Holocaust Haunts the Next Millennium: The Reappropriation of Displaced WWII Art and Cultural Property

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Gabor Bedo's father, Rudolf, sent his art collection to London for safekeeping during WWII. Rudolf lived in Hungary. His collection was worth £5 million, and included a Renoir still life and a landscape by Jan van Goyen. Unfortunately for Rudolf, *The Trading With the Enemy Act*[i] entitled the British authorities to freeze the property of all residents of enemy or enemy-occupied countries. The British government sold Rudolf's collection at auction in 1955. Gabor Bedo lodged a compensation claim against the British government in late August of 1998.[ii]

The Museum of Modern Art in New York received two letters from Jewish families claiming ownership of paintings by Schiele after a public art exhibit in 1998. The letters claimed that the paintings were stolen from their rightful owners when the Nazis annexed Austria, between 1938 and 1945. Henry Bondi wrote that his aunt, Lea Bondi, owned *Portrait of Wally* when Nazi collaborators took the painting from her apartment without her consent. Rita and Kathleen Reif, relatives of Fritz Grunbaum, stated that *Dead City III* was taken from Mr. Grunbaum's collection without his consent by Nazi agents or collaborators after his arrest in Austria.[iii]

Another Austrian, Lillian Weingast, who currently resides in New Jersey, has had some success at retrieving various paintings from Austria left behind by her family during the war. She has been unsuccessful, however, at retrieving other pieces from France to where her family escaped during the Nazi annexation. She 'does not have appropriate evidence or documentation' to prove her claim. "We ran for our lives because we didn't want to be killed," she explains.[iv]

These stories are merely a few examples of the innumerable claims that have arisen worldwide since the end of WWII pertaining to artwork and antiques which were lost, stolen, or abandoned in the chaos that was Europe at the time. The stories outlined above are fairly typical scenarios. The claims are usually for valuable art owned in Europe which was separated from its owner as a result of WWII. As is apparent by the dates cited above, these claims are current and their numbers are growing as time uncovers many of these lost articles.

(I) Background and Contributing Factors

There were various factors that contributed to this widespread loss of valuable pieces. First, Hitler declared all "modern" art to be contrary to National Socialist policies, and deemed it "*degenerate.*"[v] He only allowed artwork to be exhibited which depicted images of scenes that could be found in nature, and would not tolerate any "unfinished works."[vi] At a speech at the Nuremberg rally of 1934, Hitler explained that Cubists, Futurists, Dadaists, and other *degenerate* artists were:

> "mistaken, if they think that the creators of the new Reich are stupid enough or insecure enough to be confused, let alone intimidated, by their twaddle."[vii]

Hitler used his influence as elected Chancellor of Germany (and eventually as 'Führer') to redefine the entire infrastructure of the German art world. Directors of museums and art galleries were intimidated into upholding Hitler's standards for art. Directors and curators who would not cooperate were replaced by those who were more compliant. Some galleries were closed outright. Certain artists were prohibited from working, or forced to apply their skills for the National Socialist Party's own ends.

> "In 1938 Oskar Schlemmer took a job with a firm which specialized in painting commercial murals in Stuttgart. By 1939 he was painting camouflage on factories and military buildings. Later he found refuge at an experimental paint factory in Wuppertal whose owner also employed Gerhard Marcks and several other banned artists."[viii]

The Nazis actually held a "*degenerate art show*" in Munich in 1937 that subsequently toured the rest of Germany. The goal of this exhibition was to display the "examples of decadence"[ix] and "barbarous methods of representation"[x] that typified non-German, non-realist, and modern art.

Graffiti-like slogans were splayed across the walls above the pieces and doorways that led into exhibits. Art was disparaged for depicting black people as well as for being

created by Jewish artists; i.e. "Jewish trash that no words can describe."[xi] Unfortunately for Hitler the show was a resounding success drawing huge crowds. This is in comparison with the lack of interest shown by the public in the exclusively "German"[xii] art exhibit, held to celebrate the "Day of German Art" on July 18, 1937.

A second factor that contributed to the scattering of valuable pieces of art was straightforward theft for personal gain by high ranking Nazi officials. "The Nazis, or at least some of them, in a sense reverted to the warrior code of a bygone era: whatever was conquered was fair game or booty. They took valuables from every nook and cranny of Europe, as needed or desired."[xiii] [xiv]

Hermann Göring, who held the positions of Prime Minister of Prussia, head of the Luftwaffe, director of the Four-Year-Plan, Chief Huntsman of the Reich, and the official successor to Hitler, was one of the high-ranking Nazis with a predilection for art and antiquities. He arranged for confiscated art to be brought to him, often to be added to his private collection. Further, gifts of artwork were often sent to Göring by those seeking favour with the Nazi regime. He even set up a personal *Art Fund* in which a systematized list of desired works was kept to facilitate donations of suitable art. "By early 1938, Goering's collections had far surpassed those of his Führer."[xv]

Göring was also the first to realize the potential financial gain from the sale of *degenerate* art. He sent Seth Angerer to examine confiscated works and bring those to him with monetary value. He sold these internationally in exchange for cash with which he purchased tapestries and Old Masters, which were his preference. This practice, which was occurring throughout the Nazi party, was merely a minor precursor to the mass appropriation of art that would occur with Hitler's enactment of a law in 1938

freeing Germany from any liability for compensation for 'safeguarded' (confiscated) works of art.

This law led to the third reason for today's problems of claims to unprovenanced art, the Nazis' formation of the *Commission for the Exploitation of Degenerate Art*. This commission was largely responsible for the dispersal of stolen European art in the war era. It permitted four appointed art dealers to buy works, in foreign dollars, and export them from the country as a means of ridding the Reich of *degenerate* art.

Incredible bargains for valuable pieces were, thus, suddenly available to dealers at an auction in Lucerne, Switzerland. As well, apart from the Swiss auction, Rolf Hetsch, who managed the 'disposal operation,' often sold these works for next to nothing from a salesroom in Schloss Niederschonhausen, simply to get them out of the country and save them from an uncertain fate.[xvi]

This uncertain fate eventually became a horrific, tangible reality in the form of a "purifying" bonfire on March 20, 1939. This fire, authorized by Nazi Propaganda Director Goebbels, was constituted of valuable *degenerate* artwork deemed "unexploitable" by the commission.[xvii]

As the war progressed, a fourth factor exacerbated the problems of stolen art. Hitler had devised the plan of creating the world's greatest museum in his hometown of Linz, Austria.

In preparation for this museum, so much art was accumulated throughout Nazi occupied Europe and brought to Austria that much of it had to be stored in central repositories. The biggest of these was a series of salt mine shafts. This repository remained in place until discovered by the Allies after the war.

In order to understand the fifth reason that contributed to today's claims we must jump ahead to the end of the war. The Allies, having occupied parts of Germany, set up 'Central Collecting Points' under the guidance of the *Monuments, Fine Arts and Archives* section of the U.S. Office of Military Government. These points were intended to expedite the return of stolen art to their countries of origin.

"If irony exists on the American side, it lies in the fact that some U.S. military men, who would outwardly deplore the Nazi mentality, were themselves guilty of plunder and illegal seizure. There is strong evidence that more than a few Americans grew rich as a result of loot seized in Europe at war's end or acquired through long-distance deals."[xviii]

Many pieces went missing as U.S. soldiers, assigned to guarding or collecting art, stole pieces and transported them back to America. These pieces have resurfaced, periodically, since that time and it is impossible to estimate how many more will appear to meet the demands of the American art market. "Much art stolen internationally is sold in the U.S., and since World War II, the United States has been the biggest market for illegal art."[xix]

Joe Meador, who died in 1980, was a U.S. Army lieutenant stationed in Germany at the end of the war. His battalion was assigned to guard an uncovered salt mine in Quedlinburg where valuable pieces of art had been discovered. "At some point in the war, to save them either from the SS, the Russians, or the Americans, the Quedlinburg clergy took the priceless treasures of their church … to a mine shaft near the town."[xx] Among these were a ninth century Four Gospels manuscript and a manuscript dated from

1513, as well as many gifts from the rulers of the German states in the ninth and tenth centuries.

"As history has revealed, Lt. Meador mailed these treasures back to his parents' home in Texas; he was well aware of their value."[xxi] At his death, although not mentioned in his estate, these pieces came into the possession of Lt. Meador's heirs.

(II) The Modern Era

This brings us to the modern context of this paper. Germany heard of the existence of the stolen treasures in Texas. "The Meador family's efforts to sell the Quedlinburg Treasures … led to their discovery in 1990."[xxii] The German government weighed its options and decided to pay US$900,000 to Meador's heirs for the return of the treasures. "This is an unfortunate reflection on the American legal system, since the payment of ransom by Germany was a better alternative than going to a Texas jury who knew that Lt. Joe Meador stole the treasures."[xxiii] This was in addition to US$1.75 million paid to a Bavarian art dealer acting for Meador's estate the prior year for the return of the Quedlinburg Gospels.

(III) Difficulties and Uncertainties Surrounding the Retrieval of Stolen Art

Why would the German government choose to pay for the return of stolen property? There was no question that the articles had been taken illegally from Germany. Why should Germany have problems retrieving these pieces simply by requesting them?

These problems, of which the German government was well aware when it opted to "pay ransom," rather than rely on American jurisprudence, are embedded in the

common law system. These are exacerbated when combined with the shortcomings and uncertainty of international law.

(IV) Relevant International Law

(A) 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*[xxiv]

The preeminent international treaty governing this area today is the *Hague Convention* enacted in 1954. This convention was relatively well received with seventy-two signatories worldwide. There are two foundational premises of this convention:

1) *Culture is a valuable possession*.
2) *Culture belongs to all of mankind*.

These foundational tenets are expressed at the outset of the convention in its Preamble:

> "Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."[xxv]

The *Hague Convention* was drafted in order to address a wide range of concerns pertaining to the protection of cultural property in anticipation of or in the event of armed conflict. *Article 4* requires signatory countries to have respect for cultural property, both within its borders and within the borders of foreign states.[xxvi] *Article 7* codifies the duty of signatories to imbue their armed forces with a "spirit of respect" for foreign cultures.[xxvii]

Ideologically the *Hague Convention* is sound. It exists to promote international respect and a policy of preservation and protection of culture, which intuitively appears an admirable goal. Its shortcomings, however, render this legislation virtually impotent and thus detract from its good intentions.

"It still provides no direct relief for the return of the artwork to the country of origin. It calls on each signatory to devise a scheme of laws that will prosecute violators, but leaves each country to form its own statutes and penalties."[xxviii] These deficiencies of the convention force the victim of an international art theft to pursue other, more proactively effective, venues to see the return of her object(s).

(B) 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*[xxix]

In 1970, the *UNESCO Convention* was authored as an attempt to build upon the *Hague Convention*. Whereas the *Hague Convention* was drafted only to pertain to cultural property and its protection in the event of war, the *UNESCO Convention* sought to protect cultural property generally.

Article 3 prohibits the importation of cultural property illegally exported or stolen from a foreign nation.[xxx] *Article 7(a)* places a burden on signatories (Canada and U.S.A. are two of seventy signatories) to enact appropriate domestic legislation to prevent collecting institutions from legally purchasing or obtaining cultural property that has been "illegally removed" from another country. [xxxi] [xxxii] *Article 7(b)* is the provision that should have imbued this convention with some positive influence. This subsection requires the importing country to take reasonable steps to facilitate the return of stolen cultural property to its country of origin.[xxxiii]

(i) *Cultural Property Export and Import Act*[xxxiv]

Canada took these "reasonable steps" by enacting the *Cultural Property Export and Import Act.*[xxxv] This legislation creates the Canadian offense of importing illegally exported cultural property. It provides a remedy to foreign states, not individuals, to retrieve objects illegally imported into Canada.

This statute empowers Canadian Customs Agents to question importers about the provenance of artwork and artifacts. If the agents are unconvinced of the legitimacy of the explanation, or if the answer appears vague or evasive, measures are taken to confirm the origin of the work. Agents of museums are often brought in to examine the pieces. Usually the country from whence the articles came is contacted and asked if there have been any recent lootings. In the event that a stolen piece is discovered, a fine is levied upon the importer and the piece(s) are seized. A procedure is then followed by which the country of origin may retrieve its objects.[xxxvi]

This legislation, although effective as a quasi-criminal statute, can be problematic for those seeking to retrieve their stolen property. Foremost, this law requires a claimant to be represented by her government in such a claim. This is not a private law open to implementation by foreign nationals representing themselves as individuals. This can lead to problems for a private claimant who must convince her government that the retrieval of her object is of national importance. Further, the costs involved in facilitating the return of these objects can be a further prohibiting factor.[xxxvii]

(ii) *National Stolen Property Act*[xxxviii]

The Americans implemented the UNESCO Convention via the enactment of the *National Stolen Property Act*.[xxxix] Like the Canadian *Cultural Property Export and Import Act*[xl] this legislation also applies to the transportation of foreign goods. Unlike the Canadian law, however, this applies specifically to goods *known* to be stolen. This requirement of knowing, or *scienter*,[xli] that the article is stolen is a necessary criterion as the American provision is a criminal statute. As such, the requisite *mens rea* must exist for the crime to have been committed, which requires knowledge of the crime.

The fact that this statute is a criminal statute has important implications for those seeking the return of stolen art. As this legislation is criminal its emphasis is on deterrence. There is no provision in the legislation for the return of stolen property.

(a) *United States* v. *Hollinshead*[xlii]

Despite being a criminal statute, the *National Stolen Property Act*[xliii] has, occasionally, been employed to facilitate the return of property. The case of *Hollinshead*[xliv] is an example of adjudication giving this law some efficacy for the victim of a theft. Hollinshead had attempted to sell a well-known Guatemalan stele to the Brooklyn Museum. He was convicted under this statute and, on appeal, his conviction was affirmed. "The court also took into account general principles of fairness toward the country seeking to regain a piece of its heritage,"[xlv] and arranged to have the piece returned by the United States Customs Service.

(b) *United States* v. *McClain*[xlvi]

Hollinshead[xlvii] is an example of the *National Stolen Property Act*[xlviii] working to benefit a claimant for stolen cultural property by facilitating the property's return. This result, however, is somewhat of an anomalous application of this legislation.

In the *McClain*[xlix] case, heard three years subsequent, McClain was charged under the *National Stolen Property Act*[l] with illegally removing nationalized artifacts from Mexico. A conviction was rendered against the Accused after numerous appeals. In the final judgment, however, no orders or provisions were made for the return of these objects to Mexico.

This result illustrates an inherent lack of remedy in the statute for the victim of theft. This shortcoming often results in victims seeking other means of litigating these matters. Hans Kennon explains:

> "The failure to provide a mechanism for the return of the stolen artifact is a major flaw with the statute. While the foreign government welcomes the incarceration of the thief, this does not return the artwork, nor force the thief to compensate for its value. Also value is relative since the return of the artwork is of more critical cultural value to the country than the exchange of currency. Given the limited utility of the statute, many persons and countries turn to more conventional civil remedies."[li]

(IV) Civil Litigation Remedies and Their Inherent Limitations

As quasi-criminal proceedings in Canada require government involvement on the part of the plaintiff, as well as potentially great costs, such adjudication is not desirable by claimants of stolen cultural property. The American criminal legislation, which only provides for penalties against the thief rather than for the return of the stolen property, is even less desirable to a claimant. It is only by a rare and overly broad application of the statute that a claimant could expect the return of the property. Due to the inadequate utility of these statutes, a claimant in a common law jurisdiction is well advised to pursue civil litigation as a means of property retrieval.

(A) Statutes of Limitations

When filing a civil suit, certain factors are imperative. Foremost among these is the time frame within which the suit is brought. This is relevant as each common law jurisdiction has enacted statutes of limitations which bar a suit after a certain period of time. In Canada there is yet to be a case litigated pertaining to a claim for cultural property stolen or lost during WWII. For this reason it is still unclear when the time begins to accrue in Canada that will eventually bar such a claim.

One matter that has been settled in Canada, however, is that statutes of limitations are not merely matters of *procedural* law, but are matters of *substantive* law.[lii] This will be a relevant issue in cases of wartime losses. Issues pertaining to a choice of jurisdiction and law to apply often arise due to the international character of these disputes. This means that if a particular legal system is chosen that system's limitations period will apply rather than that of the forum where the case is litigated, unless these are one and the same.

The principle of *lex fori*[liii] applies to procedural matters, whereas *lex loci*[liv] will apply to matters of substantive law. Usually the *lex fori* and *lex loci* will be the same as it is simplest to sue in the jurisdiction where the object is located. In British and most common law courts, *the lex fori* is determined by the principle of *lex situs.*[lv] In American courts, however, the forum is determined by a 'contacts test'.[lvi] Canada has traditionally looked to British law as an indicator of which route to take, but has increasingly turned to American jurisprudence for guidance.

(B) Discovery Rule and the Emergence of Due Diligence

(i) *Elicofon*[lvii]

As there is yet to be a case of this nature in a Canadian court, and Canada is increasingly turning to its neighbour for guidance, it is pertinent to look to American jurisprudence. This is a reasonable indicator of how Canadian courts are likely to settle modern claims to cultural property lost during wartime.

Regardless of which statute of limitations is applied to a case, it is of utmost importance to first determine *when* the time begins to accrue. The first case to rule on this matter in the U.S. is the case of *Kunstsammlungen zu Weimar* v. *Elicofon.*[lviii]

In that case it was argued by the defendant that, unless a rule requiring a reasonable degree of due diligence is required for a plaintiff 'searching' for an object, the relevant common law precedent favours a thief over a *bona fide purchaser for value without notice*. The prevailing rule was the *Demand Rule*, which meant that the time period only begins to run when the claimant requests for the return of the property. When this request is denied, the time period for the statute of limitations begins to run.[lix] This is ironic as this time begins to accrue for a thief much earlier, immediately upon the theft of the object.

The court rejected this argument. The court cited *General Stencils Inc*. v. *Chiappa*[lx] as precedent that alleviates this concern and makes the Defendant's argument moot. It was already a settled matter, on the basis of this case, that equity would not allow the illogical favouring of a thief over a purchaser for value in good faith.

(C) An Inequitable Solution in the name of Equity

(ii) *DeWeerth*[lxi]

The question of due diligence was revisited in the American courts in the case of *DeWeerth* v. *Baldinger*.[lxii] The Plaintiff was suing for the return of a Monet she had lost during the war. It had been stored at her sister's home in Southern Germany for safekeeping. It had remained there, unharmed, until August of 1943. At that time, American soldiers were billeted in the home housing the Monet, and when they left they helped themselves to the painting. The piece subsequently made its way to the United States of America.

The Plaintiff had made efforts to retrieve the painting between 1943 and 1957. These efforts included filing a report with the military government as well as filing a

claim for lost property with her insurance company (for which her lawyer advised her she could not collect.) She also sent a photo of the painting to a specialist in medieval painting and asked him to investigate, as well as sending a list of stolen paintings to the F.B.I.

The painting had come into the possession of the Defendant legitimately through a purchase for value. Edith Baldinger had purchased the painting for US$30,000 in 1957. She had shown the painting publicly twice, once in 1957 and again in 1970. The Plaintiff discovered the whereabouts of the work when her nephew researched the painting by consulting a book[lxiii] located in a Cologne museum. (DeWeerth lived twenty miles from Cologne since 1957.)

After numerous appeals with rulings that ran back and forth, the case was finally resolved in favour of a due diligence requirement for claimants. Furthermore, in this case, DeWeerth did not meet this standard of due diligence. Her efforts were not congruous with the value of the painting. As well, with minimal effort she could have discovered the whereabouts of the painting in the very manner it was so discovered by her nephew.

The Plaintiff returned to the courts in 1993 with a motion to vacate the prior judgment. She based this on a development that had occurred in the relevant case law. She maintained that the judgment in *Guggenheim*[lxiv] constituted a 'change in circumstances.' She argued that this meant that the court did not weigh all the relevant circumstances and that this justified her to seek a revisitation of her case and relief in a lower court once again. "The Second Circuit held that DeWeerth's claim of

'extraordinary circumstances' was not sufficient to undermine the finality concerns of the federal court system."[lxv]

(D) Statutes of Limitations and Equitable Estoppel

(i) *Guggenheim*[lxvi]

The case that excited DeWeerth and sent her back to the courts with a final, futile attempt to retrieve her Monet was one in which the Guggenheim Museum sued a private collector for the return of a Chagall gouache. Most likely, an employee of the Guggenheim who had worked in the mailroom had stolen the Chagall. He sold it on consignment via the Robert Elkon Gallery in May of 1967 to the Lubells. The price paid was US$17,000. The Lubells displayed the painting publicly twice, once in 1967 and again in 1981. Both exhibits were at the same gallery where they had purchased the painting.

The Guggenheim had written the painting out of its inventory by deaccession and admitted that it had not notified any law enforcement agency of the theft. The museum justified this omission by maintaining that this was a calculated decision made out of fear of driving the painting underground. The only reason that the painting was ever discovered was by pure chance. A former employee of the Guggenheim had been employed at Sotheby's auction house when a transparency of the painting had been brought in. Mrs. Lubell, recently widowed, had been considering selling the painting, but the Sotheby's employee contacted the Guggenheim who demanded either the painting or its market value of US$200,000.

Mrs. Lubell refused the demand. She raised several defenses in a motion for summary judgment:

1) She cited the relevant statute of limitations for New York, which was three years.
2) She cited *DeWeerth*[lxvii] and its requirement of *due diligence* to be exercised by the claimant.

The Second Circuit accepted this argument and gave summary judgment in favour of Lubell. A due diligence requirement was found for the claimant which had not been met in this case. At the Appellate Division, however, the decision was reversed. The court reinterpreted the criterion of due diligence to require more than a lapse of time. The lack of diligence was more in the area of *laches*[lxviii] or what is generally called equitable estoppel in Canada. Furthermore the failure to act on the part of the museum may have been appropriate under the circumstances. The case was, thus, referred to the New York Court of Appeals.

At the Appellate level the court found that a requirement to exercise proactive due diligence is not a duty of the owner of the artwork for the purposes of the statute of limitations. The court looked at other states that had adopted the *discovery rule*. This is the idea that the time begins to run for purposes of statutes of limitations at the time that the object was, or should have been, discovered. The court accepted this tenet only to the limited degree that a claimant, once she has discovered the location of a missing piece, may not unreasonably delay notifying the possessor of the object. This provision is necessary to prevent potential claimants from 'sleeping on their rights' while a valuable object increases in worth.

The court reasoned that a due diligence requirement on the part of the claimant is not viable, as the standard of diligence will vary widely with the value of the object. The

court took an unexpected turn, however, and found a duty of due diligence on the part of the good faith purchaser to make reasonable efforts to research the provenance of a work before purchase. If such diligence is documented and proven then the good faith purchaser may rely on the equitable doctrine of *laches* as an estoppel to a claim against her.

This is a problematic judgment. The equitable relief of *laches* is not as heavy a bar to a claim as a statute of limitations would be. This means that this case still leaves a thief to be protected by limitations periods, but a good faith purchaser is not. Purchasers may be forced, after an indeterminate amount of time, to prove that they exercised reasonable diligence and that a claim against them is barred. This means that a thief of a piece would be spared the expense and effort of a trial that would befall a *bona fide* purchaser of the very same piece.

Hans Kennon comments:

> "Equity should not be a consolation prize to law. The Lubells displayed the Chagall twice over a fifteen year time span and made no efforts to hide their ownership. The Guggenheim's board agreed to deaccession of the artwork in 1974, without even a search or a police report. These are hardly the facts that the court should use to show the wisdom of its decision. The court has decided that a thief will achieve repose within the statutory period, but the good faith purchaser will have a strong possibility of never achieving repose."[lxix]

(E) The Solomonic Approach

i) Goldberg[lxx]

The *Goldberg*[lxxi] case seems to seek a balance between *DeWeerth*[lxxii] and *Guggenheim.*[lxxiii] Goldberg was an art dealer in Indiana. She had acquired four mosaics of great significance to the Cypriot Greek-Orthodox Church that were removed from

Cyprus and brought to Germany during a war between the Greeks and the Turks in the 1970s.

The Greeks, from the South, are of the Greek-Orthodox faith and hold a reverence for Christian art. The Turks, who reside in the North, are Muslim and have no particular regard for Christian art. In the midst of this civil war, those who had no reverence for it pillaged valuable and revered cultural property. Much of this property was displaced including the four mosaics, which ended up in the possession of Peg Goldberg.

Goldberg had purchased the mosaics in the Netherlands in 1988. She had arranged to purchase the pieces and then arranged for money to be forwarded to her to facilitate this transaction. While waiting for this money and prior to acquiring the pieces she contacted UNESCO's office in Geneva to inquire about any treaties that would have prevented the removal of the pieces from northern Cyprus to Germany in the relevant time period of the 1970s. She also maintained, although this contention is uncorroborated and contentious, that she had contacted a friend at IFAR[lxxiv] and had him search the mosaics. This claim is very questionable, as such a search requires a fee and neither Goldberg nor IFAR have any record of such a fee having been paid.

The Cypriot Church had been very proactive and diligent in its efforts to locate the mosaics. It was as a result of these efforts that they did, in fact, find the pieces in Goldberg's possession.

In the final judgment the court found a due diligence requirement for the claimant. It was determined that the Cypriot Church had fulfilled this requirement. The court commented that although Goldberg might argue that greater steps could have been taken,

the court was satisfied that the Cypriot Church took "reasonable steps" befitting the circumstances.

The court went on to examine the conduct of the *bona fide* purchaser, Peg Goldberg. They held that:

> "Especially when circumstances are as suspicious as those that faced Peg Goldberg, prospective purchasers would do best to do more than make a few last minute phone calls. … In such cases, dealers can (and probably should) take steps such as a formal IFAR search; a documented authenticity check by disinterested parties; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like."[lxxv]

The court, thus, found a duty of due diligence on the part of the *bona fide* purchaser. Further, the judgment seemed to insinuate that Goldberg did not come to the court with 'clean hands' and was thus not in a position to seek equitable relief.

This approach seems to be the fairest yet as it attempts to strike a balance between the rights of a claimant and those of a genuine *bona fide* purchaser for value. A due diligence requirement was found for both parties to such an action.

One question that arises upon examining this case, however, is the lengths to which a party must go to exercise due diligence. The court gives a description and a list of means in its reproach of Goldberg's lackadaisical investigation into the mosaics.[lxxvi] This list included traditional modes of searching as well as the more modern IFAR search.

As more mechanisms are implemented which allow for a more thorough search of a piece's provenance, will the court demand greater and greater degrees of stringency in the search conducted to satisfy the due diligence requirement? What should a potential purchaser do if a search reveals nothing about a piece's provenance?

(F) Due Diligence: An Uncertain Tenet

(i) When No Information is Available

If a duty of due diligence is imposed on the purchaser of a work, it is difficult to hold with any degree of certainty when such a duty has been carried out. When the piece that is being researched may have come to market by illegitimate means from Nazi Europe, it may be impossible for a potential purchaser to acquire any reasonable information about its provenance.

The Director of the Museum of Modern Art in New York City explains:

> "A half-century later, the challenge of sifting through successive layers of ownership is enormously complex. There is no comprehensive list of art stolen by the Nazis to which museums can refer. Until the last few years, many of the documents regarding the Nazi misappropriation of cultural treasures were simply unavailable. Locked away in archives, sometimes behind the Iron Curtain, the records that survived the war were not accessible to scholars, art historians, or heirs of Holocaust victims. "[lxxvii]

If a potential purchaser makes a reasonable attempt to provenance a suspicious work but learns nothing, or the result is a history with unexplained gaps, a conundrum arises. Due to the convoluted history of these pieces, information can be uncovered at any time. If the individual who has made an inconclusive search makes a decision to procure a piece, it is not possible to say with any certainty that she is secure against claims in the future.

As more information is uncovered about the piece, a claimant can surface who could not have reasonably known the whereabouts of the piece before. For this reason, "Even if the dealer is able to track the provenance of a painting to a reasonably certain degree; the slightest break in the chain of title could make the proposed sale fail or expose the dealer to liability for breach of warranty of quiet title."[lxxviii] This leaves the

purchaser or dealer of an unprovenanced or incompletely provenanced work in a precarious position, even after exercising a great deal of diligence.

(ii) Cyberspace: A New Factor for Due Diligence

Apart from a lack of information on a particular work, problems abound as the modern era has brought a flood of information into our midst. The Internet has provided society with the ability to access vast amounts of information in a matter of seconds. Cyberspace is awash with sites ranging in topics from, '*what is Jennifer doing right now?*'[lxxix] to, stolen cultural property[lxxx].

Will an Internet search be requisite for due diligence when searching unprovenanced art? Based on the decision in *Goldberg*[lxxxi] with its list of ways in which a duty of due diligence can be exercised in such a case it appears likely. The judgment gave a list of means by which individuals should search a work's provenance but that list did not, by any means, appear to be exhaustive.

On the surface one would imagine that the Internet would provide a solution to problems of unprovenanced art. As such a great deal of information is on the Internet, a work reported stolen should be simple to pinpoint. This, however, is not currently the case. The lack of organization inherent to the Internet has made searches for stolen art somewhat of a hit-and-miss operation.

"There are literally hundreds of web sites dealing with stolen art and antiquities. This leaves true owners with no efficient way to look for their stolen artwork, and legitimate sellers and good-faith purchasers have no efficient way to discover if the work they want to purchase has been reported as stolen."[lxxxii] If an Internet search is deemed a requirement in carrying out one's duty of due diligence, this could be problematic for an

individual who simply could not find the piece despite its posting on the Internet. That individual could be found in court to have not exercised due diligence, although every effort was made.

(G) Court Does Not Favour *Adverse Possession*

The common law has interpreted statutes of limitation for actions in replevin in terms of the doctrine of *adverse possession*. It is a means of dispossessing a true owner of her property through an open and continuous possession of that property. An individual may initially be a 'squatter' on a piece of land, but the doctrine of adverse possession can eventually give this person good title to that land.

"The doctrine of adverse possession thus operates to transfer property to one who is initially a trespasser if the trespasser's presence is open to everyone, lasts continuously for a given period of time, and if the title owner takes no action to get rid of him during that time."[lxxxiii]

(i) *O'Keeffe*[lxxxiv]

Georgia O'Keeffe had created several paintings that were housed at her husband's New York gallery in the early 1940s. The paintings were stolen from the gallery. Neither Georgia O'Keeffe nor her husband reported the theft. In 1972, while attempting to settle her late husband's estate, O'Keeffe reported the missing paintings to the Art Dealers Association of America, which kept a registry of stolen artwork. In 1975 O'Keeffe learned that her paintings were being sold on consignment in another New York gallery. The individual who had put the paintings up for sale was Ulrich Frank.

Frank, via the gallery, managed to sell the paintings to a Princeton, New Jersey gallery owner named Barry Snyder in 1976. O'Keeffe sent a letter to Snyder demanding

the return of her property. Snyder refused this demand. O'Keeffe initiated an action in replevin against Snyder.

Frank argued that his father, and then he, had owned the paintings since 1941. (This was in contradiction to O'Keeffe's contention that the paintings had hung in her husband's gallery until 1946.) Frank maintained that this amounted to continuous possession of the paintings for over thirty years. He admitted to selling the paintings to Snyder, who was a *bona fide* purchaser for value.

The case made its way up to the Supreme Court of New Jersey. The issue on appeal at that level was whether the New Jersey six year period for the statute of limitations for a replevin action had expired.

The plaintiff argued that the *discovery rule* should apply. This is the tenet that no cause of action accrues until the claimant discovers or should have discovered the location of her property. The court agreed that the *discovery rule* should apply in replevin actions under New Jersey law.

The court also addressed the doctrine of adverse possession. It overturned the settled case law[lxxxv] that allowed the use of this doctrine in replevin actions. The court found that it is not suitable to apply this doctrine to such actions. This especially applies in cases of stolen art, as it would not be reasonable to expect open and notorious possession of such chattels. Possessors of such items should be entitled to enjoy them in the privacy of their own homes.

The court ruled, therefore, that adverse possession should be usurped by the discovery rule. This different perspective on the situation shifted responsibility from the possessor of the property to the original owner. The conduct of the original owner is

examined to determine if reasonable efforts were made to pursue and retrieve her chattel. If such legitimate efforts were made, then she retains good title. The court also found that a would-be purchaser of a work does have a responsibility to research that piece's provenance. This effort is also considered in such an action.

The court was somewhat vague in its description of 'reasonable efforts' of an owner of property in her attempts to retrieve it. The court required simply an approach based on common sense. "The meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property. For example, with respect to jewelry *(sic)* of moderate value, it may be sufficient if the owner reports the theft to police. With respect to art work of greater value, it may be reasonable to expect an owner to do more."[lxxxvi]

The final issue examined by this court was the matter of multiple transfers of property from purchaser to purchaser. It was at issue whether the time period, as it pertains to limitations periods, should be renewed with each transfer. The court held that the loss of the property was one occurrence. This single incident of loss is not divisible into separate acts of possession by different possessors. This, however, should be of no concern to an original owner exercising due diligence to search for her property. This is not her concern because, as long as she remains duly vigilant in her search, she retains good title to her chattel.

(V) Conclusion and Recommendations

As is apparent many claims have arisen to art lost during WWII. It is also apparent that these claims are continuing to arise. Their numbers are more likely to increase than decrease as time passes and more lost cultural property resurfaces.

The nature of the history of these losses makes modern claims inherently difficult to prove. The atrocious and humiliating circumstances under which this property was misappropriated make claims today both difficult as well as worthy of a reciprocal degree of sensitivity. The reversion of the Nazis to a Draconian era when 'the spoils went to the victors' created injustices that require a concerted, integrated, international effort to rectify.

The international responsibility to remedy this situation proves even more pronounced due to recognition of the exacerbation of this problem by various governments and art dealers throughout the world during and after the war. Further, there was insult added to injury as Allied soldiers contributed to this problem via acts of personal pillage and smuggling.

International conventions have traditionally been ineffective at regulating the movement of illegally relocated cultural property. Further, such international statutes lack effective schemas for enforcement. Domestic legal remedies as they exist in the Anglo-American common law system are also inadequate. The prevailing situation has made payment of 'ransom' for the return of this property preferable to adjudicating the case.

Domestic attempts at implementing international conventions have only resulted in sporadic satisfaction for claimants of lost art and antiquities. These statutes tend to be based on deterrence rather than restitution. When such measures do serve to facilitate the return of stolen property, this result is anomalous. Additionally, these laws are in the realm of public international law. They often require the intervention of foreign governments on behalf of their nationals, as these remedies are not available to private

individuals. The procedures that exist also tend to be costly and prohibitively expensive for many claimants.

Civil litigation measures such as American replevin actions are also riddled with uncertainty. An examination of such actions in the U.S.A., where they have arisen with the greatest frequency, reveals an inadequate system. Choices of which legal system to apply present complications. Statutes of limitations present potential bars to such suits.

An ill-defined criterion of due diligence adds further uncertainty. This is exacerbated as this 'standard' is sometimes applied to the claimant, sometimes to the defendant, sometimes to both, and occasionally to neither. This loosely defined standard of due diligence also has the potential to evolve as the world's technological infrastructure develops with an unprecedented rapidity.

Equitable estoppel or *laches* has occasionally been applied as an attempt to inject a remedy in equity to the situation. This practice has only served to cause an aberration in law wherein the system is more favourable to a thief of cultural property than to a *bona fide purchaser for value* of such a piece.

The discovery rule has been applied to some actions. This test for the accrual of a cause of action leads to perpetual uncertainty for good faith purchasers of cultural property. These individuals must be concerned with the smallest break in the known provenance of their pieces. The application of the discovery rule amounts to the potential for claims to arise against good faith purchasers or their heirs forever. Some definitive application of a rule for the accrual of such actions is needed in order to offer these innocent parties eventual repose.

Evidently the current measures in place are inadequate to resolve this highly sensitive and widespread problem. A solution to this dilemma would necessarily involve an international cooperative effort. This effort must incorporate:

1) international norms pertaining to cultural property lost during WWII
2) an international adjudicative body to rule specifically on these matters with viable and effective enforcement procedures
3) a consolidated Internet-based registration system for such property
4) a fund to alleviate the costs to parties to such actions, such as the compensation of *bona fide purchasers for value*, constituted of monies paid to this adjudicative body by member nations
5) a clear delineation of concepts such as 'due diligence' and tests for the accrual of actions

Traditionally international adjudicative bodies have not been successful when they have been put into place. The international community has discussed the potential for an International Criminal Court since time immemorial with no success. This has been a result of different standards and values around the world. Domestic political situations have also been barriers to international cooperation. Different nations also tend to bring ideological disputes to such international attempts at cooperation due to different legal systems, political systems, and economic systems. There is the further complication of countries that have traditionally displayed a mistrust of the international community such as China and Latin American nations who tend to opt out of such attempts.

The situation is not hopeless, however. Certain international tribunals have had limited success at dealing with specific issues. The *International War Crimes Tribunal*

for Former Yugoslavia is currently demonstrating this. The fact is that the situation is serious and deserving of international attention. Innocent people have been and continue to be victimized. Neither current international nor domestic law is equipped to rectify this problem. The only solution is an internationally cooperative attempt to balance the rights of claimants against the rights of modern day possessors of misappropriated cultural property. Complications of implementing such measures are many, but the Law has never shied away from a problem simply because it is complicated and it would be an embarrassment to the Law and the international community if such a passive attitude were adopted in this case.

Appendix A

Pricing for Art Sold by the Commission for the Exploitation of Degenerate Art[1]

M. Beckmann	- *Southern Coast*	$20
	- *Portrait*	SFr 1
W. Gilles	- 5 Watercolours	$.20 each
W. Kandinsky	- *Ruhe*	$100
E. Kirchener	- Strassenzene	$160
P. Klee	- *Das Volkatch der*	$300

[1]*Nicholas*, p. 24.

Sängerin Rosa
Silber

Lehmbruck - *Kneeling Woman* $10

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[ii] "Art with a dubious past" T*he Irish Times*, August 14, 1998.
[iii] Ibid.
[iv] Michael Shapiro, "B'nai B'rith helping survivors recover looted artwork," *Washington Jewish Week*, September 26, 1997.
[v] Lynn H. Nicholas, *The Rape of Europa* (New York: Vintage Books, 1994) at pp. 7-24. [hereinafter *Nicholas*]
[vi] *Nicholas*, p.11.
[vii] Cited in B. Hinz, *Art in the Third Reich* (New York, 1979) p. 49.
[viii] *Nicholas*, p.13.
[ix] Id., p.21.
[x] Id.
[xi] Id.
[xii] The term "German" was interpreted very broadly as, for instance, Viking ships were interspersed with pieces by German artists.
[xiii] Kenneth D. Alford, *The Spoils of World War II: The American Military's Role in Stealing Europe's Treasures* (New York: Carol Publishing, 1994) p. 278. [hereinafter *Alford*]
[xiv] For an examination of the modern approach to war booty see: M. M. Mastroberardino "The Last Prisoners of World War II" (1997) 9 Pace Int'l L. Rev. 315.
[xv] *Nicholas*, p. 37.
[xvi] For an example of the prices of some of these pieces, see Appendix A.
[xvii] *Nicholas*, p. 25.
[xviii] *Alford*, p.278.
xix Robert E. Madden, "Steps To Take When Stolen Art Work Is Found In An Estate", *Estate Planning*, Volume 24, Number 10, December, 1997 (Electronic Version Copyright (c) 1997 Warren Gorham & Lamont).
[xx] *Nicholas*, p.356.
[xxi] H. Kennon, "Take a Picture, It May Last Longer If Guggenheim Becomes The Law of the Land" (1996) 8 St. Thomas Law Rev. at Sec. II(A). [hereinafter *Kennon*]
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[xxiii] *Kennon* at Sec. II(A).

[xxiv] *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, May 14, 1954, 249 U.N.T.S. 215 [hereinafter *Hague Convention*].
[xxv] Id. at Preamble.
[xxvi] Id. at Art. 4.
[xxvii] Id. at Art. 7.
[xxviii] *Kennon* at Sec. III(A).
[xxix] 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (1971) 10 Int. Legal Mats. 289. [hereinafter *UNESCO Convention*]
[xxx] Id. at Art. 3.
[xxxi] *UNESCO Convention* at Art. 7(a).
[xxxii] Canada has responded to this duty with the *Cultural Property Export and Import Act,* R.S.C. 1985, c. C-51. The United States of America has responded with the *National Stolen Property Act*, 18 U.S.C. ss. 2314 -15 (1994).
[xxxiii] *UNESCO Convention* at Art. 7(b).
[xxxiv] See note xxxii.
[xxxv] See note xxxii.
[xxxvi] In practice, this procedure is usually unnecessary as the objects are almost always returned forthwith.
[xxxvii] The costs of returning the objects must be borne by the country requesting that the objects be returned. This can present problems if the object is found in the possession of a *bona fide purchaser for value without notice*. In such a case, that individual is entitled to be compensated for the price they paid for the stolen object. Sometimes the requesting country cannot afford this cost. Some argue that this provision is prejudicial as it could require countries to pay inflated New York City Art Market prices for the return of their own property. Thus far, in Canada, this has not been an issue as this legislation has almost invariably been applied against dishonest smugglers, rather than *bona fide purchasers*.
[xxxviii] See note xxxii.
[xxxix] See note xxxii.
[xl] See note xxxii.
[xli] For a definition of this term see: *Black's Law Dictionary,* 6th ed. (St. Paul: West Publishing Co., 1991) at 936.
[xlii] *United States* v. *Hollinshead* 495 F.2d 1154 (9th Cir.1974).
[xliii] See note xxxii.
[xliv] See Note xlii.
[xlv] *Kennon* at Sec. III(C).
[xlvi] *McClain II*, 593 F.2d at 671.
[xlvii] See Note xlii.
[xlviii] See note xxxii.
[xlix] See note xlvi.
[l] See note xxxii.
[li] *Kennon* at Sec. III(C).
[lii] *Tolofson* v. *Jensen* [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110.
[liii] 'law of the forum'.
[liv] 'law of the locale of the property'.
[lv] 'law of the place where the act occurred'.
[lvi] 'law of the state with the most contacts to the object'.
[lvii] *Kunstsammlungen zu Weimar* v. *Elicofon* 678 F.2d 1150 (2d Cir. 1982).
[lviii] See Note lvii.
[lix] For an understanding of the rule of 'Demand and Refusal' see: *Menzel* v. *List* 253 N.Y.S. 2d 43; 267 N.Y.S. 3d 804 (1969); (aff'd) 298 N.Y.S. 2d 979.
[lx] *General Stencils Inc*. v. *Chiappa* 219 N.E.2d 169 (N.Y.1966).
[lxi] *DeWeerth* v. *Baldinger* 836 F.2d 103 (2d Cir.1987), cert. denied, 486 U.S. 1056 (1988), on remand, 804 F.Supp. 539 (S.D.N.Y.1992), rev'd, 38 F.3d 1266 (2d Cir.1994).
[lxii] See note lxi.
[lxiii] Claude Monet: Bibliographie et Catalogue Raisonne.

[lxiv] *Solomon R. Guggenheim Foundation* v. *Lubell* 569 N.E.2d 426 (1991).
[lxv] *Kennon* at Sec. IV(A).
[lxvi] See Note lxiv.
[lxvii] See Note lxi.
[lxviii] For a definition of this term see: *Black's Law Dictionary,* 6th ed. (St. Paul: West Publishing Co., 1991) at 606.
[lxix] *Kennon* at Sec. IV(B).
[lxx] *Autocephalous Greek Orthodox Church of Cyprus* v. *Goldberg and Feldman Fine Arts, Inc.* 917 F. 2d 278 (U.S.C.A. 7th Circ. 1990). [hereinafter Goldberg]
[lxxi] Id.
[lxxii] See Note lxi.
[lxxiii] See Note lxvi.
[lxxiv] International Foundation for Art Research: an organization that collects information concerning stolen art.
[lxxv] *Goldberg.*
[lxxvi] See text preceding Note lxxiv.
[lxxvii] G. D. Lowry, Director, Museum of Modern Art, New York, Testimony (Before the House Banking and Financial Services Committee, Washington, February 12, 1998.
[lxxviii] *Kennon* at Sec. VII.
[lxxix] http://www.jennicam.org.
[lxxx] http://www.rcmp-grc.gc.ca/html/interpol.htm, http://odci.gov/cia, http://www.fbi.gov, http://www.open.gov.uk/police/mps/home.htm, http://glyphs.com/moba/.
[lxxxi] See Note lxx.
[lxxxii] L. McFarland-Taylor, "Tracking Stolen Artworks On the Internet: A New Standard For Due Diligence" (1998) 16 J. Marshall J. Computer & Info. L. at 937).
[lxxxiii] C. Rose, "Possession as the Origin of Property" (1985) 52 University Chicago Law Rev. 73 at 78.
[lxxxiv] *O'Keeffe* v. *Snyder* 416 A.2d 862 (N.J.1980). [hereinafter *O'Keeffe*]
[lxxxv] *Redmond* v. *New Jersey Historical Society* 132 N.J.Eq. 464, 474, 28A.2d 189 (E. & A. 1942).
[lxxxvi] *O'Keeffe* at 872,