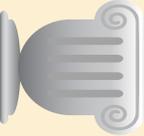
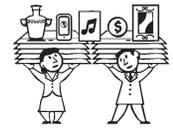


VISITING 	JUST	SOUND RECORDINGS 	MUSIC, LYRICS, AND COPYRIGHT	MUSICAL COMPOSITION 	BRAND PROTECTION IN THE APPS ERA	APP DEVELOPERS	APP MARKETPLACE OPERATORS
	LANGBORD 10	GOLD RESERVE ACT OF 1934	RARE COINS 	1933 DOUBLE EAGLE	CULTURAL PROPERTY 	ANTIQUITIES	ARTWORK
							
<h1>Cultural Property</h1> <h2><i>Who Owns It and What Laws Protect It?</i></h2> <p>BY PROFESSOR MARILYN E. PHELAN</p>							
<p>Special Status of Cultural Property</p> <p>Some would posit that cultural property, both in public and in private ownership, should be recognized as a “special category of property” subject to special property laws. As one scholar suggested,¹ cultural property, which includes valuable art and antiquities, might be included among the natural resources of a nation over which permanent sovereignty is claimed. He noted that the construction of national registers, the registration of objects of special value, the preparation and publication of lists of stolen property, and the computerization of public property and privately owned cultural objects are important tasks that should devolve upon public authorities.²</p> <p>Unfortunately, because of the significant economic value of some cultural property and despite major international efforts to protect and preserve valuable cultural treasures, there exists a multi-billion dollar industry in the illicit trading in stolen and illegally exported cultural property. As the persisting international demand for cultural property reinforces the smuggling of artworks and antiquities, corresponding demands for the return or restitution of these smuggled cultural treasures also surface. However, requests and lawsuits brought by individuals, countries, museums, churches, and other entities for the return of stolen and/or illegally exported cultural property are difficult to resolve because of conflicting and often ill-defined laws. The unfamiliar and often confusing laws protecting cultural heritage differ in the diverse countries — consequently producing differing results when courts in the United States and in other countries attempt to resolve cultural property ownership disputes.</p>							
<p>Property in the 21st Century</p>							



This article briefly reviews laws protecting cultural property. It also addresses legal issues relating to the recovery of cultural property that has been stolen or illegally exported to alert attorneys to problems they must address when assets in their client's estates include valuable cultural treasures with gaps in provenance. The article directs the reader to mediation as a preferable alternative to the litigation of international disputes grounded on conflicting laws that produce uncertainty and inconsistent results for claimants.

Legal Principles Relating to Stolen Cultural Property

Governments, individuals, museums, churches, and other entities are often victims of the illicit trade in valuable cultural property. Although there is no international law, nor a forum with international jurisdiction, to decide questions relating to the ownership of cultural property, courts in the United States have provided some judicial remedies for individual victims, foreign governments, and other entities that seek the return or restitution of stolen cultural property.³ These remedies are based on the common law principle, the English *nemo dat* rule,⁴ which provides that one who purchases property from a thief, no matter how innocently, acquires no title in the property. Title remains with the true owner.⁵ This common law principle has been codified into express law in the United States,⁶ and, thus, is recognized statutory law in all states except Louisiana.⁷ A New York court commented that this law “stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors.”⁸ The effect of the English common law rule is that purchasers of stolen cultural property can be exposed indefinitely in U.S. courts to claims of original owners.

While state courts (with the exception of courts in Louisiana⁹) must recognize that a seller cannot convey good title to property that was, at one time, stolen, a New Jersey court imposed a due diligence requirement upon the original owners as a prerequisite to proving their claim to their stolen artworks.¹⁰ Some courts have recognized the unfortunate results of such a mandate and have shifted the due diligence requirements to potential purchasers of valuable artifacts.¹¹ In balancing the equities between purchasers and the original owners, courts generally have tipped the scale in favor of the rightful owners, who often face difficult and unfair burdens in meeting a due diligence requirement.¹²

A purchaser of stolen cultural property can acquire good title to stolen property at the expiration of a statute of limitations on the actual owner's claim.¹³ Courts have expressed concern about protecting innocent purchasers when the owner had not exercised due diligence to recover stolen property;¹⁴ thus, with the exception of New York,¹⁵ and previously California because of a statute addressing a victim's discovery of the location of stolen art and antiquities,¹⁶ courts have ruled that the statute of limitations on suits to recover stolen property begins to run when the rightful owner knew or “reasonably should know” of the victim's cause of action and the identity of the possessor of the property.¹⁷ Thus, there can be a cut-off of a vic-

tim's title after a certain number of years if a court decides an owner has not exercised due diligence in pursuing their claim.¹⁸ Still, if courts shift the due diligence requirement to a potential purchaser of valuable artworks rather than require the victim to show due diligence, courts undoubtedly will apply the “reasonably should know” component of the discovery rule more favorably to those owners who have been innocent victims of the illicit trade in valuable cultural treasures.¹⁹

In New York, limitation on the time during which suit may be brought to recover stolen property does not begin until the rightful owner asserts a claim to the property and the possessor refuses to return the property.²⁰ New York courts have determined that this rule is better than the discovery rule applicable in other states because it “gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser.”²¹ In addition, a court may conclude that a purchaser of cultural property was not an “innocent purchaser” if the potential buyer failed to conduct an adequate search of the artifact's provenance.²²

Because a purchaser or possessor of stolen cultural property can be exposed indefinitely to claims of the actual owner, a client's possession of stolen artworks or antiquities causes major problems for a client and for the client's attorney. Indeed, the possession of stolen cultural treasures can wreak havoc upon

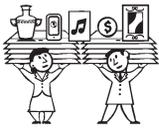
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the administration of an estate. A stolen work results in a material misrepresentation of the client's — particularly an estate's — assets and liabilities. What is actually a potential liability is treated instead as an asset.²³ Thus, initially there will be a skewed understanding about the client's assets and liabilities. Further, and most significantly, the inclusion of a stolen artwork in an estate may result in a substantial overpayment of estate taxes, especially if a tax refund is time-barred.²⁴

Because a purchaser or possessor of stolen cultural property can be exposed indefinitely to claims of the actual owner, a client's possession of stolen artworks or antiquities causes major problems for a client and for the client's attorney. Indeed the possession of stolen cultural treasures can wreak havoc upon the administration of an estate. A stolen work results in a material misrepresentation of the client's — particularly an estate's — assets and liabilities.

The common law principles noted above contrast with the principles in most civil law countries wherein a purchaser of stolen property generally can obtain title by acquisitive prescription.²⁵ Countries whose legal systems are based on Roman law generally permit a period of five years after a theft for a legal owner to recover the goods from an innocent purchaser. After that period of time, the purchaser has good title to the property.²⁶ Still, in some civil law countries the person or entity who purchased the stolen property must have been a "good faith" or "innocent" purchaser for the limitations period to begin to run.²⁷ Further, even if a foreign State determines that a current possessor of stolen cultural property has good title to the property, the rightful owners or their heirs may be successful in bringing a claim in the United States for return of the property or for recovery of a payment equal to the property's value.²⁸

Illegally Exported Cultural Property

In contrast to stolen property, state laws have not in the past prevented purchasers from acquiring good title to illegally exported artifacts.²⁹ Courts generally have not disturbed a purchaser's possession of an illegally exported artifact if the artifact was not stolen.³⁰ Still, many countries now have patrimony laws that declare state ownership of all property found at their archaeological sites.³¹ If a foreign government asserts title to artifacts located within its boundaries, a U.S. court may apply the National Stolen Property Act (NSPA)³² to the taking of such artifacts even though agents of the country of origin may never have physically possessed the artifacts.³³

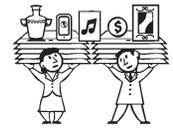
In an earlier case, *United States v. McClain*,³⁴ the Fifth Circuit upheld the conviction, under NSPA, of individuals who sold pre-Columbian artifacts in Texas. The court determined there was clear Mexican ownership of the artifacts.³⁵ In a more recent case, *United States v. Schulz*,³⁶ the Second Circuit applied the NSPA to punish encroachments upon legitimate and clear state ownership rights to illegally imported artifacts from Egypt.

Although persons and entities that have acquired illegally exported, but not stolen, cultural property may acquire good title to the property, there should be a concern that the country of origin may bring action, including criminal indictments, against the possessors of such property. For example, Italy brought a criminal indictment against a prior curator for the J. Paul Getty Museum on charges of conspiring to export looted antiquities from Italy.³⁷ Although the Getty agreed to return several ancient artifacts in its collection to Italy, Italy would not drop the criminal charges against the curator.³⁸ Greece also brought criminal action against the former Getty curator, but dropped charges when the Getty agreed to return 40 artifacts in its collections to Greece.³⁹ (Italy has entered into agreements with the Metropolitan Museum of Art, the Boston Museum of Fine Arts, and the Princeton University Art Museum for return of some of the objects in their collections.⁴⁰)

International Conventions

International conventions protecting cultural property would be effective to resolve disputes relating to stolen and illegally exported art and antiquities if all countries would ratify the treaties and abide by their terms. However, individual state interests that preclude some countries from ratifying all or parts of these treaties also rule out the possibility that the treaties can provide for a global system for resolving questions of ownership and possession of cultural treasures. Nonetheless, provisions in international conventions provide valuable guidance to courts when they are faced with conflicting state laws applicable to difficult cultural property ownership issues. A summary of the three most important international conventions follows.

Concern for the protection of cultural property evolved in the 19th Century,⁴¹ but the first significant international legislation to protect cultural property was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.⁴² The 1954 Hague Convention prohibits the destruction or seizure of cultural property during armed conflict, whether international or civil in nature, and during a period of belligerent occupation, but it also applies to peacetime international trafficking in cultural property unlawfully seized during an armed conflict.⁴³ Its preamble provides that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind," because "each people makes its contribution to the culture of the world."⁴⁴ Although the United States did not become a signatory to the Hague Convention until 2009, U.S. armed forces have followed, and received training on, its provisions since it was drafted.⁴⁵



The second and most important international agreement, the 1970 United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, focuses on private conduct, primarily during peacetime.⁴⁶ The international community became concerned in the 1960s about the importation into various countries of artifacts unlawfully obtained from the country of origin. This concern led to the drafting in 1970 of an international agreement by the General Conference of UNESCO, wherein the parties to the convention agreed to oppose all illicit import, export, and transfer of ownership of cultural property with whatever means at their disposal. At the meeting of the General Conference in Paris in 1970, the several nations in attendance recognized that the illicit trade in cultural property of various nations had become a primary cause of the impoverishment of the cultural heritage of originating countries. It concluded that international cooperation constituted one of the most efficient means of protecting each country's cultural property against the dangers resulting from the illicit transfer of such properties.⁴⁷ The U.S. Congress enacted the Cultural Property Implementation Act (CPIA)⁴⁸ in 1982, effective in 1983, to implement into domestic law Articles 7 and 9 of the 1970 UNESCO Convention.⁴⁹ The CPIA provides that when a participating nation makes a request to the United States for import restrictions on cultural property from that nation, because the requesting nation contends the cultural patrimony of the nation is in jeopardy from the pillage of its cultural properties, the president of the United States may enter into a bilateral agreement with that nation to apply import restrictions.⁵⁰ The import restrictions would provide that no designated archaeological or ethnological material exported from the requesting nation can be imported into the United States unless the requesting nation has issued a certificate that the exportation was not in violation of that nation's laws.⁵¹

The Convention for the Protection of the World Cultural and Natural Heritage, which was adopted by UNESCO in 1972, addresses the need for international protection of cultural property.⁵² The 1972 Convention established an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called the "World Heritage Committee."⁵³ Each party state submits to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage in its territory. The World Heritage Committee must maintain an up-to-date and published list of these properties in its "World Heritage List."⁵⁴ The U.S. Senate approved the 1972 UNESCO Convention in 1973, although implementing legislation for U.S. participation in the 1972 UNESCO Convention was not enacted until 1980.⁵⁵

The International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Property, which was adopted in Rome in 1995,

compliments the 1970 UNESCO Convention and mandates the return of a stolen cultural object to the original owner.⁵⁶ Further, any cultural object that was excavated unlawfully, or excavated lawfully but retained unlawfully, is deemed to be stolen.⁵⁷ In addition, a party nation to the UNIDROIT Convention may demand that a court of another party country to the convention order the return of a cultural object illegally exported from territory of the requesting nation.⁵⁸ The United States has not ratified the UNIDROIT Convention.

Mediation to Settle Disputes

Because of the difficulty of applying conflicting and often ill-defined laws to resolve cultural property disputes, alternative dispute resolution may be the most effective means of resolving conflicts regarding ownership and possession of cultural property. Submitting complicated issues related to ownership, possession, and repatriation of stolen and/or illegally exported cultural property to arbitration or mediation will prevent one party from becoming subject to another party's national court system, which may be unfamiliar, slow, or expensive. In addressing the issues related to ownership of valuable cultural property, the International Council of Museums (ICOM) has established an alternative dispute resolution mechanism that can provide a more effective system for museums to resolve

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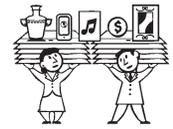
Property in the 21st Century

ownership questions relating to collections with gaps in provenance. ICOM's mediation program provides a feasible and attractive means to settle ownership questions and provides a corresponding avenue for increased protection of cultural property. ICOM has issued a document that cites its policy of many years to "encourage the negotiated resolution of disputes regarding the ownership of objects in museum collections that allegedly were stolen or illegally exported from the country of origin" and articulated its current position that there should be "the early settlement of such disputes through voluntary settlement procedures rather than through lengthy and expensive litigation or through political decisions."⁵⁹ The document provides guidance notes on the ICOM mediation process and refers to ICOM's panel of international mediators "who can be nominated to consider issues relating to the return/restitution of cultural property in museum collections that was stolen, illegally exported, illegally confiscated, or otherwise wrongfully expropriated."⁶⁰

As one expert on the means to protect cultural property stated,⁶¹ "much is at stake: the public's access to art in the present, respect and consideration for the individual and/or community whose past is embedded in the work of art, and the museum's ability to perform its service to society of protecting heritage for future generations."⁶² Countries, art collectors, and individual victims of the illicit international market in cultural treasures could utilize beneficially a mediation process similar to the ICOM process for the resolution of difficult cultural property ownership disputes. Indeed the effective utilization of a mediation process may be the only adequate method to resolve ownership controversies and also may be vital to the long-term preservation of the cultural heritage of humanity.

Notes

1. Roucouas, E., Professor, University of Athens (1983). Proceedings of the Thirteenth Colloquy on European Law. International Protection of Cultural Property. Delphi, 136.
2. *Id.* at 140.
3. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278, 280, 290-1, 294 (7th Cir. 1992), in which the court applied Indiana law to determine the right of possession of four Byzantine mosaics created in the early sixth century, as between the Church of Cyprus, the Republic of Cyprus, and the purchaser of the mosaics. The court determined that because the mosaics were stolen from the rightful owner (the Church of Cyprus), the purchaser of the mosaics never obtained title to, or right to possession of, the mosaics, and ordered the return of the mosaics to the Republic of Cyprus.
4. *Nemo dat quod non habet*. (He who hath not cannot give.)
5. In *Menzel v. List*, 246 N.E.2d 642, 820 (N.Y. 1969), a New York court stated that the "principle has been basic in the law that a thief conveys no title as against the true owner." [See also *Menzel v. List*, 267 N.Y.S.2d 804, 819 (1966).]
6. U.C.C. Article 2.403, codified in Texas at Tex. Bus. & Comm. Code §2.403, which states that a purchaser acquires all the title the purchaser's transferor had power to transfer. Obviously if there was a thief in the chain of title, no transferor had power to transfer title.
7. In *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 579 (5th Cir. 2010), *pet. cert. filed* (2010), the Fifth Circuit ruled that, pursuant to Louisiana Civil Code, §3491, ownership can be lost through adverse possession sufficient to acquire, in that case, alleged Holocaust-looted art through acquisitive prescription.
8. *Menzel v. List*, n. 5, 267 N.Y.S. at 820.
9. Pursuant to §3491 of the Louisiana Civil Code (and contrary to the common law rule), one who has possessed movable property for 10 years acquires ownership by prescription. Neither title nor good faith is required for this prescription. This provision of the Louisiana Civil Code was considered in *Dunbar v. Seger-Thomschitz*, n. 7, 615 F.3d at 577, wherein the Fifth Circuit ruled that an alleged federal common law (U.S. foreign policy most recently articulated in the Terezin Declaration, a non-binding document promulgated at the Prague Holocaust Assets Conference of June 30, 2009, which expresses a preference to adjudicate claims for recovery of Holocaust-looted art on their facts and merits) does not displace Louisiana law's prescriptive periods.
10. In *O'Keefe v. Snyder*, 416 A.2d 862, 875 (N.J. 1980), the Supreme Court of New Jersey decided that it should protect an innocent purchaser from an owner who "sleeps on his rights."
11. In *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1152-3, 1163 (2nd Cir. 1982), a federal appellate court refused to impose a due diligence requirement upon the rightful owner. The court ordered the return to the original owner of two priceless Albrecht Durer portraits, which were created around 1499 and were stolen in 1945 from a castle located in Germany.
12. Discussion in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, n. 3, 917 F.2d at 288, 293-4. In *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991), the New York court confirmed that New York courts do not impose a due diligence requirement on victims of art thefts. Recently, in *Bakalar v. Vavra*, 619 F.3d 136, 142 (2nd Cir. 2010), the Second Circuit cited the N.Y. court's statement in *Guggenheim* that placing the burden of locating stolen artwork on the victim, and foreclosing the rights of the victim to recover the stolen property if the burden is not met, would encourage illicit trafficking in stolen art. The Second Circuit referred to the court's reasoning in *Guggenheim* that shifting the burden to the wronged owners was inappropriate and that a better rule would place the burden of investigating the provenance of a work of art on a potential purchaser.
13. In three recent cases, the First Circuit, the Fifth Circuit, and the Ninth Circuit Courts of Appeal appeared to have shifted the due diligence requirement back to the victim. See *Dunbar v. Seger-Thomschitz*, n. 7, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010) and *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007), *cert. den.*, 552 U.S. 990 (2007).
14. See *O'Keefe v. Snyder*, n. 10, *Orkin v. Taylor*, n. 12, and *Dunbar v. Seger-Thomschitz*, n. 7.
15. *O'Keefe v. Snyder*, n. 10, 416 A.2d at 872.
16. In New York, case law has long protected the rights of owners whose property has been stolen, allowing recovery even if the property is the possession of a good faith purchaser. In *Guggenheim Found. v. Lubell*, n. 12, 569 N.E.2d at 430, the court ruled that the statute of limitations does not begin to run against a true owner's claim until the true owner makes demand of a good faith purchaser for return of the property and the possessor refuses to return it.
17. In 1983, California adopted a three-year statutory limitation period to govern accrual of causes of action for recovery of articles of historical, interpretive, scientific, or artistic significance that begins to run at "the discovery of the whereabouts of the article by the aggrieved party" Cal. Civ. Proc. Code §338. Recently, however, the Ninth Circuit Court of Appeals, in *Orkin v. Taylor*, n. 12, 487 F.3d at 741-2, concluded the California discovery rule incorporates the principle of constructive notice. Thus, the Ninth Circuit decided a cause of action accrues in California when a plaintiff "discovered or reasonably could have discovered her claim to and the whereabouts of the victim's property." This ruling seems to relegate the California statute of limitations provision to a regular discovery rule principle.
18. In *Von Saher v. Norton Simon Museum*, 592 F.3d 954, 968-9 (9th Cir. 2010), *pet. for cert. filed*, the Ninth Circuit again ruled that a victim's cause of action begins to accrue when the victim discovered or reasonably could have discovered the victim's claim and the whereabouts, in that case, to an allegedly stolen painting. Saher also brought her claim against the Norton Simon Museum under §354.3 of the California Code of Civil Procedure. Section 354.3 extended the statute of limitations until 2010 for claims for the recovery of Holocaust-era art. However, the Ninth Circuit ruled that §354.3 is preempted by the Executive Branch's policy of external restitution even though the United State's policy of external restitution ended in 1948. *Id.* at 965-8.5.
19. In *O'Keefe v. Snyder*, n. 10, 416 A.2d at 869, 872-3, the Supreme Court of New Jersey noted that apart from the discovery rule, the statute of limitations in replevin actions ordinarily runs against the owner of lost or stolen property from the time of the wrongful taking. However, as the court commented, this was ordinarily true "absent fraud or concealment." According to the court, where a chattel is fraudulently concealed, the general rule is that the statute is tolled.
20. See, e.g., *O'Keefe v. Snyder*, n. 10, 416 A.2d at 857, wherein the court thought that an innocent purchaser should be protected from an owner who "sleeps on his rights" and, thus, placed "due diligence" requirements on the original owner.



19. In *Guggenheim Found. v. Lubell*, n. 12, 569 N.E.2d at 427–8, the court ruled that a museum could recover a Chagall gouache that was stolen from it in the late 1960s even though the museum had done little to learn of the gouache's whereabouts.
20. *Hoelzer v. City of Stamford, Conn.*, 933 F.2d 1131, 1136-7 (2d Cir. 1991) and *Solomon R. Guggenheim Found. v. Lubell*, n. 12, 569 N.E.2d at 430. The court did state in *Guggenheim* that an owner's failure to exercise reasonable diligence to locate a stolen artwork would be considered in the context of the defense of laches. *Id.* at 431.
In *Vineberg v. Binnesette*, 548 F.3d 50, 53–4 (1st Cir. 2008), a federal district court in Rhode Island considered the viability of a laches defense asserted by a current possessor of a work of art in the possessor's effort to fend off an action for replevin and ruled laches did not preclude the victim's claim.
21. The New York court, in *Guggenheim Foundation v. Lubell*, n. 12, 569 N.E.2d at 430–1, explained that New York rejected the discovery rule because New York courts decided the rule did not provide a reasonable opportunity for individuals or foreign governments to receive notice of a possessor's acquisition of artwork and sufficient time to take action to recover a work. The court was concerned that New York would become a "haven for cultural property stolen abroad" because such works would be immune from recovery under limited time periods.
22. In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, n. 3, 917 F.2d at 291, 294, the Seventh Circuit expressed doubt that Goldberg, the purchaser of the mosaics taken from the Church of Cyprus, was a bona fide purchaser. She did not conduct a due diligence provenance search of the origin of the mosaics.
23. Discussion in Marilyn E. Phelan, "Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork," 23 Seattle University Law Review 631 (2000), pp. 671–85.
24. The IRS discussed the inclusion of stolen artifacts in an estate in TAM 915200 (1991) and ruled that art objects a decedent stole during and immediately after World War II, which the decedent possessed at his death, were included in the decedent's gross estate pursuant to §2033 of the Internal Revenue Code. The IRS further ruled that even though the artifacts were, under most circumstances, transferrable only in an illicit market, the appropriate market for establishing value included the discreet retail markets of the international network of traffickers in stolen art as well as the legitimate retail art markets consisting of international auction firms, advertised displays in antiques publications, and legitimate art and antiques dealers. The IRS also ruled that the estate could not take a deduction under §2053(a)(3) of the Code for claims brought by persons from whom the art objects were stolen.
Inclusion of valuable artworks can result in an estate tax of 35 percent of the value of the work [26 U.S.C. §2001, amended by P.L. 111–312 (Dec. 17, 2010)]. (The rate was 45 percent in 2009.) Thus, for an artwork worth \$10 million, the estate tax would be \$3.5 million. If the work was stolen and the estate or the heirs subsequently lost title and possession to the true owner in a period over three years after payment of the tax, neither the estate nor the heirs could obtain a refund of the estate taxes paid earlier. (See 26 U.S.C. §6511(a), which prescribes a three-year statute of limitations on tax refunds.)
The attorney may suggest donating the artwork to a museum and, thus, permit the donor an income tax deduction for the fair market value of the cultural treasure. However, the IRS may contend the work has no fair market value because gaps in provenance indicate the work was stolen. See discussion of valuation of property donations when the donor has questionable title in *Sammons v. Comm.*, 838 F.2d 330, 335–6 (9th Cir. 1988). The attorney also may suggest an estate donate the work to a museum and, thus, remove the estate tax liability. The problem now is that many museums will not accept a work unless provenance research substantiates the work was removed from its "probable country of modern discovery" before 1970 or was legally exported from that country after 1970. See 2008 AAM Standards Regarding Archaeological Material and Ancient Art (American Association of Museums) and 2008 AAMD Report on the Acquisition of Archaeological Materials and Ancient Art (American Association of Art Museum Directors).
25. See, e.g., Italian Civil Code, Article 1153; Spanish Civil Code, Article 464; Sweden Personal Property (Bona Fide) Acquisitions Act (1986:796)
26. In *Dunbar v. Seger-Thomschitz*, n. 7, 615 F.3d at 576, the Louisiana court rejected a victim's claim when it applied this principle, which, as part of the Louisiana Civil Code, is based on Roman law.
27. See, e.g., Italian Civil Code, Article 1153.
28. For example, in *Republic of Austria v. Altmann*, 541 U.S. 677, 688, 702 (2004), the Supreme Court affirmed a decision of the Ninth Circuit Court of Appeals that U.S. courts had jurisdiction to hear a claim of a Holocaust victim as against the Republic of Austria. The Supreme Court ruled the Foreign Sovereign

Immunities Act (FSIA), 28 U.S.C. §§1602-1611 did not bar the claim.

- Recently in *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1022, 1037 (9th Cir. 2010), pet. for cert. filed, the Ninth Circuit ruled the FSIA does not bar a claim against a foreign government even if the foreign government was not involved in the theft of a valuable artwork. The Court ruled the expropriation exception to FSIA was applicable even though neither the Kingdom of Spain nor the Foundation in possession of a stolen painting took the painting from its true owner.
29. Discussion in *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977).
30. In *Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989), the court decided that restrictions on the export of certain artifacts were addressed to protection of such artifacts and that such restrictions did not imply ownership. The court commented that possession of such artifacts is allowed to remain in private ownership and that such objects may be transferred. The court characterized an export restriction as an exercise of the police power of the state. It stated that such restrictions do not create ownership in the state. [See also *Jeanneret v. Vichy*, 693 F.2d 259 (2nd Cir. 1982).]

The general rule that export restrictions do not prevent a possessor in another country from acquiring good title to illegally exported, but not stolen, artifacts can be qualified by statutes or treaties. For example, the Pre-Columbian Art Act, 19 U.S.C. 2091–2095 provides that any pre-Columbian monumental or architectural sculpture or mural imported into the United States in violation of the Act is to be seized and is subject to forfeiture under customs laws. The Convention on Cultural Implementation Act (CPIA), 19 U.S.C. 2601 et. seq., provides that import restrictions will be placed on designated archaeological or ethnological material exported from a nation that properly requests such restrictions. If such objects are imported into the United States, they are subject to seizure and forfeiture.

In *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the Doble Trinidad*, 597 F. Supp.2d 618, 625 (E.D.Va 2009), the court ruled that two paintings were properly seized and administratively forfeited under CPIA regardless of whether they originated from Bolivia or Peru. (The United States

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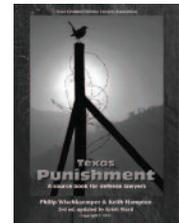
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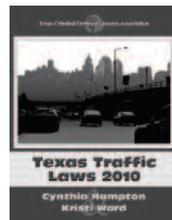
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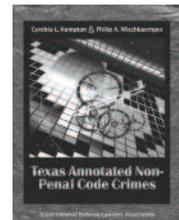
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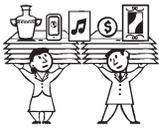


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Property in the 21st Century

- has a bilateral agreement pursuant to CPIA with both Bolivia and Peru.)
31. For example, the trade in antiquities became illegal in Italy in 1939 with the enactment of the Law for the Protection of Works of Artistic and Historic Interests (Law n.1089/39). As noted in *United States v. Antique Platter of Gold*, 184 F.3d 131, 133 (2nd Cir. 1999), cert. den., 120 S. Ct. 978 (2000), the Italian government declared ownership in 1939 to all its archaeological artifacts.

Under this law, all archaeological objects belong to the state unless they were in private ownership prior to 1902. Further, only the state (or a private citizen by special permit) can conduct excavations.

The 1932 Act with Respect to Antiquities in Greece provides that all antiquities belong to the State. Individuals cannot acquire ownership of antiquities in Greece.

In 1926, the Republic of Turkey declared in force and effect a 1906 Decree that all antiquities found in or on lands in Turkey were owned by the Republic. Also, in 1926, the Republic adopted a Turkish Civil Code, wherein Article 697 antiquities found on Turkish land are deemed to be property of the Republic.

The Second Circuit noted that the Egyptian government declared ownership in 1983 to all its archaeological artifacts pursuant to its Antiquities' Protection Law (Article 6) in *United States v. Schulz*, 333 F.3d 395, 398 (2nd Cir. 2003).
 32. 18 U.S.C. §§ 2314–15. The National Stolen Properties Act makes it a felony to knowingly sell or receive stolen goods in interstate or foreign commerce.
 33. See *United States v. McClain*, n. 29, and *United States v. Schulz*, n. 31.
 34. *United States v. McClain*, n. 29, 593 F.2d at 665–6.
 35. *Id.* Still in *Peru v. Johnson*, n. 30, 720 F. Supp. at 814–5, the court decided that Peru had not sufficiently stated a claim of ownership to pre-Columbian artifacts it claimed were excavated from historical monuments in Peru. The court ruled against Peru because evidence did not indicate for certain in what country the artifacts were found and from which they were exported. In addition, it determined that the extent of Peru's claim of ownership as part of its domestic law was uncertain.
 36. In *United States v. Schultz*, n. 33, 333 F.3d at 397–9, a well-known art dealer was convicted for knowingly transporting stolen Egyptian antiquities. The dealer was indicted for “conspiring to receive stolen Egyptian antiquities that had been transported in interstate and foreign commerce” in violation of the NSPA. The dealer contended that the objects he had taken were not stolen within the meaning of NSPA because, he claimed, they were not owned by anyone and, thus, could not be stolen. The prosecution, on the other hand, successfully demonstrated that the Egyptian government owned the antiquities pursuant to a patrimony law known as “Law 117,” which provides that all antiquities found in Egypt after 1983 are property of the Egyptian government. The Second Circuit ruled that NSPA applies to property that is stolen in violation of a foreign patrimony law and that the Cultural Property Implementation Act (discussed n. 30) is not the exclusive means of dealing with stolen artifacts and antiquities, as the dealer had contended.
 37. Discussion at “Marion True,” http://www.topics.nytimes.com/topics/reference/timestopics/people/t/marion_true/index.html.
 38. Discussion at “Rome Trial of Ex-Getty Curator Ends,” available at <http://www.nytimes.com/2010/10/14/arts/design/14true.html>. Although Italy did not dismiss the charges against the curator, the trial ended in October 2010, when the court ruled the statute of limitations had expired on the curator's alleged crimes.

See also Elizabetta Polvoledo, “Getty Pact Appears to Ease Rome Trial, Sept. 27, 2007, available at <http://www.nytimes.com/2007/01/18/arts/design/18gett.html> and “Ciao to a Met Prize Returning to Italy,” <http://www.nytimes.com/2008/01/11/arts/design/11voge.html>.
 39. See Anthee Carassava, “Greek Court Dismissed Case Against Ex-Curator,” *New York Times*, Nov. 28, 2007, available at <http://www.nytimes.com/2007/11/28/arts/design/28true.html>.
 40. Discussion at “Olympian Contests with Italy,” available at http://www.artsjournal.com/culturegrll/2010/02/olympian_contests_with_italy_m.html.
 41. Discussion in Hays Parks. (1998). “Protection of Cultural Property from the Effects of War,” In Phelan, M., Edson, G., and Mayfield, K., (eds), *The Law of Cultural Property and the Natural Heritage*, Chapter 3. Lafayette: Kalos Kapp Press.
 42. Pursuant to the 1954 Hague Convention, Article 16, cultural property bears a distinctive emblem (a blue shield) during military conflict to facilitate its recognition. The emblem repeated three times is used as a means of identification of immovable cultural property under special protection, the transport of cultural property, and improvised refuges (Article 17). Transport exclusively engaged in the transfer of cultural property, whether within a territory or to another territory, may, at the request of a contracting party, take place under special protection (Articles 12 and 13). Parties to the Convention must refrain from any act of hostility directed against transport.
 43. *Id.*, Article 4(3).
 44. *Id.*, Preamble.
 45. Discussion by Hays Parks, n. 41.
 46. Discussion in *Autocephalous Greek-Orthodox Church v. Goldberg*, n. 3, 917 F.2d at 295–7.
 47. Tariff Schedule, Pub. L. No. 97-446, 1982 U.S.C.C.A.N. (96 Stat. 4098-4101, 4106).
 48. 19 U.S.C. §2601 et seq. Discussion of CPIA in n. 30.
 49. *Id.* at §2611.
 50. *Id.* at 2602.
 51. *Id.* at §2606.
 52. Article 6 notes that parties to the convention recognize that the cultural and natural heritage of outstanding universal value” constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate.” Parties to the convention agree to give their help to the identification, protection, conservation, and preservation of such heritage.
 53. 1972 UNESCO Convention, Article 8.
 54. *Id.* at Article 11(2).
 55. See Pub. L. No. 96-515, 1980 U.S.C.C.A.N. (94 Stat.) 6406. The legislation was part of the 1980 amendments to the National Historic Preservation Act. 16 U.S.C. §470a-1.
 56. Article 3(1). The Convention does not require that a theft be proven.
 57. Article 3(2).
 58. Article 5.
 59. Document: LegComm 2007–Guidance Notes on ICOM Mediation Process, *ICOM News*, No. 1/2006, available at the ICOM website under “Statements.”
 60. Document, p. 1.
 61. Boylan, P., Emeritus Professor of Heritage Policy and Management, City University, London, first Chair of the Legal Affairs Committee for the International Council of Museums.
 62. Document: LegComm 2007–Guidance Notes on ICOM Mediation Process.

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is a professor at Texas Tech University School of Law. She is a former Paul Whitfield Horn Professor of Law, a member of the International Council of Museums Legal Affairs Committee, and co-vice chair of the Cultural Property Law Committee of the American Bar Association's Section of International Law and Practice.