CURRENT PRACTICES AND PROBLEMS IN COMBATTING ILLEGALITY IN THE ART MARKET

In the past two decades, the art market has experienced an astounding growth. The high cost of art collecting has surprised even seasoned veterans of the market, some of whom have been caught off guard by the scurry of investors seeking relief from the harsh effects of inflation. In New York alone, commercial galleries report the volume of art sales "at upwards of $500 million a year."[1] The result of all of this investment activity presents a textbook study of the classic economic forces of supply and demand. Specifically, the increasing demand for a necessarily limited supply of quality art has sky-rocketed prices up to two hundred times the pre-1950 level.[2]

The high cost of acquiring the work of a major artist is illustrated by the six million dollars which a Texas museum recently paid for a relatively unknown portrait by Velázquez.[3] Curiously, as the supply of Old Master and Impressionist works has become more severely limited, there has emerged a market for formerly disfavored schools of early nineteenth century European painting. The public avidity for art collection is also evidenced by the increasing popularity of contemporary art,[4] not to mention the booming market in art prints and small collectible objects.[5]

While art historians and critics may lament the capricious nature of public taste, it is clear that public familiarity with an artist's reputation builds demand for his work, and increased demand produces high prices.[6] More significantly, however, the limited supply and high cost of art has also produced an increase in the number of art frauds and thefts. This Comment will explore the problems and legal

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[1] N.Y. Times, Oct. 19, 1981, at C8, col. 1.

[2] Bus. Week, July 21, 1980, at 208.

[3] N.Y. Times, Oct. 2, 1981, at 1, col. 7. The Kimbell Art Museum in Fort Worth purchased the portrait of *Don Pedro de Barberana y Aparregui* painted by the Spanish artist Velazquez about 1631-33.

[4] N.Y. Times, Oct. 18, 1981, at C8, col. 1.

[5] *See* The Association of the Bar of the City of New York Committee on Art Law and Volunteer Lawyers for the Arts, Conference on Arts and the Law (April 2, 1981). As noted by one observer:

> Almost anything painted, drawn, etched, lithographed, or engraved during the past 500 years has found a ready market. . . . Boring and murky 17th century canvases by the most obscure artists, white-on-white minimalist oils, and mail order editions of badly printed lithographs have all shared in the universal chase after some tangible possession that will substitute for a rapidly devaluing currency.

Bus. Week, July 21, 1980, at 208

[6] Bus. Week, July 21, 1980, at 209.

ramifications related to five areas of art law, including forgery, fraud, theft, stolen antiquities, and marine antiquities. The second part of this Comment will focus on the efficacy of the latest art legislation as well as several proposals for legal and nonlegal solutions to illegality in the art market.

FORGERY

Record sales in the art market in recent years have presented both ingenious forgers and ordinary confidence men with plentiful opportunity for swindling the art buying public.[7] It has been estimated that transactions involving forgeries comprise up to ten percent of total art sales.[8] The heavy influx of fakes on the art market may be attributed to a combination of factors. First, art swindlers are attracted by the large profits that may be reaped from the sale of bogus works of art. In the art world, the supply of authentic works remains relatively constant thereby producing high prices in the face of increasing consumer demand. Art forgers simply take advantage of this situation.[9]

At the same time, the risk of conviction for the sale of an art forgery is comparatively small. At present, both state and federal laws are inadequate to stem art transactions involving forgery. Significantly, art forgery is not a distinct statutory crime and prosecutions generally fall within the purview of laws dealing with conspiracy,[10]

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[7] Comment, *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409 (1972). Annual sales in the art market have been estimated at $300 to $400 million. *Id. See also* Hodes, *"Fake" Art and the Law*, 27 FED. B.J. 73 (1967).

[8] DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973 (1976).

[9] Note, *Legal Control of the Fabrication and Marketing of Fake Paintings*, 24 STAN. L. REV. 930, 936 (1972); *see* L. DUBOFF, ART LAW DOMESTIC AND INTERNATIONAL 477-78 (1978), which states:

> Historical perspective provides an insight into what conditions need be present to induce the skilled artisan to emulate the general styles or specific works of the great masters. During certain periods, notably the Roman era, the Renaissance, and the industrial age to the present, the demand for fine works by renowned artists, each of which is unique or limited in number, has far exceeded their availability. The interest in acquisition by those who have accumulated wealth may arise from an appreciation for and familiarity with art, or may merely reflect a desire for a type of status or investment by the uncritical collector.

Id.

[10] *See, e.g.*, United States v. Waldron, 590 F.2d 33 (1st Cir.), *cert. denied*, 441 U.S. 934 (1979), in which the defendant appealed from a conviction under 18 U.S.C. §§ 371, 2314, 2315 (1976), for conspiring to transport property worth at least $5000 in interstate commerce knowing that such goods had been stolen. The basis of the appellant's attack revolved around the fact that although he and his cohorts planned to import stolen paintings from Canada and sell them in the United States, "one painting actually delivered was not stolen but was a forgery worth far less

larceny, and fraud.[11] General forgery statutes are designed to deal with the fabrication of documents and commercial paper.[12] Such a haphazard approach is simply not conducive to the effective deterrence of art forgery.[13]

Other reasons for the low rate of conviction include the jurisdictional problems created by the international movement of art as well as the inordinate difficulty of carrying the burden of proof beyond a reasonable doubt in a criminal case involving art forgery.[14] The shadowy origin and obscure chain of possession of a forgery often preclude the establishment of each element of the substantive crime.[15] Proof of scienter is particularly problematic as a dealer can easily claim that he was unaware that the object was a forgery at the time of its sale. Likewise, the artist can claim unawareness that his copy would be sold as the genuine article.[16] It is equally troublesome to prove that the art object is a forgery. Expert opinion as to authenticity is expensive, difficult to obtain, and frequently contradictory. If the object was produced outside of the country, any eyewitnesses to its execution or transfer would be next to impossible to locate.[17]

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than $5000." 590 F.2d at 33. The Court of Appeals for the First Circuit held "that a culpable conspiracy may exist even though, because of the misapprehension of the conspirators as to certain facts, the substantive crime which is the object of the conspiracy may be impossible to commit." *Id.* at 34.

[11] *See generally* Shientag, *Some Legal Aspects of Art and Fake Art*, 54 WOMEN LAW. J. 23, 25 (1968).

[12] Note, *supra* note 9, at 940.

[13] *See, e.g.*, State v. Wright Hepburn Webster Gallery, Ltd., 64 Misc. 2d 423, 314 N.Y.S.2d 661 (Sup. Ct. 1970), *aff'd*, 37 A.D.2d 698, 323 N.Y.S.2d 389 (1971), in which the state attorney general unsuccessfully employed a public nuisance theory when seeking an order to enjoin the defendant gallery from showing and selling some 68 paintings produced and signed by master forger David Stein and advertised by the gallery as "Forgeries by Stein." *Id.* Stein's career as a forger is notable because of his ability to paint in the style of four great contemporary artists. All told, Stein executed forty-one paintings to which he forged the signatures of Chagall, Miro, Matisse, or Picasso and which he sold for a total variously estimated at $168,000 to 1 million dollars. While serving a sentence in a French jail, Stein was permitted to ply his trade provided that the resulting works bore the signature "Stein, D." A successful London sale of Stein paintings led to the New York show for which the state attorney general sought an injunction. DuBoff, *supra* note 8, at 975-76; *see Disposition of Fake Art*, 26 RECORD OF ASSOC. OF BAR OF CITY OF NEW YORK 591 (1971), *reprinted in* F. FELDMAN & S. WEIL, ART WORKS: LAW, POLICY, PRACTICE 1079 (1974) [hereinafter cited as FELDMAN], which discusses the difficulty of applying a public nuisance theory to the sale of art forgeries as the result of stretching the doctrine so as to "embrace acts which concededly involve potential events in the future, rather than present acts or conditions." *Id.* at 1084-85.

[14] *E.g.*, Shientag, *supra* note 11, at 25; Note, *supra* note 9, at 941.

[15] Note, *supra* note 9, at 941.

[16] *Id.* at 940.

[17] *Id.* at 941.

Compounding an already arduous situation is the fact that forgery victims are sometimes reluctant to cooperate in criminal prosecutions. Art dealers often prefer to remain silent rather than risk the loss of customers.[18] Defrauded purchasers fear public embarrassment at having been made a dupe.[19] The more pragmatic buyer, however, forgoes enforcement of criminal sanctions to preserve the supposed value of the forged object for resale or tax purposes.[20] Consequently, private parties are not the only victims of art forgery.[21] The United States Treasury suffers loss of tax revenue by virtue of deductible gifts of improperly authenticated art to charitable institutions[22] and the duty free importation of ostensibly original works of art.[23]

In cases of art forgery, the role of the attorney ordinarily commences at the time when the art buyer learns or suspects that the purchased object is not the genuine product. Thus, it is essential that the lawyer familiarize himself with the methods of forgery and their detection.

A. *Methods of Art Forgery*

Technically, the legal definition of "forgery" is limited to the falsification of a writing "of legal efficacy apparently capable of effecting a fraud."[24] In art law, however, the term is normally construed according to its popular meaning. In the most basic sense, an art forgery is a copy of a work of art made for fraudulent purposes,[25]

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[18] *Id.*

[19] Shientag, *supra* note 11, at 25; Note, *supra* note 9, at 941.

[20] *See, e.g.*, Shientag, *supra* note 11, at 25; *see* Note, *supra* note 9, at 931.

[21] Unscrupulous purchasers have also utilized art forgeries as the basis of fraudulent insurance claims. *See* G. SAVAGE, FORGERIES, FAKES AND REPRODUCTIONS: A HANDBOOK FOR THE ART DEALER AND COLLECTOR 23 (1963).

[22] *E.g.*, Hodes, *supra* note 7, at 74; Note, *supra* note 9, at 931. Typical of the tax problems faced by the philanthropic art collector is that of Dr. Joseph Sataloff who gave a silver candlestick, appraised at $130,000 by Sotheby Parke Bernet, to a Washington, D.C. museum in 1974. The Internal Revenue Service disallowed a substantial portion of Sataloff's income tax deduction, claiming that the candlestick was worth only $18,000. An expert from Christie's appraised the object at $3,000. Sataloff recently filed a suit against Sotheby Parke Bernet for six million dollars in "lost tax benefits, interest, legal fees, punitive damages and emotional trauma." Holubowich, *Investing in Art: Some Traps for the Unwary*, 67 A.B.A.J. 838-39 (1981).

[23] *See* 19 U.S.C. § 1202 (1976) (schedule 7, part 11). *E.g.*, Hodes, *supra* note 3, at 74; Note, *supra* note 9, at 931.

[24] BALLENTINE'S LAW DICTIONARY 490 (3d ed. 1963).

[25] G. SAVAGE, *supra* note 21, at 1. Savage states: "fakes are genuine works which have been altered in character, or added to, for the purpose of enhancing the value; reproductions are copies made for honest purposes which may subsequently be used by others for dishonest reasons; replicas are contemporary reproductions." *Id.*

and art forgeries are frequently classified according to the method of fabrication.[26]

Signatures are easily forged either by adding the name of a famous artist to an unsigned work or by obfuscating an existing signature and replacing it with that of a master.[27] It is also common for a forger to complete an unfinished painting by an anonymous artist and sell it as an original masterpiece of the same time period.[28] Art forgers sometimes take advantage of the historical tradition of training young artists in the workshop of an accomplished master.[29] Because an apprentice frequently painted the background and unimportant details of a master's composition, it is often difficult to distinguish the hand of one from the other.[30] The stylistic similarity of teacher and student, therefore, presents the forger with a unique

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[26] Leonard DuBoff divides forgeries into three categories: "(1) Works deliberately created to be sold as the product of another artist . . . (2) Exact replicas or other innocently-created pieces which are sold as originals . . . (3) Works changed by the artist to enhance value or salability." DuBoff, *supra* note 8, at 974-75.

[27] *See, e.g.*, M. FRIEDLANDER, ON ART AND CONNOISSEURSHIP 264 (1946); DuBoff, *supra* note 8, at 974-75; Shientag, *supra* note 11, at 24; Comment, *supra* note 8, at 410; Note, *supra* note 9, at 932-33. DuBoff explains:

> In appraising the value of a work of art, it is without question that the signature affixed or the author designated by a noted expert carries an influence which is inextricably interwoven with the merits of the work itself. Consequently, the discovery and disclosure that a once-accepted original is actually a copy or a forgery creates confusion, both in terms of its market value and the appreciation this work engenders in the art community.

DuBoff, *supra* note 8, at 477. Another commentator noted:

> Signatures are commonly forged and added, often inconspicuously, leaving the buyer to find it for himself and rejoice in a discovery which seems to confirm the attribution. It has been said that in nineteenth-century Paris specialists in signatures were employed to do work of this kind. Fashions change, and it is sometimes found that the signature of a once popular master has been added to the genuine work of an artist who would, today, fetch a higher price. When Hobbema paintings were inexpensive the signature of Ruysdael, whose work was in greater demand, was sometimes substituted. Today, the chances are the Hobbema would realize the higher price of the two.

G. SAVAGE, *supra* note 21, at 239.

[28] *See, e.g.*, G. SAVAGE, *supra* note 21, at 239; Comment, *supra* note 7, at 410; Note, *supra* note 9, at 933.

[29] *See, e.g.*, G. SAVAGE, *supra* note 21, at 239.

[30] *See* M. FRIEDLANDER, *supra* note 27, at 250-57. Examples of collaboration by master and apprentice in a single work may be illustrated by Andrea del Verrocchio's *Baptism of Christ* of 1470, located in the Uffizi Gallery in Florence, which reveals the hand of the young Leonardo da Vinci in the execution of the left most kneeling angel. Some authorities have suggested that the watercourses depicted in the foreground and background as well as the chiaroscuro effects that characterize the body of Christ were painted by Leonardo. *See* S. FREEDBERG, PAINTING OF THE HIGH RENAISSANCE IN ROME AND FLORENCE 11-12 (1972); F. HARTT, HISTORY OF ITALIAN RENAISSANCE ART 276-77, 392-93 (N.D.).

opportunity to convert a work authored by the apprentice into one attributed to the master.[31]

Another method of forgery consists of the reproduction of a specific masterpiece with the intent of selling the copy as the original work.[32] A forger might also invent his own composition and merely work in the style of the artist that he wishes to imitate.[33] The process known as pastiche refers to the selection and reconstitution of details from an artist's oeuvre to invent a new composition.[34] As it was uncommon for artists to sign their work or achieve individual recognition in certain periods, it is possible for a forger to ascribe a group of paintings to a previously unidentified master.[35] In addition, the popularity of sketching life studies initiated during the Renaissance provides the forger with an abundant supply of material from which to fabricate drawings by renowned masters.[36] Finally, the credence of a forgery produced by any of the aforementioned methods may be supplemented by the production of false documents which ostensibly establish the provenance of the art work in question.[37]

Legal commentators and art scholars, alike, appear to disagree as to whether certain types of alteration may be said to constitute forgery. In earlier centuries, it was considered acceptable to modify an artist's work in order to accommodate the tastes or ideology[38] of a

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[31] *See, e.g.*, DuBoff, *supra* note 8, at 974; Hodes, *supra* note 7, at 75; Note, *supra* note 9, at 933.

[32] *E.g.*, DuBoff, *supra* note 8, at 974; Hodes, *supra* note 7, at 75; Shientag, *supra* note 11, at 24; Comment, *supra* note 7, at 410; Note, *supra* note 9, at 933; *see, e.g.*, G. SAVAGE, *supra* note 21, at 223-24.

[33] *E.g.*, DuBoff, *supra* note 8, at 974; Hodes, *supra* note 7, at 75; Comment, *supra* note 7, at 410.

[34] *E.g.*, M. FRIEDLANDER, *supra* note 27, at 258; Hodes, *supra* note 7, at 75; Shientag, *supra* note 11, at 24; Note, *supra* note 10, at 934; Comment, *supra* note 8, at 410. For example, an examination of *Interior with Drinkers* by the famous Dutch forger Van Meegeran reveals that the painting is a pastiche inspired by Pieter de Hoogh's work entitled *The Card Players* which dates to the mid-seventeenth century. G. SAVAGE, *supra* note 21, at 146.

[35] *E.g.*, Hodes, *supra* note 7, at 75.

[36] *See, e.g.*, G. SAVAGE, *supra* note 21, at 240-41; Note, *supra* note 9, at 934.

[37] *See, e.g.*, DuBoff, *supra* note 8, at 974; Shientag, *supra* note 11, at 24; Comment, *supra* note 7, at 410. One magazine article reported:

> Last winter, no fewer than 23 forged paintings purporting to be by modern masters—including Kandinsky, Cézanne, Braque, Picasso, and Klee—were sold by a former gallery owner to a reputable New York dealer. The pictures had everything: documentation, mentions in old auction sales catalogues, labels on the back with the names of galleries that had sold them in the past. In fact, the International Foundation for Art Research, a New York-based organization that authenticates paintings, found that the forgeries were worse than crude. Some of them were photoreproductions, the kind that you buy in department stores. The purchaser, himself presumably an expert, bought the lot anyway.

BUSINESS WEEK, July 21, 1980, at 210.

[38] *See, e.g.*, G. SAVAGE, *supra* note 21, at 238-39; DuBoff, *supra* note 8, at 978-79.

subsequent period.[39] Similarly, heavy-handed efforts at restoration frequently detract from the quality and hence the value of an original work.[40] When combined with fraudulent intent, such embellishment transforms the borderline case into one of forgery. The practice of fragmentation in which a single, large work is divided into a number of smaller pieces provides yet another method of increasing the marketability of a work of art.[41] Aside from cheating the purchaser who has paid a premium price for an art object that is not what it purports to be, society suffers the loss of the artist's original conception.

While the foregoing discussion dealt mainly with the forgery of paintings, many of the same methods are adaptable to other forms of the visual arts. These other media present problems of their own. For example, the current popularity of prints has made them an attractive target for forgery.[42] The problem is exacerbated by deceptive sales practices which exploit the public confusion over the characteristics of

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[39] *See, e.g.*, G. SAVAGE, *supra* note 21, at 238-39; *DuBoff*, *supra* note 8, at 978-79. *See generally* M. FRIEDLANDER, *supra* note 27, at 265. In describing the revelation, under ultraviolet light, of restoration of large, undamaged segments of a seventeenth century landscape painted in the manner of Claude Lorrain, one commentator observed:

> Because it was not an infrequent situation for a restorer in the past to find a painting already damaged, to cause damage to the painting himself, or to find portions of a painting displeasing in subject or style either to himself or to his client, he would naturally follow his impulse to add paint in as compensating a manner as his aesthetic judgment dictated. This being a common practice, it is not too difficult to visualize the restorer, in consort with his client who may have been a collector or a dealer, going one step further and making changes with the intent of actually deceiving. Having realized his success in being able to repaint the damaged areas so that they were not obvious, why not enhance the painting further with another signature?

Olin, *Examination in the Authentication of Oil Paintings* 539, 540-43, in ART LAW DOMESTIC AND INTERNATIONAL (L. DuBoff ed. 1975). Significantly, modern restoration techniques demonstrate a preference for a limited amount of repainting that is confined to the actual area of damage. *Id.* at 543.

[40] *E.g.*, DuBoff, *supra* note 8, at 979.

[41] Wall St. J., Aug. 10, 1981, at 21, col. 4, reported that over $100 million of prints are sold in the U.S. each year.

[42] THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON ART LAW AND VOLUNTEER LAWYERS FOR THE ARTS, CONFERENCE ON ARTS AND THE LAW, MEMORANDUM RE: PUBLIC HEARING ON ABUSES IN THE SALE OF ART REPRODUCTION, (April 2, 1981) [hereinafter cited as PUBLIC HEARING MEMORANDUM]. The deceptive marketing of prints is facilitated by technological advances in print reproduction, "the lack of clearly disclosed relevant information, the relatively modest price of multiples, the difficulty involved in detecting deception, and the likelihood that detection will be delayed." *Id.* at 1, 3. As with other types of art fraud, "the applicable commercial law is inadequate for the public's protection." *Id.* at 3.

The potential for confusion of the print buying public is illustrated by the so-called "Picasso prints" produced "from master plates prepared by an artist working from photographs of Picasso works owned by Marina Picasso, the artist's granddaughter. . . . Each print will bear the words, written in pencil by Marina, 'Collection of Marina Picasso.' The contemplated prices are $800 to $1,500 each." Wall St.J., Aug. 10, 1981, at 21, col. 4.

multiples that are determinate of value.[43] An original print is one produced by the artist from a master plate, sheet, or block of his own design which has received the artist's final approval.[44] The extent to which a print satisfies these criteria determines its value.[45] The value of a print is also affected by the number of impressions, its condition, and the number and size of editions.[46] Print reproductions, on the other hand, are the products of photo-mechanical processes which do not require the supervision or even the knowledge of the artist.[47] It should come as no surprise that a print buyer may be easily tricked into paying a premium price for a "signed" (genuine or forged) reproduction.

Opportunities for forgery in sculpture are chiefly associated with the technique of casting whereby a figure is produced from a prototype modeled by the artist.[48] As with prints, the value of such a piece frequently depends upon the number of casts and editions. An artist's failure to sign and number his work facilitates surreptitious copying by forgers, but even this precaution combined with control of the edition is not an absolute guarantee of authenticity.[49]

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[43] *E.g.*, S. HODES, WHAT EVERY ARTIST AND COLLECTOR SHOULD KNOW ABOUT THE LAW 113 (1974).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 113-14.

[47] *See* Hodes, *supra* note 7, at 75.

[48] *E.g.*, *id.* at 76.

The process known as surmoulage, which refers to the casting of bronzes from finished bronzes, is reponsible for much of the confusion in the sculpture market today. As stated by one observer:

> Art is no longer only a source of moral instruction or inspiration, it is also an investment and it is to those who regard art as a store of monetary value that replicas are most destructive. While in their advertisements these copies are always clearly represented as reproductions, frequently it is also implied that they will increase in monetary value, just as if they were real works of art.

Trustman, *Abuses in the Reproduction of Sculpture*, ART NEWS, Summer 1981, at 91. Realistically, however, bronze reproductions have value only for decorative purposes; that is "[u]nless . . . they appear on the market as the real thing." *Id.* Interestingly, some commentators attribute the popular demand for art objects to the sale of museum authorized reproductions. Such "[c]ritics feel that a fine line separates greed from the legitimate desire to acquaint people with great art, and there is no question that reproductions are appealing, even to the most knowledgeable people." *Id.*

[49] *Id. See* United States v. Tobin, 576 F.2d 687 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978), in which three defendants were convicted under 18 U.S.C. § 2315 (1976) for conspiracy to receive, conceal, and sell two statues worth over $5000 which had moved in interstate commerce and which the defendants knew to be stolen. At trial, the government's art expert unexpectedly testified that one of the statues, alleged to have been "an authentic casting of the 'Bronco Buster' by the noted American artist Frederic Remington," was "an excellent forgery that could fool many laymen." 576 F.2d at 689, 691. The basis of the expert's opinion, quoted below, is instructive as to methods employed to detect this type of forgery.

The buyer of antiquities must also exercise a degree of caution because the identification of ancient artists is often tenuous at best and it is difficult to ascertain the chain of possession[50] where an object is claimed to have been freshly dug from the ground. Similarly, the purchaser should be suspicious in instances where a seller of ancient art provides too detailed a representation regarding the origins of the object to be sold.[51] The uncertainty of attribution combined with the remarkably high value ascribed to even the humblest of ancient household items has produced a thriving marketplace in fake artifacts.

B. *Methods of Detecting Art Forgery*

There are essentially two approaches in the determination of the authenticity of a work of art: connoisseurship and scientific analysis.[52] The traditional method practiced by art historians is denoted by the term "connoisseurship." "The aim of connoisseurship is to restore works of art to their original positions—of time and place—in the stream of creative production. It tackles questions of authenticity and attribution, hence dating and provenance."[53] A well-trained con-

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> First, the foundry stamping is atypical. Second, the stamping identifying the statue as casting No. 93 is too indistinct. Third, the base of the statue is about one-half inch higher than it should be, and the statue is about seven-sixteenths of an inch too short. Finally, the ears on the horse are misshaped. [The expert] explained that on an early casting of the Bronco Buster such as No. 93 the horse's ears should be laid back flat and quite small. In contrast, the horse's ears in the statue he examined are rather large and stick outward. These characteristics are found only in castings of the Bronco Buster numbered above 260.

Id. at 691. Despite the fact that the expert determined that the stolen statue was a forgery, he appraised it at a value of $5,000 to $7,000 because of its quality. *Id.*

Remington attempted to control the reproduction of his work through foundry numbering of individual casts. Nevertheless, the plethora of so-called Remington's on the market is indicative of the abuses that characterize the market in counterfeit sculpture. According to one scholar, the problems of identifying genuine Remington casts are compounded by inaccuracies in numbering as disclosed by foundry records and by the posthumous authorization of castings at least until the death of the artist's widow at which time the molds were supposedly broken. Trustman, *supra* note 48, at 86. The uncertainty of attributions to Remington is further complicated by the possibility of surreptitious castings made by foundry workers from the original molds. *Id.* Of more dubious character, however, are surmoulaged works in the form of unidentified recasts or on which the appropriate foundry marking and date has been effaced. *Id.* at 87. The simplicity of disguising a surmoulage as an original bronze is illustrated by the large number of recasts made from Remington's *Bronco Buster* with plain leather chaps that have been altered to resemble Remington's rarer, woolly chapped version of the *Bronco Buster* in an attempt to hide the lack of refined detail that necessarily characterizes a reproduction. *Id.*

[50] *See, e.g.*, Hodes, *supra* note 7, at 76.

[51] *Id.*

[52] *See, e.g.*, W. KLEINBAUER, MODERN PERSPECTIVES IN WESTERN ART HISTORY 37-38 (1971). *But see* Comment, *supra* note 7, at 411.

[53] W. KLEINBAUER, *supra* note 52, at 41.

noisseur is well-versed in the history of the period in which he is a specialist and possesses a mental catalogue of the art objects produced within that time span. A good connoisseur has a long experience of handling original works of art on a regular basis.[54]

"Sound connoisseurs are not armchair wizards who go about their business by examining photographs, but scholars who handle and observe critically the actual work of art, either within or outside its original environment."[55] The stylistic analysis of the connoisseur may be confirmed through documentary research of the period in question. For example, archival material provides an important source of information regarding art objects produced after the late Middle Ages.[56] Where the piece is of ancient origin, the art historian must depend upon the evidence gleaned from coins, carvings in stone, and surviving texts of the classical historians. The presence of a signature or date on a work of art must be regarded with caution due to the potential for alteration.[57] Ultimately, the art expert is forced to rely upon the evaluation of the visual elements of a work as compared with similar works of the period.

Although the specific approach varies, an art historian will typically begin the process of authentication by comparing the questioned piece with the accepted body of the artist's work.[58] The composition may provide a clue as a forgery sometimes lacks the organic unity of an original work.[59] The appearance of anachronistic details in wardrobe, hairstyle, jewelry, architecture, or setting which postdate the supposed year of execution also reveals a lack of authenticity. As a general rule, the visual perceptions[60] of both artist and forger are products of their time. Inevitably, a forger's interpretation of the imitated work is influenced by the current appreciation for particular qualities of the master's style.[61] Any undue emphasis of a specific

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[54] *Id.*

[55] *Id.*

[56] *E.g.*, *id.* at 44.

[57] *Id. See, e.g.*, Offner, *Guido da Siena and A.D. 1221*, GAZETTE DES BEAUX ARTS 61-90 (1950), *reprinted in* Kleinbauer, *supra* note 52, at 107-23, which exemplifies the methods of connoisseurship. By utilizing his expertise and historical knowledge of the Italian Dugento, Offner was able to conclude that the inscription of the date 1221 and the words "ME GUIDO DE SENIS DIEBUS DEPINXIT AMENIS" on the Palazzo Pubblico Madonna in Siena were the work of a restorer and that Guido could not have executed the panel before the last quarter of the thirteenth century. *Id.*

[58] *See* W. KLEINBAUER, *supra* note 52, at 43.

[59] *See* M. FRIEDLANDER, *supra* note 27, at 236; Shientag, *supra* note 11, at 27.

[60] *See e.g.*, M. Friedlander, *supra* note 27, at 259; Comment, *supra* note 7, at 412.

[61] *See* Shientag, *supra* note 11, at 27. Max Friedlander stated it well in his volume *On Art and Connoisseurship:* "Since every epoch acquires fresh eyes, Donatello in 1930 looks different

aspect of the original product becomes increasingly apparent with the evolution of contemporary tastes over a period of time.[62]

Although stylistic analysis and documentary research by a qualified art historian is an effective means of authenticating a work of art, it should be noted that few experts make their services available to the public.[63] Museum directors are sometimes prohibited by their institutions from rendering opinions in order to avoid possible litigation in the event of error, damage to reputation due to inappropriate endorsements, and conflict of interest problems.[64] Similarly, professors of art history are reluctant to authenticate an object in a private collection, possibly due to a distaste for haggling over fees, disappointing hopeful owners, and the potential loss of credibility.[65]

Another approach utilized to determine the authenticity of a work of art relies upon the results of scientific testing. This type of analysis is particularly useful as a means of identifying the compositional elements of a painting, as exemplified by wood, canvas, and pigments, as well as providing a reliable method of dating.[66] Frequently, a forgery is detected due to a deviation from the use of the original materials and techniques.[67] As one commentator noted, "A forgery can be revealed if the stretcher is not made of a wood used in the original artist's locale or if its age is not contemporaneous with the date of the imitated work."[68] A forgery can also be detected by examining the type of canvas used and the method in which it was woven. Craquelure, which denotes the network of cracks which develop in a painting due to shrinkage and movement between layers of paint, is sometimes indicative of age.[69] X-rays and similar tests[70] are

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from what he did in 1870. That which is worthy of imitation appears different to each generation. Hence, whoever in 1870 successfully produced works 'by' Donatello, will find his performance no longer passing muster with the experts in 1930." M. FRIEDLANDER, *supra* note 27, at 260-61.

[62] It is apparent that the so-called "test of time" would not detect the forgery of a modern work of art. *See, e.g.*, G. SAVAGE, *supra* note 21, at 224.

[63] DuBoff, *supra* note 8, at 981.

[64] *Id.* at 981-82. *See generally* CODE OF ETHICS OF ASSOCIATION OF ART MUSEUM DIRECTORS, *reprinted in* F. FELDMAN, *supra* note 13, at 1162-63.

[65] An expert who denounces the authenticity of a work of art may find himself defending a lawsuit for slander of title brought by its owner. *See, e.g.*, Hahn v. Duveen, 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. 1929).

[66] *See, e.g.*, Stross, *The Physical Sciences in the Study of Archaeological and Art Objects* in ART LAW DOMESTIC AND INTERNATIONAL 497 (L. DuBoff ed. 1975); DuBoff, *supra* note 8, at 993.

[67] *E.g.*, DuBoff, *supra* note 8, at 995; Comment, *supra* note 7, at 411. *See generally* G. SAVAGE, *supra* note 21, at 204.

[68] Comment, *supra* note 7, at 411.

[69] *Id.* As noted by Max Friedlander, however:

> [t]here exist many genuine pictures which show no cracks, but these are never absent

employed to examine layers of pigment and undercoatings which in turn reveal the stages of artistic production as well as later alterations. X-rays, however, require expert analysis because while underpainting may be indicative of forgery, it may also indicate restoration, an artist's dissatisfaction with his work, or a desire to economize by reusing a discarded canvas.[71] The reconstruction of ancient manufacturing techniques through the production of samples via trial and error testing and compositional comparison with genuine artifacts provides another valuable method of detecting forgeries.[72] Another type of comparative analysis[73] permits the detection of a forged painting through the identification of its pigments. Records exist which describe the composition of paints and their date of discovery. If a certain pigment is known to have come into use at a particular time, its presence in a painting purported to date to an earlier period is evidence of forgery.[74]

Although the foregoing discussion of the scientific methods used to detect art forgeries is not exhaustive,[75] it is sufficient to suggest the problems inherent in this form of authentication. Significantly, expert interpretation of test results remains a necessity where artistic identity is at issue. Moreover, the cost of scientific analysis renders it an

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> in false ones. The *craquelure* caused by age differs more or less clearly from one achieved artificially. The primitive method of making cracks by drawing or scratching with pencil or brush is held in contempt by the forgers of our days. It is customary to resort to the trick of producing false cracks by a chemical action—say by sudden heating which causes a coating and breaks up the colour surface lattice-fashion.

M. FRIEDLANDER, *supra* note 27, at 263-64. *See also* G. SAVAGE, *supra* note 21, at 207-09.

[70] Ultraviolet light can also detect repainting provided the entire surface of the canvas has not undergone alteration. Photomicrographs reveal tiny characteristics of a painter's brushstrokes although the latter have a tendency to change with the development of the artist's style.

More sophisticated than the x-ray is auto-radiography which produces a series of radiographs which "permits the identification of a number of the pigments used in a painting . . . gives information on the manner in which they were originally put down by the artist, as well as their distribution throughout the body of the painting." DuBoff, *supra* note 8, at 997.

[71] *Id.* at 996.

[72] *Id.* at 995.

[73] Comparative analysis has also been used to study: lead isotope ratios in order to date paintings; desert varnish formation as a means of authenticating Egyptian limestone sculptures; and composition patterns of obsidian, clay, and quartzite artifacts in the discovery of ancient trade routes. *Id.* at 994.

[74] *See, e.g.*, G. SAVAGE, *supra* note 21, at 230-32; Comment, *supra* note 7, at 411; Note, *supra* note 9, at 930. For example, Prussian blue and zinc white do not appear before the eighteenth century. *Id.*

[75] Other methods include radiocarbon dating, thermoluminescent analysis, obsidian hydration, fission tracks, and x-ray diffraction. *See generally* DuBoff, *supra* note 8, at 988, 990, 992, 996.

impractical method of determining the authenticity of less expensive objects of art. The vagarious nature of art authentication thereby supplies the prelude to the defraudation of the art-buying public by unscrupulous dealers.

FRAUD

Bustling activity in the art market has presented more than one avenue for illegal gain in the past several years. The effect of publicity, inflation, and other indeterminable factors has implanted in the American consciousness the erroneous view that an investment in art offers a better guarantee of substantial profit than the stock market.[76] This is particularly true in the print market which has benefitted from the current popularity of artistic pursuits as well as from the notion that "collectibles" have growth potential as investments.[77] Lack of knowledge and a tendency to view works of art in terms of dollars and cents have proven to be the bane of many an inexperienced buyer.[78]

Aside from direct purchases from the artist, dealers and auction houses are the primary source of art acquisitions today. According to one commentator, disreputable art dealers are the major conduit of forgeries and stolen works.[79] Frequently, however, the seller is simply careless in failing to ascertain as nearly as possible the authenticity of a work sold as genuine. An examination of relevant case law illustrates the necessity of careful investigation by both uninitiated and experienced art lovers as a prelude to involvement in the art market.

In *Dawson v. G. Malina, Inc.*,[80] a federal district court in New York set forth a reasonable basis in fact test as the standard applicable to the evaluation of a seller's representations of authenticity to a purchaser of works of art. The art collector in *Dawson* sued a dealer

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[76] *E.g.*, Hodes, *supra* note 7, at 73.

[77] PUBLIC HEARING MEMORANDUM, *supra* note 42, at 1.

[78] Witness the emergence of investment funds that utilize slick advertising techniques which guarantee significant financial appreciation of "art portfolios." While the potential for fraud is obvious due to the intangible nature of art, problems of valuation, and dependence on the efforts of promoters, current state and federal statutes do not specifically regulate such "securities."

Similarly, art has been promoted as a tax shelter gimmick whereby the taxpayer purchases a master lithographic plate, a limited edition of prints or the reproduction rights thereto in exchange for cash and a note. Thus far, the reaction of the Internal Revenue Service has not been favorable to investors. THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON ART LAW AND VOLUNTEER LAWYERS FOR THE ARTS, CONFERENCE ON ARTS AND THE LAW (April 2, 1981). *See generally* FORBES, Nov. 24, 1980, at 185.

[79] Note, *supra* note 9, at 934-35.

[80] 463 F. Supp. 461 (S.D.N.Y. 1978).

for rescission or damages for breach of warranty in connection with the purchase of eleven objects of Chinese art.[81] After the items were shipped to his home in Jersey, Channel Islands, the plaintiff began to experience doubts as to the authenticity of a vase which the defendant had attributed to the Sung dynasty and for which the plaintiff had paid a purchase price of $35,000.[82] When the defendant refused to refund the purchase price, the plaintiff arranged for the appraisal of the remaining objects.[83] Prior to trial, the defendant accepted the return of all but five of the pieces.[84]

Citing the vagueness of expert opinion at trial as well as the lack of precedent under New York statutes, the Uniform Commercial Code, or common law fraud and misrepresentation, the district court defined the standard of proof under the applicable statute[85] as being whether the representations which Malina furnished Dawson "had a reasonable basis in fact, at the time these representations were made, with the question of whether there was such a reasonable basis in fact being measured by the expert testimony provided at trial."[86] Whether the defendant's representations "were without a reasonable basis in fact at the time that these representations were made" must be established "by a fair preponderance of the evidence."[87]

The court applied the "reasonable basis in fact test" to each of the five disputed items.[88] Essentially, the analysis consisted of a compari-

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[81] *Id.* at 463.

[82] *Id.*

[83] *Id.* at 464.

[84] *Id.*

[85] N.Y. GEN. BUS. LAW § 219-c (McKinney Cum. Supp. 1977) states:

> Any provision in any other law to the contrary notwithstanding: 1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant, a written instrument which, in describing the work, identifies it with any author or authorship, such description (i) shall be presumed to be part of the basis of the bargain and (ii) shall create an express warranty of the authenticity of such authorship as of the date of such sale or exchange. Such warranty shall not be negated or limited because the seller in the written instrument did not use formal words such as 'warrant' or 'guarantee' or because he did not have a specific intention or authorization to make a warranty or because any statement relevant to authorship is, or purports to be, or is capable of being merely the seller's opinion.
>
> 2. In construing the degree of authenticity of authorship warranted as aforesaid, due regard shall be given to the terminology used in describing such authorship and the meaning accorded to such terminology by the customs and usage of the trade at the time and in the locality where the sale or exchange took place.

Id.

[86] 463 F. Supp. at 467.

[87] *Id.*

[88] *Id.*

son of the defendant's representation of each object with the expert testimony regarding the certainty of each attribution. The court's treatment of the aforementioned Sung dynasty vase is illustrative of the test. Specifically, the final bill of sale promised an "[a]ntique Chinese Chun Yao vase" from "the Samuel T. Peters collection" which had been "exhibited at the New York Metropolitan Museum of Art . . . in . . . 1916."[89] The weight of the expert testimony favored a date later than the Sung dynasty with the defendant's experts qualifying the possibility of dating to the Sung period.[90] Of greater significance to the court, however, was the defendant's failure to inquire whether the vase was the one that had been exhibited at the Metropolitan Museum.[91] The defendant had based his representation regarding the provenance of the vase on its similarity to a photograph from the 1916 exhibition catalogue.[92] Testimony at trial, however, established conclusively that the vase in the catalogue was still in the possession of the museum.[93] Based on this and similar evidence, the court held that the plaintiff was entitled to rescind the purchase of three of the Chinese art objects and to obtain a refund of the purchase price[94] plus interest as calculated from the date of the transaction.[95]

The related problem of dealer disclaimer under the common law and the Uniform Commercial Code was addressed by the New York supreme court in *Weisz v. Parke-Bernet Galleries, Inc.*[96] The issue in *Weisz* involved whether two plaintiffs of differing experience were chargeable with knowledge of the defendant's limitation of warranty with respect to the authenticity of paintings purchased at auctions conducted by the defendant Parke-Bernet.[97] The paintings were listed in the auction catalogue as the work of Raoul Dufy along with descriptive material, a photographic reproduction, and authenticating information in the form of a certificate and a notation regarding the artist's signature.[98] Inserted among the introductory pages of the

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[89] *Id.*

[90] *Id.* at 468.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] The plaintiff had purchased the three Chinese art objects for a price totalling $59,400. *Id.* at 471. The purchase price of all eleven pieces amounted to $105,400. *Id.* at 463.

[95] *Id.* at 471.

[96] 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (City Civ. Ct. N.Y. 1971), *rev'd*, 77 Misc. 80, 351 N.Y.S.2d 911 (App. Div. 1974).

[97] 67 Misc. 2d at 1078, 325 N.Y.S.2d at 578.

[98] *Id.* at 1080, 325 N.Y.S.2d at 579-80.

catalogue was a page entitled "conditions of sale" which stated that all sales were "as is," and that "neither the galleries nor its consignor warrants or represents, and they shall in no event be responsible for, the correctness of description, genuineness, authorship, provenience or condition of the property."[99] At the outset of the auction, it was the defendant's policy to announce that all transactions were subject to the conditions of sale.[100]

Several years after making the purchase, the plaintiffs learned that the paintings were forgeries of negligible commercial value. When Parke-Bernet refused to refund the purchase price,[101] the buyers sued for breach of express warranty. The issues before the trial court were whether the plaintiffs knew or were legally chargeable with knowledge of the disclaimer, and if so, whether the disclaimer was effective under these circumstances to immunize the auction house from liability for the misrepresentation.[102]

The trial court concluded that plaintiff Weisz, who had never bid at an auction before, was not aware of the conditions of sale.[103] Citing Williston, the court stated the applicable test as "whether 'the person . . . should as a reasonable man understand that it contains terms of the contract which he must read at his peril.'"[104] The court explained that people are attracted to auctions because of an "interest in owning works of art, not on the basis of their legal experience or business sophistication."[105] Thus, it would be unreasonable to assume that a bidder would anticipate the presence of an unqualified disclaimer in a catalogue devoted to the description of the articles to be sold.[106] The court concluded that to have successfully bound Dr. Weisz to the conditions of sale, the seller would have had to call greater attention to the existence of those conditions.[107]

The court, however, found that unlike Dr. Weisz, plaintiffs, Mr. and Mrs. Schwartz, had knowledge of the conditions of sale.[108] Nevertheless, the court emphasized the defendant's superior knowledge and

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[99] *Id.* at 1079, 325 N.Y.S.2d at 579.

[100] *Id.* at 1080, 325 N.Y.S.2d at 578-79.

[101] Dr. Weisz had paid $3,347.50 for his painting. Mr. and Mrs. Schwartz paid $9,360 for their work of art. *Id.* at 1078, 325 N.Y.S.2d at 578.

[102] *Id.* at 1079, 325 N.Y.S.2d at 579.

[103] *Id.* at 1080, 325 N.Y.S.2d at 580.

[104] *Id.*, 325 N.Y.S.2d at 580 (quoting 1 S. WILLISTON, CONTRACTS § 90D (2d ed. 1937)).

[105] *Id.* at 1081, 325 N.Y.S.2d at 580.

[106] *Id.*

[107] *Id.*

[108] *Id.*, 325 N.Y.S.2d at 581.

experience as well as its intention that bidders rely upon the accuracy of the catalogue descriptions as an important determinant.[109] The court noted that Parke-Bernet's reputation was "invested with an aura of expertness and reliability.[110] The very fact that Parke-Bernet was offering a work of art for sale would inspire confidence that it was genuine and that the listed artist in fact was the creator of the work."[111] Consequently, such factors as the wording and arrangement of the catalogue as well as the technical language and subtle manner of presenting the disclaimer "le[d] to the conclusion that Parke-Bernet did not expect the bidders to take the disclaimer too seriously or to be too concerned about it. . . . [T]he average reader of this provision would view it as some kind of technicality."[112] Thus, in holding the disclaimer ineffective,[113] the court relied upon requirements of fair dealing where the contracting parties exhibit "a basic inequality of knowledge, expertness or economic power."[114]

On appeal, the judgment was reversed.[115] According to the appellate court, neither the applicable statutes nor the case law at the time of the auction "recognized the expressed opinion or judgment of the seller as giving rise to any implied warranty of authenticity of authorship."[116] In addition, the court approved the catalogue description of the terms of sale as a clear disclaimer of express or implied warranties of authenticity.[117] Noting the impossibility of achieving absolute certainty with respect to the authenticity of a work of art, the court concluded that the latter state of affairs is one element of a purchaser's bid at auction. "[S]ince no element of a wilful intent to deceive is remotely suggested in the circumstances here present the purchasers assumed the risk that in judging the paintings as readily-

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[109] *Id.* at 1081-82, 325 N.Y.S.2d at 581.

[110] *Id.* at 1082, 325 N.Y.S.2d at 581.

[111] *Id.*

[112] *Id.*, 325 N.Y.S.2d at 582.

[113] Similarly, the *Weisz* court invalidated a provision of the disclaimer which stated that "any and all claims of a purchaser shall be deemed to be waived and shall be without validity unless made in writing to the Galleries within ten days after the sale." The court found that the provision was inapplicable to Dr. Weisz because he had no knowledge of the conditions of sale. Likewise, the provision did not apply to Mr. and Mrs. Schwartz as a reasonable and fair construction by the court limited it "to claims which were known or should have been known to the buyer during the ten day period." *Id.* at 1083, 325 N.Y.S.2d at 582-83.

[114] *Id.* at 1082, 325 N.Y.S.2d at 582.

[115] Weisz v. Parke-Bernet Galleries, Inc., 77 Misc. 80, 81, 351 N.Y.S.2d 911, 912 (App. Div. 1974).

[116] *Id.* at 80, 351 N.Y.S.2d at 912.

[117] *Id.*

identifiable, original works of the named artist, and sealing their bids accordingly, they might be mistaken."[118] The dichotomous results reached by the two courts may be explained by the fact that while New York had adopted the Uniform Commercial Code by the time of the trial, it had not done so on the dates of the litigated auctions.[119] Because the Uniform Sales Act did not contain a provision governing disclaimers, the trial judge relied upon common law contract principles to reach a conclusion resembling that of a case brought under section 2-316 of the Uniform Commercial Code.[120] Because the majority of states have now enacted the Uniform Commercial Code, the result reached by the trial court is of greater relevance to a determination of the legal ramifications of a dealer disclaimer today.

Heretofore, the problem of fraud has been addressed in the context of the victimization of the art-buying public. In *In re the Estate of Mark Rothko*,[121] the element of fraud emanated from a conflict of interest on the part of fiduciaries of the artist's estate. In 1970, Mark Rothko, a noted abstract expressionist painter, died testate leaving an estate comprised mainly of 798 valuable paintings.[122] Through two separate contracts, three executors disposed of the paintings within approximately three weeks of Rothko's death.[123] Under the first agreement, the executors agreed to sell Marlborough A.G. 100 paintings for a total of $1,800,000 to be paid with a $200,000 down payment and twelve interest-free installments spread over a twelve year period.[124] In the second contract, the executors consigned 700 paintings to Marlborough Gallery, Inc., permitting the latter to sell up to thirty-five paintings a year for twelve years and receive a 50 percent commission.[125]

Since the decedent's children,[126] Kate and Christopher Rothko, were entitled to take an elective share in the estate, they instituted an action in the surrogate's court "to remove the executors, to enjoin [Marlborough A.G. and Marlborough Gallery, Inc.] from disposing of

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[118] *Id.*

[119] DuBoff, *supra* note 8, at 1010.

[120] *Id.*

[121] 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449 (1977). *See also* Trucco, *The Museum Investigations: An Update*, ART NEWS, Summer, 1981, at 120.

[122] 43 N.Y.2d at 315, 372 N.E.2d at 293, 401 N.Y.S.2d at 451.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 316, 372 N.E.2d at 293, 401 N.Y.S.2d at 451.

[126] The decedent's children were joined by the State Attorney-General "as the representative of the ultimate beneficiaries of the Mark Rothko Foundation, Inc., a charitable corporation and the residuary legatee under decedent's will." *Id.*, 372 N.E.2d at 293, 401 N.Y.S.2d at 452.

the paintings,[127] to rescind the aforesaid agreements between the executors and said corporations, for a return of the paintings still in possession of those corporations, and for damages."[128] The surrogate established that executor Bernard J. Reis was an officer of Marlborough Gallery, Inc., and that the gallery had formerly received only a ten percent commission on the sale of Rothko's work by virtue of an inter vivos contract with the artist. In addition, the surrogate found that Reis was in a position of conflicting interests which he exploited to Marlborough's benefit.[129] The surrogate further concluded that the second executor, unsuccessful artist Theodoros Stamos, utilized his position to gain the favor of Marlborough which subsequently rewarded him with a contract, and "that Stamos acted negligently and improvidently in view of his own knowledge of the conflict of interest of Reis."[130] According to the surrogate, the third executor, Morton Levine, acted imprudently as a fiduciary when he followed the lead of his co-executors without investigating the situation or securing independent appraisals when he was aware of Reis' conflict of interest, the ulterior motives of Stamos, the control of the two Marlborough corporations by one Francis K. Lloyd, and the valuable nature of the subject paintings.[131] Accordingly, the improper conduct of the executors mandated their removal as fiduciaries.[132] In addition, the surrogate found that the two corporations and Lloyd were guilty of contempt in disposing of fifty-seven paintings in violation of an injunction, and that the two contracts negotiated by the executors "provided inadequate value to the estate, amount to a lack of mutuality and fairness," and should be set aside due to the disloyalty of the executors. Furthermore, the inter vivos contracts with the artist would not be revived because the conduct of the parties "evinced an intention to abandon and abrogate these compacts."[133]

Damages for the paintings already sold were assessed against Reis, Stamos, Lloyd, and both Marlborough corporations according to the value of the paintings at the time of trial.[134] The surrogate also imposed a civil fine of $3,332,000 against Lloyd and the corporations

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[127] The Surrogate issued a preliminary injunction on September 26, 1972. *Id.*, 372 N.E.2d at 293-94, 401 N.Y.S.2d at 452.

[128] *Id.*, 372 N.E.2d at 293, 401 N.Y.S.2d at 451.

[129] *Id.*, 372 N.E.2d at 294, 401 N.Y.S.2d at 452.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

for violating the injunction.[135] Levine was held liable for negligence in the amount of $6,464,880 which was the estimated value of the paintings sold to the Marlborough corporations.[136] Likewise, Reis, Stamos, and the Marlborough corporations were held jointly and severally liable for negligence and appreciation damages in the greater sum of $9,252,000.[137] Because the liabilities were found to be congruent, payment of the higher sum would satisfy the lesser liabilities and the amount of damages would be reduced either by payment of the fine or by the return of any of the fifty-seven paintings sold in violation of the injunction.[138]

On appeal, the defendants argued "that an improper legal standard was applied in voiding the estate contracts" in "that the 'no further inquiry' rule applies only to self-dealing and that in case of a conflict of interest, absent self-dealing, a challenged transaction must be shown to be unfair."[139] The court of appeals rejected the former disagreement, noting that neither the surrogate nor the appellate division of the New York supreme court had limited their decisions to an interpretation of the "no further inquiry rule." The latter argument was rejected because there was sufficient evidence to justify the opinion that the two contracts "were neither fair nor in the best interests of the estate."[140] The court of appeals concluded that Reis and Stamos clearly occupied a position in which their personal interests "conflict[ed] with the interest of the beneficiaries."[141] Similarly, the court noted that Levine was under a duty to prudently manage the estate. Consequently, Levine's reliance upon the advice of his attorney did not shelter him from accountability for his failure to attempt to prevent the breach of his coexecutors.[142]

Nonetheless, the defendants contended that the lower courts had erred in awarding appreciation damages.[143] Distinguishing those situations where a trustee merely sold the property for an inadequate price, the court of appeals determined that appreciation damages provided an appropriate means to make the beneficiaries whole where a trustee, involved in a conflict of interst, has participated in a wrong-

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[135] *Id.*
[136] *Id.* at 317, 372 N.E.2d at 294-95, 401 N.Y.S.2d at 453.
[137] *Id.*, 372 N.E.2d at 295, 401 N.Y.S.2d at 453.
[138] *Id.*
[139] *Id.* at 318, 372 N.E.2d at 295, 401 N.Y.S.2d at 453.
[140] *Id.* at 319, 372 N.E.2d at 295, 401 N.Y.S.2d at 454.
[141] *Id.*, 372 N.E.2d at 295, 401 N.Y.S.2d at 454 (citing G. BOGERT, TRUSTS 343 (5th ed. 1973)).
[142] *Id.* at 320, 372 N.E.2d at 297, 401 N.Y.S.2d at 455.
[143] *Id.*

ful transfer.[144] Thus, the court of appeals affirmed the liability of Reis, Stamos, and the Marlborough corporations for appreciation damages reasoning that had it "not been for the breach of trust the property would still have been a part of the trust estate."[145] Due to the difficulty of assessing the value of the unreturned works of art, the court of appeals stated that the surrogate would only be held to a reasonable basis of computation achieved "through the exercise of good judgment and common sense."[146] Because it was the conduct of the defendants that rendered the calculation of damages conjectural in the first place, the court concluded that such a rule was particularly justifiable.[147]

The preceding discussion of the relevant case law suggests the ways in which courts have molded traditional legal theories to produce equitable results despite the diversity of problems that arise in connection with art sales. Significantly, unscrupulous art dealers are frequently the conduit of art forgeries or the perpetrators of fraud. There is another aspect to the deceptive practices that so frequently plague the art market, however, that is the problem of stolen art.

ART THEFT

At present, the most controversial issue facing attorneys who handle cases involving art theft concerns the right of an owner to recover stolen property.[148] The uncertainty that characterizes the

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[144] *Id.* at 321, 372 N.E.2d at 297, 401 N.Y.S.2d at 455-56.

[145] *Id.* at 321-22, 372 N.E.2d at 297-98, 401 N.Y.S.2d at 456 (citing 4 A. SCOTT, TRUSTS § 291.2 (3d ed. 1967)).

[146] *Id.* at 323, 372 N.E.2d at 298, 401 N.Y.S.2d at 457.

[147] *Id.* The court of appeals also affirmed the lower court's finding that the defendants had abrogated the inter vivos contracts by their improper conduct in regard to the Rothko estate. In addition, the former court upheld the latter's finding of contempt by virtue of defendants' bad faith action of delivering paintings subject to prior commitments of sale after the issuance of the injunction without informing the court of their intentions. *Id.* at 324, 372 N.E.2d at 298-99, 401 N.Y.S.2d at 457-58.

[148] *See* Kunstsammlungen zu Weimar v. Elicofon, No. 69 C93 (E.D.N.Y. June 12, 1981); O'Keeffe v. Snyder, 170 N.J. Super. 75, 405 A.2d 840 (App. Div. 1979), *rev'd*, 83 N.J. 478, 416 A.2d 862 (1980). *See also* N.Y. Times, Oct. 23, 1981, at A20, col. 1 (Napoleon letters stolen from French Army Museum in Vincennes discovered at Newberry Library in Chicago); TIME, Oct.19, 1981, at 86. Approximately 267 books, including a seventeenth century edition of Galileo's *Discorsi*, were recently found missing from the University College library in London. Shortly after the discovery of the theft, ninety-nine of the books were recovered in New York City following the arrest of a man who, posing as a Princeton University professor, attempted to sell the *Discorsi* and three other texts to a book dealer for $11,000. *Id. See also* N.Y. Senate Bill 5222 § 397a (1979). Section 397a which would regulate actions against non-profit organizations for recovery of objects, provides:

law governing the ownership of stolen property is the direct result of varying jurisdictional approaches compounded by difficult choice of law questions where a transaction has been spread across state or international boundaries. The general American rule is that a thief cannot acquire good title to stolen property and can transfer no better title to a good faith purchaser.[149] Although this principle serves to resolve the conflicting claims of two innocent parties in favor of the original owner, a number of exceptions have developed which soften the harsh effect upon the innocent purchaser.

One such exception appears in section 2-403 of the Uniform Commerical Code which provides that "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business."[150] The official comment to this provision notes that the purpose of this policy is to protect "buyers from persons guilty of . . . trick or fraud."[151] The term buyer in the ordinary course of business is used according to the definition supplied in section 1-201(9) and refers to "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights . . . of a third

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An action to recover an object from a non-profit organization shall accrue on the date of acquisition by the non-profit organization of such object, provided that within one year from the date of such acquisition:

(a) The non-profit organization's acquisition of such object shall have been reported in any one or more of the following: (i) a publication of the non-profit organization, (ii) any regularly published newspaper or periodical with a circulation of at least fifty thousand, or (iii) a periodical or exhibition catalogue which is concerned with the type of object claimed; or

(b) Such object has been displayed or otherwise made accessible for a period or periods aggregating at least one year during the three year period following the date of acquisition according to the regular practice of such non-profit organization with respect to such objects; or

(c) Such object has been catalogued by the non-profit organization and the catalogue material has been and shall be available upon request to the public for at least two years during the three year period following the date of acquisition.

Id. § 397a(2)(a)-(c).

[149] *See* Kunstammlungen zu Weimar v. Elicofon, No. 69C 93 (E.D.N.Y. June 12, 1981); O'Keeffe v. Snyder, 170 N.J. Super. 75, 405 A.2d 840 (App. Div. 1979), *rev'd*, 83 N.J. 478, 416 A.2d 862 (1980).

[150] U.C.C. § 2-403. The Code states:

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

Id.

[151] *Id.*, comment 2.

party in the goods buys in ordinary course from a person in the business of selling goods of that kind."[152] Thus, the Code, which has been adopted to varying degrees by most states, provides some protection to the innocent purchaser.

In *Porter v. Wertz*,[153] the appellate division of the New York supreme court had occasion to interpret section 2-403 of the Uniform Commerical Code with respect to a stolen work of art. In *Porter*, however, the innocent purchaser exception was held inapplicable to an art dealer who had purchased a stolen painting from a delicatessen employee. The plaintiff-owner in *Porter* sought to recover possession of Maurice Utrillo's painting of the *Chateau de Lion-sur-mer* which the collector acquired in 1969.[154] Throughout 1972 and 1973, plaintiff Porter was involved in a series of art transactions with Harold Von Maker whom Porter knew as Peter Wertz.[155] In the spring of 1973, Porter sold Von Maker a painting by Childe Hassam which Von Maker financed with a $50,000 deposit and $100,000 in promissory notes.[156] Porter also consented to the temporary display of the Utrillo in Von Maker's home pending the latter's decision on purchasing it.[157] Upon failing to receive the promised response, Porter made a futile attempt to contact Von Maker in order to obtain the return of the painting.[158] When the first of Von Maker's notes was dishonored, Porter initiated an investigation that revealed Von Maker's true identity as well as a long record of arrests.[159] At this point, Porter notified the FBI in regard to the unpaid notes but failed to express his concern over the whereabouts of the Utrillo.[160] Additionally, the parties' respective attorneys negotiated an agreement whereby Von Maker acknowledged the receipt of the Utrillo and a copy of Petrides' book on the artist as well as his consignment of both to a third party.[161] Essentially, Von Maker promised to pay Porter the sum of $30,000 or to return the painting within ninety days.[162] In the event that Von

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[152] *Id.* § 1-201(9).

[153] 68 A.D.2d 141, 416 N.Y.S.2d 254 (1979), *aff'd*, 53 N.Y.2d 696, 421 N.E.2d 500, 439 N.Y.S.2d 105 (1981).

[154] 68 A.D.2d at 142-43, 416 N.Y.S.2d at 255.

[155] *Id.* at 143, 416 N.Y.S.2d at 255.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* at 143-44, 416 N.Y.S.2d at 256.

[160] *Id.* at 144, 416 N.Y.S.2d at 256.

[161] *Id.*

[162] *Id.*

Maker failed to meet his obligation, his attorney was instructed to release a Cranach painting held in escrow into the custody and ownership of Porter in partial satisfaction of Von Maker's debt.[163] Unbeknownst to Porter, however, Von Maker had engaged the real Peter Wertz to complete the sale of the Utrillo to the co-defendant, Richard Feigen Gallery, prior to the signing of the contract with the plaintiff.[164] Subsequently, a Feigen employee sold the Utrillo to co-defendant Brenner who, in turn, arranged its sale to a buyer in Venezuela.[165]

The court framed the issue of ownership in terms of equitable estoppel and the affirmative defense of statutory estoppel under section 2-403.[166] In concluding that statutory estoppel did not bar recovery by the plaintiff, the court relied on its construction of the term "buyer in the ordinary course of business."[167] According to the court, Feigen failed to meet the statutory exception for two reasons.[168] First, Feigen had purchased the Utrillo from Wertz, who was associated with a gourmet delicatessen, as opposed to being a person in the business of selling works of art.[169] Secondly, Feigen was not in compliance with the "good faith" requirement applicable to merchants and defined in the Code as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[170] In the words of the court, fair dealing "should not—and cannot—be interpreted to permit, countenance or condone commercial standards of sharp trade practice of indifference as to the 'provenance,' i.e., history of ownership or the right to possess or sell an object d'art."[171] In support of its conclusion that Feigen had not met reasonable commercial standards of fair dealing in the trade, the court noted that neither Feigen nor his employee had attempted to verify the ownership of the Utrillo despite possession of the Petrides book which discussed the provenance of the *Chateau de Lion-sur-mer*.[172] In addition, the pair had not even bothered to ascertain Wertz's occupation, although the latter had left the telephone number of the delicatessen with the defendant-gallery. The court believed that such an investiga-

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[163] *Id.*
[164] *Id.* at 145, 416 N.Y.S.2d at 256.
[165] *Id.*
[166] *Id.* at 145, 147, 416 N.Y.S.2d at 257-58.
[167] *Id.* at 145-46, 416 N.Y.S.2d at 257.
[168] *Id.*
[169] *Id.* at 146, 416 N.Y.S.2d at 257.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 146-47, 416 N.Y.S.2d at 257.
[173] *Id.*

tion would have at least put the gallery on notice that further verification was necessary before consummating the deal with Wertz.[173]

Similarly, the court rejected the theory that Feigen was a good-faith purchaser for value entitled to protection under the pre-code doctrine of equitable estoppel. The court explained that equitable estoppel arises from principles of fair dealing which prevent a person who has induced the particular conduct of another from enforcing rights which would effect an injustice.[174] The court then noted that contrary to clothing Von Maker with various indicia of title or apparent authority to sell the Utrillo, Porter instead had Von Maker investigated and reported the latter's latest fraudulent activities to the FBI.[175] Although Porter might have been aware that Von Maker was an art dealer, the original agreement of the parties had restricted the display of the Utrillo to Von Maker's home.[176] In addition, Porter had taken the precaution of procuring a contract which took pains to describe the business relationship.[177] The court reasoned that Porter's actions could not be said to have "contributed to the deception practiced on Feigen by Von Maker and Wertz."[178] Feigen dealt entirely with Wertz upon whom Porter had bestowed neither actual nor apparent authority to dispose of the Utrillo.[179] Likewise, the court refused to consider the theory that Wertz was the agent of Von Maker.[180] The fact remained that Feigen should have made an attempt to verify the title of the Utrillo regardless of the practice in the art trade.[181] In the words of the court, "commercial indifference to ownership or the right to sell facilitates traffic in stolen works of art."[182] For these reasons, the court held that Porter, as the true

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[174] *Id.* at 148, 416 N.Y.S.2d at 258. As explained by the court:

> Equitable estoppel or estoppel in pais is the principle by which a party is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.

Id. at 147, 416 N.Y.S.2d at 258 (quoting 21 N.Y. JUR. *Estoppel* § 15) (1961).

[175] *Id.* at 148, 416 N.Y.S.2d at 258.

[176] *Id.* As stated by the court: "[p]ossession without more is insufficient to create an estoppel." *Id.*, 416 N.Y.S.2d at 259.

[177] *Id.*

[178] *Id.* at 149, 416 N.Y.S.2d at 259.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

owner of the Utrillo painting, was entitled to its return or payment equivalent to its value on the date of the trial.[183]

A second exception to the American rule governing the right to possession of stolen property is found in relevant statutes of limitation. Generally, if a thief does not conceal his possession of stolen property, the owner's cause of action accrues at the time of the theft.[184] On the other hand, if a thief conceals the stolen item, the owner's cause of action does not accrue until the latter discovers or should have discovered facts sufficient to constitute a cause of action.[185] The question of when an owner's cause of action accrues against the innocent purchaser of stolen property, however, presents a much more difficult problem.

Theoretically, there are several possible events which could be designated to trigger the running of the statute of limitations. Some older cases hold that in the absence of concealment, the statute begins to run when the stolen property is acquired by an innocent purchaser.[186] More recent cases, however, have tended to ameliorate the harsh effects resulting from the application of the latter rule.

In New Jersey, the recent case of *O'Keeffe v. Snyder*[187] sparked considerable public interest in the ramifications of art theft.[188] *O'Keeffe* involved the alleged theft of three small oil paintings from a New York art gallery in 1946.[189] The location of the works of art remained unknown to the artist until 1976 when she discovered them in the possession of Barry Snyder who, in turn, had purchased the paintings from third-party defendant Ulrich Frank for $35,000.[190] O'Keeffe sued Snyder in replevin to regain possession of her work.[191] Snyder defended on the ground that he was a purchaser for value, held title by adverse possession, and that plaintiff's recovery was barred by the applicable statute of limitations.[192]

In reversing a summary judgment for the defendant which was based upon the expiration of the six-year limitations period as calculated from the date of the alleged theft, the appellate division of the

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[183] *Id.*

[184] *See, e.g.*, 3 AMERICAN LAW OF PROPERTY § 15.16, at 834-38 (A.J. Casner ed. 1952).

[185] *Id.*

[186] Reynolds v. Bagwell, 200 Okla. 550, 551, 198 P.2d 215, 216-17 (1948).

[187] 170 N.J. Super. 75, 405 A.2d 840 (App. Div. 1979), *rev'd*, 83 N.J. 478, 416 A.2d 862 (1980).

[188] *See, e.g.*, N.Y. Times, July 28, 1979, at 20, col. 6.

[189] 170 N.J. Super. at 78, 405 A.2d at 841.

[190] *Id.* at 78-79, 405 A.2d at 841.

[191] *Id.* at 79, 405 A.2d at 841.

[192] *Id.* at 81, 405 A.2d at 843.

New Jersey superior court held that a thief cannot acquire good title to stolen property and can transfer no better title to a bona fide purchaser where there has not been a vesting by adverse possession.[193] Accepting O'Keeffe's story that she did not know the whereabouts of the missing paintings, the appellate division concluded that the defendant had not sustained the burden of proving that possession of the paintings had been exclusive, adverse, open, and notorious throughout the entire period of limitations.[194]

The Supreme Court of New Jersey reversed the decision of the appellate court, however, and remanded the matter for a plenary hearing to resolve the issue of whether or not the paintings had actually been stolen.[195] Noting that the critical legal debate involved the determination of the point at which O'Keeffe's cause of action accrued, the court elected to apply the discovery rule to replevin of a painting in order to avoid the unjust results produced by a strict construction of the statute of limitations.[196] The court observed that "[t]he discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exericise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action."[197] Such facts would necessarily include "the identity of the possessor of the paintings."[198]

Citing an "explosion" in the number of art thefts and the extreme difficulty of holding items of personal property in open, visible, and notorious possession sufficient to place "the original owner on actual or constructive notice of the identity of the possessor,"[199] the court suggested that the discovery rule "is more responsive to the needs of the art world."[200] Under the discovery rule an artist who makes a diligent, but unsuccessful effort to discover the whereabouts of a stolen painting will not trigger the running of the statute of limitations.[201] Thus, the discovery rule shifts the burden of proof to the original owner and judicial inquiry is focused upon the question of "whether the owner has acted with due diligence in pursuing his or her personal property."[202] The adequacy of the owner's effort is judged on a case-by-case basis.[203] Where the original owner does not

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[193] *Id.* at 82, 87, 92, 405 A.2d at 843, 846, 848.
[194] *Id.* at 83-84, 405 A.2d at 844.
[195] O'Keeffe v. Snyder, 83 N.J. 478, 484, 488, 416 A.2d 862, 865 (1980).
[196] *Id.* at 493, 416 A.2d at 870.
[197] *Id.* at 491, 416 A.2d at 869.
[198] *Id.* at 493, 416 A.2d at 870.
[199] *Id.* at 496-97, 416 A.2d at 871-72.
[200] *Id.* at 497, 416 A.2d at 872.
[201] *Id.* at 497-98, 416 A.2d at 872.
[202] *Id.*
[203] *Id.* at 499, 416 A.2d at 873.

exert due diligence in recovery, the expiration of the statute of limitations will vest title in the possessor.[204] This is true even where there have been successive purchases, since each new conversion tacks on to the prior period of possession without causing the statute of limitations to start running anew.[205] According to the *O'Keeffe* court, application of the discovery rule would encourage more careful investigation of the provenance of art works offered for sale by private parties and would promote purchases from legitimate dealers.[206]

The New York supreme court applied a different rule for determining the commencement of the statute of limitations with respect to an innocent purchaser of stolen art in *Menzel v. List*.[207] In *Menzel*, the plaintiffs had purchased a painting, entitled *The Peasant and the Ladder*, by Marc Chagall at a Brussels auction in 1932.[208] Eight years later, the German invasion caused the Menzels to flee Belgium without their possessions.[209] When the couple returned home in 1946, they discovered a receipt in place of the Chagall which had been confiscated by the German authorities.[210] The location of the painting remained a mystery until 1955 when it was purchased from a Paris art dealer by the proprietors of a New York gallery.[211] The buyers, Mr. and Mrs. Perls, relied solely on the reputation of the seller and made no inquiry regarding the provenance of the Chagall.[212] Later that year, the Perls sold the work to List for the sum of $4,000.[213] In 1962, Mrs. Menzel learned that the Chagall was in the possession of List and demanded its return.[214] List refused her request and Mrs. Menzel instituted an action in replevin.[215] List, in turn, filed a third-party complaint against the Perls alleging breach of implied warranty of title.[216] The statute of limitations was one of the defenses raised by List based upon the time elapsed either since 1941 when the Nazis confiscated the painting or 1955 when List acquired the painting from the Perls.[217] The court held that the statute of limitations defense was

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[204] *Id.* at 500, 416 A.2d at 873-74.
[205] *Id.* at 503, 416 A.2d at 875-76.
[206] *Id.* at 499, 416 A.2d at 873.
[207] 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).
[208] 24 N.Y.2d at 93, 298 N.Y.S.2d at 980, 246 N.E.2d at 742.
[209] *Id.*, 298 N.Y.S.2d at 980, 246 N.E.2d at 743.
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.* at 93-94, 298 N.Y.S.2d at 980, 246 N.E.2d at 743.
[215] *Id.* at 94, 298 N.Y.S.2d at 980, 246 N.E.2d at 743.
[216] *Id.*
[217] Menzel v. List, 49 Misc.2d 300, 304, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S. 608 (1967), *modification rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

unavailable to List based upon the rule that "[i]n replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand."[218]

More recently, a federal district court judge in New York applied the demand and refusal rule of *Menzel* in granting summary judgment to a plaintiff-museum.[219] The application of New York law by the federal court in the context of art stolen abroad and claimed by a foreign museum is significant in view of the defendant's argument that the law of the place of theft recognized the title of a good faith purchaser. In *Kunstsammlungen zu Weimar v. Elicofon*, the Weimar Museum, located in the German Democratic Republic, commenced an action against Edward Elicofon to recover two fifteenth century portraits painted by Albrecht Dürer.[220] According to the deposition[221] of Dr. Walter Sheidig,[222] the museum Director from 1940 until 1967, the portraits and other paintings had been stored in the Schloss Schwarzburg in 1943 in anticipation of Allied bombing at Weimar.[223] When American forces occupied the area known as Thuringia in 1945, the United States Military Government gave Sheidig permission to visit various depositories including Schwartzburg.[224] On his first trip to the castle on June 12, 1945, Sheidig, in the company of several American soldiers stationed there, found the storeroom locked and its contents undisturbed.[225] While transacting United States Military Government business at Schwarzburg on June 27, 1945, however, Sheidig discovered that the inner door to the depository had been forced open and the storeroom ransacked.[226] As stated in a memorandum written by Dr. Sheidig and dated July 3, 1945,[227] "[t]he two Duerer pictures were not anymore in their old place and could, for the time being, not be found."[228] Following the Russian occupation of Thuringia on July 2, 1945, Sheidig initiated a fruitless search for the missing paintings.[229]

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[218] *Id.*
[219] No. 69C 93 (E.D.N.Y. June 12, 1981).
[220] *Id.*, slip. op. at 2.
[221] *Id.* at 10.
[222] Dr. Sheidig died in 1974. *Id.* at 10.
[223] *Id.*
[224] *Id.* at 11.
[225] *Id.*
[226] *Id.* at 12.
[227] *Id.*
[228] *Id.* at 13.
[229] *Id.* at 14-16.

The defendant, Edward Elicofon, stated that he had purchased the Dürer portraits in 1946 "for $450 from a young American exserviceman . . . who appeared at Elicofon's Brooklyn home with about eight paintings and who told Elicofon that he had purchased the paintings in Germany."[230] Elicofon displayed the paintings in his home until 1966 when a friend informed him of their presence on a list of stolen works of art.[231] Thereafter, Elicofon publicized his possession of the Dürer portraits, precipitating the museum's demand for their return.[232]

On cross-motions for summary judgment, the court delineated the issue as "whether the facts . . . indicate that Elicofon bought the paintings from one who was incapable of conveying title."[233] Concluding that the Dürer portraits had been stolen from Schloss Schwarzburg between June 12 and July 19, 1945,[234] the court addressed Elicofon's contention that if a German architect living on the castle grounds had stolen the paintings, the architect "could have transferred good title to an innocent purchaser in Germany," and thereby to a subsequent transferee by virtue of the German law of "good faith acquisition."[235] According to the district court, a person can only acquire ownership from one who has no title where the owner parted voluntarily with his dominion over the painting. Furthermore, the painting must be obtained from a person who had possession, and "the purchaser must have believed in good faith that the person was the actual *owner* of the paintings, and that belief must not have been grossly negligent."[236] The court then analyzed the three types of possession recognized under German law,[237] and re-

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[230] *Id.* at 8.

[231] *Id.*

[232] *Id.*

[233] *Id.* at 9.

[234] *Id.* at 19-20.

[235] *Id.* at 25.

[236] *Id.* at 27.

[237] Under German law, the ability to transfer good title depends upon the type of possession: German law distinguishes among three types of possession—indirect possession ("*Mittelbarer Besitz*"), direct possession ("*Unmittelbarer Besitz*") and the mere exercise of physical control by a so-called possessor's servant ("*Besitzdiener*"). An indirect possessor is one who has immediate and authorized access to property, and may, in turn authorize another to exercise actual control over such property; an indirect possessor does not himself have physical custody of the property. A direct possessor is one who exercises control over property in his physical possession pursuant to the authorization of an indirect possessor. A possessor's servant is one who exercises actual control over property for another in a relationship in which he is required to comply with the other's instructions concerning the property; a possessor's servant does not acquire "possession" in the legal sense, that is, does not have actual power of control over a thing . . . which remains with the direct or indirect possessor.

Id. at 28.

jected Elicofon's argument that the architect was either a possessor or a possessor's servant who could transfer title to a good faith purchaser.[238] It was clear to the court that the American unit stationed at Schloss Schwarzburg was in charge of the storeroom.[239] Even if the architect had been a custodian, however, the court stated that German law neither permitted a public servant to transfer good title nor allowed such an official to achieve the status of a legal possessor.[240] Similarly, the court rejected the view "that a good faith acquisition is possible from a possessor's servant whose social dependence is not apparent to his purchasers," because the possessor did not voluntarily part with dominion over a chattel which was sold illegally.[241]

The district court further rejected Elicofon's argument that even if he did not acquire good title to the portraits at the time of purchase, he later acquired it by virtue of the German doctrine of *Ersitzung*.[242] As explained by the court, the law of *Ersitzung* permits a purchaser to obtain "title to movable property . . . by a good faith acquisition of the property plus possession of it in good faith, and without notice of a defect in title, for the statutory period of ten years from the time the rightful owner loses possession."[243] The court, however, concluded that *Ersitzung* was inapplicable to the present case because "New York's choice of law dictates that questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer."[244] As noted by the court, the application of a "significant relationship" test would produce the same result due to "the contacts of the case with New York."[245] Since the paintings were acquired and remained in New York, the state had an "interest in regulating the transfer of title in personal property in a manner which best promotes its policy" of precluding a purchaser from acquiring good title from a thief.[246] By limiting questions of ownership to the issue of whether a theft had occurred, the New York courts were able "to preserve the integrity of

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[238] *Id.* at 29.
[239] *Id.* at 29-30.
[240] *Id.* at 30-31. The court noted that the result would have been the same had Military Government Law No. 52 been in effect at the time of the theft because Law No. 52 precludes the transfer of good title. *Id.* at 36, 40.
[241] *Id.* at 32.
[242] *Id.* at 41.
[243] *Id.*
[244] *Id.*
[245] *Id. at* 42-43.
[246] *Id.* at 43.

transactions and prevent the state from becoming a marketplace for stolen goods."[247]

The court also disagreed with Elicofon's theory that the Weimar Museum's claim was barred by New York's three-year statute of limitations. Citing *Menzel v. List*, the court reiterated the rule "that 'the statute of limitations d[oes] not begin to run until demand and refusal.'"[248] In the view of the court, the demand rule was reasonable in light of the fact that the bona fide purchaser's possession is initially lawful, and only becomes unlawful once he has refused, upon demand, to return the property to the true owner."[249]

Finally, the court held that the Weimar Museum had standing and capacity to pursue an action to recover possession of the portraits[250] insofar as the German Democratic Republic was the legal successor to the property rights of the predecessor state,[251] as well as by virtue of the fact that the German Democratic Republic's Minister of Culture had issued an order conferring juristic status on the museum in accordance with German law.[252] Accordingly, the district court ordered defendant Elicofon to deliver the two Dürer portraits to the *Kunstsammlungen zu Weimer*.[253]

The transportation of stolen art across international boundaries suggests additional problems, particularly when a work has been sold in a foreign country which recognizes ownership by a bona fide purchaser. This issue was addressed by the English court in *Winkworth v. Christie Manson and Woods, Ltd.*[254] In *Winkworth*, several works of art were stolen from the plaintiff's home in England and transported to Italy.[255] There they were sold to Dr. D'Annone

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[247] *Id.* at 43-44.

[248] *Id.* at 49 (quoting Menzel v. List, 22 A.D.2d 647, 647, 253 N.Y.S.2d 43, 44 (1964), *on remand* 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *modification rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969)).

[249] *Id.* The court considered the demand rule to be fair to the bona fide purchaser as well.

> First, a thief who conceals his possession and thereby makes it impossible for the owner to institute suit within the limitations period may be estopped from asserting the statute of limitations as a defense. . . . Second, . . . a demand cannot be indefinitely postponed by plaintiff because there is a requirement that it be made within a reasonable time.

Id. at 50. In the present case, the court found that there was no unreasonable delay in making a demand of Elicofon for the return of the portraits as the museum had conducted a diligent search for the paintings. *Id.* at 52-53.

[250] *Id.* at 71.

[251] *Id.* at 66.

[252] *Id.* at 71.

[253] *Id.* at 79.

[254] [1980] 1 Ch. 496.

[255] *Id.* at 498.

who, in turn, returned them to England for auction by Christie's.[256] Winkworth, the original owner, sued for a declaration that the stolen "works of art ha[d] at all material times been his property"; for injunctions to restrain the defendants from disposing of the property or from receiving the proceeds from the sale of the same; and for the return of the works or their value plus damages for detinue or conversion.[257] The suit against Christie's was dropped when the auction house agreed to reserve the proceeds of sale pending the outcome of the litigation.[258] The English court approved the following rule:

> [T]he proprietary effect of a particular assignment of movables is governed exclusively by the law of the country where they are situated at the time of the assignment. An owner will be divested of his title to movables if they are taken to a foreign country and there assigned in circumstances sufficient by the local law to pass a valid title to the assignee. The title recognized by the foreign lex situs overrides earlier and inconsistent titles no matter by what law they may have been created.[259]

In the view of the court, the fact that the works of art were stolen in England where a good faith purchaser would not obtain good title, were clandestinely transported to and sold in Italy, and were later returned to England where they were sold with the proceeds remaining within the country, did not alter the result that the question of title was controlled by Italian law.[260]

The foregoing discussion of applicable case law demonstrates the uncertainty that accompanies the determination of ownership with respect to stolen art. Similarly, the lack of uniformity that characterizes state statutes governing this area of law encourages a type of "forum-shopping" by those who wish to dispose of stolen art. The latter problem becomes particularly acute when the stolen object is transported across international boundaries to a country that recognizes the title of an innocent purchaser.[261] To date, the effect of "laundering" art works stolen in the United States by selling them to a good faith purchaser in a foreign nation and then returning them for sale in this country is unclear. Another ramification of the international traffic in stolen art concerns the theft and smuggling of antiquities.

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[256] *Id.* at 499.

[257] *Id.* at 498.

[258] *Id.* at 499.

[259] *Id.* at 513 (quoting G. CHESIRE & P. NORTH, PRIVATE INTERNATIONAL LAW 527 (10th ed. 1979)).

[260] *Id.* at 514.

[261] THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON ART LAW AND VOLUNTEER LAWYERS FOR THE ARTS, CONFERENCE ON ARTS AND THE LAW (April 2, 1981).

STOLEN ANTIQUITIES

The plunder of cultural property has been a popular pastime since antiquity when victorious armies marched homeward laden with the spoils of war.[262] In modern times, the pillage has assumed the form of a flourishing black market in stolen artifacts which has resulted in the destruction of important archaeological sites around the world.[263] Typically, the process begins in culturally rich, but economically underdeveloped nations, where native looters discover and unsystematically dismantle ancient monuments leaving behind an unintelligible rubble for scientific study.[264] The public loss of beautiful and valuable art objects is but one aspect of the problem, however, for archaeologists must record the precise location and depth of every fragment uncovered in order to reconstruct accurately the early history of mankind.[265]

The illegal excavation and sale of ancient art bears political consequences in international affairs as well.[266] Many developing nations have come to the realization that the cultural past is a source of self-respect and identity for its citizens.[267] The presence of ancient monuments and art treasures in a country engenders scholarly research, enriches the intellectual life of its citizens, and provides historical continuity with ancestral generations.[268] When promoted as a tourist attraction, art objects are a boon to the national economy as well.[269]

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[262] *See, e.g.*, Palmer, *Symposium: Legal Aspects of the International Traffic in Stolen Art*, 4 SYRACUSE J. INT'L L. & COM. 51 (1976); Rogers, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL. INT'L BUS. 932, 933 (1973).

[263] *See, e.g.*, Rogers, *supra* note 262.

[264] *See, e.g., id.*; Comment, *Legal Restrictions on American Access to Foreign Cultural Property*, 46 FORDHAM L. REV. 1177, 1178-79 (1978).

[265] *See* Comment, *supra* note 264, at 1179.

> The plundered materials especially the archaeological artifacts, have a dual importance for humanity. In addition to being attractive pieces of art, cultural objects also serve as documents of the past. . . . Such documents, however, cannot be read properly once they are removed from their original site. When taken from an illegal excavation, a cultural object is usually smuggled out of the country with every attempt made to hide its true origins. . . . Knowledge of its precise archaeological environment becomes a mystery. The result is a beautiful, but meaningless, work of art; for the historical significance of the work, once taken out of its context, is forever lost.

Id.

[266] *See, e.g.*, Rogers, *supra* note 262, at 934.

[267] *Id.* at 935. Examples of cultural objects of national importance include: the Hungarian Crown of St. Stephen; the American Liberty Bell; and the Afo-A-Kom belonging to the Kom of the Cameroons. *See* J. Merryman, *The Protection of Artistic National Patrimony Against Pillaging and Theft*, in ART LAW DOMESTIC AND INTERNATIONAL 233, 255 (L. DuBoff ed. 1975).

[268] Rogers, *supra* note 262, at 935.

[269] *See id.*; Comment, *supra* note 264, at 1179.

The equation of art and "big business," however, is not without unfortunate side effects. Predictably, a national interest in the preservation of cultural property is at odds with the current obsession for buying and selling works of art.[270] In the capital rich countries of the world, art has come to be regarded as an economic commodity to be viewed as an investment, a hedge against inflation, a means of speculation, and a symbol of wealth.[271] As a result, art resources can be manipulated to influence world politics[272] or can be delivered to the marketplace to enrich the pockets of illegal traffickers. Consequently, to some degree, art has lost its elevated image of being appreciated for its own sake and frequently "stands accused of . . . distasteful practices."[273]

The United States,[274] followed by Europe and Japan, is the primary market for stolen antiquities.[275] According to some authorities, ninety percent of the artifacts sold in this country have been stolen or smuggled from abroad.[276] To date, however, the United States government has not extricated itself from its uncomfortable status as a "dumping ground" for stolen art.[277] Despite international diplomatic pressure, this country has largely resisted the implementation of regulations favorable to art-source nations.[278] Presumably, the United States' position is the product of two basic considerations.

The first argument in support of legislative inactivity with respect to stolen antiquities smuggled into this country is embedded in

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[270] *E.g.*, *The Effect of Efforts to Control Illicit Art Traffic on Legitimate International Commerce in Art*, 8 GA. J. INT'L & COMP. L. 462, 463 (1978). *See generally* Hawkins, *The Euphronios Krater at the Metropolitan Museum: A Question of Provenance*, 27 HASTINGS L.J. 1163 (1976).

[271] *See, e.g.*, Palmer, *supra* note 262, at 51; Rogers, *supra* note 262, at 933.

[272] Palmer, *supra* note 262, at 51; Rogers, *supra* note 262, at 934. As one commentator noted, the illicit flow of art and artifacts "generates anger and resentment in the victim nations. Programs of international cooperation are jeopardized and international tensions are exacerbated." *Id.*

[273] Palmer, *supra* note 262, at 51.

[274] According to the United States Customs Service, artifacts "now rank among the top 10 categories of smuggling." N.Y. Times, Sept. 1, 1981, at A17, col. 3.

[275] *See* Rogers, *supra* note 262, at 934; Comment, *supra* note 264, at 1179. *But cf.* Fishman & Metzger, *Protecting America's Cultural and Historical Patrimony*, 4 SYRACUSE J. INT'L L. & COM. 57, 58 (1976) ("as other areas of the world, such as the Middle East, become importers of art works, the United States should focus upon regulating the export of those few works of art important to the nation's historical or cultural patrimony").

[276] *E.g.*, ART LAW DOMESTIC AND INTERNATIONAL 289 (L. DuBoff ed. 1975).

[277] *See* Note, *The Retention and Retrieval of Art and Antiquities Through International and National Means: The Tug of War over Cultural Property*, 1 BROOKLYN J. INT'L L. 103, 104 (1979).

[278] *See, e.g., id.*

the theory that government control over the alienation of personal property is inimical to a free enterprise system.[279] The free-trade position is espoused primarily by art dealers and museums which object to overly burdensome regulation on the basis that exporters will simply divert their illicit wares to other wealthy, art hungry nations.[280] A related argument is tied to the tight controls instituted by many art-source nations as exemplified by Mexican law which prohibits even the exportation of duplicative or minor works despite a severe shortage of storage space and the absence of protection for objects left in situ.[281] Under the so-called black market theory, strict control of art exportation has caused the price of artifacts to rise dramatically, making such objects more attractive as investments and thereby increasing the number of thefts.[282] Thus, it is argued that regulation by the United States would only serve to aggravate an already vicious circle.[283]

Significantly, the United States government has traditionally fostered the importation of art as evidenced by its duty-free status[284] and its potential for income tax deduction as a charitable gift.[285] More than likely, the attitude that the United States is a relatively "art poor" country has engendered the second justification for the failure to implement regulation of cultural property. This is the view that ancient art is the " 'legitimate heritage of all mankind and not just of those states currently occupying the physical sites of early cultures.' "[286] Supported by scholars and art enthusiasts alike, this philosophy emphasizes the importance of art as a vehicle of communication.[287] The international exchange of art expands appreciation for unfamiliar art forms, increases understanding of foreign cultures, and facilitates stylistic innovation through its influence on local artists.[288] A related but less convincing argument is that removal of cultural

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[279] *E.g., id.*

[280] *See* Comment, *supra* note 264, at 1191.

[281] *Id.* at 1190.

[282] *Id.*

[283] *Id.*

[284] 19 U.S.C. § 1202 (1976); I.R.C. § 170.

[285] *See* Comment, *supra* note 264, at 1191.

[286] *See id.* at 1177, quoting *A Bill to Implement the United Nations Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property: Hearings on H.R. 5643 Before The Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 39 (1977) (Statement of Mr. Emmerich as presented by Mr. Ewing) [hereinafter cited as *Cultural Property Bill*].

[287] *E.g.*, Comment, *supra* note 7, at 463.

[288] *See* Rogers, *supra* note 22, at 936; Note, *supra* note 270, at 463.

property from its country of origin has been necessitated by the threat of destruction by either natural or man-made forces.[289]

At present, the United States continues to favor the interest in the international exchange and sale of art over that of discouraging the despoliation caused by illegal excavation and assisting foreign nations in the preservation of their cultural patrimony.[290] Despite implementation of strict legal controls, the art-source countries do not appear to possess the resources necessary to enforce the protection of national art treasures.[291] In order to achieve the dual goals of protecting cultural property and of encouraging the legitimate international exchange of art, it is clear that the United States must embark upon a joint effort with the exporting countries by enacting legislation aimed at decreasing the illicit trade in stolen antiquities.

Judging from the handful of cases dealing with the illicit traffic in stolen artifacts, litigation may occur either in the context of a civil suit for recovery or in that of a criminal prosecution under the National Stolen Property Act (NSPA).[292] When an artifact has been smuggled out of a foreign country and delivered for sale in the United States, the foreign government may file a suit for replevin in an American court.[293] Such actions are rare, however, due to the complexity and expense of this type of litigation.[294] At the outset, a foreign nation seeking a civil remedy must place itself in the hands of an unfamiliar legal system.[295] To succeed in carrying the burden of

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[289] For example, Lord Elgin removed much of the exterior sculpture from the Greek Parthenon in Athens and arranged for its shipment to England in the early part of the nineteenth century. As noted by one scholar, "one often encounters the statement that they [the Elgin Marbles] might have been destroyed or badly damaged—by negligence or deliberate vandalism under the Turks, by the action of the elements, more recently by smog—if they had been left in place." J. Merryman, *The Protection of Artistic National Patrimony Against Pillaging and Theft*, in ART LAW DOMESTIC AND INTERNATIONAL 233, 235 (L. DuBoff ed. 1975). *But see* Rogers, *supra* note 262, at 936.

[290] *See* Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. & COM. 77, 83 (1978).

[291] *E.g.*, Rogers, *supra* note 262, at 935.

[292] 18 U.S.C. § 2311-2318 (1976). *See, e.g.*, United States v. McClain, 545 F.2d 988 (5th Cir. 1977); United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974).

[293] *See* Complaint, Guatemala v. Hollinshead, No. 6771 (Cal. Super. Ct., filed Dec. 29, 1971), *reprinted in* FELDMAN, *supra* note 13, at 598-600. Although the case was later settled, a complaint requesting possession was filed by the government of Guatemala in the superior court of Los Angeles. *Id.*

[294] *E.g.*, Nowell, *supra* note 290, at 105; Comment, *supra* note 264, at 1180-81; Note, *supra* note 277, at 122.

[295] Nowell, *supra* note 290, at 105. Aside from proving ownership and title, a foreign government seeking the return of stolen artifacts must contend with "conflicts of laws, proof of foreign law, comity, damages, statute of limitations or laches, public law versus penal law, the distinction between goods, real estate and fixtures, and so on." Rogers & Cohen, *Art Pillage—International Solutions*, in ART LAW DOMESTIC AND INTERNATIONAL 315, 322 (L. DuBoff ed.

proof, the plaintiff government must be able to show both ownership and the right of possession.[296] Practically speaking, "[t]he possibility of retrieval by the country of origin depends on its ability to discover the whereabouts of the artifact, prove a claim that the object originated within its borders, *and* that it was exported in violation of its laws, or was stolen."[297] In view of the reality that smugglers make deliberate efforts to obscure the origins of stolen artifacts and to complicate the chain of title by passing the objects through several countries,[298] it is not surprising that foreign governments prefer to rely mainly upon settlements, customs laws,[299] and diplomatic negotiations in lieu of seeking a civil remedy.[300]

Guatemala v. Hollinshead[301] illustrates a noteworthy exception to the general aversion of foreign governments for instituting civil suits against American citizens to obtain the return of stolen artifacts. In *Hollinshead*, the defendant-art dealer made arrangements to finance the procurement of pre-Columbian artifacts with one of his coconspirators.[302] Among the items acquired by the pair was the rare and extremely valuable Machaquila stele 2 discovered in a Mayan ruin of the Guatemalan jungle.[303] The stele was cut into pieces and transported to a codefendant's fish packing plant in Belize, British Honduras.[304] There, the items were packed into boxes marked "personal effects" and shipped to the United States where the defendants unsuccessfully attempted to sell them.[305] The civil action was dismissed,

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1975). *See* W. Ger. v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd per curiam sub nom.* Kunstsammlungen v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974), which addresses the issue of standing in regard to an unrecognized foreign government.

[296] *E.g.*, Comment, *supra* note 264, at 1181.

[297] Comment, *Legal Approaches to the Trade in Stolen Antiquities*, 2 SYRACUSE J. INT'L L. & COM. 51, 53 (1974).

[298] *Cultural Property Bill*, *supra* note 286, at 19.

[299] Under 19 U.S.C. § 1497 (1970), the United States Customs Service may confiscate undeclared art objects brought into the country. Likewise, 19 U.S.C. § 1592 (1970) permits confiscation for fraudulent or false declarations by the importer.

The Customs Service recently seized a shipment of 700 pre-Columbian artifacts estimated to be worth over one million dollars which a New York art dealer had illegally exported from Peru. The Customs Service hopes to justify its unprecedented move by relying on the decision in United States v. McClain, 545 F.2d 988 (5th Cir.), in which the Court of Appeals for the Fifth Circuit held the National Stolen Property Act applicable to illegally exported artifacts owned by a foreign government. N.Y. Times, Sept. 1, 1981, at A1, col.2.

[300] Note, *supra* note 277, at 122.

[301] No. 6771 (Cal. Super. Ct., filed Dec. 29, 1971), *reprinted in* F. FELDMAN & S. WEIL, ART WORKS: LAW, POLICY, PRACTICE 597-609 (1974).

[302] United States v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974).

[303] *Id.*

[304] *Id.*

[305] *Id.* In its complaint, the Republic of Guatemala alleged that the defendants offered the stele "for sale for the sum of $350,000.00." Complaint, para. VII, Guatemala v. Hollinshead, No. 6771 (Cal. Super. Ct., filed Dec. 29, 1971), *reprinted in* FELDMAN, *supra* note 13, at 598-600.

however, when the defendants agreed to return the stele to Guatemala.[306]

While the Guatemalan government was pursuing its civil suit, the United States government was successfully prosecuting Hollinshead in a criminal case.[307] Despite the difficulties of proving scienter and willful intent pursuant to a statute designed to combat the interstate transportation of stolen goods, the NSPA has been invoked in cases involving artifacts stolen abroad and imported into the United States.[308] In *United States v. Hollinshead*,[309] the Court of Appeals for the Ninth Circuit affirmed the conviction of an art dealer for conspiring to transport and causing the transportation of stolen property in interstate commerce in violation of the NSPA.[310] On appeal, the court considered the defendant's contention that the trial judge had "erroneously instructed the jury that there is a presumption that every person knows what the law forbids," and concluded that there is no presumption of knowledge of the parameters of foreign law.[311] Reviewing all of the evidence and noting that the Guatemalan government had declared artifacts such as the well-known Machaquila stele 2 to be public property, the court stated that "[i]t would have been astonishing if the jury had found that [the defendant] did not know that the stele was stolen."[312] The circuit court held that the government was only required to prove that the defendant knew that the stele had been stolen. "[I]t was not required to prove that [the defendant] knew where it was stolen. . . . It follows that it was not necessary for the government to prove that [the defendant] knew the law of the place of theft."[313] Thus, the court of appeals did not find the error prejudicial when considered in light of the entire jury charge which properly emphasized the proof beyond a reasonable doubt standard.[314] The court concluded that it was unlikely that the jury would presume that the defendant had knowledge of the law of Guatemala.[315]

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[306] Nowell, *supra* note 290, at 105.

[307] United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974).

[308] 18 U.S.C. § 2311-2318 (1976). Sections 2314 and 2315 have been held to be applicable to stolen art objects.

[309] 495 F.2d 1154 (9th Cir. 1974).

[310] Section 2314 provides:

> whoever transports in interstate or foreign commerce any goods, ware, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, connected or taken by fraud . . . shall be fined not more than $10,000 or imprisoned not more than 10 years or both.

18 U.S.C. § 2314 (1976).

[311] 495 F.2d at 1155.

[312] *Id.*

[313] *Id.* at 1155-56.

[314] *Id.* at 1156.

[315] *Id.* at 1156.

A related issue was addressed by the Fifth Circuit in a case involving less well-known artifacts in *United States v. McClain*.[316] In *McClain*, five defendants were convicted under the NSPA for conspiring to transport, receive, and sell stolen, illegally exported art objects which had been owned by the Mexican government since 1897 when that country "vested itself with ownership of all pre-Columbian artifacts."[317] The Court of Appeals for the Fifth Circuit reversed the convictions after concluding that Mexico did not declare government ownership of all pre-Columbian artifacts until 1972.[318] The court concluded that the NSPA was applicable only where a declaration of national ownership had occurred before the illegal exportation of the artifact.[319] It reasoned that such an approach was necessitated by the need to protect owners of stolen property without expanding the meaning of the term "stolen" to include illegal exportation.[320] Thus, the court's decision is based upon a distinction between state regulation of property within its borders and acquisition of the actual ownership of such property. In its decision the appellate court pointed out that "the state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty."[321] While in *McClain* the pre-Columbian artifacts were known to have been in the United States in May 1973, the court remanded the case, noting that only the jury "could have properly made the inference of 'recent exportation' [as any other holding would] deprive the defendants of their right to a jury trial."[322]

Despite the apparent ease with which the courts in *United States v. Hollinshead* and *United States v. McClain* applied the NSPA to situations involving the illicit traffic in antiquities, such a legal theory is not without its problems. The paramount difficulty of utilizing the NSPA to combat archaeological theft in foreign countries can be traced to its origin as a statute intended to deal with the "theft of standard, modern commercial goods clearly 'owned' and 'possessed' by some person or corporation before their theft."[323] Thus, while it may be a simple matter to establish proof of knowledge, transporta-

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[316] 545 F.2d 988 (5th Cir. 1977).
[317] *Id.* at 994.
[318] *Id.* at 1000.
[319] *Id.* at 1000-01.
[320] *Id.* at 1001-02.
[321] *Id.* at 1002-03.
[322] *Id.* at 1003.
[323] Nowell, *supra* note 290, at 89. *See also* H.R. Rep. No. 1599, 73d Cong., 2d Sess. (1934); 78 CONG. REC. 8777-78 (1934).

tion, concealment, barter, or sale for goods stolen in the United States, the problems with respect to the foreign theft of artifacts are myriad.

The *McClain* case attempted to address some of the problems inherent in the application of the NSPA to stolen antiquities. The most basic hurdle involves the determination of the meaning of the term "stolen."[324] The *McClain* court wisely elected to steer clear of foreign definitions of theft and relied instead on foreign laws regarding ownership.[325] Nevertheless, even the application of foreign concepts of ownership is problematic in the sense that the United States may find itself in the uncomfortable position of enforcing another country's export laws, not to mention the inconvenience of identifying and translating the applicable statute.[326] Furthermore, extensive application of the NSPA might conflict with foreign policy decisions.[327] In cases where the foreign nation neither recognizes private ownership of certain artifacts nor claims national ownership of these objects, the NSPA will provide no deterrence to the plundering of cultural property.[328] Finally, the anonymous nature of the majority of artifacts hampers enforcement of the NSPA due to proof requirements of ownership and scienter, as well as the potential for falsifying information as to the country of origin.[329]

MARINE ANTIQUITIES

Technological advances in diving equipment have exposed the sites of underwater shipwrecks to despoliation by looters rivaling that of illegal excavations in third world countries.[330] The question of ownership, however, is still hotly debated. Historically, marine wrecks are characterized according to three classifications of property. The property can be *res nullius* because it either never had an owner, all owners are dead, or it is abandoned. Secondly, the property may still be private property, but the owner may be unknown. Finally, the property may never have been formally abandoned by its owner, and the successors may still be able to exercise rights.[331] On

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[324] Nowell, *supra* note 290, at 91-92.

[325] 545 F.2d at 1000-01.

[326] Nowell, *supra* note 290, at 93-94.

[327] *Id.* at 95-96.

[328] 545 F.2d at 1000-01.

[329] Nowell, *supra* note 290, at 96-102.

[330] Altes, *Submarine Antiquities: A Legal Labyrinth*, 4 SYRACUSE J. INT'L L. & COM. 77, 78 (1976). These underwater looters "destroy wreck sites—even using dynamite to more easily obtain the supposed treasure chests of Spanish doubloons, or cargo holds full of booty. Ships are blown up, and the scientists' chance to chart the site is lost." *Id.*

[331] *Id.* at 84-85; *cf.* H. MILLER, INTERNATIONAL LAW AND MARINE ARCHAEOLOGY 18 (1973).

the international scene, there are several different approaches to determining the status of shipwrecks.[332] First, there is the perpetual right to property which cannot be lost by non-use provided that the owner unwillingly lost mere possession (*Besitz*).[333] Second, there is the prerogative right of the state to the value of abandoned goods and to goods of unknown ownership.[334] Third, is the right of the State to terminate the rights of the owner by declaration (as in France) or by statute (as in Spain).[335]

The applicable English law which preceded the American rule does not appear to have become well-settled until about 1798.[336] Under the English rule, "in the absence of the original owner, property recovered from the sea belongs to the sovereign."[337] Curiously, American courts have traditionally reached the opposite conclusion and, until recently, have consistently held that in the absence of the original owner, property recovered from the sea belongs to the finder.[338] Nevertheless, under both approaches, "the rights of the original owner of property recovered from the sea are preferred to those of either the sovereign or the finder."[339] Similarly, English and American courts agree "that the original owner does not forfeit his property unless it has been abandoned—that is, unless all reasonable hope and expectation of recovery have ceased."[340] Such an approach accords with the view that the term "property" does not refer to a physical object but to the right to the exclusive, beneficial use of that object.[341] Hence, an undiscovered object absolutely relinquished by its original owner does not have the status of property until it is found

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[332] Altes, *supra* note 330, at 85. Under the common law, the term "wreck" applied only to property lost at sea which had come to shore. Today, however, the word "wreck" is frequently used to designate flotsam (lost property floating at sea); jetsam (sunken goods thrown overboard to save a ship); and ligan (buoyed jetsam which the owner will retrieve at some future time). Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383, 384 (1967).

[333] Altes, *supra* note 330, at 85. The wreck of the Dutch East India Company ship the *Amsterdam*, beached off the English coast in 1749, provides an example of the perpetual right of property. England recognized the Dutch claim to ownership by virtue of the Dutch State's assumption of the rights and debts of the East India Company upon its dissolution in 1798. *Id.*

[334] *Id.* at 86.

[335] *Id.* at 87.

[336] *See* Kenny & Hrusoff, *supra* note 332, at 390-91. In 1798, the English court in The Aquila, 165 Eng. Rep. 87 (Adm. 1798), settled a dispute over the cargo of the Swedish ship found floating at sea in favor of the crown. Kenny & Hrusoff, *supra* note 332, at 390-91.

[337] Kenny & Hrusoff, *supra* note 332, at 383.

[338] *Id; see* United States v. Tyndale, 116 F. 820 (1st Cir. 1902).

[339] Kenny & Hrusoff, *supra* note 332, at 392.

[340] *Id.* at 393.

[341] H. MILLER, *supra* note 331, at 18.

and reduced to possession.[342] Upon the fulfillment of these two prerequisites, a marine artifact assumes its classification as abandoned property.[343] At this point, the sovereign, under English law, or the finder, under American law, need only prove that the original owner is unknown in order to become the owner of the property.[344] The American rule is frequently justified by the view "that while the American sovereign has the *inherent* power to assert ownership of property recovered from the sea, it—unlike the English crown—has never actually done so."[345] Nevertheless, there appears to be some uncertainty in this country regarding the ownership of marine antiquities.[346] In the absence of any meaningful federal legislation[347] in this area, some of the coastal states have enacted statutes aimed at the protection of underwater wrecks.[348]

Frequently, state legislation follows the discovery and salvage of an important wreck.[349] Such was the case in North Carolina after the state successfully enjoined certain salvage operations and secured the return of artifacts removed from several wrecks.[350] In *State v. Flying "W" Enterprises, Inc.*,[351] the defendants were conducting diving operations and removing artifacts from three Confederate blockade runners and a Spanish privateer which had sunk within the territorial waters of North Carolina.[352] Departing from the American rule, the state supreme court held that where the owners of sunken vessels and their cargoes had "abandon[ed] them so effectively as to divest title

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[342] *Id.*

[343] *Id.*

[344] Kenny & Hrusoff, *supra* note 332, at 393.

[345] *Id.* at 394.

[346] *See, e.g., id.* at 385 (discussing State v. Massachusetts Co., 95 So.2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957), wherein Florida Supreme Court "awarded ownership of a sunken vessel to the sovereign, expressly invoking its version of the English common law as the basis for decision"); Altes, *supra* note 330, at 87.

[347] *But see* 33 U.S.C. §§ 414-415 (1964) (Secretary of the Army has authority to remove sunken crafts which obstruct navigable waters of United States).

[348] The statutes enacted to date are: FLA. STAT. ANN. §§ 267.011-.14 (West 1975); GA. CODE ANN. §§ 40-813a to -814a (1975); HAWAII REV. STAT. §§ 6E-1 to -15(1976); MISS. CODE ANN. §§ 39-7-1 to -39 (1972); MASS. GEN. LAWS ANN. Chs. 91 § 63, 6 § 180 (West 1973); N.C. GEN. STAT. §§ 121-22 to -33 (1974); R.I. GEN. LAWS §§ 42-45.1-1 to -13 (1974); S.C. CODE §§ 54-7-210 to -280 (Supp. 1976); TEX. REV. CIV. STAT. ANN. §§ 1-22 (Vernon 1969).

[349] For example, Florida enacted regulatory legislation following the discovery of a Spanish Flota Plata which had sunk off the coast of Cape Canaveral in 1715. Altes, *supra* note 330, at 90.

[350] State v. Flying "W" Enterprises, Inc., 273 N.C. 399, 160 S.E.2d 482 (1968).

[351] 273 N.C. 399, 160 S.E.2d 482 (1968).

[352] *Id.* at 400-01, 160 S.E.2d at 483. The ships included the Spanish sailing vessel *Fortune* which sank in the early 1700's; and the Confederate blockade runners: the S/S *Modern Greece* sunk in 1862, the S/S *Phantom* sunk in 1863, and the S/S *Ranger* sunk in 1864. *Id.* at 403, 160 S.E.2d at 485.

and ownership," the vessels were derelicts, the right to which had been the prerogative of the English crown and which now "belong[ed] to the state in its sovereign capacity."[353]

A different approach was taken by the Court of Appeals for the Fifth Circuit in *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel.*[354] The *Atocha* was a Spanish galleon which sunk during a hurricane in 1622 while en route from the Indes with a cargo of bullion.[355] In *Treasure Salvors,* the plaintiffs sued for the possession and confirmation of title to an abandoned shipwreck which they discovered resting on the continental shelf outside the territorial waters of the United States.[356] The United States, as intervenor, answered and counterclaimed, asserting title to the vessel under the Antiquities Act[357] and the Abandoned Property Act.[358] The district court granted summary judgment to the plaintiffs, concluding "that Congress ha[d] not exercised its sovereign prerogative to the extent necessary to justify a claim to an abandoned vessel located on the outer continental shelf." Thus, possession and title are rightfully conferred upon the finder of the res derelictae.[359]

On appeal, the government unsuccessfully urged several grounds for reversal. While the government argued that the district court lacked the requisite jurisdiction, the Court of Appeals for the Fifth Circuit concluded that "the district court [had] properly adjudicated title to all those objects within its territorial jurisdiction and to those objects without its territory as between plaintiffs and the United States," but had not properly adjudicated title as to claimants who were not parties to the litigation.[360] The court of appeals further

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[353] 273 N.C. at 414, 160 S.E.2d at 492; *accord,* cases cited in note 376 *infra; cf.* note 378 *infra.*

[354] 569 F.2d 330 (5th Cir. 1978).

[355] The current value of the cargo was estimated at $250 million. *Id.* at 333.

[356] *Id.*

[357] 16 U.S.C. §§ 432, 433 (1976).

[358] 40 U.S.C. § 310 (1976).

[359] Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 408 F. Supp. 907, 911 (S.D. Fla. 1976).

[360] 569 F.2d at 335-36. The court of appeals determined that the district court had jurisdiction:

> The government, by intervening in this action and by stipulating to the court's admiralty jurisdiction . . . , waived the usual requirement that the *res* be present within the territorial jurisdiction of the court and consented to the courts' jurisdiction to determine its interest in the extraterritorial portion of the vessel.
>
> Alternately, we note that assuming a lack of *in rem* jurisdiction of that part of the wreck lying outside the territorial waters of the United States, the district court is not deprived of jurisdiction over the government's counterclaim if that claim rests upon an independent basis of jurisdiction. . . . While no basis of jurisdiction was stated in

rejected the government's contention that the district court had misapplied the law of salvage due to the lack of a marine peril.[361] Noting that the *Atocha* was an abandoned vessel, the appellate court approved the applicability of the law of finds once the original owner has been divested of title.[362] "Under this theory, title to abandoned property rests in the person who reduces that property to his or her possession."[363] The court explained that the "[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths."[364] At the same time, the court determined that the law of salvage compelled a comparable result since the requirement of a marine peril was satisfied by the possibility that the *Atocha* could be lost again in the face of hostile natural elements.[365] Either way, the plaintiffs would be entitled to the "tackle, armament, apparel and cargo" of the *Atocha* in the event that the government failed to prevail in its claim of ownership.[366]

The crux of the government's claim to the *Atocha* was based primarily on two theories. First, the government argued the applicability of the Antiquities Act which is geared toward the protection of historic landmarks situated on "lands owned or controlled by the Government of the United States."[367] According to the government, the Outer Continental Shelf Lands Act (OCSLA)[368] was intended to extend the jurisdiction "of the United States to the outer continental shelf."[369] The court of appeals, however, took the position that congressional extension of jurisdiction under OCSLA was intended to control the exploitation of and resolve competing claims to "the natural resources of the offshore seabed and subsoil" which is not necessarily the equivalent of an extension of sovereignty.[370]

> the counterclaim regarding the extraterritorial portion of the wreck, the record reveals that the government based its claim to rights in the sunken vessel on the Antiquities Act . . . and the Abandoned Property Act. . . . The district court thus had jurisdiction under 28 U.S.C. § 1331 to determine the applicability of these statutes to that portion of the vessel situated in international waters.

Id. at 335.

[361] *Id.* at 336.

[362] *Id.* at 336-37.

[363] *Id.* at 337.

[364] *Id.*

[365] *Id.*

[366] *Id.*

[367] *Id.*

[368] 43 U.S.C. §§ 1331-1343 (1976).

[369] 569 F.2d at 338.

[370] *Id.* at 339.

The United States' second argument in support of its claim to ownership of the *Atocha* was its position as successor to the prerogative rights of the English Crown.[371] According to the government's theory, "the English common law rule—granting the Crown title to abandoned property found at sea and reduced to possession by British subjects—[was] incorporated into American law, and . . . Congress [had] specifically asserted jurisdiction over the *res* in this dispute."[372] Recognizing "the constitutional power of Congress to take control of wrecked and abandoned property brought to shore by American citizens (or the proceeds derived from its sale)," the court noted the lack of legislation to that effect.[373] In short, the court could find nothing in the Antiquities Act or the case law relevant to the Abandoned Property Act to support the subrogation of the United States to the prerogative rights of the English King, in accordance with the American rule.[374]

The court of appeals decision in *Treasure Salvors* accords well with precedent in the federal courts which has adhered to the "rule that, after the original owner, the finder's claim is preferred to the sovereign's."[375] Confusion arises, however, with respect to the ownership of a wreck which lies in the territorial waters of a coastal state. If a number of state courts elect to follow the reasoning of *State v. Flying "W" Enterprises, Inc.* and its predecessors,[376] the effect could be a significant change in American law. As noted by one authority, the decreasing importance of ownership concepts in modern law has brought the American rule full circle. "There are many cases in which, for tax reasons, it is a clear advantage *not* to own something," and if the property is taken by the Internal Revenue Service instead of the Queen, "there is no purpose to being an owner under American law rather than a mere finder under the English rule."[377] Conversely, if one construes *Flying "W" Enterprises, Inc.* as giving the state a proprietary right on the basis of prior possession, the supposed prefer-

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[371] *Id.* at 340.

[372] *Id.* at 340-41.

[373] *Id.* at 341.

[374] *Id.* at 341-43.

[375] Kenny & Hrusoff, *supra* note 332, at 398. *See also* United States v. Tyndale, 116 F. 820 (1st Cir. 1902) (money found on body floating on high seas belonged to finder); Murphy v. Dunham, 38 F. 503 (E.D. Mich. 1889) (coal lying at bottom of Lake Michigan belonged to finder).

[376] State v. Massachusetts Co., 95 So.2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957); The King v. Two Casks of Tallow, 166 Eng. Rep. 414 (1837); The Aquila, 165 Eng. Rep. 87 (Adm. 1798).

[377] Kenny & Hrusoff, *supra* note 332, at 383.

ence for the prerogative right of the sovereign becomes compatible with the American rule.[378]

NON-LEGAL SOLUTIONS

Having reviewed the major types of illegality in the art market and examined the relevant case law, it is necessary to survey the efficacy of both existing and proposed solutions. The most basic safeguard is, of course, buyer self-protection. It is simple common sense to investigate and purchase from reputable art dealers.[379] Although this method of art collection is not an absolute guarantee of authenticity, it is noteworthy that many responsible dealers will refund the purchase price when doubts have arisen as to the attribution of a work.[380] In the case of a contemporary artist, the buyer may either observe the actual production of the work[381] or question the artist so as to confirm its authenticity.[382] If the buyer is interested in purchasing the work of a deceased artist, however, it is wise to study the artist's stylistic development, the identifying characteristics of his work, his oeuvre, and the time period in which he worked.[383] If possible, the buyer might find it helpful to compare known forgeries

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[378] Specifically, North Carolina's Department of Archives and History had conducted diving operations at the sites of the Confederate blockade runners for purposes of recovery and restoration some three years before Flying "W" Enterprises, Inc. appeared on the scene. By the time of the defendants' "unlawful trespasses" in 1965, the state had opened a restoration center and laboratory where artifacts from the wrecks were collected for identification and study. State v. Flying "W" Enterprises, Inc., 273 N.C. at 401, 160 S.E.2d at 484. The weakness of this particular analysis, however, rests in the successful state claim to ownership of the Spanish privateer.

See Kenny & Hrusoff, *supra* note 332, at 398, which discusses the compatibility of the decision in State v. Massachusetts Co., 95 So.2d 902 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957), with the American majority rule:

> The Massachusetts Company had merely started operations, and had not yet obtained any possession to speak of, for such actions as marking the location of the ship with buoys were merely indicative of an *intention* to salvage it, and could give no possession that the law would protect. On the other hand, the people of the state had long been using the ship as a fishing spot and for navigational purposes, and it would seem that they had thereby taken possession. The possession required to give ownership is not necessarily active physical possession, but need only be such as the nature and situation of the property in question allow, and since the state wished the ship to remain where it was, it would be absurd to insist that it be raised and then restored to the same spot in order for the state to acquire possession and the ownership attendant thereon.

Kenny & Hrusoff, *supra* note 332, at 398. Note that the vessel at issue in this case was a battleship sunk by the United States Coast Artillery as target practice in 1922. 95 So.2d 902.

[379] *E.g.*, DuBoff, *supra* note 8, at 980; Shientag, *supra* note 11, at 27; Note, *supra* note 9, at 937.

[380] *E.g.*, Shientag, *supra* note 11, at 27; Note, *supra* note 9, at 937.

[381] *E.g.*, DuBoff, *supra* note 8, at 980.

[382] *E.g.*, Hodes, *supra* note 7, at 75; Note, *supra* note 9, at 937.

[383] *See generally* DuBoff, *supra* note 8, at 980; Note, *supra* note 9, at 937.

or copies with the original work.[384] It is always a good practice to question the seller closely as to provenance, acquire a certificate of authenticity, and obtain a bill of sale.[385] Nevertheless, self-protective measures are not infallible. The limitations of self-instruction in art history become obvious when one stops to consider that differences of opinion as to authorship exist even among experts. In addition, scientific analysis is neither foolproof nor inexpensive.[386] In view of the uncertainty of many attributions, it is important that legislatures and courts take steps to assure art buyers of protection in the event that they are defrauded.

There is also a limited amount of support for the prospect of self-policing by art dealers. Possible approaches for this type of control include the formulation and enforcement of a dealer code of ethics, the formation of a panel of experts authorized to authenticate works of art and to expose disreputable dealers, and the implementation of a licensing association.[387] At present, the protection of the art-buying public against fraudulent dealer practices is the exclusive domain of "the local Better Business Bureau, the consumer protection division of the state's attorney general's office, or the consumer fraud division of the local police department."[388] Ideally, however, art dealers should not take liberties with the certainty of attributions and should inform prospective buyers of any newly acquired information. "The use of key phrases such as 'from the school of,' 'in the manner of,' or 'attributed to,' could alert a purchaser to the fact that authorship is in doubt."[389] As with any self-regulating system, the success of a self-policing approach is wholly dependent upon the degree of integrity that characterizes the dealer community.

The concept of an art identification system places the burden of guaranteeing authenticity upon the artist. Such a system would require the artist to mark each of his works with a fingerprint preserved by a chemical treatment or a special design and code impressed in a color of the spectrum with a high atomic weight that is discernible via x-ray or ultraviolet light.[390] Impressions would then be filed in a central depository. Aside from facilitating authentication, the identifi-

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[384] *E.g.*, DuBoff, *supra* note 8, at 980.

[385] *Id.*

[386] *See, e.g.*, Hodes, *supra* note 7, at 75.

[387] *See generally* DuBoff, *supra* note 8, at 1018.

[388] *Id.* at 1019.

[389] *Id.*

[390] *E.g.*, DuBoff, *supra* note 8, at 1010; Hodes, *supra* note 7, at 78; *accord*, Note, *supra* note 9, at 938.

cation system could conceivably act as a deterrent to forgers[391] and serve to increase art sales by inspiring public confidence in the market.[392] Among the weaknesses of the identification system is its limitation to works of art produced after implementation of the plan.[393] In addition, the success of the system would obviously depend upon cooperation by contemporary artists.

Organization of a national art registry is another solution which has been proposed to protect the art buying public.[394] Under this system, the artist-seller would file a certificate of authenticity, a photograph of the art work sold, and information regarding the identity of the purchaser.[395] If the work of art were later resold, the seller would record the transaction including the name of the new owner.[396] The registered information would then be made available to artists, dealers, collectors and law enforcement officials.[397] Once the system became firmly established, buyers would be alerted to proceed with caution with respect to an unregistered work of art. Unregistered works would become more difficult to sell while registered ones would be likely to increase in value.[398] Predictably, the success of a national art registry would depend upon the full support of the artistic community. Clearly, it would be impracticable to permit buyers to register art due to the potential for fraud.[399] At the same time, the registry could not provide a guarantee of authenticity with respect to antiquities and other older works of art.[400]

The illicit traffic in stolen antiquities and the slow development of international agreements has led to the organization of private interests as exemplified by the International Council of Museums (ICOM).[401] ICOM, headquartered in Paris, boasts a membership of

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[391] *E.g.*, DuBoff, *supra* note 8, at 1010; Hodes, *supra* note 7, at 78.

[392] DuBoff, *supra* note 8, at 1016.

[393] *See* Note, *supra* note 9, at 938; *cf. Disposition of Fake Art*, 26 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 591 (1971), *reprinted in* FELDMAN, *supra* note 13, at 1085-86 [hereinafter cited as *Disposition of Fake Art*] (discusses pros and cons of permanently marking objects to denote forgery).

[394] *E.g.*, DuBoff, *supra* note 8, at 1016-18; Hodes, *supra* note 7, at 78. *See also Disposition of Fake Art*, *supra* note 393, at 1086-88, in which the Art Committee of the New York City Bar Association proposed the establishment of a central registry of fake art. Significantly, the Committee indicated its disapproval of the institution of an archive of fake art geared toward educational purposes unless owners contributed forgeries on a purely voluntary basis. *Id.* at 1088. Note, *supra* note 9, at 938-39.

[395] DuBoff, *supra* note 8, at 1016-18.

[396] *E.g.*, Hodes, *supra* note 7, at 78; Note, *supra* note 9, at 939.

[397] Hodes, *supra* note 7, at 78.

[398] Note, *supra* note 9, at 939.

[399] *Id.*

[400] *Id.*

[401] *See generally* Fishman & Metzger, *Protecting America's Cultural and Historical Patrimony*, 4 SYRACUSE J. INT'L L. & COM. 581 (1976); Hamilton, *Museum Acquisitions: The Case for*

3000 institutions from 100 countries.[402] Besides the promotion of international cooperation among museums, the council has expressed the necessity for its members to boycott the market in stolen antiquities.[403] In addition, the group has promulgated an ethical code designed to regulate museum acquisition policies.[404] In furtherance of its goals, ICOM disseminates a list of stolen art objects, organizes meetings to discuss law enforcement policies, and publishes a bulletin of model acquisition policies.[405] Finally, the council maintains a library containing information on such diverse topics as national antiquities laws and loan exhibitions.[406] While ICOM's proclamations are not legally enforceable, they do exert the positive effect of influencing public opinion as to the need for the protection of cultural property. More importantly, member museums who refrain from questionable practices in art acquisitions do much to encourage the legitimate exchange of art.[407]

LEGAL SOLUTIONS

Under currently existing state[408] and federal legislation,[409] art purchasers are generally relegated to seeking relief under general anti-

Self-Regulation, in ART LAW DOMESTIC AND INTERNATIONAL 347 (L. DuBoff ed. 1975); Comment, *supra* note 264, at 1194-95; Note, *supra* note 270, at 470-471.

[402] Comment, *supra* note 264, at 1188.

[403] Nafziger, *Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process*, 2 DENVER J. INT'L L. & POL'Y 231, 244 (1972).

[404] *Id.* at 245.

[405] *Id.*

[406] *Id.* at 247.

[407] *Id.*

[408] In regard to the possible efficacy of state Blue Sky Laws in the protection of art investors, see *In re* Michael Gardner v. Louis J. Lefkowitz, 97 Misc. 2d 806, 412 N.Y.S.2d 740 (Sup. Ct. 1978), in which the state Attorney General's investigation of a sale of "investment quality diamonds" (actually zirconium stones) through the use of fraudulent documents and high pressure telephone solicitations was authorized by the Martin Act, N.Y. GENERAL BUSINESS LAW § 23-A (McKinney 1967). The Act's protection against security frauds was applicable, in that the defendants promoted the diamonds as an investment and a hedge against inflation and because investors relied upon the expertise and efforts of the defendants to make the venture successful. *Id.*

[409] The copyright laws give the artist a monopoly over reproduction rights to his work. Under 17 U.S.C. § 302 (1977), "[c]opyright in work created on or after January 1, 1978, subsists from its creation and [with some exceptions] endures for a term consisting of the life of the author and fifty years after the author's death." The copyright laws, however, do not afford an absolute protection against forgery. Many works of art are not copyrighted and many forgeries are not imitations of an original art work. *See also* Trustman, *supra* note 48, at 87, which suggests that surmoulages of bronze sculptures in the public domain and stamped with the original copyright inscription offer "an avenue for [the] prosecution of foundries which market recasts as originals." *Id.*

It has been suggested that art investors may be able to take advantage of the registration requirements imposed by the Securities and Exchange Act. To date, it appears that the Securities Exchange Commission would not recommend an enforcement action with regard to the offer

fraud statutes.[410] As noted previously, these statutes have proven to be ineffective in controlling illegal practices in the art market for a number of reasons. First, the penalties and risks for statutory violation are slight in comparison to the potential for profit. Second, the fraudulent or criminal intent proof requirement is difficult to fulfill and encourages dealers to avoid making more than a casual inquiry as to the origin of works which they offer for sale.[411]

Despite these problems, however, many states continue to rely solely upon the provisions of the Uniform Commercial Code to protect the art buying public.[412] Section 2-313 of the Code governs the creation of express warranties by a seller of goods.[413] Judicial construction of the Code generally revolves around the issue of whether the seller's statement was an affirmation of fact or a description which became a basis of the bargain, thereby creating a warranty, or whether the statement was merely the seller's opinion or an affirmation of value.[414] Application of the Code to art sales creates peculiar problems of interpretation.[415] For example, if a seller describes a painting as one "executed by Monet" and refers to its "extensively documented provenance," the statement is likely to be construed as an affirmation of fact or promise.[416] The use of the phrase "Monet painting," however, is conducive to differing interpretations and might be considered insufficient to create a warranty under the UCC.[417]

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and sale of art portfolios. THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON ART LAW AND VOLUNTEER LAWYERS FOR THE ARTS, CONFERENCE ON ARTS AND THE LAW (April 2, 1981). *But see* SEC v. Brigadoon Scotch Distrib., Ltd., 388 F. Supp. 1288 (S.D.N.Y. 1975) (sales of rare coin portfolios constituted investment contracts and were therefore securities for purpose of registration requirements of Securities and Exchange Act, as success of venture was dependent upon defendant-promoter's efforts as well as on his selection of portfolios).

[410] DuBoff, *supra* note 8, at 998. *See also Disposition of Fake Art*, *supra* note 393, at 1088-89, which discusses the extension of laws dealing with libel, fraud, or the right of privacy as applied to the false imputation of authorship or the use of an artist's name for advertising purposes in terms of the confiscation of art forgeries which would ultimately be tendered to the artist or his estate for destruction or reclamation. *Id.* Furthermore, The Art Committee of the New York City Bar Association approved the issuance of an appropriate court order or directive to the owner of the forged art work. *Id.* at 1089. To date, courts have not defined art forgeries as the equivalent of contraband which can be "seized and confiscated." *Id.* at 1083-84.

[411] DuBoff, *supra* note 8, at 998.

[412] *See generally* DuBoff, *supra* note 8, at 1012; Hodes, *supra* note 7, at 77.

[413] U.C.C. § 2-313.

[414] *See* DuBoff, *supra* note 8, at 1002-03.

[415] At least one writer has suggested that the results of scientific analysis or expert examination of stylistic evidence are the equivalent of the technical specifications and blueprints approved as descriptions in comment 5 of U.C.C. § 2-313. Comment, *supra* note 7, at 418.

[416] *See* Comment, *supra* note 7, at 417.

[417] *See* DuBoff, *supra* note 8, at 1003.

The determination of whether the seller's statement constitutes an affirmation of fact or a mere opinion presents a difficult problem of interpretation. Due to the uncertainty of many attributions, it is arguable that both buyers and sellers harbor opinions about the authenticity of an art object, thereby preventing the creation of an express warranty.[418] Similarly, it has been suggested that since only the artist or other eyewitness can make a factual statement as to authorship, "a dealer's statement of authenticity is always his opinion" irrespective of reliance by the buyer.[419] Nevertheless, because the art world customarily relies upon expert opinion to determine the value of art objects, these reservations should be dismissed. As stated by one commentator, "[i]t would seem only logical and equitable that if the seller is supported by the benefits of something less than absolute, he also should bear the burdens of something less than absolute."[420] In short, the recognition that an expert's opinion as to authenticity is the equivalent of an affirmation of fact would promote greater stability in the art market by ensuring that buyers receive the benefit of their bargains.[421] If a seller desires to protect himself he may do so by resorting to an appropriate disclaimer grounded in § 2-316 of the Uniform Commercial Code.[422] Protection through a general disclaimer[423] of express warranties is likely to be held inoperative,

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[418] *Id.* at 1005.

[419] *Id.*

[420] Comment, *supra* note 7, at 417.

[421] *See id.* at 417-18.

[422] U.C.C. § 2-316. Subsection one provides:

> [w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Id. § 2-316(1). Section 2-202 states:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade . . . or by course of performance . . . and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Id. § 2-202.

[423] *See* Comment, *supra* note 7, at 422-28, which approves the applicability of § 2-314 implied warranties of merchantability and § 2-315 implied warranties of fitness for a particular purpose to art sales. For a discussion supporting a more restrictive interpretation of § 2-314 and § 2-315 in relation to the sale of art, see DuBoff, *supra* note 8, at 1012-15.

however, since the drafters sought to protect the "buyer from unexpected and unbargained" for disclaimers that contradict the express promises of the seller.[424]

To date, New York has made the greatest strides in implementing legislation designed to stem fraudulent activitiy in the art market. In 1967, New York enacted a statute which treats art forgery as a separate punishable offense.[425] A person commits the crime of simulation when "[w]ith intent to defraud, he makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship which it does not in fact possess," or when "with knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated."[426] In New York, art forgery is a Class A misdemeanor and the penalty is one year imprisonment and/or a $1000 fine.[427] The purpose of the statute is limited to the deterrence of art forgers, however, and no relief is offered to the defrauded purchaser.

Recourse for the defrauded purchaser may be found under article 12-D of the New York General Business Law.[428] This statute provides that a written statement of authorship that accompanies the sale of a work of art constitutes an express warranty of authenticity.[429] By limiting the application of the provision to sales by art merchants,[430] the legislature recognized that buyers rely upon the sellers's education and experience in regard to works of art. Consequently, the seller must avoid "puffing" as there is a statutory presumption that descriptions of authorship become part of the basis of the bargain.[431] The legislature also considered custom and usage in the market by recognizing the degree of uncertainty that characterizes many attributions

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[424] U.C.C. § 2-316, comment 1.

[425] N.Y. PENAL LAW § 170.45 (McKinney 1967). *See also Disposition of Fake Art*, *supra* note 393, at 1086, in which the Art Committee of the New York City Bar Association recommended a tagging system to denote the status of art forgeries. A "person who knowingly remov[ed] such a tag would be guilty of criminal simulation under section 170.45 of the Penal Law." *Id.*

[426] N.Y. PENAL LAW § 170.45 (McKinney 1967).

[427] *Id.* §§ 70.15, 80.05.

[428] N.Y. GEN. BUS. LAW §§ 221-222 (McKinney 1975).

[429] *Id.* § 219-c.

[430] Article 219-b defines an art merchant as:

> [A] person who deals in works of fine art or by his occupation holds himself out as having knowledge or skill peculiar to works of fine art or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. The term "art merchant" includes an auctioneer who sells works of fine art at public auction as well as such auctioneer's consignor or principal.

Id. § 219-b.

[431] *E.g.*, FELDMAN *supra* note 13, at 177; DuBoff, *supra* note 8, at 1011.

and approving the use of the terms "by a named author", "attributed to a named author", and "school of a named author."[432]

Disclaimers of warranty are permitted under New York law provided they are printed clearly and conspicuously and "specifically apprise the buyer that the seller assumes no risk, liability or responsibility for the authenticity of such work of fine art."[433] The seller's protection is limited, however, because the disclaimer is rendered inoperative if: 1) the work of art turns out to be a counterfeit and there was no clear indication of such in the bill of sale, or 2) the work was unqualifiedly stated to have been executed by a named artist and the buyer can prove that "such statement was false, mistaken or erroneous" on the date of sale.[434]

Significantly, article 12-D is geared toward consumer protection in the allowance of damages or recission where the buyer has acquired a forged or misattributed work.[435] Overall, the statute is designed to prevent "sophisticated sellers of art—so-called 'art merchants'—from selling works purportedly by well-known names to unsophisticated buyers of art."[436] Furthermore, this type of "express warranty" legislation effectively shifts the responsibility of ascertaining authenticity from the buyer to the seller.[437] The statute is also advantageous to the buyer because it eliminates any uncertainty as to "whether the written description set forth in the bill of sale is sufficient to constitute a warranty of genuineness."[438] Nevertheless, the statute has been the subject of criticism. For example, it remains unclear whether or not the original warranty applies to subsequent purchasers.[439] Secondly, article 12D applies only to written representations.[440] There has also been considerable discussion of the need for an additional statute which would grant qualified immunity to accredited art experts

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[432] N.Y. Gen. Bus. Law § 219-c (McKinney 1975).

[433] *Id.* § 219-d.

[434] *Id.*

[435] FELDMAN *supra* note 13, at 176; *e.g.*, DuBoff, *supra* note 8, at 1011.

[436] ASSOCIATED COUNCILS OF THE ARTS, THE VISUAL ARTIST AND THE LAW 67 (1971).

[437] Hodes, *supra* note 7, at 77.

[438] *Id.*

[439] *Id.*

[440] N.Y. GEN. BUS. LAW § 219-c (McKinney 1975). The weakness of this approach was noted by the Art Committee of the New York City Bar Association which observed that:

> As a practical matter, many works of art are sold with accompanying documentation. However, in the case of prints and graphic art, the only form of authentication would normally appear on the face of the object in the form of a signature and number of the edition. The misdemeanor provision may have no applicability in such instances.

Disposition of Fake Art, *supra* note 393, at 1083.

whose opinion evidence as to the fraudulent nature of a work of art later proved to be erroneous.[441] According to some authorities, such immunity would encourage expert evaluation of works of doubtful authenticity by removing the threat of liability to the seller in an action for defamation.[442] Proponents of qualified immunity theorize that an increase in the number of expert evaluations will help to bring about the subsidence of fake art transactions.[443]

A third New York statute provides that "[a] person who, with intent to defraud, deceive or injure another, makes, utters or issues a false certificate of authenticity of a work of fine art is guilty of a class A misdemeanor."[444] A certificate of authenticity is defined as a printed or written statement of opinion or fact "confirming, approving or attesting to the authenticity of the authorship of a work of fine art, which statement is subscribed by the authenticator and is capable of being used to the advantage or disadvantage of some person."[445] Such a subscription of authenticity constitutes "prima facie evidence that [the authenticator] holds himself out as having the knowledge, skill or expertise requisite to the making of such a statement." Because the statute is directed toward any transaction involving the delivery of a false certificate, an expert who supports an income tax deduction for a charitable donation of art with a false opinion as to authorship would be in violation of the law. Absent this statute, the falsification of a written statement of opinion would not carry a penalty.[446]

As a reaction to the abuse which has accompanied the expansion of the market for art prints, New York and other states have enacted so-called "Print Bills."[447] An effective fine print statute, exemplified

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[441] *E.g.*, DuBoff, *supra* note 8, at 984 n.60 ("[i]n order to take advantage of this immunity, the expert would be required to obtain certification from the New York State University Board of Regents"); Hodes, *supra* note 7, at 77-78 ("[l]icensing of art specialists could be based on certification by a State Board of Examiners").

[442] *Contra* DuBoff, *supra* note 8, at 958-87.

> Experts are professionals and should be held to the highest standard of performance. They should be required to document the reasons for their conclusions. Even stylistic experts can verbalize the facts upon which they base their findings. If they are granted greater flexibility with their decisions and immunity from suit, it is likely that their standards will decline. As a result, even more forgeries might flood the art market.

Id. at 987.

[443] Hodes, *supra* note 7, at 77-78.

[444] N.Y. GEN. BUS. LAW § 219-i (McKinney 1975).

[445] *Id.* § 219-h(c).

[446] ASSOCIATED COUNCILS OF THE ARTS, *supra* note 436, at 66.

[447] *See* CAL. CIV. CODE § 1740-45 (West 1973); ILL. REV. STAT. ch. 121-1/2, § 361-69 (1975); N.Y. GEN. BUS. LAW §§ 220-a to 220-1 (McKinney 1975).

by New York Assembly Bill 10809,[448] which was never enacted, may be categorized according to its requirements for: 1) disclosure; 2) express warranties; 3) adjustments in the burden of proof; and 4) enforcement. Typical provisions include the prohibition of catalogues, circulars, labels or the like which do not clearly and conspicuously disclose relevant information as to each edition of a fine print. Similarly, a fine print statute may require that a written invoice, receipt or certificate replete with appropriate disclosures and disclaimers accompany the sale of a fine print regardless of the status of the purchaser.[449] Frequently, the statute will include a list of the "informational details" necessary for appropriate disclosure.[450]

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[448] N.Y. ASSEMBLY BILL 10809 § 220, No. 2 (1980). The Bill defines a "fine print" as

> an impression produced in more than one copy by means including, but not limited to, engraving, etching, a woodcut, lithograph, seriograph, photograph, photogravure or any combination thereof upon paper or any other surface, sold or offered for sale for an amount in excess of fifty dollars exclusive of any frame. Pages, sheets, or plates taken from books and magazines offered for sale or sold as fine prints shall be included within the meaning of "fine print."

Id.

[449] If an art merchant describes a fine print as a "reproduction," it is unnecessary to supply "further informational detail unless it was allegedly published in a signed, numbered, or limited edition or any combination thereof or is described as a 'fine print' or 'original' in which case all of the informational detail required . . . is to be furnished." *Id.* § 221, No. 4.

[450] The New York Bill provides an exhaustive list of informational details:

> 1. The name of the artist.
> 2. The year when printed or made.
> 3. [Specific identification of the medium or media employed for execution of the print.]
> 4. Whether the finished fine print was signed by the artist.
> 5. Whether the finished fine print was approved by the artist.
> 6. The existence of any artist . . . , other than the named artist who assisted in the [execution of the master image].
> 7. The [identity of t]he person . . . who supervised the production of the . . . print.
> 8. Exclusive of trial proofs, whether the edition is being offered as a limited edition and, if so:
> (i) the authorized maximum number of signed or numbered impressions, or both, in the regular edition; and (ii) the authorized maximum number of unsigned or unnumbered impressions, or both, in the edition; and (iii) the authorized maximum number of artists, publishers, printers etc., if any, outside of the regular edition.
> 9. Whether there is more than one print in the edition with the same individual numbers or other markings denoting the limited edition.
> 10. Whether there was any prior or later editions from the same plate, the series number of the subject edition and the total size of all other editions.
> 11. Whether there were any other prints or editions, limited or otherwise, from a plate which is substantially the same or consists of the same image or of an image which is substantially the same, and whether on the same or different paper with the same or different ink or on or in any other medium or material.
> 12. Whether the plate has been destroyed, effaced, altered, defaced or cancelled after the edition for which the disclosure is being provided.
> 13. Whether the edition is a posthumous edition or restrike and, if so, whether the plate is the original one or has been reworked or otherwise altered.
> 14. The name of the workshop, if any, where the limited edition was printed.

Id. § 222.

When a fine print is sold, these details become part of the basis of the bargain, thereby creating an express warranty that may not be negated by an art merchant[451] due to the absence of formal words in the written instrument, the lack of intention or authorization to create a warranty, or because the statement was merely an expression of the seller's opinion.[452] Disclaimers attributed to a lack of knowledge by the art merchant are ineffective in the absence of proof that reasonable inquiries were made to ascertain the informational details, but that such information was unavailable.[453]

The New York Assembly Bill also contains strict enforcement measures. An art merchant who has failed to supply or who has erroneously supplied informational details must refund the purchase price of the print plus interest when the buyer returns the print. If an art merchant "offers or sells a fine print with intent to deceive, defraud or injure another person by: (i) willfully failing to provide the [required] informational detail . . . or (ii) willfully providing false informational detail; or (iii) falsely disclaiming knowledge as to any relevant informational detail; the purchaser" may recover an amount equal to three times the purchase price plus interest.[454] There is also a provision awarding costs of litigation, attorney fees, and expert witness fees to a prevailing purchaser.[455] Finally, the Assembly Bill permits the state attorney general to seek injunctive relief for violations; restitution for entitled persons; and civil penalties in the case of repeat offenders.[456]

Print bills that contain provisions similar to the preceding example offer a forceful solution to problems of fraud in the sale of prints. This type of print statute purports to obviate the need for new causes of action in the belief that an informed consumer is capable of self-protection.[457] Ultimately, the disclosure requirements aim to help the print buyer make an informed choice by eliminating confusion, misleading information, and deceptive sales practices.[458] In the event that a buyer is defrauded, however, the statute provides a meaningful remedy.

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[451] N.Y. GEN. BUS. LAW § 219-b (McKinney 1975) defines "art merchant" for the purposes of ASSEMBLY BILL 10809, § 220, No. 1 (1980) with the addition of the artist who "shall be deemed to be an 'art merchant' with respect to his own work.

[452] N.Y. ASSEMBLY BILL 10809 § 223, No. 1 (1980).

[453] *Id.* § 225.

[454] *Id.*

[455] *Id.*

[456] *Id.* § 226.

[457] *See* PUBLIC HEARING MEMORANDUM, *supra* note 42, at 3-4.

[458] *Id.* at 4.

From the preceding discussion, it is evident that New York legislative measures offer the art buying public the best protection available in the United States to date. It is obvious, however, that uniform state laws or federal legislation would do more to discourage illegal practices in the art market. The picture is less optimistic with respect to stolen antiquities. The possibility of achieving international cooperation with respect to the illicit trade in national cultural property came closest to fruition in 1970 with the United Nations Education and Social Council Convention on Illicit Movement of Art Treasures.[459] Under the terms of the convention, each signatory state must designate cultural property of importance for archaeology, prehistory, history, literature, art or science which belongs to one of eleven categories.[460] Essentially, each country is permitted to establish its own system of regulatory controls in such a manner as to permit the export of cultural property only when authorized by the state and accompanied by an export certificate. In addition, a state may classify cultural objects as ineligible for exportation. Finally, the Convention

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[459] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 10 INT'L LEGAL MATERIALS 289 (1971) [hereinafter cited as Convention]. *See generally* Rogers, *supra* note 262, at 948.

[460] Designated cultural property must belong to one of the following categories:

(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins, and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statutory art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.

Convention, *supra* note 459, at art. 1.

contains a provision which would permit concerted international action in the event that a nation's cultural patrimony is threatened with destruction.[461] Action would likely be in the form of bilateral and multilateral[462] agreements as to import and export controls.

In the area of bilateral agreements directed toward the control of illicit art traffic, the United States and Mexico have entered into a treaty designed to deter illegal excavation of antiquities and theft as well as to promote legitimate cultural exchange.[463] The Mexico Treaty protects pre-Columbian artifacts, religious art, colonial objects, and important archival documents pre-dating 1920. Under the agreement, either party may request the other to institute the legal proceedings necessary to effect the return of cultural property removed subsequent to the effective date of the treaty.[464]

In 1972, the United States took unilateral action to stem the expanding illicit trade in Latin American antiquities. The Pre-Columbian Act[465] applies to any stone carving or mural executed as a monument or as part of an architectural structure by a pre-Columbian Indian culture. Under the provisions of the Act, art objects designated on a list promulgated under the auspices of the Secretary of the Treasury and the Secretary of State may not be imported into the United States without a certificate issued by the source country certifying that such objects have not been illegally exported. Items on the list which arrive in this country without a certificate are forfeited to the government for return to the country of origin.[466]

Experience has demonstrated that unilateral action by art-source countries is ineffective to control the illicit traffic in stolen antiquities.[467] Similarly, bilateral agreements tailored to fit the needs of the

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[461] *Id.* at art. 1.

[462] *See generally* Comment, *supra* note 264, at 1191-93; Note, *supra* note 270, at 462; Note, *supra* note 277, at 105-14.

[463] In 1976, the General Assembly of the Organization of the American States adopted a convention on the protection of the archaeological, historic, and artistic heritage of the American nations. Under this Convention, each of the signatory states agreed to identify and safeguard its cultural property; act to prevent unlawful removal, exportation, and importation of cultural property; and to promote the appreciation of the art of other cultures through legitimate art exchange. 15 INT'L LEGAL MATERIALS 1350 (1976). *See generally* Rogers, *supra* note 262, at 942; Note, *supra* note 270, at 474-75; Note, *supra* note 277, at 116-17.

[464] 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, 22 U.S.T. 494, T.I.A.S. No. 7-88.

[465] *See generally* Rogers, *supra* note 262, at 939; Comment, *supra* note 264, at 1193-94; Note, *supra* note 277, at 114-16; Note, *supra* note 270, at 469-70.

[466] Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals (Pre-Columbian Act), 19 U.S.C. §§ 2091-2095 (Supp. 1973).

[467] *See, e.g.*, Rogers, *supra* note 262, at 935; Comment, *supra* note 264, at 1204; Note, *supra* note 270, at 473; Note, *supra* note 277, at 128.

signatories do nothing to halt the flow of ancient art to the markets of non-participatory nations.[468] Although international cooperation is still in its infancy, multilateral legal action appears to be the best solution to the problem of preserving national cultural property. In order to facilitate global agreement, however, art-rich countries must indicate a willingness to abandon overly-restrictive antiquities laws to the extent necessary to provide incentive to art-importing nations to assist with enforcement. It is simply unrealistic to expect "culturally hungry, financially wealthy nations . . . [to] cooperate in enforcing a scheme that does not permit, in some measure, the free international movement of art."[469] In short, while the looting of archaeological sites is unlikely to grind to a total halt in the immediate future, international action geared toward the promotion of the legitimate exchange of art objects would serve to decrease the illicit trade in cultural property.

Significantly, the recent developments in public international law do not appear to offer any protection to marine antiquities. Legal commentators appear to share the view that none of the international conventions have demonstrated an intent to include non-living resources such as sunken wrecks and their cargoes. [470] Similarly, the skeletal nature of national laws contributes to the uncertainty of the status of marine archaeology.

This state of affairs is clearly the product of the lack of "accord among nations as to the extent to which any of them may excercise sovereignty over the sea."[471] While it appears that no nation has sovereignty over the high seas and that coastal nations have some rights in adjacent territorial waters, the extent of control is undetermined.[472] Traditionally, the territorial sea was delimited by the three mile limit—the equivalent of one marine league.[473] In 1956, a United Nations Commission suggested that territorial limits be extended up to a twelve mile maximum.[474] Significantly, however, there has been no agreement as to the appropriate distance by the maritime na-

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[468] *See, e.g.*, Nowell, *supra* note 290, at 110; Rogers, *supra* note 262, at 969.

[469] Rogers, *supra* note 262, at 969.

[470] H. MILLER, *supra* note 331, at 21-25; Altes, *supra* note 330, at 81; *see* Kenny & Hrusoff, *supra* note 332, at 399.

[471] Kenny & Hrusoff, *supra* note 332, at 399.

[472] *Id.*

[473] *Id.* ("this rule is based on the medieval estimate of the effective range of a cannon mounted on shore; and in this age of increasing nationalism and better artillery, nations have begun claiming broader territorial seas").

[474] *Id.*

tions.[475] Thus, the United States continues to adhere to the three mile limit while other nations claim much greater control.[476]

Nevertheless, the Convention on the Continental Shelf permits a coastal nation to exercise sovereignty over the continental shelf, beyond the three mile limit, for purposes of exploration and exploitation of natural resources.[477] Since the continental shelf "may extend as far as two hundred miles," it is conceivable that a coastal country could attempt to enforce a claim of ownership on this basis.[478]

Proposals for the protection of marine antiquities emphasize the need for a uniform law "encompassing territorial waters, the contiguous zone, and the high seas."[479] One such system[480] would grant coastal countries the authority to issue licenses to archaeologists for the purpose of excavating *res nullius* wrecks. Where ownership rights are uncertain, however, the coastal nation would apply to the owner's country of residence for permission to proceed with the excavation or declare a divestment of ownership.[481] Upon the expiration of a specified time period, divestment would occur automatically.[482] In situations where unique or valuable artifacts are recovered from a wreck, the country of origin would be allowed to claim a percentage of its cultural property.[483] The site of each country's proportionate share would be dependent upon the location of the wreck in territorial waters, the contiguous zone, the continental shelf, or the high seas.[484] The same proposal recommends giving an award to chance discoverers of shipwrecks.[485] Presumably, such an award would discourage clandestine diving operations and provide incentive for private parties to notify the coastal government of the existence of their discoveries.

The necessity of international cooperation and a uniform approach to the protection of marine antiquities appears to be justified by the unfortunate results produced by the institution of strict antiquities laws by many art-source nations.[486] In an effort to safeguard their "cultural and archaeological heritage from unskilled excavation,

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[475] *E.g.*, H. MILLER, *supra*, note 331, at 17.

[476] *See* H. MILLER, *supra* note 331, at 14; Kenny & Hrusoff, *supra* note 332, at 399.

[477] *E.g.*, Altes, *supra* note 330, at 79-80.

[478] *See* H. MILLER, *supra* note 331, at 17; Kenny & Hrusoff, *supra* note 332, at 401. *But see* Altes, *supra* note 330, at 81.

[479] Altes, *supra* note 330, at 81.

[480] *Id.*

[481] *Id.*

[482] *Id.*

[483] *Id.* at 94-95.

[484] *See id.* at 95.

[485] *Id.*

[486] *See id.*

illicit removal, and to enhance their economic and educational interests," the latter nations have enacted legislation governing the issuance of permits for excavation; declaration and disposition of funds; penalties for noncompliance; and confiscation.[487] Nevertheless, unilateral action has proven itself ineffective "to halt [the] illicit trade in cultural property in the face of flourishing international art markets."[488] In addition, tight controls often have a detrimental impact on archaeology.[489] "Foreign archaeologists frequently find it difficult to obtain permission to explore and excavate archaeological sites in the face of restrictive national policies, compounded by strained international reactions when art-importing nations do not cooperate fully with art exporting nations to stop illicit trade in art and historical objects."[490] When applied to marine antiquities, however, tight national controls also encourage "the expansion of national jurisdiction" by the art-source countries.

CONCLUSION

From the foregoing discussion, it is clear that there are no simple solutions to problems of illegality in the art market. On the national level, uniform legislation resembling the strict enforcement measures which have been proposed in New York appear to offer the best solution at the present time. Despite its status as one of the world's largest art markets, however, New York has not adopted this remedial legislation to the fullest extent possible. A similar inertia characterizes international regulation of the art market. Although it is intellectually possible to comprehend the inability of nations to reach an accord as to the protection and legitimate exchange of antiquities, the repercussions are far more serious than problems of consumer protection. The despoilation of archaeological sites around the world gives rise to the destruction of mankind's history and precipitates a reputation of apathy for which our century will be remembered by future generations.

Lee Ann Houseman

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[487] *See* H. MILLER, *supra* note 331, at 32.
[488] *Id.*
[489] *Id.*
[490] *Id.*