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Due Diligence in Fine Art Transactions

Linda F. Pinkerton*

I. INTRODUCTION

Terms such as "stolen," "due diligence," "repose," "demand and refusal," and "good faith purchaser," are tossed about without conscious regard by the public, attorneys, and museum curators in a search for the precise meanings and interrelations of these concepts and the need for a uniform set of standards applicable to the transfer of title to works of art and cultural heritage. This article focuses on due diligence and its meaning in the United States as it relates to fine art transactions.1

II. DUE DILIGENCE

Due diligence is required in two situations related to purchases of fine art: 1) the buyer's investigation of suspicious circumstances; and 2) the victim's search for his stolen property. Although common law and statutes in the United States provide that a thief cannot convey good title and therefore not even a good faith purchaser for value can obtain good title to an object purchased from a thief, the statute of limitations cut-

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1 This article does not analyze the various definitions of "stolen" art. The law of a particular country may declare an object illegally excavated or illegally exported to be "stolen." For a particularly thoughtful treatment of this subject, see Merryman, The Retention of Cultural Property, 21 U.C. Davis L. Rev. 477-513 (1988) [hereinafter Merryman, The Retention of Cultural Property]. The law of a particular state in the United States, or of the United States as a whole, may require a different result even with identical facts. For discussion of these issues, see P. Bator, The International Trade in Art 9-18 (1983).

2 This article does not define "cultural property," "cultural patrimony," or "cultural heritage." See L. Prott & P.J. O'Keeffe, National Legal Control of Illicit Traffic in Cultural Property 4-15 (1983) [hereinafter L. Prott & P.J. O'Keeffe, National Legal Control]. The author uses the term "cultural heritage" as an umbrella term for all three. Nor does this article discuss the aspect of diligence related to verifying authenticity of a work of art, which is the subject of a separate paper being prepared by the author.

ting off stale claims and the doctrines of laches and adverse possession have offered effective exceptions to the common law rule. The laws of other countries, if applicable, also offer effective exceptions. As a practical matter, it is possible for a buyer who has been diligent in investigating suspicious circumstances relating to the seller's title to purchase and keep a stolen object unless the true owner locates the object and sues to recover it within the statutory time or shows that he has been duly diligent in investigating its whereabouts.

III. THE VICTIM'S OBLIGATION TO SEARCH FOR STOLEN OBJECTS

An important question which the victim of an art theft will ask is when the statute of limitations for an action to recover stolen art should begin to run. This is one of the most complex questions facing art buyers and sellers. Most jurisdictions in common law countries have enacted statutes of limitation marking the time to file a replevin action. These statutes differ regarding the event which starts the clock and the period of time in which it runs. A victim's diligent search for a stolen object will prevent the cause of action from accruing until the victim locates or should locate, the possessor of the object or the object itself. This operates in slightly different ways depending on the accrual rule of the jurisdiction.

A. Under the Discovery Rule

Most jurisdictions follow the discovery rule; that the cause of action accrues when the plaintiff discovers or should have discovered the facts needed to recover the chattel. In California, the only state to have a statute of limitations specifically governing stolen works of art, the


Note that transfer of title may be by donation as well as by sale. This article speaks of purchase and sale but similar issues are raised in cases involving gifts and possibly loans where possessory rights are in dispute.

4 See infra note 7 and accompanying text.

5 See infra note 109 and accompanying text. In some countries, such as West Germany, even a bad faith buyer can obtain good title from a thief after the passage of enough time. The critical question is, of course, what law governs the transaction.

6 The plaintiff may also sue for damages in a conversion action which may invoke a different statute of limitations but the same defense.

7 Gerstenblith, The Adverse Possession of Personal Property, 37 BUFFALO L. REV. 119, 141-45.

8 CAL. PENAL CODE § 484 (West 1988) defines theft stating:

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile
three-year statute of limitations begins to run upon the discovery of the whereabouts by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft. In Wisconsin, the statute actually specifies when the cause of action accrues as the time of the wrongful detention of the chattel. In Indiana, the site of the recent lawsuit to recover the Kanakaria mosaics, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., ("Kanakaria Mosaics Case") the statute of limitations to recover possession of personal property is six years.

In the Kanakaria Mosaics Case, the court articulated the issues relating to a victim’s diligence in a discovery jurisdiction. The plaintiff church was a private owner of a sixth century A.D. mosaic that was on the wall of an apse in the Church of the Panagia Kanakaria in northern Cyprus. The plaintiff nation, the Republic of Cyprus, was the country in which the Kanakaria Church had been located. Sometime between August 1976 and October 1979, after the Turkish occupation of northern Cyprus in 1974, the church was vandalized. The mosaics in question were removed from the apse and exported from the island.

In July, 1988, an Indianapolis art dealer purchased the mosaics through her business Goldberg & Feldman Fine Arts, Inc. The defendant claimed to have good title to the mosaics when she and her business were sued for replevin by the two plaintiffs who were seeking recovery of the mosaics through a claim of superior title. The court analyzed the defendants’ efforts at considerable length and found that Goldberg had not used adequate diligence to lay to rest doubts about the seller’s ability to convey property rights to the mosaics.

B. Under the Demand and Refusal Rule

The demand and refusal rule is a New York State court-made doctrine applicable to accrual of a replevin action. Although not applica-
ble to artworks alone or New York alone,\textsuperscript{15} the demand and refusal rule has recently spawned considerable jurisprudence on the recovery of stolen artworks because the location of one of the principal art markets in the world is New York, and the demand and refusal rule allows the judiciary to write effective repose legislation where the legislature will not.\textsuperscript{16}

The New York demand and refusal rule provides that the statute of limitations\textsuperscript{17} for recovery of stolen property does not begin to run until a demand has been made by the plaintiff and refused by the holder of the object.\textsuperscript{18} This rule in its pure form permitted plaintiffs to wait until they became aware of the location of a stolen object, however long that might have been.

\textit{Menzel v. List}\textsuperscript{19} is the first important demand and refusal case involving a work of art. In 1932, Mr. and Mrs. Menzel purchased a painting by Chagall which they were forced to leave behind in their home, along with all of their other possessions, when the German army invaded Belgium in 1940.\textsuperscript{20} Mr. and Mrs. Perls, art dealers in New York, purchased the painting in 1955, in Paris, without knowledge of its history. In the same year, the Perls sold the painting to the defendant List. In 1962 Mrs. Menzel noticed a reproduction of the painting in a book. She demanded that Mr. List return the painting to her. He refused and she sued in replevin.\textsuperscript{21} A jury awarded the painting to Mrs. Menzel and its value to Mr. List. The gallery was compelled to pay Mr. List the value of the painting plus costs in the litigation based upon the implied warranty of title.\textsuperscript{22}

On appeal, the jury verdict was upheld on a motion to set the verdict aside. The court concluded that the painting was plundered by the Nazis, not abandoned by the plaintiff. Therefore the seller could not have acquired good title from the thief.\textsuperscript{23} Diligence on the part of the victim was scarcely an issue.

After the New York Court of Appeals decided \textit{Menzel v. List}\textsuperscript{24} giving the demand and refusal rule clear applicability to cases involving stolen artworks, many years elapsed before the issue surfaced again. This

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} N.Y. Civ. Prac. L. & R. § 214(3) specifies that the statute runs three years from the date of accrual.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 742-43, 24 N.Y.2d at 92, 298 N.Y.S.2d at 980.
\textsuperscript{21} Id.
\textsuperscript{22} Menzel, 49 Misc. 2d at 516, 267 N.Y.S.2d at 819-20.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
time the issue came up in federal court in 1982. The Second Circuit Court of Appeals again gave strict meaning to the demand and refusal rule and to the rule that good title cannot be obtained from a thief in Kunstsammlungen zu Weimar v. Elicofon. This affirmed the decision of the federal district court for the Eastern District of New York. The court ordered Mr. Elicofon to return the two portraits painted by Albrecht Durer to East Germany. Mr. Elicofon had purchased both Durer paintings in 1946 from an American serviceman in Brooklyn. For twenty years thereafter, the paintings hung in Mr. Elicofon's house until, in 1966, he learned that they were by Durer and that they had been listed as stolen during World War II. When an article announcing the discovery appeared on the front page of The New York Times, the East German museum where the paintings had hung and the disenfranchised grand duchess who claimed the paintings made their demands, which Mr. Elicofon refused. The first lawsuit was filed against Mr. Elicofon in 1969, the year of the Menzel v. List decision.

In affirming the trial court's decision in the Kunstsammlungen zu Weimar v. Elicofon case, the Court of Appeals noted, but did not discuss, the fact that the East German museum had immediately reported the theft and thereafter engaged in diligent efforts to locate the paintings. The court did not discuss how long or how continuously the museum endeavored to locate the paintings over the twenty years that they were missing, but stated that "[t]he efforts included contacting various German museums and administrative organs, the Allied Control Council, the Soviet Military Administration, the United States Department of State, and the Fogg and Germanic museums at Harvard." Five years after the decision in Kunstsammlungen zu Weimar v. Elicofon and one year after Governor Cuomo vetoed the New York repose bill, the Second Circuit Court of Appeals significantly revised its approach to the demand and refusal rule in another important case involving stolen art, DeWeerth v. Baldinger. In that case the Court of Appeals stated that "an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property." In DeWeerth v. Baldinger, the plaintiff lost a painting by Claude Monet which she claimed to have inherited from her father. In 1943, the

25 678 F.2d 1150 (2d Cir. 1982).
26 The district court had awarded summary judgments against the defendant Elicofon and the intervenor-plaintiff Grand Duchess of Saxony-Weimar. Id. at 1150.
27 Id. at 1156.
28 See infra notes 66-68 and accompanying text.
30 Id at 110.
plaintiff's sister stored the painting in Germany in a house subsequently occupied by American armed forces. Shortly after the occupation period, plaintiff's sister discovered that the painting was missing. The plaintiff's interrupted efforts to locate the painting were the death of her claim to recover it when she finally learned that it had been exhibited by a New York art gallery. The possessor of the painting, defendant Baldinger, was a good faith purchaser for value who bought the painting in 1957. Holding that the plaintiff did not exercise due diligence in locating the whereabouts of the painting and the name of the possessor, the Second Circuit Court of Appeals reached the opposite result from that in the Menzel v. List and Kunstsammlungen zu Weimar v. Elicofon cases, and allowed the defendant to retain the painting.31

DeWeerth v. Baldinger is an extremely important case because it shows the reaction of the New York judiciary to the failure of the New York state legislature and the United States Congress to enact repose legislation. This case may be self-protective judicial action to prevent a flood of litigation filed in New York courts to recover allegedly stolen and increasingly valuable works of art. In addition, it may be a step to protect the increasingly lucrative New York art market. The Second Circuit relied heavily on its interpretation of state law in holding that a victim of an art theft must search diligently, including continuously, for the missing object in order to be able to toll the statute of limitations.32

The court in DeWeerth v. Baldinger, which considered all the circumstances, including the relative sophistication of the plaintiff, said that it was more influenced by the steps omitted by the plaintiff than by those she took toward recovering the stolen painting: She failed to "make any effort to take advantage of several mechanisms specifically set up to locate art lost during World War II, . . . a program initiated by the allied forces in Europe to handle works of art looted during the war . . . [or a] program . . . run by the United States Department of State, which engaged in its own independent effort to locate stolen art."33 The court, comparing the plaintiff's search with that of the plaintiff in Kunstsammlungen zu Weimar v. Elicofon, noted that DeWeerth failed to search for 24 years, from 1957 until 1981, and that even a minimal effort during that time would probably have found the painting.34

Most recently, in Guggenheim Foundation v. Lubell,35 Judge Fingerhood began her brief opinion with the words "More than twenty years ago." Defendants Mr. and Mrs. Lubell had purchased a painting

31 Id. at 111-12.
32 Id. at 111.
33 Id.
34 Id. at 112.
by Marc Chagall from a reputable art dealer in 1967.\textsuperscript{36} In 1986, Mrs. Lubell was informed that the Guggenheim Museum in New York City owned the painting and wished her to return it to the institution. She refused, thereby commencing at least one theoretical statute of limitations under strict application of the demand and refusal rule. The judge, however, following the decision in \textit{De Weerth v. Baldinger}, ruled in favor of the defendant because the court found that the Museum had failed to exercise due diligence in locating the painting. The \textit{Guggenheim} court failed to decide how much diligence is enough by stating that "whether a party has acted with due diligence may be a question of law for the court to decide (citations omitted). In this case, the facts are undisputed: plaintiff did nothing for twenty years except search its premises . . . ."\textsuperscript{37}

The court cited \textit{Kunstsammlungen zu Weimar v. Elicofon} in stating that "[t]he diligence required increases with the value of the lost property. If, as in the present case, the property is art work by a famous painter, with substantial value, a major search effort may reasonably be expected."\textsuperscript{38} In conclusion, but without discussion, Judge Fingerhood held that the Guggenheim Museum’s right to sue for recovery of the painting accrued in 1973 when the painting was exhibited in public for the second time.\textsuperscript{39}

Therefore, from \textit{Guggenheim} we learn very little more about New York’s view under state law than the \textit{De Weerth} court offered about the amount of diligence required of a theft victim. The decision of Judge Fingerhood currently is on appeal,\textsuperscript{40} however, making it possible for the New York appellate courts to restate, or apply differently, their own rule which the federal courts in New York have been interpreting since \textit{Menzel v. List} was decided twenty years ago.

In summation, one can say that the New York line of cases has evolved to consider due diligence prior to a demand for return of a stolen work of art possibly to be a question of law, which is to be decided by examining all the facts, de novo if necessary; that the victim bears the burden of showing an immediate and continuous search, in accessible places, particularly if the victim is a wealthy and sophisticated art collector and even if someone else must be hired to conduct the search; and that the level of the search required increases with the value of the object.

\section{Diligent Searching}

The demand and refusal rule decisions are not inconsistent with the discovery rule opinions. The latter have gone farther in noting that mul-

\begin{footnotesize}
\begin{enumerate}
\item[36] Id.
\item[37] Id.
\item[38] Id.
\item[39] Id.
\item[40] Id.
\end{enumerate}
\end{footnotesize}
tiple transfers of the object might be a mitigating factor in measuring the victim's diligence. This has been accomplished by the court focusing on the conduct of the victim rather than that of the possessor of the object and in listing the actions that failed to meet the burden of proving diligence.

An important case on this point is *O'Keeffe v. Snyder*.\(^4\) In this decision the New Jersey Supreme Court adopted the discovery rule to begin the running of the six-year statute of limitations at the time the victim, painter Georgia O'Keeffe, knew or should have known, through the exercise of due diligence, of the existence of the cause of action including the identity of the possessor of two stolen paintings by O'Keeffe.\(^2\) Having concluded that O'Keeffe's lawsuit might not be timely, the court never reached the question of whether she had in fact exercised adequate diligence in locating the objects or their possessor because it remanded the case to the trial court for those determinations and the case was settled before they were made.

The court, in an activist posture, said that the problem of art theft is "serious" and that although there are "no reasonable means readily available to a purchaser to ascertain the provenance of a painting," it was probably time for the art world to develop a system of registration of original works of art to protect good faith purchasers.\(^3\) The court went so far as to state, "Although we cannot mandate the initiation of a registration system, we can develop a rule for the commencement and running of the statute of limitations that is more responsive to the needs of the art world than the doctrine of adverse possession."\(^4\)

The *O'Keeffe* court offered several comments concerning the steps a party to an art transaction and the victim of an art theft should take stating, "[a] purchaser from a private party would be well-advised to inquire whether a work of art has been reported as lost or stolen."\(^5\) More importantly, in rejecting the concept that each change of hands among

\(^{41}\) 83 N.J. 478, 416 A.2d 862 (1980).

\(^{42}\) P. Franzese, "Georgia on my Mind"—Reflections on *O'Keeffe v. Snyder*, 19 SETON HALL L. REV. 1 (1989). *O'Keeffe* initially focused on adverse possession as the defense; the court considered at length the essentials in such a cause of action to recover personal property but expressly overruled two previous cases "to the extent that they [held] that the doctrine of adverse possession applies to chattels." *O'Keeffe*, 83 N.J. at 478, at 499, 416 A.2d at 871-72.

\(^{43}\) *O'Keeffe*, 83 N.J. at 497, 416 A.2d at 869. As of this writing, an effort to develop an international registry of stolen art is under way in England. No such registry is practical for works of art in general. See infra note 68 and accompanying text.

\(^{44}\) *Id.* On the application of the doctrine of adverse possession to personal property, see Gerstenblith, *supra* note 7. Gerstenblith's thesis is that "the good faith and reasonable reliance of the adverse possessor is the most significant extra statutory element required to establish adverse possession of personal property." *Id.* at 124.

\(^{45}\) *Id.* at 498-99, 416 A.2d at 873.
buyers starts a new statute of limitations running against the victim, the court stated:

For the purpose of evaluating the due diligence of an owner, the dispossession of his chattel is a continuum not susceptible to separation into distinct acts. Nonetheless, subsequent transfers of the chattel may affect the degree of difficulty encountered by a diligent owner seeking to recover his goods. To that extent, subsequent transfers and their potential for frustrating diligence are relevant in applying the discovery rule. . . . [A]n owner who sleeps on his rights may be denied the benefit of the discovery rule although the chattel may have been possessed by only one person.\textsuperscript{46}

The Kanakaria Mosaics Case is more recent and useful to victims than \textit{O'Keeffe}. The Indiana federal court cited \textit{O'Keeffe} in concluding that analysis must be made on a case-by-case basis,\textsuperscript{47} and that the plaintiff church and nation had been duly diligent.\textsuperscript{48} The court noted that from the time they first learned that the mosaics had been removed from the church, the plaintiff, Republic of Cyprus, "engaged in an organized and systematic effort to notify those who might assist them and to seek the return of the mosaics."\textsuperscript{49}

In a detailed review of the testimony in the case, the court recited how Cyprus had contacted the United Nations, UNESCO, museums, museum organizations, leading Byzantine scholars, curators, and the press about the missing mosaics. In fact, one of those efforts lead to the discovery of the whereabouts of the mosaics in late 1988.\textsuperscript{50} The court also took note of testimony to the effect that Cyprus had been exemplary in its diligence.\textsuperscript{51}

Equally instructive was the court's rejection of the defendant's arguments that the plaintiffs should have learned the whereabouts of the mosaics sooner than 1988. Peg Goldberg argued that the June 1982 appearance of a headline and article in a Turkish newspaper reporting that a certain person had been arrested for smuggling antique artifacts should have caused the plaintiffs to find the mosaics.\textsuperscript{52} The court found that the article, which concerned the loss of cultural property in general from

\textsuperscript{46} Id. at 502, 416 A.2d at 874.
\textsuperscript{47} Kanakaria Mosaics Case, 717 F. Supp. at 1389.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 1389. Dr. Marion True, Curator of Antiquities of The J. Paul Getty Museum in Malibu, California, had been informed by Cyprus of its interest in recovering works taken during the Turkish occupation of northern Cyprus. When the mosaics were offered to The Getty Museum, Dr. True reported this information and the names of the vendors to Cyprus. Cyprus learned of the defendant's name in early 1989.
\textsuperscript{51} Id. at 1390.
\textsuperscript{52} Id.
churches and museums on Cyprus, included one paragraph linking that person by implication to the theft of church icons from another location, and that a separate part of the article discussed the mosaics missing from the Kanakaria Church. Goldberg then asserted that Cyprus' recovery of frescoes and portions of the original Kanakaria Church mosaic in 1983 from the Menil Foundation in Texas should have lead to the recovery of the remainder of the mosaics. The court disagreed because Cyprus had asked the obvious persons in possession of the additional pieces of the mosaics, only to be told that additional information was not available. In a particularly interesting configuration of the facts, the intermediaries working with Cyprus and the Menil Foundation refused to reveal to Cyprus' representatives who had possession of the materials being returned to Cyprus because they feared reprisals against remaining artwork and individuals involved in the recovery.

D. Repose

It is arguable that eventually, even a diligent search will not save a victim's claim from the statute of limitations. The principle of repose can be applied to works of art and cultural properties which may have been removed improperly from their countries of origin so that they come to rest in their new locations free from claims of superior title after the lapse of a certain period of time. In other words, the principle of repose may allow for a specific statute of limitations for claims to recover allegedly stolen works of art or cultural property.

Obviously, repose for cultural property is a legal principle at work in art-rich nations, but not yet enacted into any uniform legislation specific to art except in California. The reluctance of legislators to enact such a bar to claims for recovery of stolen artifacts arises mainly out of the fear of being responsible for creating a haven for stolen works of art. Consequently, one might argue, the De Weerth v. Baldinger and Guggenheim Foundation v. Lubell cases represent efforts by the New York judiciary to protect the art market in New York City and the collectors in that jurisdiction by holding to an increasingly higher standard of diligence.

At least two important efforts to pass repose legislation have failed,
one in the United States Congress and the other in the New York State Legislature. Only California has enacted legislation purporting to allow stolen works of art to come to rest after the expiration of the statute of limitations. The proposed federal legislation would have barred any foreign government from bringing an action anywhere in the United States for the recovery of, or to obtain damages related to, any archaeological or ethnological material or article of cultural property which had been in the United States for five years prior to enactment of the law or prior to the filing of the lawsuit. For a “recognized museum, religious or secular monument, or similar institution” the statute of limitations was to be two years if during that time the object was exhibited or published. The statute of limitations was to be five years after the defendant acquired the object if for three of the five years the owner had made its ownership of the object public, or ten years unless the plaintiff could “establish” that the holder acquired the object with actual knowledge that it had been illegally removed from its country of origin, in which case the statute of limitations was to have been two years.

The New York bill provided that the accrual of an action against a museum, gallery or similar institution owned by a governmental entity or nonprofit organization, organized exclusively for artistic, religious, charitable, scientific, literary or educational purposes and having at least one thousand visitors annually, would begin from the time the institution provided notice in a specified manner that it was in possession of the object. The bill would have tolled the running of the three year statute of limitations only when the claimant could “provide evidence” that exercising reasonable diligence, he could not have discovered the whereabouts of the object.

Currently, the case Republic of Turkey v. The Metropolitan Museum of Art, is in federal district court in New York. The court must decide

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60 New York Assembly Bill 11462-A, Siegal, was vetoed by Governor Cuomo on July 26, 1986. The statute, had it become law, would have been titled: An Act to Amend the Civil Practice Law and Rules, in Relation to Recovery of Art Objects.

61 See CAL. CIV. PROC. CODE § 338.3, supra note 9 and accompanying text, pointing out that the California statute does not answer the accrual question. Perhaps it would be more appropriate to state that only Wisconsin has true repose legislation because that state has enacted legislation clearly allowing any stolen chattel to come to rest within six years after the defendant acquires it.


63 Id. at § 2(a). Note that in the same session of the Congress, Senators Moynihan and Dole introduced S. 605 to amend the National Stolen Property Act in response to the United States v. McLain decision, 545 F.2d 988 (5th Cir. 1977), reh’g denied, 551 F.2d 52 (5th Cir. 1977).


65 76 Civ. 8740 (VLB)—S.D.N.Y. In March, 1989, the court took under submission defendant’s motion to dismiss.
whether, in the absence of repose legislation, laches and the statute of limitations will permit The Metropolitan Museum of Art to retain a collection of antiquities the Republic of Turkey claims were illegally removed from that country approximately twenty years ago. The Republic of Turkey claims fraudulent concealment of the objects; the Museum claims that Turkey was well aware of the Museum's ownership.

One author has suggested that repose legislation is ill-advised in that it would severely handicap a sovereign government from bringing suit in the United States to recover illegally exported cultural property. That, however, is precisely the point of repose legislation. Professor Nafziger and others propose an international registry of works of art, which the O'Keeffe court recommended. This author questions the practical applicability of such a system: Who would decide which works of art qualify for registration and who would administer the keeping of such a lengthy list? How, in effect, could such a system differ substantially from the provisions of the United States legislation implementing the 1970 UNESCO Convention which requires nations to explain precisely which sites and monuments are endangered? Would it not be better for buyers to publish promptly and widely the acquisition of works of art?

Neither legislators nor the courts have attempted to establish a uniform standard for accrual of causes of action to recover works of art nor to establish which party must carry the burden of proof of diligence in such an action.

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66 The defendant's motion to dismiss this case may not be decided by the time this article is published. Note, however, that in January Judge Broderick thought the law in DeWeerth v. Baldinger was unfortunate but stated that he was nevertheless bound by it. Judge Broderick wrote the district court opinion which was reversed by the Second Circuit in DeWeerth, 836 F.2d at 103.

67 Nafziger, supra note 56, at 1890.


The United States implementing legislation prohibits import of a stolen artifact "documented as pertaining to the inventory of a museum or religious or secular public monument or similar institution," 19 U.S.C.A. § 2607; "Designated" cultural material, which is designated by the United States after entering into a treaty with a foreign state or takes emergency action pursuant to the implementing law, may not be imported. The United States may enter into such a treaty or temporarily ban jeopardized cultural property from import, however, only after certain strict procedures have been followed including presentation by the foreign state of a statement of the facts requiring certain types of cultural property to be so designated, 19 U.S.C.A. § 2602(a)(3). Although this legislation does not require foreign states to mail to the United States regular lists of important objects, it requires a specific explanation as to specific sites or monuments so as to provide specific and adequate notice of prohibited imports in a list form. See 19 U.S.C.A. § 2604.
E. War and Plunder

Courts in the United States will evaluate the victim's diligence in light of the circumstances. One such fact and circumstance is whether the object was lost in time of, or as a result of, war or insurrection. Although these have not become a special line of cases, such facts are unfortunately common to art replevin cases.

*Menzel v. List* is the first of the important, modern cases involving recovery of a stolen work of art. Also, because of the court's strict application of the demand and refusal rule, *Menzel v. List* is the source of concern on the part of the art dealers and museums which are encouraging the enactment of the repose legislation discussed above. The court's principal concern in this case with the war aspect of the facts was in determining that good title to personal property, plundered in time of war, is not transferred from the original owner from whom the property is stolen.

In *Menzel v. List*, the painting in question was missing from 1941 to 1955 but the victim's diligence was not placed in issue. Had it been an issue, it could be argued that because of war, the plaintiffs, who had lost their home and been involuntarily separated from their possessions, were unable to conduct an effective search for the missing artwork. The plaintiffs might have attempted to distinguish theirs as a war plunder case rather than the more common theft situation. Perhaps the jury did it for her. Reviewing whether the verdict should be set aside on the grounds that the statute of limitations barred the lawsuit, the court simply said that the defense of the statute of limitations was unavailable because the replevin action arose not upon the stealing but upon the defendant's refusal to convey the chattel upon demand.

In *De Weerth v. Baldinger*, the painting had been taken from a family residence during the American occupation of Germany. Because the plaintiff's efforts to recover the painting had been sporadic over the years between its loss in the 1940s and its recovery in the 1980s, the court found that the plaintiff had not exercised due diligence and, therefore,

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72 *Id.*

73 *Id.* at 304, 267 N.Y.S. 2d at 809. On the demand and refusal rule, see *supra* notes 14-18 and accompanying text.
was time barred from recovering the painting.\textsuperscript{74}

\textit{DeWeerth} appears to be the exception to the war and insurrection cases. Other cases involving cultural property plundered during wars and insurrections, as in the case of \textit{Kunstsammlungen zu Weimar v. Elicofon},\textsuperscript{75} involving two paintings by Albrecht Durer, stolen during World War II, appear to excuse the plaintiff’s delay in filing suit. The paintings were returned to their East German home after the good faith purchaser in Brooklyn lost his appeal to the United States Second Circuit Court of Appeals. That court strictly applied the New York demand and refusal rule noting, but placing no significant meaning on, the diligence of the plaintiff to recover the missing paintings. There again one might have claimed that the objects were extremely difficult to locate because of the confusion and redistribution of property following World War II.

In the Kanakaria Mosaics Case, the fact that the mosaics were removed in a time of insurrection and occupation by enemy forces was significant under both the discovery rule analysis and the alternate analysis of fraudulent concealment.\textsuperscript{76} The court pointed out that, after the 1974 Turkish invasion of northern Cyprus, Greek Cypriotes were not allowed into northern Cyprus, that Greek Cypriotes living in northern Cyprus were subjected to cruelty,\textsuperscript{77} and that in 1976 church officials and worshippers were forced to leave the village where the church was located.\textsuperscript{78} Once the plaintiffs learned of the theft of the mosaics, they exercised due diligence in searching for them.\textsuperscript{79}

It seems that war and insurrection have not developed as special grounds for excused delay on the part of a plaintiff seeking recovery of stolen artworks or cultural patrimony, but that they are factors to be considered in the case-by-case analysis of diligence on the part of a victim. Buyers of art objects from nations known to be war torn need to exercise special diligence in making inquiries about provenance and title.

\subsection*{F. The Relative Burdens}

There are two issues related to due diligence in theft and purchase situations that need to be considered in determining where the relative burdens to use diligence lie: as between victim and current holder of a

\textsuperscript{74} \textit{Id.} See supra note 34 and accompanying text.

\textsuperscript{75} 678 F.2d 1150 (2d Cir. 1982). See discussion of the demand and refusal rule \textit{supra} notes 25-27, and accompanying text. According to Stephen Weil, Deputy Director of the Hirshorn Museum in Washington, D.C., the correct statement of the rule should simply be that the Nazi always loses.

\textsuperscript{76} Kanakaria Mosaics Case, 717 F. Supp. at 1385. The court pointed out that the doctrine of fraudulent concealment would and did toll the statute of limitations to the extent that the discovery rule did not apply.

\textsuperscript{77} \textit{Id.} at 1378-79.

\textsuperscript{78} \textit{Id.} at 1380.

\textsuperscript{79} \textit{Id.}
stolen object, the courts require the victim to show diligence, insofar as the plaintiff victim must excuse a delay in filing a lawsuit to recover the object. The buyer must carry the burden of showing diligence in examining the seller's ability to convey good title insofar as the buyer must establish his good faith in suspicious circumstances. In a replevin case over stolen artwork, both delay in filing suit and suspicious circumstances are likely.

Should these issues be analyzed differently depending on whether the victim is a private citizen or an art rich nation? No. If, in examining all the circumstances of the case as in DeWeerth, the court considers the wealth and sophistication of the victim, can any individual be considered more wealthy or sophisticated than an entire nation which claims to be losing its patrimony?

In cases involving the recovery of a stolen work of art, only one decision has discussed the relative burdens on the parties. In O'Keeffe v. Snyder, the New Jersey Supreme Court decided that one benefit of overruling the previous New Jersey case law making adverse possession applicable to chattels was that

[...]he discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property. The court plainly stated as a reason for prohibiting the further use of adverse possession as a theory for recovery of stolen chattels that its decision would shift the burden of proof from the possessor to prove the elements of adverse possession to the claimant owner in order to establish facts allowing them to justify deferring the commencement of the limitations period.

Although no other court has grappled with this issue expressly, it seems clear from the perspective of the DeWeerth and Guggenheim courts that the burden of victim diligence is a heavy one, at least in a demand and refusal jurisdiction where the lawsuit appears to be filed after expiration of the statute of limitations. In the Kanakaria Mosaics Case, although the court did not comment expressly on the weight of the victim's burden of proof, the plaintiff was able to show what the Court found to be a continuous and thorough search for the mosaics.

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80 83 N.J. at 497, 416 A.2d at 862.
81 Id. at 497, 416 A.2d at 862 (1980).
82 Id. at 500, 416 A.2d at 873. See Petrovich, The Recovery of Stolen Art: Of Paintings, Statues and Statutes of Limitations, 27 U.C.L.A. L. Rev. 1122 (1980) for a careful discussion of the difference between the adverse possession theory and the discovery rule.
As the Kanakaria Mosaics Case illustrates,\textsuperscript{83} the question of which party to an art transaction should bear the loss of the work of art or its value becomes a procedural problem\textsuperscript{84} because: 1) every jurisdiction has its own statute of limitations governing adverse possession, duration of warranties, replevin, fraud and recision for mistake; and 2) most art transactions span more than one jurisdiction, thus making it necessary for a court to resolve a conflict of law question before reaching the substantive legal question of whether the burden of being a good faith purchaser was met.\textsuperscript{85}

If the victim of a theft is to be held primarily responsible for finding the object, should the good faith buyer nevertheless be required to check for holders of superior title? In other words, should a good faith purchaser be permitted to purchase an object without bearing the burden of searching title diligently at the time of purchase and searching for possible claimants? Yes, particularly because, as the court stated in \textit{O'Keeffe v. Snyder}, there is no available means of performing a title search on works of art and, as the Kanakaria Mosaics Case court noted under Swiss law, the court will presume good faith unless the plaintiff can show suspicious circumstances.\textsuperscript{86} The good faith of the purchaser should not be so tightly drawn as to require the same level of diligence as that of a victim in satisfying the prerequisites to obtain a tolling of the statute of limitations.

\section*{II. The Buyer's Obligation to Search for Claims Against Title}

In the current art market, art prices are so high\textsuperscript{87} that the primary

\textsuperscript{83} See also \textit{O'Keeffe}, 83 N.J. at 478, 416 A.2d at 868, deciding between New York and New Jersey law.

\textsuperscript{84} Note the importance of The Convention on Contracts for the International Sales of Goods, 834 U.N.T.S. 107 (1964). This Convention first went into effect in 1972 when the minimum number of nations (five) ratified it. In 1980, it was revised. Currently, nineteen countries have signed the Convention and it is in effect in at least eleven of those including China, France, Italy, and the United States (where it went into effect on January 1, 1988). The United Kingdom and Switzerland have not signed. See Garro, \textit{Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods}, 23 \textit{Int'l Law.} 443 (1989). For the countries in which this treaty is in effect, it provides solutions to the choice of law and other questions involved in resolving disputes. Note the provisions of article 44 requiring the buyer to give prompt notice to the seller of a nonconformity in the goods unless the buyer has a "reasonable excuse," and the absence of a definition of "reasonable excuse" or of the time allowed before the need for such an excuse. This convention includes no special provisions for works of art.

\textsuperscript{85} See Petrovich, \textit{supra} note 82 at 1122-58.

\textsuperscript{86} Kanakaria Mosaics Case, 717 F. Supp. at 1394-95.

\textsuperscript{87} A portrait of Cosimo I de Medici painted by Jacopo Pontormo sold at Christies on May 31, 1989 for $35.2 million; Pablo Picasso's self portrait sold for $47.9 million at Sotheby's on May 9, 1989. See also \textit{N.Y. Times Magazine} July 16, 1989 at 3, col. 1, on the high prices being paid for antiquities.
obligation on the part of a buyer to search the title of the object is obviously the duty to protect his own investment to the maximum extent feasible. In real property sales in the United States, title searches and title insurance fill this gap. Because works of art are generally movable personal property, not registered or subject to any public recording system, searching the title of a work of art to be sure it is free of encumbrance is a far more difficult task. Nor does title insurance per se exist for artworks. For purposes of this discussion, the question is how far must the buyer go in order to exercise the diligence required of a good faith purchaser. Being a good faith purchaser is important in the United States because a buyer in good faith can take good title from one who merely has voidable title; because a purchaser not in good faith does not acquire the benefit of the seller's implied warranty of good title; and because in many countries other than the United States and England, a good faith buyer may obtain good title even from a thief.

In order to be a good faith purchaser under the Uniform Commercial Code, a buyer in the United States must exercise honesty in fact in his conduct or in the transaction at issue. For a merchant to be able to claim good faith, the merchant must be honest in fact and observe reasonable commercial standards of fair dealing in the trade. More important for purposes of sales of works of art, because the question of a buyer's good faith is a question of fact, a buyer must make inquiries into the seller's ownership of the goods if the circumstances of the sale are such that the buyer should have done so in order to investigate facts such as an unreasonably low price.

A. Investigating Title

A buyer's good faith is a fact question. As noted above, in the United States, where the Uniform Commercial Code governs the transaction, good faith is defined as "honesty in fact in the conduct or transaction concerned." If the circumstances of the transaction would cause a reasonable and honest buyer to ask questions about title or provenance of a work of art, the particular buyer must do so. Merchants must use "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade" in order to be in good faith.

In Porter v. Wertz, the New York Court of Appeals points out that

90 U.C.C. § 1-201(19)(1989).
92 U.C.C. § 1-201 (19).
93 U.C.C. § 2-103(1)(b).
a merchant seller bears the ultimate burden of investigating the authority of a seller to the merchant to convey good title in order to qualify as receiver of an entrustment under the Uniform Commercial Code and therefore be able to convey good title to a buyer in the ordinary course of business. Likewise, in Taborsky v. Maroney, the court of appeals upheld a district court opinion that art dealers who are buyers of the works of art lose the status of buyers in the ordinary course if they have notice that the sale is in violation of the rights of a third party. The appellate court held that the merchant buyer had a duty to investigate the seller's authority to sell the object in light of suspicious circumstances.

In reply to the amicus argument of the Art Dealers Association of America, Inc. that such a duty would wreak havoc on the transactions of art dealers, the court found that the dealers' arguments had little to recommend themselves. Since the Porter v. Wertz and Taborsky v. Maroney decisions, there has been considerably more activity among art dealers in New York in checking with the International Foundation for Art Research ("IFAR") about the provenance of an object and the possibility that it may be stolen.

In Menzel v. List, the court considered the value of the warranty of good title from Perls Galleries in New York to the good faith defendant List who was compelled by the jury to surrender a Marc Chagall

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95 UCC § 2-403; Porter, 68 A.D.2d at 146, 416 N.Y.S. 2d at 254. The court was not persuaded by the gallery's argument that failure to investigate title to works of art is the practice of the trade. Porter, 68 A.D. 2d at 149, 416 N.Y.S. 2d at 259. The Art Dealers Association of America filed an amicus curiae brief in the case arguing that it was not customary for art dealers to verify title before buying objects, Amicus Curiae Brief of the Art Dealers' Ass'n of Am. at 3. See Hoover, Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants, 51 GEO. WASH. L. REV. 443 (1983).


97 Id.

98 Id.

99 Id.

100 For a useful collection of essays explaining the role IFAR plays in recovery of stolen artworks, see the following six columns written by the Executive Director of IFAR, Connie Lowenthal, in The New York Times: Jan. 11, 1989, at 15, col. 1; Feb. 14, 1989, at 12, col. 1; April 5, 1989, at 12, col. 1; May 16, 1989, at 12, col. 1; July 28, 1989, at 8, col. 1; and Sept. 15, 1989, at 8, col. 1.

101 Menzel, 24 N.Y. 2d at 91, 246 N.E. 2d at 742. See supra notes 18-19 and accompanying text.
painting, or its value, to the plaintiff. Mr. List returned the painting to the plaintiff and the jury awarded him the current value of the painting and his costs in the litigation.\(^\text{102}\) Based upon the implied warranty of title, the New York Court of Appeals upheld the jury's award.\(^\text{103}\)

In the Kanakaria Mosaics Case,\(^\text{104}\) the court first dealt with the choice of law question in order to decide whether the substantive law of Indiana or Switzerland applied. Concluding that Switzerland, the site of the wrongful taking of possession of the mosaics by the defendants, did not have significant contacts or relations with the lawsuit, the court determined that Indiana had the more significant relations with the parties, the mosaics in question, and the transaction.\(^\text{105}\) Because not even a good faith buyer can obtain title from a thief under Indiana law, the defendant Goldberg's diligence in investigating the title in the object was not relevant to the ultimate question in the case which was the right to possession of the mosaics.\(^\text{106}\)

Having rejected the appropriateness of the Swiss law analysis, the court nevertheless performed an extremely careful analysis of whether the defendant would have been in good faith under Swiss law which allows a buyer to obtain good title from a thief after the passage of five years.\(^\text{107}\) After pointing out that the plaintiff bears the burden of showing that either the buyer knew for a fact that the seller did not have good title or that the circumstances surrounding the transaction should have created doubt in the buyer's mind about the ability of the seller to transfer good title, the court required the defendant to show that she took steps to inquire into the seller's capacity to transfer property rights and that the steps reasonably resolved the doubt.\(^\text{108}\)

The district court examined the factors relating to the transaction to shift the burden of proof to the defendant. First, the defendant's knowledge that the mosaics came from an occupied area; second, the unique and important nature of the mosaics; third, the disparity between the

\(^{102}\) Id. at 98-99, 246 N.E. 2d at 743.

\(^{103}\) Id. at 98, 246 N.E. 2d at 743.

\(^{104}\) Kanakaria Mosaics Case, 717 F. Supp. at 1374.

\(^{105}\) Id.

\(^{106}\) Note that the defendant, Goldberg's "reason to know" that the seller had less than good title would be relevant in an action to recover from the parties who sold her the mosaics for breach of the implied warranty of good title under U.C.C. § 2-312.

\(^{107}\) As Professor von Mehren, the plaintiff's expert, testified at trial, the plaintiff would be required by Swiss law to investigate the peculiarities of the transaction in order to be able to lay to rest any questions that an honest and careful buyer would have observed and thereby be able to claim good faith purchaser status. Kanakaria Mosaics Case, 717 F. Supp. at 1394-95. Professor von Mehren testified at trial that the law of Switzerland presumes good faith and permits a good faith purchaser to acquire good title from a thief if the good faith purchaser holds the goods for five years. Id. at 1394-95 n.15.

\(^{108}\) Id. at 1381-82.
selling price ($1.08 million) and the appraised value ($5 to $6 million); fourth, the unknown reputation of the seller; fifth, the suspect "cast of characters acting as middlemen," one of whom the buyer knew to be a felon; and sixth, the haste with which the transaction was carried out.109

The court found that Goldberg failed to carry her burden of proof to show that she took adequate steps to lay to rest the doubts raised by these six factors. She failed to produce written or corroborative evidence of telephone calls she claimed to have made during the few days during which she decided to buy the mosaics. Most importantly, she failed to contact the Republic of Cyprus, the so-called Turkish Republic of Northern Cyprus or the Church of Cyprus even though she was told that the mosaics came from an "extinct" church in northern Cyprus.110 She failed to contact Interpol, the international police organization headquartered in France or any disinterested expert in Byzantine art.111 In summary, the court found that Goldberg had made "only a cursory inquiry into the suspicious circumstances surrounding the sale of the mosaics"112 and that she "utterly failed"113 to take additional steps. Therefore, the court concluded, she failed to conduct an inquiry sufficient to resolve doubts as to the seller's capacity to convey property rights to the mosaics.114

B. Export and Import

If improper export or improper import of a work of art may constitute a cloud on title,115 the question arises whether the buyer should examine some or all of the documents authorizing export and import of the object in order to determine that the work of art in question was authorized to leave its country of origin. Because fine art is so mobile, a buyer should assume that the object may have traveled across many borders. Should the question be extended, therefore, to whether the buyer should be required to trace all movements of the work of art, and over what period of time? Or, in light of the fact that the seller might once have been a buyer, should the seller of a work of art be required to produce, to

109 Id. at 1379-85.
110 Id. at 1403-04.
111 Id.
112 Id. at 1405.
113 Id.
114 Id.
115 See Jeanneret v. Vichy, 693 F.2d 259 (2d Cir. 1982) infra note 118 and accompanying text, where the Second Circuit refused to decide this question. Consider, with respect to importing objects into nations that require declarations such as the United States, that the object may be subject to forfeiture by the government. The famous case of the so-called Boston Raphael illustrates this point quite well. For a discussion of the press accounts of that case, see K.E. Meyer, supra note 70 and P. Bator, supra note 1.
the buyer's satisfaction, proof that the object was moved legally across all borders?

The virtually limitless distance over time and geography require the buyer to inquire into a different answer. As a practical matter in the art market, the question is where the risk of error should lie. The Uniform Commercial Code clearly applies the risk to the seller that a party with a superior claim may come forward and recover the goods, but only for a fixed period of time. Only if the buyer has notice that there is a problem or if there are facts suggesting that there may be a problem which should be identified is the buyer in danger of losing good faith status and therefore required to act diligently in satisfying him or herself that the title is good.116 Consider the hypothetical case involving a good faith purchaser of a work of art exported in violation of a nation's cultural patrimony laws.117 The important question of title in the United States is whether the foreign government, or some other party, can prove ownership or that the title was inalienable under that country's laws and that the object was stolen, as did the plaintiff in the Kanakaria Mosaics Case. If the buyer has knowledge of the illegal export, that fact would be considered along with the other facts surrounding the transaction to determine whether suspicious circumstances were present about which the buyer should have made diligent inquiries.

In Jeanneret v. Vichy,118 the court addressed but has so far refused to decide the question of whether improper export is a cloud on title. Some countries impose an ownership interest on certain antiquities and other works of art.119 Other objects are contraband and therefore subject


117 For an excellent set of hypothetical cases and analysis of each, see Merryman, The Retention of Cultural Property, supra note 1. Professor Merryman's case 2 involves a French collector who sells his Poussin painting to a dealer who removes the painting from France without the export permit required by French law. The dealer takes the painting to the United States and sells it to an American museum. Id. at 483. Compare, as Professor Merryman does, the famous case of the Cleveland Museum's Poussin. Id. at 483, n. 15.


119 Federal Law Concerning Monuments and Archeological, Artistic and Historic Zones, May 6, 1972 (Mex.). See United States v. McClain, 593 F.2d 658 (5th Cir. 1979) (conviction upheld under Mexican law which declares ownership in cultural properties) and United States v. Hollinshed, 495 F.2d 1154 (9th Cir. 1974) (conviction upheld under Guatemalan law which declares ownership in cultural properties). See also Merryman, Retention of Cultural Property, supra note 1 at 478-89.

For a discussion of the different legislative schemes designed to retain cultural patrimony, see L. Prott & P.J. O'Keeffe, Handbook of National Regulations Concerning the Export of Cultural Property, prepared for UNESCO (1988); J. Merryman & A. Elsen, Law, Ethics and the Visual Arts 46-139 (1st ed. 1979); L. Prott & P.J. O'Keeffe, National Legal Control, supra note 2; and Niec, Legislative Models of Protection of Cultural Property, 27 Hastings
to seizure in the United States for political reasons. Other nations, such as Great Britain, require export permits for certain works of art or cultural property and allow the government to acquire the object for its stated value or the price that another party has agreed to pay. It is at least arguable that such governments acquire no claim against title to many types of illegally exported works of art merely because of the illegal export.

In Jeanneret v. Vichy, the plaintiff was a Swiss art dealer who agreed to buy a Matisse painting from the defendant Vichy in 1973. The painting was delivered to the plaintiff in March 1973 and she made final payment to the defendant in June 1973. The plaintiff-dealer thereafter exhibited the painting in her Geneva gallery for approximately four months, where the gallery's catalogue described the painting as dating from around 1924 and as being from a Milanese art collection—that of the defendant's father; then from a New York collection—that of the defendant. The painting belonged to the defendant, however no export license was obtained from Italy when the painting was exported. The painting remained unsold in the Geneva gallery.

The following year, the plaintiff met an Italian official in Italy who

L.J. 1089 (1976). On the distinction between retention and protection, see Merryman, Retention of Cultural Property, supra note 2, at 506-508.


See MacPherson, The Great Cuban Art Bust, Wash. Post, Aug. 24, 1989, at C1 for an article describing a raid on works of art from Cuba collected by an American against the law of the United States prohibiting import of objects made in Cuba.

The law of England is in The Export of Goods (Control) Order, no. 2070 (1987) and in the Notice to Exporters (Relating to Export of Works of Art and Antiquities) (1972). See also and compare, the law of Italy, Law of June 1, 1939 XVI, no. 1089 on Protection of Things of Artistic or Historical Interest (Italy). This law succeeds the earlier regulation in the Law of June 20, 1090, no. 364; Law of June 23, 1912, no. 6888; Royal Decree of Jan. 30, 1913, no. 363; Decree Law of Feb. 3, 1918, no. 348; Decree of Nov. 22, 1925, no. 2192. The two laws differ substantially. The Italian law asserts ownership in objects discovered by excavation and prohibits transfer of ownership of works owned by the state. In addition, the Italian law prohibits export of any object if the object is significant and its export endangers the national heritage. If the object is privately owned and declared to be of national interest, and export permit must be obtained which requires application to the Ministero Per I Beni Culturali, which has a right of preemption.

Jeanneret, 693 F.2d at 267, where the Second Circuit reminds us that "even when an item more than fifty years old has been exported from Italy, liability to pay the State the value of the exported item and any fine rests on the exporter, not on a purchaser." See Nass, Jeanneret v. Vichy: Evaporating the Cloud, supra note 118. See also P. Bator, supra note 1, at 10-11 wherein the distinction between "stolen and illegally exported" is emphasized.

Jeanneret, 693 F.2d at 260.

Id.
informed her that the painting had probably been exported from Italy illegally. The plaintiff wrote to Vichey in New York and asked to rescind the transaction on the grounds that the painting had been illegally exported from Italy.\textsuperscript{125} The defendant refused to rescind the transaction. Jeanneret filed a diversity suit in federal district court in New York in 1977. The plaintiff claimed breach of express and implied warranties of title, false and fraudulent representations, breach of contract, and that she had been used in a tax evasion scheme.\textsuperscript{126} The parties agreed that New York law rather than Swiss law governed the case.\textsuperscript{127}

A jury ruled for the plaintiff on the breach of implied warranty and breach of contract claims but not on the express warranty or false representation claims.\textsuperscript{128} The federal district court then reduced the plaintiff's award and denied the defendant's motion for a judgment.\textsuperscript{129} The district court judge ruled that the implied warranty of title exists whenever a third party presents a claim on title, whether valid or invalid.\textsuperscript{130} The district court went on to rule that because Italy had initiated criminal proceedings against the defendant for allegedly violating Italian export regulations and because Italy had listed the painting on its "notificato" list, after the suit was filed, a jury could find that the Italian government had a legitimate claim against the title to the painting.\textsuperscript{131}

The Second Circuit reversed this ruling, stating that the plaintiff's claim that invalid export was a cloud on title was "novel" and that the court therefore was not prepared to decide this question without guidance from the state courts which does not exist.\textsuperscript{132} The Second Circuit remanded the case for a factual determination of the age of the painting, the outcome of which would determine which part of Italian export law might have been violated.\textsuperscript{133} In remanding the case, the Second Circuit avoided the important question of whether there is any export violation which, under United States law, could impose a cloud on title such that the warranty of good title is breached.

In the \textit{Kanakaria Mosaics Case}, the defendant purchased mosaics which were accompanied by documents she contended reflected legal ex-

\textsuperscript{125} Id. at 261.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 266.
\textsuperscript{128} Id. at 265. The claim involving a scheme to evade taxes was dismissed by the judge.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 263.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 268.
\textsuperscript{133} Id. at 269. The case is to be retried. If the painting were older than 50 years and the painter deceased, it may be necessary to acquire an export permit under the law of 1939. If the painting were less than 50 years old, no permit for export would be required.
import from the Turkish Republic of Northern Cyprus. However, Northern Cyprus is not a government recognized by the United States or any government other than Turkey. The defendant had no proof of export from the Republic of Cyprus which is the only nation recognized by the United States for the island of Cyprus. One of the many questions before the court in that case was whether the defendant had failed to act as a reasonably prudent buyer in her failure to ask for export documents from the recognized government.

Whether illegal import of a work of art clouds title has not been addressed by the courts of the United States. However, the fact that all works of art must be declared as they are imported into the United States subjects objects imported, but not declared, to seizure by the United States Customs Service. Even more important for persons importing artifacts into the United States are the treaties in place between the United States and Mexico, and the United States and Peru prohibiting certain works of stolen archaeological, historical and cultural importance from entering the United States. These treaties do not change the law of the United States and the United States legislation specifically regulat-

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134 Kanakaria Mosaics Case, 717 F. Supp. at 1382. The court strongly disagreed with the defendant on this point.

135 At the opening of the trial, the Turkish Republic of Northern Cyprus moved the court to permit that government to intervene. The court denied the request from the bench on May 30, 1989 on the grounds that Northern Cyprus is not recognized by the United States Government and the Executive Branch rather than the Judicial Branch makes such determinations. Northern Cyprus appealed the ruling to the Seventh Circuit. Id. at 1376-77.

Note, in Kunstsammlungen zu Weimar v. Elicofon, the court dealt with the same issue and barred East Germany from suing Mr. Elicofon for return of the paintings. In 1974, however, when the United States formally recognized East Germany, that state was permitted to intervene as plaintiff. The significance of this delay became considerable as the court stated in dictum that even if it had found that the plaintiff's lawsuit accrued in 1946 when Mr. Elicofon acquired the paintings, it would have tolled the statute of limitations until 1974 when the "non-recognition" rule barring East Germany's action expired, 678 F.2d at 1153.

136 19 U.S.C. §§ 1701-1711. See the Boston Raphael case, supra note 95 and accompanying text. For a careful but critical treatment of the authority of the United States Customs Service to act in such cases, see Fitzgerald, A Wayward Course: The Lawless Customs Policy Toward Cultural Properties, 15 INT'L L. & POL. 857-894 (1983). Of particular interest is the recent decision of the U.S. District Court for the Central District of California in Peru v. Johnson, No. CV 88-6990-WP6 (C.D.CA. June 29, 1989 LEXIS, Genfed Library, Dist. file). In that case, the government of Peru sued for replevin to recover various works of art, allegedly of Peruvian origin. The United States Customs Service, armed with a search warrant, confiscated the collections of Mr. Johnson and others on the theory that the objects had been illegally removed from Peru and illegally imported into the United States. The district court, after the criminal action against Mr. Johnson was dropped, concluded that Peru could not prove ownership of the objects because the law of Peru under which the country claimed title was unclear. To date, most of Mr. Johnson's collection has been returned by the Customs Service.

ing the import of pre-Columbian, monumental or architectural sculpture or murals from certain countries without a permit from the country of origin — which does change the law of the United States.\textsuperscript{138} The United States Code expressly subjects improperly imported pre-Columbian monumental or architectural sculpture or murals to seizure,\textsuperscript{139} thereby seeming to cloud title to such objects under United States law. It might be difficult for a purchaser who is a citizen of the United States and who presumably had the benefit of due process at the time the ban on import was enacted to claim good faith.

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\textbf{VII. SOLUTIONS}

\textit{A. Buyer's Diligence — One Policy}

The following is the \textit{Antiquities Acquisition Policy of The J. Paul Getty Museum} in Malibu, California.\textsuperscript{140} The policy of the Getty Museum represents one collector's solution to the problems posed by the absence of clear standards of diligence on the part of a buyer, particularly in purchasing works so old that clear provenance can almost never be established.

The Trustees of The Getty Museum faced the dilemma of being responsible to the art rich nations claiming to be robbed of their patrimony. Planning to continue to collect antiquities, they adopted the following policy in 1987 as a means of voluntarily submitting their plans for each such acquisition, in advance, to the scrutiny of the governments which might have a patrimony claim to the object in question and to IFAR. Because the Getty Museum does not collect works of pre-Columbian art or objects likely to come from Mexico, the burden of determining whether there has been a violation of the treaties between the United States and those Countries is not assigned in the policy.\textsuperscript{141} The policy states the following:

\begin{footnotesize}
\begin{enumerate}
\item[138] 19 U.S.C. §§ 2091-2095 (1988). The meaning of the term "country of origin" is defined at § 2095(4) as "the country where such sculpture or mural was first discovered."
\item[139] 19 U.S.C. § 2093(a) (1988). Note that under the provisions of § 2093, such a work of art will be returned to the government of origin only if that government bears all the expenses of return and otherwise complies with the regulatory procedures. 19 U.S.C. § 2093(b)(1) (1988). Otherwise, the Customs Service may dispose of the object as it would any other illegally seized contraband. 19 U.S.C. § 2093(b)(2) (1988).
\item[140] Particular credit for The Getty Museum's policy goes to Dr. Marion True, Curator of Antiquities, and Bruce A. Bevan Jr., Esq., who drafted the policy.
\item[141] Similarly, the policy does not concern import procedure. All objects which enter the Museum require proper documents evidencing legal import into the United States.
\end{enumerate}
\end{footnotesize}
The Antiquities Acquisition Policy of The J. Paul Getty Museum

It is the policy of The J. Paul Getty Museum to acquire Classical antiquities of great artistic merit that become available in the United States and abroad, provided that these acquisitions are made in accordance with the 1970 UNESCO Convention and with certain procedures enumerated here.

1. Vendors of substance. All transactions shall be conducted only with vendors of substance and established reputation in order that such transactions shall be covered by enforceable warranties.

2. Notification of foreign governments. Before acquiring an important object, the Museum will send photographs of it to the appropriate government agency of the possible countries of origin in order to determine if there are any specific objections or possible claims that may be made concerning the object. In addition, photographs will be sent to the International Foundation for Art Research in New York to be checked against its current list of objects reported stolen or missing.

3. Warranties. Upon the approval of an object for purchase, the vendor will be required to warrant for a period of 48 months following delivery of the object:
   a) that the object offered is authentic;
   b) that the vendor has good title to the object;
   c) that the object had been legally exported from its country of origin and has been or will be legally exported from the country in which it was found and has been or will be legally exported from and into all other relevant countries, including the United States; and
   d) that all other customs and patrimony laws, regulations and requirements of all other relevant countries have been met.

4. Announcement, exhibition, and publication. The acquisition of an important object will be announced promptly to the press, and the appropriate government agencies of the possible countries of origin will be notified. The object will be placed on exhibition as soon as it can be safely installed; an illustrated entry for the object will be included in the next Acquisitions Supplement to The J. Paul Getty Museum Journal; and the curator of Antiquities or a specialist in the field will prepare a scholarly publication of the object to appear within a year of acquisition or as soon thereafter as possible.

5. Claims. In the case of acquisitions made after adoption of this Policy:
   a) If the Museum becomes aware, more than 48 months after acquisition and delivery of an object, of a patrimony claim by a foreign government which claim would be valid but for the bar of the statute of limitations or the three year exemption period in Section 312 of the 1970 UNESCO Convention, the Museum normally will offer to return the object to the aggrieved country upon payment of just compensation.
   b) If the Museum becomes aware of a patrimony claim by a for-
eign government before the expiration of the 48 month period, at the Museum's option, the vendor will be required by warranty to defend the claim at the vendor's expense. Should the vendor be unable or unwilling to do so, the Museum will consider the validity of the claim and will determine accordingly whether to contest the claim or surrender the object.

c) If the vendor defends such a claim which ultimately is adjudged valid, the vendor will be required by the sales agreement to be responsible for all damages, costs and expenses imposed by judgment upon the Museum; if the object is ordered to be returned to the aggrieved country by the judgment, the vendor in addition shall refund to the Museum the purchase price thereof, interest thereon and all expenses borne by the Museum in connection with the transaction.142

The Museum's inquiries to foreign governments of likely origin are broad enough to welcome any information about the object, not only about its ownership.143 The notice, exhibition, and publication provisions of the policy assure that the statute of limitations in California has begun144 on any claims of superior title, not only against the countries which were notified but also against any other putative holder of superior title. The policy in practice requires the notified governments to examine their records immediately upon notice and to come forward promptly with claims, if any exist. While the policy may not be a perfect solution to the problems facing a good faith purchaser of antiquities, it assures the thoroughness required to demonstrate good faith.

The situation in which a foreign government knows that an object about to be purchased is stolen from a particular collection is the easy case. The more difficult and certainly the more common case is the one in which no one has knowledge of the object or its origin. In such a situation, The J. Paul Getty Museum policy expects the notified government to conduct whatever examinations and inquiries it deems necessary to establish its claim, if one exists, promptly. It also burdens the country claiming patrimony with the responsibility for policing its own territories where illegal excavations may be taking place, as does the United States legislation implementing the 1970 UNESCO Convention145 and the Convention itself.146

142 The Antiquities Acquisition Policy of The J. Paul Getty Museum, Malibu, California.
143 Whether all government ministries of the arts or comparable organizations are prepared to receive and reply to a steady stream of inquiries from purchasers of works of art is an important question. Art-rich nations which complain of the flow of objects from their lands to others should allocate the necessary resources to field such inquiries from buyers diligent or courteous enough to make them.
144 CAL. CIV. PROC. CODE § 338.3.
The warranty provisions of The J. Paul Getty Museum policy place a burden on vendors dealing with the Museum to avoid selling objects which have been illegally exported from the countries which they have passed through and requires the Museum to assure that the vendor can be held responsible for his warranty. A culpable vendor will lose his profit and his future market, which should be a significant deterrent to participation in illegal activities.

B. Victim Diligence

The O'Keeffe court is correct in focusing on the victim's behavior in a suit to recover stolen artwork rather than on that of the possessor. The victim of an art theft claiming to search diligently, whether a private citizen or national government, should send the following communications in writing, accompanied by clear reproducible photographs, immediately upon discovery of the theft and on a regular basis thereafter:

1. Notice to local police and Interpol of the details of the theft.
2. Notice to the major newspapers and art and archaeological periodicals in the major capitols of the world, including the major cities in the art market such as New York, London, Basel, Geneva, Paris and Rome.
3. Notice to IFAR.
4. Notice to known scholars around the world in the particular field of expertise related to the object.
5. Notice to dealers, museums and other collectors around the world known to have an interest in the particular type of art.

CONCLUSION

A buyer of a work of art through a transaction governed by the law of the United States must exercise diligence in eliminating any doubts about the seller's ability to convey good title if the buyer should reasonably have noticed suspicious circumstances. Because works of art are not registered such that title can be searched as title to real property, buyers in such circumstances must observe a disciplined system of investigation.

Victims of art theft must observe equally disciplined systems of inquiry into the whereabouts of stolen objects in order to be diligent and thereby able to bring timely suit in court in the United States to recover stolen objects.

The lack of international uniformity among such systems presents

231 (1972), 10 I.L.M. 289 (1971). See also article 7(b) treating as stolen only objects taken from a "museum or . . . religious or secular public monument or similar institution . . . provided that such property is documented as appertaining to the inventory of that institution." See Merryman, Retention of Cultural Property, supra note 1, at 506-13.
the buyer and the victim with the dilemma of anticipating the rules of the forum. To the extent that art lovers can agree on an internationally acceptable, and binding, standard of diligence in such circumstances, the process of rejecting and recovering stolen art would become easier and therefore more successful in the future.

Currently, UNIDROIT is drafting a treaty on restitution of works of cultural property, a treaty intended to provide international uniformity on the question of whether a good faith purchaser must return a stolen object to its rightful owner. If this effort succeeds, it will provide the much needed uniformity of principle but not, as of this writing, the type of detail which would provide an international objective standard of good faith in art purchases. With respect to victim diligence, however, the UNIDROIT draft treaty would provide no objective standard of diligence but at least one statute of limitations for the resolution of claims. Let us hope this effort succeeds.
