

A woman with dark hair, wearing a dark blazer and skirt, is seen from behind, looking at a large, ornate painting in a gallery. The painting is framed in gold and depicts a landscape with pink and white flowers. To the right, another painting is partially visible, showing a green landscape. The gallery has white walls and a wooden floor.

# RECOVERING

## **FAST FACTS:**

**Trade in stolen art is the fastest-growing crime in the United States and the third largest part of international criminal activity.**

**The civil law countries of Europe tend to protect subsequent, innocent purchasers.**

**Export laws must be enforced by the exporting country, not the importing country.**

# STOLEN ART



## AVOIDING THE PITFALLS

BY CHARLES A. PALMER

**T**he Barridoff Galleries of Portland, Maine listed an oil painting of gulls at Monhegan Island in their auction catalog of August, 2002. The catalog mentioned that the painting had a brass plate that said "Treasury Department Art Project." The United States Attorney intervened. The painting was withdrawn from the auction and the U.S. Attorney has sued for the return of the painting to the United States.<sup>1</sup>

The General Services Administration is searching for paintings with Treasury Department brass tags. Most of these paintings were produced during the 1930s and 1940s by the Works Progress Administration (WPA). The paintings were produced by artists working on hourly wages for the WPA. Most are owned by the federal government since Congress has never passed legislation authorizing their sale or disposition. More than 10,000 of these paintings are missing.

### TRADE IN STOLEN ART IS BIG BUSINESS

Trade in stolen art is the fastest-growing crime in the United States and the third largest part of international criminal activity. The Chinese believe that stolen art has become the largest illegal export from their country. It is estimated that thieves take 30,000 pieces of art per year in Italy, and 6,000 in France. Insurance companies pay between \$3 billion and \$5 billion per year on stolen art insurance claims. There are numerous reasons for the flourishing trade in stolen art.

Military conflict has always been a harbinger of activity in stolen art. The tragic plunder of art by the Nazis in World War II is well documented and is still being addressed by our courts. Recent fighting in Afghanistan where the museum in Kabul was looted, in Beirut where the museum has been shelled for more than 15 years, and of

course, the tragic looting of the museums in Iraq, promise a whole new influx of stolen art. The fall of Communism and the rise of organized crime in Russia and Eastern Europe will also supply more stolen art to international markets. But war is not the only cause of art theft.

Art theft is structurally different than the theft of other property. Valuable works of art are relatively small, easily hidden, and easily moved both within and out of a country. Many thefts of art are never reported to the police. Victims of art theft fear that if the theft is publicized, other thieves will try to capitalize on their lack of security. Many also believe that publicity about the theft will just drive the art further underground.

### INNOCENT PURCHASER V THEFT VICTIM-OWNER

According to Interpol, most art thieves break and enter private homes or, secondly, churches. Collectors and connoisseurs rarely perpetrate these crimes. More often, criminals steal art in order to sell it for money. Art theft victims will probably not find their property in the hands of a thief, but more likely, in the hands of a subsequent, innocent purchaser. When this happens, the courts are presented with a cruel dilemma. Should the property be awarded to the subsequent, innocent purchaser or the art theft victim? Both are innocent victims of criminal activity. The courts are split on how to deal with this issue.

### THE CIVIL LAW AND INNOCENT PURCHASERS

The civil law countries of Europe tend to protect subsequent, innocent purchasers. A bona fide purchaser, i.e., a person who purchases property for value and without notice that it is stolen property, will prevail in Switzerland, a major art trading country, five years from the date of the theft. In Japan, the waiting period is two years after purchase, in Luxembourg seven days, and in Italy there is no waiting period, the bona fide purchaser owns the property at the time of purchase.

The protection of bona fide purchasers in civil law countries is important in Michigan. Thieves will probably not choose to sell their stolen property in the community where it was stolen. One of the advantages of stealing art is that it can easily be transported. The victim of art theft in Michigan may very well have to sue for its recovery in another state or country. If art stolen in Michigan finds its way to Italy, a prospect that is becoming even more likely with the breakdown of border checks within the European Common Market, a subsequent bona fide purchaser will own it. Ironically, that art could be brought back to the United States by the bona fide purchaser or its successors and the United States courts may be obligated to recognize the title acquired by the law of the country where the property was located at the time of sale.<sup>2</sup>

### COMMON LAW AND THEFT VICTIMS

Common law countries are not as friendly to the claims of the subsequent, innocent purchaser. Under the common law, a thief

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does not acquire any title or ownership interest in stolen property. Since the thief has no title, the thief cannot convey title to another purchaser, even if that purchaser is an innocent purchaser for value. But subsequent purchasers have defenses when the owner sues for possession of stolen property.

All states have statutes of limitations limiting the period of time for bringing a cause of action to recover property. That period of time will vary from state to state. Michigan's statute of limitations for the recovery of personal property is six years.<sup>3</sup> But when does the statute of limitations begin to run, i.e., when does the cause of action accrue? There are two different answers.

### COMMON LAW—DISCOVERY RULE

Most courts in the United States have held that the statute of limitations begins to run when the owner knew or should have known the facts needed to recover the property. This depends upon a detailed, case-by-case analysis by the trial court. The case of *Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts, Inc*<sup>4</sup> dealt with rare mosaics of Christ and his disciples (very few likenesses of Christ and his disciples survived the iconoclasm) purchased by Peg Goldberg, an Indianapolis art dealer. The mosaics had been taken from the Cypriot Church of Kanakaria during the Turkish occupation of the island in the late 1970s. Goldberg paid \$1.08 million for the mosaics in one-hundred-dollar bills and brought them back to Indiana. But Cyprus wanted them back.

The government of Cyprus had been looking for the mosaics. They had contacted the United Nations, the press, museums, and leading scholars in the field. The court found that their efforts were sufficient to toll the statute of limitations since they had exercised reasonable diligence in searching for the stolen art. Their cause of action did not accrue until they discovered the identity of the possessors. Even though the mosaics had been stolen in the 1970s, the owner's cause of action to recover them did not accrue until late 1988 when they discovered who had them. Cyprus' lawsuit was timely. But there is another significant test of when a cause of action for return of stolen art accrues in a common law country.

### COMMON LAW—LACHES AND DEMAND, REFUSAL RULE

New York, a major center for the trade in art, is more protective of the owner's rights to recover stolen art. In 1964, the New York Appellate Division ruled in *Menzel v List*,<sup>5</sup> a suit to recover possession of a Chagall painting lost to the Nazis in 1940, that the New York three-year statute of limitations did not begin to run until the owners had demanded its return and been refused by the possessor. The New York Court of Appeals re-affirmed the demand-refusal rule in *Solomon R. Guggenheim Foundation v Lubell*<sup>6</sup> but ameliorated the harshness of that rule to the innocent purchaser by acknowledging that the court should also look at the defense of laches. In that

case the museum had failed to notify any law enforcement agency, museum, gallery, or art expert about the theft. The Guggenheim claimed that it had remained silent in order to avoid driving the art further underground. The court remanded the case to the trial court to determine whether the Guggenheim was guilty of laches, i.e., whether it had unreasonably delayed seeking the return of the painting and whether that delay had prejudiced the purchaser.

New York is in the minority in applying the demand and refusal rule to the accrual of a cause of action for replevin. Michigan case law seems to reject the demand-refusal rule.<sup>7</sup> But even New York ameliorates the harshness of this rule to the art purchaser by considering whether an unreasonable delay in seeking return of the property has caused prejudice to a subsequent purchaser.

## COMPUTER DATABASES AND ART THEFT

When the church in Cyprus lost its mosaics, it was required to contact a number of sources to provide notice that their property had been stolen. Today, there are a number of internet databases that provide information on stolen art. Probably the most prominent art loss database is the Art Loss Register (ALR).<sup>8</sup> The ALR is a for-profit corporation with offices in New York and London. It was formed with the support of Christie's, Sotheby's, and a number of art insurance brokers like Lloyd's of London. It is currently the world's largest independent database of stolen art and antiques. It contains information on nearly 100,000 pieces of stolen art and antiques. The important new presence of these computer databases has implications for every owner of valuable art.

## VIOLATION OF EXPORT LAWS

Export laws must be enforced by the exporting country, not the importing country. The United States will not disturb otherwise lawful possession just because the property has been illegally exported from another country.<sup>9</sup> But illegally exported art may cause other concerns.

In *Jeanneret v Vichy*<sup>10</sup> the Second Circuit Court of Appeals considered the legal ramifications of the sale of an Henri Matisse painting that allegedly had been illegally exported from Italy. Although it is clear that the United States government will not disturb possession of such a painting in this country, there are other practical problems. First, this is a painting that may be subject to seizure or other legal remedies if it is taken back to Italy. But more importantly, a vice-president of Sotheby's testified at the trial that the painting, which he appraised at \$750,000 if it had been legally exported, would have no value if it had been illegally exported since "no reputable auction house or dealer would be prepared to handle it."

The court considered whether the sale of such an illegally exported painting would violate the implied warranty of title. Although the federal court was reluctant to rule on such an important matter of state law, the issue of breach of the implied warranties in sale must be considered when any illegally exported art is sold. It is important for Michigan lawyers to note that Canada has legislation

prohibiting the import of illegally exported cultural property and providing for the seizure of such property.<sup>11</sup> But there is even more reason to be concerned about illegally exported art.

In *United States v McClain*<sup>12</sup> the defendants were indicted under the National Stolen Property Act for smuggling pre-Columbian artifacts out of Mexico for sale in the United States. The defendants argued that they could not be prosecuted for violating Mexico's export laws but the prosecution relied on a different theory. The government of Mexico had declared in 1972 that all pre-Columbian artifacts in the country belonged to the government. Although the court re-affirmed that the United States would not enforce Mexico's export laws, it held that if the defendants knew of the national laws vesting ownership in the country of origin then they could be convicted of an offense under the National Stolen Property Act. In *McClain*, the defendants made statements showing that they knew they were stealing when they exported the antiquities from Mexico.

## CONCLUSION

Art theft victims must report their loss as soon as possible. Whether the art is in a civil law country or a common law country; or whether the art is in a discovery rule state or a demand-refusal and laches state, the court will want to know whether the victim took steps to notify any potential, innocent purchasers.

The art purchaser must check to see whether the art is stolen. How much checking will depend upon the circumstances. The major auction houses usually check their art for sale with the computer databases, but many private sellers do not. A check of internet databases for stolen art is a minimum for most good faith purchasers. ♦



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## Footnotes

1. *Challenging the GSA on WPA Art* by Samuel Pennington, Maine Antique Digest, October 2001.
2. Restatement (Second) of Conflict of Laws, section 247 (1971).
3. MCLA 600.5813; MSA 27A.5813.
4. 917 F2d 278 (CA 7, 1990), reh'g denied.
5. 253 NYS2d 43 (App Div 1964).
6. 550 NYS2d 618 (App Div 1990), affirmed, 569 NE2d 426 (NY 1991).
7. See *Goodwill Industries of Detroit v Whisitt*, 367 Mich 569, 116 NW2d 783 (1962) and *Trail Clinic, PC v Bloch*, 114 Mich App 700, 319 NW2d 638 (1982).
8. See [www.artloss.com](http://www.artloss.com).
9. See *United States v McClain*, 545 F2d 988 (CA 5, 1977), cert denied, 444 US 918 (1979).
10. 693 F2d 259 (CA 2, 1982).
11. Cultural Property Export and Import Act, R.S.C. chs. 46-54 (1975) (Can.).
12. *Supra* n 7.