

The University of Akron

From the Selected Works of Robert L Tucker

Summer 2011

Stolen Art, Looted Antiquities, and the Insurable Interest Requirement

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STOLEN ART, LOOTED ANTIQUITIES, AND THE INSURABLE INTEREST REQUIREMENT

*By Robert L. Tucker**

I. INTRODUCTION

The twenty-first century brings good news and bad news for lovers of fine art and antiquities. The good news is that the American public is showing a dramatically increased appreciation for objects of culture. The bad news is that this increased appreciation for cultural objects has increased the demand for those items, both on the part of museums and private collectors. The increase in demand has spurred considerable black-market activity, including both the looting and smuggling of objects of antiquity,¹ and in the theft and sale of pieces of fine art.

II. STOLEN ART AND LOOTED ANTIQUITIES—THE SCOPE OF THE PROBLEM

A. *Stolen Art*

“[E]ach year tens of thousands of art thefts occur worldwide.”² One can scarcely read the newspaper without tripping across stories about major art thefts or artwork found in the home of collectors who unwittingly purchased stolen pieces.

For example, in May 2010, a lone art thief stole five paintings worth hundreds of millions of Euros (including works by Picasso and

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1. “The general, political definition of an antiquity (as it is used in political agreements and national laws) is an object that is more than 150 years old.” JAMES CUNO, WHO OWNS ANTIQUITY? 5 (2008).

2. ART LAW HANDBOOK § 5.01, at 283 (Roy S. Kaufman ed., 2000).

Matisse) in an overnight heist from the Paris Museum of Modern Art.³ And in 2009, U.S. Immigration and Customs and Enforcement agents found a 350-year-old statue of a saint and former pope that had been stolen from an Italian church in November 1990 in the home of a North Carolina couple.⁴ The statue was one of seventeen busts and two oil paintings that had been stolen from a church in Naples, Italy.⁵ The purchasers—who had no idea that the bust had been stolen—were required to return it to the Italian church, which is its true owner.⁶

Even university professors are part of the problem. In the mid-1990s, Anthony Melnikas—a retired Ohio State University professor—was convicted and sentenced to jail for ripping rare leaves from books in the Vatican library.⁷ The stolen pages came from the Vatican's collection of works by Petrarch, a fourteenth-century scholar and poet who is often thought to be one of the founders of the Italian Renaissance.⁸

Film director Steven Spielberg is personally acquainted with the problems associated with the black market for fine art. In 2007, he learned that his beloved Norman Rockwell painting had been stolen from a Missouri art gallery sixteen years earlier.⁹

It is hard to say how big the stolen art market is, but it is certainly more than one billion dollars each year.¹⁰ Insurance companies pay somewhere between three billion and five billion dollars each year on stolen art claims.¹¹ The FBI calculates that six billion dollars of art is

3. Angela Charlton, *Paintings Worth Millions Stolen in Paris*, BUS. INSIDER (May 20, 2010, 5:58 AM), <http://www.businessinsider.com/paintings-worth-millions-stolen-in-paris-2010-5>.

4. *Missing Centuries-Old Statue Found in North Carolina Home*, FOXNEWS.COM (Mar. 21, 2009), <http://www.foxnews.com/story/0,2933,510022,00.html>.

5. *Id.*

6. *Id.*

7. Dorothy Shinn, *Bruce Ferrini, Akron Rare Book Dealer, Dies at 60*, OHIO.COM (May 14, 2010, 6:32 PM), <http://www.ohio.com/news/93815284.html>.

8. *Id.*

9. Sheppard Mullin, *Art Insurance: Clean as a Rockwell*, ART L. GALLERY BLOG (June 5, 2009, 1:13 PM), <http://www.artlawgallery.com/2009/06/articles/insurance/art-insurance-clean-as-a-rockwell/>; *Stolen Rockwell Found in Spielberg's Collection*, TODAY.COM (Mar. 3, 2007, 5:19 PM), <http://today.msnbc.msn.com/id/17430445/ns/today-entertainment/>.

10. ART LAW HANDBOOK, *supra* note 2, § 5.01, at 283.

11. *Id.* at 285 n.18.

stolen annually.¹² Hundreds of thousands of art objects are stolen each year.¹³

Nearly twenty years ago, at least one commentator observed that stolen art is often taken from art-rich nations in Africa, Asia, and Eastern Europe, and then smuggled to a country in Western Europe (such as Switzerland) that has liberal laws protecting bona fide¹⁴ purchasers.¹⁵

It is little wonder that smugglers favor art and antiquities. They are high-value, low-volume items with a ready market.¹⁶ They are valuable, easily hidden, and easily transported.¹⁷ And, perhaps most important of all, they can be “laundered” or legitimized because of the absence of controlling international law and the favorable treatment accorded to bona fide purchasers in civil-law countries.¹⁸

Although art theft is rampant on every continent, it is especially heavy in Central and Eastern Europe.¹⁹ It “has been fanned by political upheaval in Eastern Europe, bringing in its wake an epidemic of [art] theft as well as destruction.”²⁰ “Plunder from countries that have suffered recent military conflicts, such as Bosnia and Kuwait, add to the illegal commerce, as “virtually all the stolen objects went abroad.”²¹

Only ten to fifteen percent of the stolen art is ever recovered.²² The rest makes its way onto the open market. Because of this, experts believe that as much as five percent of the entire art market consists of stolen artwork.²³

“Since World War II, the United States has been the biggest market of illegal art.”²⁴ Most stolen art is sold on the open market.²⁵

12. *It's Like Stealing History*, FBI, http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft (last visited Aug. 1, 2011).

13. Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 660 (2000).

14. A “bona fide purchaser” is an innocent purchaser who acquires stolen property in good faith and for fair market value. ART LAW HANDBOOK, *supra* note 2, § 5.03[A], at 309 (citing U.C.C. § 2-103(1)(b) (1999) (amended 2001)).

15. Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 19 (1993).

16. *Id.* at 20.

17. *Id.*

18. *Id.* at 20–21.

19. Phelan, *supra* note 13, at 660.

20. *Id.* (quoting Norman Palmer, *Recovering Stolen Art*, 47 CURRENT LEGAL PROBS., no. 2, 1994 at 215, 218).

21. *Id.* (quoting Norman Palmer, *Recovering Stolen Art*, 47 CURRENT LEGAL PROBS., no. 2, 1994 at 215, 218).

22. ART LAW HANDBOOK, *supra* note 2, § 5.01, at 283.

23. *Id.*

24. Phelan, *supra* note 13, at 660 (citing Alan Riding, *French Museum Chief vs. Art*

"[M]ore than 250,000 works of art and antiquities have been reported stolen to the leading commercially available databases alone."²⁶ And the true number of thefts is actually much higher, since art theft often goes unreported.²⁷

It has been said that stolen art "inundates" the legitimate market²⁸:

[A]ttorneys, estate executors, trustees, and legal commentators have advised art collectors to conduct due diligence investigations to determine whether valuable art objects have been stolen. As one observer commented, "[t]he lax commercial conventions of the art trade have resulted in most stolen art being eventually owned by innocent good faith collectors."²⁹

These conventions, "which enable massive quantities of stolen art to seep into the legitimate market, necessarily undercut any reasonable reliance that secure title has attached to an art object."³⁰ The so-called "stringent purchasing practices" followed by art dealers often simply require sellers of artifacts to sign a form stating that they have good title to the piece.³¹

The problem of stolen art is exacerbated by the customs and traditions of the art market, in which transactions are presumptively secret:

One scholar has related that the most striking thing to a lawyer who comes upon the art world is the assumption that transactions should normally be, and are certainly entitled to be, secret.

Finally, the "lackadaisical" "ask no questions" conventions of the international art trade make it imperative that buyers and collectors aggressively and competently investigate materials to ensure that they are not acquiring stolen property."³²

Indeed, "[e]ven reputable auction houses such as Sotheby's have been known not to investigate title."³³

Thieves, N.Y. TIMES, June 15, 1991, at 113).

25. *Id.* at 661.

26. *Id.*

27. *See id.*

28. Phelan, *supra* note 13, at 633.

29. *Id.* (second alteration in original) (quoting Peter Spero, *Asset Protection Aspects of Art*, 3 J. ASSET PROTECTION 58, 59 (1998)).

30. *Id.* at 659.

31. ROGER ATWOOD, *STEALING HISTORY* 32 (2004).

32. Phelan, *supra* note 13, at 662 (footnote omitted).

33. Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2452 (1994).

The near-total lack of investigation and inquiry in the commercial art world means that reputable dealers and auction houses often sell stolen art, and collectors unwittingly acquire these stolen pieces. A former Secretary General of the International Council of Museums (ICOM) recently declared that “the art market is the only sector of economic life in which one runs a 90 percent risk of receiving stolen property.”³⁴ Likewise, a former Executive Director of the International Foundation for Art Research (IFAR) has concluded that “85% of all stolen art is hanging on the walls or sitting on the pedestals of unsuspecting collectors.”³⁵ And an asset protection specialist (who is also an attorney) has counseled that “[a]rt theft is so pervasive today that chances are that any client who owns an object of art may be holding stolen property.”³⁶

B. *Looted Antiquities*

The trade in unprovenanced antiquities³⁷ has exploded over the past forty years.³⁸ Indeed, most antiquities (between sixty and ninety percent) offered for sale on the international market have no provenance.³⁹ These unprovenanced antiquities generally end up in private and public collections in Europe, North America, and the Far East.⁴⁰

The market for illicit, unprovenanced antiquities is huge. It is difficult to establish figures, since the work is done surreptitiously and the pieces have never been appraised. An approximate figure of five billion dollars per year, however, is often mentioned at international conferences and in the media.⁴¹ Because the illicit excavation and

34. Phelan, *supra* note 13, at 663 (quoting Elisabeth des Portes, *The Fight Against the Illicit Traffic of Cultural Property*, in *THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE* 5-1, 5-4 (Marilyn Phelan & Robert H. Bean eds., 1998)).

35. *Id.*

36. *Id.* (alteration in original) (quoting Peter Spero, *Asset Protection Aspects of Art*, 3 J. ASSET PROTECTION 58, 58 (1998)).

37. “In conventional terms, an unprovenanced antiquity is one with modern gaps in its chain of ownership.” CUNO, *supra* note 1, at 1. An artifact is unprovenanced if there “is no evidence that the antiquity was exported in compliance with the export laws of its presumed country of origin.” *Id.* Since these are modern laws, the gaps in the chain of ownership that are of interest are the modern gaps (generally post-1970). *See id.*

38. Neil Brodie, *An Archaeologist's View of the Trade in Unprovenanced Antiquities*, in *ART AND CULTURAL HERITAGE* 52, 52 (Barbara T. Hoffman ed., 2006).

39. *See id.* at 52–53.

40. *Id.* at 52.

41. Barbara T. Hoffman, *Exploring and Establishing Links for a Balanced Art and*

marketing of antiquities is illegal, it has rarely been quantified.⁴² Nevertheless, as suggested above, the international illicit trade in cultural property (which includes stolen art as well) ranks third after drugs and weapons.⁴³

There long has been—and continues to be—considerable disagreement in the international community about the extent to which modern day countries should be able to claim the exclusive right of ownership of artifacts generated or owned by cultures that occupied the same area centuries or millennia ago. For example, it has been observed that modern Egypt is culturally, religiously, and socially dissimilar from its ancient forbearers.⁴⁴ Likewise, most modern day Italians likely have little cultural or emotional relationship with the Etruscan civilization that once occupied portions of their country, just as many modern day Americans feel little or no cultural relationship with the American Indians that once inhabited North America.⁴⁵ As another author put it: “Modern Turks, who are primarily descended from thirteenth-century Ottoman conquerors, have little in common, ethnically or culturally, with the Trojans, Lydians and Mycenaeans of the distant past.”⁴⁶

Even important officials within a single nation’s government make conflicting statements about whether cultural property can ever truly belong to a “nation” rather than to the world at large (particularly when the current citizens of that nation are ethically and culturally divergent from the creators of the artifacts). For example, for many years, Dr. Zahi Hawass has been the Secretary General of Egypt’s Supreme Council of Antiquities.⁴⁷ Dr. Hawass has often demanded the return of antiquities that he claims were improperly removed from Egypt, even where the acquirer had apparently exercised due diligence in researching the provenance of the piece before acquiring it.⁴⁸ Indeed, Dr. Hawass has gone so far as to say that certain objects, even though not looted, are “icons of our Egyptian identity” and that “they should be in the motherland. They should not be outside Egypt.”⁴⁹

Cultural Heritage Policy, in ART AND CULTURAL HERITAGE, *supra* note 39, at 1, 3.

42. Brodie, *supra* note 38, at 54.

43. *Id.*

44. CUNO, *supra* note 1, at 48, 128–29, 135–36.

45. *See id.* at 135–37.

46. Britt Peterson, *Tales from the Vitrine: Battles over Stolen Antiquities*, NATION (Jan. 7, 2009), <http://www.thenation.com/article/tales-vitrine-battles-over-stolen-antiquities>.

47. CUNO, *supra* note 1, at 169 n.4.

48. *Id.*

49. *Id.* at 171 n.10.

Yet, on his popular television program that aired in 2010 entitled *Chasing Mummies*, Dr. Hawass opens each episode by referring to the Egyptian antiquities he unearths in the following terms: "It's our past. It's not the Egyptian past, it's the past of everyone. This is history."⁵⁰

Notwithstanding this dispute, many countries forbid the excavation and export of antiquities, and these restrictions are honored (at least to some degree) under international law. There is nothing new about the illegal excavation (commonly known as "looting") and smuggling of antiquities from their country of origin. In Belize in 1970, it was "estimated that there were two hundred looters for every archaeologist working in that country alone."⁵¹ The problem was even worse in neighboring Guatemala.⁵²

Perhaps the most recent—and well-publicized—instance of mass looting occurred in the context of various wars in the Gulf.⁵³ Although Saddam Hussein scrupulously protected Iraqi antiquities, he did not hesitate to loot those of other countries.⁵⁴ After invading Kuwait in 1990, the Iraqi army reportedly "made off with nearly every item housed in the Kuwait National Museum."⁵⁵

Iraq then found its antiquities looted after the second Gulf War in 2003.⁵⁶ John Russell, an archaeologist and former cultural advisor to the Coalition Provisional Authority, said that after the Iraq Museum was looted in 2003, "newly surfaced Iraqi artifacts were sold in the United States at venues to accommodate every price range: the major New York auction houses, brick-and-mortar galleries, online virtual galleries, and the burgeoning, anonymous, unregulated mega-market of eBay."⁵⁷

One of the most famous antiquities of all time—the bust of Nefertiti—was smuggled out of Egypt, its country of origin.⁵⁸ In February 2009, a document was discovered in the German Oriental Institute showing how archaeologist Ludwig Borchardt was able to

50. See, e.g., *Chasing Mummies: Cursed* (History Channel television broadcast Sept. 8, 2010).

51. ATWOOD, *supra* note 31, at 28.

52. *Id.*

53. Peterson, *supra* note 46.

54. *Id.*

55. *Id.*

56. *Id.*

57. Peterson, *supra* note 46.

58. Roger Boyes, *Secret Note Reveals How Germany Smuggled Queen Nefertiti Bust from Egypt*, *TIMES* (London) (Feb. 11, 2010), <http://www.timesonline.co.uk/tol/news/world/europe/article5702671.ece>.

smuggle the 3400-year-old bust of Queen Nefertiti to Berlin in 1913.⁵⁹ “Written in 1924, the document is the account by the secretary of the German Oriental Company of a meeting he attended on January 20, 1913 between Borchardt and a senior Egyptian official.”⁶⁰ Under the arrangement between Germany and Egypt, the two countries were to divide the antiquities unearthed as part of that investigation equally.⁶¹ Borchardt, however, wanted to be certain that the bust of Nefertiti would go to Germany.⁶² To that end, it was tightly wrapped up and placed deep in a box in a poorly lit chamber in the hope that it would escape the notice of the Egyptian chief antiquities inspector.⁶³ “A photograph taken of the bust was deliberately unflattering. The specifications state that the bust was made of gypsum, which is almost worthless, although the queen’s features were in fact painted on limestone.”⁶⁴ Egypt now wants the bust of Nefertiti to be returned, and its ultimate disposition is the subject of an ongoing dispute between the governments of Germany and Egypt.⁶⁵

Indeed, Egypt has been actively trying to recover stolen or looted artifacts for many years. In 2008, a bust of Pharaoh Amenhotep III that had been stolen fifteen years earlier was returned to Egypt after a lengthy legal battle with an antiquities dealer.⁶⁶ This piece is just one of approximately 5000 pieces of looted or stolen antiquities retrieved by Egypt since 2002.⁶⁷

Egypt also recently demanded that U.S. authorities return a 3000-year-old wooden sarcophagus of a pharaoh that had been smuggled out of Egypt more than a century ago.⁶⁸ This sarcophagus was reportedly taken from Egypt in 1884 after it was stolen from a tomb in Luxor.⁶⁹ In early 2010, after Egypt filed suit, U.S. authorities agreed to return this

59. *Id.*

60. *Id.*

61. *Id.*

62. Boyes, *supra* note 58.

63. *Id.*

64. *Id.*

65. *Id.*

66. Rebecca Santana, *4,300-Year-Old Pharaonic Tombs Unveiled near Cairo*, NEWSVINE (Dec. 22, 2008, 11:55 AM), http://www.newsvine.com/_news/2008/12/22/2238394-4300-year-old-pharaonic-tombs-unveiled-near-cairo.

67. *Id.*

68. *Egypt Wants Coffin Back*, GRAND RAPIDS PRESS, Mar. 23, 2009, at A2.

69. *Id.*

sarcophagus (which had been confiscated at the Miami airport after being shipped from Barcelona) to Egypt.⁷⁰

Art museums in the United States have repeatedly found themselves in trouble for holding looted antiquities. Because the United States does not enforce export restrictions of other countries,⁷¹ stolen and looted artwork frequently enters the United States⁷² and is often acquired by museums.⁷³

Not long ago, the Cleveland Museum of Art agreed to return fourteen ancient treasures looted from Italy, which ranged from Etruscan jewelry to a Medieval cross.⁷⁴ The museum signed a deal in Rome with officials from the Italian Culture Ministry, in which the museum agreed to transfer the artifacts in exchange for loans of other treasures.⁷⁵ Photos and documents discovered in raids conducted on Swiss warehouses in the 1990s showed that these artifacts had been looted.⁷⁶ The antiquities dealers whose warehouses were raided reportedly controlled the flow of illegal art exports from Italy.⁷⁷ These raids sparked a worldwide hunt for Italy's lost treasures.⁷⁸

The New York Metropolitan Museum of Art ("the Met") has faced one charge after another of receiving loot over the years. Perhaps the most famous, however, is one involving a fifteen-piece set of Roman silvers that Italian authorities believe was looted in Sicily in 1980.⁷⁹ "As of 2003, Italy was demanding the return of allegedly looted goods from at least seven U.S. museums on the basis of evidence gathered by the art

70. *Egypt to Receive Stolen Sarcophagus from U.S.*, CBS NEWS (Feb. 22, 2010, 1:55 PM), <http://www.cbsnews.com/stories/2010/02/22/world/main6231652.shtml>.

71. See discussion *infra* Part III.A.1.

72. Karen S. Jore, *The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit from Ineffective Laws Governing Cultural Property?*, 13 BROOK. J. INT'L L. 55, 71-72 (1987). "[T]he transfer in New York of artifacts and lesser known artwork which may have been illegally exported from their country of origin goes virtually unhampered." *Id.* at 76.

73. *Id.* at 72 ("[I]f the artifact is a particularly significant piece, some museums will likely entertain the possibility of purchasing it. Indeed, unless the museum interested in the artifact is self-regulating regarding acquisitions, it will have an acquisitions policy that does not exclude those artifacts which appear to have been illegally acquired." (footnotes omitted)).

74. Ariel David, *Cleveland Museum to Return 14 Looted Antiquities*, OHIO.COM (Nov. 20, 2008, 8:50 AM), <http://www.ohio.com/news/ohio/34792769.html>.

75. *Id.*

76. *Id.*

77. *Id.*

78. David, *supra* note 74.

79. ATWOOD, *supra* note 31, at 142.

police, and threatening to bar those museums from receiving traveling shows of any Italian art if they didn't cooperate."⁸⁰

In 1993, the Met ended a lengthy dispute with Turkey over the Lydian Hoard, which consisted of 360 artifacts buried in the tombs of royalty and noblemen in the era of the legendary King Croesus of Lydia in sixth century B.C.⁸¹ These artifacts were, in fact, from a collection that had gone missing twenty years before, taken "by grave robbers from Sardis, an ancient city in western Turkey, which served as the capital of the Lydian empire at its peak in the sixth and seventh centuries BC."⁸² This "Lydian Hoard had passed through a number of smugglers and semireputable dealers before reaching the Met in the 1960s."⁸³ News reports indicate that there was "plenty of evidence that the Met had known something of the provenance of the objects at the time [they were acquired] and willfully ignored it. The Turkish government sued the Met for the unconditional return of the cache and, after a six-year legal battle, finally won."⁸⁴ Even the Met's director said that he believed that "the stuff was illegally dug up."⁸⁵ "[T]he Met labeled it 'East Greek Treasure' even though the pieces were of distinctly Anatolian style, not Greek."⁸⁶ The Met's then-director confessed that this mislabeling was "for purposes of obfuscation."⁸⁷

Oscar White Muscarella—who has been described as "a dissident curator" within the Metropolitan Museum of Art—refers to its Greek and Roman Galleries as "The Temple of Plunder" because they are so filled with what he views as stolen artworks.⁸⁸ A former director of the Met, who was dismissed by its board in 1977, is quoted as admitting that "I bought a lot of smuggled stuff."⁸⁹ This former director began dealing in smuggled pieces when he was still a curator.⁹⁰ Within two years of his hire, he was collecting \$850,000 worth of smuggled antiquities every

80. *Id.* at 142–43.

81. *Id.* at 143.

82. Peterson, *supra* note 46.

83. *Id.*

84. *Id.*

85. ATWOOD, *supra* note 31, at 143.

86. *Id.*

87. *Id.*

88. SHARON WAXMAN, LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD 182 (2008).

89. *Id.* at 193.

90. *Id.* at 194.

year.⁹¹ By his own admission, he “organized stuff to be smuggled out of every country, mostly medieval stuff, mostly into Switzerland.”⁹²

The next director of the Met fared little better. Under his watch, the Met had to return a number of looted pieces to Italy in view of the mounting evidence that they had been looted.⁹³ He, too, defended the Met’s knowing acquisition of unprovenanced antiquities, “arguing that it was necessary to buy up important pieces even if they may have been looted.”⁹⁴

A 1991 catalogue that accompanied a 1990 Met exhibition was titled *Glories of the Past, the Art from the Shelby White and Leon Levy Collection*.⁹⁵ Archaeologists David Gill and Christopher Chippindale examined this catalogue and concluded that eighty-four percent of the works shown in this exhibit first surfaced after 1973 (when the UNESCO convention was adopted) and thus had no known provenance so must be considered looted.⁹⁶

In 1997, the government of Guatemala began campaigning for the return of its most flagrantly-plundered antiquities in U.S. museums.⁹⁷ “The Kimbell Art Museum in Fort Worth, the Art Institute of Chicago, and the Cleveland Museum of Art, among other institutions, all have in their permanent collections Mayan artifacts smuggled out of Guatemala since 1960.”⁹⁸

One of the most notable incidents of a museum knowingly acquiring looted antiquities was the acquisition by the J. Paul Getty Museum of numerous antiquities looted from Italy.⁹⁹ The curator knew that these objects had been looted and smuggled first to Switzerland then to the United States by convicted smuggler Giacomo Medici.¹⁰⁰

The Getty Museum’s curator, Marion True, worked closely with antiquities dealers Robin Symes and Christos Michaelides, “who had become successful dealers in the antiquities market in the 1980s and the 90s and who had been major suppliers to the Getty.”¹⁰¹ Symes and Michaelides’ success “derived from the unregulated art market, most of

91. *Id.*

92. WAXMAN, *supra* note 88, at 194.

93. *Id.* at 196–98.

94. *Id.* at 198.

95. *Id.* at 202.

96. WAXMAN, *supra* note 88, at 203.

97. ATWOOD, *supra* note 31, at 147.

98. *Id.* at 146.

99. PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY* 81–83 (2006).

100. *Id.* at 85.

101. WAXMAN, *supra* note 88, at 310–11.

it of illegal origin, laundered through the free zone in Switzerland¹⁰² and handed off to wealthy collectors or respectable museums who did not push very hard for more information when told the piece belonged to an unnamed 'Swiss collector.'"¹⁰³ Symes later admitted that his years of success were attributable to "his naked disregard for laws about antiquities exports."¹⁰⁴

These buying practices were widespread. By the early 2000s, respected authors reported that "everyone in the art and museum worlds knew, antiquities for sale meant, for the most part, looted antiquities," since for decades no source country had allowed their export or domestic sale."¹⁰⁵ John Walsh, the director of the Getty Museum from 1983 to 2000, testified in a deposition in 2004 that "[f]rom the beginning, we knew that there was the potential of being offered material that had been illegally excavated, or illegally removed from Greece or Turkey or Italy. . . . This was a common problem. Everybody knew it in 1983; everybody knows it now."¹⁰⁶

But that did not stop the Getty from trying to camouflage its illicit collection. Between 1983 and 2000, the Getty Museum published six volumes of a catalogue denominated *Greek Vases in the J. Paul Getty Museum*, which was ostensibly a reputable academic publication.¹⁰⁷ But it was later determined that the catalogue "dealt in considerable detail with loot" and that "[t]here is probably no equivalent in the history of antiquities scholarship that has so betrayed its high ideals."¹⁰⁸

One of the most recent—and striking—investigations into looted antiquities occurred on a January morning in 2008, when dozens of federal agents from the National Park Service, the International Revenue Service, and Immigration and Custom Enforcement simultaneously raided four museums in Southern California.¹⁰⁹ The investigation began

102. The "free zone" or "free port" area of the Geneva airport is reserved for items that have not passed through Swiss customs. ART LAW HANDBOOK, *supra* note 2, § 5.02[A][2][b], at 303. Transactions conducted in the "free zone" are sometimes arguably subjected to Swiss law (since the transfer of ownership occurs there), even though Swiss authorities disclaim any knowledge or control over the objects of the sale, since they were never inspected or cleared through customs. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, 717 F. Supp. 1374, 1393–94 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278, 289 (7th Cir. 1990).

103. WAXMAN, *supra* note 88, at 312.

104. *Id.*

105. *Id.*

106. *Id.*

107. WATSON & TODESCHINI, *supra* note 99, at 92.

108. *Id.*

109. WAXMAN, *supra* note 88, at 368.

five years earlier, when an undercover agent with the National Park Service learned of a network that smuggled looted objects and donated them to museums in exchange for inflated appraisals used as tax write-offs.¹¹⁰ Museum officials and two antiquities dealers had been caught on tape in dozens of secretly recorded meetings and phone conferences, discussing the handling of artifacts smuggled from China and Thailand.¹¹¹ One of the individuals involved in this scheme described it as follows:

[It was] a network of dealers from whom he bought antiquities in Thailand, which he then shipped to the United States with "Made in Thailand" stickers on the relics. . . . He said that he had sold "hundreds" of such items to the Bowers Museum and that he had sought to buy artifacts from the Ban Chiang Dynasty, a culture that occupied Thailand from 1,000 BC to AD 200, all at the behest of the Bowers's chief curator, Armand Labbé¹¹²

This investigation disclosed that the Deputy Director of Collections and the Registrar of the Pacific Asia Museum met with an undercover agent who said he wanted to donate objects from Thailand.¹¹³ The Deputy Director of Collections told him that she was supposed to put up "token resistance" to accepting antiquities without proper paperwork but accepted the pieces anyway.¹¹⁴ And at the Bower's Museum, the chief curator not only "accepted loans of objects looted from Thai and Native American graves [but] even solicited the donor to purchase objects from the Ban Chiang civilization for donation to the museum."¹¹⁵ The search warrants also stated that the museum's current director, Peter Keller, visited the storage locker where smuggled objects such as these were kept.¹¹⁶

Egyptian antiquities are a favorite subject of looting and illicit exportation. For example, four duck-shaped artifacts from the Middle Kingdom were recently stolen from the storehouses at Saqqara, which is near Cairo.¹¹⁷ "One appeared at Christie's in 2006; another turned up at around the same time at the Rupert Wace Gallery in London."¹¹⁸ The

110. *Id.*

111. *Id.*

112. *Id.* at 369–70.

113. WAXMAN, *supra* note 88, at 370.

114. *Id.*

115. *Id.*

116. *Id.*

117. WAXMAN, *supra* note 88, at 23.

118. *Id.*

ancient funeral mask of Ka Nefer Nefer, acquired by the St. Louis art museum, was a looted antiquity, since Egypt can prove that the mask was logged in a storage catalogue in the 1950s.¹¹⁹

Some museums take the position that Egyptian antiquities exported prior to 1983 are fair game. For example, Aggy Lerolle of the Louvre maintains that the Egyptian Antiquities Authority has “no right to ask for anything [exported] before 1983,’ when Egypt banned the export of antiquities unearthed after that date.”¹²⁰

Illicit antiquities from Greece have also been popular subjects in the last several decades. In the 1980s and 1990s, artifacts were stolen from museums from all over Greece.¹²¹ Perhaps the most audacious of these was the 1990 theft from the archaeological museum in Corinth.¹²² In that single event, the thieves acquired 285 pieces—the largest theft of art in Greece’s history.¹²³ “The pieces disappeared until 1998, when they began to surface at auction—at Christie’s, through an American collector with ties to the Karahalios clan.”¹²⁴

Occasionally, looters enlist the help of local villagers in their unauthorized excavations. In 1976, a farmer with a donkey accidentally came across a tomb from a 3500-year-old Minoan civilization.¹²⁵ The tomb turned out to be a trove of pottery and gold.¹²⁶ He enlisted the assistance of his fellow villagers:

The villagers dug day and night to empty that tomb and find any others in the vicinity. For six or seven months, they banded together—including the local authorities—and dug in secret, agreeing to divide the spoils. They emptied an entire cliffside of its Minoan riches, eighteen tombs in all . . . until nothing was left but a hole in the ground. . . . Thirteen years later, golden Minoan objects turned up at the Michael Ward Gallery in New York.¹²⁷

119. *Id.*

120. *Id.* at 65.

121. WAXMAN, *supra* note 88, at 346.

122. *Id.*

123. *Id.*

124. *Id.*

125. WAXMAN, *supra* note 88, at 347.

126. *Id.*

127. *Id.*

III. WHAT'S LEGAL—AND WHAT ISN'T

A. *International Law*

1. *The conflict between common-law and civil-law jurisdictions*

Common-law jurisdictions like the United States and the United Kingdom follow the principle that a thief takes no title to stolen property and has no title to confer, even to a bona fide purchaser.¹²⁸ This doctrine is often expressed in Latin as the principle *nemo dat quod non habet*, meaning that no one may give better title than he has.¹²⁹ But that is not the case throughout much of Western Europe. Those countries that follow the civil codes permit a bona fide purchaser who obtains title through a thief to obtain title superior even to the rightful owner.¹³⁰

The conflict between the common-law and civil-law jurisdictions is important because of the established rule of “private” international law holding that “the validity of a transfer of personal property . . . will be governed by the law of the country where the property is situated at the time of the transfer.”¹³¹ The effect of this *lex locus situs* rule is to focus on the conduct or transaction that led to the bona fide purchaser’s possession of the piece.¹³² Thus, even in common-law jurisdictions, if the transfer to the bona fide purchaser occurred in a civil-law country, the bona fide purchaser will be protected.¹³³ Neither the presence of the stolen artwork in the common-law jurisdiction after the transfer nor the rightful owner’s domicile in the common-law jurisdiction affects the applicability of the *lex locus situs* rule, which is considered to be necessary for commercial convenience and the avoidance of uncertainty in commercial transactions involving personal property.¹³⁴

These rules of law are well known to sophisticated traffickers, who are fully aware that the *situs* rule, taken in combination with the protection of bona fide purchasers in civil-law countries, enables the purchaser to prevail even against the rightful owner.¹³⁵ And even in

128. Collin, *supra* note 15, at 21.

129. *Id.* at 21 n.28 (citing Boris Kozolchyk, *Transfer of Personal Property by a Nonowner: Its Future in Light of Its Past*, 61 TUL. L. REV. 1453, 1462 (1987)).

130. *Id.* at 22.

131. *Id.*

132. Collin, *supra* note 15, at 22.

133. See, e.g., *Winkworth v. Christie Manson & Woods*, [1980] Ch. 496, 512–13 (Eng.).

134. *Id.*

135. Collin, *supra* note 15, at 24.

common-law countries—as will be described in greater detail below—the rights of the true owner may be barred by the expiration of a comparatively short statute of limitations.

This is not to say that countries lack export regulations that apply to art (both stolen and legitimate). These laws date back to 1464, “when Pope Pius II prohibited the exportation of works of art from the [P]apal [S]tates.”¹³⁶ Export prohibitions became common more than 100 years ago, and “[t]oday, almost every country in the world restricts and regulates the export of cultural property.”¹³⁷

In general, these restrictions may take the form of 1) a total embargo prohibiting the export of all protected cultural property (which may be defined to include all or virtually all art); 2) one of several export licensing systems; 3) taxation incentives or disincentives; or 4) some combination of these.¹³⁸ In the United States, the National Stolen Property Act makes it a federal crime to transport in foreign commerce goods known to be stolen, or to receive, conceal, or sell such goods.¹³⁹

But all of these import/export restrictions are pertinent only to a smuggler or to someone who knowingly receives stolen property. For a subsequent bona fide purchaser, they are wholly irrelevant:

The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States; illegal export does not itself render the importer (or one who took from him) in any way actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country.¹⁴⁰

The same applies in all of the other major art-importing countries, including England, France, Germany, and Switzerland.¹⁴¹

It is unrealistic to expect that civil-law countries will suddenly adopt common-law rules concerning the respective rights of victimized owners and bona fide purchasers of stolen art work or vice versa. And the level of market sales of stolen artwork demonstrates the woeful inadequacy and ineffectiveness of treaties (which have largely gone unratified among the nations most affected). It seems to be generally conceded among commentators that more treaties would simply

136. Paul M. Bator, *An Essay on International Trade in Art*, 34 STAN. L. REV. 275, 313 (1982).

137. *Id.* at 314.

138. *Id.* at 314–17.

139. 18 U.S.C.A. §§ 2314–2315 (West 2011).

140. Bator, *supra* note 136, at 287.

141. *Id.*

represent a waste of time and effort.¹⁴² Other methods to reign in the rampant theft and resale of artwork recommended by commentators include the enactment and enforcement of anti-corruption laws in art-source countries; revising tax laws regarding ownership, donation, and inheritance of works in arts in countries with an active black market; increasing criminal and civil penalties for looting, art theft, and smuggling of cultural property; and committing resources to assist in staffing and training foreign and domestic customs and law enforcement officers.¹⁴³

But, perhaps most importantly, these commentators recommend the more aggressive use of technology (including internet-based resources).¹⁴⁴ These suggestions include the creation of registries that would list items of truly outstanding cultural patrimony (including archaeological sites); and the development of publicly available, sophisticated, private or governmental art loss registries that would accept descriptions and photographs of stolen items from any source.¹⁴⁵

2. *Treaties*

In partial recognition of the notion that the world at large—rather than just a single nation—has a common interest, stake, and claim to ownership in the relics of ancient civilizations, the United Nations' Educational, Scientific, and Cultural Organization (UNESCO) adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005.¹⁴⁶ This Convention “acknowledges that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of everyone.”¹⁴⁷ It further acknowledges that this shared heritage is “nurtured by constant exchanges and interactions between cultures.”¹⁴⁸

But this 2005 Convention also highlights the fact that definitions of “cultural property” are often inconsistent and conflicting.¹⁴⁹ There is no standard international definition of what constitutes cultural property.¹⁵⁰

142. ART LAW HANDBOOK, *supra* note 2, § 6.04[A][3], at 419.

143. *Id.* at 420.

144. *Id.*

145. *Id.*

146. CUNO, *supra* note 1, at 48.

147. *Id.*

148. *Id.*

149. ART LAW HANDBOOK, *supra* note 2, § 6.02[A], at 391.

150. *Id.*

In general, "cultural property" may be said to include artifacts "that are expressive of a specific culture and are unusual or uniquely characteristic of that culture."¹⁵¹

There is general agreement that there are two basic types of cultural property: antiquities and objects of artistic importance.¹⁵² "Antiquities" are often (but not invariably) defined as items predating the Middle Ages.¹⁵³ These objects include coins, objects used in ritual worship, eating and cooking implements, tools, jewelry, and weapons.¹⁵⁴ In some countries, statutory definitions of "antiquities" require that an object be at least 100 years old to qualify as such.¹⁵⁵

By contrast, "objects of artistic importance" generally refer to the fine arts.¹⁵⁶ These may include paintings, drawings, prints, photographs, woodcuts, decorative items of furniture, tapestries, and ceramics.¹⁵⁷ Unlike antiquities, even contemporary works of art may constitute "objects of artistic importance" and can be deemed "cultural property."¹⁵⁸

i. The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict

The first international convention that dealt solely with the protection of cultural property was issued in 1954.¹⁵⁹ It was titled: "The Hague Convention for the Protection of Cultural Property In the Event of Armed Conflict" ("1954 Hague Convention").¹⁶⁰ The scope of the 1954 Hague Convention is very narrow. It focuses exclusively on the protection of cultural heritage objects in the event of armed conflict. It arose in the wake of the widespread destruction of cultural heritage objects that occurred during World War II.¹⁶¹ The 1954 Hague Convention covers certain classifications of movable and immovable property, including monuments of architecture, art, or history;

151. Manus Brinkman, *Reflexions on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures*, in ART AND CULTURAL HERITAGE, *supra* note 38, at 64, 65.

152. ART LAW HANDBOOK, *supra* note 2, § 6.02[A], at 391.

153. *Id.*

154. *Id.* at 392.

155. *Id.*

156. ART LAW HANDBOOK, *supra* note 2, § 6.02[A], at 392.

157. *Id.*

158. *Id.*

159. CUNO, *supra* note 1, at 25.

160. *Id.*

161. *Id.*

archaeological sites; works of art; manuscripts; books; and other objects of artistic, historical, or archaeological interests.¹⁶² States that are signatories to the convention agree to take preventive measures to protect property not only in times of hostility, but also in times of peace.¹⁶³

International acceptance of the 1954 Hague Convention was very slow. In 1994, it was observed that among the five permanent members of the UN Security Council, only France and Russia were parties to the convention.¹⁶⁴

Although the United States signed the Hague Convention in 1954, it did not ratify the Convention until March 13, 2009.¹⁶⁵ The 1954 Hague Convention came about as a result of the devastated monuments and plundered art works that occurred during World War II.¹⁶⁶ The Senate refused to ratify the 1954 Hague Convention because the U.S. military objected (ostensibly because it might preclude bombing the Kremlin, which was an historic building).¹⁶⁷ The timing of the 1954 Hague Convention was also problematic, since 1954 was the beginning of the Cold War.

But after the Soviet Union collapsed, the Pentagon withdrew its objections.¹⁶⁸ President Clinton transmitted the 1954 Hague Convention to the Senate in 1999, and in 2007 the State Department placed it on its treaty priority list.¹⁶⁹ In July 2008, the Senate Foreign Relations Committee voted unanimously to recommend ratification.¹⁷⁰ The full Senate ratified the treaty in September 2008.¹⁷¹

ii. *The 1970 UNESCO Convention*

“After World War I, the newly formed League of Nations held discussions on the imposition of controls over the illicit exploitation of

162. Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations for the Execution of the said Convention art. 1, May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 240.

163. *Id.* art. 3.

164. CUNO, *supra* note 1, at 25.

165. See Douglas Cox, *Archives and Records in Armed Conflict: International Law and the Current Debate over Iraqi Records and Archives*, 59 CATH. U. L. REV. 1001, 1002 (2010).

166. C. Brian Rose, *War and Culture—Senate Acts to Safeguard Past During Conflicts*, *ARCHAEOLOGY* (Jan./Feb. 2009) at 6.

167. *Id.*

168. *Id.*

169. *Id.*

170. Rose, *supra* note 166.

171. *Id.*

cultural property—in particular antiquities—but the resulting Treaty of Sevres was never ratified.”¹⁷²

Throughout the 1930s, the League’s Office International des Musées coordinated efforts on this topic¹⁷³:

Although a draft “Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest, Which Have Been Lost, Stolen or Unlawfully Alienated or Exported” was prepared, there were strong objections from art market countries (in particular the Netherlands, the United Kingdom, and the United States), and in 1939, with the outbreak of war, the initiative came to an end.¹⁷⁴

After World War II, UNESCO took an interest in drafting a convention to protect cultural property in the times of war, which led to the 1954 Hague Convention.¹⁷⁵ Two years later, recommendations were made “on international principles applicable to archaeological excavations.”¹⁷⁶ These recommendations specifically proposed that the art trade should do nothing to “encourage smuggling of archaeological material.”¹⁷⁷

In the 1960s, as a result of initiatives by Peru and Mexico, UNESCO adopted stronger recommendations along those lines.¹⁷⁸ This movement led to a committee of experts being established in 1964, composed of representatives from thirty countries, whose task it was to prepare a draft convention.¹⁷⁹ This body eventually produced UNESCO’s “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,” (“1970 UNESCO Convention”) which the General Conference of UNESCO adopted on November 14, 1970 at its sixteenth session.¹⁸⁰ The adoption of the 1970 UNESCO Convention generally has been taken as a watershed event.¹⁸¹ Although many archaeologists are against the international traffic in all antiquities, most now take the

172. WATSON & TODESCHINI, *supra* note 99, at 28.

173. *Id.* at 28–29.

174. *Id.*

175. *Id.*

176. WATSON & TODESCHINI, *supra* note 99, at 29.

177. *Id.*

178. *Id.*

179. *Id.*

180. WATSON & TODESCHINI, *supra* note 99, at 29.

181. *Id.*

more pragmatic approach of refusing to deal in or with antiquities having no provenance that first came to light after 1970.¹⁸²

In an effort to curb the illicit trade in cultural property, the 1970 UNESCO Convention created “an international legal scheme that grants recovery rights for both smuggled and stolen property.”¹⁸³ Although the United States ratified the 1970 UNESCO Convention in 1972, it was not self-executing, and actual implementation of the treaty was delayed for more than a decade.¹⁸⁴ In 1983, Congress enacted the implementing legislation necessary to put the treaty into effect.¹⁸⁵ This legislation—called the Convention on Cultural Property Implementation Act (CCPIA)—is narrower than the underlying Convention and applies only to instances where cultural material is in “jeopardy of pillage.”¹⁸⁶ Even then, it applies only if there is a finding that “less drastic remedies are not available” or if the pillage is of “crisis proportions.”¹⁸⁷ Where the designated conditions are found to exist, the United States may then restrict imports by either entering into bilateral or multilateral agreements with other nations, or by imposing emergency import restrictions.¹⁸⁸

It is the President or his designee who must decide whether to enter into such agreements or impose import restrictions.¹⁸⁹ In determining whether to grant the import restrictions that may be requested by another nation, the President may consider the view of the Cultural Property Advisory Committee.¹⁹⁰ This Committee (established under the terms of the CCPIA) consists of eleven members who represent museums; the fields of archaeology, anthropology, ethnology, or related areas; specialists in the international sale of cultural property; and the interests of the general public.¹⁹¹

The 1970 UNESCO Convention has several inherent shortcomings.¹⁹² At the insistence of the United States, it was not made retroactive.¹⁹³ “Anything removed from its original place or

182. *Id.*

183. ART LAW HANDBOOK, *supra* note 2, § 6.03[B][1], at 397–98.

184. *Id.* at 398.

185. *Id.*

186. *Id.*

187. ART LAW HANDBOOK, *supra* note 2, § 6.03[B][1], at 398.

188. *Id.*

189. *Id.* § 6.03[B][1][a], at 398.

190. *Id.*

191. ART LAW HANDBOOK, *supra* note 2, § 6.03[B][1][a], at 398–99.

192. ATWOOD, *supra* note 31, at 153.

193. *Id.*

demonstrably on the market before 1970 was not affected.”¹⁹⁴ Further, the 1970 UNESCO Convention has a short statute of limitations. “Any material or artifact that had been displayed publicly by a museum and announced in the institution’s literature that was open and available to the public would be exempted from the law after three years.”¹⁹⁵

iii. The 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects

The entity known as the International Institute for the Unification of Private Law (generally referred to as “UNIDROIT”) is an organization that was originally established as part of the League of Nations.¹⁹⁶ Its purpose is to “promote the international acceptance and adoption of uniform private law treaties.”¹⁹⁷

In June 1995, a diplomatic conference for the adoption of the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (the “UNIDROIT Convention”) was held in Rome, Italy.¹⁹⁸ Representatives of seventy nations participated in the conference, including the United States.¹⁹⁹ Like the 1970 UNESCO Convention, it “provides the means for a nation to recover stolen or illegally exported cultural property, including antiquities.”²⁰⁰ But unlike the 1970 UNESCO Convention, it “specifically equates illegal excavation with theft, thereby giving source countries a basis for recovering illegally excavated objects under existing stolen property law.”²⁰¹ To date, twenty-two nations have signed the UNIDROIT Convention, eleven have ratified it, and thirteen have acceded to it.²⁰² The UNIDROIT Convention went into effect in July 1998 for the first five countries to ratify it.²⁰³

194. *Id.*

195. *Id.*

196. ART LAW HANDBOOK, *supra* note 2, § 6.04[A][1], at 415.

197. *Id.*

198. Patty Gerstenblith, *Unidroit Ratified*, ARCHAEOLGY (July/Aug. 1998), <http://www.archaeology.org/9807/newsbriefs/unidroit.html>.

199. CUNO, *supra* note 1, at 49.

200. Gerstenblith, *supra* note 198.

201. *Id.*

202. *1995 Unidroit Convention*, CINO.A.ORG, <http://www.cinoa.org/index.pl?id=2298> (last visited Aug. 3, 2011). The United States is not among the signatories. Gerstenblith, *supra* note 198.

203. Gerstenblith, *supra* note 198.

The UNIDROIT Convention requires purchasers of stolen items to return them, even if they acted in good faith.²⁰⁴ But it also requires the original owners to compensate good faith purchasers.²⁰⁵ This requirement was a concession to certain civil-law countries (including Switzerland and France) that permit good-faith purchasers to acquire title to stolen objects.²⁰⁶ The commentators have noted that this might actually make it more difficult to recover stolen material in common-law jurisdictions such as the United States and England, where even good-faith purchasers do not acquire title to stolen property.²⁰⁷

Under the UNIDROIT Convention, to qualify for compensation as good-faith purchasers, possessors must show that they “exercised due diligence when acquiring” the object in question.²⁰⁸ Furthermore, the UNIDROIT Convention’s limitations period requires that “claims for the recovery of cultural objects must be brought within three years of when the claimant discovered the location of the object and the identity of its possessor, or within 50 years of the theft or illegal exportation, whichever comes first.”²⁰⁹ An exception limits claims to the three-year period if the objects belong to a public collection or form part of “an integral part of an identified monument or archaeological site.”²¹⁰

The UNIDROIT Convention has a number of fundamental problems, which experts believe will make it unlikely that a sufficient number of art-market nations will sign or ratify it to make it effective.²¹¹ Chapter III of the UNIDROIT Convention, which is titled “Return of Illegally Exported Cultural Objects,” states:

[T]he requesting country shall be entitled to have an illegally exported cultural object ordered returned to it by the courts of the addressed country, provided that the loss of the object “significantly impairs” at least one of the following interests:

- the physical preservation of the object or its context
 - the integrity of a complex object
 - the preservation of information . . .
 - the traditional or ritual use of the object by a tribal or indigenous community
- or*

204. *Id.*

205. *Id.*

206. *Id.*

207. Gerstenblith, *supra* note 198.

208. *Id.*

209. *Id.*

210. *Id.*

211. ART LAW HANDBOOK, *supra* note 2, § 6.04[A][1], at 416.

- it is established that the object is of "significant cultural importance" for the requesting state.²¹²

If the return of the object is ordered, its current possessor is entitled to "fair and reasonable compensation" so long as that possessor "neither knew nor ought reasonably to have known at the time of the acquisition that the object had been illegally exported."²¹³

Arguably, Chapter III of the UNIDROIT Convention essentially directs the courts of the addressed jurisdiction to enforce the export control laws of the requesting jurisdiction.²¹⁴ This enforcement contravenes the established public policy of a number of important art-market countries, including the United States.²¹⁵

The UNIDROIT Convention was originally considered to be an alternative to the 1970 UNESCO Convention, which had not been signed by a number of major art-importing countries.²¹⁶ Although the United States was actively engaged in writing the UNIDROIT Convention, however, it is not a signatory.²¹⁷ This is because, while the Convention was being drafted, American museums and art dealers submitted a brief to the U.S. delegation asking that it not join the UNIDROIT Convention and that it withdraw the provision equating illegal excavation with theft.²¹⁸ Although they were unsuccessful on the latter point, the museums and dealers did succeed in preventing the United States from becoming a signatory to the UNIDROIT Convention.²¹⁹

iv. The Future of International Regulation of Looted Antiquities

To be blunt, efforts to limit illicit sale of looted antiquities through international treaties have been a dismal failure. Only two major art-market countries are parties to the 1970 UNESCO Convention, and no major art-market country has ratified the UNIDROIT Convention.²²⁰

212. *Id.* at 416–17.

213. *Id.* at 417 (quoting International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects art. 6(1), June 24, 1995, 34 I.L.M. 1330).

214. *Id.*

215. ART LAW HANDBOOK, *supra* note 2, § 6.04[A][1], at 417.

216. Gerstenblith, *supra* note 198.

217. *Id.*

218. *Id.*

219. *Id.*

220. ART LAW HANDBOOK, *supra* note 2, § 6.04[A][3], at 419.

Leading commentators have urged the cessation of attempts to reduce this illicit trade by way of treaties or attempts to enforce export laws of foreign nations in favor of other solutions.²²¹ Insofar as these recommendations pertain to looted antiquities (rather than traditional art theft), the recommendations include 1) the establishment of a “publicly available registry requiring archaeologists excavating in source countries to provide photographs and descriptions of objects found on the digs” within a designated time; 2) “a research method to support the prompt completion of archaeological digs and to make publication of the finds without delay”; and 3) investigating “the possibility of privatizing archaeological sites and public monuments to ease the funding burden” on governments in artifact-rich countries.²²²

B. *U.S. Law*

The United States has long been reluctant to enact legislation regulating private domestic or international movement or ownership of cultural property.²²³ To the extent that a general “policy” can be said to exist, the United States’ “policy” is that it will not enforce the export control laws of foreign nations.²²⁴ This policy of noninterference has encouraged importation and collection of art into the United States. It is for that reason (among others) that the United States is now home to some of the world’s leading museums and art collections.²²⁵

Apart from import restrictions on endangered species or political embargos, there are few federal laws specifically regulating the import of cultural property into the United States.²²⁶ Those laws that do exist largely result from international treaties ratified by the Senate, which are described in the preceding section. There are, however, a few relevant statutes, plus case law from various jurisdictions within the United States that are relevant to ownership of antiquities imported into the United States from abroad.

1. *Stolen Art*

Since World War II, the United States has been the biggest market

221. *Id.*

222. *Id.* at 420.

223. *Id.* § 6.03[A], at 394.

224. ART LAW HANDBOOK, *supra* note 2, § 6.03[A], at 394.

225. *Id.* at 395.

226. *Id.* at 396.

for stolen art, the majority of which is sold on the open market.²²⁷ Although the number of art thefts greatly exceeds the number actually reported, more than 250,000 works of art and antiquities have been reported stolen to the leading commercially available stolen-art databases.²²⁸

The absence of investigation and inquiry in the commercial art world means that reputable dealers and auction houses often sell stolen art, and unobservant collectors regularly acquire looted materials. A former Secretary General of ICOM recently declared that "the art market is the only sector of economic life in which one runs a 90 percent risk of receiving stolen property."²²⁹ A former executive director of IFAR has echoed these concerns, saying that "85% of all stolen art is hanging on the walls or sitting on the pedestals of unsuspecting collectors."²³⁰ And an asset protection specialist/attorney has counseled that "[a]rt theft is so pervasive today that chances are that any client who owns an object of art may be holding stolen property."²³¹

"The FBI and Lloyds of London estimate that as much as six billion dollars of art has been stolen annually in recent years"²³² Literally hundreds of thousands of art objects are stolen each year, and "[a]rt theft is raging on every continent, especially in Central and Eastern Europe."²³³ International art looting "has been fanned by political upheaval in Eastern Europe, bringing in its wake an epidemic of [art] theft as well as destruction.' Plunder from countries that have suffered recent military conflicts, such as Bosnia and Kuwait, add to the illegal commerce, as 'virtually all the stolen objects went abroad.'"²³⁴

Court decisions in the United States have required the exercise of due diligence in determining the legitimacy of acquisitions. For example, in the case of *Republic of Turkey v. The Metropolitan Museum*, the government of Turkey sought to reacquire possession of looted antiquities reputed to have come from the age of the legendary King

227. Phelan, *supra* note 13, at 660–61.

228. *Id.*

229. *Id.* at 663.

230. *Id.*

231. Phelan, *supra* note 13, at 663 (alteration in original).

232. *Id.* at 659.

233. *Id.* at 660.

234. *Id.* (footnote omitted) (quoting Norman Palmer, *Recovering Stolen Art*, 47 CURRENT LEGAL PROBS., no. 2, 1994 at 215, 218).

Croesus of Lydia.²³⁵ Between 1966 and 1970, many of these objects were acquired by the New York Metropolitan Museum of Art²³⁶:

[A]lthough rumors of this acquisition circulated, the purchase was not announced by the Museum. It was not until some of the pieces were put on permanent display in 1984 . . . that the Republic of Turkey was able to conclude that these pieces were indeed those looted from the Ushak tombs.²³⁷

Turkey filed suit in the New York state courts, which followed earlier rulings that required “that the purported owner of a work must have exercised due diligence at the time of its acquisition.”²³⁸ A motion to dismiss the claim based on the statute of limitations ground (which was held to have been tolled until the artifacts were put on display) was denied.²³⁹

New York is considered to be the center of the art market in the United States.²⁴⁰ New York courts “have imposed an affirmative obligation upon buyers and collectors of art to investigate the background of potentially stolen materials in their possession.”²⁴¹

In most states, the true owner’s cause of action against the possessor is for conversion.²⁴² In these states, the statute of limitations for bringing an action for conversion begins to run when a good faith purchaser takes possession of stolen property.²⁴³ But in a few states—including New York—the cause of action does not arise until the true owner demands the return of the property and the current possessor refuses to return it.²⁴⁴

The New York rule in some respects protects both the true owner and the good-faith purchaser. The New York rule (that conversion does not occur unless and until the bona fide purchaser refuses to return the property) shields the innocent purchaser from tort liability, while simultaneously protecting the true owner’s claim from being extinguished by the mere passage of time.²⁴⁵

235. COLIN RENFREW, *LOOT, LEGITIMACY AND OWNERSHIP* 43 (2000).

236. *Id.*

237. *Id.*

238. *Id.*

239. RENFREW, *supra* note 235, at 43.

240. Phelan, *supra* note 13, at 639.

241. *Id.* (citing *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991)).

242. *Id.*

243. *Id.* at 640 (citing PROSSER AND KEETON ON THE LAW OF TORTS § 15, at 94 (W. Page Keeton ed., 5th ed. 1984)).

244. Phelan, *supra* note 13, at 641.

245. *Id.*

In New York, the true owner's cause of action against the bona fide purchaser is for replevin, rather than conversion.²⁴⁶ Further, the New York decision in *Guggenheim* held that the statute of limitations defense was unavailable, even though the innocent bona fide purchaser had publicly displayed the work, which had been stolen more than twenty years earlier.²⁴⁷ This result was unchanged, even though the museum had done absolutely nothing since the theft occurred to either search for the painting or to notify the art world of its loss.²⁴⁸ It did not notify the police, the FBI, Interpol, or any other museums, galleries, or artistic organizations of the theft (ostensibly for fear that such notice would drive the thief further underground).²⁴⁹ The *Guggenheim* court agreed that it was possible that a bona fide purchaser might defeat the original owner's claim with an affirmative equitable defense of laches.²⁵⁰ But even on the extreme facts of the *Guggenheim* case, the court was unwilling to say as a matter of law that the defense of laches would apply.²⁵¹

The *Guggenheim* decision makes four important points. First, the court held that it is "plain that the relative possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long."²⁵² Thus, "[a]ny failure of the owner to exercise due diligence in locating the chattel after discovering its disappearance is not a factor in determining the accrual of the statute of limitations."²⁵³ Second, the *Guggenheim* decision makes the conduct of both parties relevant to the final ownership decision. It therefore scrutinizes the actions taken by the bona fide purchaser at the time of acquisition to avoid acquiring stolen property.²⁵⁴ Third, by making laches (rather than a strict statute of limitations) the applicable defense, the court shifted the burden of proof to the purchaser to show that she made due diligence efforts prior to the purchase.²⁵⁵ Fourth, the *Guggenheim* decision imposes the duty of

246. *Guggenheim*, 569 N.E.2d at 429.

247. *Id.* at 430.

248. *Id.* at 428.

249. *Id.*

250. *Guggenheim*, 569 N.E.2d at 431.

251. *Id.*

252. *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 622 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991).

253. Vincent C. Alexander, *Supplemental Practice Commentaries*, N.Y. C.P.L.R. 206, C206:1, at 93 (McKinney Supp. 1996).

254. *Guggenheim*, 550 N.Y.S.2d at 623 ("[D]efendant's vigilance is as much in issue as plaintiff's diligence . . .").

255. Hans Kennon, *Take A Picture, It May Last Longer if Guggenheim Becomes the Law*

showing prejudice caused by any delay by the art theft victim in searching for its lost property or prosecuting its claims.²⁵⁶

Outside of New York, those jurisdictions applying the “discovery rule” create incentives for taking precautions against acquiring stolen art. In one case, the court held that a family from whom a painting had been stolen in 1960 was sufficiently “diligent” to preserve their judicial remedy to reclaim the painting, even though they had done nothing to notify the art market of their loss for thirty years.²⁵⁷ The only steps they had taken were to notify the local police and the FBI of the theft.²⁵⁸ Although the court concluded that the family “could certainly have been more aggressive in their search,”²⁵⁹ it nevertheless held that “the balance of equities weighs in [the family’s] favor.”²⁶⁰ The buyer—a professional art restorer—failed to investigate the painting before purchasing it at an auction.²⁶¹ The court concluded that by failing to conduct an investigation, the buyer “took a gamble” and assumed “the risk that an original owner could appear at any time.”²⁶²

For that reason, throughout the United States, regardless of the various rules of law applied, bona fide purchasers are at risk of losing possession of their art work (as well as the purchase price they paid for it) years or even decades after they acquire it. This is the sort of risk that a policy of insurance seems uniquely well positioned to cover.

2. *Looted Antiquities*

Protection of antiquities in the United States began with the Antiquities Act of 1906.²⁶³ The limited protection provided by this Act resulted from the desire to protect prehistoric Indian ruins and artifacts on federal lands in the West.²⁶⁴ “It authorized permits for legitimate archaeological investigations and penalties for persons taking or

of the Land: The Repatriation of Fine Art, 8 ST. THOMAS L. REV. 373, 405–06 (1996).

256. Alexander, *supra* note 253, at 94.

257. *Erisoty v. Rizik*, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *36 (E.D. Pa. Feb. 23, 1995).

258. *Id.* at *17.

259. *Id.* at *40–41.

260. *Id.* at *38.

261. *Erisoty*, 1995 U.S. Dist. LEXIS 2096, at *38–39.

262. *Id.* at *39.

263. 16 U.S.C.A. §§ 431–433 (West 2010).

264. *Antiquities Act of 1906*, NAT’L PARK SERVICE, <http://www.nps.gov/history/history/hisnps/nps/history/antiqu.htm> (last modified Nov. 29, 2004).

destroying antiquities without permission.”²⁶⁵ The Antiquities Act did nothing to protect against the illegal importation of illicitly excavated artifacts coming from other countries, however. Instead, it has been used to proclaim natural geological features—including more than 800,000 acres of the Grand Canyon—as national monuments.²⁶⁶

The next major U.S. enactment for the purpose of protecting archaeological artifacts was the Archaeological Resources Protection Act of 1979 (ARPA).²⁶⁷ This Act, too, was largely limited to protecting artifacts on U.S. soil. The stated purpose of ARPA was to “secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals.”²⁶⁸ ARPA also prohibited interstate or international sale, purchase, or transport of any archaeological resource excavated or removed in violation of a state or local law, ordinance, or regulation.²⁶⁹

Protection of artifacts excavated outside the United States was first enacted in January 1983, when President Ronald Reagan signed the Cultural Property Implementation Act (CPIA).²⁷⁰ This enactment actually implemented (in part) the ratification in 1972 of the 1970 UNESCO Convention.²⁷¹ The CPIA is narrower than the Convention and applies to specifically identified cultural material that is in “jeopardy from the pillage,”²⁷² when either “less drastic remedies are not available”²⁷³ or the pillage is of “crisis proportions.”²⁷⁴ The statute permits the United States to impose import restrictions in such cases either by entering into agreements with foreign governments or by imposing emergency import restrictions.²⁷⁵ The CPIA also makes it

265. *Id.*

266. *Id.*

267. 16 U.S.C.A. §§ 470aa–470mm (West 2010).

268. 16 U.S.C.A. § 470aa(b) (West 2010).

269. 16 U.S.C.A. § 470ee(a)–(c) (West 2010).

270. 19 U.S.C.A. §§ 2601–2613 (West 2010).

271. Barbara T. Hoffman, *International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective*, in ART AND CULTURAL HERITAGE, *supra* note 39, at 159, 160.

272. 19 U.S.C.A. § 2602(a)(1)(A) (West 2010).

273. 19 U.S.C.A. § 2602 (a)(1)(C)(ii).

274. 19 U.S.C.A. § 2603(a)(2) (West 2010).

275. 19 U.S.C.A. § 2603(a).

illegal to import property stolen from a museum or from a religious or secular public monument.²⁷⁶

But before the import restrictions are imposed, a request for them must be made by another signatory to the 1970 UNESCO Convention.²⁷⁷ Once special import restrictions are in place under the CPIA, in order to lawfully import property from one of the restricted countries, the importer must either produce a valid export certificate for the property from its country of origin, or must establish that the property existed outside of the country of origin as of the effective date of the U.S. import restrictions.²⁷⁸

The CPIA draws a distinction between looted (or pillaged) cultural property and stolen cultural property. The first portion of the Act (Sections 303 through 307) deals with the problem of the pillage and illicit export of un-inventoried archaeological and ethnological material and addresses the illicit import of un-inventoried archaeological material. The second part (Section 308) provides protection for artifacts stolen after they have been documented or inventoried within a collection.²⁷⁹

By late 2000, ten countries had requested import restrictions under the CPIA.²⁸⁰ Eight of those had been granted and a ninth (Italy) was still under consideration.²⁸¹ One of the most stringent import restrictions permitted under the CPIA was promulgated by the Bush administration in 1990.²⁸² Under the Treasury Department regulatory notice titled "Import Restrictions Imposed on Significant Archaeological Artifacts from Peru," the U.S. government authorized U.S. custom agents to seize any archaeological artifacts that might originate from a region in Peru that is of a special archaeological significance.²⁸³ Interestingly, this regulation did not address the question of whether the government of Peru "owned" its undiscovered archaeological resources. This uncertainty has, for years, been the subject of debate in the international art community.

276. 19 U.S.C.A. § 2607 (West 2010).

277. 19 U.S.C.A. § 2602(a)(1).

278. 19 U.S.C.A. § 2606(a)–(b) (West 2010).

279. *Background: An Introduction to International Cultural Property Protection in the U.S.*, UNITED STATES INFORMATION AGENCY CULTURAL PROPERTY ADVISORY COMMITTEE, <http://dosfan.lib.uic.edu/usia/E-USIA/education/culprop/backgrnd2.html>.

280. ATWOOD, *supra* note 31, at 159.

281. *Id.*

282. *Id.* at 156.

283. Import Restrictions Imposed on Significant Archaeological Artifacts from Peru, 55 Fed. Reg. 19029-01 (May 9, 1990).

As noted in Part III.A.2 above, not everyone agrees that countries should be able to claim ownership and exclusive possession of all objects originally unearthed in their territory, regardless of their connection to their modern day culture.²⁸⁴ Recognizing this, in 2005 UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.²⁸⁵ This Convention acknowledges that cultural diversity forms a common heritage of humanity, which should be cherished and preserved for the benefit of everyone, and that this heritage is nurtured by constant exchanges and interactions between cultures.²⁸⁶

The U.S. protection against importation of looted antiquities is far from complete. And to a certain extent, that importation is arguably even encouraged, in that the U.S. government still permits collectors to donate pillaged artifacts to museums in exchange for tax write-offs.²⁸⁷

IV. THE RECENT CREATION OF INSURANCE PRODUCTS

Collectors and museums spend immense sums of money on their collections. Just a few years ago, the market for fine art was estimated to be more than forty billion dollars.²⁸⁸ But just as art prices have risen, so too have costly ownership disputes and provenance battles. At least four major types of title challenges face museums and individual collectors.

First, as noted above, the market in stolen art exceeds an estimated six billion dollars per year.²⁸⁹ Like Steven Spielberg, most buyers have no idea they are purchasing a stolen piece of art, since the theft may have occurred years—or even decades—before the claim arose. But because stolen property remains stolen forever—and clear title can never be thereafter conveyed, even to bona fide purchasers—the risk of “bad title” continues ad infinitum.²⁹⁰

Second, as described in *Frigon v. Pacific Indemnity Co.*, there are frequently consignment problems.²⁹¹ Recent court decisions have

284. CUNO, *supra* note 1, at 48.

285. *Id.*

286. *Id.*

287. ATWOOD, *supra* note 31, at 241.

288. Brian Madden, *Protection in Fine Art Fights*, FORBES.COM (Mar. 28, 2008, 3:30 PM), http://www.forbes.com/2008/03/28/picasso-spielberg-art-pf-ii-in_bm_0328soapbox_inl.html.

289. Phelan, *supra* note 13, at 659.

290. Madden, *supra* note 288.

291. *See Frigon v. Pac. Indem. Co.*, No. 05 C 6214, 2007 WL 756384, at *3–4 (N.D. Ill.

determined that sales that do not conform to the terms of a consignment sales agreement can convert the art into stolen property.²⁹² A good-faith purchaser of such a piece is not protected even if the provenance is otherwise clear.²⁹³

Third, prior purchasers may have granted a lien against a piece of art to a lender. Because there is no single place where these liens must be filed, even the most careful of provenance searches can fail to turn up significant title problems created by liens against the art or artifact.²⁹⁴

Finally, ownership disputes may arise because of probate irregularities. Where works of art have been in a single family's hands for generations, they often lack a clear chain of title because they were not probated through each owner's estate.²⁹⁵ The IRS has recently started to focus more aggressively on these estate issues.²⁹⁶

Given these risks, museums and individual collectors have long been concerned about the risk that they may not have good title to a valuable piece or collection. They need a way to protect their investment in case they must someday surrender the piece to its true owner.

Somewhat surprisingly, insurance that would cover defects in title to artwork was not available before the 1980s.²⁹⁷ But since 1983, insurance policies have been available to insure museums (but not individual collectors) against forfeiture or the loss of pieces that must be returned to their true owner.²⁹⁸ Like other forms of title insurance, these art title insurance policies provided two distinct benefits; defense and indemnity. If an ownership challenge arises, the insurer pays for the legal defense of the insured's title.²⁹⁹ If that defense is unsuccessful, the insurer pays out the value of the art work (up to policy limits and subject to any deductibles) in indemnity payments.³⁰⁰

Both the defense cost and indemnity aspects of these policies have become particularly important. The defense cost coverage is important

Mar. 14, 2007).

292. *Id.* at *4.

293. Madden, *supra* note 288.

294. *Id.*

295. *Id.*

296. *Id.*

297. Ashlea Ebeling, *Insurance: Hey, That's My Picture on Your Wall*, FORBES.COM (Dec. 14, 1998), <http://www.forbes.com/forbes/1998/1214/6213258a.html>.

298. Colloquy, *Who Is Entitled to Own the Past?*, 19 CARDOZO ARTS & ENT. L.J. 243, 272 (2001).

299. Ebeling, *supra* note 297

300. *Id.*

because disputes over ownership are common, protracted, and costly.³⁰¹ The indemnity coverage is important because of “the long-standing industry practice of maintaining the confidentiality of buyers and sellers” that has resulted in “a veil of secrecy” that surrounds many art transactions. As a result, the provenance of many pieces of art is uncertain.³⁰² Coupled with this is the fact that hundreds of thousands of works stolen in the Nazi era—estimated to now be worth more than one billion dollars—are now commonly found on the open art market.³⁰³ Collectors are justifiably reluctant to invest in artwork that may one day be taken from them by the “true” owner without compensation.

Insurance that covered these risks did not become available to individual collectors until the 1990s, when “war loot” insurance became available from one of the syndicates that operate in the Lloyd’s of London insurance marketplace.³⁰⁴ At first, the policies that were available from this syndicate—known as Hiscox Syndicate 33—were available only to dealers and were limited to one million dollars in coverage.³⁰⁵ But shortly thereafter, these new Lloyd’s policies were made available to owners of collections worth ten million dollars or more, and provided up to fifty million dollars of coverage.³⁰⁶ The premium for these policies depended on the ownership history, but ranged as high as two percent for a collection where there were gaps in ownership history.³⁰⁷

Even with these new insurance products, there were still major gaps in the art title insurance market. In 2001, Ashton Hawkins, the Executive Vice President of the Metropolitan Museum of Art, was asked whether insurance policies had been developed that would insure a museum against forfeiture or loss if they lacked good title to the artifact.³⁰⁸ In response, Hawkins complained of the absence of a product suitable to that purpose.³⁰⁹

In 2006, a new insurance product known as “art title insurance” was

301. Kate Taylor, *Insurance for Art Collectors Covers Ownership Disputes*, N.Y. SUN (July 10, 2008), <http://www.nysun.com/arts/insurance-for-art-collectors-covers-ownership/81553/>.

302. Mullin, *supra* note 9.

303. *Id.*

304. Ebeling, *supra* note 297.

305. *Id.*

306. *Id.*

307. *Id.*

308. Colloquy, *supra* note 298, at 272.

309. *Id.*

created.³¹⁰ At that time, only one company—founded by an attorney and a former AON brokerage executive—offered the product.³¹¹ That company—ARIS Title (owned by ARIS Holdings Ltd.)—claimed to be offering the “world’s first transfer of legal ownership risk for art” through its Art Title Protection Insurance policy.”³¹²

In announcing this new development, ARIS described art title insurance as having gone “from a long-standing conceptual notion to an actual product.”³¹³ The ARIS policy was designed for both individual and institutional investors, and was structured to address the chain of title and lien risks inherent in art as a form of property.³¹⁴ An art succession and philanthropy consultant for a leading London-based auctioneer and appraiser of fine art and antiques described procuring this form of insurance coverage as “provenance mitigation” that reduced the risk for any work of art that the purchaser was acquiring.³¹⁵

In ownership disputes, the ARIS policy covers both defense costs and indemnity (the cost of the artwork) if the case is lost and the insured must surrender the piece to its true owner.³¹⁶ The ARIS policy does not, however, cover the owner if the work is simply found to be inauthentic.³¹⁷ Since it began selling art title insurance in June 2006, ARIS has written more than 300 policies covering works of fine art valued between \$20,000 and \$4,000,000.³¹⁸ ARIS does not, however, offer title insurance on antiquities.

This competition from ARIS forced Hiscox to broaden the coverage it offered. By the end of 2006, Hiscox announced that it would sell title insurance for both artwork and antiquities.³¹⁹

After these insurance products came to market, *Forbes* magazine was quick to recommend that owners of expensive artwork take out title insurance. After noting that the “more a piece of art is worth, the more

310. Donn Zaretsky, *More on Art Title Insurance*, ART L. BLOG (May 28, 2008), <http://theartlawblog.blogspot.com/2008/05/more-on-art-title-insurance.html>.

311. Steve Yahn, *Securing the Chain*, RISK & INS. (Dec. 1, 2006), <http://www.riskandinsurance.com/story.jsp?storyId=13405709>. Interestingly, Yahn points out that ARIS is reinsured by the Hiscox syndicate at Lloyd’s, which had been the original seller of large title insurance policies restricted to art dealers. *Id.*

312. *Id.*

313. *Id.*

314. Yahn, *supra* note 311.

315. *Id.*

316. *Id.*

317. *Id.*

318. Donn Zaretsky, *Title Insurance for Art*, ART L. BLOG (Dec. 7, 2006), <http://theartlawblog.blogspot.com/2006/12/title-insurance-for-art>.

319. *Id.*

likely that someone will come up with a creative theory about why you don't really own it," Forbes came up with a simple recommendation and solution—"[t]ake out an insurance policy."³²⁰

Although there are clear benefits to title insurance, consumers frequently complain of the cost. Premiums for title insurance for works of art are substantially more expensive than those for title insurance to real estate (the cost of which is typically less than one percent of the sale price).³²¹ Premiums for art title insurance range anywhere from one percent to seven percent of the item's purchase price.³²² Insurers justify the high premiums by pointing to the unregulated, non-transparent nature of the art market, where pieces often lack a clear, clean chain of title or indisputable provenance.³²³

One benefit of an ARIS policy is that a one-time premium of 1.75% to 6.75% of the value creates a life-of-ownership policy that can be passed on to heirs.³²⁴ The prices charged by Hiscox are lower when viewed as a percentage of value, but are in reality substantially higher because the premium must be paid annually.³²⁵ Although the prices are set on a case-by-case basis, Hiscox premiums typically range of 0.5% to 2.5% of the cost of the artwork, depending on the risk.³²⁶ Thus, as Forbes noted, a ten-million-dollar policy on a Monet with a dubious provenance could wind up costing \$250,000 per year.³²⁷

As this brief historical sketch demonstrates, title insurance for art and artifacts has become increasingly important. But just as its importance—and availability—has increased, so too have the problems associated with this form of insurance. In 2003, the Insurance Department for the State of New York was asked whether title insurance for fine art fell within the ambit of title insurance under New York law.³²⁸ The Office of General Counsel of the Insurance Department issued an opinion noting that previously issued opinions had held that a policy that insures personal property was "substantially similar" to regular title insurance, and it could therefore be written by—and only

320. Carrie Coolidge, *Hey That's Mine*, FORBES.COM (Dec. 25, 2006), <http://www.forbes.com/forbes/2006/1225/090.html>.

321. Mullin, *supra* note 9.

322. *Id.*

323. *Id.*

324. Zaretsky, *supra* note 310.

325. Coolidge, *supra* note 320.

326. *Id.*

327. *Id.*

328. STATE OF N.Y. INS. DEP'T, SALE OF FINE ART TITLE INSURANCE IN NEW YORK (2003), available at <http://www.ins.state.ny.us/ogco2003/rg031008.htm>.

by—a licensed title insurance company.³²⁹ Because a fine arts policy would offer coverages that “are analogous to title insurance policy coverages that cover[] real property and/or chattels,” the Office of General Counsel concluded that such policies could be written in New York, so long as the insurer filed its forms and rates in accordance with state law.³³⁰

Because it is now clear that art title insurance is indeed true “insurance,” it must meet the same fundamental requirements of any other form of insurance. As discussed in the following Part, it is nearly universally acknowledged that an insurance policy is valid only if the insured had an “insurable interest” in the object that is covered by the policy. The ultimate question thus presented is whether or when the law can or should recognize a person as having an “insurable interest” in stolen art or looted antiquities.

V. THE INSURABLE INTEREST REQUIREMENT

A. *What Constitutes an Insurable Interest?*

A basic requirement of insurance law is that the insured must have an insurable interest in the property being insured.³³¹ This position requires the insured to have clear proprietary or contractual rights in the property, and denies the existence of an insurable interest for anyone who does not have such rights, but merely a hope or expectation of such rights.³³² “The concept of insurable interest is basic to the entire body of insurance law.”³³³ To put it differently, “[a]n insurable interest is an economic interest under which its bearer enjoys the benefits of its existence and suffers by its loss.”³³⁴ A contract of insurance is void if the insured had no insurable interest.³³⁵ This is because property

329. *Id.*

330. *Id.*

331. John Birds, *Insurable Interests in Works of Art 1* (May 15, 1996) (unpublished manuscript) (on file with author).

332. *Id.*

333. 3 CALIFORNIA INSURANCE LAW & PRACTICE § 35.09[1] (2010).

334. *Id.* (noting that the question of whether an insured has an insurable interest frequently arises in property insurance coverage disputes). Although the precise definition of an insurable interest may vary from state to state, it is generally recognized that there is an insurable interest “if the insured has a direct pecuniary interest in the preservation of the property and will suffer a pecuniary loss should it be damaged or destroyed.” *Id.*

335. *Napavale, Inc. v. United Nat’l Indem. Co.*, 336 P.2d 984, 988 (Cal. Dist. Ct. App. 1959).

insurance policies are contracts of indemnity, and an insured suffers no loss unless the insured has an interest in the damaged property.³³⁶

This insurable interest must be both “existing” and based on “actual right.”³³⁷ Thus, in many states, there can be no insurable interest in stolen property, since a possessor of stolen property has no right to it.³³⁸ The common-law rule throughout the United States is that one cannot gain title to personal property that was stolen, even if the purchase was in good faith.³³⁹ As one commentator noted, “a thief who wrongfully takes goods is not a ‘purchaser’ . . . but a swindler who fraudulently induces the victim to voluntarily deliver them is a ‘purchaser.’”³⁴⁰ Since a person with void title can only convey void title, the successor of a thief—and all successors of the successor—cannot acquire good title to the goods.³⁴¹

Section 2-403 of the UCC provides that “a person with voidable title has power to transfer a good title to a good faith purchaser for value.”³⁴² But this may not protect a good faith purchaser who (unknowingly) purchased stolen artwork and took the trouble to insure it against loss or damage. Courts have consistently held that UCC section 2-403 distinguishes between one who unlawfully acquires goods by theft versus one who acquires them by deceit.³⁴³ The former is a mere thief who holds no title (or “void” title) to the goods and is unable to convey good title even to a bona fide purchaser.³⁴⁴

Thus, if no person after the original owner ever held even voidable title, then the original owner remains the only rightful owner with good title to the artwork. Regardless of the number of transactions distancing the original owner from the ultimate purchaser (who obtained insurance on the property), none of the successor purchasers obtained good title if each seller in the chain of custody held only void title.

336. *Id.*

337. *See, e.g.*, LEO P. MARTINEZ, CASES AND MATERIALS ON INSURANCE LAW 538–39 (6th ed. 2010).

338. *Ariasi v. Orient Ins. Co.*, 50 F.2d 548, 551 (9th Cir. 1931); *see also Napavale*, 336 P.2d at 988.

339. *See, e.g.*, *Candela v. Port Motors Inc.*, 617 N.Y.S.2d 49, 50 (App. Div. 1994); *Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co.*, 268 Cal. Rptr. 16, 19 (Ct. App. 1990) (holding that any title derived from a thief is void, not “voidable” under UCC section 2-403).

340. 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-403:4 (Frederick H. Miller ed., 2011).

341. *Id.*

342. U.C.C. § 2-403 (1988).

343. HAWKLAND, *supra* note 340, § 2-403:4.

344. *Id.*

It is, of course, possible to have an “insurable interest” in property even without holding legal title. It is often said that a person has “an insurable interest in property if he derives an economic benefit from its existence, or would suffer any loss from its destruction, whether or not he has any title to, possession of, or lien upon this property.”³⁴⁵ Even so, there have long been disagreements as to what constitutes an insurable interest. Two basic theories have emerged in American jurisprudence on the subject. The “legally enforceable right” theory posits that the insured must have “some valid and recognizable property right in the subject matter.”³⁴⁶ The more liberal “factual expectations” view requires only that insured “suffer some actual loss or detriment from the damage, loss or destruction to the insured property, and maintain some gain, benefit or advantage from its continued existence.”³⁴⁷

In some states, the “insurable interest” requirement is purely a creature of the common law.³⁴⁸ In others, the legislatures have specified what constitutes an “insurable interest” in property. But even these statutory provisions are wildly inconsistent. For example, New York has adopted the more lenient “factual expectation” view of insurable interest:

No contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. In this article, “insurable interest” shall include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.³⁴⁹

By contrast, California has adopted statutory provisions requiring an “actual right to the thing” insured or a valid contract for it: “A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable.”³⁵⁰

But regardless of which of these theories a state may adopt, in all states mere possession of the property is not enough, even if possession

345. EMERIC FISCHER ET AL., *PRINCIPLES OF INSURANCE LAW* § 5.01[A], at 342 (3d ed. 2004).

346. MARTINEZ, *supra* note 337, at 538.

347. *Id.* at 538–39.

348. John Dwight Ingram, *Insurable Interest in Property: The Factual Expectancy Doctrine*, 40 FED’N OF INS. AND CORP. COUNS. Q. 327, 331 (1990).

349. N.Y. INS. LAW § 3401 (McKinney 2010).

350. CAL. INS. CODE § 283 (West 2010).

alone gives the possessor certain rights as against a trespasser.³⁵¹ As one Georgia appellate court observed:

[I]t is clear that mere possession of property, although giving the possessor certain rights against a trespasser, is in and of itself not sufficient to constitute an insurable interest . . . While title may not always be the determinative factor, the insured must have some *lawful* interest in the property before he can have an insurable interest in the property, although that interest might be "slight or contingent, legal or equitable."³⁵²

Given these disparate views as to what constitutes an "insurable interest," courts have struggled mightily with the question of whether a subsequent purchaser of stolen property acquires an "insurable interest" even though the purchaser unquestionably does not acquire legal title. The courts remain sharply divided on this subject. For example, Georgia courts have held that a subsequent bona fide purchaser does not hold an insurable interest in stolen property.³⁵³ On the other hand, other courts have concluded that *good faith* purchasers have an insurable interest, since they have good title as against all the world except the true owner.³⁵⁴

In jurisdictions that follow the stricter "legally enforceable right" view of insurable interests, a downstream purchaser of stolen artwork or looted antiquities has no insurable interest. But what about downstream purchasers in jurisdictions that follow the more liberal "factual expectancy" rule?

Given the extraordinarily high levels of illicit activities in the marketplace for art and antiquities, and in view of the prevailing practice in the world of art and antiquities dealers wherein all participants purposely fail to ask any searching questions that might disclose a defect in title, prospective purchasers of these goods should be considered to be on inquiry notice of potential defects in title.³⁵⁵ A strong argument can

351. See, e.g., *Splish Splash Waterslides, Inc. v. Cherokee Ins. Co.*, 307 S.E.2d 107, 109 (Ga. Ct. App. 1983).

352. *Id.* (citations omitted) (quoting *Fenn v. The New Orleans Mut. Ins. Co.*, 53 Ga. 578 (1875)).

353. *Herrington v. Am. Sec. Ins. Co.*, 184 S.E.2d 673, 674 (Ga. Ct. App. 1971); *Gordon v. Gulf Am. Fire & Cas. Co.*, 149 S.E.2d 725, 728–29 (Ga. Ct. App. 1966).

354. *Reznick v. Home Ins. Co.*, 360 N.E.2d 461, 464 (Ill. App. Ct. 1977); *Scarola v. Ins. Co. of N. Am.*, 292 N.E.2d 776, 776–77 (N.Y. 1972); *Castle Cars, Inc. v. U.S. Fire Ins. Co.*, 273 S.E.2d 793, 795 (Va. 1981); *Barnett v. London Assur. Corp.*, 245 P. 3, 4 (Wash. 1926).

355. Inquiry notice is that "[n]otice attributed to a person when the information would lead an ordinarily prudent person to investigate the matter further." BLACK'S LAW DICTIONARY 1165 (9th ed. 2009).

be made that no person can ever be a true bona fide purchaser unless they have utilized all reasonably available resources to ascertain that prior owners lawfully acquired the work.

To qualify as a bona fide purchaser, it is not enough that the buyer pays full value for an artifact. In addition, the purchaser must not know *or have reason to know* that the property may have been stolen:

It is essential that the insured be an innocent, bona fide purchaser. Whether a jurisdiction adheres to a legal interest or factual expectancy theory of insurable interest, the insured's interest in the property must be a lawful one, and this is not the case if the insured acquires the property illegally or knows or has reason to know that the property in question is stolen.³⁵⁶

The "innocence" of the purchaser has been litigated in the context of insurable interest in stolen vehicles, which is the type of transaction in stolen goods that most of the past insurable interest cases have confronted. Where the circumstances surrounding a purchase should have put the buyer on inquiry notice of potential problems, courts have not hesitated to find that the buyer lacked an insurable interest.³⁵⁷ For example, in one often-cited case, an individual observed a Corvette in a restaurant parking lot.³⁵⁸ After examining the auto, the prospective purchaser entered the restaurant and asked two persons whom he believed to be the owners whether the auto was for sale.³⁵⁹ They informed him it was not, but the prospective purchaser nonetheless handed them a business card and asked them to call if they should ever wish to sell the vehicle.³⁶⁰

Several weeks later, the purchaser received a call from "Jay" and "Kathern," who identified themselves as the individuals with whom he had spoken in the restaurant, and said they would be interested in selling the car.³⁶¹ The parties agreed on a sale price of \$9500, which the buyer intended to pay by check.³⁶² The buyer estimated the retail value of the vehicle to be between \$18,000 and \$25,000.³⁶³

356. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 46[a], at 305 (4th ed. 2007).

357. See, e.g., *Howard v. State Farm Mut. Auto. Ins. Co.*, 496 N.W.2d 862, 867 (Neb. 1993).

358. *Id.* at 864.

359. *Id.*

360. *Id.*

361. *Howard*, 496 N.W.2d at 864.

362. *Id.*

363. *Id.* at 865.

When the sellers arrived in town several days later, they contacted the buyer from a pay phone.³⁶⁴ The sellers demanded that \$6500 of the purchase price be paid in cash “for tax purposes” and the balance was paid by certified check the next morning.³⁶⁵ The seller’s signature on the bill of sale was notarized by the purchaser’s wife, who did not require that the seller establish her identity.³⁶⁶

The buyer never received (and apparently never even asked for) the actual certificate of title.³⁶⁷ Further, although the registration receipts were available (which showed three different spellings of “Kathern’s” first name), the buyer claimed that he did not study or even “think about” studying the signature.³⁶⁸ He simply looked at the vehicle identification number and the car and “basically that was about it.”³⁶⁹ The buyer maintained that the bill of sale “[l]ooked like a proof of ownership” to him.³⁷⁰

The buyer then insured the vehicle with State Farm.³⁷¹ Just days later, the vehicle was destroyed by fire under suspicious circumstances.³⁷² As it turned out, the vehicle identification numbers on the glove compartment, engine, and valve tappet cover had been altered.³⁷³ The buyer presented a claim under his State Farm policy, and State Farm denied the claim.³⁷⁴ In the ensuing litigation, the Nebraska Supreme Court held that an *innocent* purchaser has an insurable interest in a stolen vehicle.³⁷⁵ But given the circumstances of this acquisition, the Court also held that the buyer failed to establish that the vehicle was purchased under “innocent circumstances”: “We . . . hold that a subsequent innocent purchaser of a stolen vehicle acquires an insurable interest in such vehicle. Consequently, [the purchaser] had no insurable interest in the Corvette if he either stole it or purchased it under other than innocent circumstances.”³⁷⁶

The authors of one insurance casebook posit that the decisions

364. *Id.* at 864.

365. *Howard*, 496 N.W.2d at 864–65.

366. *Id.* at 865.

367. *Id.*

368. *Id.*

369. *Howard*, 496 N.W.2d at 865.

370. *Id.* at 862.

371. *Id.* at 866.

372. *Id.*

373. *Howard*, 496 N.W.2d at 866.

374. *Id.*

375. *Id.* at 867.

376. *Id.*

finding no insurable interest in a stolen vehicle could be “viewed narrowly” on the grounds that all states use certificates of title to evidence ownership in automobile transfers.³⁷⁷ According to these authors, these “‘pink slips’ furnish a source for reasonable reliance by purchasers not applicable as to other chattels.”³⁷⁸ They note that, in one decision, the court found that a victimized buyer had no insurable interest because the state’s registration statute mandated literal compliance, but the application to transfer title to the stolen vehicle did not contain the true identification number of the auto in question.³⁷⁹

Although artwork and antiquities do not have “certificates of title,” there are sources of information that can provide a buyer with something upon which they can place “reasonable reliance” that the subject of the transaction has not been stolen or looted. It is not too much to require that these readily available avenues of information be explored before an individual qualifies as a “bona fide” or “innocent” purchaser of stolen art or looted antiquities.

B. Title Insurance and the Insurable Interest Requirement

As with any other kind of insurance, to have a valid policy of title insurance, the insured must have an insurable interest in the insured property³⁸⁰:

If property, including artwork, is stolen, the law in the United States prevents a purchaser from acquiring good title regardless of the purchaser’s good faith and ignorance of the theft. This common law rule, the English *nemo dat* rule, provides the one who purchases, no matter how innocently, from a thief, or all subsequent purchasers from the thief, acquires no title in the property.³⁸¹

377. MARTINEZ, *supra* note 337, at 538.

378. *Id.*

379. *Id.*

380. Glass v. Stewart Title Guar. Co., 354 S.E.2d 187, 189 (Ga. Ct. App. 1987) (“A contract of title insurance is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the assured in a specific amount against loss through defects of title . . . wherein the latter has an interest, either as purchaser or otherwise.” (quoting Beaulieu v. Atlanta Title & Trust Co., 4 S.E.2d 78, 80 (Ga. Ct. App. 1939), *overruled on other grounds by* Fid. Nat’l Title Ins. Co. v. Keyingham Invs., LLC, 702 S.E.2d 851, 853 (Ga. 2010)); 9 JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 5202, at 17 (1981) (“In order to effect a valid contract of title insurance, it is necessary for the insured to have such an interest in the property that he would suffer a pecuniary loss if the title thereto were defective . . .”).

381. Phelan, *supra* note 13, at 633.

These rules apply to works of art as well.³⁸² If the art work or antiquity was stolen, then no insurable interest exists. Writing on the specific subject of stolen art, one commentator wrote that, “[a]t common law, a thief’s title is void. The thief cannot give a buyer, even a [bona fide purchaser], good title. Thus, a buyer does not take title if somewhere back in the buyer’s chain of title a claim rests on theft.”³⁸³

In the context of stolen art and looted antiquities, other commentators have noted that “it is a fundamental principle of Anglo-American common law that a thief cannot pass good title to a good-faith purchaser.”³⁸⁴ This rule is subject only to a few exceptions, which have been narrowly construed by the courts. For example, a thief—or a good-faith purchaser for value from a thief—can acquire title superior to that of the original owner if the applicable statute of limitations has expired or if the defendant can establish the defense of laches on the part of the original owner.³⁸⁵

But the statute of limitations may not even begin to run for years—or even decades—after the theft occurred. In New York, which is considered to be the “undisputed center of the U.S. art market,”³⁸⁶ the courts apply the “demand and refusal rule” to determine when the statute of limitations begins to run.³⁸⁷ Under this rule, the statute of limitations does not even *begin* to run until the owner locates the stolen art, demands it return, and receives a refusal from the current possessor.³⁸⁸

While the New York rule is ostensibly a “minority” rule, New York’s status as the center of the U.S. art market means that its rule of law often prevails. But even if it does not, the law in other U.S. jurisdictions is nearly as onerous. Other jurisdictions typically apply the “discovery rule” in art replevin actions.³⁸⁹ Courts applying the discovery

382. Birds, *supra* note 331, at 1 (“[A] basic group requirement of insurance law [is] that the person insuring (the insured) must have an insurable interest in the property being insured . . .”).

383. 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, 50 (1995) (“Anglo-American Law is well-settled that neither a thief nor a good faith purchaser from the thief, nor even subsequent good faith purchasers, can pass good title.”); see also Bibas, *supra* note 34, at 2440 (footnotes omitted); *About Us*, ILLICIT ANTIQUITIES RES. CENTER, <http://www.mcdonald.cam.ac.uk/projects/iarc/info/us.htm> (last updated June 2007).

384. ART LAW HANDBOOK, *supra* note 2, § 5.01, at 285.

385. *Id.*

386. *Id.* § 5.02[A][1], at 287.

387. *Id.*

388. ART LAW HANDBOOK, *supra* note 2, § 5.02[A][1], at 287.

389. *Id.* § 5.02[A][2][a], at 299.

rule often hold that “discovery” requires that the victim of the theft have knowledge of the identity of the current holder of the work because, “absent that knowledge the owner would lack an adequate factual basis to bring a claim.”³⁹⁰ Outside of the United States, more protection may be available for bona fide purchasers. For example, the law in Switzerland and certain other civil-law nations is notoriously much friendlier to bona fide purchasers.³⁹¹ This treatment often gives rise to disputes as to which law applies in an art replevin action.

The traditional choice-of-law rule is the *lex loci delicti commissi* rule, under which “questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer.”³⁹² Under this rule, the relevant transfer is the acquisition of the work by the first alleged good-faith purchaser, *not* the jurisdiction where the theft occurred or jurisdictions where subsequent transfers were made by good-faith purchasers.³⁹³

A few courts—including those of New York—have rejected or modified this traditional rule, and instead have adopted a “most significant contacts” choice-of-law test.³⁹⁴ The use of this “most significant contacts” test can prevent the law of jurisdictions like Switzerland (that is generally more favorable to bona fide purchasers) from applying to the transaction.³⁹⁵

In short, unless the law from a jurisdiction like Switzerland applies to the transaction, purchasers of stolen art or looted antiquities will have the same insurable interest problem as the purchaser of a stolen auto. That is, depending on the jurisdiction, they will either have no insurable interest in the stolen object as a matter of law, or they will have tremendous difficulty establishing that they were truly an “innocent” purchaser of these stolen objects such that they do have an insurable interest.

390. *Id.* § 5.02[A][2][b], at 303–04 (citing *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 289 (7th Cir. 1990)).

391. *Id.* § 5.01, at 284.

392. ART LAW HANDBOOK, *supra* note 2, § 5.04[B], at 316 (quoting *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, No. 98 Civ. 7664(KMW), 1999 WL 673347, at *4 (S.D.N.Y. Aug. 30, 1999)).

393. *Id.* § 5.04[A], at 316.

394. *Id.* § 5.04[C], at 317.

395. *Id.* at 318.

VI. THE AVAILABLE MEANS FOR TRACING OWNERSHIP

There are no universally accepted standard resources for searching for stolen art.³⁹⁶ Instead, there is a patchwork of voluntary and incomplete databases that may (or may not) contain information regarding stolen artwork.³⁹⁷ The currently available art registries include the Art Loss Register (ALR) which is a British for-profit corporation. This entity began in 1976 as a registry maintained by the non-profit IFAR.³⁹⁸ In the late 1980s, IFAR began to computerize its paper records that contained information from a manual registry of stolen works of art.³⁹⁹

The database also permitted owners to register all uniquely identifiable items, which protected current owners of valuable artwork against subsequent theft.⁴⁰⁰ The details of the registered piece were maintained securely on the database at no charge.⁴⁰¹ It was only in the event of a theft and successful recovery that the registrant was assessed a fee (which ranged from between fifteen and twenty percent of the value of the item at the time of its recovery).⁴⁰²

In 1991, IFAR joined with Sotheby's, Christie's, certain London-based insurance brokers, and several British and American companies to establish the ALR.⁴⁰³

The ALR maintains a sophisticated computerized database in both New York City and London with information and images of over [100,000] stolen art objects. Art theft victims or their insurers may register stolen art with the ALR for approximately \$65 per item. . . . From 1991–93, the ALR claims to have played a role in the recovery of over 400 works of art, 200 of which were recovered in one location.⁴⁰⁴

396. Phelan, *supra* note 13, at 671.

397. Collin, *supra* note 15, at 28.

398. Hawkins et al., *supra* note 383, at 87.

399. *Id.*

400. *Registration*, ART LOSS REG., <https://www.artloss.com/content/registration> (last visited Aug. 4, 2011).

401. *Id.*

402. *Id.*

403. Hawkins et al., *supra* note 383, at 87.

404. *Id.* at 87–88; *see also* ART LAW HANDBOOK, *supra* note 2, § 5.02[A][3], at 308 (providing the more recent estimate of over 100,000 images of stolen art objects contained in the ALR).

The ALR serves both insurance companies and private collectors.⁴⁰⁵ The ALR Art Theft Search Service permits prospective buyers to determine if a work has been reported as stolen.⁴⁰⁶ The ALR charges potential buyers a fifty-dollar fee to search the registry to see if a work has been reported stolen.⁴⁰⁷ The Metropolitan Museum of Art announced in February 1994 that it would screen all proposed acquisitions in excess of \$35,000 with the ALR.⁴⁰⁸

The Thesaurus Group maintains a second art theft database called "TRACER," which is a computerized, online service that is located on the Isle of Wight in the UK.⁴⁰⁹ TRACER receives reports of stolen and missing art objects from a variety of sources.⁴¹⁰ It includes "[a]ll reports of stolen materials that Trace Publications, Ltd. . . . of Plymouth, England has compiled since its inception in 1988."⁴¹¹

A third UK-based database tracking stolen art is FindStolenArt.com.⁴¹² This website was developed to assist police forces across the United Kingdom in the recovery and return of stolen antiques, and to enable auction houses, collectors, and dealers to comply with their due diligence obligations.⁴¹³

There are several specialty databases that also collect potentially relevant information. Some specialize in art that was looted by the Nazis during the Holocaust.⁴¹⁴ Others specialize in stolen art from a specific era or from a specific geographic area.⁴¹⁵

Washington D.C.-based Trans-Art International maintains a Historic Art Theft database, which includes "the largest and most complete compilation of information about losses of art objects

405. Brinkman, *supra* note 151, at 66.

406. Hawkins et al., *supra* note 383, at 88.

407. *Id.*

408. *Id.*

409. Phelan, *supra* note 13, at 717.

410. *Id.*

411. *Id.*

412. *Welcome to FindStolenArt.com*, FIND STOLEN ART, <http://www.findstolenart.com> (last visited Aug. 4, 2011).

413. *Id.*

414. See, e.g., *Art Claims*, N.Y. STATE HOLOCAUST CLAIMS PROCESSING OFF., www.claims.state.ny.us/art.htm (last visited Aug. 4, 2011); LOST ART INTERNET DATABASE, www.lostart.de/Webs/EN/Start/Index.html?_nnn=true (last visited Aug. 4, 2011); NAZI-ERA PROVENANCE INTERNET PORTAL, www.nepip.org (last visited Aug. 4, 2011).

415. See, e.g., COMMISSION FOR LOOTED ART IN EUROPE, www.lootedartcommission.com (last visited Aug. 4, 2011); LOOTEDART.COM, www.lootedart.com (last visited Aug. 4, 2011).

sustained as a result of World War II.”⁴¹⁶ It specializes in title searches of fine art and antiquities.⁴¹⁷

More limited information on stolen art can be found at other websites, including those maintained by the Antique Tribal Art Dealers Association Website,⁴¹⁸ the FBI National Stolen Art File,⁴¹⁹ and Interpol’s Cultural Property Program Website.⁴²⁰ In addition, the Illicit Antiquities Research Centre of the McDonald Institute for Archaeological Research in the United Kingdom provides some information on missing and stolen objects of antiquity.⁴²¹ It does not, however, maintain a database of stolen antiquities.⁴²²

Courts and commentators alike have suggested that a similar register should either be operated by the government or a non-profit entity to minimize costs and maximize the availability of information.⁴²³ Others have suggested that Congress enact legislation under which stolen art may be registered with a centralized, user-financed art law database.⁴²⁴ These commentators have suggested that the legislation also provide that an owner who reports art theft to this database “would toll the running of the statute of limitations until the original owner learned who had acquired the object, provided she continued to diligently attempt to locate it.”⁴²⁵ This means that a modern-day purchaser who checked the database and found that his or her prospective purchase was not listed would have assurance that, after three years, the statute of limitations for a replevin action would have expired, and he or she would have unquestionable good title to the piece. As for work stolen before the implementation of the registry, the statute of limitations would be subject to the discovery rule, much as it now is in many states.

416. Phelan, *supra* note 13, at 733.

417. *Id.*

418. ANTIQUE TRIBAL ART DEALERS ASS’N, INC., www.atada.org (last visited Aug. 4, 2011).

419. *National Stolen Art File (NSAF)*, FBI, http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/national-stolen-art-file (last visited Aug. 4, 2011).

420. *Stolen Works of Art*, INTERPOL, www.interpol.int/public/workofart/default.asp (last visited Aug. 4, 2011).

421. *About Us*, ILLICIT ANTIQUITIES RES. CENTER, *supra* note 386.

422. *Id.*

423. Hawkins et al., *supra* note 383, at 88.

424. ART LAW HANDBOOK, *supra* note 2, § 5.02[A][3], at 308.

425. *Id.* (citing Hawkins et al., *supra* note 383, at 88–95; Tarquin Preziosi, Note, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225, 247–51 (1997)).

VII. A PROPOSED SOLUTION

The author of a leading insurance treatise states that “the public interests underlying the insurable interest doctrine are usually well served by considerations which are dictated by the self-interests of an insurer.”⁴²⁶ He adds that “insurers typically ascertain whether an insurable interest exists before entering into an insurance contract.”⁴²⁷ If that is truly the case, then insurers should have no objection to reasonable regulations that require past ownership of artwork and antiquities to be examined before a policy of title insurance can issue on that type of personal property.

Good-faith purchasers of expensive artwork and artifacts have a legitimate interest in protecting their investment. They do not want to invest thousands or millions of dollars in an acquisition, only to later discover that the piece was stolen or looted and that they must surrender it to the true owner without compensation. This is a situation that plainly calls for the availability of an insurance product.

Paradoxically, however, insurance—including title insurance—is customarily not available unless the insured can show an insurable interest in the property that is the subject of the policy.⁴²⁸ Some courts have held that even a bona fide purchaser of unlawfully acquired property has no insurable interest.⁴²⁹ And in the others, because of the rampant levels of art theft and antiquities looting and the refusal of buyers and sellers alike to ask hard questions about the provenance of a piece, purchasers of expensive art and antiquities should at least be on inquiry notice of potential defects in the chain of title. That self-imposed, intentional, and willful ignorance about an object’s chain of title casts serious doubt as to whether those purchasers could ever truly be considered “innocent” so as to establish an insurable interest in even the most liberal jurisdictions.

Public policy also demands some limitation on the availability of title insurance on art and antiquities. Insurance should not be used as a vehicle to allow purchasers to knowingly acquire stolen art—or to willfully or recklessly blind themselves to the possibility that it was stolen or looted—then later to have recourse against an insurer if they

426. ALAN I. WIDISS, *INSURANCE: MATERIALS ON FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND REGULATORY ACTS* § 3.3(a), at 133 (1989).

427. *Id.*

428. See discussion *supra* Part V.

429. See *supra* note 353 and accompanying text.

must surrender the piece to the true owner. By the same token, purchasers who acquire objects with a good faith belief based on a reasonable investigation that the seller can convey clear title should be able to protect their investments. But how can this be done?

For stolen art, the emerging publicly available databases provide the best mechanism for a regulatory solution that protects the interests of both the original owner and a bona fide purchaser. More than fifteen years ago, one author observed that a "cloud over an artwork's title arises when its provenance is unclear or questionable," and that the law should encourage buyers to exercise caution to investigate the provenance of the piece under consideration.⁴³⁰ That author noted that the technology in existence in the mid-1990s was sufficient to permit the creation of an international theft registry.⁴³¹ The same author complained that "[c]urrent law does not give a buyer enough incentive to make sure that his seller has verified title,"⁴³² and suggested that buyers "could spread the risk of loss by purchasing title insurance" (even though, as the author noted, title insurance for art work was not then available).⁴³³

For looted antiquities, industry experts have opined that problems caused by the trade in unprovenanced antiquities will be solved only "when it becomes possible to discriminate between antiquities that are on the market legitimately and those that are not."⁴³⁴ At the moment, there are only two ways this can be done. First, the current owner could prove publication or public display of the antiquity in the United States prior to 1970.⁴³⁵ Second, the owner could produce the original signed export license from the artifact's country of origin.⁴³⁶

These competing interests and goals call for regulations that permit title or casualty insurance to be issued on art and artifacts *only* if certain conditions are met. For works of art other than antiquities, insurance regulators should consider promulgating regulations that permit coverage only under two circumstances. First, the regulations should allow a title insurance policy to be issued if the insured produces

430. Bibas, *supra* note 33, at 2451.

431. *Id.* at 2462.

432. *Id.* at 2454.

433. *Id.* at 2454 & n.107 (stating that title insurance for artwork "may not have arisen yet" because art-theft databases were a recent phenomenon, and that "[n]ow that they exist, it should be possible to use these databases to estimate risk and set a premium").

434. Brodie, *supra* note 38, at 62.

435. See 19 U.S.C.A. § 2606(a) (West 2010).

436. See *id.*

certificates showing that, prior to the acquisition of the object proposed for insurance, a search was conducted of the Historic Art Theft Database, and the ALR database, and that these databases confirm that the piece in question has never been reported as stolen.

Alternatively, regulations could permit title insurance to be issued on any artwork that has been registered and described on a publicly available and searchable registry for a defined period of time. This method would allow the true owners of stolen art work (or investigators working independently or on their behalf) to search these registries regularly for their missing pieces. If a piece has been listed on a publicly available and searchable database for a reasonable period of time and no claim has been made, then an insurance product to cover title to that piece would be fully consistent with public policy.

The insurable interest requirement can be addressed through the same statute or regulation that limits the availability of other title insurance policies. The regulatory authority can decree that, for the purpose of title insurance on art and antiquities, a good-faith purchaser for value who has conducted the required due diligence investigations through the designated databases shall be deemed to have an insurable interest in that property.

For looted artifacts of antiquity, however, the rules must necessarily be somewhat different. The registration system described above will not work for looted artifacts, since by definition their existence was never previously known before their illicit excavation and sale.⁴³⁷ It would be futile to make inquiry of the country where the artifact is believed to have originated. If the excavation and exportation was clandestine, the government of the source nation would have absolutely no way of knowing anything about the find.⁴³⁸ Furthermore, in many cases, the nation from which the artifact might have originated may be unknown or doubtful. And of course, there is no guarantee that the governments of these nations would ever respond to the large number of inquiries that

437. Brodie, *supra* note 38, at 53 (“[A]ll artefacts that are recovered by means of clandestine excavations will not have been seen in modern times . . . so that when they appear on the market they cannot be recognised and identified as stolen.”); see also Ildiko P. DeAngelis, *How Much Provenance Is Enough? Post-Schultz Guidelines for Art Museum Acquisition of Archeological Materials and Ancient Art*, in ART AND CULTURAL HERITAGE, *supra* note 38, at 398, 404 n.36 (“ALR cannot list objects that are undocumented, such as those surreptitiously excavated, so its effectiveness for archaeological material may be limited.”).

438. RENFREW, *supra* note 235, at 25–26, 33, 44.

might be generated, nor would anything prohibit those countries from making spurious and unsupported claims of ownership.

Moreover, the mere fact that a piece was displayed at a museum or published in a catalogue after 1970 is inadequate evidence of good provenance. Even among museums that are generally regarded as respectable, this post-1970 publication technique is sometimes used to confer a legitimate provenance on a "hot" antiquity.⁴³⁹ This practice has sometimes been described as a form of "antiquity laundering" or as "provenance through publication."⁴⁴⁰

For antiquities, the answer is for insurance regulators to require either proof of publication or public display in the United States of the insured antiquity prior to 1970, or the production of the original signed export license, before title to an antiquity may be insured. If an artifact was publicly exhibited or listed in a museum catalog before 1970, then it was obviously imported prior to the enactment of the UNESCO Convention. Alternatively, if the owner can produce the original signed export license, there is *prima facie* evidence that the artifact was neither looted nor imported in contravention of the laws of its country of origin. Requiring that one of these two criteria be satisfied before a title policy on an antiquity may be issued will deter their illicit excavation and exportation, while simultaneously allowing bona fide purchasers to protect their investment.

Other commentators have recognized the salutary policies promoted by requiring buyers to take precautions against acquiring stolen property.⁴⁴¹ As one former chair of the American Bar Association's Internet National Cultural Property Committee has stated:

[P]ersons who acquire materials on the international art market without further investigation should not, and indeed cannot, be considered "innocent" or "good-faith" purchasers for title clearing purposes. . . . [T]he international art market is a sieve through which stolen art objects pass undetected to unwary collectors. For thirty years, both courts and commentators have decried the absence of commercial integrity in the art market and punctuated the importance of independent investigation. Persons who neglect or brush aside the admonitions are necessarily in some degree culpable. At a minimum, they are negligent in failing to take reasonably appropriate precautions to limit the

439. *Id.* at 31.

440. *Id.* at 31, 35.

441. ART LAW HANDBOOK, *supra* note 2, § 5.03[B], at 314 ("[T]he increased accessibility of stolen-art databases, which has enhanced the ability of anyone contemplating an acquisition to determine whether it has been reported stolen . . . [makes] the innocent acquisition of stolen art both less common and less excusable.").

notorious risk of acquiring stolen property. An intention to capitalize upon the systemic corruption of the international market and to exploit the plight of theft victims also reasonably might be imputed to sophisticated participants who are all too familiar with the art world's many machinations.⁴⁴²

Given the widely recognized problems of stolen art and illicit antiquities, purchasers have voluntarily "entered into a transaction known to be problematic."⁴⁴³ Buyers who are aware that stolen and illicit works flood the marketplace can take effective steps to avoid the acquisition of stolen or illicitly excavated art and artifacts.⁴⁴⁴

As Professor Phelan noted more than ten years ago, "[p]urchasers of artworks can no longer claim 'good faith status' if they have not conducted an investigation of title."⁴⁴⁵ Public policy should encourage that investigation by permitting purchasers of expensive art and artifacts to obtain title insurance if—but only if—they submit proof that they exercised due diligence to establish clear title to the piece they seek to insure.

442. Phelan, *supra* note 13, at 658.

443. *Id.* at 670.

444. *Id.*

445. *Id.* at 733.