

THE NAZI ART THEFT PROBLEM AND THE ROLE
OF THE MUSEUM: A PROPOSED SOLUTION
TO DISPUTES OVER TITLE

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I. INTRODUCTION

It was part of the established policy of the Nazi regime to confiscate works of art from Jewish families during World War II.¹ Some of these works of art found their way into the stream of commerce and are now in the possession of museums and individuals in the United States. They were acquired by good-faith purchasers who paid fair value for the artwork or received the artwork as a donation, as is often the case for a museum. This Article deals primarily with the resulting tug-of-war that now exists between two innocent parties: an American museum holding a work of art that may have been stolen by the Nazis during World War II and the heirs of the original owner who perished at the hands of the Nazis during the War.

This Article reviews the legal principles raised in title disputes involving artwork stolen during World War II. The discussion recognizes the difficulty of resolving ownership disputes that arise more than fifty years after an event, when evidence is often lacking and claimants may be deceased. Legal problems are further magnified by the passionate feelings aroused by attachment to a work of art, as well as by overwhelming revulsion to the horror of the Holocaust. The Article concludes that the Holocaust was an event so catastrophic that established legal concepts do not clearly resolve the issues at hand, and suggests an alternate method of resolution.

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1. See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994).

A. *Museums Defined*

A museum may be defined as “a public or private non-profit agency or institution organized on a permanent basis for essentially educational or esthetic purposes which employs a professional staff, owns or utilizes tangible objects, cares for them, and exhibits them to the public on a regular basis.”² Museums may be organized as corporations, associations, or trusts.³ A museum’s essential activity is to hold works of art as a public trust for the education and benefit of the general public. Its basic responsibilities include maintaining and managing its collections, and preserving the integrity of the museum’s collections for the enjoyment and education of future generations. Art museums are accountable to the public and their responsibilities are generally enforceable by the Attorney General’s Office of each state.

B. *Stolen Art*

Stolen works of art which enter into legitimate channels of commerce cause commercial problems, because good title cannot pass to stolen artworks. Under U.S. law, neither a thief nor any purchaser who obtained artwork through a thief can take good title⁴ unless the applicable statute of limitations has expired. If the statute of limitations does not apply, then the rightful owner may either reclaim the artwork at any point, primarily through an action in replevin⁵ (an action to recover stolen artwork), or seek damages through an action in conversion⁶ (an action to collect damages for unlawful dominion and control of artwork).

Since all art-related civil actions are subject to statutes of limitation which may vary from state to state (usually three to five years from an event), plaintiffs are often time-barred from

2. Museum Services Act, 20 U.S.C. § 968(4) (1976), *quoted in* MARIE C. MALARO, *A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS* 3 (1985).

3. *See* MARILYN E. PHELAN, *MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL* 2-10 (1994).

4. *See* 3 WILLIAM BLACKSTONE, *COMMENTARIES* 145. This common law proposition has been incorporated into the Uniform Commercial Code (U.C.C.). *See* U.C.C. §§ 1-103, 1-201(32), (33) & 2-403(1) (McKinneys 1993).

5. *See* DAN D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION* 399 (1973).

6. *See id.* at 403.

obtaining recovery. In New York⁷ and California,⁸ however, a suit brought fifty to seventy-five years after the theft may still be timely because of the concept of accrual. As discussed *infra*, accrual delays the time when the statute of limitations period begins to run.⁹

II. THE STATUTE OF LIMITATIONS DEFENSE

The public policy objectives for having a statute of limitations include: (1) the prompt filing of suit by a party, on the premise that those with valid claims will not delay in asserting them; (2) the protection of a defendant from having to defend a claim after a substantial period of repose, where evidence may have been lost or destroyed; and (3) the promotion of the free trade of goods, by making sure that those who have dealt with property in good faith can enjoy secure and peaceful possession after a certain, specified time period.¹⁰ The New York Court of Appeals has stressed the commercial necessity of assuring that those who have dealt in good faith with property be secure in their possession after a reasonable period of time:

[T]he primary purpose of a limitations period is fairness to [the] defendant. A defendant should "be secure in his reasonable expectation that the slate has

7. See *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311 (1991), *aff'g* 153 A.D.2d 143 (N.Y. App. Div. 1st Dep't 1990) (modifying an order from the Supreme Court, N.Y. County, entered Feb. 14, 1989, which denied a motion by plaintiff for discovery and inspection and granted a cross-motion by defendant for summary judgment).

8. See CAL. CIV. PROC. CODE §338(c) (West 1982 & Supp. 1997) (noting that prior to a 1988 amendment, §338(c) appeared as §338(3)).

9. For an excellent general discussion of artwork title disputes, including a review of some of the resources available for recovering and investigating title to artwork, see Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437 (1994); 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 (1995); Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art—The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75 (1994); John G. Petrovich, *The Recovery of Stolen Art: of Paintings, Statues and Statutes of Limitations*, 27 U.C.L.A. L. REV. 1122 (1980). See also RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* ch. 3 (2d ed. 1998) [hereinafter *ART LAW*].

10. See Petrovich, *supra* note 9, at 1127-28.

been wiped clean of ancient obligations, and he ought not to be called on to resist a claim where the 'evidence has been lost, memories have faded, and witnesses have disappeared.'" There is also [a] need to protect the judicial system from the burden of adjudicating stale and groundless claims.¹¹

The historical bases of statutes of limitations, although valid, have forced the courts to choose between two theoretically innocent parties: the aggrieved original owner and the bona fide purchaser. The trend of judicial decisions over the past ten to fifteen years has been to favor the aggrieved original owner.¹² When such an owner has been diligent in attempting to locate missing property, the owner's diligence reasonably serves to put a bona fide purchaser on notice that a potential problem with the title to the artwork may exist. Such notice penalizes the purchaser who buys under suspicious circumstances and fails to adequately investigate title. A purchaser who loses to the aggrieved original owner, however, often has recourse against the seller. When an original owner has *not* been diligent, judicial decisions favoring that party—as in the *Guggenheim* case discussed *infra*—do not seem "reasonable," since the bona fide purchaser could not have discovered the defect in the title to the artwork.

A. *The Concept of Accrual*

In a suit to recover artwork on a theory of replevin, or to obtain damages on a theory of conversion, the typical statute of limitations provides that the time during which a cause of action may be brought starts to run when the cause of action accrues.¹³ Because accrual in most states has been left to judicial interpretation due to a lack of statutory precision,¹⁴ several theories of accrual pertinent to art theft victims have arisen

11. *Duffy v. Horton Memorial Hosp.*, 66 N.Y.2d 473, 476-77 (1985) (internal citations omitted). *See also Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969).

12. *See generally Bibas, supra* note 9.

13. *See Petrovich, supra* note 9, at 1128. *See generally Hawkins et al., supra* note 9; *Montagu, supra* note 9.

14. *See Petrovich, supra* note 9, at 1129.

over the years, only to be subsequently rejected by a majority of states because of their innate unjustness.¹⁵

One theory is accrual by adverse possession,¹⁶ a method of transferring title to property without the owner's consent. To effect a transfer under this doctrine, the holder of property must have had hostile, actual, open and notorious, exclusive, and continuous possession of the property for the duration of the limitations period. One major drawback of this theory—from the possessor's perspective—is that the existence of each of the above-stated elements of possession must be proved with clear and convincing evidence by the defendant-possessor before the limitations period can begin to run. Yet the character of possession of most artwork—typically, exclusive residential display—does not satisfy the requirement of “open and notorious” possession. Accordingly, the adverse possession theory permanently denies the possessor's right to repose (clear title and use), in contradiction to the objective of the statutes of limitation.

In the majority of states today, both an action to recover stolen artwork (replevin) and an action to collect damages for unlawful dominion and control of artwork (conversion) accrue—that is, the statute of limitations begins to run—when a possessor acquires the stolen property. In these states, the law makes no distinction between a bad-faith possessor, such as a thief, and a good-faith purchaser; in all cases the clock begins to run when the possessor takes possession. Although this concept of accrual certainly ensures relatively prompt repose of possession, the prospective repose may be too prompt. Given the private character of art ownership and the frequently confidential manner of its acquisition—whether through theft or

15. See generally Petrovich, *supra* note 9; Bibas, *supra* note 9.

16. See, e.g., *Redmond v. New Jersey Historical Soc'y*, 132 N.J. Eq. 464, (1942). The general legal rule is that a thief who takes and conceals property cannot get title, however long he holds the property—that is, the statute of limitations does not begin to run. He can, however, take title through adverse possession, since in that case he openly and notoriously holds the property, giving the owner a reasonable chance of knowing its whereabouts and asserting title. See also 51 AM. JUR. 2d *Limitation of Actions* §124, at 693-94 (1970). For further discussions of the adverse possession theory of accrual, see Bibas, *supra* note 9, at 2441; Petrovich, *supra* note 9, at 1140-44; David A. Thomas, *Adverse Possession: Acquiring Title to Stolen Personal Property*, PROBATE & PROPERTY, Mar./Apr. 1996, at 12.

through legitimate means, such as a public auction where consignors and buyers alike are often anonymous—the aggrieved original owner, burdened with the difficulty of locating the art, may be too quickly time-barred from bringing suit. This interpretation of accrual, which is harsh for aggrieved original owners, potentially allows jurisdictions governed by it to become havens for stolen art.

California, in contrast, is highly protective of prior owners. California, still the only state with legislation governing accrual of a cause of action involving stolen artwork or artifacts, provides that an action must be brought within three years of “the discovery of the whereabouts” of the work “by the aggrieved party.”¹⁷ Although the claimant is not required by the statute to locate the work, the California courts appear to impose a duty of reasonable diligence in conjunction with the discovery rule.¹⁸ This means, for example, that as many as forty years after a good-faith purchaser has acquired a work of art, the prior owner may still not be time-barred from bringing suit, either for damages or for the recovery of the artwork.

Other states, through case law, have distinguished between good-faith purchasers and all other possessors by taking one of three approaches: (1) the demand-refusal rule, (2) the laches approach, and (3) the discovery rule.

B. *The Demand-Refusal Rule*

The demand-refusal rule was first proposed in New York in the 1960s in *Menzel v. List*,¹⁹ the first case in the United States to rule directly on the statute of limitations issue in a claim to recover stolen art.²⁰ In *Menzel*, the court viewed a demand by the aggrieved original owner and a refusal by the current possessor as substantive elements of both conversion and replevin. Accordingly, the court reasoned, a bona fide purchaser remains a bona fide purchaser of property until that

17. CAL. CIV. PROC. CODE § 338(c) (West 1982 & Supp. 1997).

18. See, e.g., *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109 (1988) (stating that “[a] plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her”). See also *infra* notes 60 & 63 and accompanying text.

19. *Menzel v. List*, 49 Misc.2d 300 (N.Y. Sup. Ct. N.Y. Co. 1966), *modified as to damages*, 28 A.D.2d 516 (N.Y. App. Div. 1st Dep’t 1967), *rev’d as to modifications*, 24 N.Y.2d 91 (1969).

20. See *Petrovich*, *supra* note 9, at 1133.

party is notified by an aggrieved original owner of a superior claim to the property and the purchaser refuses to return the property on the original owner's demand. Only then, on the demand for the return of the property by the aggrieved original owner and the refusal by the bona fide purchaser, does the clock in the statute of limitations begin to run.

The *Menzel* court believed that, in applying this rule to good faith purchasers, it was giving such purchasers the benefit of the doubt until notice was given to the contrary by the aggrieved original owner.²¹ The paradoxical result of the court's ruling is that it indefinitely postpones accrual of a cause of action against a good-faith purchaser, thereby extending far into the future the time when a good-faith purchaser may obtain good title and repose. Under the demand-refusal rule, moreover, no demand is necessary against a bad-faith possessor, so that in the case of theft the statute starts to run immediately—in the bad-faith possessor's favor. This can result in barring a suit against a thief or converter at a certain point in time, while a suit against a good-faith purchaser could still be brought.²²

To mitigate the potential unfairness, New York subsequently modified the demand-and-refusal requirement in *Kunstsammlungen zu Weimar v. Elicofon*,²³ holding that when demand and refusal are necessary to start a limitations period, the rightful owner's demand may not be unreasonably delayed after the possessor of the stolen property is identified.

In *DeWeerth v. Baldinger*,²⁴ summarized *infra*, the rule was modified yet again. *DeWeerth* involved an eight year tug-of-war between Gerda DeWeerth and Edith Baldinger over a Monet

21. See *Menzel*, 49 Misc. 2d at 315.

22. See Petrovich, *supra* note 9, at 1139. See also *In re Spewack*, 203 A.D.2d 133 (N.Y. App. Div. 1st Dep't 1994), where the plaintiff's action was time-barred against the alleged thief thirty-two years after the defendant allegedly stole certain papers relating to the musical production "Kiss Me Kate." The court noted: "When the stolen object is in the possession of a thief . . . the statute begins to run, anomalously, from the time of the theft, even if the owner was unaware of the theft at the time it occurred" unless the thief is estopped from asserting the statute of limitations under the doctrine of equitable estoppel. *Id.* at 133-34.

23. *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

24. *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *rev'g* 658 F. Supp. 688 (S.D.N.Y. 1987).

painting, *Champs de Blé à Vetheuil*. In 1922, Plaintiff Gerda DeWeerth, a German citizen, inherited from her father who was a serious collector of art, a Claude Monet painting which remained in her possession until August 1943, at which time she forwarded the painting and other valuables to her sister's house in southern Germany for safekeeping during World War II. At the war's end in 1945, the sister, who had quartered American soldiers, noticed after their departure that the painting was missing and so advised DeWeerth that autumn. DeWeerth exerted the following efforts on behalf of her lost Monet: in 1946, she filed a report with the military government administering the Bonn-Cologne area after the war; in 1948, she queried her lawyer regarding insurance claims on her lost property, including the Monet; in 1955, she asked, to no avail, a former art professor to investigate the painting's whereabouts, forwarding him a photograph of the lost Monet; in 1957, she sent a list of her artwork lost during the war to the West German federal bureau of investigation. None of her efforts to locate the Monet were fruitful, and she gave up.

Meanwhile, the Monet resurfaced on the art market in December 1956, when it was acquired on consignment by Wildenstein & Co., a New York gallery, from an art dealer in Switzerland. The painting remained in Wildenstein's possession until June 1957, when it was sold for \$30,900 to defendant Edith Baldinger, a good-faith purchaser. Baldinger retained the Monet in her New York City apartment.

In 1981, DeWeerth's nephew, Peter von der Heydt, learned that his aunt had owned a Monet that had disappeared during the war. Shortly thereafter, von der Heydt identified the painting in a *catalogue raisonné* of Monet's works located in a museum less than twenty miles from where DeWeerth had been living since 1957. Through the *catalogue raisonné*, von der Heydt traced the painting to the Wildenstein gallery and then compelled Wildenstein to identify Baldinger, the current owner. In December 1982, DeWeerth by letter demanded the Monet's return and in February 1983 Baldinger by letter refused, whereupon DeWeerth immediately initiated an action to recover her painting.

A New York federal district court ruled that DeWeerth owned the painting and ordered Baldinger to return it, finding that the action was timely since DeWeerth had exercised

reasonable diligence in searching for the painting.²⁵ The Second Circuit reversed, holding that New York's limitations law includes "an obligation to attempt to locate stolen property,"²⁶ and that DeWeerth failed to meet the diligent-search requirement by neglecting to conduct any search for the twenty-four years from 1957 to 1981. Her "failure to consult the catalogue raisonné," which enabled her nephew to trace the painting to the Wildenstein gallery within three days, was "particularly inexcusable."²⁷ Thus under *DeWeerth*, which remained the law in New York from 1987 until February 1991, a cause of action for either replevin or conversion against a good-faith purchaser did not accrue until three factors coalesced: (1) the plaintiff had to demand the artwork's return, and the defendant had to refuse to comply with the demand; (2) once the plaintiff located the property, the demand had to be made with no unreasonable delay; and (3) to satisfy the "no unreasonable delay" requirement, the plaintiff had to use reasonable diligence in locating the stolen property.²⁸

It is important to note that the Second Circuit in *DeWeerth* followed a long line of New York cases that discussed the issue of diligence on the part of the aggrieved original owner. In *Menzel* the court found that "a search had been made by Mr. and Mrs. Menzel for the painting ever since the end of the war"²⁹ In *Kunstsammlungen* the court found that "in view of insurmountable impediments the activities reflect a continuous and diligent search. There exists no question that the efforts to find the paintings were 'reasonably diligent.'"³⁰

With the advent of the case of *Guggenheim v. Lubell*,³¹ which is currently the law in New York, the due-diligence requirement was abolished. The aggrieved original owner may now make a demand in timely fashion under the limitations

25. *See id.* at 103.

26. *Id.* at 108.

27. *Id.* at 111.

28. *See id.*

29. *Menzel v. List*, 49 Misc.2d 300, 307 (N.Y. Sup. Ct. N.Y. Co. 1966), *modified as to damages*, 28 A.D.2d 516 (N.Y. App. Div. 1st Dep't 1967), *rev'd as to modifications*, 24 N.Y.2d 91 (1969).

30. *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 852 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d. Cir 1982).

31. *See Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311 (1991), *aff'g* 153 A.D.2d 143 (N.Y. App. Div. 1st Dep't 1990).

statute whenever he or she happens to discover the whereabouts of the lost property. Nevertheless, as seen in *Guggenheim*, the fact that an aggrieved party is, for example, able to bring timely suit forty years after the loss of his or her property does not preclude the current possessor of an artwork from asserting other affirmative defenses.

III. THE LACHES DEFENSE: NEW YORK'S CURRENT LAW

*Guggenheim v. Lubell*³² was an action brought by the Solomon R. Guggenheim Foundation, which operates the Guggenheim Museum in New York City. The action sought to recover a Marc Chagall gouache worth an estimated \$200,000 from the defendant, Rachael Lubell. She and her late husband, both good-faith purchasers, bought the painting in 1967 from the art dealer Robert Elkon, and it hung in their apartment in New York City for the following nineteen years.³³

The Chagall gouache, known as *Menageries*, or *Le Marchand de Bestiaux (the Cattle Dealer)*, was painted in 1912, in preparation for an oil painting. Acquired by the museum in 1937, it remained in the collection until sometime after April 1965, when it was reported missing. The reported loss was not confirmed until 1969, when the museum inventoried its paintings.

In August 1985, a transparency of *Menageries* was brought to Sotheby's for an appraisal. The transparency was seen by a former employee of the Guggenheim, who identified the Chagall as the one missing from the museum's collection. After determining the identity of the art dealer's client (Rachael Lubell), the museum in January of 1986 requested the return of the gouache. Lubell refused, and the museum subsequently brought an action in the New York State Supreme Court to recover the gouache. The court, relying heavily on the three-pronged rule of *DeWeerth*, dismissed the museum's suit as time-barred.

However, in January of 1990, the appellate court dismissed the statute of limitations defense. In so doing, the court held that whether the museum was obliged to do more

32. *See id.*

33. On two occasions (in 1969 and 1973), however, the painting was exhibited publicly at the Robert Elkon Gallery.

than it did in its quest for the gouache depended on “whether it was unreasonable *not* to do more, and whether it was unreasonable not to do more is an issue of fact *relevant to the defense of laches* and not the statute of limitations.”³⁴

Unlike the statute of limitations defense, laches is an affirmative defense that is based on arguments grounded in equity; a defense of laches claims a delay warranting a presumption that the aggrieved party has waived its rights. It usually involves knowledge by the aggrieved party of its rights, an unreasonable delay in exercising those rights, and a change of position working to the detriment of the defendant.³⁵

To successfully assert the defense of laches, the defendant in *Guggenheim* had to show that she was prejudiced by the museum’s delay in demanding the return of the gouache. Moreover, the appellate court noted that the defendant’s vigilance was as much at issue as was the plaintiff’s diligence; that is, information on the face of the bill of sale transferring the gouache to the defendant arguably raised “bright red flags” that would have generated suspicions in the mind of a prudent purchaser about the gouache’s provenance, leading to further inquiries. This was yet another reason, in the eyes of the appellate court, for characterizing the defense as one of laches.³⁶

The appellate court, in citing the U.C.C.,³⁷ noted that if Lubell was a good-faith purchaser and the gouache was not stolen, her title was superior to that of the original owner. However, in this case, whether the gouache was stolen was an issue of fact. Accordingly, the burden of proof fell on Lubell to establish that the gouache was *not* stolen and that she thereby acquired good title to it. The court recognized that imposing this burden was onerous, but concluded that it nevertheless “serves to give effect to the principle that ‘persons

34. See *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 146 (N.Y. App. Div. 1st Dep’t 1990) (emphasis added). Note that the statute of limitations can bar an action if there is no question of material fact. The statute of limitations defense is an affirmative defense, meaning that it attacks the legal right to bring the action as opposed to attacking the truth of the claim.

35. See *id.* at 146-50.

36. See *id.* at 152.

37. See *id.* at 152-53. See also U.C.C. §2-403(1).

deal with the property in chattels or exercise acts of ownership over them at their peril.’”³⁸

In February of 1991, the New York Court of Appeals affirmed the holding of the appellate court, concluding, without providing substantial support for its reasoning, that the federal court of appeals in *DeWeerth* should not have imposed a duty of reasonable diligence on the original owners for the purposes of the statute of limitations. The court noted: “While the demand and refusal rule is not the only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to the true owners of stolen property.”³⁹

The court further noted that New York case law recognizes that the true owner, having discovered the location of the lost property, cannot unreasonably delay the making of a demand for the return of the property.⁴⁰

But the court never explained why claims of non-diligent owners for recovery of stolen artwork from bona fide purchasers should be exempt from the general application of the statute of limitations, thereby permitting claims at some indefinite time when a former owner should discover the location of the artwork and decide to seek its return. The court did note that its decision was in part influenced by recognition that New York enjoys a worldwide reputation as a pre-eminent cultural center. Further,

[to] place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would . . . encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen artwork unless the true owner was able to establish that it had undertaken a reasonable search for the missing art.⁴¹

38. See *id.* at 153 (citing to W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §15, at 93 (5th ed. 1984 & Supp. 1988), quoting *Hollins v. Fowler*, L.R. 7 Q.B. 639 (1874)).

39. See *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 318 (1991), *aff'g* 153 A.D.2d 143 (N.Y. App. Div. 1st Dep't 1990).

40. See *id.* at 319.

41. *Id.* at 320.

In affirming the appellate court's order, however, the New York Court of Appeals stressed that its holding should not be viewed as sanctioning the Guggenheim Museum's conduct and that the defendant's contention that the museum did not exercise reasonable diligence in locating the painting should indeed be considered by the trial judge in the context of the laches defense.⁴² Accordingly, the Guggenheim Museum won the right to pursue recovery of the Chagall gouache from Lubell. The case ultimately settled on the eve of trial in 1993.⁴³

A. *The Trouble with the Laches Defense*

Under New York law, as played out in *Guggenheim*, the bona fide purchaser of a work of art, when sued by an aggrieved original owner, may assert as a defense the doctrine of laches. To do so, however, the purchaser must prove: (1) the original owner's unreasonable and inexcusable delay in bringing suit; *and* (2) prejudice (or harm) to the purchaser resulting from that delay.⁴⁴ Proving these facts places a heavy evidentiary burden on the bona fide purchaser. Since the crux of an investigation into delay focuses on its unreasonableness, rather than on its length, it may be difficult to amass documentary evidence as to such unreasonableness. Over the passage of forty to fifty years, for example, such evidence may be lost or destroyed. The *DeWeerth* court's analysis of the aggrieved original owner's diligence in pursuing stolen art should be acknowledged in this regard. In theory, there should be no material difference between the diligence standard applied by the *DeWeerth* court and the diligence standard applicable to a defense of laches. The key element of the re-

42. See *id.* at 321. For cases subsequent to *Guggenheim*, see *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990); *Hoelzer v. City of Stamford*, 933 F.2d 1131 (2d Cir. 1991); *Hoelzer v. City of Stamford*, 722 F. Supp. 1106 (S.D.N.Y. 1989); *Golden Buddha Corp. v. Canadian Land Co. of America, N.V.*, 931 F.2d 196 (2d Cir. 1991).

43. The settlement terms were confidential. However, it has been reported that Lubell and the two defendant galleries allegedly agreed to pay the Guggenheim \$212,000 in damages in exchange for Lubell retaining possession of, and obtaining title to, the painting. See ARTNEWSLETTER, Jan. 25, 1994, at 4-6.

44. See *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 149 (N.Y. App. Div. 1st Dep't 1990).

quired diligence applicable to the original owner is a continuous search; not an initial search or filed claim followed by years of inactivity.

The prejudice (or harm) required to support a laches defense includes: (1) loss of evidence that would support the defendant's position, such as lost documents or death of witnesses, and (2) a material change in the defendant's position that would not have occurred but for the delay.⁴⁵ The prejudice to a bona fide art purchaser results from the aggrieved original owner's failure to conduct a continuous search for the stolen artwork—one which would have prevented the bona fide purchaser from buying the artwork in the first place. A purchaser's acquisition of a work of art is, in and of itself, a material prejudicial change in circumstances caused by the true owner's unreasonable conduct in not maintaining a continuous search for the stolen artwork.⁴⁶ Prejudice can also be shown (1) if the artwork has increased in value so that the economic loss to the bona fide purchaser is greater than it would have been had the purchaser learned of the true owner's claim at or about the time of the purchase, or (2) if the bona fide purchaser refrained from acquiring another work of art by a particular artist because the purchaser bought the work in dispute (the artwork being claimed by the true owner) by that same artist.

Unfortunately, a laches investigation—involving, as it does, a “multi-factor balancing of all the equities”⁴⁷—precludes any bright-line rules of guidance. It virtually ensures protracted and expensive litigation. The *Guggenheim* demand-refusal rule, coupled with a laches defense that stresses the unreasonableness, rather than the length, of the delay, tilts the balance far too unfairly in favor of an aggrieved original owner, particularly when such an owner is not diligent whereas the bona fide purchaser is.⁴⁸

45. See Hawkins et al., *supra* note 9, at 67.

46. See *Robins Island Preservation Fund, Inc. v. Southold Dev. Corp.*, 959 F.2d 409, 424 (2d. Cir. 1991) (upholding laches defense where “[i]t is unlikely that [defendant] would have purchased the property had it known its title was in dispute”).

47. Bibas, *supra* note 9, at 2446.

48. See Hawkins et al., *supra* note 9, at 59-66 (providing an excellent critique of *Guggenheim*).

IV. THE "DISCOVERY RULE" DEFENSE

A number of states—including California,⁴⁹ New Jersey,⁵⁰ Indiana,⁵¹ Ohio,⁵² Pennsylvania,⁵³ and Oklahoma⁵⁴—have developed a discovery rule for the recovery of stolen art. Under this rule, the court determines when a diligent owner would or should have discovered the stolen property for purposes of commencing the running of the limitations statute. *O’Keeffe v. Snyder*⁵⁵ provides one example. In 1976, the artist Georgia O’Keeffe sued a bona fide purchaser for the return of three paintings allegedly stolen in 1946 from an art gallery operated by her husband, the photographer Alfred Stieglitz. Over the years, O’Keeffe made casual and sporadic attempts to locate the missing paintings, which ultimately turned up in a gallery in 1975. The New Jersey Supreme Court, in adopting an equitable discovery rule, noted that “O’Keeffe’s cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings.”⁵⁶ The court remanded for a full trial because of open factual issues, including the question of O’Keeffe’s diligence.

In a case popularly known as the “Byzantine Mosaics,”⁵⁷ the Federal Court of Appeals for the Seventh Circuit awarded possession of certain Byzantine mosaics to the Church of Cyprus. Both the Church and the Republic of Cyprus had sought to recover these mosaics, which had been stolen from the Church and were later purchased by a gallery owner in Indiana. In making the award, the court dismissed the defendant-

49. See CAL. CIV. PROC. CODE §338(c) (West 1982 & Supp. 1997).

50. See *O’Keeffe v. Snyder*, 83 N.J. 478, 499 (1980).

51. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990). See also discussion in ART LAW, *supra* note 9, at 555 n.8.

52. See *Charash v. Oberlin College*, 14 F.3d 291 (6th Cir. 1994).

53. See *Erisoty v. Rizik*, No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), *aff’d*, No. 95-1807, 1996 U.S. App. LEXIS 14999 (3d Cir. May 7, 1996). See also *Mucha v. King*, 792 F.2d 602, 611-12 (7th Cir. 1986) (discussing the applicability of the Illinois discovery rule to conversion of a bailed work of art).

54. See *In re 1973 John Deere 4030 Tractor*, 816 P.2d 1126 (Okla. 1991).

55. *O’Keeffe v. Snyder*, 83 N.J. 478, 499 (1980).

56. See *id.* at 493.

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

gallery's argument that the suit was untimely. The court noted that Cyprus's cause of action for recovery of the mosaics accrued, within the meaning of Indiana's statute of limitations for replevin actions, when Cyprus learned that the mosaics were in the possession of the defendant. The court concluded that Cyprus had exercised due diligence in searching for the mosaics.

In *Charash v. Oberlin College*, a 1994 case, the Sixth Circuit, in applying Ohio law and remanding the case for further proceedings, noted that in Ohio a cause of action for conversion or replevin must be brought within four years after the cause of action accrues and that such a cause of action does not accrue "until the wrongdoer is discovered," either by actual or constructive knowledge.⁵⁸ Plaintiff Helen Charash, the administrator and sole heir to the estate of her sister, the artist Eva Hesse, sued Oberlin College more than twenty years after her sister's death. Charash accused the college of converting forty-four Eva Hesse drawings that were allegedly misappropriated by a New York art dealer (since deceased), whose brother, in turn, donated the drawings to Oberlin College. Although it was conceded by Oberlin College that Charash lacked actual notice that the drawings in question were in Oberlin's possession, the Sixth Circuit held that there was a genuine issue of fact as to whether Charash had constructive notice of such possession.

In *Erisoty v. Rizik*⁵⁹, a 1995 case, a federal district court applied the discovery rule under Pennsylvania law to determine accrual and awarded an aggrieved original owner title to

58. *Charash v. Oberlin College*, 14 F.3d 291, 299 (6th Cir. 1994) (quoting OHIO REV. CODE ANN. § 2305.09 (Anderson 1995)).

59. See *Erisoty v. Rizik*, No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807, 1996 U.S. App. LEXIS 14999 (3d Cir. May 7, 1996). In a recent development in the case, the district court, ruling on a motion for summary judgment, held that the plaintiffs were not entitled to compensation for their restoration efforts during the time the painting was in their possession. See Order Upon Consideration of Defendants' Motion for Summary Judgment, *Erisoty v. Rizik*, No. 93-6215 (Oct. 22, 1996). The court found that although enriched, the defendants were not unjustly so. First, the court noted that plaintiffs bore the risk that "since the provenance of the painting was unknown, an original owner could appear at any time to reclaim the painting." *Id.* at 6. Additionally, the court reasoned that the benefit which inured to the defendants was incidental to the plaintiffs' own interest in restoring the paintings to reap profits from its eventual sale.

and possession of an eighteenth-century masterpiece by Corrado Giaquinto entitled *Winter*. The masterpiece was stolen from the owner's mother's house in July 1960 and was discovered by a furniture removal company in March 1988 in a plastic trash bag. The artwork had been torn into five pieces. The company consigned the artwork to a Philadelphia auction house to be sold at auction. It was purchased in 1989 by the plaintiff, a professional conservator. The aggrieved original owner, after having immediately reported the artwork's theft to the police and the FBI in 1960 and having searched continuously for the artwork over the next thirty years, reported the theft of *Winter* to the International Foundation for Art Research (IFAR) in 1992, when it learned of the organization's existence.

IFAR, working in conjunction with the FBI, tracked the painting to the plaintiff, removed the painting from the plaintiff, and ultimately returned it to the original owner. The plaintiff, after unsuccessfully demanding the return of the artwork, sued for declaratory and injunctive relief. The court, in weighing all the relevant factors to be considered in applying the discovery rule, noted that the original owner was reasonably diligent over the years in searching for the masterpiece. The court further reasoned that the plaintiff had bought the painting without inquiring into the painting's prior ownership or the consignor's identity, and had failed to make requisite inquiries regarding the painting's suspicious torn condition with either art or law enforcement agencies.

California is the only state in which deferred accrual of a claim to recover stolen artwork until the theft victim's discovery of the whereabouts of the property is made explicit in a statute.⁶⁰ The statute was adopted in 1983, but two recent

60. See CAL. CIV. PROC. CODE §338(c) (West 1982 & Supp. 1997). In 1983, the California legislature implemented an amendment to the statute of limitations, which explicitly deferred commencement of a cause of action to recover stolen cultural property until the date the owner discovered the location of the stolen objects. Section 338(c) reads as follows:

An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. The cause of action in the case of theft, as defined in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his

cases dealing with art stolen prior to 1983 are currently pending in the California appellate system.

Gold coins stolen from the American Numismatic Society some time before 1970 are the subject of *Naftzger v. American Numismatic Society*.⁶¹ The theft remained undetected because the thief had substituted similar coins of lesser value. The Society learned that some of the coins were in the possession of a collector, Roy Naftzger, who had purchased them in good faith from the alleged thief. The Society immediately notified Naftzger of its claim to the stolen coins and demanded their return. Naftzger refused to return the coins and entered Los Angeles County Superior Court in 1993 to obtain declaratory relief and to quiet title to the coins. The Society filed a cross-complaint against Naftzger, seeking to recover the coins.

In 1994, the trial court ruled in favor of Naftzger. The court found that the statute of limitations on the filing of an action in replevin had already run against the Society. The court ruled that the statute in force at the time of the theft provided for a three-year limit, beginning from the time of the accrual of the cause of action, which was the occurrence of the theft. The court rejected the Society's argument that the version of the statute amended in 1983 should be applied retroactively.

The California Court of Appeals for the Second District reversed the trial court, holding that a discovery rule of accrual requiring the theft victim's actual discovery of the possessor's identity was implicit in the pre-1983 version of the statute of limitations applying to the recovery of stolen personal property.⁶² Accordingly, the Society, having filed its action only months after discovering that Naftzger had the coins, had filed within the time limit. The court also ruled that whether the

or her agent, or the law enforcement agency which originally investigated the theft.

Although the California courts have not interpreted this particular rule, they seem to impose a duty of reasonable diligence in conjunction with a discovery rule. See, e.g., *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109 (1988).

61. *Naftzger v. American Numismatic Society*, 42 Cal. App. 4th 421 (Cal. Ct. App. 1996). See also Shapreau, *Title Bout—The Discovery-Accrual Rule*, S.F. DAILY J., Feb. 29, 1996; Shapreau, *California Adopts an "Actual" Discovery Accrual Rule for Claims to Recover Stolen Art*, 7 INT'L J. CULTURAL PROP. 177 (1998).

62. See *Naftzger*, 42 Cal. App. 4th 421 (1988).

Society had used due diligence in tracking down the stolen items was of no consequence under the pre-1983 discovery rule.⁶³

This holding is restricted to the pre-1983 version of the statute of limitations. *Naftzger* makes it clear that, under the current statute of limitations in California, only claims to recover articles of “historical, interpretive, scientific or artistic significance” will be delayed by the discovery rule.⁶⁴ The court expressed no opinion as to whether, in actions brought in law or in equity, the plaintiff would be time-barred by laches or placed at a disadvantage by a lack of reasonable diligence in identifying the person in possession of the property. Although the theft victim’s diligence is not a component of the *Naftzger* discovery rule, it is still an important factor in the contest for title to stolen art. A theft victim who fails to act reasonably to locate stolen art could be exposed to a laches defense even under *Naftzger*.

The *Naftzger* case should be compared with *Society of California Pioneers v. Roger Baker*,⁶⁵ in which a gold cane handle was stolen from the Society in 1978. The gold handle subsequently passed through a number of hands until Baker, a good-faith purchaser, bought it in 1991. In 1992, the Society learned that Baker had the cane handle and filed a replevin action against him. The trial court ruled in favor of Baker, reasoning that the pre-1983, three-year statute of limitations on actions in replevin had run against the Society, and determined that the time period began to run when the cause of action accrued—that is, at the time of the theft. The California Court of Appeals reversed and held for the Society, finding that the starting time for the pre-1983 statute of limitations was to be reinstated each time the stolen object changed hands. Since the cane handle changed ownership in 1980, the statute was still running when the 1983 amendment became law. Accordingly, the court held that the 1983 statute applied and that the cause of action accrued in 1992, when the society dis-

63. *See id.* The Court *in dicta* also indicated that the doctrine of adverse possession is not applicable to effect a transfer of title in personalty in stolen property cases.

64. CAL. CIV. PROC. CODE §338(c) (West 1982 & Supp. 1997).

65. *Society of California Pioneers v. Roger Baker*, 43 Cal. App. 4th 774 (1996).

covered that Baker had the cane handle. Significantly, in a footnote the court implied that under the amended California statute the discovery standard may be one of constructive notice. The court further noted that the question of reasonable diligence has some bearing on that issue since, in some circumstances under the constructive standard, one is charged with the notice that a reasonable inquiry would disclose.⁶⁶

The court acknowledged that its interpretation of the pre-1983 statute was broader than the current rule under the amended statute in that the pre-1983 discovery rule of accrual applies to *any* stolen item, whereas the current rule applies only to objects of historical, interpretive, scientific, or artistic significance.

A. *Drawbacks to the Discovery Rule*

The discovery rule is fact-sensitive and fact-intensive. In determining whether to apply the rule, a court must consider and weigh all the relevant factors in a given case. The following list of factors is by no means exhaustive: (1) the nature of the injury; (2) the time elapsed since the initial wrongful act; (3) the availability and the quality of witnesses; (4) the availability and the quality of physical evidence; (5) whether an inference can be drawn that the delay was intentional; (6) whether and to what extent the defendant was prejudiced by the delay; (7) whether the original owner acted reasonably in searching for the stolen work; and (8) whether the good-faith purchaser acted reasonably in inquiring about the provenance of the purchased work. Such information is not generally obtainable without discovery proceedings and a trial, normally a lengthy and costly process. Moreover, such a matrix of factors must be evaluated on a case-by-case basis, which necessarily permits a certain subjective element to influence a given outcome. As noted by at least one commentator, under the discovery rule, as with the demand-refusal rule, a bona fide purchaser can never be certain of enjoying repose of title, because there is no definitive date from which the limitations period begins to run.⁶⁷

66. *See id.* at 783 n.10.

67. *See* Hawkins et al., *supra* note 9, at 81.

V. CONCLUSION

A. *Bright-Line Rules as a Solution*

Adopting uniform bright-line rules that establish a hierarchy of preferences, which courts could use to determine title would be far more equitable for aggrieved original owners and bona fide purchasers alike. A number of commentators have proposed the adoption of bright-line rules.⁶⁸ One particularly intriguing idea proposes legislation, initially state and ultimately federal legislation, encouraging aggrieved owners to register stolen artwork with a confidential, computerized international stolen-art registry. Such owners, in the words of the commentators, “would be protected against a limitations claim by subsequent purchasers. Correspondingly, a purchaser who consulted the registry at the time of purchase would be protected by a three-year limitations period from the date of purchase.”⁶⁹

Under this proposal, so long as a registered owner used reasonable diligence in searching for the art, his or her time to commence suit would be tolled indefinitely against a subsequent buyer. At the same time, once the purchaser checked the registry and determined that the artwork in question had not been registered, the three-year statute would begin to run in the purchaser’s favor. If neither party used the registry, a discovery rule would apply.⁷⁰ It is hoped that New York State will be among the first to introduce legislation addressing title to artworks that balances the rights of innocent owners and innocent buyers based on a policy of computerized registration compliance.

B. *An Alternative Solution—An International Commission to Settle Disputes Over Art Stolen During World War II*

Clearly, there is a multitude of competing interests in dealing with stolen art when two innocent parties are involved, such that an easy solution is not possible. There are numerous approaches, exceptions to each, and special rules under each approach, all of which are extremely time-consuming and ex-

68. See, e.g., Bibas, *supra* note 9; Hawkins et al., *supra* note 9; Montagu, *supra* note 9.

69. Hawkins et al., *supra* note 9, at 54.

70. See *id.*

pensive in terms of legal cost. These approaches produce uneven results. One thing is clear from a review of the cases: a matter involving a claim for an artwork stolen during World War II will take between seven and twelve years to resolve. The legal cost will most likely exceed the value of the art, and the nondiligent claimant has little chance of victory resulting in the return of the artwork, since most claims will be barred by a statute of limitations or laches defense. Addressing the issue of art stolen during World War II, I propose the following alternative solution:

Works of art, even stolen works, should remain—under all circumstances—in the American museum where they are now located. This will eliminate the emotional issues involved in a dispute over possession and ownership, and will encourage museums' cooperation in opening its records for the purpose of tracing provenance.

A restitution commission consisting of art historians and art experts should be established concerning the confiscation program instituted by the Nazis during World War II. This commission could be administered in part through the newly established Commission for Art Recovery, but should be a separate, distinct governmental entity. There is a great deal of precedent for such a commission, most recently that being established to handle war claims after the Persian Gulf War and the Iran-United States Claims Tribunal.⁷¹

Individuals who have a claim that works of art belonging to their family were stolen by the Nazis would have the opportunity to present their claim to this commission. If the commission determines that there is solid evidence that the property was in fact stolen by the Nazis and the claimant is an heir, the commission should possess the authority to award reasonable compensation to the claimant.

I underline that the commission's authority for awarding restitution would be confined to providing reasonable compensation, not the current fair market value of the stolen artwork. The amount of compensation would be determined

71. See Jodi B. Ganz, *Heirs Without Assets and Assets Without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts*, 20 *FORDHAM INT'L L.J.* 1306 (1997); Elyse Garmise, *The Iraqi Claims Process and the Ghost of Versailles*, 67 *N.Y.U. L. REV.* 840 (1992); Seth A. Stuhl, *Spoils of War? A Solution To The Hermitage Trove Debate*, 18 *U. PA. J. INT'L ECON. L.* 409 (1997).

under guidelines developed by the commission which would balance competing needs, and most likely award a value appropriate at some time in the past or some percentage of current value. The legislation creating the restitution commission could also amend the Internal Revenue Code to provide that the reasonable compensation paid would not be taxable income to the recipient.⁷²

The benefit of such a commission is the elimination of the need to quantify and prove the original owner's efforts to look for the property, to prove that the artwork was "stolen," or to produce ownership or other documents that might be required in a court of law. The statute of limitations, laches, the discovery rule, and the miscellaneous other defenses would therefore not apply. Years of discovery and depositions, and hundreds of thousands of dollars in expenses for lawyers, translators, and expert witnesses would be avoided. The commission would make its determinations based on facts, and if the facts indicated both theft by the Nazis and that the claimant was the appropriate heir, the commission could then award compensation.

The commission would be funded from two sources. First, the United States government would fund it with \$25 million.⁷³ A small portion of this amount would be used for the operational expenses of the commission, with the balance

72. See, e.g., I.R.S. Notice 95-31, 1995-1 C.B. 307, 1995 WL 279779 (I.R.S.) (stating that monetary compensation or property received by U.S. individuals under the German Act Regulating Unresolved Property Claims (*Gesetz zur Regelung offener Vermoögensfragen*, v. 1990 (BGBl.1)), enacted in 1990 following reunification of East and West Germany for property that the Nazis confiscated or subjected to forced sale, represents a payment for damages sustained as a result of hostilities or political persecution). The entire amount of monetary compensation is exempt from taxation under the income tax convention between the two countries, regardless of whether a portion represents interest. See *Convention on Income Tax*, Aug. 2, 1989, U.S.-F.R.G., art. XIX, para. 1(c), S. TREATY DOC. NO. 101-10 (2d Sess. 1990).

73. The Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (105th Congress) signed by President Bill Clinton on Feb. 13, 1998, provides in § 202:

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

being set aside for distributions to claimants and for resources to help claimants research their claims. Second, a license fee would be created and applied to all auction houses and art dealers, comprising one-tenth of one percent of their gross yearly sales, with a maximum of \$10,000 per art dealer per year and a maximum of \$1,000,000 per auction house per year. This license fee would be in force for a limited period of three years. The amount is not onerous—its purpose is to produce additional funds for the commission, and to place part of the financial burden on those who benefit from added stability in the art market (i.e., art dealers and auction houses). It is designed to be a license fee so that the amount would be tax deductible when it is paid, and so that it would not be passed on to consumers. As a limited time requirement, it should be easy to administer, and the art professionals may be expected to comply on a voluntary basis.⁷⁴

None of the funds of the commission would be used to fund or encourage litigation through research organizations. Once the decision has been made to make use of the commission, the results of any research could not be used in a court of law. Furthermore, there would be no new requirements for

The Act does nothing about returning artworks to anyone. The Act does allocate funds for restitution claims based on bank accounts and gold.

74. This proposal has been criticized by those who ask why an art dealer who deals only in contemporary art should have to comply with the license provision when such dealer receives no benefit, i.e., the dealer does not benefit from added stability in the art market since the contemporary art market is already stable and is not affected by title issues over art stolen by the Nazis. An alternate proposal would make the license fee for art dealers completely voluntary. Those art dealers who did comply with the license fee provision would be issued a certificate or emblem that could be prominently displayed at the art dealer's place of business. The art dealer would then be faced with a business decision: whether the display of the emblem would encourage art buyers to purchase artworks from the art dealer who displayed the emblem, as opposed to the art dealer who did not display the emblem. Even on a voluntary basis, I would expect that the majority of art dealers would elect to comply with the license provision so that they could display such an emblem and, hence, increase their business. An additional source of funding for the commission could be a one-quarter of one percent sales tax on all sales of art over \$25,000 for a three year period. Since all purchasers of art benefit from a stable art market, they also should contribute to the fund to be used by the commission.

consumer diligence and special searches by consumers before a work of art is purchased.⁷⁵

The individual is not barred from suing in a court of law under the legal principles reviewed earlier. However, once an individual files a lawsuit for the recovery of stolen art, he or she would be precluded from filing a claim with the restitution commission. This restriction will make it easier, from a public relations point of view, for museums to assert a statute of limitations defense in good faith (which should prevail in most cases), since the claimant failed to use an alternative available remedy.⁷⁶ Filing a claim with the restitution commission would bar any lawsuit against any museum for the return of the artwork.

In creating the commission, the legislation would also strengthen the federal immunity-from-seizure clause⁷⁷ for

75. The Bill entitled Stolen Artwork Restitution Act of 1998, H.R. 4138, 105th Cong. (1998), introduced by Representatives Schumer and Lowry, contains provisions that this writer believes would precipitate litigation and place financial burdens on museums that already have limited resources. Equally important, by requiring each purchaser of artwork shipped in interstate or foreign commerce to complete "a documented, reasonable, multisource inquiry" as to provenance, the Bill would discourage the purchase of art and thereby put a damper on the art market, reducing its economic vitality. Burdening the good-faith non-merchant buyer of art with an expensive investigation of provenance lacks any sound relationship to the practicalities of the marketplace and flies in the face of well-accepted art market practice and case law. *See, e.g.*, *Graffman v. Espel*, No. 96 CIV. 8247, 1998 U.S. Dist. LEXIS 1339 (S.D.N.Y. Feb. 9, 1998) (holding "[a]s a matter of law, the Does [good-faith non-dealer purchasers of a work of art] had no obligation to investigate the provenance of the painting"). *See also* *Porter v. Wertz*, 68 A.D.2d 141 (N.Y. App. Div. 1st Dep't 1979), *aff'd*, 53 N.Y.2d 696 (1981); *Morgold, Inc. v. Keeler*, 891 F. Supp. 1361 (N.D. Cal. 1995).

76. *See* Judith H. Dobrzynski, *Museums Call for System to Address Nazi Booty*, N.Y. TIMES, Feb. 5, 1998, at E1 (quoting Philippe de Montebello, the Director of the Metropolitan Museum of Art, as stating that "[n]one of us wants to have demonstrably stigmatized works of art hanging on our walls;" and reporting that a 13-member task force of museum directors will develop guidelines to resolve individual ownership claims arising from the seizure of artworks before, during, and immediately after World War II).

77. *See* 22 U.S.C. § 2459 (1994). The statute states that cultural objects imported into the United States by nonprofit organizations for temporary display are granted immunity from judicial seizure, provided that, before the object enters the country, the United States Information Agency determines that the object is of cultural significance and, in conjunction with the Department of State, finds that the temporary exhibition of the object is in the national interest. If all the criteria are met, a notice of immunity, in accord-

artworks, by exempting implicitly all works of art from seizure when on a museum loan and streamlining the procedure which must be followed in order to be in compliance with the statute. This legislation will prevent in the future what was, in this writer's opinion, the precipitous filing of a criminal grand jury subpoena by a New York City District Attorney seeking to prevent the return of artworks allegedly stolen by the Nazis that were on loan to a New York City museum.⁷⁸

ance with the statute, is published in the Federal Register. Immunity from seizures is then in effect.

Under the proposal suggested in this article, the immunity from seizure would be automatic and there would be no necessity to publish in the Federal Register.

78. Two paintings by Egon Schiele were on loan from an Austrian foundation to the Museum of Modern Art in New York City when allegations were made by two families that the paintings had been confiscated by the Nazis. Manhattan District Attorney Robert M. Morgenthau issued a subpoena preventing the Museum of Modern Art from returning the paintings to Austria at the end of the exhibition. The Federal Immunity statute, *supra* note 77, did not apply since the Museum failed to comply with the registration process. However, a New York State statute provides:

No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is en route to or from, or while on exhibition or deposited by a non-resident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other non-profit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.

N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1997) (effective Dec. 31, 1984). The statute contains no exception for a criminal investigation and has clear, unambiguous language that would prevent the issuance of a subpoena for the seizure of a work of fine art on loan to a museum in New York State. A motion to quash the subpoena was filed in the New York Supreme Court, New York County, by the Museum of Modern Art. Recently, referring to the New York statute, the court held that "the legislative intent is clear and the statutory language unambiguous" and concluded that the subpoena must be quashed. *Decision, In re Application to Quash Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 177 Misc. 2d 985 (N.Y. Sup. Ct. N.Y. Co. 1998). See generally Judith H. Dobrzynski, *Modern Is Urged to Play Solomon in Paintings Dispute*, N.Y. TIMES, Jan. 1, 1993, at E1; Judith H. Dobrzynski, *How Did You Get That Art in the War, Daddy?*, N.Y. TIMES, Jan. 25, 1998, at § 4, p. 4; Robert Hughes, *Hold Those Paintings!*, TIME, Jan. 19, 1998, at 70.

The benefits of this proposal are: (1) works of art remain in the museums where they belong; (2) some compensation is provided to the heirs of Holocaust victims; (3) problems of ownership are resolved without the legal technicalities previously explained; (4) the burden of funding the restitution commission is placed on those who benefit most from a stable art market (that is, the auction houses, the art dealers, and the U.S. Government); and (5) all of the foregoing is accomplished at little or minimal legal cost.⁷⁹ The foregoing proposal presents a viable solution. It is an equitable resolution to the competing interests of innocent parties when artwork, stolen by the Nazis during World War II, entered the commercial stream of commerce and found their way to museums in the United States.

79. A detailed discussion of the application of the proposed solution to title disputes between individuals is beyond the scope of this article. However, there is no reason why the proposed procedure could not be adapted to make it applicable to resolving disputes between an individual bona fide owner of a work of art and the heirs of the original owner of the work. The bona fide owner would retain possession and the heirs of the original owner could seek compensation from the restitution commission in the manner outlined above. Alternatively, the commission could mediate a settlement between the two parties that results in the work of art being donated to a museum, with a consequent income tax deduction to the donor, and some compensation (not necessarily equal amounts) paid to each of the competing claimants by the commission and possibly the museum.