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Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.: A Case for the Use of Civil Remedies in Effecting the Return of Stolen Art

In Italy, for 30 years under the Borgias, they had warfare, terror, murder and bloodshed, but they produced Michelangelo, Leonardo da Vinci and the Renaissance. In Switzerland, they had brotherly love; they had 500 years of democracy and peace and what did that produce? The cuckoo clock. So long, Holly.¹

I. Introduction

A nation's art is important because it mirrors the country's people and history. Fine art is the only exported product of a country that remains in its original condition. Scientific discoveries are duplicated; musical compositions are interpreted and altered. The work of Pasteur and Beethoven belong to the world not just to their home countries of France and Austria, whereas works of art are original and unique unto the artist's own hand. This uniqueness gives art its important place in a nation's heritage.

Uniqueness also gives art a high price tag and a high demand. The demand is not, however, limited to legitimate purchases but extends into a profitable market of stolen art works. In recent years, the record number of paintings and other works of art that have been stolen has reached critical levels. Last year alone there were over 5000 pieces of art reported stolen to the International Foundation for Art Research (IFAR), an organization which compiles information on stolen art.² However, this number does not include art that may have been plundered from remote archaeological sites and

1. *The Third Man* (Selznick-London Films 1949).

2. Telephone interview with Dr. Constance Lowenthal, Executive Director, International Foundation for Art Research (November 2, 1989) [hereinafter Lowenthal Interview]. "Stolen" means acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership." *United States v. Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974). Art theft has become so lucrative that it is second only to narcotics among illegal businesses. *Boston Globe*, Feb. 12, 1989, Magazine at 16.

which have not yet been discovered as missing.³ Interpol keeps a record of stolen art but it is estimated that it contains only about one-third of the art that is actually stolen.⁴ To add to the difficulty of recording the total amount of stolen art, only about thirty percent of the objects stolen have been actually photographed, making a positive identification of the object, if found, almost impossible.⁵ Countries which demand that national treasures be returned are often Third World states that were pilfered and looted by colonial or invading forces in the early twentieth century. World Wars I and II forced many private collectors to hide their works and much of that art was discovered and stolen or destroyed.⁶

Only a small fraction of antiquities are moved legally. The large majority of artifacts are excavated, transported, and sold illegally.⁷ There are two primary ways in which art is moved illegally in international trade: Art can be taken by a person holding good title from a country in violation of that country's export laws or it may be stolen and smuggled out of the country.⁸ The former movement is not actionable in United States courts since United States customs laws do not restrict the importation of art that has been illegally exported from another country.⁹ The only exceptions to this rule of non-prosecution are the treaties between the United States and Mexico¹⁰ and the United States and Peru¹¹ in which the United States agreed to respect the export laws of these countries.

This Comment will explore the remedies currently available to foreign countries and to individuals who have discovered that works stolen from them are in the possession of American museums, art dealers, and private individuals. It will also explain why, in light of the recent decision of *Autocephalous v. Goldberg*,¹² civil sanctions are the best means to effect the return of stolen art as well as to help deter future buyers of stolen art, thus shrinking the stolen art

3. Lowenthal Interview, *supra* note 2.

4. B. BURNHAM, *THE ART CRISIS* 27 (1975).

5. *Id.*

6. *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1379 (S.D. Ind. 1989).

7. Fishman & Metzger, *Protecting America's Cultural and Historical Patrimony*, 4 SYRACUSE J. INT'L L. & COM. 51, 77 (1976).

8. P. BATOR, *THE INTERNATIONAL TRADE IN ART* 10 (1981) (originally appeared as *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982)).

9. *Id.* at 11.

10. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, United States-Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088 [hereinafter United States-Mexico Treaty].

11. Agreement between the United States of America and the Republic of Peru for the Recovery and Return of Stolen Archaeological, Historical and Cultural Property, Sept. 15, 1985, United States-Peru, 33 U.S.T. 1607, T.I.A.S. No. 10136 [hereinafter United States-Peru Treaty].

12. 717 F. Supp. 1374 (S.D. Ind. 1989).

market.

There are three avenues for recovery: The National Stolen Property Act; treaties similar to the ones the United States has with Mexico and Peru; and civil suit in federal court.¹³ The civil remedies available are the most practical, because in addition to having the art returned, the threat of litigation serves as an excellent deterrent to art purchasers. The fear of having art, purchased at considerable cost, returned to the country from which it was stolen would certainly make a buyer examine all pertinent documents.

II. Historical and Procedural Background of *Goldberg*

The Byzantine mosaics purchased by Peg Goldberg, an Indiana art dealer, were originally part of a large mosaic dating from A.D. 520 that was attached to the apse of the Church of the Panagia Kanakaria in Lythrankomi, a village in the northern part of Cyprus.¹⁴ The church mosaic has great historical significance since during the period of Iconoclasm in the eighth century all religious art was ordered destroyed to prevent veneration of religious icons.¹⁵ The mosaics in this case, however, were one of the six or seven Byzantine mosaics that survived the edict.¹⁶ The mosaics depicted Jesus as a young boy seated in the lap of his mother, the Virgin Mary, who is sitting on a throne surrounded by a mandorla¹⁷ of light. This central mosaic was bordered by two archangels. Next to each archangel was a frieze¹⁸ with the busts of the twelve apostles.

Over the passage of time the mosaic deteriorated and some of it was destroyed. By 1950 only the figure of Jesus, one archangel, and nine of the twelve apostles remained.¹⁹ The four mosaics that were taken from Cyprus included the figure of the adolescent Jesus, the archangel, and the apostles James and Matthew.²⁰

13. Public pressure is a non-legal remedy to recover the stolen art from a museum which is in possession of it. See generally *Lost Sacred African Art Turns Up in Gallery Here*, N.Y. Times, Oct. 25, 1973, at A1, col. 6; *Owner Returning Statue to Kom*, N.Y. Times, Oct. 31, 1973, at A1, col. 6; *Italians Accuse Boston Museum Chiefs: You Smuggled the Raphael*, The Times (London) Feb. 7, 1971, at 1, col. 2; *Syrian Mosaic Returned by the Newark Museum*, N.Y. Times, Dec. 25, 1974, at A16, col. 1.

14. See *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1377 (S.D. Ind. 1989). The apse of a church is the "vaulted semicircular . . . recess in a building especially at the end of the choir of a church." RANDOM HOUSE DICTIONARY OF ENGLISH LANGUAGE 74 (1967) [hereinafter DICTIONARY].

15. *Judge Orders Art Dealer to Return Rare Mosaics to Church of Cyprus*, N.Y. Times, Aug. 4, 1989, at C1, col. 1 [hereinafter Goldberg Article].

16. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1377 (S.D. Ind. 1989).

17. *Id.* at 1377-78. A mandorla is an "almond shape area or space especially a schematic aureole containing a representation of a sacred personage." DICTIONARY, *supra* note 14, at 870.

18. A frieze is the part of a "classical entablature between the architrave and the cornice usually decorated with sculpture in low relief." DICTIONARY, *supra* note 14, at 569.

19. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1378 (S.D. Ind. 1989).

20. Goldberg Article, *supra* note 15, at C25, col. 1.

During the Turkish military invasion of Cyprus in 1974, the Greek Cypriots of Lythrankomi were forced to flee northern Cyprus for the southern part of the island, which was controlled by the Republic of Cyprus.²¹ After the invasion, reports filtered in that many of the churches and national monuments in northern Cyprus had been destroyed. It was some time between August 1976 and October 1979 that the Kanakaria Church was vandalized and the mosaics were taken.²² In November 1979, a visitor to the church noticed the mosaics were missing and reported the theft to the Cyprus Department of Antiquities²³ which for the next nine years engaged in efforts to recover the mosaics by circulating press releases and contacting Byzantine art authorities.²⁴

The mosaics reappeared in 1988. Goldberg was in Amsterdam on behalf of a client to examine a painting for possible purchase.²⁵ The sale of the painting never took place, but Goldberg was informed by Robert Fitzgerald, an art dealer whom Goldberg testified she had known for a few years, of four early Christian mosaics that were for sale.²⁶ After meeting with Dutch art dealer Michael van Rijn and California attorney Ronald Faulk, Goldberg "fell in love" with the mosaics and decided to purchase them.²⁷

At the trial, Goldberg stated that she knew that Robert Fitzgerald was in the habit of using one of four different names and that Michael van Rijn, in addition to alleging to be a descendant of Rembrandt, had been convicted in absentia in France of forging Marc Chagall's signature on lithographs he was selling.²⁸ She was told that the seller, Aydin Dikman, had found the mosaics in the rubble of an "extinct" Cypriot church and was granted permission by the Turkish Cypriot authorities to export them.²⁹ According to van Rijn, the seller wanted \$3 million for the mosaics but wished to sell them quickly because he "had recently become quite ill and had [a] cash

21. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1378-79 (S.D. Ind. 1989).

22. *Id.* at 1379.

23. *Id.* at 1380.

24. *Id.* at 1379-80. "The Cypriots have brought the loss of these mosaics to the attention of people who would have been more directly involved with Byzantine art." Dr. Marion True, Curator of Antiquities at the J. Paul Getty Museum." *Id.* The approach by the Cypriots was "consistent with what is happening in the art world today, the goal is to stifle the trade at the point of destination." Dr. Gary Vikan *id.* at 1389.

25. *Id.* at 1381.

26. *Id.*

27. *Id.* Interestingly, Michael van Rijn purchased an El Greco painting from Wilderstein's, a New York art dealer, for \$2 million in 1983. A year and a half before the sale, the Rumanian government had made a claim that the El Greco belonged to them and not to the Rumanian royal family that had sold it to Wilderstein's. The claim was later dismissed when the Rumanian government failed to prove that it held title to the painting. L.A. Daily J., Mar. 11, 1987, at 4, col. 3. See also *infra* text accompanying notes 118-26 for another case in that Wilderstein's sold property that had questionable title.

28. Goldberg Article, *supra* note 15, at C25, col. 2.

29. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1381 (S.D. Ind. 1989).

problem."³⁰ Goldberg was shown export documents that allegedly proved that the mosaics were exported properly from northern Cyprus. The documents, however, made no mention of Dikman or the mosaics.³¹

The final purchase price was settled at \$1.08 million and Goldberg sought to finance it through Merchants National Bank of Indianapolis (Merchants).³² Goldberg's contact at the bank was Otto N. Frenzel III, the Vice Chairman of Merchants.³³ Frenzel had known Goldberg for several years and had purchased art from her.³⁴ Merchants had even asked for Goldberg's advice in deciding whether to loan money for art purchases.³⁵ Frenzel agreed to help in securing a \$1.2 million loan³⁶ to buy the mosaics if she was sure of the "propriety of purchasing the mosaics."³⁷ She testified that she had told Frenzel and the loan officer that she would be keeping ten percent (\$120,000) for her expenses.³⁸ Both Frenzel and the loan officer testified that they understood the purchase price of the mosaics to be \$1.2 million.³⁹ In order to secure the loan, Goldberg signed a business promissory note binding Goldberg & Feldman Fine Arts, Inc. as a corporation and herself individually.⁴⁰ Once secured, Merchants sent the money to a bank in Geneva where Goldberg executed the sale on July 7, 1988.⁴¹ The bill of sale she received lists \$1.2 million as the price Goldberg paid for the mosaics.⁴²

Goldberg then returned to the United States with the mosaics.⁴³ By the fall of 1988 she had offered to sell them to the Getty Museum.⁴⁴ By this time, the Cypriot Ambassador had learned that the mosaics were in the United States and began inquiries to discover their exact location and possessor.⁴⁵ Goldberg's continued contact with the Getty Museum led the curator of antiquities to contact the Autocephalous Church's law firm and United States Customs Service.⁴⁶

Cypriot officials were subsequently informed that Goldberg was

30. *Id.*

31. *Id.* at 1382.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1383.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1384.

45. *Id.*

46. *Id.*

the current owner of the mosaics and was holding them in Indianapolis. They requested that she return the mosaics, and upon her refusal, they brought suit in federal district court in Indiana for their return.⁴⁷

The plaintiffs, the Autocephalous Church and the Republic of Cyprus, filed their complaint on March 29, 1989. The parties submitted an "Agreed Order," approved by the court on March 31, 1989, which directed the plaintiffs to post a \$150,000 security bond in return for the defendant's promise not to take any "action to alter, destroy, sell or transfer possession of the four Kanakaria mosaics."⁴⁸ On May 24, 1989, the Turkish Republic of Northern Cyprus (TRNC) moved for intervention as a plaintiff.⁴⁹ That motion was denied, as was TRNC's motion to stay the trial.⁵⁰ The ensuing trial was bifurcated leaving possession of the mosaics the only issue to be determined.⁵¹

III. United States Statutes Dealing with Stolen Art

A. *National Stolen Property Act*

Of all the remedies available in the United States that enable a foreign country to recover their stolen property only one makes it a federal crime: the National Stolen Property Act (NSPA), enacted in 1934.⁵² Its two sections encompass the receivership, concealment, or sale of stolen foreign goods. Section 2314 deals with the interstate or foreign transport of goods that are known by the transporter to be stolen, while Section 2315 refers to the receipt of the goods with the knowledge they have been stolen.⁵³

The first use of the NSPA came in the 1970s in *United States v. Hollinshead*.⁵⁴ Hollinshead, a dealer in pre-Columbian art, ar-

47. *Id.* at 1385.

48. *Id.* at 1376.

49. *Id.* at 1377.

50. *Id.*

51. *Id.*

52. The applicable provisions state: "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 2314 (1988).

Whoever receives, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of \$500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; . . . Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 2315 (1988).

53. *Id.*

54. 495 F.2d 1154 (9th Cir. 1974).

ranged to receive a rare and extremely valuable stele⁵⁶ from a site in Guatemala. The stele had been the subject of interest of archaeologist Ian Graham, who had visited the site and recorded it as Stele No. 2.⁵⁶ The stele was cut into many pieces and shipped to Hollinshead in California.⁵⁷ During an attempt by Hollinshead to sell it to the Brooklyn Museum, Dr. Graham was contacted by a curator from the museum who asked Graham's opinion of the stele.⁵⁸ Dr. Graham notified the authorities, resulting in the discovery of the smuggling trail.⁵⁹ The government of Guatemala filed suit in a California federal court seeking its return.

One commentator believes this was the first time a foreign government had brought such a suit.⁶⁰ The defendants alleged that they did not know that the removal of the stele constituted a violation of Guatemalan law.⁶¹ The court pointed out, however, that by the very nature of their conduct, the defendants knew the stele was stolen.⁶² The court, in applying the NSPA to the facts, determined that the defendants indeed knew that the article transported was stolen and that there was no need for the United States to prove that the defendants knew it was stolen from Guatemala.⁶³

In *Hollinshead*, the stolen art never left the hands of the conspirator. All of Hollinshead's attempts to sell the stele failed, so no good-faith purchaser was ever involved in the scheme. Hollinshead and his co-conspirators acted with the requisite scienter to be prosecuted under the NSPA.

The next case which invoked the NSPA was *United States v. McClain*.⁶⁴ In that case, the defendants were arrested for transporting and receiving stolen pre-Columbian artifacts. The defendants had five teams working at archaeological sites in Mexico and smuggling unearthed artifacts to California with the aid of forged or backdated documents and permits;⁶⁵ the documents were antedated due to a new law which prohibited private ownership of artifacts after a certain date.⁶⁶ The defendants would then receive the objects in California and either sell them immediately or take them to Europe, auction them off to their agents who would bring them back to the

55. *Id.* A stele is an "upright stone slab or pillar bearing an inscription or design and serving as a monumental marker or the like." *DICTIONARY, supra* note 14, at 1392.

56. P. BATOR, *supra* note 8, at 69.

57. *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974).

58. P. BATOR, *supra* note 8, at 69.

59. *Id.*

60. *Id.* at 70-71.

61. *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974).

62. *Id.* at 1154.

63. *Id.*

64. *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979).

65. *Id.* at 660-61.

66. *Id.* at 661.

United States with foreign bills of sale to legitimize a resale.⁶⁷ During a meeting with Federal Bureau of Investigation undercover agents, the defendants mentioned that they were very careful since their activities were "illegal" and "against the law."⁶⁸

The defendants argued that the NSPA was not applicable to items deemed stolen only by a foreign nation's "declaration of ownership."⁶⁹ The court rejected this argument and held that the NSPA applies to a foreign nation's declarations of ownership "even though the owned objects have never been reduced to possession by a foreign government."⁷⁰ Under United States law a state or national government may be an owner even though it never physically possesses the goods it owns.⁷¹

The problem with applying the NSPA to the case of stolen art lies in the requirement of knowledge of the theft or the conversion to be present. The country or person from whom the art has been stolen is only seeking its return from the present owner through civil remedies. In order to prosecute under the NSPA, the United States government must initiate a criminal action. The United States is faced with the problem of proving scienter, which is all but impossible if the art has passed through several buyers; each record of sale would create seemingly legitimate chain of title. In most cases, the stolen art is only rediscovered when it appears on the legal art market with its current owner unaware of the item's infamous background.⁷²

Applied to the facts of *Goldberg*, the NSPA would probably have failed to convict Goldberg of receiving stolen property. Goldberg made inquiries into the export of the mosaics and directed Faulk to inspect the export documents. Faulk reported that everything seemed to be in order.⁷³ From the comments made after the case was decided, it seems that close scrutiny in the purchase of foreign art has not been the trade practice.⁷⁴ Goldberg testified that in addition to examining the export documents, she inquired if the

67. *Id.*

68. *Id.* at 661-62. The defendants also told the undercover Federal Bureau of Investigation agents that they should visit Hollinshead if they wanted to buy valuable stela and large figurines. *Id.* at 662.

69. *Id.* at 663.

70. *Id.* at 664.

71. *Id.*

72. See *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2nd Cir. 1982); *DeWeerth v. Baldinger v. Wilderstein*, 836 F.2d 103 (2nd Cir. 1987).

73. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1382 (S.D. Ind. 1989).

74. "This decision (Goldberg) really tells both museum and private individuals that the danger of buying stolen art is very serious, and their investigations should be very thorough." Constance Lowenthal, the executive director of the International Foundation for Art Research in New York City. Goldberg Article, *supra* note 15, at C25, col. 1. Gary K. Vikan, the curator of medieval art at the Walters Art Gallery in Baltimore who testified at Goldberg's trial, stated: "The significance of the decision is quite profound. We are going to use this decision as the basis of formulating a policy on the purchase of antiquities. We will ask such questions as

mosaics were stolen or if a treaty would prohibit their importation to the United States.⁷⁵ She stated that she had contacted IFAR, the United Nations Educational, Scientific and Cultural Organization's (UNESCO) office in Geneva, and custom officials in the United States, Germany, Switzerland, and Turkey.⁷⁶ Yet there was no record of Goldberg having made an effort to thoroughly examine whether Dikman was the true owner of the mosaics.⁷⁷ The court found sufficiently suspicious circumstances to raise considerable doubt as to whether Dikman was the rightful owner and thus could have conveyed property rights in the mosaics to Goldberg.⁷⁸

The NSPA, however, requires knowledge that the goods were stolen. Stealing art work and illegally exporting it are not the same thing.⁷⁹ One scholar places illegally exported items into three categories: A legally owned but illegally exported item; a stolen and illegally imported item; or an item with a questionable title that is decided by a matter of law or fact.⁸⁰ A piece of art may be in the hands of the true owner yet taken from the country against that country's export laws. Goldberg apparently did not have knowledge that the mosaics were stolen. She was shown documents alleging proper export from Cyprus. The suspicious circumstances concern the export of the mosaics, not the possible theft of them. The court's determination that Goldberg was not a good faith purchaser does not make her a knowing receiver of stolen property. The court examined the testimony and the documents that were offered to show proper export of the mosaics, and determined she was not a good faith purchaser. This, however, does not support a finding that she knowingly received stolen property.

B. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property

In 1970, the member countries of UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (Convention).⁸¹ The Convention marked the first international attempt to

is the price appropriate? Was the work attached to a building? Was it removed in time of war? the more suspicious the circumstances the circumspect the buyer must be." *Id.* at 1, col. 1.

75. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1283 (S.D. Ind. 1989).

76. *Id.*

77. *Id.* at 1403.

78. *Id.* at 1402.

79. *Id.* at 1377.

80. P. BATOR, *supra* note 8, at 11.

81. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S.

control the stolen art market.⁸² The operative section contained in article 7 requires each country to prevent the export of any item of any "cultural property"⁸³ that is not accompanied by proper export certification and to prevent the importation of any items of "cultural property" without proper export certification from another country.⁸⁴ These requirements are extraordinarily sweeping due to the large number of items that are included in the definition of "cultural property" in article 1.⁸⁵

Parties to the Convention whose "cultural patrimony is in jeopardy from pillage"⁸⁶ may call upon other parties for aid. This assistance can include imposing controls on the exports and imports of the stolen cultural property in international commerce. There are currently sixty-one nations which have ratified the UNESCO Convention.⁸⁷

The United States' enabling legislation for the UNESCO Convention, the Convention of Cultural Property Implementation Act (Cultural Property Implementation Act),⁸⁸ was delayed for over ten years due to strong lobbying efforts on the part of museums and collectors who feared government intervention in its acquisitions. In ratifying the UNESCO Convention in 1972, the United States Senate limited its application to institutions whose acquisition policies were controlled nationally.⁸⁹ This excluded all private dealers, collectors and museums from the Convention and any of the enabling legislation. From 1972 to 1983, Congress and special interest groups grappled over the wording of such legislation.⁹⁰ In 1983, the United States finally passed the Cultural Property Implementation Act, which enacted, with modifications, only articles 7 and 9 of the

231 (1972), reprinted in 10 *I.L.M.* 289 [hereinafter UNESCO Convention].

82. The only other multilateral agreement was the Convention for the Protection of Cultural Property in the Event of Armed Conflict at the Hague, May 14, 1954, 249 U.N.T.S. 215.

83. UNESCO Convention, *supra* note 81, at art. 7. See *infra* note 85 for the description of cultural property.

84. *Id.*

85. "For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: . . ." UNESCO Convention, *supra* note 81, at art. 1. These categories included rare specimens of flora and fauna, property relating to history and the lives of national heroes, postage stamps, and rare manuscripts and books. *Id.*

86. *Id.*

87. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1379 n.2 (S.D. Ind. 1989).

88. Convention of Cultural Property Implementation Act, title III, 19 U.S.C. §§ 2601 *et seq.* (1988).

89. "The United States understands Article 7(a) to apply to institutions whose acquisitions policy is subject to national control under existing domestic legislation and not to require the enactment of new legislation to establish national control over other institutions." 118 CONG. REC. 27925 (1972). These nationally controlled institutions include only the National Gallery of Art in Washington, D.C. and the other branches of the Smithsonian Institution.

90. P. BATOR, *supra* note 8, at 62-68.

UNESCO Convention.⁹¹ The power of the Cultural Property Law is limited in that the United States can only take action to protect cultural pillage by either a Presidential determination⁹² or in an emergency situation.⁹³

IV. United States Treaties Dealing with Stolen Art

A. Mexico

Following a significant increase in the number of pre-Columbian art works being stolen from Mexico and brought to the United States, the United States in 1970 signed a treaty with Mexico to provide for the recovery and return of stolen archaeological, historical, and cultural property.⁹⁴ The treaty dealt specifically with "archaeological, historical and cultural properties"⁹⁵ dating from the Pre-Columbian and colonial periods of both the United States and Mexico. Pursuant to the treaty the artifacts protected must be owned by the federal, state or municipal governments of either nation, and documentation of ownership must be presented in order to initiate proceedings to effect the return of the artifacts.⁹⁶ The enacting legislation provides that if an "owner" failed to present proper certification from the government of the country of origin of a pre-Columbian monumental or architectural sculpture or mural, a customs officer should seize the artifact, and if the owner failed to produce certification within ninety days, the artifact would be forfeited to the United States.⁹⁷ The United States would then return the pre-Columbian work to the country of its origin.⁹⁸

This treaty was brought about by an exigent situation concerning the art work produced during a certain time period.⁹⁹ While each country may feel that an emergency exists when an artifact is stolen, this treaty deals with preserving the patrimony of Mexico and the

91. See *supra* note 89 for discussion of article 7. Article 9 provides for how requests from countries seeking help under the Convention are to be treated.

92. 19 U.S.C. § 2602 (1988).

93. 19 U.S.C. § 2603 (1988).

94. United States-Mexico Treaty, *supra* note 10.

95. "Pre-Columbian monumental or architectural sculpture or mural" is defined in the treaty as:

(A) 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

(B) any fragment or part of any stone carving or wall art described in subparagraph (A) of this paragraph.

19 U.S.C. 2095 (1988).

96. 19 U.S.C. § 2092 (1988).

97. 19 U.S.C. § 2093(a) (1988).

98. 19 U.S.C. § 2093(b) (1988).

99. P. BATOR, *supra* note 8, at 6-7.

United States. The United States' willingness to enter into this treaty was evidenced by self-interest in its own national culture.¹⁰⁰

It is also easier to deal with Mexico since the flow and interaction of goods between the United States and Mexico is more common, raising the awareness of customs agents on both sides of the border of proper export documentation, since pre-Columbian art is fairly recognizable. The idea that a treaty must be entered into with every country that believes that it needs special protection from the loss of its cultural property, however, would create endless implementation problems due to language and translation difficulties. In addition, if customs agents were made to scrutinize every piece of art and every accompanying document, the delays and the costs of art importation would prove excessive.

B. Peru

The United States and Peru signed an agreement in 1981 similar to that concluded between the United States and Mexico.¹⁰¹ The United States-Peru agreement, however, deals primarily with communications between the parties relating to stolen property to be introduced into the international market.¹⁰² If such a situation is about to occur, the parties agree to search and locate the stolen property once it enters their respective territories and to use all legal means to recover and return the property to the requesting party.¹⁰³

V. Civil Remedies Available to Original Owner

A plaintiff claiming theft of a piece of art has a cause of action in replevin.¹⁰⁴ Replevin demands the return of the object without damages or criminal prosecution of the thieves.¹⁰⁵ The defendant can raise defenses to the action by claiming that he was a purchaser in good faith and that the true owner failed to act upon his rights within a reasonable time.¹⁰⁶ "Reasonable time" is determined by taking into account such factors as concealment of the object and diligent pursuit of the object by the original owner.¹⁰⁷

Civil remedies are much more efficient than criminal sanctions for several reasons. First, civil remedies encourage the original own-

100. See *Convention on the Cultural Property Implementation Act: Hearings on H.R. 5643 and S. 2261 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance, 95th Cong., 2d Sess.* 23 (1978).

101. United States-Peru Treaty, *supra* note 11.

102. *Id.* at art. II(1).

103. *Id.* at art. II(2).

104. *Autocephalous v. Goldberg*, 717 F. Sup. 1374, 1375 (S.D. Ind. 1989).

105. "Replevin is an action at law for the recovery of specific personal chattels, wrongfully taken and detained." 77 C.J.S. REPLEVIN 1 (1952).

106. See *infra* text accompanying notes 123-26 and 182-86.

107. See *infra* text accompanying note 165.

ers to sue the converters, thereby increasing the chances of discovering the various persons in the chain of possession and increasing the costs to the thieves in terms of the cost of the lawsuit and in the imposed penalties. Second, civil sanctions can be more broadly applied than criminal sanctions to the receivers and purchasers of the stolen property. Third, fewer of the constitutional protections that are allowed to a criminal defendant are allowed to a civil defendant; thus, the civil suit would be a more favorable remedy than the criminal prosecution of the holders of the stolen property.¹⁰⁸ Additionally, a court need not examine legislative history or intent in a civil suit as they would in applying a criminal statute¹⁰⁹ nor would there be "potential interference with the operations of the State Department."¹¹⁰ Pursuant to 28 U.S.C. § 1332(a), a foreign country could bring suit in federal court where the court has original jurisdiction over the subject matter of the claim, provided that there be a diversity of citizenship and the amount in controversy exceeds \$50,000.¹¹¹

A. The Effect of Due Diligence and Statutes of Limitations in Preserving the Original Owner's Rights

The principle of due diligence and the statute of limitations are based on the theory that plaintiffs may not be passive in pursuing their rights; plaintiffs must act prudently and quickly to bring their causes of action. Art purchasing is a double-edged sword; the buyer must exercise due diligence in determining whether the art was stolen and whether the seller has good title, and the original owner must also exercise due diligence in locating the art after its theft or disappearance. The *Goldberg* court discussed the favorable judicial attitude toward tolling the statutes of limitations when the court determines that the plaintiff did not delay in bringing a claim.¹¹² Statutes of limitations are considered "statutes in repose"¹¹³ that "are enacted upon the presumption that one having a well-founded claim will not delay in enforcing it."¹¹⁴ The statutes also prevent surprises in reviving stale claims¹¹⁵ long after "evidence has been lost, memories have faded, and witnesses have disappeared."¹¹⁶

108. Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 MICH. L. REV. 1512, 1601 (1976).

109. Norwell, *American Tools to Control the Illegal Movement of Foreign Origin in Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. & COM. 77, 103, n.140 (1978).

110. *Id.* See *supra* notes 48-49 and accompanying text.

111. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1377 (S.D. Ind. 1989).

112. *Id.* at 1385.

113. *O'Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980).

114. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1385 (S.D. Ind. 1989).

115. *Servoamation Cor. v. State Tax Com.*, 60 A.D. 2d 374, 400 N.Y.S.2d 887 (1977).

116. *Elkins v. Derby*, 12 Cal. 3d 410, 525 P.2d 81, 115 Cal. Rptr. 641 (1974).

1. *Original owner must use due diligence in locating the current possessor of the stolen art.*—The purpose of due diligence privileges are appropriate when dealing with stolen art. Art loses its value if it is altered or disguised, so a thief will endeavor to keep it in its original state.¹¹⁷ The fact that the art will not be converted makes it easier to recognize and easier for an owner to find his stolen property than an owner who has had his car, stereo, or jewelry stolen since these items are easily converted or used for parts, rendering recognition almost impossible.

In *DeWeerth v. Baldinger*,¹¹⁸ a West German national and the alleged former owner of a Monet painting brought suit against an American purchaser. The Monet disappeared during World War II after it was sent by its owner, DeWeerth, to the home of her sister for safekeeping.¹¹⁹ It arrived at her sister's estate where it was displayed. During the quartering of American soldiers at the castle, however, the painting disappeared.¹²⁰ The Monet reappeared in the United States in 1956 and was purchased by defendant Baldinger in 1957 for \$30,900.¹²¹ Thirty additional years passed before DeWeerth learned of the painting's whereabouts, even though Baldinger had allowed the Monet to be displayed at two public exhibitions and in a published volume of Monet's works.¹²²

The court found that DeWeerth had not used due diligence as required under New York law to seek the recovery of the Monet and to learn the name of its current owner.¹²³ New York treats a good faith purchaser as innocent until the true owner makes the defect in title known and the purchaser refuses to return the property.¹²⁴ Unless the true owner exercises due diligence to identify the good faith purchaser, however, the accrual time of the action could be extended indefinitely, while a thief would be immune from an action after only three years.¹²⁵ Thus, due diligence is required to "prevent unnecessary hardship to the good-faith purchaser."¹²⁶

117. This statement deals primarily with paintings, since a portion of a painting has no value. Although artifacts are worth much more if intact, cut up portions of friezes and stelae can be very valuable and are easier to transport.

118. *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987).

119. *Id.* at 105.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 110-11.

124. *Id.* at 108. See also *Menzel v. List*, 24 N.Y.S.2d 91, 246 N.E.2d 742, 298 N.Y.S. 979 (1969), which was a replevin action for a Chagall painting confiscated by the Nazis and bought by the defendant. The court found that the statute of limitations did not run until the defendant refused to return the painting upon Menzel's demand.

125. *DeWeerth v. Baldinger*, 836 F.2d 103, 108-09 (2d Cir. 1987).

126. *Id.* at 109. "[T]he primary purpose of a limitations period is fairness to a defendant (citation omitted). A defendant should 'be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim

The court in *Kunstsammlungen Zue Weimar v. Elicofon*¹²⁷ was faced with determining the rightful owner of two paintings by Albrecht Dürer which were stolen in 1945 from a castle in what is now East Germany, and discovered in Brooklyn, New York in 1966.¹²⁸ The current owner, Elicofon, did not know that the portraits were stolen nor that they were Dürers.¹²⁹ The opinion traces the history of the portraits and the law of Germany through the nineteenth and twentieth centuries.¹³⁰

The court first determined which plaintiffs were able to assert ownership over the Dürers. The court found that title had passed through a 1927 agreement, between the heirs of the Grand Duke of Saxony-Weimar and the Territory of Weimar. In this agreement, the Grand Duke's property interests in Thuringia, including the Grand Ducal art collection containing the Dürers, were transferred to the government.¹³¹ Title had then been transferred to the German Democratic Republic (GDR) by either an act of the GDR in 1952 or indirectly as a successor to the Third Reich, to whom the property rights of the Land of Thuringia had passed.¹³²

Having determined that the GDR had received a property interest in the Dürers, the court turned to Elicofon's claim that the New York statute of limitations barred the action.¹³³ The court applied New York law which states that an innocent purchaser of stolen goods is in lawful possession of the goods until the true owner asserts his claim.¹³⁴ Elicofon's status as an innocent purchaser became one of a wrongdoer when he refused to return the Dürers after the owner's request of return. Thus, the statute of limitations did not accrue until the refusal provided that the plaintiff not unreasonably delay the demand by not pursuing the stolen property.¹³⁵ The court stated that the determination of what constitutes a reasonable time is made on a case by case basis.¹³⁶ Although the court did find some

where the evidence has been lost, memories have faded, and witnesses have disappeared' (citation omitted). There is also the need to protect the judicial system from the burden of adjudicating stale and groundless claims (citation omitted)." *Id.*

127. 678 F.2d 1150 (2nd Cir. 1982).

128. *Id.* at 1152.

129. *Id.* at 1152-53.

130. This case is particularly fascinating in its discussion of the disintegration of dynastic Germany and the subsequent formation of the German Democratic Republic and Federal Republic of Germany. This history is pertinent since under New York law there exists a judicially created "non-recognition" toll that prevented the statute of limitation from running until the United States recognized the GDR in 1974. *Id.* at 1164.

131. *Id.* at 1158-59.

132. *Id.* at 1151.

133. *Id.* at 1160.

134. *Id.* at 1161.

135. *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 849 (1981), *aff'd*, 678 F.2d 1150 (2nd Cir. 1982).

136. *Id.*

deficiencies in the efforts of the Kunstsammlungen Zu Weimar (KZW), the circumstances of East-West relations and the political tensions that followed World War II had to be taken into consideration.¹³⁷ Based on the political climate, the court determined that deficiencies did not prove that the KZW had not been diligent and decided that the delay of the action was "reasonable and excusable as a matter of law."¹³⁸

The United States' enabling legislation for the UNESCO Convention incorporates this theory of due diligence which the courts have applied in exempting any articles that have been in the United States for at least ten consecutive years and have been exhibited in museums or religious institutions for at least five of those years, and by barring foreign governments from bringing suit if they have had fair notice of the article's location during that time.¹³⁹ This exclusion lends credence to the theory that the art world is an intertwined network which allows the location of a piece of art to be readily known.

The court in *Goldberg* determined that the Autocephalous Church had exercised due diligence in attempting to find the mosaics. The Church had contacted the United Nations, UNESCO museums, leading Byzantine scholars, and the press.¹⁴⁰ This systematic approach should set a standard for others who wish to insure their ability to recover stolen property from an American owner.¹⁴¹

2. *The buyer must also exercise due diligence when purchasing any piece of art.*—A purchaser of property, especially when the purchaser is knowledgeable in the area of the purchase, must be wary of suspicious circumstances that surround the sale.¹⁴² The purchaser has a duty to examine a questionable title to protect against future claims from the original owner.¹⁴³ This can be a difficulty especially in the art world where secrecy is a trade practice. Art dealers and auction houses often sell art on behalf of well-to-do families who wish to conceal the fact that they are facing financial difficulties. One commentator points out that while few pieces of art come

137. *Id.* at 852.

138. *Id.* (footnote omitted).

139. 19 U.S.C. § 2611(2)(b). *See also* H.R. Rep. No. 615, 95th Cong., 1st Sess. 17 (1977).

140. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1389 (S.D. Ind. 1989).

141. For a discussion of resources available to buyer to verify the title of a piece of art, *see* Note, *Title Disputes in the Art Market*, 51 GEO. WASH. L. REV. 443 (1980).

142. U.C.C. 2-104(1) defines merchant as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skills peculiar to the practices or goods involved in the transaction . . ." U.C.C. 2-103(1)(b) provides that good faith on the part of merchants is "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.*

143. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1404 (S.D. Ind. 1989).

with a perfect and complete pedigree,¹⁴⁴ the purchaser is not prevented from inquiring into suspicious documents and circumstances and insuring that at least the seller has the ability to convey good title. This is especially true in *Goldberg*, since the defendant was an art dealer. Although Goldberg was not an expert in Byzantine art, she was experienced in the art trade.¹⁴⁵

The defendant's due diligence was not favorably discussed by the court in *Goldberg*. The court noted the extreme indifference with which Goldberg conducted her inquiry into the true ownership of the mosaics; phone calls she alleged to have made were not recorded;¹⁴⁶ export documents she was shown were dubious on their face, yet she did not question them.¹⁴⁷ Goldberg's own testimony shows that she knew of the middlemen's shady backgrounds.¹⁴⁸ The court also noted that the hasty way in which the deal was completed and the mosaics turned over to Goldberg raised suspicions.¹⁴⁹ The hurried nature of the sale raised the possibility that Goldberg knew that the mosaics were stolen yet wanted them no matter what the cost. Had Goldberg offered to make a good faith deposit, put the remaining funds in escrow, and had a contract drawn up that would go into effect on a specific date contingent on "the satisfactory resolution of provenance, authenticity, and restorability,"¹⁵⁰ the mosaics might have been secured for Goldberg and she might have had time to further examine the title.¹⁵¹ The cost of her cursory examination of the mosaics extends beyond Goldberg's lost possession of the mosaics; it has brought about the bankruptcy of her art dealership.¹⁵²

There are organizations that can be contacted and procedures followed to insure that artistic property is not stolen. As stated before, IFAR and Interpol maintain lists of art reported stolen. Each country's customs agency can then determine from its records

144. P. BATOR, *supra* note 8, at 84 n.146.

145. Goldberg's area of expertise lay in nineteenth and twentieth century American and European art. Barbara Divver, another art dealer as well as a friend and mentor, suggested to Goldberg that she get a Byzantine expert to give her expert advice. Goldberg declined to do so. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1404 (S.D. Ind. 1989).

146. *Id.* at 1403.

147. *Id.* at 1402. "The Court cannot improve on Dr. Vikan's summation of the suspicious circumstances surrounding this sale: 'All the red flags are up, all the red lights are on, all the sirens are blaring.'" *Id.*

148. Goldberg testified that she knew little of Michael van Rijn, yet she did know that he was a felon convicted in France for art forgery and that he was being sued for failing to pay money to a gallery. *Id.* at 1402. She also stated she had known Robert Fitzgerald for several years, knew of his aliases, and knew he was currently being sued for his involvement with a purported Michaelangelo modello. *Id.*

149. *Id.* at 1403.

150. *Id.*

151. *Id.*

152. When Goldberg's lawyer, Joe E. Emerson, was asked if the court's ruling would bankrupt her, he replied, "'The debt approximates her net worth. You can draw your own conclusions.'" Goldberg Article, *supra* note 15, at 1, C25, col. 1.

whether the art has been removed from that country legally.

Goldberg is a perfect example and a warning for buyers who have not allayed all suspicions and doubts as to a piece of art work. The price that Goldberg paid was low compared to the multi-million dollar price tag the mosaics should have had. However, the price was still steep enough to refrain from taking the gamble that the title to the mosaics was good and that no other owner could step forward and claim them.

B. Statute of Limitations

Another way in which the courts encourage due diligence when purchasing what may be stolen art is the tolling of the statute of limitations. The general rule of law is that the statute of limitations is not tolled when property is concealed from the owner.¹⁵³ The courts allow an owner reasonable time to discover the stolen property and assert title. The "discovery rule" is applied to determine when the plaintiff's cause of action accrues.¹⁵⁴ The "discovery rule" simply prevents the statute of limitations from running in situations where the plaintiff, "using due diligence, cannot bring suit because he is unable to determine a cause of action."¹⁵⁵ In an action in replevin, the plaintiff brings suit for the return of a specific property. If the plaintiff cannot locate the specific property there is no cause of action.¹⁵⁶ Thus, the encouragement of due diligence prevents an owner from sitting on his rights and prevents a good faith purchaser from being brought to trial.

In *DeWeerth*, the court found a lack of due diligence on the part of the original owner because the painting had been exhibited and even published in a collection of Monet works.¹⁵⁷ There were numerous opportunities for DeWeerth to discover the whereabouts of the stolen art. The true owner of the art work is required to pursue all avenues to recover the art.¹⁵⁸ The art world is unique in that it is a recognized legitimate profession as well as a black market. The people who come in contact with art are educated and professional and are not always willing to aid the thieves. In *Hollinshead*, *DeWeerth*, and *Goldberg*, the location of the stolen art was discov-

153. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1389 (S.D. Ind. 1989). See also 51 AM. JUR. 2D *Limitation of Actions* 124 (general rule is that the statute of limitations runs from the time of theft except in the case of concealment); and 54 C.J.S. *Limitations on Actions* 88 (general rule is that fraudulent concealment of stolen property tolls the statute of limitations until such a time that the property is discovered or should have been discovered by using due diligence).

154. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1389 (S.D. Ind. 1989).

155. *O'Keeffe v. Snyder*, 83 N.J. 478, 490, 416 A.2d 862, 869 (1980).

156. See *supra* note 99.

157. *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2nd Cir. 1987).

158. *Id.* at 110.

ered when an art expert was contacted in connection with the sale of the piece. In *Goldberg*, the experts at the Getty Museum raised suspicions that the work may have been stolen and aided in informing Cyprus that Goldberg was in possession of the mosaics.¹⁵⁹

*O'Keeffe v. Snyder*¹⁶⁰ is an interesting application of the discovery rule. In this case, Georgia O'Keeffe attempted to recover three of her paintings that had been stolen in 1947 from the art gallery owned by her husband, Alfred Stieglitz. She did not report the theft nor did she pursue the person, an employee of the gallery, whom she suspected of the theft.¹⁶¹ The paintings were discovered in a Princeton, New Jersey art gallery in 1977, and O'Keeffe brought an action in replevin against the owner.¹⁶² The New Jersey Supreme Court reiterated the principle that in order "[t]o avoid harsh results from the mechanical application of the statute [of limitations], the courts have developed a concept known as the discovery rule."¹⁶³ Since a replevin action is for the recovery of a specific piece of property, the plaintiff must know who is in possession of the property; without knowledge of the possessor, the plaintiff cannot bring an action.¹⁶⁴

In arguendo, the court in *Goldberg* stated that even if the discovery rule did not apply to a replevin action, the doctrine of fraudulent concealment would have prevented the statute of limitations from tolling.¹⁶⁵ The court cited the *O'Keeffe* decision in which the New Jersey court limited the cause of action when the original owner "discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action."¹⁶⁶

Not all states have recognized that the statute of limitations does not run until the owner has had reasonable time to discover where the piece is located. *Elicofon* stated that under New York law

159. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1376 (S.D. Ind. 1989).

160. *O'Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862, 864-65 (1980).

161. *Id.* at 484-85, 416 A.2d 865-66. An interesting note to this case is that O'Keeffe was both the original owner and the artist. It seems she should have been more diligent to find the paintings. There was factual dispute as to O'Keeffe's allegation of the theft since Ulrich A. Frank, the third party defendant who sold the paintings to Snyder, testified that the paintings had been in his father's possession before the alleged theft and remained in his family until he sold them. *Id.* at 866.

162. *Id.* at 486, 416 A.2d 866.

163. *Id.* at 488, 416 A.2d 867.

164. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1389 (S.D. Ind. 1989).

165. *Id.* at 1387. "The harshness which may result from the application of a statute of limitations has been avoided by judicial recognition of certain exceptions. One of these exceptions is the doctrine of fraudulent concealment which operates as an equitable doctrine to estop a defendant from asserting a statute of limitations when he has, either by deception or by violation of duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action." (quoting *Burks v. Rushmore*, 534 N.E.2d 1101 (Ind. 1989)).

166. *O'Keeffe v. Snyder*, 83 N.J. 478, 491, 416 A.2d 862, 869 (1980).

the accrual date was the date for return of the goods.¹⁶⁷ The innocent purchaser becomes a wrongdoer only after refusing the owner's demand for return of the artwork.¹⁶⁸ Prior to the demand, the purchaser is entitled to lawful possession.¹⁶⁹ The KZW could not have made the demand until it knew that Elicofon was in possession of the Dürers. The court found that the KZW had been reasonably diligent in attempting to locate the paintings.¹⁷⁰

Stolen art is probably the most easily influenced illegal market. By deterring the purchaser from buying art without a careful and thorough investigation of theft, the stolen art market will find itself overflowing with stolen art but without purchasers. By encouraging the owner to seek out all avenues in locating the stolen art work, a buyer will need to be wary of an item which catches his eye. Because of art's uniqueness and memorableness, the owner has a better chance of recovery than most owners of stolen property.¹⁷¹

VI. Problems in Applying Foreign Law in Respect to Controlling Stolen Art

International cooperation in this arena is not necessarily reliable. While all countries profess their willingness to help in controlling traffic in stolen art, not all are willing to implement legislation. One basic problem in relying on foreign law in controlling traffic in stolen art is that Europe's finest museums are filled with pieces that were taken, usually without permission, from other countries. The most famous case concerns the marbles taken from the Parthenon in Athens by the Earl of Elgin between 1801 and 1812.¹⁷² In 1816 the Earl sold the marbles to the British Museum, where they have been displayed and catalogued as "The Elgin Marbles" ever since.¹⁷³ Other works of art have also acquired a second national home. Many French Impressionist paintings have come to be recognized as much a part of Russia as they are a part of France; Da Vinci's *Mona Lisa* is readily identified with the Louvre; and the Museum of Art in Philadelphia is renowned for its Van Gogh collection.

In most suits brought in the United States to recover stolen art, the defendant has usually argued that the laws of another country

167. N.Y. CIV. PRAC. L. & R. 206(a) (Consol. 1978): "Where a demand is necessary to entitle a person to commence an action the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete." *Id.*

168. *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2nd Cir. 1982).

169. *Id.*

170. 536 F. Supp. 829, 852 (E.D.N.Y. 1981).

171. *DeWeerth v. Baldinger*, 836 F.2d 103, 109 (2nd Cir. 1987).

172. Merryman, *Thinking about the Elgin Marbles*, 83 MICH. L. REV. 1880, 1882 (1985).

173. *Id.*

apply and that he has become a bona fide purchaser.¹⁷⁴ The courts in deciding the choice-of-law issue have consistently chosen to apply the laws of the United States.¹⁷⁵ This is not always true in foreign countries where a choice-of-law decision can assist in laundering stolen art and where bona fide purchasers are protected by the courts. In *Winkworth v. Christie's Ltd.*,¹⁷⁶ for example, art pieces were stolen from the plaintiff in England and taken to Italy where they were resold. The sale was conducted under Italian contract law since both parties to the sale and the art works were physically in Italy at the time of the sale.¹⁷⁷ The art was returned to England where Christie's, a prestigious London auction house, put them up for sale.¹⁷⁸ The plaintiff subsequently brought suit. The defendant claimed that under Italian law he had obtained good title. Italian law allows good title to be conveyed even though the seller's title is defective, if the purchaser is in good faith and is not aware of any illegality of the property when he receives it.¹⁷⁹ The transaction must also be carried out in an appropriate manner with regard to documenting and evidencing the sale.¹⁸⁰ The court adopted the *lex situs* of the painting and held that the defendant had obtained good title.¹⁸¹

A. Good Faith Purchaser and Statute of Limitations

The court in *Goldberg* discussed, *in arguendo*, that if Swiss law had been found to apply to the case, a good faith exception would have to be decided. Under Swiss law, a purchaser can acquire title to stolen property that would be superior to that of the original owner if it is purchased in good faith.¹⁸² There is a presumption that the purchaser had acted in good faith, and the plaintiff must overcome this presumption by showing that suspicious circumstances surrounded

174. See *DeWeerth v. Baldinger*, 836 F.2d 103 (2nd Cir. 1987); *Autocephalous v. Goldberg*, 717 F. Supp. 1374 (S.D. Ind. 1989); *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2nd Cir. 1982).

175. *Id.*

176. *Winkworth v. Christie's Ltd.*, 1 All ER 1121 (1980).

177. *Id.* at 1123.

178. *Id.*

179. *Id.* at 1124-5.

180. *Id.*

181. *Id.* at 1136.

182. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989).

"Where a person in possession of a movable chattel loses it or has it stolen from him or otherwise taken from him against his will he can demand it back within a period of five years from any person who is detaining it. Where the chattel has been brought at a public auction on in a market overt or from any dealer in property of the same kind it cannot be recovered from the first purchaser or any subsequent bona fide purchaser, unless he is compensated for the purchase money paid." *Id.* This public auction exception has created a large number of "private" public auctions in Switzerland for the sole purpose of legitimizing stolen art. B. BURNHAM, *supra* note 4, at 45.

the sale of the property to the extent that "an honest and reasonably prudent purchaser"¹⁸³ would have doubted the seller's ability to convey property rights.¹⁸⁴ If the plaintiff is successful in overcoming this presumption, the burden shifts to the defendant to prove his good faith.¹⁸⁵ In establishing good faith, the purchaser is required to show that he "took steps to inquire into the seller's capacity to convey the property rights and that such steps reasonably resolved such doubt."¹⁸⁶

In *Elicofon* the court also discussed the application of foreign law, in this case the law of Germany, and subsequently dismissed its application. Elicofon argued that under German law he had acquired title.¹⁸⁷ The German law that would have applied is known as the *Ersitzung* doctrine. This doctrine awards title to a holder who for ten years has uninterrupted good faith possession.¹⁸⁸ Most European nations have a statute of limitations of three to ten years after which the person in possession cannot be charged with stealing.¹⁸⁹ After thirty years the owner of the stolen property loses his claim to ownership.¹⁹⁰ In the United States, an owner can lose his claim to property if he does not exercise due diligence in seeking to recover it.¹⁹¹ Most states' statutes of limitations will not accrue unless the owner fails to assert his right to the property within a reasonable time.¹⁹²

The country that has caused the most concern for owners of stolen art is Japan. The Japanese, especially in recent years, have invested considerably in Western art.¹⁹³ This desire to invest is coupled with a two year statute of limitations on stolen art, provided the Japanese purchaser did not know it had been stolen;¹⁹⁴ this makes Japan a favorable market for thieves to sell their stolen art.¹⁹⁵

183. *Autocephalous v. Goldberg*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989).

184. *Id.*

185. *Id.*

186. *Id.* (footnote omitted).

187. *Kunstsammulungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2nd Cir. 1982). Under German law, (1) A person who has a movable thing in his proprietary possession for ten years acquires ownership (usucaption). (2) Usucaption is excluded if the acquirer is not in good faith in obtaining possession or if he subsequently learns that he is not entitled to ownership. BGB 937 (W. Ger.).

188. *Kunstsammulungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2nd Cir. 1982).

189. B. BURNHAM, *supra* note 4, at 45.

190. *Id.* at 47.

191. *See supra* text accompanying notes 153-71.

192. *Id.*

193. *A Lucrative Crime Grows Into a Costly Epidemic*, N.Y. Times, March 20, 1990, at C20, col. 3 [hereinafter *A Lucrative Crime*].

194. MINPO, art. 193. The Japanese Civil Code also provides that the injured party cannot reclaim stolen property unless he first reimburses the good faith purchaser. MINPO, art. 194.

195. "In 1988, some paintings by Corot that were stolen in France were recovered in Japan, and we keep hearing rumors that the Monet ["Impression, Sunrise", the painting that gave the Impressionist Movement its name] is in Japan." *A Lucrative Crime*, *supra* note 193, at C20.

B. Other Foreign Controls

The primary purpose of foreign law that controls stolen art concerns the protection of cultural property and the prevention of illicit art traffic leaving the country.¹⁹⁶ Many countries list and classify their cultural property in an official compilation. France began to classify "all historical buildings and art treasures" in 1965.¹⁹⁷ The exportation of a classified item is prohibited. If an item is not classified, the French government can refuse to allow it to be exported and can require that it remain within the country.¹⁹⁸ The French government can also purchase the item for its national collection within six months of any application for exportation.¹⁹⁹

Great Britain also employs such power in purchasing objects that have been denied an export license. This applies to all art, however, regardless of national origin. The criteria upon which the Reviewing Committee on the Export of Works of Art of the Department of Education and Science decides whether to grant an export license are "whether the object is so closely connected with British History and national life that its departure would be a misfortune, [and/or] whether it is of outstanding aesthetic importance, [and] whether it is of outstanding significance for the study of some particular branch of art, learning, or history."²⁰⁰

Italy also reserves the right to purchase any cultural property within two months of the proposed export.²⁰¹ The definition of cultural property is nearly all movable and immovable objects of "artistic, archaeological, or ethnographic interest to the country."²⁰²

VII. Conclusion

Goldberg stands as an example to future victims of art theft and

196. Fishman & Metzger, *supra* note 7, at 59.

197. *Id.* at 60. See also "Hungarian Decree No. 9 of 1963 on the Protection of Museum Pieces requires registration by an official inventory of all material, documents, and monuments of outstanding importance to the archaeological, historical, natural, artistic, ethnographic, scientific, economic, or technical heritage of the country, or to its economic, social, and cultural development." *Id.* at 60-61.

198. *Id.* at 60.

199. B. BURNHAM, HANDBOOK OF NATIONAL LEGISLATION: THE PROTECTION OF CULTURAL PROPERTY 34-35 (1974).

200. Fishman & Metzger, *supra* note 7, at 63-4.

201. *Id.* at 62. Italy is perhaps the most plundered of all European nations since it contains "more than half of the world's cultural holdings." The Italian Cabernini recorded "244,403 paintings, statues, frescoes, coins and other items . . . stolen . . . from 1970 through 1989." Half of the art objects have been recovered. *Italy Fears that its Art Treasures will Scatter in a Unified Europe*, N.Y. Times, Mar. 5, 1990, at 1, col. 4. Experts point to a lackadaisical attitude as a major cause of the high number of thefts since Italy "count[s] on a new art treasure's turning up to take the place of one that has disappeared." *Id.* at C13, col. 2.

202. Fishman & Metzger, *supra* note 7, at 62. The unification of Europe in 1992 may result in the increased movement of stolen art within Europe since trade barriers and customs guards will vanish. N.Y. Times, *supra* note 187, at A1, col. 3.

subsequent purchasers of stolen art. Cyprus followed methodical steps to insure that, absent concealment, the people who would be contacted when the mosaics resurfaced were made aware that they and the church were the true owners. Therefore, within six months of the mosaics' appearance in Indianapolis, the Cypriot Ambassador was informed of their whereabouts. Goldberg, however, did not follow such steps in insuring that she could and would obtain good title to the mosaics. Her recklessness toward the safeguards that could have protected her from purchasing stolen art may have very well destroyed her professionally as well as financially.

By encouraging due diligence on both sides, the stolen art market will shrink, increasing the difficulty for a thief to unload the piece and profit from the theft. As with any market of goods, once demand falls so does the production. In a corollary to this, the theft of artwork should decrease. *Goldberg* sends a strong message to buyers with United States connections that cognizable receivership of stolen art will not be tolerated and will make buyers think twice before purchasing a questionable piece of art.

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