Nov. 4, 1997, at E1; see also Alan Riding, *France to Display Art Looted by Nazis*, N.Y. TIMES, Apr. 3, 1997, at C13.

134. See Borodkin, *supra* note 9, at 387. Among other favorable laws that have made this country a favorite in the illicit art trade, artworks that are placed in a Swiss bank for five years become property of the owner, as long as she is not the thief.

135. The former director of the Metropolitan Museum of Art has admitted as much. He stated that "almost every antiquity that has arrived in America in the past ten to twenty years has broken the laws of the country from which it came." See Borodkin, *supra* note 9, at 377 (citing Ricardo Elia, *Ricardo Elia Responds*, ARCHEOLOGY, May/June 1993, at 1, 17 (quoting THOMAS HOVING, *MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART* (1993))).

136. Telephone Interview with Lloyd Goldenberg, Trans-Art International (Nov. 10, 1998) [hereinafter Goldenberg Interview]. Trans-Art is a group of lawyers/investigators who provide clients with an "ownership/due diligence certificate," after carefully searching through ten to fifteen sources of information about title and provenance. This certificate does not guarantee that a work is not stolen, but does provide the client with a possible laches defense.

ple, doubts over the provenance of van Gogh's *Wheat Field with Cypresses* at the Metropolitan recently made the news.¹³⁷ It was reported that the Met tracked the provenance on paper, but evidently had no qualms about acquiring a painting with a gap in ownership for the years 1939 to 1951.¹³⁸ In 1994, the Met acquired a Monet from a principal benefactor without inquiring into provenance.¹³⁹ It appears that the donor purchased the painting from a dealer who collaborated with the Nazis.¹⁴⁰ The painting was reported as stolen with the Art Loss Register in 1995, which did not inform the Met, one of its clients, about the report.¹⁴¹

Although museums have established standards and requirements in acquiring gifts or purchases, they only date back to 1970, and even since then, they have not always been strictly followed. In 1970, the International Council of Museums met in Paris to establish rules governing acquisition and adopted a standard that requires "full, clear, and satisfactory documentation in relation to the origin of any object to be acquired."¹⁴² Of course, these are not binding until a particular museum adopts them. The University of Pennsylvania Museum soon after ICOM's conference concluded that it would no longer purchase art unless accompanied by a pedigree, and the Harvard University Museums recommended that the University be assured that it could obtain valid title to an object before acquiring it.¹⁴³ The Brooklyn Museum stated the obligation more strongly:

The Brooklyn Museum will not acquire or accept as a loan any work of art when it is either known or suspected that the work of art may be stolen property or may be in the

137. See Judith H. Dobrzynski, *Tracing a Van Gogh Treasured by the Met*, N.Y. TIMES, Feb. 11, 1998, at E3.

138. See *id.* The painting was actually legitimately sold. Peter Witt, a grandchild of the original owner and inheritor of the painting confirmed this.

139. See Walter V. Robinson & Maureen Goggin, *The Art World's Spoils of War*, BOSTON GLOBE, Apr. 24, 1997, at A1.

140. See *id.* The article mentions that the painting and the collaborating dealer were referenced in Lynn Nicholas' book, *THE RAPE OF EUROPA* *supra* note 19.

141. See *id.*

142. See 2 LEONARD D. DUBOFF & SALLY HOLT CAPLAN, *THE DESKBOOK OF ART LAW* app. 21 at 112 (2d ed. 1993).

143. See *id.* at 116.

United States illegally, that is, contrary to the laws of this country. When a work of art is in question it is the *responsibility of the curator* to establish its provenance and, where indicated, to make all reasonable inquiries of the appropriate agencies of foreign governments to determine (a) that the Museum can obtain clear title and deed if a purchase is contemplated or (b) that a proposed lender has clear title and deed at the time the loan is made.¹⁴⁴

The Smithsonian Institution stated that the obligation was also on the museum director, but only to make a *good faith determination* that the object in question was not stolen.¹⁴⁵

The J. Paul Getty Museum in California has taken the lead in requiring that the primary obligation rest upon the vendor, but also recognizing that the museum can play a part.¹⁴⁶ The vendor must warrant that an object offered is authentic, that the vendor has good title, and that the object has been legally exported for forty-eight months following delivery. The Getty must send photographs of the object to the appropriate governmental agencies of the possible countries of origin to see if there are any claims, and also check with the International Foundation for Art Research in New York. The Metropolitan Museum of Art has a formal policy of checking acquisitions with the Art Loss Register.¹⁴⁷

In 1991, the American Association of Museums ("AAM") adopted as a condition of membership, a Code of Ethics for Museums.¹⁴⁸ It also required each member museum to institute its own, more particularized code of ethics by January 1, 1997. However, its standards are very vague. For example, it requires acquisitions to be conducted "in a manner that discourages illicit trade in such materials."¹⁴⁹ Outside commentators have been more direct in requiring museums to make sure that they are acquiring a work that

144. *Id.* at 123 (emphasis added).

145. *See id.* at 126 (emphasis added).

146. *See* Linda F. Pinkerton, *Repatriation and Other Claims by Foreign Governments* in C479 ALI-ABA 11, 16 (1990).

147. *See* 2 RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 1434 (2d ed. 1998).

148. *See* Duboff, *supra* note 142, at 122.

149. *See id.* at 121.

is not encumbered or restricted. The authors of a major treatise on art law suggest that with gifts, the transferor should be required to supply a detailed provenance, but the museum should also independently check its accuracy.¹⁵⁰ In the case of purchase where title is later found to be faulty, the museum can usually bring an action under U.C.C. 2-312 based on breach of warranty title.¹⁵¹

It appears that museums use different standards of research concerning acquisition history and authenticity verification for different collections. Thomas R. Krens, director of the Guggenheim explained that a collection that showed up at a museum that the museum had never heard of would demand scrutiny.¹⁵² However, a collection or piece that has been shown at other famous and respectable museums gives the impression that the previous institutions have done the necessary verification. If the collection has been written about, the assumption is also that others have done the research.¹⁵³ However, as we have seen, a work's provenance may have become obscured, it may have been deliberately falsified, or more commonly, the previous institutions did not, in fact, do the necessary research.

Recently, the Museum of Modern Art in New York has become the center of an international controversy, with far-reaching implications for similar situations. The Leopold Foundation lent MOMA two paintings by Egon Schiele. After two families claimed that these works had been stolen from them by the Nazis, Manhattan's District Attorney issued a subpoena that prevents the return of the works until the ownership matter is settled.¹⁵⁴ The

150. See Lerner, *supra* note 147, at 1431-32.

151. See *id.*

152. See Judith H. Dobrzynski, *The Zealous Collector—A Special Report; A Singular Passion for Amassing Art, One Way or Another*, N.Y. TIMES, Dec. 24, 1997, at E1.

153. See *id.*

154. See Judith H. Dobrzynski, *Modern Tries to Quash Order to Keep 2 Schieles*, N.Y. TIMES, Jan. 23, 1998, at E34 [hereinafter Dobrzynski I]. MOMA subsequently asked a court to quash the grand jury subpoena, arguing that New York's Arts and Cultural Affairs Law shields art on public exhibition from seizure. See also, Simon Beck, *The Art of a Diplomatic Row*, SOUTH CHINA MORNING POST, Jan. 11, 1998, at 11 (reporting that it is "bad form" to refuse to return borrowed treasures, and also that the World Jewish Congress has condemned the confiscation. One should also note that the chairman of the WJC is Ronald S. Lauder, MOMA's chairman).

authority for the seizure was that the paintings were possible evidence if a criminal case was filed.¹⁵⁵ This action sparked an art-world furor and art collectors and museums are reported to be rethinking plans to loan pieces to American galleries, and it is asserted that the auction industry could suffer if sellers decide against putting items on the American market for fear of similar confiscations.¹⁵⁶ Moreover, attempts to settle the controversy by the Leopold Foundation were withdrawn after the subpoena and now it appears the battle will be fought in court if the paintings are not returned.¹⁵⁷ These cases will no doubt multiply. The authors of the two most prominent books on the subject, Lynn Nicholas and Hector Feliciano reportedly receive calls every day, and the World Jewish Congress is devoting considerable attention to the matter.¹⁵⁸

Private galleries also figure into this tale of looted art. They regularly purchase at auctions, but can only acquire a title that the auction house can transfer, which is sometimes less than whole.¹⁵⁹ Recently, the Wildenstein galleries have come under attack, partly as a result of Feliciano's book, which alleges that through involvement with the Nazis, the Wildensteins are in possession of many works of stolen art from French Jews.¹⁶⁰ It is common knowledge in the art world that the Wildenstein vaults contain over ten thousand of the world's richest and most important art treasures, primarily paintings. A painting's whereabouts may be un-

155. See Peter Plagens, *The Spoils of War*, NEWSWEEK, Mar. 30, 1998, at 60.

156. See Philip Sherwell & Catherine Milner, *Art World Faces Chaos after US Seizure of Nazi Loot*, SUNDAY TELEGRAPH (London), Jan. 11, 1998, at 11.

157. See Dobrzynski I, *supra* note 154, at E34.

158. See Judith H. Dobrzynski, *Ideas and Trends: Show and Tell; How Did You Get that Art in the War, Daddy?*, N.Y. TIMES, Jan. 25, 1998 at D4 [hereinafter Dobrzynski II]. See also, *infra* Part V.

159. See Borodkin, *supra* note 9, at 386.

160. One should note that the Wildensteins are a wealthy French Jewish family whose art collections were ransacked by the Nazis. See FELICIANO, *supra* note 2, at 61. See also Eric Konigsberg, *What Money Can't Buy*, N. Y. MAGAZINE, Dec. 15, 1997, at 36. The Wildenstein family has brought a lawsuit in France seeking \$1 million in damages from Mr. Feliciano under sections of France's Civil Code that require reparation for any damage caused by one person to another. See Alan Riding, *Art Dealers Combat Rumors of Nazi Links*, N.Y. TIMES, May 10, 1999, at E1. It appears that the lawsuit, which went to trial in May of 1999, is not so much a defamation claim, but a damage to business reputation and commercial damage claim based on the allegations in Feliciano's book that Georges Wildenstein essentially collaborated with the Nazis. See *id.*

known for forty or fifty years, until the Wildensteins sell it.¹⁶¹

Recently, the heirs of Alphonse Kann traced manuscripts they believe to be part of their father's collection that was raided in France to the Wildenstein gallery in New York.¹⁶² The pieces were marked with "ka" the symbol the Nazi forces used as documentation, but the Wildensteins have refused to acknowledge the heirs' claim.¹⁶³

III. INTRODUCTION TO UNITED STATES LAW

A. *Summary of the Law*

"The law stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors."¹⁶⁴ In art theft, there is said to be two legitimate interests: that of the original owner who has been the victim of the theft, and that of the purchaser in good faith of that object. These interests include not only the monetary value of the paintings, but also a deeper value to the owner or admirer that exceeds that placed on an ordinary possession. One Holocaust survivor remarked poignantly, "[it is] not just for money. There are feelings involved, for sentimental reason. I have paintings in my home that [they are] almost like family. Not quite, but almost. And it makes me feel that at least I have something of them that is surviving."¹⁶⁵ Undersecretary of State Stuart Eizenstat has stated that it is "a search for truth, not just for money."¹⁶⁶ The chairman of the American Association of Museums admits, "[there is] an emotional and intellectual relationship with art that is not there with gold."¹⁶⁷

161. See Konigsberg, *supra* note 160, at 33.

162. See Alan Riding, *Staking a Claim to Art the Nazis Looted; Collector's Family Tries to Illuminate the Past of Manuscripts in France*, N.Y. TIMES, Sept. 3, 1997 at C11.

163. See *id.*

164. *Menzel v. List*, 267 N.Y.S.2d 804, 820 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd.*, 24 N.Y.2d (1969).

165. Interview by David D'Arcy with Lilian Weingast, Holocaust survivor, *NPR Morning Edition: Tracking Stolen Art* (NPR radio broadcast, Sept. 5, 1997) (NPR Morning Edition Transcript No. 97090514-210).

166. See Maureen Goggin, *B'nai B'rith Unit to Seek Jewish Art*, BOSTON GLOBE, Sept. 4, 1997, at A3.

167. See Dobrzynski II, *supra* note 158, at D4, *quoting* Robert P. Bergman, also

Of course, the Nazis, the collaborating dealers, and the knowing purchasers of stolen art do not have legitimate recognized interests. But art that was stolen by the Nazis may have gone through so many hands that it is actually now in the possession of what is known as a “good faith purchaser.” Many dealers and other middlemen in the past and still to this day deal in an “air of secrecy,” and it is quite likely that an object’s title can become so obscured that the good faith purchaser can truly be unaware of the prior theft.¹⁶⁸ As Mr. Feliciano puts it, the paintings have “lost their memory. People do not remember, and those who do remember, perhaps do not want to remember.”¹⁶⁹

Common law countries such as the United States seek to return artwork to original owners, abiding by the general rule that title cannot pass through theft. Under ordinary state property law, the valid owner may sue to recover the object because the purchaser acquired defective title from the transferor. This rule is codified in the Uniform Commercial Code at U.C.C. sections 2-401 through 2-403. Under American law, simply being a good faith purchaser does not insulate one from a claim by the valid owner. There is no compensation for the subsequent bona fide purchaser. However civil law countries including those of Europe protect the bona fide purchaser to encourage free commerce and avoid uncertainty in commercial transactions. The original owner is deprived of title.¹⁷⁰ The main difference is that the two systems treat legal assignment of risk differently. In civil law countries, the original owner bears the risk of loss by theft and sale to a good faith purchaser, whereas the good faith purchaser bears the risk that the seller may not be able to pass good title in common law countries.¹⁷¹

Replevin is a common law action by which the original owner of goods may recover the goods from someone who has wrong-

director of the Cleveland Museum of Art.

168. See Bersin, *supra* note 107, at 133 (1992).

169. See Interview by Ray Suarez with Hector Feliciano, *NPR All Things Considered: The Lost Museum* (NPR radio broadcast, May 12, 1997) (NPR All Things Considered Transcript No. 97051207-212).

170. See Forbes, *supra* note 104, at 237.

171. See Brian Bengs, Note, *Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Imported Cultural Objects and U.S. Property Law*, 6 *TRANSNAT’L L. & CONTEMP. PROBS.* 503 (1996).

fully taken or retained possession.¹⁷² The law remains fairly clear that purchasers and acquirers of stolen art, even those in good faith, stand to lose stolen artwork to the valid owner by replevin actions, based on the assumption that a thief can never convey good title.¹⁷³ Title remains in the valid owner, and thus on demand, and usually through legal proceedings, the current possessor must either give the art back or pay the original owner its present value.¹⁷⁴ The cases that result involve attempts to balance conflicting policies of encouraging commerce by protecting good faith purchasers, protecting property rights of the original owners and discouraging litigants from bringing stale claims.

A statute of limitation governs most actions. However, these statutes could cut off any hope for victims for return of a stolen work of art, since a stolen artwork may not resurface until many years later. Under traditional rules, the statute of limitations begins to run from the time of the theft unless the property has been concealed.¹⁷⁵ However, in most of the cases this Article is concerned with, a good faith purchaser has bought the work and has not knowingly concealed it. Under the general rules of most states, the statute of limitations is construed to run against the owner from the time of the good faith purchase, but the owner may not have any knowledge of the purchase or the identity of the purchaser.¹⁷⁶ To mitigate these harsh results, the courts have devised different ways of formulating the statute of limitations and allowing it to be tolled under the laches doctrine and other equities.¹⁷⁷ Unless the relevant statute of limitations has definitively run or the defense of laches is successful against the aggrieved original owner, such as when the original owner with knowledge of the artwork's whereabouts delayed unreasonably in seeking its return, the original owner will

172. *See id.* at 517-18.

173. This was true under common law and has been incorporated into the U.C.C. *See Lerner, supra* note 147, at 254 n.73.

174. *See id.* at 1432.

175. *See* Ildiko P. DeAngelis, *Civil Claims for Recovery of Stolen Property: Developments in the Law and Lessons for Museums* in C723 ALI-ABA 5, 10 (1992).

176. *See id.* at 10.

177. One should note that the laches doctrine can benefit both a true owner and a good faith purchaser, depending on which direction the equities lie.

usually prevail.¹⁷⁸

Many of the following cases concern the concepts of due diligence and laches. Since these concepts have been and will be crucial to the outcome of cases concerning art looted by the Nazis, their meaning is discussed in the art theft context. Due diligence has been applied retroactively to prospective buyers and dispossessed owners. The courts have imposed this standard retroactively because there has not been a consistent standard formulation concerning the processes or methods of investigation into provenance on either the seller or buyer side.¹⁷⁹ Thus there are still many uncertainties and no uniform rules, customs, or usage of trade as to how far back in the chain one ought to look, how to treat gaps in the chain, what ought to be disclosed, and if disclosed, in what form, by whom and to whom.¹⁸⁰

Due diligence means “persistent and continuous inquiries through multiple channels of investigation.”¹⁸¹ It involves an inquiry into title, warranties, authenticity, and provenance, possibly more.¹⁸² At present, the required number or source of “multiple channels” has not been exclusively defined, although as is discussed, what is insufficient has been determined in individual cases.

An example of due diligence at work is one where a dispossessed owner through theft believes the art to have disappeared, but finds that it has surfaced in someone else’s possession.¹⁸³ The original owner sues, and the defendant argues that the statute of limitations for personal property has expired and thus is a bar. The courts thus fashioned a rule that addressed the frustrations of original owners who did not and probably could not have located their works before the statute ran. The so-called discovery rule required the plaintiff to be diligent in finding out where the art could be and/or the identity of the new “owner.” If the plaintiff was duly

178. See Lerner, *supra* note 147, at 1432.

179. See Darraby, *Current Developments*, *supra* note 9, at 667.

180. See *id.*

181. See JESSICA L. DARRABY, ART, ARTIFACT, AND ARCHITECTURE LAW, 2.57-2.62 (1995).

182. See *id.* at 2.58.

183. See *id.* at 2.60.

diligent, then the discovery rule allowed the accrual period in the statute of limitations to be calculated from the discovery date. Together with the equitable rule and defense of laches, which requires a showing of (1) unreasonable delay by the plaintiff that (2) causes undue prejudice to the defendant, the discovery rule began to govern art theft cases.¹⁸⁴

An understanding of the laches defense is crucial to an analysis of the case law in an attempt to predict what will happen in the courts when faced with victims of art stolen by the Nazis and good faith purchasers. Laches is an equitable defense used to mitigate the harsh effects of a statute of limitations when defendants have been prejudiced by plaintiffs who “slumbered on their rights.”¹⁸⁵ At present, the courts following the “discovery rule” make clear that in cases where diligence is required by the plaintiff, if the plaintiff has been diligent, the defense of laches is not addressed, the assumption being that it is *not available* to the defendant.¹⁸⁶ In New York, which currently follows the “laches rule,” a good faith purchaser may be able to assert the laches defense. This is burdensome, however, since the purchaser must prove (1) the original owner’s unreasonable and inexcusable delay in bringing suit and (2) prejudice or harm to the purchaser because of that delay.¹⁸⁷

When a court looks at delay, the length of time is not the focus, rather the court examines the unreasonableness of the delay.¹⁸⁸ A plaintiff rebuts accusations of unreasonable delay by providing documentation of searches in the relevant sources. In this way, the plaintiff shows that she did not delay, and that she could not demand return and after refusal, bring suit because her investigations did not locate the purchaser or the art’s location. Moreover, as in the *Guggenheim* case,¹⁸⁹ the court may be disinclined to find prejudice to the purchaser, who has, after all, enjoyed a stolen work of

184. *See id.* at 2.61, (citing *O’Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980)).

185. *See* BLACK’S LAW DICTIONARY 875 (6th ed. 1990).

186. *See* *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff’d*, 917 F.2d 278 (7th Cir. 1990); *Weiner*, *supra* note 131, at 611.

187. *See* 1 LERNER & BRESLER, *supra* note 147, at 235.

188. *See id.* at 236.

189. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311 (1991); *see also infra* note 249 and accompanying text.

work of art for years.¹⁹⁰

A very relevant aspect of this rule to be aware of is that courts have expanded the concept to require in possession defendants to have conducted their own due diligence, when “suspicious circumstances” accompany a sale or transfer.¹⁹¹ Courts assumed that this would cause discovery of the “weak link” of title in stolen art and refusal of the deal. Commentators disagree whether this is a valid assumption.¹⁹² While it is true that no central registration procedures exist for art, many sources of information exist that are readily available. However, as has become clear, defects in title do not have the same deterrent effect in the art market as they do, for example, in purchases of land or vehicles.¹⁹³

The validity of transfers of personal property is governed by the law of the state where the property is located.¹⁹⁴ For example, under New York law, actions that accrue in New York follow New York’s statute of limitations of three years, while actions that accrue outside the state may be subject to a foreign jurisdiction’s limitations period under so-called borrowing statutes.¹⁹⁵ The borrowing period applies only if it is shorter than New York’s period.¹⁹⁶ Choice of law is often relevant, and where it is at issue, “a state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law.”¹⁹⁷ Courts also consider where the paintings are and where

190. See 1 LERNER & BRESLER, *supra* note 147, at 236.

191. See DARRABY *supra* note 181, at 2.61.

192. See *id.* at 2.61 - 2.62 for emphasis on the difficulty of tracking artwork through chains of ownership. However, in my interview with Lloyd Goldenberg, *see supra* note 136, he stated that his research into databases, police organizations, conversations with scholars, governments, etc., discloses problems and irregularities quite commonly.

193. See Darraby, *supra* note 181, at 2.62.

194. See *Kunstsammlungen Zu Weimer v. Elicofon*, 536 F. Supp. 829, 846-47 (E.D.N.Y. 1981).

195. See *DeWeerth v. Baldinger*, 836 F.2d 103, 106 (2d Cir. 1987).

196. See *id.*

197. See *Hoelzer v. City of Stamford*, 933 F.2d 1131, 1136 (2d Cir. 1991); *see also* *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1375 (S.D. Ind. 1989), *aff’d*, 917 F.2d 278 (7th Cir. 1990) (Indiana had a more significant relationship to the suit, even though Switzerland was where the mosaics were purchased).

the parties reside.¹⁹⁸ Sometimes the law of the forum can dictate the outcome, or can encourage or discourage bringing suit in the first instance.¹⁹⁹

Additionally, the laws of foreign countries are likely to be relevant when stolen works are imported into the United States. Under the international legal principle *lex situs*, the law of the nation where the art is located at the time of transfer is the governing law for any legal actions concerning the art.²⁰⁰ A defense might be that the law of the nation where the stolen art was sold conferred title on the good faith purchaser, as in Switzerland, and thus allowed the work to be freely sold. However, this would directly contradict the holding of *Autocephalous Greek-Orthodox Church v. Goldberg*²⁰¹ and other cases that adhere to the maxim that a thief never acquires title to stolen goods and thus can never pass good title to a purchaser.²⁰² To apply Swiss law, which eventually awards title to a good faith purchaser, would be anomalous to the interests of Indiana, the forum in *Autocephalous*. In any event, the court found that Indiana had the most significant contacts with the case.²⁰³ Moreover, there is an “in transit” exception under Swiss law that allows for application of the law of the destination country.²⁰⁴

One should note that this Article does not deal with cultural property in the accepted sense, but rather with essentially private property that was stolen. Cultural property is defined in the UNESCO 1970 Convention as that which, “on religious or secular grounds, is *specifically designated* by each state as being of importance for archeology, prehistory, history, literature, art or sci-

198. See *O’Keefe v. Snyder*, 416 A.2d 862, 868 (N.J. 1980).

199. For example, the lawyer who successfully negotiated the return of antiquities to Turkey previously had withdrawn a claim against the San Antonio Museum of Art, presumably because Texas law would apply. See Borodkin, *supra* note 9, at 404.

200. See Bengs, *supra* note 171, at 518.

201. *Autocephalous* 717 F. Supp. at 1374.

202. See Harlan Levy & Constance Lowenthal, *Stolen and Smuggled Art*, N.Y.L.J., Dec. 9, 1997 at 1.

203. See *Autocephalous*, 917 F.2d at 286. The factors that were considered in this decision were (1) what country or state were the parties from who financed the transfer and transferred the mosaics; (2) which parties had the greatest financial stake in the outcome; (3) what law did the choice of law clause in the contract designate; and (4) where were the mosaics being held. See *id.*

204. See *Autocephalous*, 717 F. Supp. at 1395.

ence.”²⁰⁵ There has been much written on the protection of cultural property as there are at least three significant international agreements to accomplish this goal.²⁰⁶ They are the 1954 Hague Convention,²⁰⁷ the 1970 UNESCO Convention,²⁰⁸ and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.²⁰⁹ The United States also has put in place several additional protections of its own. They are the Pre-Columbian Art Act of 1972,²¹⁰ the 1983 Convention on Cultural Property Implementation Act which is the implementing legislation to UNESCO, and the National Stolen Property Act of 1934.²¹¹

205. Forbes, *supra* note 104, at 240 (emphasis added). The U.S. Archeological Resources Protection Act defines cultural property as “any material remains of past human life or activities that are of archeological interest and at least 100 years of age.” Archeological Resources Protection Act, 43 C.F.R. § 7.3 (1997).

206. See generally Edwards, *supra* note 107; Bengs, *supra* note 171.

207. The Hague Convention focuses on protection of cultural property during wartime and prohibits destruction of it during any armed conflict and occupation. Each participating nation should prosecute and impose sanctions upon those who breach this convention. See Forbes, *supra* note 104, at 244.

208. The UNESCO Convention protects cultural property designated as such by the member states beyond times of war, and focuses on private conduct. UNESCO imposes obligations on members to protect their own cultural property by laws, regulations, setting up agencies, supervising excavations, etc. However, the UNESCO protection is limited to objects stolen from a museum or from a religious or secular public monument or similar institution in the requesting state which is documented as owned by that institution. See *id.* at 244-46.

209. The UNIDROIT Convention has the goals of coordinating the conflicting private laws of member states and to prepare a set of uniform rules to be adopted. Unlike UNESCO, cultural objects stolen from private homes or private collections are protected and can be claimed by the original owners, without having to have been registered with, or designated by, the state. See *id.* at 246-47. However, the UNIDROIT Convention will not be of help to the families whose art was stolen, since it only applies to art works stolen after the date the 1995 treaty was ratified by the host country. See Sivan Baron et al., *Intellectual Property*, 34 AM. CRIM. L. REV. 741, 764 (Winter 1997).

210. This Act prohibits the importation of any monument or structure from pre-Columbian Indian cultures without a certificate from the country of origin and provides for customs seizure if this requirement is not complied with. See Forbes, *supra* note 104, at 252-53.

211. This Act makes it a federal crime to illegally import cultural property into the United States. Courts have used this to enforce foreign claims for repatriation. It is a felony to knowingly sell or receive stolen goods in interstate or foreign commerce and there can be a fine up to \$10,000 or imprisonment up to ten years. The government must prove three things: the defendant knew the goods were stolen; the goods were transported in foreign or interstate commerce; and the goods had a value of over \$5,000. See *United States v. McLain*, 545 F.2d 988 (5th Cir. 1977), *appeal after remand*, 593 F.2d 658 (5th

The Association of Art Museum Directors has set up a task force to deal with the legal claims that have surfaced and the flood of claims that may well occur. Because many disputes end in settlement, the number of stolen art cases is small, but this may change. The Association of Art Museum Directors envisions an arbitration mechanism or alternative dispute resolution.²¹² It has become clear, however, that at least some of these cases—if not the vast majority—will be decided by the courts, since there is clearly law to be applied.²¹³ Moreover, because the New York courts follow the “laches rule,”²¹⁴ litigation is almost assured since laches analysis involves a “multi-factor balancing of all the equities.”²¹⁵ As the cases demonstrate, the trend is to favor the original aggrieved owner.

B. *The Cases*

1. Demand-Refusal Rule: New York’s Former Approach

It must be remembered that, in this country, if a seller has defective title to an artwork, a subsequent purchaser, no matter how innocent, cannot obtain good title to the art. One who purchases from a thief acquires no title in the stolen property.²¹⁶ This concept was espoused by the court in *Menzel v. List*,²¹⁷ one of the few cases and the most prominent one specifically concerning art that was stolen by the Nazis from Jews fleeing Europe.

In an action for replevin, the Menzels sought to recover a Chagall that had been left behind when the couple fled Brussels in 1941. The painting was seized as “decadent Jewish art,” and a re-

Cir. 1979) (related case—defendants challenged their second round of convictions) for the most prominent decisions under the NSPA.

212. See David D’Arcy, *NPC Morning Edition: American Stance on Looted Art* (NPR radio broadcast, Feb. 13, 1998), available in 1998 WL 3306383.

213. See Goldenberg Interview, *supra* note 136.

214. See *supra* note 249 and accompanying text.

215. See Stephen A. Bibas, Note, *The Case Against Statutes of Limitation for Stolen Art*, 103 YALE L.J. 2437, 2446 (1994).

216. See MARILYN E. PHELAN, *MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL* 279 (1994).

217. 267 N.Y.S.2d 804 (Sup. Ct. 1966), modified, 279 N.Y.S.2d 608 (App. Div. 1967), *rev’d.*, 24 N.Y.2d 91 (1969).

ceipt was left where the painting had been. The court noted that the Menzels had searched for the painting ever since 1941, and had finally located it in the possession of Albert List.²¹⁸ While Menzel asserted that she had met with the “demand and refusal” rule, List alleged that he had bought the painting from a dealer who had represented that title was good. Both List and the dealer, Perls, who had bought the painting from a French dealer, asserted that they were purchasers in good faith. As remains the case today with some dealers, both art galleries assumed without inquiring that an offer of sale from a reputable gallery was in effect a representation of good title and authenticity.²¹⁹

The court affirmed a jury verdict for Menzel, finding support in a 1874 New York case that the statute of limitations was not a bar since the cause of action against an innocent purchaser arises upon the defendant’s refusal to convey the chattel upon demand.²²⁰ Under this case, the purchaser is not considered a wrongdoer until demand is refused.²²¹ Thus, List was ordered to return the painting to Menzel, but the Perls gallery had to pay List the present value of the painting. In finding that it was of no consequence that Perls and then List may have been good faith purchasers, the court stated that, “[t]hroughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith.”²²²

The *Menzel* case is the advent of a more lenient rule for victims of art theft. In effect, the demand and refusal rule, which is a requirement for the plaintiff, abrogated the statute of limitations as to stolen art in the hands of good faith purchasers. Also, it is significant that the gallery had to pay List the *present value* of the Chagall painting, the amount List would have been able to sell the painting for had the Perls gallery conveyed good title. As discussed previously, much of the art that the Nazis seized was considered “degenerate” and was sold at scandalously low prices at auctions before the war ended. Thus, an heir to a painting that was

218. See 267 N.Y.S.2d at 807.

219. See *id.* at 808.

220. See *id.* at 809.

221. See *Gillet v. Roberts*, 57 N.Y. 28 (1874).

222. See 267 N.Y.S.2d at 819.

stolen during the Holocaust, if she did not want the painting, would be entitled to the present value of such a work. One can only imagine the soaring prices some of these “degenerate” pieces by the likes of Chagall, Picasso, and Gauguin would fetch today.

This case is also instructive because it tells us that as far back as twenty-five years ago, the New York courts (where most of the art trade takes place) were instructing those in the art markets to do title searches. On appeal for the measure of damages Perls had to pay List, he argued that he should only have to pay List what List actually paid for the painting, not its present value. Perls argued that questioning a reputable dealer as to title would be an “insult.”²²³ The court replied, “[p]erhaps, but the sensitivity of the art dealer cannot serve to deprive the injured buyer of compensation for a breach which could have been avoided had the insult been risked.”²²⁴ Further, the court stated that if this inquiry did not produce reliable information as to title, the buyer should either refuse to buy it or inform his vendee of the uncertain status of title.²²⁵ This seems like at least the beginnings of a very workable rule, one which could have served as guidance for those who are now afraid of losing what they bought as “innocent” purchasers.

The New York courts reiterated their concerns with the way business is done in the art world in *Porter v. Wertz*.²²⁶ The facts are complicated. Essentially, Porter owned a Maurice Utrillo painting that he loaned to Von Maker to hang in his home while deciding whether to buy it.²²⁷ Von Maker, using the alias of Peter Wertz, who was an accomplice of Von Maker’s, sold the Utrillo to the Feigen gallery, who in turn sold it to a buyer in Venezuela.²²⁸

In finding that Porter was not equitably estopped from recovering, the court, in dicta, chastised the gallery for not making any kind of inquiry into whether Von Maker/Wertz was the owner or authorized to sell the painting.²²⁹ There is some reason to believe

223. See 24 N.Y.2d at 97.

224. *Id.*

225. See *id.*

226. 416 N.Y.S.2d 254 (App. Div. 1979), *aff’d.*, 53 N.Y.2d 696 (1981).

227. See 416 N.Y.S.2d at 255-56.

228. See *id.* at 256.

229. See *id.* at 259.

that the gallery knew when it bought the painting that the seller, the real Peter Wertz, was a delicatessen employee.²³⁰ In fact the court decided that the gallery owner, Feigen, was *not* a good faith purchaser under U.C.C. sections 2-103 and 2-403 because the circumstances required inquiry, and Feigen's argument that he was not obliged to make such inquiry under trade practice was dismissed.²³¹ The court found that this commercial indifference, "in an industry whose transactions cry out for verification of . . . title" facilitated stolen art trafficking and increased the culpability of the owner.²³²

The case was affirmed, but the court did not reach the previous court's conclusion that it was a departure from reasonable commercial standards for the Feigen gallery to fail to inquire into title and Peter Wertz' credentials as an art dealer.²³³ Interestingly, the New York Attorney General asked the court to rule that if a purchaser of a valuable painting did not inquire as to title or question the credentials of the art dealer, this failure was a departure from reasonable commercial standards and was not good faith. Despite the Art Dealers Association of America's argument that the ordinary custom in the art business was to make no inquiry into title and that the imposition of this would cripple the art business, the court summarily dismissed the contention,²³⁴ again sending a clear message to the art world.

The court in *Kunstsammlungen Zu Weimer v. Elicofon*²³⁵ relied explicitly on *Menzel's* demand and refusal rule as applied to the statute of limitations. The case was a suit brought by an East German museum against an American collector, Elicofon, to recover two Albrecht Durer paintings that were stolen from a castle in 1945. The Second Circuit recounted the East German museum's diligent efforts in attempting to locate the paintings.²³⁶ Elicofon

230. See 1 LERNER & BRESLER, *supra* note 147, at 109.

231. See *id.*

231. See *id.*

232. See *id.*

233. See 53 N.Y.2d at 700.

234. See *id.* at 502.

235. 678 F.2d 1150 (2d Cir. 1982).

236. See *id.* at 1156.

had bought the unsigned paintings for \$450, not realizing that they were by Durer.²³⁷ The court followed the *Menzel* rule in finding that the statute of limitations is tolled indefinitely against a good faith purchaser until a demand is made.²³⁸ The plaintiff East German museum was awarded the paintings. The district court recognized that neither it nor *Menzel* had decided whether the demand and refusal rule imposed a duty of diligence on the museums to locate the paintings, and the Second Circuit did not discuss the issue.²³⁹

In *DeWeerth v. Baldinger*,²⁴⁰ the demand and refusal rule was modified to include an obligation on the part of the aggrieved original owner to use due diligence in locating the stolen property. Gerda DeWeerth inherited a Monet, but it disappeared while in the possession of her sister, who had quartered American soldiers in 1945. For twelve years, she made efforts to locate it, but finally gave up. In 1956, the Monet was acquired on consignment²⁴¹ by Wildenstein & Co., and thereafter bought by Edith Baldinger, a good-faith purchaser.²⁴² DeWeerth's nephew found the Monet in a catalogue raisonné published by Daniel Wildenstein in Cologne, Germany, less than twenty miles from where DeWeerth had lived since 1957.²⁴³

The Second Circuit reversed a district court finding for DeWeerth, stating that the demand and refusal rule includes a diligent search requirement that DeWeerth had not complied with since 1957.²⁴⁴ This rule was thought to mitigate the situation, and provide some certainty and closure for good faith purchasers. The Second Circuit stated that it was following New York law, but that

237. *See id.*

238. *See id.* at 1163-64.

239. *See* 536 F. Supp 829, 849-50 (E.D.N.Y. 1981). The court did however, find that the museum had been diligent in any case.

240. 836 F.2d 103 (2d Cir. 1987).

241. Consignment is when an artist transfers art to a dealer for sale, display, and exhibition and thus enters into an agency relationship with the dealer. Title remains with the artist until there is a sale. *See* Lerner, *supra* note 147, at 5.

242. *See* 836 F.2d 103, 105.

243. *See id.*

244. *See id.* at 110.

there was no controlling state authority on the issue.²⁴⁵ The court stated that it was free to examine all relevant precedent, statutes, and policy, and eventually decided that New York favored the good faith purchaser.²⁴⁶ The court also remarked, as the court had in *Menzel*, that many problems could be solved through a proper investigation into location and title.²⁴⁷ The court faulted DeWeerth for not consulting the catalogue in Cologne, but also for failing to take advantage of programs to locate lost art, such as the Collecting Points, and a program run by the Department of State, as well as efforts that the German government undertook.²⁴⁸ Thus, the court found that where the demand and refusal rule of *Menzel* applies, demand cannot be unreasonably delayed.

2. Laches Approach: New York's Current Law

The courts in New York now make the owner of any disputed work liable to original owners or their heirs for stolen works. *Solomon R. Guggenheim Foundation v. Lubell*²⁴⁹ essentially holds that if an owner cannot prove that she has thoroughly investigated a work's history, she will be forced to hand it back, or pay the original owners or their heirs the full market value. Consequently, the New York court agreed with *DeWeerth* that laches safeguards the interests of a good faith purchaser by weighing in the balance of competing interests the owner's diligence in pursuing her claim, but held that due diligence was relevant to laches, *not* to the statute of limitations.

The *Guggenheim* decision roundly criticized the Second Circuit's interpretation of New York law in *DeWeerth*. The court noted that New York politicians and federal agencies were concerned with New York becoming a haven for cultural property stolen abroad if it followed the discovery rule. The decision also gives individuals and foreign governments time to find lost or stolen art, noting that placing the burden on the wronged owner could en-

245. *See id.* at 108.

246. *See id.* at 108-109. Later New York decisions strongly disagreed with the Second Circuit's interpretation of New York law.

247. *See id.* at 109.

248. *See id.* at 111.

249. 77 N.Y.2d 311 (1991).

courage illicit trafficking.²⁵⁰

In *Guggenheim*, the Guggenheim Museum sought to recover a Chagall painting, which had been confirmed as stolen in 1969 from Lubell, a good faith purchaser. The Lubells had bought the painting from a well-known art gallery in 1967 and had displayed it in their home for twenty years, even exhibiting it publicly twice.²⁵¹ In 1986, after learning of the Chagall's whereabouts, the Guggenheim demanded its return, and Lubell refused.²⁵² The Guggenheim had never reported or publicized the theft as a tactical decision, believing that to do so would drive the painting further underground and diminish any hope of recovery.²⁵³ This is one reason why the gallery that sold the painting and Lubell did not think anything strange when the invoice and receipt for the painting noted that the Chagall had been in the collection of the museum's mailroom employee who later turned out to be the thief.²⁵⁴ However, the Lubells did contact the artist himself and his cataloguer, Franz Meyer, in investigating the provenance.²⁵⁵

The court refused to specify what reasonable due diligence by the valid owner would be necessary to defeat a laches defense, and noted that it would be different depending on the parties, the value of the property, the manner in which it was stolen, and the type of institution from which it was stolen.²⁵⁶ The court also declined to rule that the museum's failure to notify the authorities was unreasonable. The court affirmed the district court's statement that whether the museum was obliged to do more depended on whether it was unreasonable *not* to do more, which the court said is, "an issue of fact relevant to the defense of laches and not the statute of

250. *See id.* at 318-19.

251. *See id.* at 314. The gallery was the Gertrude Stein Gallery in New York. This is yet another example of inadequate title inquiries by a reputable gallery.

252. *See id.*

253. *See id.* at 315. Indeed, the museum had done nothing more than search its own premises.

254. *See id.*

255. 77 N.Y.2d at 320. Neither of the cases discuss this interesting fact further, and so one assumes that Chagall did not remember or know that the piece really belonged in the Guggenheim.

256. *See id.*

limitations.”²⁵⁷

There are at least three important aspects to the *Guggenheim* decision. First, the practical effect of the determination that the proper defense is laches is that laches requires that the defendant show prejudice in addition to delay.²⁵⁸ The appellate court stated that in fact, the delay had not harmed Lubell, but had rather benefited her, by giving possession, even for just a finite time, of something she otherwise would not have had.²⁵⁹ This statement is quite unsympathetic to good faith purchasers, but other commentators have noted that the harm is that the defendant will have difficulty in addressing outdated claims.²⁶⁰ Second, the burden of proving that a painting is not stolen rests with the good faith purchaser, which means that the defendant must have records of due diligence in title and provenance verification.²⁶¹ Finally, although New York law does not impose a duty of due diligence on original owners, they may have to comply with a standard of reasonable diligence to overcome the equitable laches defense.²⁶² This is because the good faith purchaser may argue, if she can, that the valid owner unreasonably delayed. However, if the plaintiff can produce documentation that she conducted searches to find the art, the defense will fail.

As stated, New York courts voided the victim's duty of due diligence to overcome a statute of limitations defense, but due diligence may still bear upon laches. This has caused some commentators to argue that stolen art, at least in courts following the New York laches rule, really has no statute of limitations.²⁶³ However, by giving the bona fide purchaser the use of the equitable doctrine of laches, a trial must be held to determine the reasonableness of the actions of the parties.

257. See *id.* at 320(emphasis added).

258. It is difficult to show harm or prejudice if the purchaser did not do a title check. See Goldenberg Interview, *supra* note 136.

259. See Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 622 (App. Div. 1990).

260. See Weiner, *supra* note 131, at 610.

261. See *Guggenheim*, 77 N.Y.2d at 314.

262. See *id.*

263. See Goldenberg Interview, *supra* note 136. Hector Feliciano has argued that there is an argument that art looting, which is a war crime, has no statute of limitations.

3. The Discovery Rule

The discovery rule attempts to mitigate the consequences of the New York rule by not only requiring valid owners to exercise reasonable diligence in searching for their stolen property, but also by stating that the statute of limitations begins to run when the valid owner knew or reasonably should have known the location of the art.²⁶⁴ It is the majority rule in replevin actions for stolen art in almost every jurisdiction.²⁶⁵

The first court to apply this rule was the New Jersey Supreme Court in *O'Keefe v. Snyder*.²⁶⁶ Georgia O'Keefe sued a good faith purchaser for the return of three of her paintings allegedly stolen in 1946 from her husband's gallery in New York. From 1946 to 1976, she had made sporadic attempts to locate the paintings, but not until 1972 did she report the theft to the authorities, and even then, only to the Art Loss Register.²⁶⁷ Because of factual disputes, the case was remanded for a full trial, but the court did instruct the trial court to consider whether (1) O'Keefe was duly diligent; (2) at the time of the theft, there was an effective method for alerting the art world; and (3) registering paintings with the Art Dealers Association of America or any other organization would put a reasonably prudent purchaser of art on notice that there was a valid owner.²⁶⁸

Again, as courts had previously done, the *O'Keefe* court indicated that purchasers should inquire into whether a work may have been stolen.²⁶⁹ Tellingly, the court stated, “[i]t may be time for the art world to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting. An efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of ad-

264. See Ashton Hawkins et al., *A Tale of Two Innocents: Creating An Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 79 (1995).

265. See Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership is No Pretty Picture*, 43 *DUKE L.J.* 337, 357 (1993).

266. 416 A.2d 862. (N.J. Sup. Ct. 1980).

267. See 416 A.2d at 865-66.

268. See *id.* at 865-70.

269. See *id.* at 873.

verse possession with all of its uncertainties.”²⁷⁰

Indiana also follows the discovery rule and requires the plaintiff as well as the defendant to conduct due diligence.²⁷¹ In the leading case like others, once the plaintiff has been shown to be duly diligent, laches will not be discussed.²⁷² In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*,²⁷³ the Church and the Republic of Cyprus sought the return of four Byzantine mosaics created in the early sixth century stolen from the church in the 1970s, and later bought by art dealer Peg Goldberg. Goldberg argued that the statute of limitations had run, but the court found that the cause of action did not accrue until the plaintiffs “using due diligence, knew or were on reasonable notice of the identity of the possessor of the mosaics.”²⁷⁴ The court also found that the Church had exercised due diligence immediately upon learning of the theft and continuing until they were located.²⁷⁵

The court highlighted several facts about Goldberg’s purchase that should be a warning to other purchasers of fine art. Goldberg purchased from a Dutch dealer who she knew had been convicted in France for forging Marc Chagall’s signature to prints, was told that the mosaics had been “found” in the rubble of a Cypriot church, accepted documentation that did not specifically address the mosaics, paid 1.08 million dollars for the mosaics, when they were later appraised at between three and six million dollars, knew very little about the seller, knew that the middleman used various aliases, knew that all three middlemen were to profit in the sale,

270. *See id.* at 872.

271. *See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 288 (7th Cir. 1990).

272. *See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff’d.*, 917 F.2d 278 (7th Cir. 1990); Weiner, *supra* note 131, at 611.

273. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff’d.*, 917 F.2d 278 (7th Cir. 1990).

274. *See* 717 F. Supp. at 1388; 917 F.2d at 288. The district court alternatively found that the doctrine of fraud or concealment, which tolls the statute of limitations, was also applicable here. *See* 717 F. Supp. 1374 at 1392. *See also*, Republic of Turkey v. OKS Partners, 797 F. Supp. 64, 69 (D. Mass. 1992) (a plaintiff cannot “discover” the cause of action until he knows that the works are being held by another, or at least, where that person is).

275. *See* 717 F. Supp. at 1380.

and knew that the viewing, sale and transport to the United States was rushed, taking only three days in all.²⁷⁶ The court found that all of these aspects raised significant suspicions sufficient to cause “an honest and reasonably prudent purchaser in Goldberg’s position to doubt” the seller’s capacity to convey clear title and rights in the mosaics.²⁷⁷

Goldberg testified, however, that she called the International Foundation for Art Research, UNESCO, and various customs offices.²⁷⁸ The court found that this testimony was not credible, since she could produce no names or records, and the organizations had no record of her calls.²⁷⁹

Pennsylvania also applies the discovery rule. In *Erisoty v. Rizik*,²⁸⁰ the original owner, Rizik, was awarded a painting by Corrado Giaquinto, which was stolen in 1960 and found in the possession of Erisoty in 1992. The court quoted the Seventh Circuit in *Autocephalous* in stating that, “[w]e note that any laziness’ this rule might at first blush invite on the part of plaintiffs is heavily tempered by the requirement that, all the while, the plaintiff must exercise due diligence to investigate the theft and recover the works.”²⁸¹

The court found Rizik diligent because he had contacted the FBI, Interpol, and IFAR.²⁸² Although not necessary to the decision, the court commented that Erisoty should have inquired into the painting’s ownership and contacted art and law enforcement agencies, especially since the painting was in five pieces when sold.²⁸³

California is the only state where the law that a cause of action to recover stolen property²⁸⁴ does not accrue until the date the

276. *See id.* at 1381-83, 1400-02.

277. *See id.* at 1402; *see also* 917 F.2d at 294.

278. *See* 717 F. Supp. at 1382.

279. *See id.* at 1403.

280. No. CIV. A. 93-6215, 1995 WL 91406, at *1 (E.D. Pa. Feb. 23, 1995).

281. *See id.* at *12, *quoted in Autocephalous*, 917 F.2d at 289.

282. *See id.* at *13.

283. *See id.* at *14.

284. The statute applies to property that has historical, interpretive, scientific, or artistic significance. *See Naftzger v. Am. Numismatic Soc.*, 49 Cal. Rptr.2d 784, 786

owner discovers the location of the stolen objects is explicitly grounded in statute.²⁸⁵ The statute was adopted in 1983. In *Naftzger v. American Numismatic Society*,²⁸⁶ the California state appeals court reversed a trial court's judgment for Naftzger that was based on the lower court's rejection of the Society's argument that the 1983 version of the statute should apply retroactively.²⁸⁷ In this case, gold coins had been stolen from the Society in 1970, and later purchased by a good faith collector, Roy Naftzger.

The court held that a discovery rule of accrual, as in the 1983 statute, was implicit in the pre-1983 version of the statute, and thus, the Society was within the time limit.²⁸⁸ The court also held that whether the Society had been diligent in attempting to locate the coins was of no consequence under the pre-1983 discovery rule.²⁸⁹ Commentators on this decision remark that despite the fact that the court did not discuss laches, a theft victim who fails to act reasonably to locate her art could be attacked on laches grounds even under *Naftzger*.²⁹⁰ This prediction was borne out in another California appellate court case, *Society of California Engineers v. Roger Baker*,²⁹¹ which dealt with the theft of a gold cane handle. The court implied that under the discovery standard of the 1983 statute, constructive notice may be at issue.²⁹² Thus, diligence may bear on the statutory issue, since under constructive notice, one is charged with what a reasonable inquiry may disclose.²⁹³

C. Analysis of the Cases

As stated above, the cases involve attempts to balance conflicting policies of protecting good faith purchasers, protecting the original owners, and discouraging litigants from bringing stale claims. The New York demand and refusal rule clearly favors the

(Cal. Ct. App. 1996).

285. See 1 LERNER & BRESLER, *supra* note 147, at 239.

286. 49 Cal. Rptr. 2d 784 (Ct. App. 1996).

287. See 1 LERNER & BRESLER, *supra* note 147, at 239 (vol. 1).

288. See 49 Cal. Rptr. 2d at 784, 786.

289. See *id.* at 791-92.

290. See 1 LERNER & BRESLER, *supra* note 147, at 240.

291. 50 Cal. Rptr. 2d 865 (Ct. App. 1996).

292. See 50 Cal. Rptr. 2d at 865, 870, n.10.

293. See *id.*

valid owner because she is not barred from making a claim until a demand is made. For statutes of limitations purposes, no due diligence efforts need to be undertaken by the original owner. The good faith purchaser's need for assurance that she is the legal owner is severely discounted by this rule. The laches defense may mitigate the harshness of this rule upon good faith purchasers, but as discussed, this defense imposes high evidentiary burdens.

In contrast, the discovery rule permits the original owner to sue when she discovers or should have discovered the whereabouts of a work of art through the use of reasonable means. This rule seems to be a good compromise in that it recognizes that original owners can be truly unaware of where their art is located, but also recognizes the need for repose for the purchaser. However, there really is no limitation on the good faith purchaser's liability since under both the demand/laches rule and the discovery rule, a suit may be brought many years after the art has been purchased.

The former New York rule of simple demand and refusal without laches was subject to criticism that it allowed the valid owner to "sleep on his rights" in delaying suit. Particularly with stolen art, this is a valid criticism, due to the skyrocketing values of works by the most famous and admired artists. An owner could conceivably wait until the value of the painting is such that recovery will easily defray the costs of litigation. This is still available even with the laches modification, but since laches introduces equitable considerations, a purchaser could draw attention to it, hoping that the court would find that this kind of delay did in fact prejudice the good faith purchaser.

Laches assures a trial and escalated costs, but perhaps this is a satisfactory price to pay for more reasoned analysis and the benefits of taking into account equitable considerations. The New York demand/laches rule is also consistent with the U.C.C., which states that even a good faith purchaser cannot obtain good title from a thief or one who acquired property from a thief.²⁹⁴ It may seem unfair to subject purchasers to the demand/laches rule now, whereas the legal duties of individuals operating in the art world

294. See Hayworth, *supra* note 265, at 375.

were previously ill-defined if not non-existent.²⁹⁵

The purchasers of art should take from the *Guggenheim* decision a directive that they have the burden to make authenticity and provenance determinations before purchasing. However, a good faith purchaser has other remedies, such as breach of implied warranty of title, against a dealer, as in the *Menzel* case, under U.C.C. 2-312(1)(a).²⁹⁶ By putting the burden on the purchaser, the demand rule may deter some thefts. Purchasers may be less likely to buy stolen art, and more likely to ask questions.²⁹⁷ Most buyers have the ability and means to investigate title and provenance, and by doing so, should be able to contribute to a decline in the stolen art market.²⁹⁸ The courts have already expressed their dislike of the secrecy and informality of the artworld in several important cases, as discussed above. One court noted that “commercial indifference to ownership or the right to sell facilitates traffic in stolen works of art” and that “[c]ommercial indifference diminishes the integrity and increases the culpability of the apathetic merchant.”²⁹⁹

The laches defense may appear illusory because it imposes a very difficult burden upon the good faith purchaser. However, it is not an empty doctrine and may be successful in particular cases. As more time passes, the courts may not excuse delay, if in fact there are not persuasive reasons for the delay as there were in the cases discussed above. Moreover, the attention that stolen art, particularly art that was stolen by the Nazis, has received from the legal, governmental, art and media communities means that there is more information available to valid owners. There are also inves-

295. An argument can be made that the duties are still ill-defined. However, with several prominent courts outlining the way in which they will presumably rule in the future, these duties and actions expected are at least becoming more fleshed out.

296. Every sales contract includes a warranty of title. See Sydney M. Drum, *DeWeerth v. Baldinger: Making New York a Haven for Stolen Art*, 64 N.Y.U.L. REV. 909, 934-35 (1989); Bibas, *supra* note 215, at 2454.

297. Telephone Interview with Constance Lowenthal, former executive director of IFAR, now director of the Commission for Art Recovery at the World Jewish Restitution Organization (Jan. 21, 1999).

298. See Bibas, *supra* note 215, at 2450.

299. See *Porter v. Wertz*, 416 N.Y.S.2d 254 (App. Div. 1979) *aff'd.*, 53 N.Y.2d 696 (1981).

tigative companies such as Trans-Art International,³⁰⁰ which can be hired to conduct the proper due diligence searches. Due to the comprehensive databases of stolen art in operation and under construction discussed in the next section, the laches defense may become more beneficial to a purchaser. The courts might be more willing to find prejudice, if despite the wealth of information on art theft that exists today and the relative ease of access to it, an original owner continues to delay in seeking the return of artwork. Valid owners might be well-advised to bring suit as soon as possible, because a “one-stop” resource, as this author suggests, simply does not exist at present, although collaborative efforts have been forged.

The main alternative, the discovery rule, is too subjective and what constitutes unreasonable delay can vary widely from case to case, and from court to court. It is true that many resources exist for a valid owner to alert the art community that art is stolen, but there is no unified process or checklist of steps. The international trade in art makes the research process much more difficult. The costs of searching through the various resources may be prohibitive, although some organizations offer free services, and it is unclear when due diligence will be satisfied—when has enough been done. Additionally, the cases are unclear on whether individual original owners would be expected to conduct due diligence in the same way as institutional plaintiffs would. Many of the survivors of the Holocaust and their heirs are not financially well-off,³⁰¹ and it may seem unfair to impose a duty of due diligence upon them at the outset, that is, at the statute of limitations stage, (discovery rule) rather than at the laches stage (New York rule). Most importantly and simply, the purchaser, however good faith she may be, never really had any right to the artwork, while the valid owner unquestionably did. As other commentators have suggested, rules that impede valid owners from recovering art provide economic incentives for thievery and for art dealers to refrain from asking questions, or to remain silent about a work’s illicit origins.³⁰²

300. See *infra* note 347 and accompanying text.

301. See Goldenberg Interview, *supra* note 136.

302. See Drum, *supra* note 296, at 933-34.

Thus, the demand/laches rule in New York is unsympathetic to good faith purchasers and clearly favors original owners.³⁰³ Its application can admittedly be harsh to good faith purchasers. In addition, a “party may be successful in part upon how successful they are in gaining sympathy.”³⁰⁴ Indeed, theft victims on the whole are sympathetic, and courts are uncomfortable with awarding title to even good faith purchasers because of the lack of investigation into often suspicious circumstances.³⁰⁵ One can safely assume that Holocaust victims and their heirs would be sympathetic plaintiffs. If the law takes into account who has a stronger moral claim to the art, few would argue against a conception that all victims of art theft, but especially Holocaust victims and their heirs, have the stronger moral claim.

While the cases employ different standards and legal analysis, it is clear that both plaintiffs and defendants would be well advised to be diligent. This means that the plaintiff suing for the return of stolen art should document the “substantial and meaningful steps”³⁰⁶ that she has taken in attempting to locate the art. The defendant should be prepared to show that she was diligent in ascertaining the status of a work’s title and provenance.³⁰⁷ This does not mean that something cannot be bought that is later found to be stolen, because a tight record of diligent searches should show, if it does not disclose theft, that there are no records to be found, or that somewhere along the line, the provenance was constructed reliably, despite the fact that it later proved to be incorrect.

Although there is no set standard for what will constitute due

303. The *Guggenheim* court admitted as much. See Solomon R. Guggenheim Found. v. Lubell, 711 N.Y.2d 311, 320 (1991).

304. A partly related example of sympathy on the part of juries and judges is illustrated in the case of the German Church of Quedlinberg’s claim against a World War II Allies veteran’s heirs living in Texas. In this claim, the church claimed that the deceased veteran had stolen artifacts while stationed in Germany. Rather than “raising the spectre of Nazi Germany before a Texas jury,” the church chose to pay a three million dollar finder’s fee to the heirs. See Borodkin, *supra* note 9, at 404-05.

305. See Bibas, *supra* note 215, at 2449.

306. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 290 (7th Cir. 1990).

307. See Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art—The Tug of War between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75, 78 (1993).

diligence, courts in leading cases have mentioned several organizations and agencies that would be helpful to contact, as well as suggesting courses of action in conducting due diligence. Of course, the scope of a due diligence search will depend on what object is at issue, how important it is, how well-known it is, who the parties are, etc., but one can make some suggestions as to which sources of information should be consulted.³⁰⁸ All of the suggestions come from cases in which there were suspicious circumstances.

The original, valid owner's due diligence might be satisfied by consulting the various sources or engaging in the activities in this checklist:

1. reporting the theft to the police, the FBI, and Interpol
2. contacting UNESCO
3. contacting the International Council of Museums
4. contacting Europa Nostra (an organization devoted to preserving the cultural heritage of Europe)
5. contacting the Council of Europe
6. publication with IFAR
7. publishing the theft with listings that registries like the ALR make possible
8. consulting with individuals from museums and galleries, individuals in academia, archeology, and people known to be interested in the country of origin's affairs
9. contacting international auction houses
10. addressing symposia, congresses, and other meetings
11. writing press releases

308. See *O'Keefe v. Snyder*, 416 A.2d 862, 873 (N.J. 1980); see also *Erisoty v. Rizik*, No. Civ. A. 93-6215, 1995 WL 91406, at *14 (E.D. Pa. Feb. 23, 1995). (“[W]hat efforts are reasonable for an individual who is relatively unfamiliar with the art world may not be reasonable for a savvy collector, a gallery, or a museum”).

12. running classified advertisements.³⁰⁹

The good faith purchaser's due diligence might be satisfied by consulting the various sources or engaging in the activities in this checklist:

1. contacting the country of origin or possible countries of origin
2. making inquiries to art and law enforcement agencies such as Interpol
3. contacting disinterested experts
4. conducting an IFAR search
5. conducting a documented authenticity check
6. conducting a full background search of the seller and his claim of title
7. having insurance protection
8. having a contingency sales contract
9. inquiring into ownership and identity of the consignor
10. inquiring into catalogues of the artist's works
11. contacting the artist if possible or the artist's cataloguer
12. contacting military authorities, museum directors, scholars, the State Department, and embassies
13. publishing the theft in art magazines and other news sources
14. keeping records of efforts to verify that stolen art is not being purchased
15. requesting that the dealer show proof of valid export permits when applicable

309. The checklist was compiled from the following cases: *Autocephalous*, 717 F. Supp. at 1380 and same 917 F.2d at 281; *Erisoty v. Rizik*, 1995 WL 91406 at *13; *Society of California Pioneers v. Baker*, 50 Cal. Rptr. 2d 865, 873 (Ct. App. 1996); *O'Keefe v. Snyder*, 416 A.2d at 872.

16. taking advantage of organizations that were set up after World War II for the specific purpose of locating stolen art
17. publishing the theft with listings that registries like the ALR make possible
18. searching the catalogue raisonn e and through exhibition catalogues of the particular artist.³¹⁰

In New York and California, where most of the art transactions take place, the courts heavily favor the original aggrieved owner. The rules themselves may be enough for the courts to find in favor of the victims' claims that art that belonged to them was stolen by the Nazis. The fact that these will be highly sympathetic plaintiffs should make no difference in a legal sense, but may nonetheless sway the courts even more in their favor.³¹¹ Moreover, the individuals, galleries, and museums, for the most part, did not conduct adequate title searches into works of art, and the courts have consistently faulted good faith purchasers for this failure. As the cases illustrate, the courts are sympathetic to theft victims, and uncomfortable with awarding artworks to buyers who purchase without inquiry into title when suspicious circumstances suggest they should.

Buyers of stolen art that lose in the courts or settle with the valid owner will probably be able to recoup their loss from the merchant who sold them the art. This is because the buyer may recover for breach of warranty under the Uniform Commercial Code.³¹² Some have made the argument that merchants of stolen art are in the best position to investigate title and are capable of

310. The checklist was compiled from the following cases: *Autocephalous*, 917 F.2d 278, 294; *Autocephalous*, 717 F. Supp 1374, 1403-04; *Erisoty v. Rizik*, 1995 WL 91406, at *14; *Porter v. Wertz*, 416 N.Y.S.2d 254 (App. Div. 1979), 257; *Solomon R. Guggenheim v. Lubell*, 77 N.Y.2d 311, 314 (1991); *Menzel v. List*, 24 N.Y.2d 91, 96 (1969); *Kunstammlungen Zu Weimer v. Elicofon*, 536 F. Supp. 829, 850-51 (E.D.N.Y.); *DeWeerth v. Baldinger*, 836 F.2d 103, 110-12 (2d Cir. 1987).

311. One commentator regards the various rules as similar, if not equivalent in that they all are flexible balancing tests. To be weighed is the owner's diligence and delay, the buyer's innocence and reliance, whether there is prejudice on either side, and other equitable factors. *See Bibas, supra* note 215, at 2448.

312. *See* U.C.C. § 2-312(1)(a) (every sales contract includes warranty of title).

spreading loss through insurance.³¹³ What could happen is a number of lawsuits, moving back through the chain of sales until the loss rests with the original purchaser from the thief.³¹⁴ Even with art that was stolen from the Nazis many years ago, this scenario is not implausible, and investigators have proven that records do exist to a certain extent. However, the original purchaser may have been “the Nazis,” and may be long gone or dead, or may simply be unknown or forgotten. A full discussion of the ramifications of this scenario is not possible here, but it is the author’s belief that the law should currently focus on the rights of the victims.

The mounting legal, moral, political, and social problems associated with art theft have spurred the art industry and political leaders to call for various changes in the way the art world conducts business. Changes are desperately needed, and while they might not benefit all victims and purchasers of art stolen by the Nazis, they should be welcomed and debated for the future. Any changes must be international in scope, and will admittedly be difficult to coordinate at first.

One idea that would be of great use is state and ultimately federal legislation that mandates aggrieved owners to register stolen art with a confidential, computerized, international stolen art registry.³¹⁵ The idea is that as long as a registered owner was diligent in searching for the art, the statute of limitations would be tolled indefinitely. If a purchaser checked the registry and found that the art she wanted to buy was not listed, a three year statute of limitations would begin to run. The commentators favor a discovery rule if neither party checks the database.³¹⁶

However, the courts have been telling the art world what the prudent course should be for thirty years now. An international database is a good idea and should be implemented, but it does not address the underlying problem - the fact that the multibillion dollar art industry and market is without a required title search

313. See Bibas, *supra* note 215, at 2467.

314. See Goldenberg Interview, *supra* note 136.

315. See 1 LERNER & BRESLER, *supra* note 147, at 241. See also Bibas, *supra* note 215, at 2461-67 (describing this idea in detail).

316. See 1 LERNER & BRESLER, *supra* note 147, at 242.

1999]

LEAVE NO STONE UNTURNED

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mechanism and apparently feels no need for one. Buyers and sellers should be obligated to conduct title and provenance searches, as buyers and sellers dealing in other expensive items have always done. States should begin setting up the systems capable of conducting an inquiry into title as soon as possible. Perhaps the predicted wave of litigation will spur the state and national legislatures to pursue this action.

IV. LEGISLATION AND SPECIFIC STATUTES

On February 12, 1998, the House Banking Committee held a hearing on what to do about the issue of plundered art by the Nazis.³¹⁷ Senator Alphonse D'Amato testified, stating that, "[after fifty] years of stonewalling, speedy restitution to the families who deserve and need their assets is the only course . . ."³¹⁸ None of those testifying, the majority of whom were representatives of museums, stated that legislation was necessary, and instead several suggested that the registries should unify and coordinate research of lost art and that wartime documents should be declassified.³¹⁹ However, Representative Charles E. Schumer told the panel that he planned to introduce legislation that would require those who acquire art to do full title searches to ensure that the art is not stolen.³²⁰ This is the only way in which trafficking in stolen art can really be curtailed. It is the course that the courts have been urging upon the legislatures for over thirty years.

Most significantly, a bill sponsored by Senator Alphonse D'Amato of New York was signed into law on February 13, 1998 cited as the "Holocaust Victims Redress Act."³²¹ This law makes specific reference to and findings on the problem of art that was looted by the Nazis, and its purpose is to "provide redress for inadequate restitution of assets seized by the United States Government during World War II which belonged to victims of the Holocaust and for other purposes."³²² The law authorizes the President to obligate up to twenty-five million dollars for distribution, under the Tripartite Commission for the Restitution of Monetary Gold, to charitable organizations assisting survivors of the Holocaust. It also authorizes appropriations of five million dollars for archival

317. See Judith H. Dobrzynski, *Capitol Hill Looks at Issue of Art Stolen in Wartime*, N.Y. TIMES, Feb. 15, 1998 at A17 [hereinafter Dobrzynski III].

318. See Elaine S. Povich, *Washington Briefing/ A Weekly Report on People and Issues in the Nation's Capital/ When Art Becomes Politics/Politicians Tackle Nazi Looting, Insurance Issues*, NEWSDAY, Feb. 22, 1998, at A30.

319. See Dobrzynski III, *supra* note 317, at A17.

320. See Walter V. Robinson, *Museums' Stance on Nazi Loot Belies Their Role in a Key Case*, BOSTON GLOBE, Feb. 13, 1998, at A1.

321. Pub. L. No. 105-158, 112 Stat. 15 (1998).

322. See *id.*

and translation services to assist in the restitution of assets looted or extorted from victims of the Holocaust. From the findings in the bill and now law, the focus of the restitution efforts will likely be stolen art.

Former Senator D'Amato also sponsored the United States Holocaust Assets Commission Act of 1998, which was signed into law on June 23, 1998.³²³ This law established the Presidential Advisory Commission on Holocaust Assets, which will develop a historical record of assets of Holocaust victims in the possession of the Federal Government, encourage the National Association of Insurance Commissioners to report on Holocaust-related claims practices of companies doing business after 1933, review the research conducted by other entities regarding such assets, and report its recommendations to the President, who will then report the recommendations to Congress for action.³²⁴

Additionally, then Representative Charles E. Schumer of Brooklyn and Nita M. Lowey of Rye stated in the spring of 1998 that they would introduce legislation that will provide \$5 million to private organizations helping heirs and survivors trace their losses and another five million dollars for provenance authenticity of federal art holdings. The bill would also require those buying art, including museums, to conduct a title search, that is, "due diligence" as discussed in this Article.³²⁵ Also deemed crucial was some sort of international coordination due to the different laws in this area, as previously discussed. One may recall that in the United States, good title is not acquired if the piece is stolen, but in some European countries, good faith purchasers may attain clear title.³²⁶

The State Department has engaged J.D. Bindenagal, acting ambassador to Germany from 1996 to 1997 to work for undersecretary of State for economics, business, and agricultural affairs Stuart E. Eizenstat.³²⁷ Mr. Eizenstat spearheaded the investigation into Swiss banks accused of holding Nazi looted gold. Mr. Binde-

323. Pub. L. No. 105-186, 112 Stat. 611 (1998). See Thomas Bill Summary and Status, (visited Mar. 22, 1999) <<http://thomas.loc.gov>>.

324. See *supra* note 323.

325. See Dobrzynski III, *supra* note 317, at A17.

326. See *id.*

327. See Shawn Zeller, *Around the Agencies*, NAT'L J., Feb. 21, 1998, at A20.

nagal, in conjunction with other interested individuals and organizations, such as the Holocaust Museum arranged an international conference on stolen art—the Washington Conference on Holocaust-era Assets—that was held in Washington, D.C. on November 30 through December 3 of 1998. Representatives of over forty nations attended and discussed the ramifications of restitution, the opening up of archives, and the making of amends for past injustices.³²⁸

V. PROPOSED SOLUTIONS

“Art theft from the Holocaust is one of the few things from the Holocaust that we can make right.”³²⁹ Many of the predicted cases will end in settlement or through private negotiations.³³⁰ However, an original owner must take steps to have the legal grounds to initiate a negotiation for return of the stolen art, or to begin legal proceedings. Organizations are gathering more information every day, as the topic of stolen art is regularly in the national newspapers, discussed in Congress, fought over in the courts, and discussed by the art world. The following is a list of some of the most reputable sources to begin one’s search for stolen art. It is meant to be a guide for anyone who believes that they or their family may have been the victim of art theft.

One should also consult the other sources referred to in the cases section, especially in the section listing what courts have included in their definitions of due diligence. In addition, an appendix of useful Internet sites is attached. Most of the organizations

328. *See id.* The Internet site for full text of the reports, testimony, etc. is <www.state.gov/www/regions/eur/holocausthp.html>.

329. *See* Lowenthal Discussion, *supra* note 297.

330. For example, Alexandre Rosenberg, son of Paul Rosenberg received a letter in 1970 stating that a Degas painting owned by his father could be found with two Swiss or Germans, who did not wish to be known. They said that they wanted to sell it to him, but Rosenberg wrote back and said the painting was his family’s and had been illegally confiscated. Because of complex international laws and the difficulties of a lawsuit, Rosenberg, as Feliciano recounts, offered to give up all rights to the painting in exchange for a sum. Surprised, the anonymous “owners” accepted. *See* FELICIANO, *supra* note 2 at 169-70. Also, a six figure settlement was reached between the seller and heirs to a painting that Sotheby’s sold in January of 1997. *See* Walter V. Robinson, *Portrait Nazis Stole is Hotly Disputed*, BOSTON GLOBE, May 5, 1997, at A3.

listed below have Internet sites, and more detail, such as contact information is provided in the appendix. One must realize that this process will most likely involve hiring an attorney. This is advisable because not only are there knowledgeable attorneys working in stolen art recovery, there are groups, as discussed below, that may fund all or part of a lawsuit if necessary. Of course, having an attorney is advisable even if the case never reaches the litigation stage but instead goes through mediation or some other type of dispute resolution. Additionally, as a practical matter, the people and institutions an original owner will be negotiating with or bringing suit against will undoubtedly be represented by skilled attorneys and may have more funds at their disposal.

One should begin by contacting the *International Foundation for Art Research* (“IFAR”) in New York City. IFAR has maintained a stolen art database since 1975, which has been computerized since 1983, and also offers authentication services. IFAR publishes IFAR Reports, a quarterly journal containing a “stolen art alert.” The alert is compiled with the input of the art community, insurance companies, the police, the FBI, and Interpol.³³¹

The *Art Loss Register* (“ALR”) is an international clearinghouse established in 1991, representing London and New York insurance brokers such as Lloyd’s of London, major auction houses such as Christie’s, and IFAR. ALR maintains one hundred thousand listings of stolen and missing art, works closely with insurance companies and law enforcement officials and is hired by large auction houses to screen upcoming offerings for stolen works. The register can be searched for a small fee, but the fee has been waived for wartime claimants.³³² The comprehensive “Art Theft Report Form” and the recently added specialized “Wartime Losses Report Form” can be transmitted to the ALR via electronically from their websites.

The new form specifically designed for claimants whose art was stolen or is missing is the result of an ALR initiative, supported by its shareholders (including Sotheby’s and Christie’s) an-

331. See Lerner, *supra* note 147, at 203.

332. Telephone Interview with Anna Kisluk, Director of Operations at the Art Loss Register (Dec. 30, 1998).

nounced on June 2, 1998, to identify and recover art stolen during the Holocaust. Through this initiative, ALR is working with two other organizations that have recently devoted attention to the issue of art stolen by the Nazis; the Commission for Art Recovery of the World Jewish Congress and the New York State Banking Department Holocaust Claims Processing Office.³³³ Information that is provided for the ALR's Wartime Losses Report Form will be forwarded to these two organizations for inclusion into their own databases (unless requested not to do so), in an effort to build as comprehensive a database as possible for Holocaust art losses.³³⁴

The *Commission for Art Recovery* of the World Jewish Restitution Organization is part of the World Jewish Congress and is dedicated to identifying and locating art stolen by the Nazis and registering claims for the victims of Nazi thefts.³³⁵ The Commission also has a database of works which have been found in the sense that they exist in museums, auction house catalogues, etc.³³⁶ The claim form for a lost or stolen work is fed into the database for a possible match. In the event a match is made, the information is turned over to the claimant and the person or institution holding the work to pursue the matter as they see fit, with guidance available from the Commission.³³⁷

The *New York State Banking Department Holocaust Claims Processing Office* was created in June of 1997 to act as an advocate for individuals from any state or country in recovering assets, such as money and art believed to have been stolen or lost during 1933 to 1945 in Europe.³³⁸ The Department regulates banks, and as an outgrowth of the controversy surrounding Swiss bank ac-

333. *Id.*; Telephone Interview with Constance Lowenthal, Executive Director and Bill Lee, Claims Manager at Commission for Art Recovery at the World Jewish Restitution Organization (Jan. 21, 1999); Telephone Interview with Monica Dugot of the New York State Banking Department Holocaust Claims Processing Office (Jan. 8, 1999).

334. See *A Wartime Losses Report Form*, available at (visited Mar. 22, 1999) <<http://www.artloss.com/repuswar.htm>>.

335. See Lowenthal Interview, *supra* note 297; *Mission Statement* available at (last visited Mar. 22, 1999) <<http://www.wjc-artrecovery.org>>.

336. See *id.*

337. See *id.*

338. See Dugot Interview, *supra* note 333; Holocaust Claims Processing Office, (visited May 13, 1999) <<http://www.claims.state.ny.us>>.

counts, became involved in claims concerning art.³³⁹ After a claim form is filled out, a search begins through the HCPO database, other databases, and additional sources of information at no cost to the individual.³⁴⁰ The Banking Department, as a governmental regulatory entity is a particularly useful organization to contact since they maintain good relations with, and thus may be able to obtain access to the records of European banks and insurance companies and authorities.³⁴¹

The *Holocaust Art Restitution Project* (“HARP”) based at the B’nai B’rith Klutznick National Jewish Museum in Washington, D.C. was launched September 4, 1997 and serves as a research and development engine for documentation and tracking of Jewish cultural losses during the Holocaust.³⁴² Not only will this information be available for use in tracking works of art, but it will also represent a comprehensive history of European Jewish collectors, their collection, and the fate of those collections between 1933 and 1945.³⁴³ HARP’s mandate is to create one centralized place where survivors or heirs can begin the search for looted art and the directors envision a readily accessible database via the National Jewish Museum and the Internet.³⁴⁴ HARP is expected to have four to five persons actively seeking out the history of Jewish collections and what happened to them during the Holocaust.³⁴⁵

The *Art Dealers Association of America* in New York has maintained a stolen art archive since 1971 and publishes monthly notices of stolen artwork. These notices are distributed to various individuals and institutions in the art community.³⁴⁶

Trans-Art International is a private, for-profit organization of attorneys and investigators who provide clients with a document called an “ownership/due diligence certificate” that may be used as

339. *See id.*

340. *See id.*

341. *See id.*

342. See HARP’s mission statement at <<http://www.lostart.org.mission.htm>>; see also, Group to Trace Art Taken by Nazis, St. Louis Post Dispatch, Sept. 5, 1997, at 12A.

343. *See id.*

344. *See id.*

345. *See id.*

346. *See Lerner, supra* note 147, at 203.

information or may provide support for a laches defense.³⁴⁷ Trans-Art consults the art databases, experts on a particular artist, 10-25 internationally known museums, catalogue raisonnées, the government of the country of the artist's birth, lawyers, journalists, art insurers, appraisers, restorers, conservators, and *Trace* magazine in London.³⁴⁸

The art program of the *International Criminal Police Organization* (Interpol) is a group of police agencies of 176 countries.³⁴⁹ Police agencies submit information about stolen art to Interpol, and in return, Interpol distributes a poster/report of stolen objects from these reports.³⁵⁰

This author agrees with other commentators that the victims of art theft, and in particular the victims of the Nazis' art looting, should be awarded restitution.³⁵¹ Their claims are paramount and should be addressed. Museums, galleries, auction houses, and individual purchasers must realize that the secrecy and "no questions asked" customs of the art world have contributed to the problem, and be forthcoming in providing restitution. This author proposes that all of these parties, when confronted with a claim by an original owner that is determined to be true by independent experts, or if they disagree, by a court, return the art to the original owner, pay the owner the present value of the work as in *Menzel*, or arrange for a museum to exhibit the piece with a description of its provenance. The present value payment may seem harsh because it is likely that the work's value will have soared. However, if the original owners do not want the actual art, the purchaser will simply sell it and deliver the proceeds to the owner, or purchase the work from the owner from his own funds. It would not be fair to simply allow the valid owner to recover the price she originally paid for the work, because she has been deprived not only of the

347. See Goldenberg Interview, *supra* note 136.

348. See *id.*

349. See Lerner, *supra* note 147, at 204.

350. See *id.*

351. As Ori Z. Soltes, director of HARP, stated, it is misleading and even wrong to think that there are two "equally situated victims," because one had choices, while the other did not have any semblance of choice. See *Holocaust Victims' Claims: Hearings before the House Banking and Financial Services Committee*, 105th Cong. (1998) [hereinafter *Hearings*] (testimony of Ori Z. Soltes), available in 1998 WL 8991990.

art, but also of the likelihood that it would increase in value over time. Moreover, the purchaser can sue a dealer, if one is involved, for breach of warranty of quiet title, and a dealer can spread the risk of loss because she is usually a knowledgeable repeat player.³⁵²

This author does not advocate that the parties take it upon themselves, without a claim by an original owner, to inquire into the title and provenance of works they already hold and then turn them over if they determine that the original owner has the better claim. In a perfect world, these types of voluntary transactions would be commended, but they are unlikely to happen and also impose too high of a burden on the good faith purchaser. The purchaser should not have to take the initiative in actively searching title and locating owners, but should be forthcoming when met with a determination that the art was stolen from a valid owner. This proposal mirrors the common law replevin action, by which a possessor of stolen goods must return the goods to the valid owner, but only upon demand. However, a *new* would-be purchaser should, especially in light of the many new sources of information that now exist, take it upon herself to conduct a duly diligent inquiry into authenticity and provenance verification as described in this Article.

Many stolen art databases exist, and a few specifically focusing on art that was stolen during the Holocaust by the Nazis have been created in the last two years. Several organizations, as discussed, have decided to collaborate by exchanging information on stolen and missing works claimants provide to them. This kind of cooperation is needed since one would need to reasonably search all the available resources that exist to satisfy one's self, and possibly the courts, that due diligence had in fact been accomplished. It is entirely commendable that so many different organizations have their own databases and registries of stolen art. Ideally, however, individuals would be able to have a thorough search conducted through all of the existing databases and registries by submitting a claim form to any one of the organizations, whose database would be

352. See Bibas, *supra* note 215, at 2454.

linked to all of the other databases that exist.³⁵³

The databases should also attempt to include the kind of research that has led Hector Feliciano to recover several paintings to date. Every step—fruitful or not—would be documented in the database and thus a path would begin to take shape that would hopefully lead to a work's whereabouts and eventual recovery. This approach seems to be the one suggested by Ori Soltes of HARP. In his testimony before the House Banking and Financial Services Committee, he stated that HARP's database would "trace the sinuous and tortured paths of dispersal" and show the missing works on screen.³⁵⁴ Legislation that disburses funds for this type of research should be supported by valid owners and good faith purchasers alike.

A familiar argument that is likely to arise in this context is the idea that art always serves best when it is most visible and accessible.³⁵⁵ This is an important argument, but it is not a trump. We should not blindly accept this argument for several reasons, in part because of the moral considerations that exist since this art was stolen through a program of racial hatred and genocide. The consequences of this may be that museums in particular lose some of what they previously had, and thus, the public may lose the enjoyment of viewing some beautiful works of art. However, the parties to future litigation and negotiation concerning these matters may be willing to compromise in a way that is beneficial to everyone. Owners of fine art have always been willing to loan works of art to museums and other organizations for the simple reason that exhibition increases the value and stature of the artworks.³⁵⁶

353. This idea has already taken shape in the cooperation and exchange of information by the Art Loss Register, the Commission for Art Recovery, the Holocaust Claims Processing Office, and the Holocaust Art Restitution Project.

354. See *Hearings*, *supra* note 351 (testimony of Ori Z. Soltes).

355. See Bator, *supra* note 108, at 300. A different but also familiar argument is usually made, but is not relevant here. That is the idea, often espoused by major museums, that art and artifacts are not taken care of in their countries of origin and thus it is better that they be preserved by those institutions that value the art and have the resources to care for it. See *id.* at 295-300.

356. See *Hearings*, *supra* note 351 (testimony of Ori Z. Soltes). Mr. Soltes argues that there are many willing to loan works of art for beneficent purposes, but also because it would likely increase the work's value. In his testimony, he forcefully made the point

This could be accomplished in several ways: the valid owner or heir could donate the piece to the museum and the museum would exhibit the painting as well as its provenance, the museum could pay the owner the current value of the painting in exchange for title to the painting,³⁵⁷ or a sharing arrangement could be worked out so that both owner and museum could exhibit the painting at different times, with title resting in both (many private collections are public at times or become so³⁵⁸). The type of settlement reached in August of 1998 between the Goodman heirs and the pharmaceutical magnate Daniel Searle, discussed earlier in this Article, is also an option. At issue was Degas' *Landscape with Smokestacks*, and the settlement is believed to be one of the first of its kind involving art stolen by the Nazis. The Goodmans claimed that the Degas had been stolen from a Paris warehouse by the Nazis, but Daniel Searle argued that the painting had been legitimately purchased and had been published and featured in exhibitions after the war, and thus that he should not lose the work due to the Goodmans' incomplete inquiries.³⁵⁹ The agreement calls for third party evaluators to appraise the painting for an average actual value, at which point the Art Institute of Chicago will purchase the Goodman family's share for half of that amount.³⁶⁰ Searle, a trustee of the museum, will donate his share to the museum and receive a tax write-off.³⁶¹ Both parties avoided what would have been a lengthy legal battle, but both reportedly spent large sums of money. The Art Institute of Chicago acquires the coveted painting, and will display it with a

that legislatures should require due diligence on the part of museums when purchasing or accepting a loan. This would mean that some works of art would remain unseen by the public because they are of questionable provenance. However, Mr. Soltes argued that investigation into title will not ruin the art world as it has not ruined other commerce, while admitting that it may delay the acquisitions and loan processes.

357. An heir to the Goudstikker artworks, of which many hang in Dutch museums, suggested that she did not want to take the paintings from the museum. Instead she would like "some compensation" and recognition by the museum of Goudstikker's role as a collector. See Alan Riding, *Heirs Claim Art Lost to Nazis in Amsterdam; Another Collection Joins the Disputes Over Who Owns War's Cultural Booty*, N.Y. TIMES, Jan. 12, 1998, at E1.

358. See Bator, *supra* note 108, at 300.

359. See Kevin M. Williams, *Degas Settlement Lands in Uncharted Territory*, CHI. SUN-TIMES, Aug. 16, 1998, at 43.

360. See *id.*

361. See *id.*

plaque bearing the inscription, "Purchase from the collection of Friedrich and Louise Guttman and a gift of Daniel C. Searle."³⁶² The original owner also might be willing to loan the artwork to a museum for public viewing for specified periods, with title remaining with the valid owner. However, the choice must lie with the aggrieved original owner if restitution and recognition of their claims is to have any meaning.

CONCLUSION

The original owners and heirs of art that was stolen by the Nazis in a systematic plan to rob them of their lives, their culture, and their identity, deserve to have these works returned to them. All of the participants in this story, from individuals to institutions, should be willing to make efforts to make a terrible and continuing wrong a right. As the Holocaust survivor quoted earlier in this Article stated, sometimes art belonging to their ancestors is all the families have left of their loved ones who perished in the Holocaust.

362. *See id.* The fact that the Art Institute is the beneficiary of the painting is interesting, since it advised Searle in his initial purchase of the painting. *See id.*

APPENDIX

INTERNET SITES THAT PROVIDE CURRENT
INFORMATION ON ART THEFT

In addition to the individual Internet sites listed below, Yahoo, an Internet search engine has a search mechanism which allows for access to a library of sites specifically related to looted art and other assets during the Holocaust. To access this library, go to Yahoo Home, and then click on the following categories presented on the screen in this order: Arts: Humanities: History: 20th Century: Holocaust, the: Asset Recovery and Restitution.

1. The Art Loss Register

Homepage Address: <www.artloss.com>

Publisher of the Site: The Art Loss Register, London and New York

Last Updated: November 1998

The Art Loss Register is a permanent computerized database of stolen and missing works of art, antiques and valuables, which operates on an international basis to assist law enforcement agencies by helping with the recovery of stolen art, antiques and valuables, discouraging art theft and preventing fraud. Founded in January 1991 on the initiative of the insurance, art and antiques industries and operating as a commercial venture, the ALR is a significant development in the fight against art theft.

In the event of a theft, details of the stolen objects are supplied by subscribing insurance companies, loss adjusters, law enforcement agencies, private individuals, museums, galleries and individuals who have suffered a theft. A full description is fed into the ALR database and registered as a stolen work. The *Art Theft Report Form* can be accessed through the main web page. The form is very detailed with four pages of questions. Additionally, the new *Wartime Losses Report Form* is accessible. This form seeks similar information, while tailoring several of its questions to the circumstances of thefts during the Holocaust.

The Art Loss Register site provides updates on recoveries, contains a link to its quarterly newsletter, and links to law enforcement agencies. It also provides links to antique companies, art organizations, auctioneers, insurance organizations, media, and museums. There is also a good, and quite comprehensive article at this site on one of the subjects in this Article entitled, "Britain and Post-War Restitution." The article was written in 1998 by the Holocaust Educational Trust in London. It is essential reading for an overview of post-war restitution efforts by the Allies and the obstacles they faced.

One may also contact Anna Kisluk, Director, Art Loss Register, 666 5th Avenue, Suite 2102, New York, New York 10103, 212-391-8791.

2. International Foundation for Art Research (IFAR)

Homepage Address: <www.ifar.org>

Publisher of this Site: IFAR

Last Updated: June 1998

The International Foundation for Art Research is a non-profit organization that maintains a computerized database of stolen art and also offers a comprehensive authentication service to assist in the resolution of questions of authenticity and attribution of works of art. IFAR employs its own experts and researchers, and also occasionally hires outside experts. IFAR also publishes a quarterly journal, IFAR Reports, which contains a "stolen art alert" and other information concerning the fine arts. IFAR can be reached at 212-391-6234.

3. The Commission for Art Recovery

Homepage Address: <www.wjc-artrecovery.org>

Publisher of this Site: World Jewish Congress and World Jewish Restitution Organization

Last Updated: Unknown

The *Commission for Art Recovery* of the World Jewish Restitution Organization is part of the World Jewish Congress and is dedicated to identifying and locating art stolen by the Nazis and

registering claims for the victims of Nazi thefts. The claim form for a lost or stolen work is “fed” into the database for a possible match. In the event a match is made, the information is turned over to the claimant and the person or institution holding the work to pursue the matter as they see fit, with guidance available from the Commission. The Commission’s services are free of charge. The telephone number is 212-521-0102.

4. Holocaust Art Restitution Project (“HARP”)

Homepage Address: <www.lostart.org>

Publisher of this Site: HARP

Last Updated: Under construction, but plenty of information is currently available.

The Holocaust Art Restitution Project, together with the Washington D.C. National Jewish Museum serves as a research and development engine for documentation of Jewish cultural losses during the Holocaust. HARP has set out to document, research and track Jewish cultural losses for what will become a centralized database of information. Not only will this information be available for use in tracking works of art, but it will also represent a comprehensive history of European Jewish collectors, their collections, and the fate of those collections between 1933 and 1945. HARP’s goal is to complete this database, and have it be readily accessible to anyone via the National Jewish Museum and the Internet. HARP will also be staging several exhibits at the National Jewish Museum, which will focus on collections and items, looted by the Nazis and recovered at the end of World War II. HARP can be contacted at 202-857-6672.

5. New York State Banking Department Holocaust Claims Processing Office (“HCPO”)

Homepage Address: <www.claims.state.ny.us/>

Publisher of this Site: New York State Banking Department

Last Updated: January 14, 1999

The Holocaust Claims Processing Office was created in June of 1997 to assist individuals from any state or country in recovering

assets, such as money and art believed to have been stolen or lost during 1933 to 1945 in Europe. A claim form is filled out and a search begins through the HCPO database, other databases, and additional sources of information at no cost to the individual. The Banking Department is a particularly useful organization to contact since they maintain good relations with, and thus may be able to obtain access to the records of European banks and insurance companies and authorities. HCPO may be reached at 800-695-3318 or 212-618-6983, and assistance in several languages is available.

6. INTERPOL—United States National Central Bureau
Cultural Property Program

Homepage Address:

<www.usdoj.gov/usncb/culturehome.htm>

Publisher of this Site: United States Department of Justice

Last Updated: September 21, 1998

This site contains information on selected works from the INTERPOL database of stolen cultural property, under the heading of “Most Wanted Works of Art.” INTERPOL, the International Criminal Police Organization is not a police entity, rather it is an organization whose purpose is to facilitate and encourage police cooperation all over the world. The USNCB is the United States point of contact for INTERPOL. The USNCB and thus INTEPOL are available only to the law enforcement community, so it is advised that those wishing to use INTEPOL’s resources contact their local police, who can then transmit requests to the USNCB.

7. Federal Bureau of Investigation (“FBI”) National Stolen
Art File

Homepage Address: <www.fbi.gov/art.htm>

Publisher of this Site: FBI

Last Updated: Unknown

The FBI created the National Stolen Art File to assist law enforcement agencies in resolving the problem of the illicit trade in art and cultural artifacts. The Stolen Art File is a computerized index of stolen art and cultural property that has been reported to the

FBI, and contains images, descriptions, and investigative case information. The primary goal of the Stolen Art File is to serve as a research and analysis tool for investigators and law enforcement officials. A request to be entered into the Stolen Art File must come through a law enforcement agency and the work must usually be valued at over \$2000. If an individual wishes to access the file, she should contact the local FBI office. The National Stolen Art Files office number is 202-324-4192.

8. The Museum Security Network

Homepage Address: <museum-security.org>

Publisher of the Site: Museum Security Network

Last Updated: January 14, 1999

This is a Web site and mailing-list devoted to cultural property security and safety aspects for management and security professionals working in museums, libraries, national parks, archives, universities, galleries and all other institutions active in the field of cultural property and heritage. Information is offered about security products, organizations, consultants, salvage and safety programs, training programs, reporting stolen property, publications and articles. The mailing-list offers *daily* reports about incidents, such as thefts, involving cultural property. All services are free of charge. There are links to *Interpol's Stolen Art* Web site and *Art Crime*, which reports daily on incidents of cultural property crime.

There is also a link to *The Art Newspaper*, a London-based electronic monthly journal of news in the international art world, with affiliates in Italy, Paris, and Spain. This site contains information on museum issues, including security, exhibitions, acquisitions, policy, legal matters, and general trends in the field. The website is at <<http://artnewspaper.com>>

9. Steven R. Keller & Associates, Inc. and Horizon Institute Inc.

Homepage Address: <www.horizon-usa.com/intlartcop/>

Publisher of the Site: Steven R. Keller

Last Updated: June 26, 1997

Steven R. Keller heads a security consulting firm specializing in projects involving museums, libraries, cultural and historic properties, select universities, and facilities involving high value assets. Clients include the Smithsonian Institution, the National Gallery of Art, Harvard University, the Statue of Liberty, and 200 other institutions and clients.

10. Frenkiel International

Homepage Address: <www.restituion.com>

Publisher of this Site: Frenkiel International

Last Updated: Unknown

Frenkiel International specializes in restitution claims management, and is currently handling over 400 claims of restitution claims in real estate and looted art. The company has connections in the United States and abroad, particularly in the former East Germany, through which they provide information and help to clients wishing to pursue a restitution claim. Frenkiel can be contacted at its New Jersey office at 800-938-8124.

11. bei dhh-3 (a German websites which is primarily in the German language)

Homepage Address: <www.dhh-3.de/biblio/bremen>

Publisher of the Site: Unknown

Last Updated: May 23, 1998

Although most of this site is in German, there is a link to "Looted Art" at which there are at least three English language links of interest. The first is a link to a newsletter entitled *Spoils of War*, a report from ten European countries that have been affected by art looting during and after World War II. The newsletter is published by the German Coordination Office of the Federal States for the Return of Cultural Property. Two "Special Reports" were also at this site: (1) Recovering Wartime Losses and Other Stolen Art and Cultural Property Found in the United States at www.dhh-3.de/biblio/bremen/sow3/srlireco.htm and (2) The Role of IFAR [International Foundation of Art Research] and the Art Loss Register in the Repatriation of Cultural Property Displaced in World

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War II at <www.dhh-3.de/biblio/bremen/sow1/ifar.htm>

12. CHUBB Insurance for Businesses: Insurance for Museums and Cultural Institutions

Homepage Address:

<www.chubb.com/businesses/package/trades/museums>

Publisher of the Site: Chubb

Last Updated: Spring 1997

This is somewhat of an unexpected place to find information on art theft, but it just so happens that Chubb is a major insurer for museums. The company publishes a newsletter that comes out once a year entitled *Museum Notes: Managing Your Museum in the 90's*, which has information and articles on art thefts and how to prevent them.

13. Getty Information Institute

Homepage Address: <www.ahip.getty.edu/pco>

Publisher of this Site: Getty Institute

Last Updated: May 1997

The Getty Institute has links to a database entitled "Protecting Cultural Objects" ("PCO"). This link was useful in that it allowed me to access what is called "Object ID"- an international standard for describing art, antiques, and antiquities. From there one could access the Object ID checklist, which helps identify an object in a way that is useful to police and customs agencies, appraisers, and the insurance industry. The site also provided interesting information on the art trade and appraisers, law enforcement agencies, and provided a bibliography about sources on art theft.

14. Antiques Trade Gazette

Homepage Address:

<www.atg-online.com/stolen/stolen.html>

Publisher of this Site: Antiques Trade Gazette in London

Last Updated: updated weekly

This is an online magazine that describes art and antiques that have fallen victim to theft. The site has pictures of art and antiques believed to have been stolen or missing, and one can check this site in an attempt to avoid becoming a purchaser of stolen goods. There is also an information package one can order about publicizing an art theft.