# Spencer's Art Law Journal

Edited by Ronald D. Spencer

## Editor's Note

This is Volume 3, Issue No. 1 of *Spencer's Art Law Journal*. This issue contains three essays, which will become available on ARTNET, starting July 2012.

As noted in the first two Volumes of this Journal, the legal structure we call art law (an amalgam of personal property law, contract, estate, tax and intellectual property law) supporting the acquisition, retention and disposition of fine art, often fits uneasily with art market custom and practice. The result is that 21st century art market participants are frequently unsure of their legal rights and obligations.

The three essays in this Spring Issue deal with core issues for ownership of visual art – possession and title. The first essay looks at the fraught issues involved with buying and selling antiquities in the United States. The second essay deals with the difficult issues of the statute of limitations and owners' recovering possession of art once held by them, but which has been misappropriated, that is, stolen or converted. The last essay addresses a frequent issue for owners of art collections, to wit, how to pass (or not) the collection to heirs.

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Three times a year issues of this Journal will address legal questions of practical significance to collectors, dealers, scholars and the general art-minded public.

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# BUYING AND SELLING ANTIQUITIES IN TODAY'S MARKET

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William G. Pearlstein

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*This essay addresses legal issues commonly faced by private collectors and dealers when buying and selling antiquities. The evolving and multi-layered legal framework in which those issues must be considered can be complex, confusing and sometimes arbitrary.-- RDS*

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**Introduction**

Buying and selling ancient art requires the prudent purchaser to research the provenience (country of origin) and provenance (history of ownership) of an object and to evaluate the available information in the context of the legal framework discussed below. In my experience, objects that have a plausible history of ownership and origin, even if not fully documented, can, generally, be safely purchased. A partially-documented history does not necessarily indicate fresh looting or illegal export. Even objects that entirely lack history are also not necessarily smuggled or looted. The demand for documented provenance is a relatively recent phenomenon and many owners simply failed to keep records of their objects, which they treated like other household possessions. Nevertheless, potential penalties for the unwitting purchaser of smuggled or stolen objects include civil forfeiture (for which even bona fide purchasers are rarely compensated), and, for those who knew, or in retrospect should have known, jail. The good news is that prudence and diligent investigation will be rewarded. Even well-provenanced antiquities at the top of the antiquities market can be undervalued compared to other segments of today's art market and will afford satisfaction for decades and validate the owner's good taste and erudition.

Set out below is a checklist of the main categories of potential legal exposure when evaluating a potential purchase: is the importation barred by a U.S. treaty or statute? These include treaties, embargoes and import restrictions, which are all subject to different compliance regimes. Could the object be considered stolen property under U.S. law? Was the object properly exported under applicable foreign law and then properly imported under U.S. Customs law? Each category of legal risk must be independently evaluated. They are summarized in outline form below. The prudent purchaser will go through the checklist and satisfy himself as to each category of potential liability.

Also summarized below is the legal academic background and legislative history of the U.S. laws that govern the trade in ancient art. Today it is widely known that many foreign "source" nations have nationalized ownership of all archeological objects, in or out of the ground. However it is less widely known that a smaller number of others, such as Japan, England and Israel, have not, and provide alternate models that allow for private ownership once the needs of national heritage are deemed satisfied. Others, like India, permit domestic private ownership but prohibit export. Italy nationalized only archeological objects that were not privately-owned before 1902 and permits export of privately–owned materials not deemed to be important to the national patrimony. Moreover, it is almost unknown, and perhaps conveniently forgotten, that, in his ground-breaking 1973 "Essay on the International Trade in Art", Professor Paul Bator of the Harvard Law School concluded that the U.S. should reserve judgment and not simply hand a "blank check" to foreign nations. U.S. import restrictions on foreign archeological materials need not be as broad as foreign requests, and U.S. criminal law should not automatically be triggered by foreign "found in the ground laws." Rather the goal was to balance the competing interests of national heritage, archeological context and international cultural exchange. After a decade of careful



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consideration, the policy of "no blank checks" was embraced at the highest levels of American legal academia and Congressional leadership. Fast forward 30 years to the present. The policy of "no blank checks" has been discarded and the State Department, U.S. Courts and Homeland Security often seem determined to give fullest effect to foreign laws, disregarding the best thinking of the prior generation. To this author, Bator's approach seems persuasive and intellectually sound, while the "blank check" approach fails to balance competing policy interests (including the U.S. interest in promoting a lawful international trade in art).

**U.S. Legal Framework Governing Purchases and Sales of Ancient Art**

a. Express Import Restrictions

(i) _1970 UNESCO Convention_. The UNESCO Convention is widely perceived as the first multi-national legislation recognizing and attempting to remedy the growing problem of looting of cultural artifacts.[1] But UNESCO is often cited for what it is not. It is not a universal declaration that all cultural objects must be returned to the country of origin. It is not self-executing and requires implementation by each signatory "State Party." UNESCO invites signatory "State Parties" to negotiate and implement multi- or bi-lateral import restrictions. It also requires "State Parties" to regulate and reform their internal markets (although these provisions are generally overlooked when UNESCO is cited as an anti-market signpost).

(ii) Pre-Columbian Monumental and Architectural Sculpture and Murals Statute (1972).

A. Restricts imports into the U.S. of stone carvings and wall art which are "pre-Columbian monumental or architectural sculpture or murals."

B. Applies to any stone carving or wall art which: (i) is the product of a pre-Columbian Indian culture of Mexico, Central America, South America, or the Caribbean Islands; (ii) was an immobile monument or architectural structure or was a part of, or affixed to, any such monument or structure; and (iii) is subject to export control by the country of origin; or (iv) any fragment or part of any stone carving or wall art.

C. Importation requires certification by the country of origin or "Satisfactory Evidence" that such sculpture or mural was exported from the country of origin on or before the effective date of the customs regulation listing such sculpture or mural; or satisfactory evidence that such sculpture or mural is not covered by the list covered by customs regulation. (A similar mechanism was subsequently adopted for the CPIA. See below).

(iii) _Bilateral Treaties with Mexico, Peru, Guatemala and Ecuador._ As a result of these early treaties, the U.S. market for Pre-Columbian materials is largely confined to provenanced materials.

(iv) Unilateral U.S. Embargoes.

A. Iraq (since 1991); emergency restrictions under CPIA since 2008.

B. Iran.

C. Sudan.

D. Syria.

The Iran, Sudan and Syria embargoes are administered by the U.S. Office of Foreign Asset Control ("*OFAC*") together with U.S. Customs and Border Protection. Issues are not necessarily easily addressed with OFAC. For example, one U.S. collector considered purchasing a low six-figure collection of antique (not ancient) Iranian textiles at auction in Germany. The collection had been owned by a single family in Germany for several generations. Because there was no assurance that OFAC would grant an exemption (especially in light of heightened tensions between the US and Iran), the collector declined to bid and the collection was presumably purchased by a non-U.S. collector. Ushabtis imported by another collector were seized by U.S. Customs under the embargo because in a moment of candor he identified them as Sudanese. The problem was that they were not Sudanese, because they had been exported in the 19th century when Sudan was still part of Egypt, which was then administered by the Ottomans or later by the English. Because export was documented to predate Sudan's

national existence, it was initially argued to U.S. Customs that Sudan couldn't claim the pieces because no Sudanese law applied. OFAC subsequently granted an exemption after a formal submission was made.

There are other difficulties with the embargoes, including the potential for misidentification due to geographical overlap. For example, certain Iranian objects may be confused with other objects of "Near-Eastern" origin, certain Syrian objects may be confused with classical antiquities from around the Mediterranean, and certain Sudanese objects could be confused with Egyptian.

(v) Convention on Cultural Property Implementation Act of 1983

A. The "CPIA" is the Act by which Congress implemented the UNESCO Convention.[2]

B. The 13 year long implementation process was marked by lengthy Congressional hearings,[3] and was largely informed by the views of Prof. Paul M. Bator, whose "Essay on the International Trade in Art"[4] remains the most thorough and balanced examination of the different perspectives on the antiquities trade.

C. CPIA provides a mechanism whereby the U.S. can restrict the importation of "Archeological and Ethnological Materials" designated by the American President (*i.e.*, the State Department) upon review of a "State Party's" application for restrictions and certain required "determinations" by an 11-member Cultural Property Advisory Committee ("*CPAC*").

D. "<u>In theory</u>": Import restrictions are limited by the terms of CPIA (summarized in items 1-11 below):

1. Archeological Materials must be "culturally significant", 250 years old, ordinarily discovered by digging, and "first discovered in and subject to export control by" the State Party.

2. Ethnological Materials must be tribal, distinctive, comparatively rare, and "non-redundant."

3. Multi-National Response Requirement, that is, other significant market nations must impose similar import restrictions

4. Applicant must satisfy "Self-Help" Requirements.

5. Less drastic remedies are not available.

6. Restrictions must be "consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes". (Some observers feel that, at a minimum, this requirement implies that import restrictions must be used as a framework to facilitate museum loans to compensate for any restrictions imposed on the private trade).

7. Restrictions have an initial five year term; 3 year renewal terms upon CPAC review

8. "Emergency Restrictions" may be unilaterally imposed by the U.S. on the recommendation of CPAC if an "emergency condition" exists with respect to a "newly discovered type of material," "sites recognized to be of high cultural significance," or pillage of "crisis proportions."

9. "Satisfactory Evidence" Exemption. Designated Materials can be legally imported if the importer can provide Satisfactory Evidence (a Consignor's Statement and an Importer's Declaration) that the object was either:

(x) exported prior to the date the import restrictions are published in the Federal Register, or

(y) exported from the State Party not less than 10 years prior to the date of entry into the U.S. (and importer did not acquire an interest more than one year prior to entry).

The "Satisfactory Evidence" exemption can be extremely useful to purchasers or importers who can provide "Satisfactory Evidence" of timely export. Restricted materials are often imported on the basis of this exemption. There is some question as to the quality of documentation that an importer must submit to substantiate the claims of prior export. For example, the successful seller/importer of a colonial-era Latin American textile was able to provide photographs of the textile in the hands of the original owner decades before U.S. import restrictions went into effect. Similarly, the successful importer of a Pre-Columbian textile submitted a photograph of the textile in a Japanese gallery years before the date of the U.S. import restrictions. It is unclear how much latitude U.S. Customs has to deny the exemption if the required certificates are not supported by persuasive factual evidence of prior export.

10. "Stolen Property." Objects may be forfeited by Customs if stolen from "the inventory of a museum or religious or secular public monument or similar institution in any State Party" after the later of 1983 (the effective date of the CPIA) or the date of the State Party joined UNESCO. (This is a very traditional, essentially "site-specific," definition of theft. It is the opposite of a "blank check" definition of theft under *McClain* triggered by a general declaration of national ownership. See below.)

11. "Safe Harbors" for Museums and Old Collections. Any "cultural property" (including Designated Materials) is exempt from the CPIA if held in the United States for a period of not less than three consecutive years by a recognized museum or religious or secular monument or similar institution, and was purchased by that institution for value, in good faith, and without notice that such material or article was imported in violation of the CPIA, if the material is published and exhibited for specified periods. Cultural property is also exempt if it has been within the United States for a period of not less than 20 consecutive years and the claimant establishes that it purchased the material or article for value, in good faith, and without notice that such material or article was imported in violation of law. These "Safe Harbors" would have been extremely important to U.S. Museums and collectors if the civil remedies provided by the CPIA had not been eclipsed by U.S. criminal laws, as discussed below. As it is, this provision only protects U.S. museums and collectors from civil forfeiture under the CPIA, not from seizure under criminal law or for other customs violations. In this author's view, the Association of Art Museum Directors and other collecting constituencies should have fought much harder over the years to preserve the viability of these potentially critical exemptions. Transparency should merit repose, as should old collections acquired in good faith.

E. "<u>In practice</u>": Import restrictions are perhaps underused but almost always overbroad.

1. Emergency and bilateral restrictions have been granted to: Bolivia, Canada, Colombia, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua and Peru.

2. The trend is for unilaterally-granted, theoretically narrow, emergency restrictions to be converted into bilateral treaties, and for bilateral restrictions to apply to *all* objects in a source nation's inventory created before a specified date (usually the point in the timeline at which "antiquity" is deemed to have ended). For example, the Memorandum of Understanding between the US and the People's Republic of China restricts broad categories of materials created from the Paleolithic period (approximately 75,000 BC) through the end of the Tang Dynasty in 906 AD. The MOU between the US and Italy restricts broad categories of materials from the 9$^{th}$ Century BC through the 4$^{th}$ Century AD.

3. There is substantial disagreement as to the meaning and application of the statutory criteria between the collecting constituencies, that feel increasingly disenfranchised by the CPAC process, the State Department bureaucracy that administers the CPIA, and the archeological community which is generally opposed to the acquisition of unprovenanced objects and in favor of the broadest possible import restrictions.

4. The disagreements came to a head in the 2005 request by The People's Republic of China for blanket restrictions on all cultural objects from prehistoric times through 1911, including

stone, pottery, ceramics, bamboo, painting, silk, etc. The proposed restrictions were labeled by a pro-archeology journalist as a "gross-overreach." Opponents argued that the vast and growing domestic Chinese market dwarfed the external markets and would render any U.S. import restrictions pointless, especially in the absence of a multi-national response, and the presence of a vibrant Hong Kong market. There was a perception among this opposition that the State Dept. and CPAC had pushed the interpretative limits of the CPIA past any plausible bounds. Accordingly, China's application remained stalled until the last days of the Bush Administration. Given the growing size and volume of the internal market for ancient Chinese artifacts within China, it is increasingly clear that U.S. import restrictions accomplish little more than to shift a small fraction of market share to domestic Chinese auction houses.

Of particular interest were two letters of comment submitted by Sotheby's, which suggested that, in the absence of statutory guidance, the "significance" of archeological objects proposed for restriction should be determined according to certain factors, including: quality and state of the existing archeological and art historical record; site specificity, portability and documentary importance; mass production and lack of rarity; frequent and long-term market incidence. Sotheby's Asian Art specialist applied these criteria to the realities of the market for ancient Chinese art and proposed a discrete list of categories of ancient art that could plausibly be restricted, subject to satisfaction of the other statutory criteria. This analysis represented some of the best thinking in the field in the last 30 years and could be said to represent the singular fully-developed application of the Bator/Moynihan viewpoint.

5. At a CPAC hearing in May 2010, the author handed out a 200 page catalogue of ancient art consigned to an auction house in Florence, Italy, and objected to the renewal of our MOU with Italy because it denies Americans access to materials that are legally sold in Italy to Italians and collectors around the world. Arthur Houghton then testified that in his long career as a museum curator, Committee member, State Department diplomat and member of the National Security Council, he had never seen a treaty less favorable to the U.S. The treaty was nevertheless renewed and even expanded to include coins. After the CPAC hearing, one of the directors of the Association of Art Museum Directors ("*AAMD*") told me that AAMD sees the Italian MOU as a means to bargain for museum loans from the Italians. If this is, in fact AAMD's intent, I see AAMD's position as opposed to the interests of private collectors and dealers and view the MOU as a badly-flawed treaty that restricts the flow of art, ideas and objects and undermines the Enlightenment values that "Universal Museums" claim to represent. On a recent visit to Rome, one could find a number of shops openly selling archeological materials (presumably privately-owned before 1902) the importation of which into the U.S. is restricted under the MOU.

b. Case Law Framework

(i) Criminal Laws.

A. *U.S. v. McClain*.[5] Basic rule: knowing violation of a foreign ownership law may result in criminal liability under the National Stolen Property Act ("*NSPA*").

1. Foreign ownership laws are enforced; foreign export controls are not. But foreign laws are not always clear—except in retrospect to expert witnesses.

2. The rule of *McClain* is fundamentally inconsistent with the "no-blank checks" theory originally conceived by Professor Bator and Senator Moynihan.

(x) Under *McClain* the country of origin determines the legality of importation (regardless whether the object is site-specific or freshly-excavated). Because national ownership laws are all-inclusive, *McClain* potentially criminalizes the importation of any object exported from the claiming nation after the date of its ownership law. (e.g., 1902 for Italy). (Note that, although *McClain* promotes the retention of national patrimony by the country of origin, national retention, by itself, does not promote the preservation of archeological sites and context.)

(y) Under CPIA, the U.S. determines the legality of importation and reserves judgment as to the scope of foreign ownership claims. The goal was to create selective import filters,

prospective from the date of the restrictions, and not all-inclusive barriers retroactive to the date of the foreign law (e.g., for Italy, 2001 under CPIA as compared to 1902 under *McClain*)[6]

(z) Senator Moynihan sponsored legislation that would have limited the application of *McClain* to site-specific or provenanced objects but S. 605, which Senator Moynihan claimed was the intended companion piece to the CPIA, failed in 1985 under opposition by State and Justice Departments. Professor Paul Bator testified in favor, but to no avail.[7] The failure of S.605 created the conceptual schism between the blank-check approach of *McClain* and the balanced, facts and circumstances approach of the CPIA, and also ensured that *McClain* would eclipse the CPIA in relevance to the importer/purchaser.

3. Note: the importer and/or purchaser must always perform a *McClain* analysis regardless of the object's status under CPIA.

(x) The purchaser or importer must try to determine:

(i) country of origin (which is not always possible because the geography of ancient cultures doesn't always match modern national borders—classical, Near Eastern and Pre-Columbian objects may often have multiple potential countries of origin);[8]

(ii) date of export (records are often nonexistent or simply unavailable);

(iii) whether the likely country or countries of origin had enacted a national ownership law at the date of export (which, under *McClain,* must be clear and published to satisfy due-process concerns). The reality is that foreign ownership laws are extremely difficult to obtain, in translation or otherwise, and local lawyers can be difficult and expensive to retain for the purpose of obtaining reliable interpretive advice. Moreover, foreign laws, and their related compliance and enforcement regimes, are not always clear even to sophisticated local counsel or, even if clear, local administrative practices and interpretation can cloud the waters and leave the importer (and counsel) in doubt as to the effect of local law. Finally, certain nations (such as Egypt, Italy and Cambodia) have enacted multiple patrimony laws over the years. These can be inconsistent and the effect of the cumulative statutory layering can be unclear.

(iv) In sum, property can be considered "stolen" under *McClain* if it was exported after a country enacted a (reasonably) clear national ownership law and the exporter knows of the violation. Note that recent amendments to the National Stolen Property Act suggest that the required guilty knowledge can be imputed to a subsequent, "downstream" owner or importer, thus making even possession by a downstream, good faith purchaser a crime.[9]

(v) Under Anglo-America common law, no one can take good title from a thief. If a piece is considered stolen, nobody in the chain of possession can obtain good title, and even a remote, "downstream," good faith purchaser is at risk of losing the property to the original owner in a claim for replevin or conversion. By contrast, the law in civil code countries (such as France) often confers title on a bona fide purchaser after a certain period of repose. Switzerland amended its laws (rather more favorable to the bona fide purchaser) under pressure from Italy to address the concern that Switzerland was being used as a haven to launder stolen art and artifacts. Nevertheless, the continuing tension between the US and civil code rules can introduce additional uncertainty to a transaction. For example, an Israeli dealer bought what he thought was a local, Canaanite object from a licensed dealer in East Jerusalem. Assuming good faith, the Israeli took good title under Israeli law. When he consigned it to Christies in New York, a curator at the Metropolitan Museum identified the object as one that he had excavated in Egypt in the 1970s and that subsequently disappeared from an Egyptian government warehouse. The object was withdrawn from the auction and seized. In the context of a civil forfeiture, there was no opportunity raise any potential defenses, including the choice of law question as to whether the consignor's title should be determined under Israeli law instead of U.S. law. Egypt never reported the theft to the Art Loss Registry or any other international database or government authority (although a laches defense would not have been available in the context of a civil forfeiture).

4. It is arguable that the CPAC process, which was intended by Professor Bator and Senator Moynihan to be the centerpiece of U.S. policy, has become a sideshow. (Malcolm Bell, a prominent archeologist, has said that in his view the CPIA provides a useful belt and suspenders supplement to the *McClain* rule.)

5. The recent UK criminal statute, "*Dealing in Cultural Objects (Offences) Act 2003*," seems to this author to make better policy than the *McClain* rule, because, in principal, the UK Act makes it a crime to deal knowingly in objects that are identified to a particular archeological site or monument rather than to violate a law that nationalizes objects that may neither have been freshly excavated nor, indeed, excavated at all. (The reach of the UK statute is analogous to that of the National Stolen Property Act had S.605 been passed). Site-specific looting ought to be a crime.

B. *U.S. v. Schultz.*[10] Fred Schultz, a New York dealer, was convicted under the National Stolen Property Act for conspiring to market smuggled Egyptian artifacts for Jonathan Tokeley-Parry, who was convicted in the UK. Schultz was held either to know that Parry's activities were illegal or to have "consciously avoided" knowledge of the facts and of the requirements of Egyptian law. The Second Circuit Court of Appeals overrode arguments against triggering U.S. criminal liability on the vagaries of foreign law by concluding that importers could take comfort in the knowledge requirement under the National Stolen Property Act. But "conscious avoidance" is a dangerous standard for the importer. Although it seems self-evidently prudent not to turn a blind eye to suspicious facts that may indicate smuggling or recent clandestine excavation, it is not self-evident that a U.S. buyer should engage foreign counsel to obtain a working knowledge of foreign laws that may or may not apply to the object in question. (Perhaps the 2d Circuit created an implied price point above which a purchaser should be seen as having consciously avoided learning the nature of foreign ownership law by failing to engage foreign counsel.) In affirming Schultz's conviction, the Court of Appeals embraced the broadest possible theory of "blank check" state ownership. In rejecting arguments for a narrow theory of state ownership, it cited a case that considered New York State's authority to regulate clam beds off Long Island. Given the legislative history, the Court seems to have deliberately ignored the integrated policy structure so carefully conceived by Professor Bator and Senator Moynihan. In this author's view, the international trade in ancient art raises different concerns and deserves more nuanced treatment than the regulation of clam beds.

(ii) Civil Laws

A. U.S. To date, no U.S. federal or state court decision has upheld a civil claim for replevin or conversion based on breach of a foreign ownership law.

1. Foreign claimants tend to rely on U.S. government enforcement agencies to bring claims. In this way the U.S. taxpayer pays their legal fees and the foreign claimant is not subject to defenses, such as statute of limitations and laches (that is, claimant's unreasonable delay prejudiced the defendant), which are being applied with increasing stringency against owners and their successors in other art world actions, such as Holocaust claims.

B. UK. In December 2007, the UK Court of Appeal reversed the trial court's decision in *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.*[11] The case involved the suit by Iran for the recovery of objects of Iranian origin (and perhaps freshly excavated). The trial court held for the defense, characterizing Iran's law as the kind of "public", "penal" or customs law that the courts of another nation will not enforce, citing *Ortiz v. New Zealand* (New Zealand lost a claim to Maori objects illegally exported to the UK because the objects had not been forfeited prior to export).[12] The Court of Appeal reversed, stating the Iranian law stated a valid ownership claim and that the general trend of international law was to recognize such claims. The reversal in *Barakat* underscores how treacherous it can be for a purchaser or importer to find, interpret and understand foreign laws and how tenuous the distinction can be between an enforceable national ownership law and an unenforceable export control law.

(iii) Customs Laws

A. *Steinhardt.*[13] Customs seized an ancient gold Phiale from Michael Steinhardt, a prominent collector. The Second Circuit Court of Appeals affirmed the forfeiture because the importer's customs

declaration identified the country of origin as Switzerland instead of Italy. This was held to be a "material misstatement" because U.S. customs agents would have been on notice of Italy's potential claim—presumably under *McClain*—had Italy been correctly identified as the country of origin. (The trial court, the District Court for Southern District of New York, had also summarily upheld the forfeiture on *McClain* grounds, without any showing of scienter.) The problem with the material misstatement claim is, again, the absence of scienter—according to Robert Haber, Steinhardt's then dealer, there was no intentional misstatement of country of origin; instead, Steinhardt's customs agent automatically assumed that the country of export was the country of origin.[14] In effect, *Steinhardt* affirmed a claim for civil forfeiture based, ultimately, on a criminal statute, without any showing of scienter either for the primary offense—the material misstatement—or the underlying offense of breach of Italy's ownership law via *McClain*.

B. Any perceived defect in information declared to U.S. Customs can become the basis for civil forfeiture, with or without scienter.

C. For more than a decade, as a U.S. Customs official, Jim McAndrew, now a consultant to a customs law firm, single-handedly created Customs policy from scratch, on the basis of daily "horse-trading" with foreign cultural authorities such as Zawi Hawass of Egypt. Jim developed a reputation with the trade for being fair and reasonable. But the legality of import ought to be based on more principled grounds than a Customs agent's sense of fair play. To the author, it is clear that the administrative practices at Customs and Border Protection should ultimately be harmonized with the civil and criminal branches of US law.

D. U.S. Homeland Security recently seized an Egyptian sarcophagus imported by a U.S. collector. The complaint simply recited a series of Egyptian found-in-the-ground laws, observed that the sarcophagus was Egyptian, and concluded that it must have been stolen. But there was no discussion of the date or circumstances of export. The forfeiture thus avoided the most fundamental elements of a *McClain* analysis—date of export, nature of source country law then in effect, exporter's state of mind. Professor Stephen Urice of the University of Miami Law School has characterized the seizure as "extra-legal."[15] While contesting the forfeiture of some underprovenanced Byzantine objects (on the basis of unrelated suspicions of a foreign regulator against the foreign importer), an Assistant U.S. attorney was asked whether, in her view, all unprovenanced objects were considered stolen property under U.S. law. She paused before answering, "No."

E. At one point a few years ago, a large number of dealers in different fields--ancient art, coins, and maps, manuscripts and Americana--were separately detained upon deplaning at various U.S. airports. Apparently, they were all on a "watch list" in response to an internal Customs concern that must have included many dealers in various fields.

F. Customs law and procedure is a specialized body of law with its own rules and procedure. An importer can have materials seized without explanation. After some weeks, he will receive a standard "Notice of Forfeiture," which gives the importer the choice of contesting by administrative proceeding (not recommended—Customs has a home court advantage), converting the forfeiture into a civil litigation, or not contesting and abandoning the property. The importer's decision may well turn on the value of the goods. It is rarely worthwhile to engage legal counsel to contest unless the goods are worth low six-figures, as legal fees can easily run into the tens of thousands. On the other hand, the importer and counsel have no way to know the legal theory on which the forfeiture is based (or the government's version of the underlying facts) unless they elect to convert the proceeding into a civil litigation. This was the case where a collector/importer had approximately $200,000 in goods seized, and elected to convert the forfeiture into a civil litigation. After reviewing the facts and legal claims asserted in the government's claim, the collector decided to defend. The matter was ultimately settled and the goods were released. (However, the goods were rendered unmarketable by the history of litigation.)

**Italian and Greek claims against U.S. Museums and Collectors.**

A few observations about the recent, well-publicized repatriations by U.S. museums and collectors to Italy and Greece:

a. At least one hard-core smuggling ring was operated in Italy by Giacomo Medici, from the Freeport of Geneva, who sold through Robert Hecht in Paris, Robin Symes in London, and Bruce McNall of the

Summa Gallery in California, to U.S. institutions and collectors. When the Italian police raided Medici's warehouse, they found photographs and records of 20,000 or more objects that had been illegally excavated and smuggled out of Italy. These documents allowed authorities to identify objects in U.S. collections to Medici's warehouse and in some cases to find sites. (Note that at the May 2010 CPAC hearing discussed above, the author proposed, without effect, that the renewal of the Italian MOU be conditioned on Italy's publication of the Medici archives so as to allow U.S. museums to police their acquisitions and the market. Demands for transparency should not be a one-way street.)

b. In some cases, the U.S. purchasers either knew at the time, or later learned that the purchased objects were smuggled. At The Getty Museum, as early as the tenure of Jiri Frel, who preceded Marion True, Arthur Houghton, then a curator, resigned in protest at questionable acquisition practices and predicted that such practices would ultimately lead to claims from countries of origin. According to The Los Angeles Times, senior Getty management, in consultation with counsel, later concluded that it had acquired objects known to be "fenced." The Getty's practice thereafter was to try to retain the problematic acquisitions while adopting increasingly stricter, albeit prospective, acquisition policies.

c. In other cases, the purchaser acted in good faith on the basis of affirmative representations and warranties by the seller and the absence of evidence of recent excavation. For example, while engaged in negotiations with Shelby White, a well-known private collector, for the restitution of certain objects, the Italians publicly stated that Ms. White was a bona fide purchaser to whom no wrongdoing attached. Philippe de Montebello, formerly Director of the Metropolitan Museum, protested against the quality of some of the evidence presented by the Italians, stating that "there are lots of holes in the ground in Sicily." And the Getty negotiated a settlement with Greece for the return of four objects, for one of which, a grave stele, there was no evidence as to when the piece left Greece.

d. The current trend at the high-end of the antiquities market is towards transparency in negotiations, heavily negotiated representations and warranties regarding provenance and provenience, and corresponding indemnities. It seems clear that many of the challenged transactions would not have survived scrutiny under today's market standards.

e. It seems equally clear that no prudent seller should make the unqualified representation customarily demanded by museum purchasers to the effect that the "Object has been imported to and exported from all applicable countries in accordance with all applicable laws." How can the seller possibly know? Sellers should disclose and represent only what they know and negotiate the indemnity for repatriation claims separately. Also sellers should negotiate to cap their indemnification obligations at the purchase price, cap the buyer's reimbursable legal fees, and insist on a limited survival period (6 years maximum) for representations. A museum buyer may cite the need to protect its "core values" and insist on having an unlimited, unqualified right to "put" the piece back to at any time the museum feels insecure, which could be triggered by a completely unmeritorious foreign claim or even a bare inquiry. When a museum enters the stream of commerce, it is not automatically entitled to impose onerous terms on a seller. No rational seller should agree to a perpetual, contingent indemnification obligation.

f. The same concerns arise when consigning an object to auction. The consignment agreement forms used by all the major auction houses require the consignor to make similarly problematic, unqualified representations about absence of foreign claims, and universal legality of all prior export and import. At least one of the auction houses charges a 15% withdrawal fee if it has any doubts, in its "sole discretion," as to the accuracy of any of the consignor's representations and warranties.

**The Fate of Looted Iraqi Antiquities**

a. At a public panel in New York in Spring 2008, Col. Matthew Bogdanos, USMCR, insisted that antiquities fund terrorism. One of his slides showed solid lines purporting to demonstrate that Iraq is connected with New York and other western capitals by a global antiquities smuggling network. Yet when asked how much looted Iraqi material is entering New York, he answered: "None, yet."

b. The reality seems to be that, despite looting of Iraqi archeological sites on a massive scale, looted materials are not appearing on Western markets in any quantity or with any frequency (although seizures are occasionally announced of varying magnitude). (Near Eastern objects did appear on Western Markets in quantity after the first Gulf War in the 1990s). While there have been isolated seizures of objects in the U.S., thousands of objects have been seized in and repatriated from Jordan and Syria. According to Donny George, former (now late) head of the Iraqi antiquities department, Turkey appears to have made little effort to interdict looted Iraqi materials and Iran only began to do so in late 2008. There is no evidence that Iraq ever repatriated cultural materials looted by Iraq from Kuwait during the first Gulf War.

c. Iraqi cultural objects have been subject to a U.S. embargo since 1991 and are now subject to emergency import restrictions under CPIA (which appear to have expired). They cannot be marketed, displayed or exhibited in the U.S.. Perhaps these objects are being sold to collectors of means and taste in the Persian Gulf States, where such objects are simply unregulated.

**The 1970 Rule**

The Association of Art Museum Directors has adopted guidelines for its members regarding acquisitions of ancient art. Subject to limited exceptions, member museums are advised not to acquire objects by purchase or gift that do not have documented provenance to 1970 (or an export permit from the country of origin.) The 1970 Rule has changed the rules of the game for collectors who, in the past might have considered gifts or bequests to a U.S. Museum. It has also had the predictable effect of creating an estimated million-plus "orphaned" objects" held by U.S. collectors. Based on my experience in the trade, only a small number of these objects may have looted since 1970. Nevertheless, objects that are not "1970 Compliant" may suffer decreased marketability as market makers look for safe harbors. Given the diminished opportunity for gifts and bequests to museums, collectors are starting to inquire about the possibility of creating private foundations to house, exhibit and conserve their collections. On the other hand, there are signs that strict adherence to the 1970 Rule is not universal among AAMD member museums and that certain museums will exercise independent judgment regarding the purchase or loan of non 1970-compliant material. For example, the author understands that at least one major collecting museum will consider acquiring objects that are not 1970-compliant if the country of origin permits private ownership and a legal market in the same materials. In addition, from February through May 2012, the Walters Art Museum exhibited 129 Precolumbian works from Mexico to Peru from the collection of John Bourne given or promised to the Walters, including material loaned to the Walters by the Los Angeles County Museum of Art and the New Mexico History Museum. The collection included objects that were not 1970- compliant, had no history of recorded archeological excavation and some of doubtful authenticity. The Walters' catalogue is frank about these issues, notes the difficulty of authenticating certain pieces given the sophistication of modern forgers, and states that the Walters' acquisitions and accessions are informed by the museum's commitment to Due Diligence, Transparency and Good-Faith Engagement with claimants.

**Structuring a Restitution; Tax and Other Issues**

Private, consensual restitutions are often structured so that the collector donates the object to a U.S. cultural institution friendly to the source nation which then displays the object in the U.S. for a few years before returning the object to the source nation. Historically, the collector has been entitled to take a charitable deduction for the appraised value of the object. U.S. tax policy could be said to encourage negotiated restitutions rather than prolonged litigation. In a troubling recent development, however, the IRS challenged the appraised value of ancient objects donated to a U.S. institution in anticipation of their repatriation to a country of origin. When a private collector donated an object to a U.S. institution with ties to the country of origin, the IRS challenged the multi-million dollar appraised value on the grounds that, absent documented provenance, no market existed for the object and the object had no value. On another occasion, where a dealer tried to make a voluntary restitution of some objects repurchased at great expense, many years after the initial sale, from remote, downstream purchasers, the cultural authorities of the country of origin simply failed to respond.

**Buying at Auction**

Buying at auction generally takes much of the headache out of the process—for buyers. The auction houses have internal (but unpublished) compliance protocols (that may vary from field to field) and attorneys and specialists who are (generally) sensitive to the pitfalls of the ancient art market and (generally) do a (reasonably) thorough job of vetting provenance, establishing provenience and sifting through potential claims before accepting an object for consignment. Auction houses have to be careful—they offer their buyers a five year warranty of title.

**Selling at Auction**

Auction is an excellent way to sell unless there is reasonable doubt as to when or how the object left the country of origin, in which case one should be extremely cautious about consigning the object for sale. In essence, consigning an object to auction is like putting the object in the middle of a well-lit, very public, bulls-eye and daring foreign governments to make a claim. Some foreign governments make a point of policing auctions of materials sourced from their homeland. The auction houses shrug off the occasional claim and proclaim the benefits of the "transparency" they offer. On balance, they're right. As a piece builds up a history of publication, exhibition and auction it becomes an increasingly safe purchase. However, dealers have additional reason to be cautious about consignment. The auction houses are occasionally subject to subpoenas from the U.S. Attorney responding to inquiries or investigations of foreign governments for the names and records of their consignors. For example, after Italy made its claims against the Getty for materials sourced from Robin Symes, Greece launched a fishing expedition. One collector who had consigned a "Greek" object received a subpoena for document production relating to the Greek investigation. But it was clear from its type and style that the piece was of Greek colonial origin, and that it had not been produced or discovered in modern Greece but in a neighboring modern country. The auction house was eager to accommodate the U.S. Attorney and the U.S. Attorney was eager to accommodate the Greeks. But the auction house failed to have its specialists point out the obvious and spare the consignor the expense of having to do so itself.

**Selling in Europe**

As a rule, the European markets (France, Belgium, Germany, Netherlands, Scandinavia) seem to be less demanding in terms of requiring documented provenance and easier to sell in. On the whole, European enforcement agencies seem to be less aggressive than American. There is a widespread sense among market participants that the U.S. is the most difficult jurisdiction in which to do business. Whether that is good or bad depends on which side of the debate you are on.

**Pre-Clearance with Foreign Governments**

From time to time U.S. dealers or collectors contact foreign governments (such as Egypt or Cambodia) in advance to ensure that they have no claims against a particular piece. But the foreign government is under no obligation to respond, and in fact it rarely does. If the government does respond, the response does not amount to a legally enforceable release of claims. (Why would a foreign cultural authority agree to release claims?) Although the proactive auction house may protect itself by attempting to "pre-clear" a piece with a foreign government, there is only risk for the consignor. Even the most unmeritorious claim by a foreign government can render a piece unmarketable.

**What Does the Future Hold? A Two-Tier Market?**

It is hard to predict the future of the antiquities market. Clearly there is a continued demand for ancient art among private collectors and curators. As a result of all the vetting, auction sales are healthy and strong. But there is already solid evidence from auction house sales that provenanced pieces sell at a premium and that unprovenanced or underprovenanced pieces of equal quality may not be accepted for consignment and may not sell if they are. There is also some concern that the auction houses may ultimately adopt the 1970 Rule for the same reason as the AAMD—it is a prophylactic "safe harbor" that spares them the aggravation, embarrassment and expense of the occasional consignment withdrawn under threat from a foreign government. Will separate markets evolve for museum-worthy pieces with documentation to 1970 and a second tier of objects marketable only to private collectors?

**Trading Transparency for Repose**

One way to restore certainty and liquidity to the antiquities markets would be to trade "Transparency for Repose." One can envisage a future in which objects are anonymously published on an electronic database, with known information about provenance and provenience. Access to the database would be subject to a conditional license, binding on all those with access and their affiliates and confidants. If not claimed within one year by a country of origin, "Seasoned Objects" would be free and clear of any claims under U.S. federal and state law. Compensation would be paid to "Bona Fide Purchasers" and claims could be brought after one year if "Fresh Evidence" arises. Although the devil is in the details, the advantages are clear: Transparency Should Merit Repose. One can also envisage resistance from the trade and objections from claimants and others (enforcement agencies?) that the license was not legally binding or enforceable against them. Nevertheless, if review of the database became an industry standard and part of accepted "best practices," would a claimant's failure to review the database support a laches defense? Such a database would be more useful than the Art Loss Register, which only publishes the relatively small number of known objects whose theft is reported.

**Fakes, Forgeries, Authentication, Restoration**

Although questions of title and marketability seem to assume overriding importance in this field, collectors of ancient art, ethnological objects and textiles should have the same concerns about fakes, forgeries, authentication, and undisclosed restoration or repair as collectors in any other field of fine art. For example, carbon dating and thermo-luminescence testing are commonly used to date pottery. But testing results can be faked or manipulated. It has been rumored in the trade that Chinese forgers are crushing ancient pottery shards and recycling the powder to use in contemporary forgeries, in order to pass customary materials testing. Your author witnessed an Asian art specialist from one of the large auction houses identify various restorations to a series of ancient Chinese sculptures that had not been identified to the purchaser by the US dealer. It is widely believed in the trade that fakes and forgeries also plague the booming domestic market in China for Chinese antiquities. Some dealers (and auction house specialists) are top scholars in their field, and some are not. A dealer who spans several fields may need to rely on outside expertise. If a condition report is not available at the time of sale, it is prudent to condition the purchase on outside, expert examination.

**Recent Developments**

A number of recent developments reflect the continued evolution of the law affecting the trade in ancient art.

***Asia Society Symposium.***

On March 18, 2012, the Asia Society hosted a symposium co-sponsored by the American Committee for Cultural Policy, a recently-formed not-for-profit corporation.[16] The panelists included a number of senior members of the U.S. museum community, both retired and active, as well as collectors, dealers and others. The panelists, as a whole, and in particular the museum personnel, presented a variety of viewpoints, and the discussion represented the first frank public dialogue regarding the problems with the current legal and policy framework. One of the panelists took the position, now commonly voiced by U.S. museums, that museums have moved beyond concepts of ownership and title to focus on "stewardship," loans, shared access and institutional exchange. Yet concern was voiced that when the AAMD adopted the 1970 Rule to avoid one set of problems, it created another; there is no doubt that the 1970 Rule has had the perhaps unintended effect of impairing the marketability and value of a vast number of "orphaned" objects in all fields that are currently held by private collectors. There was also concern that the U.S. legal framework has swung too far in favor of national retention and enforcement to the detriment of U.S. institutions and cultural life. Examples were given of foreign institutions acquiring objects declined by U.S. museums solely because otherwise unobjectionable objects were not "1970-Compliant." Clearly there is widespread discontent in the U.S. collector and museum communities with the current regulatory and policy framework, which was reinforced by the events described below.

***Turkish Claims against US Museums***

In late March 2012, it was reported that the Republic of Turkey had demanded the return of a number of objects held by various U.S. museums.[17] Turkey says that it has evidence that the materials were exported after the 1906,

the date of Turkey's national patrimony law. On the other hand, it has also been reported that Turkey has liberalized its legal regime and may now permit the sale of archeological materials held by museums to private collectors.[18]

***SLAM Mummy Mask***

On March 31, 2012, a U.S. federal district court granted the Saint Louis Art Museum's ("*SLAM*") motion to dismiss the U.S. Government's claim for civil forfeiture of ancient Egyptian sarcophagus mask known as Ka-Nefer-Nefer.[19] The U.S. Government alleged that: Egyptian records reflected that the mask had been in the possession of the Egyptian government from the time it was excavated at Saqqara in 1952 until sometime between 1966 and 1973, when the mask was determined to be missing; SLAM purchased the Mask from Phoenix Ancient Art in New York in 1999 for $499,000; because Egyptian records never recorded the sale, de-accession or export of the mask, the mask must be considered stolen property and returned to Egypt. In a short, scathing decision, the Court held that the Government failed to allege any facts that amounted to a claim of theft under the Federal Rule of Civil Procedure 12(b)(6) and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, and also failed to state what law(s) were violated in order to articulate a legal standard under which to evaluate a claim of theft or illegal export.[20]

SLAM publicly stated that it had purchased the mask from Phoenix Gallery after what SLAM characterized as a thorough due diligence investigation of provenance and provenience. SLAM publicly stated that Phoenix had contractually agreed to refund the purchase price to SLAM. Reading between the lines, the inference is that the Phoenix guaranty would have been triggered only by a successful claim on the merits and not a mere adverse claim. Otherwise SLAM might have declined to defend title and settled for "putting" the mask back to Phoenix, thereby shifting the economic risk and the legal burden to Phoenix.

***Egyptian Charges Against Zawi Hawass***

On April 2, 2012, it was publicly reported that the Egyptian government had referred charges against Zawi Hawass, formerly director of Egypt's Supreme Council of Antiquities, alleging waste of public funds and theft of antiquities.[21] The author's understanding is that, while in office, Hawass had pressed U.S. enforcement agencies to pursue Egypt's claim to the SLAM mask. They initially resisted his demands because of the lack of hard evidence of theft and their reluctance to rely solely on Egyptian records, whose accuracy and veracity has been privately questioned.

***US v. Khmer Statue***

On April 4, 2012, the U.S. filed a complaint for the civil forfeiture of a rare and spectacular ancient Khmer statue.[22] The statue was one of a pair linked to a find site in Cambodia. Each statue had been broken off at the feet, and the feet and pedestals remain in situ. The statue (above the ankles) had been purchased by a Belgian collector from Spinks in London in the 1970s. The collector and Sotheby's signed a Consignment Agreement in late March 2010 for the September 2010 auction in New York. Sotheby's had the statue imported into the U.S. in April 2010 and then contacted the Cambodian government in an attempt to "pre-clear" the piece in advance of the March 2011 auction. Cambodia reacted by demanding that Sotheby's withdraw the lot from auction and return it to Cambodia. Sotheby's resisted, and then the U.S. filed an "*in rem*" action, in essence on behalf of Cambodia.

The Government's complaint is founded on the premise that the statue is identified to a known find-site (*i.e.*, the feet and pedestal remain in situ at the Prasat Chen temple); that the Koh Ker site in which the temple lies appears not have been looted until after 1939; and that French IndoChina and then Cambodia enacted a series of national ownership laws starting around 1900. Conspicuously absent are any hard factual allegations as to the date when, or the circumstances under which, the statue left Cambodia. As with the SLAM mask, theft is inferred and assumed to have occurred during the Cambodian civil war in the 1970s. Sotheby's compliance director (a former U.S. prosecutor who worked with Zawi Hawass on the *Schultz* trial) was quoted to say, correctly, that the statue could have been exported at any point in time before or after Cambodian national ownership laws were in effect. A dispassionate analysis under *McClain, Schultz* and *SLAM* suggests that the Government should lose, given its failure to allege the date of export. Even if it were shown that the statue had been exported after the date of a Cambodian patrimony law, *McClain* and *Schultz* would require an analysis of the quality of those laws. Finally,

the Khmer Rouge held Cambodia's seat in the UN and was the internationally recognized government of Cambodia for several years; if the Khmer Rouge looted the statue in the 1970's, should its export be regarded as state-sanctioned deaccession rather than theft?

Although Sotheby's is contesting the forfeiture, its only stake is in defending its decision to accept the consignment. The owner/consignor is at risk of losing its purchase price in the statue; it has already lost the gain between the average estimated hammer price and its purchase price. Moreover, even if Sotheby's wins, the statue may become unmarketable. The complaint cites a number of internal Sotheby's communications between an outside scholar and an in-house Asian art specialist indicating misgivings about the provenance of the piece and the advisability of contacting the Cambodian Minister of Culture. This matter highlights the tension between a consignor and an auction house in dealing with potentially problematic materials.

***US v. Khouli et al: Exposure for Downstream Purchasers***

In April 2012, the US Attorney for the Eastern District of New York announced that Mousa Khouli had plead guilty to smuggling Egyptian cultural property into the US from Dubai, "using a variety of illegal methods intended to avoid detection and scrutiny by Customs." Although Khouli had falsely declared Dubai instead of Egypt as the country of origin (for Customs' purposes, the country of "original manufacture"), the information package presented to Customs disclosed that the objects were Egyptian. Under the "material misstatement" test of *Steinhardt*, the question is whether the total mix of information disclosed by the importer was sufficient to put the average Customs agent on notice that Egypt might be able to assert an ownership claim to the objects. Given the totality of disclosure in *Khouli*, the technically incorrect country of origin declaration might not have risen to the level of a "material misstatement" under *Steinhardt*. More important, the government's conspiracy claim against two co-defendants one, a collector and other a dealer, has troubling implications for downstream purchasers. They are alleged to have been co-conspirators on the basis of correspondence with Khouli. In contrast to the relatively full paper trail between Fred Schultz and Jonathan Tokeley-Parry, the relationship between Khouli and both the dealer and collector seems more tenuous, and their alleged knowledge of Khouli's bad actions almost entirely inferential. One of the co-defendants, the collector, has claimed, without apparent objection by the government, that he was not involved in the importation process for the pieces or told anything about the way that they would be or ultimately were imported. It remains to be seen whether the government will prevail against the alleged co-conspirators on the basis of what appears to be a slender record of their involvement with Khouli.

**The Prospects for Legislative Reform**

The author shares the concerns voiced at the March 2012 Asia Society Symposium and believes that there is a need for legislative reform, both to restore conceptual unity to the civil, criminal and customs law branches of U.S. policy and to correct the blank check approach of the State Department under CPIA and of U.S. enforcement agencies under *McClain*. Archeologists, enforcement agencies and the plaintiff's bar would vigorously disagree and insist that the current legal framework creates a flexible, multi-layered barrier to the importation of looted objects. The prospects for legislative reform are uncertain at best. For the foreseeable future, it appears that private collectors of ancient art and U.S. museums will have to cope as best they can with the current U.S. system and hope that perhaps the federal courts will continue to reject under-substantiated claims for restitution.

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**NOTES**

[1] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, November 14, 1970, 823 U.N.T.S. 231. See the State Department's International Cultural Property Protection Home Page for hyperlinks to cited laws. http://exchanges.state.gov/heritage/index.html.

[2] *Convention on Cultural Property Implementation Act*, Pub. L. 97-446, Title III, 96 Stat. 2350 (1983) (codified at 19 U.S.C. Section 2601 *et seq.*).

[3] See *Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 4 Syracuse Journal of International Law and Commerce 97 (Summer 1976).

[4] 34 Stan. L. Rev. 275 (1982).

[5] *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977); *aff'd in part, rev'd in part,* 593 F.2d 658 (5th Cir. 1979); *cert. denied*, 444 U.S. 918 (1979).

[6] *"The [Senate Finance] Committee intends these limitations to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. U.S. actions in these complex matters should not be bound by the characterization of other countries… .*" Senate Report. No. 97-564 (1982).

[7] "*My general position is that the UNESCO legislation which deals with the specific problem of the looting of archeological sites, and which represents a very elaborately crafted compromise, is the law that should be used to deal with this problem. General American criminal legislation should not be artificially manipulated in order to deal with the problem of the possession of artifacts of wholly uncertain and unknown origin. [Furthermore, the Stolen Property Act should be limited to] cases of real theft, where it is shown and proved that somebody took something from somebody else's ownership, and it is a real ownership and not simply one of those abstract vesting statutes saying that everything belongs to the State*." Testimony of Paul Bator, *Hearing before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate,* Ninety-Ninth Congress, First Session, on S. 605, May 22, 1985, Serial No. J-99-27, at 19, 20.

[8] See *Peru v. Johnson*, 20 F. Supp. 810 (C.D. Cal. 1989), *aff'd sub nom. Peru v. Wendt*, 933 F.2d 1013 (9th Cir.1991).

[9] *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, Stephen K. Urice, 40 N.M.L. Rev. 123 (2010).

[10] *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *aff'g* 178 F. Supp. 2d 445 (S.D.N.Y 2002).

[11] [2007] EWCA Civ 1374 [2007] WLR (D) 343.

[12] *Attorney-General of New Zealand v. Ortiz and Others*, 3 All ER 432, 2 W.L.R 10, 1 Lloyd's Rep 173 (QB 1982); [1982] 3 W.L.R. 570 (Eng.C.A.), aff'd [1983] 2 W.L.R. 809 (Engl.H.L).

[13] *United States v. An Antique Platter of Gold*, 991 F.Supp. 222 (S.D.N.Y. 1997); *aff'd* 184 F 3d. 131 (2d Cir. 1999).

[14] Haber's explanation is plausible because the same thing happened to me when I bought a fine and rare vintage Gibson guitar built in Kalamazoo, Michigan from a French collector who shipped by DHL. I successfully appealed a claim for several thousand dollars of duty owed on goods that were mistakenly identified as being of foreign manufacture. I submitted photos of the guitar and stressed that Elvis played a Gibson.

[15] See *Unveiling the Executive Branch's Extralegal Cultural Property Policy*, Andrew L. Adler and Stephen K. Urice, August 12, 2010, electronic copy available at: http://ssrn.com/abstract=1658519.

[16] The Asia Society program Collecting Ancient Art in the 21st Century is online: http://asiasociety.org/video/arts/collecting-ancient-art-21st-century.

[17] http://chasingaphrodite.com/2012/03/20/exclusive-turkey-seeks-the-return-of-18-objects-from-the-metropolitan-museum-of-art/.

[18] http://www.todayszaman.com/news-272221-controversy-over-price-tagging-of--artifacts-continues.html.

[19] *United States v. Mask of Ka-Nefer-Nefer* E.D.MO 2012, No. 4:11CV504HEA.

[20] A German court rejected an Egyptian action to enjoin the export from Germany of a sarcophagus and tomb items of Queen Meretities because, under the German Code of Civil Procedure, Egypt failed to substantiate its ownership and property rights in the objects, in particular by relying on its own records to prove ownership and theft. Kammergericht, judgment of October 16, 2006 - 10 U 286/05.

[21] http://english.ahram.org.eg/NewsContent/1/64/38308/Egypt/Politics-/Egypts-Indiana-Jones-faces-charges.aspx.

[22] *United States v. A 10th Century Cambodian Sandstone Sculpture, Currently Located at Sotheby's in New York, New York,* S.D.N.Y. 12 Civ. 2600.



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# NEW YORK'S DISTINCTIVE RULE REGARDING RECOVERY OF MISAPPROPRIATED ART AFTER THE COURT OF APPEALS' DECISION IN MIRVISH V. MOTT

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Judith Wallace

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*This essay examines the unsettled case law about owner claims to recover misappropriated art under New York's distinctive demand and refusal rule and the rights of good faith purchasers or innocent recipients of gifts of misappropriated art when the statute of limitations has run in their favor. When these good faith/innocent folks decide to sell, can the owners get their art back from the buyer?—RDS*

• • •

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**Introduction**

Many are aware that one may gain legal title to real property by "adverse possession"—*i.e.,* by occupying land openly and under a claim of right for the period specified under state law, which is ten years in New York. Public policy favors the active use of land, disfavors efforts to tie up rights in real estate in perpetuity, and, under certain circumstances, rewards misappropriation that is blatant and longstanding.

Personal property, in contrast, is treated differently. That raises the question of whether, and under what circumstances, possession of misappropriated personal property can be transformed into actual ownership. Is the mere passage of time sufficient? Is the expiration of the statute of limitations for conversion—just three years in New York—enough time? Some owners of art might not even notice their property was missing during that time, especially if it were not publicly exhibited. Are there special issues or public policy concerns applicable to fine art, and if so, what are they?

***Mirvish v. Mott***

Earlier this year, the New York Court of Appeals, the state's highest court, decided *Mirvish v. Mott,* a case concerning the ownership of *The Cry,* an erotically-themed monumental bronze sculpture by Jacques Lipchitz*,* which raised many of these issues.[1]

*Mirvish v. Mott* concerned a gift of *The Cry* by Yulla Lipchitz, the widow of sculptor Jacques Lipchitz, to her companion of nearly 20 years.[2] Yulla had given her companion several other works of art over the years, always using a written deed of gift. In the case of *The Cry,* the 1,100-pound sculpture could not be easily displayed in the New York City apartment the couple shared, so the sculpture was kept in storage, and Yulla made her gift by writing out and handing over an unambiguous, explicit, signed, dated, handwritten statement on the back of a photograph of the *The Cry* stating that "I gave this sculpture 'The Cry' to my good friend Biond Fury in appreciation for all he did for me during my long illness. With love and my warm wishes for a Happy Future, Yulla Lipchitz / October 2, 1997, New York."

A year later, Hanno Mott, Yulla's son by a prior marriage, who had a power of attorney for his mother, loaned the sculpture in Yulla's name to an exhibit at the Tuileries Garden in Paris adjacent to the Louvre. Mott was unaware of the gift at the time of his loan in his mother's name and Yulla's companion was equally unaware of the loan, thinking that *The Cry* remained in storage.



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After Yulla's death in 2003, her companion sought to retrieve the sculpture from storage, and contacted Mott, who was Yulla's executor as well as a residuary beneficiary of his mother's estate. Mott did not respond to the companion's repeated demands. The frustrated companion sold his interest in the work to Toronto art collector David Mirvish, who demanded the return of the sculpture and was informed that it had been sold to an overseas buyer in 2004. Mirvish then sued the estate and Mott and, in a later, separate lawsuit, once he learned Mott's buyer's identity, sued the buyer. The buyer immediately offered to settle the dispute and, in a settlement joined by Mott, agreed to return *The Cry* to escrow in New York pending the determination of the ownership of *The Cry* by the New York courts.

***New York's Distinctive Demand and Refusal Rule from Guggenheim v. Lubell***

The *Mirvish* dispute implicated New York's well-known demand and refusal rule, most famously set forth in the landmark 1991 case of *Guggenheim v. Lubell.*[3] *Guggenheim* involved a claim for a work of art (a gouache by Marc Chagall) that had been stolen from the Guggenheim museum. Decades after the theft, the museum located its painting at the home of a couple that had purchased it in good faith from a New York gallery. The museum sued to recover it.

In New York statute of limitations for conversion is three years, and the statute of limitations for a claim seeking replevin (the recovery of the specific property, rather than money damages for conversion) is keyed to conversion's time limit. In *Guggenheim,* the Court of Appeals held that, in a claim seeking to recover misappropriated property, the statute of limitations for conversion and replevin only starts to run when the owner makes a demand which is refused, unless a demand would have been futile. The demand and refusal rule had been set forth in earlier New York cases, but *Guggenheim* reiterated it along with a discussion of its importance in claims relating to artwork in view of New York's strong public policy interest in ensuring that New York does not become a haven for trafficking in stolen cultural property.

Notwithstanding this strong public policy, the *Guggenheim* decision has been applied unevenly, or ignored, in various Appellate Division (New York's intermediate appellate court) and federal court decisions concerning disputes over property ownership in the two decades since *Guggenheim* was decided.[4] It was therefore reasonable to assume that the Court of Appeals was taking the opportunity to address the confusion concerning the interplay of the statute of limitations and property ownership under the unique facts presented in the *Mirvish* case.

***Surrogate's Court Decision***

Because the dispute concerned a claim for personal property against an estate, the court of first instance was the Surrogate's Court, which has jurisdiction over probate matters. In that court, Mott challenged the validity of the gift, although he did not dispute Yulla Lipchitz's intent, her mental capacity, that she was not coerced, or the identification of her handwriting on the deed of gift. He also asserted a statute of limitations defense, arguing that Mirvish's time to file a claim began to run at the time of the 1998 loan to the Louvre and was time-barred, notwithstanding the rule in *Guggenheim,* which holds that the statute of limitations begins to run at the time of demand and refusal (2004) unless the demand was futile.

Mirvish moved for summary judgment, seeking a determination that he was entitled to *The Cry* as a matter of law. While that motion was being briefed and argued, Mirvish, Mott and the buyer concluded their settlement agreement, which, as noted above, provided that *The Cry* would be delivered to whoever prevailed on the issue of *ownership.* As a result of that settlement agreement, Mirvish argued that Mott's statute of limitations defense was inapplicable, since the expiration of a statute of limitations does not extinguish title under New York law.

On December 31, 2008, the Surrogate's Court decided that Mr. Mirvish was the owner of *The Cry*. It did not make any finding on Mott's statute of limitations defense—apparently agreeing that it was irrelevant to the determination of ownership, which was the sole issue to be decided given the settlement agreement—and did not mention the Court of Appeals' decision in *Guggenheim* or New York's demand and refusal requirement, since it was undisputed that demand for *The Cry* had not been made by the donee until 2004.

### *Appellate Division Decision*

Mott appealed, and the Appellate Division unanimously reversed the Surrogate, finding that the 1998 loan to the Louvre was a conversion that started the time to file a lawsuit seeking the sculpture to run. The Appellate Division likewise did not mention *Guggenheim* or explain why the demand and refusal requirement would not apply here. Furthermore, the Appellate Division considered an argument by Mott that there was a fact question as to whether Mrs. Lipchitz actually had delivered the written gift instrument to her companion during her lifetime or whether that companion had found the gift instrument among Yulla's belongings after her death.

### *Questions Left Open by the Court of Appeals' Decision in Mirvish v. Mott*

Mirvish then obtained leave to appeal to the Court of Appeals. Because New York's highest court grants leave to appeal in only about six percent of civil cases where there is no dissent in the Appellate Division and no constitutional issue, it was anticipated that the inconsistency of the Appellate Division's decision with the demand and refusal requirement set forth the Court's landmark decision in *Guggenheim* might be the Court's focus.

In February 2012, the Court of Appeals unanimously reversed the Appellate Division and reinstated the decision of the Surrogate's Court, which had held that Mirvish was the owner of *The Cry*.[5]

However, the Court of Appeals' decision is notable for what it did *not* decide. While the award of *The Cry* to Mirvish is generally consistent with the longstanding New York rule applied to artwork in *Guggenheim,* the Court did not so much as mention *Guggenheim* in its decision and specifically declined to consider the demand and refusal rule. The Court of Appeals reversed the Appellate Division and found that the handwritten deed of gift was sufficient to establish that Mirvish is the owner of *The Cry*, but relied principally on the terms of the settlement agreement in the separate lawsuit against the party in possession of *The Cry* to reject Mott's other arguments against Mirvish's right to take possession of the sculpture. The result is a curiously limited decision that calls into question the Court of Appeals' commitment to *Guggenheim* and how the demand and refusal rule is to be applied going forward.

Accordingly, this is an opportune time to assess the state of the law in New York. This essay aims to identify decisions inconsistent with *Guggenheim* that are arguably wrongly decided, possible distinctions and suggestions as to how they should be resolved, and potential open issues for future litigants.

## The State of the Law in New York Prior to the Decision in *Mirvish v. Mott*

### *Guggenheim's Demand and Refusal Rule*

In *Guggenheim,* the Court of Appeals set forth what was intended to be a rule with "clarity and predictability":

> The rule in this State is that a cause of action for replevin … accrues when the true owner makes a demand for the return of the chattel and the person in possession of the chattel refuses to return it. … Until demand is made and refused, possession of the stolen property ... is not considered wrongful.[6]

The only exceptions are when demand would be futile—for example, if he work has been destroyed or further transferred, or if the possessor is a thief who would know his possession is wrongful and presumably refuse any demand. Thus, in *Guggenheim,* after the museum made a claim for the return of its painting which was refused by the Lubells, the museum had a timely claim against the Lubells for the return of the museum's Chagall.

The *Guggenheim* court also recognized that important state (and federal) public policy reasons supported a rule that is protective of true owners in view of New York's "worldwide reputation as a preeminent cultural center." The court also took into account the Governor's decision, on the advice of the U.S. State Department, to veto a statute that would have provided a three-year state of limitations for art objects owned by certain non-profit institutions such as museums, which would run from the time that the institutions published a notice that they were in possession of the artwork, to prevent New York from becoming "a haven for cultural property stolen abroad."



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***New York Distinction Between the "Right" of Ownership and "Remedy" of a Conversion Claim***

The *Guggenheim* rule is based in part on the well-established principle of New York law that the lapse of a statute of limitations for a claim for conversion does not confer ownership on the party in possession. Courts refer to this as the distinction between a "right" (*i.e.*, ownership) and a "remedy" (*i.e.*, the ability to sue for replevin and obtain possession).[7] Often, this distinction is cold comfort to the true owner, who may have the satisfaction of knowing he continues to be the "true owner" but would be barred from filing a lawsuit to get that property back from the converter who has possession.

However, the distinction becomes significant if the party who is wrongfully in possession then sells or gifts the work to a third party. Because the owner's underlying title to the property remains undisturbed, the owner can demand the return of the property from that third party, and if the demand is refused, the owner has a timely lawsuit for conversion. Thus, the right versus remedy distinction in New York has teeth, and generally renders converted artwork unmarketable.

In *Guggenheim,* the Court recognized the "seemingly anomalous" rule that the statute of limitations against the thief had long since expired, but that the claim against the Lubells as converters was timely. Thus, in *Mirvish v. Mott,* after Mott asserted his statute of limitations defense, Mirvish learned the identity of the 2004 purchaser, and sued that purchaser. That purchaser obviously recognized that, under *Guggenheim,* Mirvish had a timely claim in which the only issue would be ownership of *The Cry*, and agreed to a settlement that would return the sculpture to escrow in New York for delivery to whomever the courts determined to be the owner.

This rule is less unfair than it may appear at first glance. Thieves do not get a "get out of jail free" card allowing them to take advantage of a statute of limitations defense, while the good faith purchasers from the thief are subject to claims. Courts in New York have long recognized that it is equitable to require property to be delivered to the true owner, and have developed various doctrines to prevent defendants who rely on their own conversion or concealment from taking advantage of the defense of statute of limitations. As the state's highest court held in 1910 in *Lightfoot v. Davis*, "the tort-feasor cannot allege his own wrong for the purpose of carrying back the injury to a time which will let in the statute [of limitations]."[8] Similarly, in 1965, the Court of Appeals held in *General Stencils, Inc. v. Chiappa*, that the doctrine of "equitable estoppel" prevents the wrongdoer from asserting the statute of limitations as a defense so that he cannot "take refuge behind the shield of his own wrong."[9] Thus, since the thief should be prohibited from asserting a statute of limitations defense at all, there is no significant anomaly or inequity in how the statute of limitations is applied. If these doctrines are coherently and consistently applied, there should be no perverse incentive for possessors to assert that they are wrongdoers so as to assert the statute of limitations defense, because there is no advantage to be gained.

***Because Demand and Refusal Is a Substantive Element, Mere Possession of Property Owned By Another Is Not a Tort***

The reason that the statute of limitations for a claim by an owner on a good-faith possessor does not start to run until demand and refusal is because, under New York law, refusal of a demand that is not futile *is* the wrongful conduct that constitutes conversion. New York courts have repeatedly held that the demand for property and its refusal is a "substantive" element of a conversion claim that is required to characterize the possessor as a wrongdoer, and is not merely a "procedural" step that needs to be complied with before the owner can file a lawsuit. Thus, as the Court of Appeals held in *Guggenheim*, someone who is not a thief but innocently possesses property he or she does not own has done nothing wrong until the owner demands the property's return, and the possessor refuses that demand. Demand is futile when the possessor is an outright thief or if the property has been transferred or destroyed. Thus, the court explicitly held that the statute of limitations does not run from when the owner had the *right* to make a demand for the artwork (which is the test in certain other legal contexts), but rather when the owner *did* make that demand.[10]

This was a well-established principle long before *Guggenheim.* As the federal Court of Appeals for the Second Circuit explained in 1982 in *Kunstsammlungen Zu Weimar v. Elicofon*,[11] which also involved the assertion of a statute of limitations defense to a claim to recover artwork, calculating the statute of limitations from when the owner had the right to make the demand "would eviscerate the undisputed distinction in New York law between



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substantive and procedural demands ... Indeed, the very notion of a substantive demand requirement is that, despite having a right to the property, the true owner must nevertheless demand its return and be refused before he has a cause of action at all against the refuser." The cases that incorrectly suggest the cause of action accrues and the statute of limitations runs from the soonest time that an owner *could* have made his demand, regardless of when demand is actually made, are improperly addressing demand as a *procedural* requirement.[12]

***Inconsistent Application of the Guggenheim Demand and Refusal Rule in Lower Courts***

Some courts nevertheless hesitate to apply the demand and refusal rule, perhaps because it may seem harsh to allow a claim against an innocent party in possession decades after the initial misappropriation, even when the delay is not the fault of the owner and there has been no prejudice to the party in possession. (And when the owner has unreasonably delayed making a demand, and the possessor is prejudiced by that delay, the possessor may have a defense of laches, which is discussed below). As a result of this hesitancy on the part of courts to apply the rule, there are decisions in New York that incorrectly state that "wrongful" or "unauthorized" possession of property starts the statute of limitations period, or that use of the property as though one is the owner is conversion and starts the statute of limitations period. After all, many possessors would prefer to be considered wrongdoers from the time of their acquisition if it meant that the claim against them to recover the property would be time-barred. These decisions quite clearly conflict with *Guggenheim.*

One such case is *New York City Transit Authority v. New York Historical Society,* decided by the Appellate Division, Second Department in 1997, which involved collections of photographs that had been donated by the New York City Transit Authority to the New-York Historical Society.[13] The Transit Authority, it was later learned, did not in fact have the legal authority to transfer those photographs. Just as in *Guggenheim*, when the Transit Authority demanded their return, the museum asserted a statute of limitations defense.

In *New York City Transit Authority*, however, the court found for the museum, citing *Guggenheim,* oddly enough, for the proposition that "[it]t is well settled that where the initial possession of a chattel is wrongful or unlawful, the cause of action to recover the chattel accrues and the Statute of Limitations begins to run at the time of the initial unlawful possession." The court then distinguished *Guggenheim,* and held that the statute of limitations against the museum began to run from the New-York Historical Society's possession, with the result that the Transit Authority's claim was time-barred, because "[a] demand is only a substantive requirement of a cause of action to recover chattels where one in possession of the chattels acquired such possession lawfully or where, as in the case of a good-faith purchaser for value, the initial possession of the chattels is not considered wrongful." In other words, the court found, bafflingly, that receipt of a gift from a public agency that the agency did not have authority to make was wrongful, but that a good-faith purchase of stolen property was somehow less wrongful, with the result that while a good-faith purchaser was subject to a claim, a museum that paid nothing for the property had a good statute of limitations defense. It is hard to see why a court would view the museum as less blameworthy (and, therefore, more worthy to keep the property) than the Lubells in *Guggenheim.* The Lubells investigated the artwork's provenance by contacting the artist's family, and had no way of learning of the theft because the Guggenheim did not report the work stolen to law enforcement authorities or other museums. The New-York Historical Society, in contrast, could have checked with the Governor's office to see if the gift of public property to a private party was permissible or authorized, or performed the legal research to identify the same state Constitution provision that the court relied upon. Unfortunately, the only feature of *New York City Transit Authority* that is consistent with *Guggenheim* was that a museum prevailed.

There are also a handful of cases, some of which rely on dicta or pre-*Guggenheim* decisions, to state the proposition that acts that are consistent with a belief that one owns the property at issue constitute conversion. These are inconsistent with the facts of *Guggenheim,* as the Lubells had possession of the work for twenty years, loaned the work for public exhibition, held themselves out as owners, and treated the Chagall in every way as if it was their property. Nevertheless, the Court of Appeals found that the conversion only occurred when the Lubells refused the Guggenheim's demand.

Just such an error was made by the Appellate Division in *Mirvish v. Mott.* The First Department misapplied case law, stating that "asportation" of property constitutes conversion, which the court interpreted to mean simply moving property from one place to another without an intent to steal the property. For the proposition that an

"asportation" constitutes conversion, the Appellate Division in *Mirvish v. Mott* relied upon a Second Department decision in *Davidson v. Fasanella*,[14] a spare opinion which appears to be inconsistent with the substantive demand and refusal requirement. That decision may be explained as an erroneous statement of tort principles in connection with a dispute over a decades-old contract dispute where the art was purchased but for some reason never delivered to the buyer.[15] *Davidson* is probably best understood as a case in which the buyer's contract remedy of specific performance against the seller was barred by the statute of limitations, not as a conversion case.

An explicit holding in *Mirvish v. Mott* that theft, sale, transfer, or destruction are the only circumstances that make demand futile would therefore have helped clarify the application of *Guggenheim* and helped similarly situated owners to resolve their claims more quickly and definitively. Finding that "asportation" means even innocent movement of property, and constitutes conversion, would mean that the statute of limitations for conversion or replevin would almost always start to run when a good-faith purchaser picks up a work of art from a gallery and takes it home. Alternatively, a clarification that "asportation" means theft would be consistent with the rule that demand and refusal is not required on a thief, and that the statute of limitations for conversion against a thief runs from the time of the theft.

***Affirmation of Guggenheim by the Court of Appeals in 2002 in State v. Seventh Regiment***

As the Court of Appeals confirmed eleven years later, in, *State of New York v. Seventh Regiment Fund, Inc.*,[16] a dispute over state militia memorabilia, the proper distinction is between persons who, before the owner's demand, know their possession is wrongful (like a thief) and persons who do not know their possession is wrongful (like Mott). The Appellate Division decision in *Guggenheim* had explicitly stated that "the requirement that a demand be made upon a good faith purchaser (*or indeed anyone else whose possession is not tortious*) is a substantive element of the cause of action, not a procedural condition precedent to suit . . ."[17] Similarly, in *Seventh Regiment,* the court confirmed that "[n]aturally, if demand would be futile because circumstances show that *the defendant knows it has no right to the goods*, demand is not required."[18] Both *Guggenheim* and *Seventh Regiment* were unanimous decisions of the Court of Appeals.

***What the Court of Appeals Decided in Mirvish v. Mott***

The Court of Appeals reversed the Appellate Division, relying on its 1990 decision in *Sofsky v. Rosenberg* setting forth the common-sense rule that possession of a clear and unambiguous gift instrument after the donor's death established a presumption that the gift had been delivered.[19] Accordingly, the Court of Appeals reinstated the Surrogate Court's holding that the gift by Yulla Lipchitz was valid and therefore Mirvish is the owner of *The Cry.*

This left the issue of whether the statute of limitations was applicable to Mirvish's claim, and whether or not it had expired. As noted above, Mott asserted a variation of the defense asserted in *Guggenheim,* arguing that his loan of the sculpture in 1998 in Yulla's name to the Louvre exhibit was a conversion that started the statute of limitations running. He also argued that *Guggenheim* only applied to bona fide purchasers and not to those who received their property from an estate. Yet the Court of Appeals—like the Surrogate's Court and the Appellate Division—did not so much as mention the *Guggenheim* case, the leading decision on the statute of limitations for conversion and replevin, when it rejected Mott's argument. Instead, the court held that the terms of a settlement agreement of the related case against the buyer to whom Mott had sold the sculpture in 2004, which provided that the sculpture would be delivered to whomever prevailed on the issue of *ownership*, resolved the issue, and it did not need to decide when the statute of limitations for conversion started to run. Accordingly, the court did not take the opportunity to clarify a number of inconsistencies in how *Guggenheim's* purportedly clear rule has been applied by other New York courts.

**How Other Jurisdictions Resolve Statute of Limitations Issues**

In other jurisdictions, the statute of limitations does not run from demand and refusal. Rather, it may run from the time that work was misappropriated, or from the time that the owner knew or should have known about the misappropriation. In *Guggenheim,* the Court of Appeals unequivocally rejected New Jersey's alternative of a "discovery" rule, which would start the statute of limitations running when the true owner knew or should have known who has possession of stolen artwork, and which requires the owner to exercise reasonable diligence in

searching for missing property.[20] The Court noted the difficulty of determining what actions a true owner should have taken on the facts of any particular case, and acknowledged that there was a legitimate difference of opinion in the art community about whether publicizing an art theft was likely to lead to recovery or merely drive a stolen work underground.[21]

Furthermore, in some other jurisdictions, the expiration of the statute of limitations serves to extinguish claims to title, in contrast to New York's distinction between a "right" and a "remedy." In *Mirvish,* the Court of Appeals confirmed—apparently as so obvious a point that it required no citation or discussion—that actual ownership or title to property is not affected by the expiration of a statute of limitations for conversion.[22] Similarly, a federal court in California evaluating the state's most recent attempt to extend the statute of limitations for Holocaust-era claims recognized that a statute of limitations "affects only the potential remedy but no substantive right," and that applicable California or foreign law would determine ownership.[23] However, that is not the rule in all jurisdictions. In New Jersey, and in Switzerland, for example, the expiration of a statute of limitations *does* confer good title on the party in possession.[24]

**Where Are We Now In New York?**

In view of the Court of Appeals' reluctance to reaffirm *Guggenheim,* it is an opportune time to note a number of related doctrines that are applicable to mitigate any unfairness caused by the application of *Guggenheim* to possessors who acted in good faith, while at the same time protecting the rights of the true owner.

***Does New York Recognize Adverse Possession of Personal Property?***

Federal courts have seemingly recognized something akin to adverse possession of personal property in New York.

In *Songbyrd, Inc.. v. Grossman*, the federal district court did so through a back-door method in its conversion analysis. The court noted that "the decisive issue is when [the defendant] began unauthorized possession" of master recording tapes claimed by a recording artist known as "Professor Longhair."[25] This rule—if it were an accurate statement of law—would be harsher than the "discovery" rule in New Jersey that starts the statute of limitations running when the owner knew or should have known of the work's theft and is utterly inconsistent with *Guggenheim.* (It should be noted that New Jersey's highest court stated that adverse possession did not apply to personal property because, among other reasons, it would be hard to show the requirement of open and notorious possession for items that can be easily concealed or displayed in the home.)

*Songbyrd* stated that "New York has not required a demand and refusal for the accrual of a conversion claim against a possessor who openly deals with the property as its own."[26] That observation is incorrect, because the Lubells had displayed the Mark Chagall gouache in their living room for decades and twice loaned it for public exhibition.[27] The proposition that one could start the statute of limitations running by asserting a claim of right to the artwork is analogous to the concept of adverse possession of real property, and the Lubells asserted a defense of adverse possession, which was rejected.[28] Given *Guggenheim's* holding, the answer to the question presented in *Mirvish*, whether any movement or assertion of ownership of *The Cry* in connection with the 1998 loan to the Louvre could have started the statute of limitations to run, should have been a simple and resounding "no."

More recently, a decision from the U.S. District Court for the Southern District for New York, in *Board of Managers of Soho International Arts Condominium* explicitly stated that the doctrine of adverse possession applies to personal property, relying on the 1910 New York Court of Appeals decision in *Lightfoot v. Davis,*[29] and that the statutory period for adverse possession is three years.[30] *Soho International Arts Condominium* involved the City's efforts to force the condominium to reinstall a mural by the artist Forrest Myers. In that case, the mural was more of a hot potato than a sought-after asset, and the City alleged that the condominium owned the mural as a result of adverse possession, so as to require the building to assume responsibility for the artwork, while the condominium disclaimed ownership. The superficial similarity to real property, from the fact that the mural was painted on a building, may have made adapting the adverse possession analysis to a dispute over ownership of art deceptively easy. Unsurprisingly, though, the court found that there could be no adverse possession by a party that did not want or claim the property. The safest course may be not to rely too much on a 100-year old case with dicta on the possibility of a theory of adverse possession of personal property, because the holding of



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*Lightfoot* was that a thief cannot obtain good title. The absence of case law in New York awarding ownership of personal property based on a finding of adverse possession may be more telling than these outliers. *Soho International Arts Condominium* may be most useful as an illustration of the general rule that when parties are making completely counterintuitive arguments (*i.e.,* my adversary owns the property in dispute), anomalous and arguably incorrect statements of law may result.

Moreover, the significance of these incorrect statements should not be inflated into an actual conflict as to the validity of *Guggenheim.* For example, *Songbyrd* was not wrongly decided as barred by the statute of limitations, because in that case the owner's demand and refusal of that demand occurred even *earlier* than the defendant's unauthorized possession. The Second Circuit noted that Professor Longhair demanded the return of his master recording tapes in 1975, and it affirmed the trial court's decision that the owner's conversion claim "accrued no later than August 1986 and was time barred at the time this action was filed in 1995."[31] Similarly, the court in *Soho International Arts Condominium* found that there was no adverse possession. Thus, neither of these incorrect statements resulted in decisions that were, on the merits, inconsistent with *Guggenheim.*

***Does a Successful Laches Defense Result in Good Title for the Possessor?***

To ensure that the demand and refusal rule is applied equitably, courts do not need to search for pretextual distinctions. Instead, potential unfairness to blameless defendants can be addressed by the defense of laches. As the court noted in *Guggenheim,* unreasonable delay is not relevant to the statute of limitations. Instead, it is relevant to the defense of laches. An owner cannot unreasonably delay making a demand once learning of the location of the property, but if he does, and if that delay results in prejudice, a defense of laches may allow the possessor to retain possession. If there is no prejudice, the possessors have no cause to complain from enjoying the property for longer than they were rightfully entitled to. Whether or not there has been unreasonable delay and prejudice is usually regarded as an issue of fact, which means that laches is generally an issue that cannot be resolved by a pre-trial motion.

Whatever length of time is needed to establish the "delay" element of the test, the expiration of the three-year statute of limitations for conversion and replevin is probably not sufficient. The decades-long delay in *Guggenheim* was sufficient to warrant a trial on laches (though the case settled before that trial), but was not sufficient to establish that defense as a matter of law. Similarly, in a later Appellate Division decision, the Appellate division reversed summary judgment for the defendant because even a 24-year delay was not too long as a matter of law.[32] Even Holocaust-era claims relating to looted art are still, fifty years later, potentially viable.

But no matter how lengthy the delay, a defendant asserting laches must also show prejudice, such as a change in position caused by the owner's delay. Because of this, laches is a difficult defense for a possessor who paid nothing for the artwork, like the New-York Historical Society (who received a gift) or Mott (who asserted rights as an heir). For example, in a case involving a claim by an art restorer who sought to quiet title to artwork that had been in his custody for many years, the Second Circuit confirmed that it makes no sense to grant a party "who paid nothing for" property a "windfall" by dispensing with the demand and refusal requirement for conversion and shifting the burden to wronged owners. The court found that art restorer would have failed to establish prejudice, even if he had raised laches, because he had paid nothing for the murals.[33] In contrast, the Lubells paid for the Chagall, and their warranty against their seller had certainly expired. Mott did not even make the laches argument in the Surrogate's Court.

But what rights against a defendant does a possessor gain as a result of prevailing on a defense of laches? In *Guggenheim,* the Court of Appeals held that the Lubells' defense of laches remained viable. However, based on that case, it does *not* seem that a successful laches defense could confer ownership on the possessor. The Appellate Division's decision in *Guggenheim* states that laches governs "the relative *possessory* rights of the parties," in contrast to the adverse possession statute, which provides the potential for "establishing *title* by virtue of the mere lapse of time" in connection with real property (emphasis supplied).[34] This is consistent with the New York rule that the lapse of a statute of limitations bars a remedy for conversion or replevin, but does not extinguish an ownership right. The result of a successful laches defense may be different in other jurisdictions, but those jurisdictions might also hold that the expiration of a statute of limitations confers title on the possessor.



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Thus, under New York law, it would seem that a successful laches defense by the possessor, like the expiration of the statute of limitations, cannot result in good title to misappropriated art.

In *Mirvish v. Mott,* it would be hard for Mott to have argued laches, which may explain why he did not assert this defense. The delay was not long, and Mott paid nothing for *The Cry,* and nothing for shipment to and from the exhibit at the Louvre, and only sold *The Cry* after receiving a demand. The mere fact that the possessor has become accustomed to the mistaken belief that he is the owner does not constitute prejudice. As the Appellate Division held in *Guggenheim,* the museum's delay in making its demand benefited rather than prejudiced the Lubells, because it gave [them] that much more time to enjoy what [they] otherwise would not have had."

***Accounting for Interference that Falls Short of Conversion***

The fact that Mott's loan of *The Cry* did not constitute conversion and start the statute of limitations to run for conversion does not mean that unauthorized borrowing of property is not actionable. It should be regarded as a trespass.

For example, in both a pre-*Guggenheim* 1983 decision in *Sporn v. MCA Records Inc.*,[35] and in a post-*Guggenheim* decision in 1995 in *Vigilant Ins. Co. v. Housing Authority*,[36] the Court of Appeals distinguished between trespass and conversion, holding that a conversion consists of a "destruction or taking" of property or an act "to the exclusion of the owner's rights," in contrast with mere "interference," which is a trespass. After describing this distinction, the Court of Appeals in *Sporn* held that the 1965 sale of master recordings, followed by commercial exploitation of that recording *and* the rejection of a demand (admitted by the plaintiff) that the recording company stop doing so, was sufficiently exclusive of the owner's rights to constitute conversion.[37] Likewise, in 1995, in *Vigilant*, the Court of Appeals held that the plaintiff's cause of action for conversion accrued when the defendant placed stops on bonds and refused to honor the title and right of the plaintiff's subrogor to negotiate the bonds or redeem interest coupons.[38] Unfortunately, the Court of Appeals did not take the opportunity to hold in *Mott* that a loan to the Louvre that unquestionably increased the value of *The Cry* was at most a trespass, and certainly not a conversion, since *The Cry* was returned intact after the loan and demand was not futile.

In short, trespass is actionable, and damages may be appropriate, but because trespass is not conversion, it does not start the statute of limitations to run for recovery of the property. This makes perfect sense, because a trespass, such as borrowing or lending the property without authorization, might not be readily discoverable, and should not enable the trespassor to then seize possession of the property three years later with impunity and be entitled to a statute of limitations defense. That would defy common sense.

***Courts Administering Estates Must Be Authorized to Determine Ownership***

*Mirvish v. Mott* arose, as many disputes do, in the context of an estate proceeding in which the estate claimed the property and disputed the decedent's gift of that property. One question raised in *Mirvish v. Mott* was whether the Surrogate's Court, which has jurisdiction over the probate of estates, has jurisdiction under Section 209(4) of the Surrogate's Court Procedure Act to declare the ownership of any disputed property claimed by the executor, without regard for whether the claim against the estate was time barred.

Here, too, the Court of Appeals' decision was based on the specific facts of *Mirvish v. Mott.* Because Mott had, in a separate petition of his own, independently asked the Surrogate to determine the ownership of *The Cry,* the Court of Appeals held there was no question that the issue of ownership was properly before the Surrogate without regard for Mott's assertion of the statute of limitations defense to Mirvish's claim.

It would have been helpful guidance to future litigants if the court had confirmed the Surrogate's jurisdiction in *Mirvish v. Mott* to determine ownership did not depend entirely on the fact that there were dueling petitions. After all, estates do not hold property in perpetuity, but exist for a limited time to distribute the decedent's property. Courts have recognized that the Surrogate has broad authority to decide on its own to address issues necessary for the administration of estates in the interests of justice,[39] and the New York State Constitution, article VI, Section 12(e) provides that "[t]he surrogate's court shall exercise such equity jurisdiction as may be provided at law."

It also makes practical sense to allow the Surrogate to determine ownership when these issues are presented, because deferring resolution of the issue of ownership until the estate sold the property would simply defer resolution until a later day, which is contrary to judicial economy. In any event, in most circumstances, the fact that the ownership is disputed would render the property unmarketable or significantly reduce its value, because no recipient or purchaser of the disputed property would have any assurance that he or she has good title or could convey good title; rather, they would have a "time bomb" that could explode into litigation against the purchaser, beneficiary, estate, and executor and unsettle the distribution of assets.[40]

***Is Guggenheim Confined to Bona Fide Purchasers?***

Another argument raised in *Mirvish v. Mott,* which the Court of Appeals did not address, was that the demand and refusal requirement applies only to bona fide purchasers, like the Lubells in *Guggenheim.* Mott argued that individuals who received property that was initially misappropriated by some kind of mistake or misunderstanding, rather than outright theft, or who had received the property by or bequest, rather than by purchase, were not governed by the demand and refusal rule. The Appellate Division in *New York City Transit Authority* made essentially the same carveout.

This argument makes no logical or equitable sense, because it would treat people who paid for a work of art worse than those who received gifts or bequests of misappropriated art. Such a limitation would gut the impact of *Guggenheim*'s distinction between possession and ownership, which is intended to deter trafficking in stolen goods. Under *Guggenheim,* misappropriated property becomes unmarketable because the owner would have a fresh claim against any transferee, whether the transfer is by purchase or by gift. Allowing broad, unwarranted exemptions from *Guggenheim* would undercut the public policy goals of *Guggenheim* and the recognition of demand and refusal as a substantive element of conversion, by allowing thieves or converters to gift stolen or misappropriated property. A defendant who would rather see artwork in the hands of a museum rather than returned to the owner would be able to frustrate the owner's rights. This proposed rule would also incentivize buyers not to record payments for transfers of artwork, and instead to characterize them as gifts.

Furthermore, basing a distinction on whether the property was initially stolen or simply misappropriated based on a mistake or misunderstanding would invite every defendant to raise potentially unresolvable factual issues about the initial wrongful taking of the property, which would be problematic in view of the previously stated strong public policy of ensuring that New York is inhospitable to trade in stolen artwork. A distinction of this sort would invite defendants to assert that they are successors in interest to thieves. The Court of Appeals in *Mirvish v. Mott* could have clarified that the demand and refusal rule is not limited to the facts of *Guggenheim* but applies a basic principle of property ownership.

***Does the Demand and Refusal Rule Apply Only to Claims Involving Fine Art?***

A related question is whether the demand and refusal rule only applies to cases involving fine art, in view of *Guggenheim's* reliance on public policy issues relating specifically to New York's role as a cultural center and the importance of ensuring that New York does not encourage trafficking in stolen art.

Art disputes tend to recur because litigation over long-delayed demands are only likely to arise when the property does not depreciate, even after decades, and where it is movable, easily concealed, and not readily traceable. Art fits this description perfectly.

The fact that New York's governor, on the advice of the U.S. Department of Justice, would not waive the demand and refusal rule even for cultural institutions that openly displayed art and provided public notice evidences the importance of ensuring there is no exception that allows New York to facilitate trafficking in stolen art. That does not mean that the demand and refusal element of conversion *only* applies to claims concerning art. Furthermore, the demand and refusal rule has not been limited in such a way in the case law—*State v. Seventh Regiment,* decided by the Court of Appeals eleven years after *Guggenheim*, involved a variety of property, including artwork, letters, flags, trophies, silverware, medals and other military memorabilia. Finally, there is no sound policy reason why New York law should facilitate trade in stolen jewelry, rare books, furnishings, fossils, items used in religious practice, historic artifacts, or any other valuable items that could equally well be part of a



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country's cultural heritage or history and implicate the same concerns that the federal and state government raised with respect to fine art.

In sum, New York, as a commercial as well as cultural center, should have a policy interest in not being a center for trafficking in valuable stolen property of any kind.

**Predictions for the Future**

Looking into a crystal ball, it is possible that the Court of Appeals avoided weighing in on these issues because there was some difference of opinion and the Court strives for unanimity—in 2011, 129 of 242 of its decisions on appeals were unanimous.[41] Alternatively, the Court might have declined to analyze unnecessary issues because of the Court's need to be efficient—after all, all seven Judges of the court generally hear oral argument and decide appeals, and in 2011, the court disposed of more than 3,500 matters, including all the motions and leave applications that that—in addition to appeals, they decide motions and criminal leave applications.[42]

Since the Court last revisited the *Guggenheim* case in any significant way nearly ten years ago, it easily could be another decade before these issues are again squarely before the Court. The Court's decision protects the rights of owners to claim misappropriated property. However, while the overall framework of principles governing conversion, the statute of limitations, and laches generally can function as a coherent, clear, principled and consistent set of doctrines that reflect a strong public policy in favor of restoring of artwork to its true owner, a number of inconsistent and uncorrected Appellate Division decisions create potential questions and, more importantly, difficulty in obtaining results without the expense and uncertainty of a trial. Therefore, until the Court of Appeals revisits the open questions, parties seeking to claim disputed gifts should remember that the Court has reaffirmed the basic principle that ownership is not affected by the expiration of a statute of limitations.

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**NOTES**

[1] *Mirvish v. Mott*, 18 N.Y.3d 510, 942 N.Y.S.2d 404 (2012). With Gary D. Sesser and Ronald D. Spencer, also of Carter Ledyard's art law practice, the author represented the appellant, David Mirvish, in this case.
[2] The Court of Appeals decision recounts the facts in detail.
[3] *Solomon R. Guggenheim Museum v. Lubell,* 77 N.Y.2d 311 (1991).
[4] *See, e.g., Davidson v. Fasanella,* 269 A.D.2d 351 (2d Dep't 2000).
[5] *Mirvish v. Mott*, 18 N.Y.3d 510, 942 N.Y.S.2d 404 (2012), *reconsideration denied,* 2012 WL 1988434 (N.Y. Ct. App. June 5, 2012).
[6] *Guggenheim,* 77 N.Y.2d at 320.
[7] *See Tanges v. Heidelberg North Am., Inc*., 93 N.Y.2d 48 (1999); *Hulbert v. Clark*, 128 N.Y. 295, 297 (1891); David D. Siegel, N.Y. Practice § 34, at 38 (2d ed. 1991).
[8] *Lightfoot v. Davis*, 198 N.Y. 261, 269 (1910),
[9] *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 127 (1966).
[10] *See Guggenheim*, 77 N.Y.2d at 319-320 ("*compare* [CPLR] 206 [where a demand is necessary to entitle a person to commence an action, the time to commence that action is measured from when the right to make demand is complete]").
[11] *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161-1162 (2d Cir. 1982).
[12] *See* Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership is No Pretty Picture*, 43 Duke L.J. 337, n. 131. (1993).
[13] *New York City Transit Auth. v. New York Hist. Soc.*, 167 Misc. 2d 31 (Sup. Ct. Kings Co. 1995), *aff'd* 237 A.D.2d 419 (2d Dep't 1997),



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[14] *Davidson v. Fasanella*, 269 A.D.2d 351 (2d Dep't 2000).
[15] *See Davidson v. Fasanella*, Index No. 18900/97, 1999 WL 35023183 (Sup. Ct. N.Y. County March 1, 1999)
[16] *State of New York v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 260 (2002).
[17] *Guggenheim,* 153 A.D.2d at 147 (emphasis supplied)
[18] *State of New York v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 260 (2002) (citation omitted).
[19] *See Sofsky v. Rosenberg,* 76 N.Y.2d 927, 930 (1990); *see also G. Brinckerhoff v. Lawrence,* 2 Sand. Ch. 400 (Chancery) (1845) ("Where the intent of the donor is proved under his own hand … the courts have … presumed a delivery in support of the gift, on slight evidence.").
[20] *See O'Keefe v. Snyder*, 83 N.J. 478 (1980).
[21] *Guggenheim*, 77 N.Y.2d at 318-320..
[22] *Mirvish v. Mott,* 942 N.Y.S.2d at 410.
[23] *Cassirer v. Thyssen-Bornemisza Collection Fdn.,* No. CV 05-3459-GAF, slip op. at 2 (C.D. Cal. May 24, 2012).
[24] *See Guggenheim,* 77 N.Y.2d at 319 (*citing O'Keefe v. Snyder*, 83 N.J. 478 (1980)). *See* also *Bakalar v. Vavra*, 619 F.3d 136, 141-46 (2d Cir. 2010) (noting difference between Swiss law and New York law, as set forth in the *Guggenheim* decision, concerning title to stolen art).
[25] *Songbyrd, inc. v. Grossman*, 23 F.Supp.2d 219, 222 (N.D.N.Y. 1998), *aff'd* 206 F.3d 172 (2d Cir. 2000).
[26] *See Songbyrd, Inc.*, 206 F.3d 172, 183.
[27] *See Guggenheim,* 77 N.Y.2d at 316, 321.
[28] *See Guggenheim,* 77 N.Y.2d at 316
[29] *Lightfoot v. Davis,* 198 N.Y. 261 (1910)
[30] *Board of Managers of Soho International Arts Condominium v. City of New York*, No. 01 Civ. 1226 (S.D.N.Y. May 13, 2005).
[31] *Songbyrd,* 206 F.3d at 174, 181; *Songbyrd*, 23 F. Supp.2d at 223.
[32] *Martin v. Briggs,* 235 A.D.2d 192, 199 (1st Dep't 1997).
[33] *Hoelzer v. City of Stamford*, *Connecticut*, 933 F.2d 1131, 1138 (2d Cir. 1991).
[34] *Guggenheim,* 153 A.D.2d 143, 149-50 (1st Dep't 1990) (emphasis supplied).
[35] *Sporn v. MCA Records Inc.*, 58 N.Y.2d 482 (1983).
[36] *Vigilant Ins. Co. v. Housing Authority*, 87 N.Y.2d 36 (1995).
[37] *Sporn,* 58 N.Y.2d at 486-89.
[38] *See Vigilant*, 87 N.Y.2d at 36.
[39] *Stortecky v. Mazzone,* 85 N.Y.2d 518 (1995).
[40] Madden, Robert E., *Steps To Take When Stolen Art Work Is Found In An Estate*, 24 Est. Plan 459, 1997 WL 869194 (W.G.&L).
[41] Court of Appeals 2011 Annual Report, p. 6.
[42] Court of Appeals 2011 Annual Report, p. 3

# COLLECTOR – ESTABLISHED FOUNDATIONS: WHEN THE KIDS ARE NOT VERY INTERESTED IN YOUR ART COLLECTION

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Ronald D. Spencer

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*This modest essay describes an estate planning tool for collectors who thought they had to choose between their collection and their kids. But the collector can keep the former (pretty much) intact, and still benefit the latter. – RDS*

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Art collections, formed by collectors, create a perplexing issue with respect to estate planning. The issue is easier if the likely heirs are interested in and knowledgeable about the art.

A frequent goal is keeping intact a collection—built with great energy, attention and money over many years—while providing financial security for heirs.

These twin goals are often best achieved by establishing a private family foundation and gifting the foundation a substantial portion of the art collection—but how much of the collection, since the childrens' future financial needs are often not clear? One solution lies in providing in the collector's Will that the collection goes to a Foundation established by the collector. The Will can provide that, if there is no foundation already in existence, the Executor is instructed to establish one. The Will would then go on to provide that the entire art collection would go to the children (or to a surviving spouse, with the surviving spouse gifting the collection by her Will to the children). Then within nine months of the collector's (or spouse's) death, the children could decline any part, or all, of the art collection (depending on their financial needs and estate tax considerations). Any part of the collection the children decline would pass automatically to the foundation, thereby reducing the federal estate tax payable by the collector's estate. (Of course, any amount going to the children (and not declined by them) in excess of $5 million (the amount free of federal estate tax in 2012) would be subject to federal estate tax).

If a private foundation is established, there are several matters to consider about the foundation's governance and operations. With respect to governance of the foundation, typically the founding collector is a member of the Board of Directors and President. Additional Directors typically are the spouse and children of the collector, and anyone else, such an art historian or art dealer (Yes, art dealers can be Board members who would simply recuse themselves from any Board vote involving a conflict between the foundation and their art dealing) who can bring art expertise to the Board concerning the core collection. The collector's spouse and children are considered "disqualified persons" under the Internal Revenue Code, and, as such, may be paid for their personal services only if such services are "reasonable and necessary to carrying out the tax-exempt purpose of the foundation," and are "not excessive". The foundation's purposes typically include (but need not be limited to) publicly exhibiting (or arranging for public museums and private art galleries to exhibit) the art collection to the public.

The foundation's operations and activities in furtherance of these purposes would be to arrange for public exhibitions of the collection --- although not necessarily all the collection at any one time or in any one venue. Note that the public exhibition may consist of temporary loans by the foundation of significant parts of the collection to museums and art galleries.

A private foundation must make annual qualifying distributions of 5% of the fair market value of its "non-charitable use assets", that is, foundation assets not used for its tax exempt purposes. (An exempt-purpose asset is an asset actually used, or held for use, by the foundation in carrying on the charitable, educational or similar

functions which give rise to the foundation's tax exempt status). Stocks, bonds and similar financial assets owned by the foundation are not charitable use assets (even though the income from such financial assets supports the foundation's charitable or educational activities). However, art assets should be considered foundation charitable-use assets since the art is being publicly displayed or held for display to the public for much of the time. Thus, the 5% distribution requirement would not apply to the value of the foundation's art. In the event the foundation needed to sell some of its art to fund its activities, such sales might cause the foundation's art (possibly including exhibited not-for-sale-art) to be considered non-charitable-use assets and, hence, be included in the base upon which the 5% minimum distribution is calculated. In this circumstance, lacking sufficient financial assets, the foundation might be obliged to meet its annual grant distribution requirement by charitable gifting of foundation-owned art.

If the collector wished the foundation to do more than just be a (somewhat passive) grant-making foundation, that is, if the foundation itself were to conduct exempt activities to achieve its exempt purposes rather than through grants to other organizations, it might well qualify as an operating private foundation. As an operating foundation, it would not be required to meet the 5% minimum distribution requirement (hence not need to be concerned with its art assets being a base upon which the 5% is calculated). As an operating foundation, contributions to it from the collector (if the foundation had been established during the collector's life) would be deductible for income tax purposes to the extent of 50% of the collector's adjusted annual gross income, whereas contributions to grant-making private foundations are limited to 30% of the donor's income.

Moreover, an operating foundation might be useful, where the collector had in mind active programs conducted by the foundation itself, such as commissioning scholarly publications, arranging for itself public exhibitions and scholarly lectures and seminars, etc. Operating foundation status would require at least one professional on staff to conduct these programs.

The collector should understand that, as a practical matter, the goal of keeping the collection intact after the collector's death cannot usually be achieved by simply gifting the collection to a public museum on the condition that the museum exhibit the art as a single unified collection for many years. Public museums might be happy to receive all or part of the collection as a gift, but a museum will generally not obligate itself for years and years, to exhibit the collection as a single, unified collection. Only the collector-established foundation can assure the collector that the collection will be kept largely intact and exhibited, and thereby assure the collector's long-term collecting and artistic legacy.

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