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NOTE

INTERNATIONAL ART THEFT DISPUTES: HARMONIZING COMMON LAW PRINCIPLES WITH ARTICLE 7(b) OF THE UNESCO CONVENTION

*Of all facts concerning art, this is the one most necessary to be known, that, while manufacture is the work of hands only, art is the work of the whole spirit of man.*¹

INTRODUCTION

The demand for cultural property² by investment-driven

1. JOHN RUSKIN, *The Queen of the Air*, in 19 THE WORKS OF JOHN RUSKIN 391 (complete ed. 1905).

2. The United Nations Educational, Scientific and Cultural Organization ("UNESCO") has broadly defined the term cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science." UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 823 U.N.T.S. 231, 10 I.L.M. 289 [hereinafter UNESCO Convention or Convention], *codified in part in* Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (1988) [hereinafter Implementation Act or CPIA]. Article 1 of the UNESCO Convention lists categories of cultural property. *Id.* These categories include

- (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 statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;

societies has engendered an increase in international art theft.³ As a result, disputes often arise between the owner and the possessor of cultural property.⁴ Courts in the United States have become an often-used forum to resolve international art theft disputes.⁵ The United Nations Educational Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "UNESCO Convention" or the "Convention") provides a framework for resolving disputes over cultural property.⁶ U.S. courts, however, do not ap-

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- (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.

UNESCO Convention, 823 U.N.T.S. at 234-36, 10 I.L.M. at 289-90.

Cultural property embodies a nation's heritage, reflecting its history, religion, anthropology, scientific knowledge, artistic expression, and other aesthetic values in a tangible form. *Id.* art. 1, 823 U.N.T.S. at 236-37, 10 I.L.M. at 291. An individual or the collective genius of nationals may create cultural property providing a symbol for contemporary societies to relate to their cultural heritage. *Id.* art. 4, 823 U.N.T.S. at 234-36, 10 I.L.M. at 289-90.

3. See James A.R. Nafziger, *An Anthro-Apology for Managing the International Flow of Cultural Property*, 4 HOUS. J. INT'L L. 189 (1982) (discussing inadequacy of import-export controls over cultural property); Karen S. Jore, Note, *The Illicit Movement of Art and Artifact*, 13 BROOK. J. INT'L L. 55, 55-56 (1987) (discussing pillaging of artifacts from archaeological sites); see also Judith Hennessee, *Great Art*, CONNOISSEUR MAGAZINE, July 1990, at 42 (discussing 1989 art theft of Gardner Museum in Boston with estimated loss at over US\$200 million).

4. See, e.g., *O'Keeffe v. Snyder*, 416 A.2d 862, 872 (N.J. 1980). The court noted that disputes concerning title are a serious problem and that the explosion in art thefts is a worldwide phenomenon reaching epidemic proportions. *Id.* (relying on affidavit of International Foundation for Art Research); see also Constance Lowenthal, *Purloined Porcelain*, WALL ST. J., Sept. 30, 1991, at A10. See generally, RIDHA FRAOUA, *LE TRAFIC ILLICITE DES BIENS CULTURELS ET LEUR RESTITUTION* (1985); LYNDEL V. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* (1989).

5. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990); John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 340 n.7 (1989) (describing United States as nation to which cultural property flows); see also William Honan, *Avarice and Audacity in Texas*, N.Y. TIMES, Jan. 11, 1991, at A28 (discussing recent suit by German government to recover art works taken by U.S. soldier during World War II).

6. UNESCO Convention, *supra* note 2, 823 U.N.T.S. 231, 10 I.L.M. 289; see John B. Gordon, Comment, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L.J. 537 (1971).

ply the principles of the UNESCO Convention.⁷ Rather, U.S. courts apply both common law and equitable principles governing personal property to determine the rightful owner of cultural property.⁸ The application of these principles has resulted in conflicting judicial standards for factually complex art theft cases.⁹

This Note argues that U.S. courts should adopt a uniform approach in assessing litigants' conduct to adjudicate art theft disputes. Part I discusses the history of the UNESCO Convention and the Convention on Cultural Property Implementation Act (the "CPIA" or "Implementation Act") and sets forth article 7(b) of the Convention which bans the import of stolen cultural property. Part II highlights the uncertainty in U.S. state and federal courts' application of common law principles to controversies concerning title to stolen art. Part III advocates the application of uniform standards in the adjudication of art theft disputes and the reconciliation of the conflict between article 7(b)(ii) of the UNESCO Convention and U.S. jurisprudence. This Note concludes that international art theft litigants must be subject to evenhanded judicial treatment that embraces the spirit of the UNESCO Convention, while applying the letter of the Implementation Act to facilitate the return of cultural property to its country of origin.

7. See *Autocephalous*, 917 F.2d at 297 (Cudahy, J., concurring) (noting that Implementation Act was not applicable to art theft case before court because cause of action arose prior to effective date of act); see *infra* notes 28-31 and accompanying text (discussing reasons for Convention's inapplicability).

8. See *Autocephalous*, 917 F.2d 278; *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988); *infra* notes 58-186 and accompanying text (discussing U.S. courts' application of common law and equitable principles in art theft disputes); see also Barbara B. Rosecrance, Note, *Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 CORNELL INT'L L.J. 311, 321 (1986). The bulk of litigation remains in the form of a civil action for replevin in which courts treat cultural property as unique chattel. *Id.* However, criminal prosecutions also have been instituted under the provisions of the National Stolen Property Act. *Id.*; see 18 U.S.C. §§ 2314-2315 (1988). See generally M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. & COM. 281 (1983).

9. See *infra* notes 72-186 and accompanying text (discussing conflicting judicial standards).

I. *THE UNESCO CONVENTION*A. *Background and Legislative History of the UNESCO Convention and Implementation Act*

The UNESCO Convention resulted from a deliberative political process influenced by the competing interests of source-nations and market-nations.¹⁰ The interests of "art rich" source nations centers on preserving their cultural heritage by retaining art works.¹¹ These interests compete with those of market nations in which investors and cultural institutions acquire art works and encourage the art trade.¹²

The UNESCO Convention recognizes the moral obligation of State Parties to respect each other's cultural heritage.¹³ It seeks to eliminate barriers to understanding between nations caused by one country's exploitation of another's cultural property.¹⁴ It also strives to foster international cooperation to prevent the depletion of a signatory nation's cultural heritage caused by the illicit transfer of ownership of cultural property.¹⁵

10. See Merryman, *supra* note 5, at 340. Cultural property originates from source-nations, such as Mexico, Peru, Indonesia, Germany, Italy, and China. *Id.* Market-nations are those to which cultural property tends to gravitate, such as Switzerland, the United States, and Japan. See *id.*; see also John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 479 n.5 (1988). See generally Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466 (1988).

11. See Merryman, *supra* note 10, at 478-79 (discussing cultural property "retention schemes" as form of export control found mostly in nations rich in cultural artifacts).

12. *Id.* at 500. Cultural property is valuable to market nations because it can exact a high price on the international market as an economic investment. *Id.* It can also enhance the local economy by providing a tourist attraction. See *id.*

13. UNESCO Convention, *supra* note 2, pmbl., 823 U.N.T.S. at 232, 10 I.L.M. at 289. The preamble of the UNESCO Convention states that "[i]t is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations." *Id.*

14. *Id.*; see Gordon, *supra* note 6, at 540-41 (discussing tensions between nations caused by international illicit art trade).

15. UNESCO Convention, *supra* note 2, art. 2(1), 823 U.N.T.S. at 236, 10 I.L.M. at 290. Article 2(1) of the UNESCO Convention provides that

[t]he States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each countries [sic] cultural property against all the dangers resulting therefrom.

The UNESCO Convention provides numerous mechanisms to control the illicit transfer of cultural property. The Convention provides for the development of national services to assist in the protection of cultural property and for the use of export certificates.¹⁶ In addition, the Convention requires signatory nations to maintain a cultural property registration system and to establish penalties for violations of import or export prohibitions.¹⁷ It mandates the recovery and return of illegally exported or stolen items and requires the development of measures to prohibit art institutions from acquiring illegally exported artifacts.¹⁸

Furthermore, the Convention creates a cause of action to recover illegally acquired cultural property.¹⁹ This provision effectuates the Convention's premise that cultural property is inalienable and that signatory nations therefore have an indefeasible right to its return.²⁰ Another provision functions as an emergency measure, allowing a complete import prohibition on property that is subject to widespread pillaging.²¹

In 1972, the United States became a party to the UNESCO Convention.²² The U.S. Congress recognized that the United States was a principal market for stolen or illegally exported archaeological artifacts and art objects.²³ The flow of unauthorized artifacts strained foreign relations with the countries

Id.

16. *Id.* arts. 5-6, 823 U.N.T.S. at 238-40, 10 I.L.M. at 290-91.

17. *Id.* arts. 8, 10, 823 U.N.T.S. at 242, 10 I.L.M. at 291.

18. *Id.* art. 7, 823 U.N.T.S. at 240, 10 I.L.M. at 291.

19. *Id.* art. 13, 823 U.N.T.S. at 244, 10 I.L.M. at 291-92; *see infra* note 237 (providing text of article 13).

20. UNESCO Convention, *supra* note 2, art. 13, 823 U.N.T.S. at 244, 10 I.L.M. at 291-92.

21. *Id.* art. 9, 823 U.N.T.S. at 242, 10 I.L.M. at 291. Article 9 is one of two substantive provisions in the Convention and functions to prevent the depletion of archaeological or ethnological materials. *Id.*; *see* Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 339-40 (1982).

22. *See* S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 7 (1972). For the legislative history of U.S. accession to the Convention, *see* S. REP. NO. 564, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 4078, 4098-111. The Senate's advice and consent to ratification was unanimous. *Id.*

23. *See* S. REP. NO. 564, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 4078, 4098-111. The U.S. Secretary of State urged the U.S. Congress to implement the Convention. The U.S. Congress stressed that the United States should assist in returning cultural property based on principle, good foreign relations, and concern for the preservation of humanity's cultural heritage. *Id.*

of origin, which were often allies.²⁴ The United States ratified the Convention in the belief that international cooperation was necessary to mitigate the adverse effect on foreign relations caused by the illicit trade in cultural property.²⁵

In 1983, Congress enacted the Implementation Act, codifying the UNESCO Convention.²⁶ The primary objectives of the CPIA are to prohibit the importation of stolen cultural property from the institutions of other signatory nations, to assist in the recovery of cultural property, to exercise import controls over cultural property, and to facilitate legal actions to recover cultural property upon request by a State Party.²⁷

The CPIA is inapplicable under certain circumstances. First, the Implementation Act applies only to stolen cultural property that is accessioned²⁸ to a public institution.²⁹ Second, it applies only to cultural property stolen after the statute's ef-

24. *See id.* Those governments that were victimized by the outflow of cultural property to foreign lands protested and requested repatriation of the property upon its subsequent appearance in the United States. *Id.* The U.S. Secretary of State emphasized that clandestine excavations frequently destroyed the scientific value of objects, and noted that architectural complexes of ancient civilizations were mutilated, stone sculptures removed, and churches robbed. *See* S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 7 (1972); *see also* Final Report on the UNESCO Convention, U.N. Doc. SHC/MD/5 Annex 1, at 20 (1970) (discussing countries' concern over illegal excavations and destruction of cultural property).

25. *See* S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 7 (1972).

26. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, Title III, 96 Stat. 2351 (1983) (codified at 19 U.S.C. §§ 2601-2613 (1988)); *see supra* note 2. For the legislative history of the Implementation Act, *see* S. REP. NO. 564, 97th Cong., 2d Sess. *reprinted in* 1982 U.S.C.C.A.N. 4078, 4098-111; *see also* JOSEPH M. SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 1108-09 (3d ed. 1988) (discussing necessity of implementing legislation for internal law to conform to non-self-executing treaty in order to bind U.S. courts).

27. *See* S. EXEC. REP. NO. 29, 97th Cong., 2d Sess. 4 (1972). The CPIA also provides a mechanism by which, at the request of a foreign country, the U.S. Customs Service can enforce, to a limited degree, a foreign nation's export laws in this country. However, to do so a bilateral or multilateral agreement must exist between the United States and that country. *See* Moore, *supra* note 10, at 472-73 n.36.

28. *See* Bancorp Leasing and Fin. Corp. v. Stadel Pump & Constr., Inc., 739 P.2d 548, 551 (Ore. 1987) (stating that accession occurs when goods of two different owners are jointly incorporated, so that title to resulting product goes to owner of principal goods); *see also* LAW & COMMERCIAL DICTIONARY IN FIVE LANGUAGES 14 (1985) (defining accession as principle derived from civil law by which owner of property becomes entitled to all that such property produces and all that owner adds or unites to it as result of labor or skill). *See generally* Deaccessioning, Disposition, and the Pledge of Museum Collections: The Legal Parameters, in LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 109 (1991) (discussing "deaccessioning" as involving process and policy for removal of art object from museum's collection for later sale or exchange).

fective date, January 12, 1983, or after the date of the Convention's entry into force for the requesting State Party, whichever is later.³⁰ These conditions may render the CPIA inapplicable in many judicial proceedings to recover stolen cultural property, thus the need to modify state common law tort principles and adopt the uniform approach proposed herein.³¹

B. *Article 7 of the UNESCO Convention*

Article 7 is one of two major substantive provisions of the UNESCO Convention.³² It requires the governments of signa-

29. 19 U.S.C. § 2607 (1988) (prohibiting importation of documented cultural property).

30. *Id.* § 2610 (providing effective date).

31. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 297 (7th Cir. 1990) (Cudahy, J., concurring) (noting CPIA's inapplicability due to effective date); see also Graham J. Dickson, Note, *The Need for a National Registry of Cultural Objects*, 11 *FORDHAM INT'L L.J.* 839, 848-49 & n.72 (1988) (discussing CPIA's inapplicability to dispute concerning Lydian artifacts); *infra* notes 187-265 and accompanying text (discussing need for uniform standards).

32. UNESCO Convention, *supra* note 2, 823 U.N.T.S. at 240, 10 *I.L.M.* at 291. Article 7 directs that

[t]he State parties to this Convention undertake:

(a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States;

(b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;

(b)(ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

Id.; codified in 19 U.S.C. §§ 2607, 2609 (1988); see *supra* note 21 (discussing other substantive provision in article 9).

tory nations to thwart the illicit trade in cultural property by proscribing the transfer of stolen or unregistered art.³³ Subsection (a) of article 7 prohibits a signatory nation from importing an artifact that does not have an export certificate authorizing its transfer outside another signatory nation's territory.³⁴ Article 7(b) bans the importation of cultural property "stolen" from a museum or a religious or secular public monument.³⁵

1. Subsection (a)

Subsection (a) of article 7 provides that parties to the UNESCO Convention agree to undertake necessary measures to prevent the acquisition of illegally exported cultural property from another signatory nation.³⁶ The term "necessary measures" is broad and discretionary.³⁷ The Convention may require, by implication, that a State Party initiate a judicial action or administrative procedures for the acquisition of art treasures, cooperate by providing information as to the whereabouts of illicit cultural property, and assist "wherever possible" in searching for the location and recovery of illicit cultural property.³⁸

Article 7(a) applies only to government-controlled museums and similar institutions.³⁹ In the United States, the UNESCO Convention only covers the acquisition policies of federally-controlled organizations.⁴⁰ The vast majority of cul-

33. See S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 5 (1972). Congress understood that article 7 does "not affect existing remedies available in state or federal courts." *Id.*

Unregistered artifacts are termed "illegally exported" in article 7(a) and refer only to cultural property exported in violation of article 6. *Id.* Pursuant to article 6, illegally exported objects are those that lack an export certificate. UNESCO Convention, *supra* note 2, 823 U.N.T.S. at 240, 10 I.L.M. at 290-91, *codified in* 19 U.S.C. § 2606 (1988).

34. UNESCO Convention, *supra* note 2, 823 U.N.T.S. at 240, 10 I.L.M. at 291.

35. *Id.*

36. *Id.*

37. S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 3-4 (1972). The U.S. Senate understood that the provision requiring implementation of "necessary measures" would be subject to the signatory nation's laws. S. REP. NO. 564, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 4078, 4098-4100.

38. See S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 3 (1972).

39. UNESCO Convention, *supra* note 2, 823 U.N.T.S. at 240, 10 I.L.M. at 291; see Bator, *supra* note 21, at 380.

40. S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 4 (1972). The Senate stated that

tural property in the United States, however, resides in state or private collections.⁴¹ Consequently, the provision's impact is greatly reduced in the United States because it only applies to a minority of the entities that maintain art works.⁴²

2. Subsection (b)

Article 7(b)(i) requires signatory nations to prohibit the importation of cultural property stolen from a museum, religious, or secular institution.⁴³ "Cultural property" as defined in article 1 and protected by article 7(b)(i) is limited to objects that are documented as belonging to the collections of public institutions and that are therefore considered national treasures.⁴⁴ Public institutions register artifacts by documenting them in their inventory and providing a registration certificate upon the transfer of an object.⁴⁵ These documentation procedures establish the provenance of the artifact and vest clear title to the property in the State Party.⁴⁶ As a result, the artifact's owner is undisputed, thereby facilitating recovery of lost artifacts.⁴⁷ Consequently, the enforcement of article 7(b)(i) depends on the establishment of procedures to document the provenance⁴⁸ of artifacts.⁴⁹

Article 7(b)(ii) requires that upon the request of a signatory nation a state party must take appropriate steps to recover

"[t]he United States understands article 7(a) to apply to institutions whose acquisition policy is subject to national control under existing domestic legislation and not to require the enactment of new legislation to establish national control over other institutions." *Id.* The provision only affects federally-controlled institutions such as the National Gallery of Art and the Smithsonian Institution. *See* Bator, *supra* note 21, at 380.

41. *See* Bator, *supra* note 21, at 380.

42. *See id.* (discussing affected entities).

43. UNESCO Convention, *supra* note 2, art. 7(b)(i), 823 U.N.T.S. at 240, 10 I.L.M. at 291.

44. *Id.* art. 7(b)(i), 823 U.N.T.S. at 240, 10 I.L.M. at 290; *see supra* note 32 (containing text of article 7).

45. *See* Bator, *supra* note 21, at 329 (discussing export documentation).

46. *Id.* (discussing vesting of title).

47. *Id.*

48. *See* Porter v. Wertz, 416 N.Y.S.2d 254, 257 (App. Div. 1979) (defining provenance as history of ownership or right to possess or sell art object), *aff'd*, 421 N.E. 2d 500 (N.Y. 1981); *see also* Michael Kimmelman, *Absolutely Real? Absolutely Fake?*, N.Y. TIMES, Aug. 4, 1991, § 2 (Arts & Leisure), at 1, 25 (discussing recent controversy concerning authenticity of ancient Greek statue because no documented history or provenance exists).

49. *See* Bator, *supra* note 21, at 378 (discussing enforcement of article 7).

and return stolen cultural property that is located within its territorial limits.⁵⁰ This subsection is particularly important because it provides substantive remedies for the complaining state party as well as for the state party or individual in possession of the disputed cultural property.⁵¹ It states that, to effect the recovery and return of the cultural property, the requesting nation must pay just compensation to an innocent purchaser or to a person who has valid title to the property.⁵²

Article 7 both prohibits illicit trade in art and provides equitable remedies to facilitate the return of national treasures to signatory nations, thereby aiding countries in preserving their cultural heritage.⁵³ This article stresses the Convention's intent to thwart the illicit transfer of cultural property.⁵⁴ The Convention, a comprehensive multinational agreement for the protection of cultural property in peacetime, provides for the "interchange of cultural property" among signatory nations.⁵⁵

The Convention's principles are at odds, however, with common law principles.⁵⁶ Moreover, U.S. jurisprudence con-

50. UNESCO Convention, *supra* note 2, art. 7(b), 823 U.N.T.S. at 240, 10 I.L.M. at 290.

51. *Id.*, art. 7(b)(ii), 823 U.N.T.S. at 240, 10 I.L.M. at 290 (requiring signatory nations "to take appropriate steps to recover and return any such cultural property").

52. *Id.*; *see also* 19 U.S.C. § 2609 (1988).

53. UNESCO Convention, *supra* note 2, arts. 7, 9, 823 U.N.T.S. at 240-42, 10 I.L.M. at 290-91 (requiring just compensation to innocent purchaser for return of property and providing for emergency measures to protect property threatened with pillaging).

54. *Id.* arts. 3, 7, 823 U.N.T.S. at 236, 240, 10 I.L.M. at 290, 291 (declaring that import, export, or transfer of ownership contrary to Convention's principles is "illicit" and requiring measures to prevent national institutions' acquisition of illegally exported artifacts).

55. UNESCO Convention, *supra* note 2, pmb., 823 U.N.T.S. at 232, 10 I.L.M. at 289. The UNESCO Convention's sixty-four signatory nations include Canada, the United States, Italy, Cyprus, Egypt, Mexico, Peru, the Soviet Union, and Zaire. U.S. DEP'T OF STATE, TREATIES IN FORCE 299-300 (Jan. 1, 1990). Following World War II, nations recognizing the need for an agreement to protect cultural property during conditions of war met at The Hague and prepared an agreement that culminated in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, 249 U.N.T.S. 240 (the "Hague Convention").

56. *See infra* notes 58-186 and accompanying text (discussing conflict); *see also* *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 291 (7th Cir. 1990) (stating principle that even good faith purchaser for value acquiring stolen item receives no title); *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2nd Cir. 1982) (same); *Heckle v. Lurvey*, 101 Mass. 344, 345 (Sup. Jud. Ct. 1869) (same); *O'Keeffe v. Snyder*, 416 A.2d 862, 867

cerning personal property does not distinguish between accessioned artifacts and privately owned art works to determine whether common law, equitable principles, or the CPIA should apply in a particular case.⁵⁷

II. COMMON LAW PRINCIPLES IN ART THEFT DISPUTES

U.S. state and federal courts apply state common law principles of conversion and equitable principles to international disputes involving the return of cultural property.⁵⁸ Under common law, the tort of conversion only applies to serious interferences with the chattel of the plaintiff sufficient to justify a forced judicial sale to the defendant.⁵⁹ In conversion, possession of the chattel has been transferred to a wrongdoer, leaving the true owner with the right to recover the chattel itself in a replevin action, or to recover damages.⁶⁰

Due to the unique and irreplaceable nature of cultural

(N.J. 1980) (same); *Basset v. Spofford*, 45 N.Y. 387, 391 (1871) (same); *Menzel v. List*, 49 Misc. 2d 300, 315 (N.Y. Sup. Ct.) (same), *modified as to damages*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd as to modification*, 246 N.E.2d 742 (N.Y. 1969). See generally DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.7, at 281-83 & n.1 (1973).

57. U.S. state and federal courts apply common law principles to all disputes involving the recovery of stolen art works in a replevin action, regardless of whether the item is cultural property accessioned to a public institution of a UNESCO signatory nation. See *infra* notes 58-186 (discussing common law).

58. See *Autocephalous*, 917 F.2d at 286 n.10 (applying Indiana statute that codified common law tort principle); *DeWeerth v. Baldinger*, 836 F.2d 103, 109 (2d Cir. 1987) (same), *cert. denied*, 486 U.S. 1056 (1988); *Mucha v. King*, 792 F.2d 602, 613 (7th Cir. 1986) (applying tort law conversion principles); *Elicofon*, 678 F.2d at 1160 (upholding common law principle that even good faith purchaser does not acquire title to stolen art); *Republic of Turkey v. Metropolitan Museum*, 762 F. Supp. 44, 47 (S.D.N.Y. 1990) (applying equitable doctrine of laches); *Menzel*, 49 Misc. 2d at 315 (upholding principle that thief does not pass title even to good faith purchaser).

59. See WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 15, at 90 (5th ed. 1984) (“[T]he tort of conversion has been confined to those major interferences with the chattel, or with the plaintiff’s rights in it, which are so serious, and so important, as to justify the forced judicial sale to the defendant which is the distinguishing feature of the action.”).

60. See J.B. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313 (1890) (formulating essence of tort as “one had the property, the other only the right of property”); see also PROSSER & KEETON, *supra* note 59, § 15, at 90. U.S. state and federal courts consider several factors in determining whether a defendant has converted chattel and whether resulting damages are owed to the plaintiff. *Id.* First, courts examine the extent and duration of the defendant’s exercise and control over the chattel. *Id.* Second, they assess the defendant’s intent to assert a right which is in fact inconsistent with the plaintiff’s right of control. *Id.* Finally, courts consider a defendant’s good faith or bad faith. *Id.*

property, the wrongfully dispossessed plaintiff generally seeks return of the chattel.⁶¹ The plaintiff thus brings an action in replevin to recover the cultural property rather than an action at law that allows recovery of the chattel's value as damages.⁶²

Courts in the United States often consider several crucial procedural and substantive issues in a replevin action for the recovery of art works. First, courts scrutinize the litigants' duty of diligence. Second, courts assess the art purchaser's good faith.⁶³ Third, courts apply the doctrine of fraudulent concealment.⁶⁴

A. Plaintiff's Duty of Diligence

Diligence is an important element of an action to recover stolen art.⁶⁵ The term "diligence" is the opposite of negligence. It implies varying degrees of attentive and persistent attempts on the part of the plaintiff to recover the art work.⁶⁶ Lack of diligence may trigger the statute of limitations and affect the accrual of the cause of action.⁶⁷ The issue of diligence may also affect the defendant's equitable defense of laches.⁶⁸ In addition, some courts impose a duty of diligence on the de-

61. *See, e.g., In re Marriage of Allen*, 724 P.2d 651, 656 (Colo. 1986); DOBBS, *supra* note 56, § 5.13, at 399-400 (1973) (discussing principle that equitable relief is granted when remedy at law, money damages, is inadequate).

62. *See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 290 (7th Cir. 1990) (applying Indiana statute that codifies common law). Replevin is defined as "an action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels." BLACK'S LAW DICTIONARY 1299 (6th ed. 1990) (citation omitted).

63. *See infra* notes 141-65 (discussing duty to investigate in good faith).

64. *See infra* notes 166-81 (discussing doctrine of fraudulent concealment).

65. *See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1387 (S.D. Ind. 1989) (discussing that determination of plaintiff's diligence is central to both discovery rule and fraudulent concealment), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

66. *See* BLACK'S LAW DICTIONARY 457 (6th ed. 1990) (defining diligence).

67. *See O'Keefe v. Snyder*, 416 A.2d 862, 865 (N.J. 1980) (determining that plaintiff's lack of due diligence affected accrual of action); *see also DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987) (holding that statute of limitations was not tolled due to plaintiff's lack of diligence), *cert. denied*, 486 U.S. 1056 (1988).

68. *See Republic of Turkey v. Metropolitan Museum*, 762 F. Supp. 44 (S.D.N.Y. 1990); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991); BLACK'S LAW DICTIONARY 875 (6th ed. 1990) (defining laches as neglecting to assert a claim that with lapse in time causes prejudice to adverse party).

defendant to investigate the art work's title.⁶⁹

Despite the importance of diligence, U.S. state and federal courts do not distinguish between an individual and an institutional plaintiff's ability to search for stolen art works.⁷⁰ Moreover, diligence requirements vary among the different states regardless of the plaintiff's status as an individual or an institution, thereby creating inconsistencies in U.S. jurisprudence.⁷¹

1. Institutional Plaintiff

U.S. state and federal courts consider varying factors to determine whether the plaintiff's efforts in searching for stolen art work fulfill the duty of diligence. In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*,⁷² the U.S. Court of Appeals for the Seventh Circuit defined due diligence as a "substantial and meaningful" investigation undertaken from the time the plaintiff first became aware of the art works' disappearance.⁷³ The Seventh Circuit held that "a cause of action [in replevin] accrues when the plaintiff ascertains, or by due diligence could ascertain, actionable damages."⁷⁴

In *Autocephalous*, four early Christian Byzantine mosaics were removed from the Kanakaria Church in war-torn Cyprus, without church or state authorization.⁷⁵ The defendant, an Indiana art dealer, purchased the four mosaics while on business in Amsterdam.⁷⁶ Subsequently, the Kanakaria Church brought a replevin action in Indiana to recover the artifacts and the dis-

69. *Lubell*, 569 N.E.2d 426; *Porter v. Wertz*, 416 N.Y.S.2d 254 (App. Div. 1979), *aff'd*, 421 N.E.2d 500 (N.Y. 1981).

70. Compare *Lubell*, 569 N.E.2d 426 (institutional plaintiff) with *O'Keeffe*, 416 A.2d 862 (individual plaintiff).

71. Compare *Lubell*, 569 N.E.2d 426 (not requiring diligence of institutional plaintiff) with *O'Keeffe*, 416 A.2d 862 (requiring diligence of individual plaintiff).

72. 917 F.2d 278 (7th Cir. 1990).

73. *Id.* at 290.

74. *Id.* at 288.

75. *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1375 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990). The court determined that the mosaics were stolen sometime between August 1976 and October 1979. *Id.* at 1379.

76. *Id.* at 1381. Plaintiff Goldberg purchased the four mosaics for US\$1.08 million. *Id.* at 1401. Upon her return to the United States, plaintiff Goldberg offered to sell them to the Getty Museum for US\$20 million. *Id.* A representative of the museum began an investigation that eventually led to the Cypriot Embassy's discovery of the mosaics' whereabouts. *Id.* at 1384-85.

trict court ordered replevin.⁷⁷

The Court of Appeals for the Seventh Circuit affirmed the district court's replevin order.⁷⁸ The court noted that the efforts initiated by the plaintiff included contacting UNESCO and prominent art scholars, sending press releases to museums, and notifying many personal contacts in the art world.⁷⁹ The court found the action timely and concluded that the plaintiff had fulfilled its duty of due diligence in searching for the mosaics.⁸⁰

Similarly, in *Kunstsammlungen Zu Weimar v. Elicofon*,⁸¹ the plaintiff, a government-owned museum located in Germany, sought the return of two Dürer paintings stolen during World War II.⁸² The District Court for the Southern District of New York noted that the museum director had promptly informed several German art museums and military agencies of the circumstances surrounding the theft.⁸³ The director had also contacted U.S. art scholars as well as the Allied and Soviet armies administering Germany after the war.⁸⁴ Applying New York law, the district court ordered return of the paintings. The U.S. Court of Appeals for the Second Circuit, concluding that the plaintiff had fulfilled its duty of diligence, affirmed the judgment of the district court.⁸⁵

In contrast, the New York Court of Appeals, in *Solomon R. Guggenheim Foundation v. Lubell*,⁸⁶ did not impose a due dili-

77. *Id.* at 1376.

78. *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 279 (7th Cir. 1990).

79. *Id.* at 281. The court reiterated the district court's findings that plaintiff's efforts to recover the mosaics were organized and systematic. *Id.* The plaintiff disseminated information as part of an over-all strategy to reach experts and scholars likely to be involved in "any ultimate sale of the mosaics." *Id.*

80. *Id.* at 279.

81. 678 F.2d 1150 (2d Cir. 1982).

82. *Id.* at 1152-53.

83. *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 850-52 (S.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

84. *Id.* Germany administered a Central Collecting Points program ("CCP"), in which the plaintiff participated, which catalogued and stored art works until the owners claimed them. *Id.* at 851-52. In addition, the plaintiffs contacted the U.S. Department of State that undertook efforts to locate the stolen art and publicized their loss in listings available to museums and galleries. *Id.*

85. *Elicofon*, 678 F.2d at 1165-66 (2d Cir. 1982), *aff'g*, 536 F. Supp. 829, 858-59 (S.D.N.Y. 1981).

86. 569 N.E.2d 426 (N.Y. 1991).

gence requirement on the plaintiff.⁸⁷ In *Lubell*, the plaintiff museum found a Chagall gouache missing from its premises during the mid-1960s.⁸⁸ The museum did not take steps to locate the gouache, such as contacting law enforcement agencies or informing other museums, galleries, and art organizations of the theft.⁸⁹ In 1985, the plaintiff learned that defendant Lubell had purchased the gouache from an art dealer in 1967.⁹⁰ The museum demanded return of the work, defendant Lubell refused, and the Guggenheim Museum initiated a replevin action.⁹¹

The New York Court of Appeals recognized the difficulty of crafting a reasonable diligence requirement that could include all variables in art theft cases.⁹² Moreover, it believed that placing the burden of locating art work on the true owner would encourage illicit trafficking in stolen art.⁹³ Essentially, the court preserved a plaintiff's right to pursue a replevin action by declining to articulate arbitrary rules of conduct to constitute due diligence.⁹⁴

87. *Id.* at 431. In *Lubell*, the New York Court of Appeals distinguished between the accrual of an action when the owner seeks recovery from a thief and accrual of an action brought against a good faith purchaser. *Id.* at 429-30. The *Lubell* court articulated the New York rule that in a replevin action against a thief, the action accrues at the time of theft. *Id.* In contrast, in a replevin action against a good faith purchaser, the accrual of the action is deferred until the owner demands the return of the property and the defendant refuses its return. *Id.* at 429. The court noted that under New York law, demand is a substantive element of the cause of action and that a good faith purchaser commits no wrong until he has notice of the true owner's claim, and thereby is given an opportunity to return the chattel. *Id.*

88. *Id.* at 427. *Webster's New Universal Dictionary* defines a gouache as a way of painting with opaque colors ground in water and mixed with a preparation of gum. WEBSTER'S NEW UNIVERSAL DICTIONARY 789 (unabr. 2d ed. 1979).

89. *Lubell*, 569 N.E.2d at 427 (N.Y. 1991).

90. *Id.*

91. *Id.* at 428. The New York Supreme Court had granted defendant Lubell's cross-motion for summary judgment stating that the statute of limitations barred the action because the museum used only minimal efforts to locate the stolen art. *Id.* at 428. On appeal, the New York Appellate Division modified the judgment and held that the trial court had erred. *Id.* at 429. The New York Court of Appeals affirmed the Appellate Division's opinion because several issues of material fact existed and therefore were inconclusive as a matter of law. *Id.* at 431.

92. *Id.*

93. *Id.*

94. *Id.* at 429-31.

2. Individual Plaintiff

Some U.S. courts hold an individual plaintiff to the same standard of diligence required of an institutional plaintiff. The U.S. Court of Appeals for the Second Circuit, in *DeWeerth v. Baldinger*,⁹⁵ formulated a standard for a plaintiff's diligence similar to the institutional standard but applied it to an individual's search for stolen art.⁹⁶ In the fall of 1945, following the departure of U.S. troops from southern Germany, plaintiff DeWeerth discovered that her Monet painting had disappeared.⁹⁷ Subsequently, the plaintiff began an investigation by filing a report with the Allied military government in Germany and the West German bureau of investigations, but her efforts to locate the Monet from 1945 through 1957 were fruitless.⁹⁸ In 1981, plaintiff DeWeerth discovered that the painting was located in New York City and commenced a replevin action in 1983.⁹⁹

The Second Circuit concluded that the plaintiff was not duly diligent in searching for the art work.¹⁰⁰ The court noted

95. 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988).

96. *Id.* at 104.

97. *Id.* at 105.

98. *Id.*

99. *DeWeerth v. Baldinger*, 658 F. Supp. 688, 693-94 (S.D.N.Y.), *rev'd*, 836 F.2d 103, 105 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988). A catalogue of Monet's works, located in a German museum, identified the painting and indicated that a New York art dealer sold the Monet in 1957 to defendant Baldinger. *DeWeerth*, 836 F.2d at 105. Defendant Baldinger, a New York resident, joined the art dealer as a third party defendant. *Id.* at 105-06. The court, however, severed the third party action under Federal Rule of Civil Procedure 42(b). *Id.* at 106 n.2.

100. *DeWeerth v. Baldinger*, 836 F.2d 103, 111-12 (2d Cir. 1987) (referring to plaintiff's investigation as "minimal"), *cert. denied*, 486 U.S. 1056 (1988). The District Court for the Southern District of New York had determined, however, that plaintiff DeWeerth had exercised reasonable diligence in locating the painting and ordered replevin. *DeWeerth*, 658 F. Supp. at 698. In 1946, the plaintiff asked a lawyer whether it were possible to do anything about the lost painting, and, in 1955, requested that an art expert initiate a search. *Id.* at 694-95. Neither the lawyer nor the art expert pursued the matter and, in 1957, the plaintiff filed a list of the lost art work with the West German federal bureau of investigations. *Id.* Based on the circumstances of the case, the district court found that the plaintiff's failure to pursue the Monet from 1957 until her nephew discovered its whereabouts in 1981 was reasonable. *Id.* The Court of Appeals for the Second Circuit reversed the judgment of the district court. *DeWeerth*, 836 F.2d at 104.

The Second Circuit in *DeWeerth* cited *Elicofon* for support, emphasizing that the plaintiff in *Elicofon* undertook a "continuous and diligent search" following "many channels." *Id.* at 111. In contrast, the district court in *DeWeerth* had observed that in *Elicofon* "the plaintiff was a government-owned art museum, with resources, knowl-

that the reports filed with the military government and West Germany's bureau of investigations consisted only of a standard form list and a one sentence letter.¹⁰¹ The court characterized the plaintiff's inquiries to an attorney and art expert as general, and emphasized that she failed to pursue the matter through further investigation.¹⁰² Moreover, the court concluded that the plaintiff did not take advantage of specific mechanisms established to locate lost art, and thus could not recover the painting.¹⁰³

Similarly, in *O'Keeffe v. Snyder*,¹⁰⁴ the Supreme Court of New Jersey imposed a comparable duty of diligence on an individual plaintiff.¹⁰⁵ The plaintiff in *O'Keeffe*, a now-renowned North American artist, claimed that three of her works had been stolen in 1946.¹⁰⁶ Soon after the theft, the plaintiff mentioned the theft to the director of the Art Institute of Chicago but did not investigate further.¹⁰⁷ In 1972, the plaintiff's agent reported the theft to the Art Dealers Association of America and the works were listed in its stolen paintings registry.¹⁰⁸ In 1975, the plaintiff discovered that the missing paintings were in a New York City gallery.¹⁰⁹ In 1976, plaintiff O'Keeffe brought a replevin action against a New Jersey art dealer who possessed the works.¹¹⁰ The Supreme Court of New Jersey de-

edge and experience that far exceeded any means an individual such as DeWeerth could undertake in searching for a missing painting." *DeWeerth*, 658 F. Supp. at 694-95. The court of appeals, however, labelled the plaintiff a "wealthy and sophisticated art collector" and suggested that she could have hired someone to mount an extensive investigation. *DeWeerth*, 836 F.2d at 112.

101. *DeWeerth*, 836 F.2d at 111. By contrast, the district court in *DeWeerth* highlighted the following factors to support its finding that plaintiff's search was duly diligent: plaintiff's advanced age from 1957 through 1981 prevented a more active search, and the published references regarding the disputed Monet were not generally circulated to the public. 658 F. Supp. at 694.

102. *DeWeerth*, 836 F.2d at 111.

103. *Id.* The Second Circuit noted that the plaintiff failed to notify the Allied forces' CCP program and did not correspond with the State Department or with the Trust Administration. *Id.* The plaintiff argued that the CCP dealt only with property stolen by Germans and located in Germany, and that therefore it would not have been helpful in the search. *Id.* at 111 n.6.

104. 416 A.2d 862 (N.J. 1980).

105. *Id.* at 872 (focusing on plaintiff's diligence in pursuing property).

106. *Id.* at 864.

107. *Id.* at 866.

108. *Id.*

109. *Id.*

110. *Id.*

terminated that these efforts were insufficient and did not fulfill the plaintiff's duty of diligence.¹¹¹

Under certain factual situations, some U.S. courts are reluctant to place a duty of diligence on the plaintiff. In contrast

111. *Id.* at 873-74. The trial court had ruled that the action was barred by the statute of limitations and granted summary judgment to the defendant. *Id.* at 865. The Appellate Division concluded that the paintings were stolen and dismissed the statute of limitations defense based on a theory of adverse possession. *Id.* at 871-72. The Appellate Division held that the defendants did not prove the open, visible, and notorious requirement for adverse possession and granted summary judgment to the plaintiff. *Id.*

The Supreme Court of New Jersey rejected the adverse possession analysis and determined that the Appellate Division erred by accepting the theft of the paintings as fact. *Id.* at 871-72. Although defendant Snyder conceded that the paintings were stolen, the Supreme Court concluded that a question of material fact existed as to theft because of contradictory testimony provided by third-party defendant Frank, the person who had sold the paintings to defendant Snyder. *Id.*

Moreover, the Supreme Court in *O'Keefe* applied the "discovery rule," which tolls the statutory period until the plaintiff knows, or reasonably should have known by exercising due diligence, of the cause of action and the possessor's identity. *Id.* at 870-71. Under this rule, the burden of proof of diligence lies with the plaintiff who must establish facts that would justify tolling the statute of limitations. *Id.* at 872. The Supreme Court of New Jersey noted that the limited record was "fraught with factual conflict," *id.* at 865, reversed the lower court's decision, and remanded the case. *Id.* at 877.

Justice Handler's dissenting opinion in *O'Keefe* criticized the due diligence required by the discovery rule. He observed that the rule required that parties focus on the collateral issue of tolling the statutory limitations period and become entangled in extensive, duplicative hearings. *Id.* at 878. Justice Handler provided an extensive analysis of the equitable considerations found in a replevin action. *Id.* at 883-85. He further noted that although the defendant raised laches as a defense, asserting an unreasonable delay in commencing the action, the doctrine of unclean hands bars the defense of laches. *Id.* Similarly, he noted that equitable estoppel had been applied in actions involving conflicting claims to legal title of chattels and "[a] thorough balancing of the equities has been followed specifically to adjudicate the competing claims for misappropriated works of art." *Id.* at 884. Justice Handler attacked the majority's holding because it failed to place a "similar duty of diligence or vigilance . . . upon the subsequent receiver or possessor, who, innocently or not . . . actually trafficked in stolen art." *Id.* at 878; *see also* *Porter v. Wertz*, 416 N.Y.S.2d 254, 257-58 (App. Div. 1979) (discussing equitable principles found in conversion case where art work was subject to bailment), *aff'd*, 421 N.E.2d 500 (N.Y. 1981).

New York has expressly rejected adoption of a discovery rule. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991). In 1986, the Governor vetoed Assembly Bill 11462-A that provided for the state's three-year limitations statute to begin running when an art institution gave notice of possession of an art work. *Id.* The Governor was concerned that the statute would not "provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum's acquisition and take action to recover it before their rights are extinguished." *Id.* The U.S. Department of State, the U.S. Department of Justice, and the U.S. Information Agency all recommended the bill's veto. *Id.*

to the *O'Keefe* decision, the U.S. Court of Appeals for the Seventh Circuit, in *Mucha v. King*,¹¹² did not invoke diligence standards because historical events were unclear.¹¹³ In *Mucha*, a Czechoslovak artist consigned his painting "Quo Vadis" to a Chicago art gallery in 1920.¹¹⁴ In 1979, the gallery illegally converted the painting.¹¹⁵ Defendant King subsequently purchased the painting from an art dealer in 1981.¹¹⁶ In 1983, after an investigation prompted by a letter of inquiry sent to him by an art enthusiast in 1982, plaintiff Mucha, the artist's son, brought an action for the replevin of "Quo Vadis."¹¹⁷ The court noted that the letter placed the plaintiff on notice of a probable conversion action and that he had acted promptly in locating the painting.¹¹⁸ The Court of Appeals for the Seventh Circuit concluded that the plaintiff's action was timely, tolling the statute of limitations.¹¹⁹

U.S. state and federal courts apply inconsistent standards for fulfilling due diligence, thus hindering the plaintiff's right to replevin of artifacts. Although courts focus on the plaintiff's conduct in searching for stolen art works, they fail to relate the efforts to the plaintiff's status and circumstances, thus often failing to reach the merits of the dispute.

3. The Defense of Laches

The issue of plaintiff's diligence in searching for stolen art

112. 792 F.2d 602 (7th Cir. 1986).

113. *Id.* at 604-05. The defendant argued that the facts were uncontested. *Id.* The court did not accept the defendant's factual allegations and instead distinguished between material facts that are legally significant and "historical" facts that are not. *Id.* The court stated that material facts are determined by applying a legal standard to historical events. *Id.* The court noted that material facts must be upheld "unless found to be clearly erroneous." *Id.*; accord *Weidner v. Thieret*, 886 F.2d 958, 960 (7th Cir. 1989). For a discussion of the discovery rule, see *supra* note 111.

114. *Mucha*, 792 F.2d at 606.

115. *Id.* at 604.

116. *Id.*

117. *Id.* at 613.

118. *Id.* The Seventh Circuit did not invoke the discovery rule. Instead, the court noted that it was not practical for the plaintiff to sue earlier and that application of the rule would place an onerous burden of diligence on the plaintiff to do so. *Id.* at 611-12. The *Mucha* court indicated that "[i]n a case such as this, given the antiquity of the bailment and the fact that many of the principals are dead," the application of the discovery rule would be speculative. *Id.* at 612 (citing *O'Keefe v. Snyder*, 416 A.2d 862, 872-73 (N.J. 1980)).

119. *Id.* at 611-12.

works is also relevant to the defense of laches. Some U.S. state and federal courts analyze lapsed time between the theft and the initiation of suit under the rubric of laches.¹²⁰ Laches is usually applied to situations in equity where there is no time bar in law. Thus, the equitable doctrine of laches permits a defendant to avoid a claim for the return of stolen art that otherwise is timely.¹²¹ Under the doctrine, the defendant asserts that the plaintiff unreasonably delayed in bringing suit and that the delay prejudiced or disadvantaged the defendant. Plaintiff's delay must have caused damage to the defendant—as in the situation where evidence has been destroyed or witnesses have disappeared without having made a statement.¹²² Relief lies in the conscience of the equity court rather than as a matter of legal right.¹²³

The Court of Appeals of New York in *Lubell*¹²⁴ held that the plaintiff's delay in bringing suit did not bar the action.¹²⁵ The court analyzed the plaintiff's alleged delay in bringing suit as laches and balanced the defendant's duty to investigate the validity of the art work's title against the plaintiff's obligation to search for stolen art work.¹²⁶ The court noted that unreasonable delay as well as prejudice to the defendant was one of the elements of the defense of laches.¹²⁷

The New York Court of Appeals noted that on the limited record equity did not favor either party because the defendants had diligently investigated the provenance of the gouache

120. See, e.g., *Republic of Turkey v. Metropolitan Museum*, 762 F. Supp. 44, 46 (S.D.N.Y. 1990); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

121. See *DOBBS*, *supra* note 56, at 43-44 (discussing laches).

122. *Id.*

123. See *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 619 (App. Div. 1990), *aff'd*, 569 N.E.2d 426, 431 (N.Y. 1991). The New York Appellate Division noted that "defendant's vigilance is as much in issue as plaintiff's diligence" and that the conscience of the court required a thorough inquiry into both parties' actions. *Id.* at 623.

124. 569 N.E.2d 426 (N.Y. 1991).

125. *Id.* at 431. The court noted that New York's statute of limitations could have barred the action. *Id.*

126. *Id.* By comparison, the Court of Appeals for the Second Circuit in *DeWeerth* determined that the action was untimely and that therefore the statute of limitations barred the action. *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988). The court did not address the equities of the case and the impact of laches. *Id.* at 112 n.7.

127. *Lubell*, 569 N.E.2d at 431.

prior to purchase by contacting the artist and his son-in-law.¹²⁸ The plaintiff, on the other hand, asserted that it deliberately had decided not to investigate the theft actively due to the common belief that “publicity often pushes a missing painting further underground.”¹²⁹ The court stressed the applicability of the laches doctrine and the need to balance the equities with regard to the respective litigants.¹³⁰ The court, unable to conclude that the museum’s conduct was unreasonable as a matter of law, remanded the case to the trial court.¹³¹

Similarly, in *Republic of Turkey v. Metropolitan Museum*,¹³² the U.S. District Court for the Southern District of New York analyzed the plaintiff’s delay in bringing suit in terms of laches.¹³³ In that case, the defendant moved to dismiss the complaint on the grounds that too much time had lapsed prior to plaintiff’s initiation of suit.¹³⁴ Applying *Lubell*, the court stated that the defendant’s claim of delay related only to the availability of a laches defense and not to a defense based on the statute of

128. *Id.*

129. *Id.* at 431. The New York Appellate Division noted that “defendant’s vigilance is as much in issue as plaintiff’s diligence.” *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 623 (App. Div. 1990), *aff’d*, 569 N.E.2d 426 (N.Y. 1991). The Appellate Division was persuaded by the plaintiff’s argument that “obvious red flags” on the bill of sale would have alerted a prudent purchaser to inquire further into the work’s provenance. *Id.*

130. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991).

131. *Id.* At the time of trial, 1987, the defendant Lubell had filed a third-party complaint against the estate of the gallery owner that had sold her the gouache in the mid-1960’s. *Solomon R. Guggenheim Found. v. Lubell*, N.Y. L.J., Sept. 24, 1991, at 21 (N.Y. Sup. Ct.). The defendant alleged that the art gallery breached the warranty of title and fraudulently represented the gouache’s title as clear. *Id.*

Subsequent to the New York Court of Appeals ruling, the estate’s executor moved to add a statute of limitations defense against both claims and the New York Supreme Court granted the motion. *Id.* The defendant opposed the motion to amend, however, claiming prejudice because she was unable to argue a statute of limitations defense before the court of appeals. *Id.* The trial court stated that since laches applied in this case, the issue could not summarily be decided as an issue of law but was “a question of fact to be determined at trial.” *Id.* Therefore, the trial court noted that it was inappropriate “at this time” to consider the defendant’s contention that the claim for breach of warranty of title had not accrued, in particular, because defendant Lubell sought indemnity in the event that the Guggenheim Museum prevailed at trial. *Id.*

132. 762 F. Supp. 44 (S.D.N.Y. 1990).

133. *Id.* at 46-47.

134. *Id.* at 45.

limitations.¹³⁵ The District Court for the Southern District of New York denied the defendant's motion because genuine issues of material fact existed concerning the requirement of prejudice to the defendant.¹³⁶

Uncertainty exists in U.S. state and federal courts as to the standard of diligence required of a plaintiff in searching for stolen cultural property.¹³⁷ In some courts, the statute of limitations bars the action, while in others the defense of laches permits the litigants a plenary trial on the merits by an inquiry into the equities of the case.¹³⁸ Moreover, courts do not address consistently the issue of the defendant's diligence in investigating title and also fail to assess fully the art purchaser's good faith.¹³⁹ In addition, courts inconsistently apply the doctrine of fraudulent concealment.¹⁴⁰

B. *The Defendant's Duty to Investigate Title in Good Faith*

A limited number of courts have stated that an art purchaser has a duty to investigate title.¹⁴¹ Art purchasers often fail to inquire thoroughly into the provenance of art works prior to their acquisition.¹⁴² Under common law conversion rules, the purchaser of an art work, whether in good faith or not, is vulnerable to a replevin action by the true owner at any

135. *Id.* at 46-47.

136. *Id.* at 47; see Constance Lowenthal, *Republic of Turkey v. Metropolitan Museum of Art: Arguments on Met's Motion to Dismiss Turkey's Claim*, INT'L FOUND. ART RES. REPS., July-Aug. 1988, at 9-10.

137. Compare *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990) (requiring due diligence of institutional plaintiff) with *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991) (not requiring due diligence of institutional plaintiff).

138. *E.g.*, *Republic of Turkey v. Metropolitan Museum*, 762 F. Supp. 44, 46 (S.D.N.Y. 1990); *Lubell*, 569 N.E.2d at 431; *cf.* *O'Keeffe v. Snyder*, 416 A.2d 862, 884-85 (N.J. 1980) (Handler, J., dissenting) (recognizing applicability of duty to investigate title to art industry defendant based on equitable considerations).

139. Compare *Lubell*, 569 N.E.2d at 431 (requiring defendant to investigate title) with *O'Keeffe*, 416 A.2d at 877 (Sullivan, J., dissenting) (not requiring defendant art dealer to investigate title).

140. Compare *O'Keeffe*, 416 A.2d at 872 (recognizing doctrine of fraudulent concealment but not applying it) with *Autocephalous*, 917 F.2d at 290 (applying doctrine of fraudulent concealment).

141. See, *e.g.*, *Lubell*, 569 N.E.2d at 431; *Porter v. Wertz*, 416 N.Y.S.2d 254, 259 (1979), *aff'd*, 421 N.E. 2d 500 (N.Y. 1981).

142. *O'Keeffe*, 416 A.2d at 872 (noting art purchasers' failure to investigate title); see *supra* notes 3-5 and accompanying text (discussing proliferation of art theft disputes and purchasers' neglect in investigating art works' provenance).

time.¹⁴³ A good faith purchaser of personal property previously taken wrongfully does not acquire good title against the true owner.¹⁴⁴

Placing the burden of proof on the defendant favors the true owner but permits the good faith purchaser to show steps taken to investigate title.¹⁴⁵ The New York Court of Appeals in *Lubell* held that a defendant can be subject to a duty to investigate title in art theft cases.¹⁴⁶ The court stated that the defendant bore the burden of proving that the Chagall gouache in question was not stolen.¹⁴⁷ The court noted that the purchaser had inquired of the artist and his son-in-law prior to the purchase in order to confirm the painting's provenance and title.¹⁴⁸ The court stated that a balancing of the equities is required and that the defendant can appeal to the court's conscience in equity.¹⁴⁹ The court of appeals remanded the case to the trial court to consider the purchaser's good faith conduct in investigating title as well as the true owner's delay in bringing suit.¹⁵⁰

The New York Appellate Division in *Lubell* had also addressed the issue of whether a purchaser received valid title from a merchant under the Uniform Commercial Code (the "UCC").¹⁵¹ UCC section 2-403(1) provides that a merchant may transfer good title to a good faith purchaser for value.¹⁵² The art gallery obtained the Chagall gouache at issue from a former mailroom employee of the museum and sold it to the

143. See *supra* notes 56, 58-59 and accompanying text (discussing common law principle that not even good faith purchaser can acquire title to chattel from thief).

144. See *Porter*, 416 N.Y.S.2d at 258-59.

145. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. See *id.*

151. N.Y. U.C.C. LAW § 2-403(1) (McKinney 1991); *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 623-24 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991); see JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* at 188-90 (3d ed. 1988) (discussing good faith purchasers).

152. See U.C.C. § 2-103(1)(b) (1991) (defining good faith as honesty in fact and observance of reasonable commercial standards of fair dealing in trade); see also WHITE & SUMMERS, *supra* note 151, at 189 & nn. 12-13 (noting that U.C.C. adheres to common law rule that purchaser cannot acquire good title from thief).

defendant.¹⁵³ The defendant's bill of sale identified the former museum employee as the previous owner of the gouache, implicating that individual as the thief because no other owners were listed on the bill.¹⁵⁴ The court noted that the bill of sale raised "bright red flags" that should have alerted the purchaser to investigate title prior to purchase.¹⁵⁵ The Appellate Division thus concluded that under UCC section 2-403(1) title would be transferred if the defendant was a good faith purchaser and only if the piece had not been stolen.¹⁵⁶

In *Porter v. Wertz*,¹⁵⁷ the New York Appellate Division clarified the meaning of "good faith" in UCC section 2-103(1)(b).¹⁵⁸ The court stated that a good faith purchaser cannot permit or condone questionable trade practices nor act indifferently to the provenance of the art work.¹⁵⁹ The plaintiffs in *Porter* temporarily loaned a Utrillo painting to a potential buyer.¹⁶⁰ The buyer never paid for the painting, yet sold the piece to co-defendant Feigen, an art dealer, with the assistance of defendant Wertz.¹⁶¹

The Appellate Division emphasized that merchants' apathy concerning their right to sell increases their culpability and facilitates commerce in stolen art.¹⁶² The court noted that, even if common in the trade, the practices are inexcusable because a merchant has a duty to verify the history of art work before consummating a sale.¹⁶³ Consequently, a merchant who fails to investigate the provenance of art work is not a *bona fide* purchaser and therefore is not protected under the UCC.¹⁶⁴

153. *Lubell*, 550 N.Y.S.2d at 623-24.

154. *Id.* at 624.

155. *Id.* at 623.

156. *Id.* at 624. The Appellate Division upheld the common law maxim that persons deal with property in chattel or exercise possession over it at their peril. *Id.*; see *Hollins v. Fowler*, 7 L.T.R. 639 (Q.B. 1874) (stating common law maxim); see also PROSSER & KEETON, *supra* note 59, § 15, at 93 (discussing conversion principles and good faith purchaser).

157. 416 N.Y.S.2d 254 (App. Div. 1979), *aff'd*, 421 N.E.2d 500 (1981).

158. *Id.* at 257; see *supra* note 152 (defining good faith pursuant to U.C.C.).

159. *Porter*, 416 N.Y.S.2d at 257.

160. *Id.* at 255-56.

161. *Id.*

162. *Id.* at 259.

163. *Id.*

164. *Id.* The New York Appellate Division noted that the defendant's knowl-

The duty to investigate the provenance of art work may lead to the discovery of clouded title. It thus functions as a prophylactic measure for the good faith purchaser, alerting the purchaser to an inherently risky transaction and to the consequences of such a purchase.¹⁶⁵

C. *The Doctrine of Fraudulent Concealment*

While the plaintiff's duty of due diligence and the defendant's duty to investigate title are based on tort principles, the doctrine of fraudulent concealment has its origins in equity.¹⁶⁶ The doctrine estops a defendant from asserting a statute of limitations defense if the defendant has, either by deceit or by a violation of duty, concealed material facts and thus prevented the plaintiff from discovering a possible cause of action.¹⁶⁷ Specifically, the doctrine applies to one who has wrongfully detained or taken property and therefore focuses on the defendant's conduct.¹⁶⁸ U.S. courts, however, have applied the doctrine of fraudulent concealment inconsistently to disputes concerning stolen cultural property.¹⁶⁹

edge of a catalogue of Utrillo's works, prior to purchase, could have raised doubts as to his right to transfer title. *Id.* The court determined that defendant Wertz, the party who sold the Utrillo to co-defendant Feigen, had no legal right to possession. *Id.* Therefore, even if co-defendant Feigen had made the purchase in good faith, he would not have received valid title. *Id.* Thus, the piece's subsequent sale did not transfer title and the court ordered replevin. *Id.* Nevertheless, the defendant could not retrieve the painting because it was located in Venezuela at the time of the action. *Id.* The court thus authorized a damages award, to be assessed at a later time. *Id.* at 257-58 (discussing U.C.C. § 2-403).

165. *See, e.g.,* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991). The court qualified its holding by stating that its opinion did not suggest that plaintiff's conduct was no longer an issue in the case. *Id.* at 431.

166. *See generally* Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 *BUFF. L. REV.* 119, 127-31 (1989).

167. *See, e.g.,* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 288 (7th Cir. 1990).

168. *See, e.g.,* *Autocephalous*, 917 F.2d at 294 (Cudahy, J., concurring); O'Keefe v. Snyder, 416 A.2d 862, 872-73 (N.J. 1980) (explaining that doctrine functions to toll statute of limitations where chattel is fraudulently concealed from plaintiff); 37 *AM. JUR.* 2D §§ 144-46 (2d ed. 1968) (discussing common law fraud and deceit in relation to concealment).

169. *See* *Autocephalous*, 917 F.2d at 294 (Cudahy, J., concurring) (noting applicability of doctrine to toll statutory limitations period until original owner has actual knowledge of identity of possessor of stolen or lost art work). *But see* O'Keefe, 416 A.2d at 872 (recognizing doctrine's function and applicability to medical malpractice but not to stolen art work).

In *Autocephalous*, the U.S. Court of Appeals for the Seventh Circuit did not disturb the lower court decision to invoke the doctrine of fraudulent concealment.¹⁷⁰ The district court in *Autocephalous* had found several facts material to the issue of fraudulent concealment. The mosaics were removed from the Kanakaria Church without church or state authorization sometime between August 1976 and October 1979.¹⁷¹ The accused thief misrepresented the provenance of the mosaics by claiming the mosaics were from Turkey.¹⁷² Moreover, although the thief returned four pieces of mosaic, the government of Cyprus determined that two of the returned pieces were not genuine.¹⁷³

The district court concluded that the doctrine of fraudulent concealment tolled the statute of limitations.¹⁷⁴ It ruled that the plaintiffs reasonably could not have been on notice of the cause of action or of the possessor of the mosaics.¹⁷⁵ Furthermore, the mosaics were stolen and did not resurface for nine years, a period of time that indicated "by its very nature" that the art work was fraudulently concealed from the true owner.¹⁷⁶ The Court of Appeals for the Seventh Circuit found no error in the district court's application of the doctrine of

170. *Autocephalous*, 917 F.2d at 290, *aff'g* 717 F. Supp. 1374, 1392 (S.D. Ind. 1989) (holding that Indiana law required that defendant actively conceal stolen property's location and that plaintiff undertake diligent search). The concurring opinion emphasized that the limitations statute is tolled until the original owner has "actual knowledge" of both the property's location and the identity of the possessor. 917 F.2d at 294 (Cudahy, J., concurring). *But see* *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1163 n.23 (2d Cir. 1982) (citing *General Stencils, Inc. v. Chiappa*, 219 N.E.2d 169 (N.Y. 1966) (holding that defendant not required to conceal property affirmatively in order to toll statute of limitations)).

171. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1379 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

172. *Id.* at 1390. According to the testimony of an art dealer who carried out Cyprus's investigation, the alleged thief lied about possessing the Cypriot mosaics. *Id.* After a confrontation, however, the alleged thief agreed to turn over the mosaics. *Id.*

173. *Id.* (noting that, according to witness' testimony, alleged thief claimed that he returned all mosaics in his possession). Cyprus, upon learning of the theft, immediately contacted UNESCO and many other international organizations in a worldwide attempt to alert the art industry of its investigation. *Id.* at 1379-80.

174. *Id.* at 1391.

175. *Id.*

176. *Id.* at 1392.

fraudulent concealment.¹⁷⁷

In *Republic of Turkey*, the U.S. District Court for the Southern District of New York also addressed the issue of fraudulent concealment.¹⁷⁸ The court denied the defendant's motion to dismiss because a question of material fact existed as to whether the defendant had fraudulently concealed the artifacts at issue in the case.¹⁷⁹ Instead, the district court required the litigants to undertake discovery and proceed to trial to address the issue of fraudulent concealment among other issues of material fact.¹⁸⁰

In contrast, the Supreme Court of New Jersey in *O'Keeffe* did not fully address the issue of fraudulent concealment.¹⁸¹ The court recognized that if a chattel is concealed from the true owner, fairness requires the tolling of the statute during the concealment period.¹⁸² The pieces stolen in 1946 were three small paintings that the plaintiff argued could be moved and concealed easily.¹⁸³ Due to inconclusive evidence and the existence of a question of fact as to actual theft, the court did not invoke the doctrine of fraudulent concealment.¹⁸⁴ Furthermore, the Supreme Court of New Jersey failed to require discovery as to the doctrine's possible application on remand of the case to the trial court.¹⁸⁵

Courts inconsistently apply the doctrine of fraudulent concealment in art theft disputes. Similarly, courts disagree as to the standard of diligence required of the plaintiff in search-

177. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 290 (7th Cir. 1990).

178. *Republic of Turkey v. Metropolitan Museum*, 762 F. Supp. 44, 46 (S.D.N.Y. 1990).

179. *See id.* at 46-47.

180. *Id.*

181. *O'Keeffe v. Snyder*, 416 A.2d 862, 872-73 (N.J. 1980). Similarly, the Superior Court of New Jersey's Appellate Division failed to apply the doctrine of fraudulent concealment in *O'Keeffe*. Although the Appellate Division had determined that the paintings were stolen and that their whereabouts remained unknown until 1976, it did not invoke the doctrine. *O'Keeffe v. Snyder*, 405 A.2d 840, 841 (App. Div. 1979), *rev'd*, 416 A.2d 862 (N.J. 1980).

182. *O'Keeffe*, 416 A.2d at 872.

183. *Id.* at 871.

184. *Id.*

185. *Id.* at 865 (noting that limited record was replete with factual conflict). The New Jersey Supreme Court applied the discovery rule to determine the accrual of the action. *See id.* at 873; *supra* note 111 and accompanying text (discussing discovery rule).

ing for stolen cultural property, often failing to distinguish between institutional and individual plaintiffs. In addition, courts fail to scrutinize the purchaser's conduct to determine whether it undertook a good faith effort to investigate the provenance and title of the art work prior to the purchase.¹⁸⁶

III. THE NEED FOR UNIFORM STANDARDS

The inconsistent application of principles of law and equity by U.S. state and federal courts in art theft disputes demonstrates the need for uniform standards. Although, the UNESCO Convention urges a spirit of international cooperation, incongruous adjudications of factually similar situations frustrate this goal.¹⁸⁷ The Convention recognizes that signatory nations have an indefeasible right to recover objects registered in government-controlled repositories.¹⁸⁸ These collections represent a nation's inalienable "moral property."¹⁸⁹ The Convention provision requiring just compensation of an innocent purchaser more consistently facilitates the return of cultural property to the true owner.¹⁹⁰

Uniform standards in adjudicating international art theft disputes are necessary to effectuate the UNESCO Convention's goals of impeding the illicit art trade and of assisting signatory nations to recover stolen or illegally exported cultural property.¹⁹¹ The application of uniform standards to an action

186. Compare *O'Keeffe v. Snyder*, 416 A.2d 862, 869-70 (N.J. 1980) (discussing diligence requirements and purchaser's good faith) with *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 289, 291 (7th Cir. 1990) (discussing diligence requirements and purchaser's good faith).

187. UNESCO Convention, *supra* note 2, art. 2(1), 823 U.N.T.S. at 236, 10 I.L.M. at 290 (stating that "international co-operation constitutes one of the most efficient means of protecting each countries [sic] cultural property"); see ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM*, at vii (2d ed. 1977) (quoting Dean Roscoe Pound) (urging jurists to use comparative law method to address present and future international problems).

188. UNESCO Convention, *supra* note 2, art. 13, 823 U.N.T.S. 231, 244, 10 I.L.M. 289, 291-92; see *supra* note 20 and accompanying text (discussing article 13).

189. Preliminary Report of the UNESCO Convention, UNESCO Doc. SHC/MD/3, at 10, para. 74 (1969) [hereinafter Preliminary Report].

190. *Id.*

191. See Final Report, UNESCO Doc. SHC/MD/5, Annex I, at 17 (1970) (discussing *bona fide* purchaser and noting Swedish legal principles according to which right to movable property is not subject to prescription); cf. Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987) (stating that uniform application of rule explains its function).

for the recovery of cultural property would provide a measure of certainty in U.S. jurisprudence and would contribute to consistent and fair judgments in international controversies.¹⁹²

U.S. state and federal courts should, guided by Convention principles, adopt a uniform approach to adjudicating complex cultural property disputes. In replevin actions, state and federal courts should evaluate the plaintiff's diligence based on its status as an institution or an individual. Second, courts should consistently apply the doctrine of fraudulent concealment. Third, courts should scrutinize the defendant purchaser's good faith. By applying each of these three factors in every case, courts would foster a plenary trial on the merits and a thorough inquiry into the defendant's good faith, an approach that is consistent with both the obligation of signatory nations under the UNESCO Convention and judicial practice in many countries.¹⁹³

A. Due Diligence Based on Plaintiff's Status

The application of a due diligence standard to plaintiff's search for stolen cultural property must take into account the plaintiff's status.¹⁹⁴ The Second Circuit's decisions in *Elicofon* and *DeWeerth* subjected parties who are not similarly situated to

192. See VON MEHREN & GORDLEY, *supra* note 187, at 93-94 (explaining that drafters of German Civil Code included Roman law concepts based on *boni mores* such as "good faith" and "fairness" thus allowing flexibility in judicial determinations).

193. See Preliminary Report, *supra* note 189, para. 73 (1969). The UNESCO Convention's preliminary draft report states that the purchaser is presumed to be in good faith and the burden of proving an absence of good faith is on the party seeking recovery of the item. *Id.* The report further emphasizes that this view is consistent "with judicial practice in many countries," and that as a result the Convention should require that fair compensation be made to the *bona fide* purchaser for return of the property. *Id.* See generally Constance Lowenthal, UNIDROIT Proposes Art Recovery Convention, INT'L FOUND. ART RES. REPS., Aug.-Sept. 1991, at 5-6 (reporting on international legal effort supported by UNESCO to supplement current Convention).

194. Compare *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988) with *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 849-50 (S.D.N.Y. 1981) (demonstrating application of similar duty of diligence without regard to plaintiff's status), *aff'd*, 836 F.2d 111 (2d Cir. 1982). The Second Circuit in *DeWeerth* failed to acknowledge that the plaintiff, an individual, had limited resources with which to conduct a continuous search over an extended period of time. In contrast, the plaintiff in *Elicofon*, a state-owned museum, had access to vast resources in conducting a search for the missing art works. See *supra* note 100 (discussing diligence standards applied by district court and court of appeals in *DeWeerth*).

the same standard of diligence in their search for stolen art.¹⁹⁵ Instead, courts should apply a balancing test to determine whether a plaintiff seeking the recovery of stolen art fulfilled its duty of diligence. Courts should balance the plaintiff's delay in bringing suit against the plaintiff's practical difficulties in commencing the action at an earlier time.¹⁹⁶ To evaluate these difficulties, courts should look to factors such as the plaintiff's age, health, financial ability to undertake an extensive search, and access to witnesses. The court should view the plaintiff's circumstances in their totality and take into account the plaintiff's status as an institution or an individual, thus allowing greater flexibility in judicial determinations.¹⁹⁷

In *O'Keefe*, the Supreme Court of New Jersey failed to consider the plaintiff's practical difficulties in bringing a replevin action at an earlier point in time.¹⁹⁸ The court's diligence standard did not take into account the plaintiff's status and circumstances and imposed an onerous duty of diligence on an individual with limited resources.¹⁹⁹ Consequently, the court

195. See *DeWeerth*, 836 F.2d at 109. The *DeWeerth* court would enforce a blanket rule of reasonable diligence on all plaintiffs because much art is maintained in private collections where it is both unadvertised and unavailable to the public. *Id.* The "reasonable" diligence standard adopted in *DeWeerth*, however, is unreasonable, particularly as applied to an individual plaintiff. See Robert A. Barker, *Rights Involving Stolen Art*, N.Y. L.J., Mar. 25, 1991, at 6. No matter how diligent that individual may be in attempting to ferret out stolen art work, if the work is kept in an unadvertised private collection, the inherent difficulties involved in locating the art creates an onerous duty of diligence on plaintiffs. See *id.*

The Court of Appeals for the Second Circuit assumed that plaintiff *DeWeerth* had the financial resources to retain an agent to conduct a broad and thorough investigation to locate the Monet. *DeWeerth*, 836 F.2d at 109. The court did not indicate that plaintiff could afford such an expenditure, however, and characterized the plaintiff as wealthy because of property holdings in Germany. *Id.* at 112.

196. See *supra* notes 112-19 (discussing *Mucha v. King*, 792 F.2d 602 (7th Cir. 1986), where court concluded that passage of time created evidentiary and practical problems, thus not requiring plaintiff to commence suit earlier).

197. See VON MEHREN & GORDLEY, *supra* note 187, at 93-94; see also INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW ("UNIDROIT"), Preliminary Draft Convention on Stolen or Illegally Exported Cultural Objects, Study LXX/Doc.19 (1990), art. 2 (providing that diligence determination relate to "relevant circumstances of the acquisition," including character of parties) [hereinafter UNIDROIT, Preliminary Draft Convention].

198. See *O'Keefe v. Snyder*, 416 A.2d 862, 866 (N.J. 1980).

199. See *id.* at 884-85 (Handler, J., dissenting) (noting special pertinence of equitable considerations requiring fullest exposure of all facets of controversy); see also *supra* note 111 (discussing discovery rule). The diligence requirements imposed by the discovery rule may likely preclude courts from hearing the merits of a case.

failed to reach the merits of the case.²⁰⁰

Application of the balancing test, on the other hand, would have allowed the court to reach the merits. Seemingly, plaintiff's thirty-year delay in bringing suit appears to be *per se* unreasonable. Although the death of key witnesses prior to the commencement of suit created problems of proof for the plaintiff and thus hindered her case, this factor is not conclusive as to the facts of the case.²⁰¹ Thus factors such as plaintiff's status as an individual, her inability to mount an extensive investigation over an extended period of time, limited financial resources at the time of theft, and the art industry's lack of reliable mechanisms to register and recover stolen art at the time of loss, posed practical difficulties in locating the art works.²⁰² In weighing these factors against the plaintiff's delay in bringing suit, the plaintiff could be considered to have been duly diligent as these factors reveal the plaintiff's many practical difficulties in searching for the paintings. Therefore, viewed in light of the totality of the circumstances and considering plaintiff's status, the *O'Keefe* court should have proceeded to hear the merits of the case.²⁰³

In contrast, the U.S. Court of Appeals for the Seventh Circuit in *Mucha* did not place an onerous burden of diligence on an individual plaintiff bringing a replevin action.²⁰⁴ The historical events in *Mucha* are similar to those present in *O'Keefe*. First, the loss occurred several decades before the suit, and key

O'Keefe, 416 A.2d at 884-85. Consequently, a trial court may not reach relevant allegations, such as the alleged thief's implication in several art thefts. *Id.* at 865. In effect, the Supreme Court of New Jersey required an inordinate duty of diligence from the true owner to prove facts which had been obscured with the passage of time. *Id.*

200. *O'Keefe*, 416 A.2d at 884-85.

201. *See id.* at 865-66 (noting that plaintiff's colleagues at time of paintings' theft had died and therefore evidence and credible testimony to corroborate plaintiff's claim of theft was scarce).

202. *See id.* 884-85 (Handler, J., dissenting).

203. *Cf. id.* at 880-81 (Handler, J., dissenting) (stressing that discovery rule does not discourage art theft and promotes right of true owner to seek return of stolen art works). In *O'Keefe*, the majority ignored the common law maxim that good title cannot be acquired from a thief, or even by a good faith purchaser. *Id.* at 881 (Handler, J., dissenting). Instead, it provided a "convoluted" rendition of the law of statutory limitations periods and the doctrine of adverse possession. *Id.* at 881 (Handler, J., dissenting); *see supra* note 111 (discussing discovery rule); *see also* Gerstenblith, *supra* note 166, at 127-31 (discussing discovery rule).

204. *Mucha v. King*, 792 F.2d 602, 611-12 (7th Cir. 1986).

witnesses to the controversy had died in the interim period.²⁰⁵ Second, the circumstances in *Mucha* posed practical difficulties for the plaintiff because, as a citizen and resident of Czechoslovakia, and as an individual unfamiliar with the art trade, he was not on notice of a possible conversion until a letter of inquiry alerted him.²⁰⁶ In addition, the plaintiff did not have reasonably facile access to the U.S. art industry's mechanisms that facilitate recovery of lost or stolen art.²⁰⁷ In light of the plaintiff's status and circumstances, the Seventh Circuit correctly determined that the plaintiff was duly diligent in bringing the replevin action.²⁰⁸ The application of the balancing test to similar facts in other art theft disputes would facilitate a plenary trial on the merits.

Courts adjudicating art theft disputes correctly focus on the plaintiff's evidence of steps taken in seeking the stolen art.²⁰⁹ A burdensome diligence standard, however, may bar a plenary hearing on the merits and frustrate the goal of recovering stolen art. The due diligence balancing test provides a rea-

205. *Id.* at 612 (determining that bailment occurred several decades before plaintiff brought suit and that artist who consigned painting died many years before).

206. *Id.* at 607, 612-13.

207. *See id.* at 609-11 (describing Czech plaintiff's life in Europe and unfamiliarity with U.S. art industry until visit to United States in 1973 to attend exhibition of father's work).

208. *See id.*

209. *But see* *O'Keeffe v. Snyder*, 416 A.2d 862, 873 (N.J. 1980). The Supreme Court of New Jersey in *O'Keeffe* also articulated a due diligence standard that emphasized the value of the stolen art work, stating that the "nature and value of the personal property" affects the meaning of due diligence. *Id.* As an example, the court stated that a theft report of moderately-valued jewelry would fulfill the owner's duty of diligence. *Id.* With regard to art work, however, the court required greater diligence because of the property's greater value and thus proposed a proportional analysis in which the greater the value of the property, the greater the diligence required of the owner. *Id.*

The difficulty inherent in determining the value of cultural property due to the art industry's volatile pricing and the existence of often priceless art treasures makes pecuniary evaluations irrelevant in art theft disputes. These evaluations are also unrelated to the true owner's or a signatory nation's right to bring suit to recover stolen cultural property. *See supra* notes 19-20 and accompanying text (discussing UNESCO Convention's article 13). A reasonable standard of diligence must be related to plaintiff's conduct and its status, and not to what the disputed property is worth. *See supra* notes 65-119 and accompanying text (discussing diligence standards for plaintiffs). For example, in *DeWeerth v. Baldinger*, the Second Circuit concluded that an individual plaintiff had not met its duty of diligence because it failed to pursue an extensive investigation, and not because of the value of the Monet. *See supra* notes 100-03 and accompanying text (discussing court's diligence determination).

sonable standard that considers the totality of the circumstances and fosters a plenary hearing on the merits.²¹⁰ As a result, the test facilitates just adjudications of factually complex disputes concerning stolen cultural property.

B. Courts' Approach to Defendants

1. Invoking the Doctrine of Fraudulent Concealment

U.S. courts should apply the doctrine of fraudulent concealment in cultural property disputes to further the UNESCO Convention's goal of obstructing the illicit movement of cultural property. The doctrine is particularly well suited to cultural property disputes where the location of valuable treasures has been concealed or misrepresented.²¹¹ In *Republic of Turkey*, the court recognized that genuine issues of material fact existed regarding the defendant's *bona fide* purchase of Turkish artifacts and the plaintiff's assertion that the museum engaged in "misrepresentations and other acts of concealment."²¹² In such circumstances courts should invoke the doctrine of fraudulent concealment.²¹³

To apply the doctrine of fraudulent concealment, courts must examine the circumstances surrounding the theft and the subsequent commencement of suit.²¹⁴ A defendant should be estopped from unfairly benefitting from a statute of limitations defense where it had concealed the cause of action, precluding the plaintiff from bringing suit.²¹⁵ By invoking the doctrine, courts provide the opportunity for a plenary trial on the mer-

210. See *supra* notes 194-210 and accompanying text (discussing due diligence balancing test for uniform standards).

211. See *Hennessee*, *supra* note 3, at 43 (noting Swiss investment consortia that buy art for investment purposes and store it in vaults for years).

212. 762 F. Supp. 44, 45 (S.D.N.Y. 1990).

213. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1392, *aff'd*, 917 F.2d 278 (7th Cir. 1990). The district court emphasized that the reappearance of the stolen mosaics nine years later implied a fraudulent concealment. *Id.* The court also required that the plaintiff undertake a reasonably diligent search for the stolen artifacts. *Id.*

214. See *O'Keeffe v. Snyder*, 416 A.2d 862, 885 (N.J. 1980) (Handler, J., dissenting) (noting that small paintings' mysterious disappearance occurred several decades prior to plaintiffs' ability to identify possessor and commence suit).

215. See *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 621 (App. Div. 1990), *aff'd*, 569 N.E.2d 426, 430-31 (N.Y. 1991) (discussing fairness concerns similar to those espoused by Justice Handler in *O'Keeffe* dissent, 416 A.2d at 883-85).

its, thus allowing litigants to “get to the heart of the matter.”²¹⁶

2. The Duty to Investigate Title in Good Faith

An art purchaser has a duty to investigate the provenance of art work prior to its purchase.²¹⁷ A requirement to investigate title dictates that a purchaser must take good faith measures to fulfill a reasonable duty of diligence.²¹⁸ As measures of good faith, the purchaser should inquire into the history of ownership of the piece or request a certificate of right to pass title from the seller.²¹⁹ Additionally, the purchaser may evaluate the seller’s reputation and negotiate a clause that protects the purchase against the economic consequences of a subsequent third party claim.²²⁰ The purchaser should request a formal search from art organizations, such as the stolen paintings registry of the International Foundation for Art Research (the “IFAR”), the Art Dealers Association of America, or the Art Loss Registry (the “ALR”).²²¹ Furthermore, an inquiry of the country of origin or of the living artist is a reasonable method to ensure that the artifact’s title is clear.²²²

216. *O’Keeffe*, 416 A.2d at 885 (Handler, J., dissenting) (criticizing majority’s decision because it did not allow parties to reach merits of case).

217. *E.g.*, *id.* at 878 (Handler, J., dissenting) (discussing defendant’s alleged ignorance of art work’s provenance as unreasonable); *Lubell*, 569 N.E.2d at 431 (articulating caveat that defendant’s vigilance was in issue thus indicating importance of title search).

218. *See* *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1400-04 (S.D. Ind. 1989) (according to Swiss substantive law, purchaser is required to show steps taken to investigate artifact’s provenance), *aff’d*, 917 F.2d 278 (7th Cir. 1990); *Porter v. Wertz*, 416 N.Y.S.2d 254, 257-59 (App. Div. 1979) (requiring defendant to investigate provenance of painting), *aff’d*, 421 N.E.2d 500 (N.Y. 1981); I. WILLIAMS, *SOURCES OF LAW IN THE SWISS CIVIL CODE* 27 (1976). Under Swiss substantive law, *bona fides* is an “essential element” for protecting rights. *Id.* Consequently, a presumption of good faith exists and the judge has broad discretionary powers to decide whether the defendant acted in good or bad faith. *Id.*

219. *See* *Autocephalous*, 717 F. Supp. at 1390-91 (discussing evidence of steps taken in good faith to investigate title); *see also* Stephen E. Weil, *Repose*, INT’L FOUND. ART RES. REPS., Aug.-Sept. 1987, at 6-7 (discussing rights to stolen art).

220. *See* Weil, *supra* note 219, at 6-7 (discussing rights to stolen art).

221. *See id.* (discussing rights to stolen art); *see also* *Art Theft Seen Rising When Europe Unifies*, J. COMM., Sept. 17, 1991, at 3A (discussing London-based ALR’s impact in aiding recovery of stolen art).

222. *See* *Autocephalous*, 717 F. Supp. at 1399-1400 (discussing evidence of steps taken in good faith to investigate title).

Authorities in the international art trade agree with the New York Court of Appeals ruling in *Lubell*, which places the burden of inquiry into an art work's title on the defendant good faith purchaser.²²³ The IFAR has indicated that, in light of the international art trade's known proclivity for defective title, purchasers are expected to protect themselves by verifying title with certified documentation.²²⁴ This requirement is consistent with society's interest in discouraging art theft and promotes the UNESCO Convention's goals of impeding the illicit art trade and preserving the cultural heritage of signatory nations. Absent this affirmative duty to investigate title, a purchaser or possessor with a "checkered background" may acquire title to stolen art more easily than a true owner may regain its possession.²²⁵

Finally, in determining whether a defendant has purchased stolen art in good faith, courts should distinguish between an individual purchaser and the better positioned parties that participate in the art trade, such as museums, art galleries, dealers, and auction houses.²²⁶

3. Standard for Defendant in the Art Industry

Nevertheless, due to their intimate knowledge and extensive resources, entities and individuals in the art industry

223. See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991) (placing burden to investigate title on purchaser); cf. William Honan, *Judge Clears Way for Trial Over Turkish Art at Met*, N.Y. TIMES, July 20, 1990, at C25 (noting IFAR executive director's comment that museums and art purchasers should be "exceedingly careful" to establish themselves as good faith purchasers).

224. See Weil, *supra* note 219, at 6-7 (stating that innocent purchaser should bear loss for voluntary entry "into a transaction to acquire material of type that is known sometimes to be problematic" because purchaser should request and receive documentation, negotiate arrangement that may protect against economic consequences of subsequent third party claim, and weigh vendor's title); see also William Honan, *Art Dealer Told Again to Return Mosaics*, N.Y. TIMES, October 26, 1990, at C17 (noting that executive director of IFAR commended judges for *Autocephalous* decision that required purchaser to investigate seller; IFAR director also commented that purchasers need to request search from IFAR, procure authenticity of title from disinterested party, and require seller to provide title warranty clause in sales contract).

225. See *O'Keeffe v. Snyder*, 416 A.2d 862, 878 (Handler, J., dissenting) (discussing defendant art dealer's failure to investigate title).

226. See *Porter v. Wertz*, 416 N.Y.S.2d 254, 259 (App. Div. 1979) (emphasizing that commercial indifference diminishes integrity and increases culpability of merchant), *aff'd*, 421 N.E.2d 500 (1981). The court in *Porter* held the defendant art dealer to a higher standard. *Id.*

should be held to a higher standard of good faith in their dealings and investigations of title. Courts should require the defendant to show that it acted as a reasonably prudent purchaser in the art industry by providing evidence of substantial steps taken to verify the validity of title.²²⁷

The dissent in *O'Keefe* specifically questioned whether the defendant had acted with the requisite care and "reasonable prudence" of a responsible person in the art world.²²⁸ First, the defendant failed to trace the provenance or history of possession back to the living artist.²²⁹ Second, the defendant, a professional art dealer, made no attempt to verify title prior to the purchase by contacting the Art Dealers Association of America, where the paintings were listed as stolen at the time of the sales transaction.²³⁰

A showing of substantial steps provides a uniform approach to determine whether a defendant has fulfilled its duty of diligence to investigate title and thus whether it has acted in good faith. As evidence, courts should require steps such as an inquiry of the living artist or governmental authority from the artifact's country of origin, a certificate of title or provenance of the artifact, and a formal search from at least two major art theft registries, such as the IFAR, the ALR, Interpol, or the Art Dealers Association of America. Requiring an art industry purchaser to provide evidence of substantial steps taken in good faith serves to preclude an unscrupulous defendant from profiting from "sharp trade practices."²³¹ The test also discour-

227. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1400-04 (S.D. Ind. 1989), *aff'd on other grounds*, 917 F.2d 278 (7th Cir. 1990). Under the district court's Swiss law analysis, the defendant art dealer was required to show steps taken to investigate title to the mosaics because of the suspicious circumstances surrounding the sale. *Id.* at 1400-04. The analysis delineated an objective standard to determine the good faith of a buyer. *Id.* The district court concluded that the suspicious circumstances surrounding the purchase of the mosaics would cause "an honest and reasonably prudent purchaser in [defendant] Goldberg's position to doubt [seller] Dikman's capacity to convey property rights to the mosaics." *Id.* at 1404.

228. *O'Keefe*, 416 A.2d at 885 & n.4.

229. *Id.* at 866 (discussing defendant's conduct).

230. *Id.* at 877 (Sullivan, J., dissenting) (noting that defendant art dealer claimed ignorance of existence of stolen art registry).

231. See *Porter v. Wertz*, 416 N.Y.S.2d 254, 257 (App. Div. 1979) (determining that defendant's failure to investigate title was inexcusable because it had commercial duty to refrain from sharp trade practice), *aff'd*, 421 N.E.2d 500 (N.Y. 1981).

ages negligent practices that facilitate art theft and is therefore consistent with the UNESCO Convention's goal of obstructing the illicit transfer of cultural property.²³²

C. *Reconciling the Common Law Treatment of the Good Faith Purchaser with Article 7(b)(ii)*

The international nature of art theft disputes requires that U.S. courts view the UNESCO Convention in light of basic principles of law shared by both civil and common law countries.²³³ However, article 7(b)(ii), which provides for just compensation to an innocent purchaser, conflicts with the common law principle that an innocent purchaser acquires no title from a thief.²³⁴ Thus, under the common law action for replevin, an innocent purchaser can be compelled to return the chattel to a plaintiff without receiving compensation.²³⁵ Unless a treaty exists between the United States and another state party that allows for the return of artifacts without compensation, this provision may often pose difficulties for U.S. state and federal courts.²³⁶

232. See Final Report, UNESCO Doc. SHC/MD/5, Annex I, at 20-21 (discussing Convention's goals in U.S. delegate's response).

233. See RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 155 (3d ed. 1985). Commentators have noted that "[t]he quest for law is a task to be accomplished by all jurists in common, each acting in a given sphere and using his own techniques, but always inspired by a common ideal—that of arriving, in each instance, at the solution which best conforms to the general sense of justice—a justice founded upon a reconciliation of all kinds of interests of private individuals and those of the community at large." *Id.*

234. UNESCO Convention, *supra* note 2, 823 U.N.T.S. 231, 240, 10 I.L.M. 289, 291. Article 7(b)(ii) allows for the just compensation of an innocent purchaser of stolen property or of one with valid title upon recovery of cultural property. *Id.* at 238, 10 I.L.M. at 291; *codified in* 19 U.S.C. § 2609(c)(1)(A) (1988); see *supra* notes 56, 58-59 and accompanying text (discussing common law principle that thief passes no title, even to good faith purchaser).

235. See *supra* notes 56, 58-59 and accompanying text (discussing common law principle).

236. See 19 U.S.C. § 2609(c)(1)(B) (1988). Section 2609 of the Implementation Act provides for reciprocal agreements that allow for the return of stolen cultural property "without requiring the payment of compensation." *Id.* The conflict between article 7(b)(ii) of the UNESCO Convention and U.S. common law and statutory rules may be avoided by a treaty between the United States and another State Party to return stolen cultural property without payment of compensation to the innocent purchaser, to the extent permitted by the U.S. Constitution. See, e.g., Treaty Relating to the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Mar. 24, 1971, U.S.-Mex., art. III, para. 1, 22 U.S.T. 494, T.I.A.S. No. 7088, at 3 (providing that upon request of one party other party will employ legal

Pursuant to Article 13(c) of the UNESCO Convention,²³⁷ government authorities can bring a civil action on behalf of a signatory nation to recover lost or stolen cultural property.²³⁸ Therefore, pursuant to article 13(c), an action for the recovery of stolen cultural property is analogous to the common law action for replevin.²³⁹ Nonetheless, in contrast to a replevin action, article 7(b)(ii) entitles the innocent purchaser to just compensation for the return of the cultural property. This solution is also the general rule under the civil law, as expressed, for example, in the French, German, Swiss, and Italian Civil Codes.²⁴⁰

means at its disposal to recover and return stolen cultural property); *see also* S. EXEC. REP. K, 91st Cong., 2d Sess., para. 3 (1971) (noting that U.S.-Mexico treaty is self-executing and authorizes U.S. Attorney General to institute civil action in federal district court pursuant to 28 U.S.C. § 1345 (1988)).

237. UNESCO Convention, *supra* note 2, 823 U.N.T.S. at 244, 10 I.L.M. at 291-92. Article 13 states that

[t]he States Parties to this Convention also undertake, consistent with the laws of each State:

(a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;

(b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;

(c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;

(d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

Id. at 244, 10 I.L.M. at 291-92.

238. S. EXEC. REP. No. 29, 92d Cong., 2d Sess. 4 (1972) (discussing availability of civil actions).

239. *Id.* (according to Congress, true owner may commence civil action and recover property without compensation to good faith purchaser). The article 7(b) import prohibition may create a basis for a cause of action to recover stolen art works. *See* S. EXEC. REP. No. 29, 92d Cong., 2d Sess. 5 (1972) (noting availability of judicial proceedings).

240. *See* Levmore, *supra* note 191. Roman and French law provide the principles applicable in civil law countries to determine the good faith of a purchaser. *Id.* at 56-57. Under Roman law, an innocent party could perfect title through usucaption, a device analogous to common law adverse possession. *Id.* at 56. A thief or even a person who obtained title in good faith, however, could not receive title superior to that of the true owner. *Id.* at 56-57 & n.39. Similarly, modern French law permits recovery from a thief. CODE CIVIL [C. CIV.] art. 2279 (Fr.), in *English at THE FRENCH CIVIL CODE* (John H. Crabb trans. 1977); *see* Levmore, *supra* note 191, at 57 n.10. The French Civil Code deviates from Roman law by favoring one who purchases in a fair and open market or from a merchant established in the sale of a particular type of

This apparent contradiction can be reconciled. The court should read subsection (b)(ii) in light of the civil law's basic tenet that presumes the purchaser's *bona fides*.²⁴¹ This presumption places the burden on the plaintiff to show the purchaser's lack of good faith.²⁴² A faithful interpretation of the subsection requires that the court conscientiously determine

property. C. civ. art. 2280; see Levmore, *supra* note 191, at 57, n.41 (stating that pursuant to article 2280 one who is not established merchant and sells items sporadically should arouse suspicion). The true owner can recover the property from the purchaser but must reimburse the purchaser the price paid. *Id.* at 57.

The Swiss civil code provides a presumption of good faith favoring the purchaser. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] art. II (Switz.), in *English at THE SWISS CIVIL CODE* (Ivy Williams trans. 1976). In addition, art. III permits the judge broad discretion in adjudicating the issue of good faith. ZGB art. III. See *infra* note 249 (providing text of article III).

The Italian Civil Code also favors the good faith purchaser. CODICE CIVILE [C.C.] art. 1153 (It.), in *English at THE ITALIAN CIVIL CODE* (Mario Beltramo et. al. trans. 1969); see Merryman, *supra* note 10, at 484 n.17 (noting that Italian law favors good faith purchaser of painting and not owner from whom it is stolen); see also MANOLO FRIGO, LA PROTEZIONE DEI BENI CULTURALI NEL DIRITTO INTERNAZIONALE 313 (A. Guiffè ed. 1986) (discussing recent Italian case law); Anna Lo Monaco, *Sulla Restituzione Dei Beni Culturali Rubati All'Estero*, 71 RIVISTA DI DIRITTO INTERNAZIONALE 842, 842-43 & n.l., 852 & n.20 (1988) (discussing two recent contrary court decisions in which Tribunal of Rome held that antique dealer was in good faith because purchaser did not exhibit gross negligence when purchasing stolen tapestry; Pretore of Milan held that antique dealer was not in good faith, and ordered return of furniture to true owner, because purchaser failed to investigate diligently origin of antique furniture).

The German Civil Code provides for the good faith acquisition of movable property from an unauthorized person if the purchaser "had obtained possession" of the property. BÜRGERLICHES GESETZBUCH [BGB] § 932(1) (F.R.G.), in *English at THE GERMAN CIVIL CODE* (Ian S. Forrester et. al. trans. 1975). A purchaser, however, "is not in good faith if he knows, or owing to gross negligence does not know" that the movable does not belong to the seller. BGB § 932(2). In addition, title is not transferred if the movable was stolen or lost. BGB § 935(1); see *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 821, 839-40 (S.D.N.Y. 1981) (analyzing facts pursuant to German Civil Code provisions for movables), *aff'd on other grounds*, 836 F.2d 111 (2d Cir. 1982); see also NORBERT HORN, HEIN KÖTZ & HANS G. LESER, *Movables*, in *GERMAN PRIVATE AND COMMERCIAL LAW*, ch. 10, § 2, at 176 (1982).

Under U.S. law, the defendant, even if a "good faith purchaser for value," may be required to return the artifacts without receiving just compensation. See *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982). In *Elicofon*, the Second Circuit followed common law tort principles of conversion and granted replevin to plaintiff despite its acknowledgement that defendant was a good faith purchaser. *Id.* The Court of Appeals for the Second Circuit in *Elicofon*, however, did not address the applicability of German law since it determined that New York law applied. *Id.*; see *supra* notes 56, 58-59 (discussing principle that thief does not pass title).

241. See *supra* note 240; *infra* note 246 (discussing good faith principle in civil law countries).

242. See *supra* note 240 (discussing civil law); *infra* notes 246-49 (discussing Swiss Civil Code).

the purchaser's "innocence" as a prerequisite to payment for the recovered cultural property.²⁴³ Therefore, the court must focus on the good faith of the purchaser.

Under the common law, however, the court focuses on the issue of whether the chattel was stolen.²⁴⁴ Consequently, the court precludes a decision on the issue of the purchaser's good faith, undermining the validity of the purchaser's claim of innocence.²⁴⁵

By contrast, under the Swiss Civil Code, for example, a purchaser is presumed to be *bona fide*.²⁴⁶ A plaintiff seeking the return of cultural property can overcome the good faith presumption, however, by showing that the purchaser failed to investigate suspicious circumstances, in which case the burden of

243. *Webster's New Universal Dictionary* defines faithful as observant of compact, treaties, contracts, and conforming to the instrument's letter and spirit. WEBSTER'S NEW UNIVERSAL DICTIONARY 659 (unabr. 2d ed. 1979). The author uses this term to emphasize the need for U.S. courts to observe the relationship between the UNESCO Convention's goal of preserving signatory nations' cultural heritage and article 7(b)(ii)'s purpose to facilitate the return of cultural property when adjudicating cultural property disputes. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention]. An international treaty generally is interpreted in accordance with the principles set forth in article 31 of the Vienna Convention which states in part that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text . . . its preamble and annexes." *Id.*; see also SWEENEY, *supra* note 26, at 1018-19 (discussing treaty interpretation and Vienna Convention). Although the United States has not yet ratified the Vienna Convention, this general rule of treaty interpretation provides an approach for U.S. courts that is internationally acceptable. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 78-79 (1991).

244. See Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1057-60 (1954) (noting that "good faith" does not protect purchaser).

245. See *id.* Professor Gilmore noted that "[a]s the doctrine strikes roots in one or another field, the 'good faith' component tends to atrophy and the commercial purchaser is protected with little more than lip service paid to his 'bona fides.'" *Id.* at 1057. The severe treatment of the good faith purchaser harkens back to early American and English cases. *E.g.*, *Hollins v. Fowler*, 7 L.T.R. 639 (Q.B. 1874); see *supra* notes 58-60 and accompanying text (discussing common law conversion principle).

246. ZGB article II states that

Bona fides is presumed whenever the existence of a right has been expressly made to depend on the observance of good faith. No person can plead *bona fides* in any case where he has failed to exercise the degree of care required by the circumstances.

ZGB art. II; see *supra* note 240 (discussing Swiss Civil Code); see also DAVID & BRIERLEY, *supra* note 233, at 152 & n.9 (discussing good faith principle).

proof then shifts to the purchaser.²⁴⁷ The purchaser must show measures taken in a good faith attempt to overcome reasonable doubts as to the seller's capacity to convey title.²⁴⁸ Evidence of good faith measures must be substantial or the court may determine that the purchaser either acted in bad faith, or at the very least, not in good faith.²⁴⁹ If the purchaser does not prove good faith, the true owner can recover the property pursuant to article 7(b)(ii) without paying compensation to the defendant.²⁵⁰ The owner recovers the property because the purchaser was not innocent and thus did not acquire valid title to stolen cultural property.²⁵¹ In these circumstances, article 7(b)(ii) of the UNESCO Convention is consistent with the common law rule that a thief does not pass valid title because, as in a replevin action, the purchaser must return the artifacts without receiving compensation. In addition, such a ruling is in accord with article 13's requirement that judicial actions be consistent with the laws of the signatory nation.²⁵²

247. *Cf.* *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1400-04 (S.D. Ind. 1989), *aff'd on other grounds*, 917 F.2d 278 (7th Cir. 1990) (explaining Swiss substantive law principles). The court found many suspicious circumstances surrounding the sale of the mosaics, including the defendant's knowledge of Turkey's 1974 military occupation of Cyprus, the fact that the appraised commercial value of the mosaics was significantly higher than the price paid by defendant, and the rushed sales transaction. *Id.* at 1400-01. The court also discredited defendant's testimony that she "fell in love" with the mosaics upon seeing photographs of them because of eager attempts to sell them for US\$20 million immediately following the transaction. *Id.* at 1401 n.24.

248. *See id.* at 1400-04. The district court examined defendant's action in order to assess its purported good faith. *Id.* at 1400. First, the court found that the inquiry with UNESCO was inadequate because defendant failed to verify whether the mosaics were reported as stolen. *Id.* at 1403. Second, the telephone call to IFAR was not credible because defendant failed to produce a receipt indicating a formal search or even the name of the person with whom it had communicated. *Id.* Finally, the defendant failed to contact the Republic of Cyprus, the first logical step in such an inquiry, or even a single disinterested authority on Byzantine art. *Id.* at 1403-04.

249. *Id.* at 1404 (concluding that defendant failed to take reasonable steps to resolve doubt as to good faith and therefore did not obtain good title or right to possession of mosaics); ZGB article III states that

[w]here the law expressly leaves a point to the discretion of the judge, or directs him to take circumstances into consideration, or to appreciate whether a ground alleged is material, he must base his decision on principles of justice and equity.

ZGB art. III.

250. S. EXEC. REP. NO. 29, 92d Cong., 2d Sess. 4 (1972).

251. *See DOBBS, supra* note 56, § 5.13, at 399-400 (discussing common law replevin action).

252. UNESCO Convention, *supra* note 2, art. 13, 823 U.N.T.S. at 244, 10 I.L.M.

On the other hand, if the purchaser does prove good faith pursuant to article 7(b)(ii), the innocent purchaser is entitled to compensation for the return of the cultural property. If a *bona fide* possessor must relinquish the property in the interest of a signatory nation's objective to preserve its cultural heritage, compensation is only just under principles of equity.²⁵³ The U.S. Congress's implementing legislation, however, noted that the legislation would not preempt state law or modify remedies, thus taking into account the Senate's advice and consent to the Convention's ratification in 1972.²⁵⁴ Nonetheless, Congress's express codification of article 7(b)(ii) evidences an intent to supersede state common law and give precedence to the international treaty.²⁵⁵ In fact, the U.S. Congress created a statutory basis for the Convention's substantive remedial provision, article 7(b)(ii), in section 2609 of the CPIA, and thus effectively modified the long established common law principle.²⁵⁶ As a result, payment of just compensation to an innocent purchaser is consistent with the law of the

at 291-92. Article 7(b) obligates the U.S. government to assist in the recovery and return of cultural property to its country of origin. Moreover, under the article 13 requirement of compatibility with national legislation, the defendant may be entitled to just compensation under the U.S. Constitution's fifth amendment. See Bator, *supra* note 21, at 383-84. The applicable fifth amendment clause states that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. Article 7(b)(ii) is consonant with the fifth amendment, as it stipulates that a purchaser with valid title must be justly compensated for returning artifacts to a signatory nation's public museum or institution. UNESCO Convention, *supra* note 2, art. 7(b)(ii), 823 U.N.T.S. at 240, 10 I.L.M. at 291.

Under certain instances, a purchaser may acquire valid title by prescription, a method of acquiring title based on long and continued enjoyment. BLACK'S LAW DICTIONARY 1183 (6th ed. 1990). Generally, in the United States, prescriptive title may be based on a statute of limitations defense and/or a theory of adverse possession as applied to chattels. See Gerstenblith, *supra* note 166; see also O'Keefe v. Snyder, 405 A.2d 840, 844-47 (App. Div. 1979) (basing its decision on theory of adverse possession of chattels), *rev'd*, 416 A.2d 862, 871-72 (N.J. 1980).

253. See RALPH A. NEWMAN, EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 205-380 (1973) (discussing equitable principles and good faith); see also Final Report, UNESCO Doc. SHC/MD/5, Annex I, at 17 (noting Swedish delegate's reply concerning legal principles governing movable property).

254. See S. EXEC. REP. No. 29, 92d Cong., 2d Sess. 7 (1972).

255. See S. REP. No. 564, 97th Cong., 2d Sess., reprinted in 1982 U.S.C.C.A.N. 4078, 4099; see *supra* note 26 (discussing necessity of codification of non-self-executing treaty in order for treaty to bind U.S. courts).

256. 19 U.S.C. § 2609(c)(1); see *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1493 (1991) (stating that treaties are construed more liberally than private agreements, and to ascertain their meaning, courts may look to history, negotiations, and

signatory nation, the United States, as required by article 13 of the Convention. Moreover, the remedial provision of article 7(b)(ii), as codified in the CPIA, preempts any local or state law contrary to the provision.²⁵⁷

In addition, the legislative history of the U.S. accession to the Convention evidenced a foreign policy determination to aid in the preservation of signatory nations' cultural heritage and to promote a concerted international effort to recover and return cultural property.²⁵⁸ This policy is not grounded in common law property rights but in a broad international legal perspective that considers the right to national "cultural property" to be inalienable and essential to the integrity of a nation's culture and civilization.²⁵⁹ The U.S. Congress further

"practical construction adopted by the parties") (quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985)).

A U.S. Senate report on the Convention indicates that U.S. customs authorities are not expected to detect illicit cultural property at international borders; therefore, in the United States and other countries, judicial proceedings will frequently be necessary to effect recovery. See S. EXEC. REP. No. 29, 92d Cong., 2d Sess. 4 (1972). The Senate understood that article 7(b) permits recovery of stolen artifacts pursuant to existing U.S. state statutes and common law governing the return of personal property. See *id.* Subsection (b) also creates the right to bring actions in federal court pursuant to CPIA section 2609(c). See 19 U.S.C. §§ 2601-2613 (1988).

257. See Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, Title III, 96 Stat. 2351 (1983) (codified at 19 U.S.C. §§ 2601-2613 (1988)). The U.S. Congress noted that the Convention was not self-executing and would have no domestic legal effect except as defined by implementing legislation. S. REP. No. 564, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 4078, 4101. Upon codification, preemption occurs by virtue of the Supremacy Clause of article VI of the U.S. Constitution, which states in part that "[a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. CONST. art. VI, cl. 2; see *Eastern Airlines, Inc. v. Floyd*, 872 F.2d 1462, 1480 (11th Cir. 1990) (dismissing state common law claim and stating that "[a]ny state law in conflict with a treaty of the United States is invalid" under Supremacy Clause) (quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978)), *rev'd on other grounds*, 111 S. Ct. 1489 (1991).

258. See *supra* notes 22-26 and accompanying text (discussing CPIA legislative history); see also UNIDROIT, Study LXX/Doc. 14, at 3, para. 6 (1989), in THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY. The summary report of the UNIDROIT study group noted the "capital importance" of protecting cultural property. *Id.* Protection of cultural property is critical because art works are increasing in value due to the practice of "laundering" money resulting from "closer links between commerce in works of art and traffic in drugs." *Id.* Therefore, a policy that discourages the illicit art trade is political in nature. *Id.* See generally Gordon, *supra* note 6, at 540-41 (discussing criminal activity engendered by lucrative art trade and difficulty of law enforcement).

259. See generally Gerte Reichelt, *La Prot ection Internationale Des Biens Culturels*, 1 REVUE DE DROIT UNIFORME 52 (1988). UNIDROIT and UNESCO have undertaken

recognized the importance of the implementing legislation to the United States' international cultural relations with close allies.²⁶⁰

Therefore, rather than applying varying analyses, which create uncertainty in state and federal courts, the U.S. judiciary should apply uniform standards in replevin actions to reach the merits of each case and to inquire thoroughly into the purchaser's good faith. A good faith inquiry on the merits is consistent with article 7(b)(ii) of the UNESCO Convention, the CPIA, and equitable principles.²⁶¹

The concept of good faith, a major provision of the Convention, is a fundamental principle shared by civil and common law countries.²⁶² Its inclusion in the Convention highlights its importance to signatory nations in providing an equitable remedy designed to facilitate the repatriation of cultural property.²⁶³ Although these disputes are often factually complex, courts must undertake to uphold the UNESCO Convention's goal to protect and preserve cultural property.²⁶⁴ The continuing proliferation of illicitly traded art requires a judicial commitment to ensure that national law conforms to interna-

joint in-depth studies of the international protection of cultural property. *Id.* The second of these studies focuses on the good faith acquisition of cultural property in civil law countries. *Id.* Cultural property may be classified as property "which is *res extra commercium*" because of its unique characteristics. *Id.* at 89. Consequently, it is not subject to the law which usually governs trade in movable goods. *Id.* For example, in France, property belonging to the "public domain" is excluded from commerce, and Law 31.12.1913 concerning historic monuments does not permit acquisitions even in good faith. *Id.* at 89-91.

260. See *supra* notes 22-25 and accompanying text (discussing U.S. foreign relations considerations prior to Convention's implementation).

261. See NEWMAN, *supra* note 253, at 589-650 (discussing application of equitable principles in civil and common law countries).

262. See UNESCO Convention, *supra* note 2, art. 7(b)(ii), 823 U.N.T.S. 231, 240, 10 I.L.M. 289, 291; see also DAVID & BRIERLEY, *supra* note 233, at 150-54 (discussing good faith as super-eminent principle of law).

263. See Reichelt, *supra* note 259. A UNIDROIT study on the illicit movement of cultural property explains that, from a private law perspective, the right to payment facilitates the restitution of stolen cultural property, extends the legal remedies available to the former owner, and increases the purchaser's risk. *Id.* at 107.

264. See UNESCO Convention, *supra* note 2, pmbl., 823 U.N.T.S. at 232, 10 I.L.M. at 289; see also James A.R. Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT'L L. & POL. 789, 795-99 (1983) (discussing dispute in *New Zealand v. Ortiz*, [1984] 1 App. Cas 1 (1983), as example of case that frustrates UNESCO Convention's purpose because English Court of Appeal held that retrieval of illegally exported Maori cultural property "must be achieved by diplomatic means").

tional law in order both to discourage illegal trading and to facilitate the return of cultural property to its country of origin.²⁶⁵

CONCLUSION

In adjudicating art theft disputes, courts in the United States must undertake to create a jurisprudence that embraces the ideals espoused in the UNESCO Convention. Utilizing uniform standards to examine the conduct of litigants in a *replevin* action can provide a basis for just resolution to controversies involving cultural property. The UNESCO Convention represents a concerted effort to focus international attention on the importance of the cultural property of nations and instill respect for the heritage of all peoples. The U.S. judiciary must manifest in its decisions both the spirit and the letter of the UNESCO Convention.

*Maritza F. Bolaño**

265. See *supra* note 257 (discussing Supremacy Clause). For related views, see COMMISSION COMMUNICATION ON THE PROTECTION OF NATIONAL TREASURES, Doc. 594 (1989), at 3-7 (setting out European Community and international legal frameworks relating to movement of national treasures and related problems upon completion of internal market in 1992); *id.* at 8, para. 24 (noting that "rules laid down by civil law" concerning movable property would govern recovery of stolen art with "crux" of problem being *bona fide* purchaser); UNIDROIT, Preliminary Draft Convention, *supra* note 197, arts. 4(1), 8(1) (providing "fair and reasonable compensation" to good faith purchaser for return of art object); *id.* art. 9 (creating judicial cause of action where possessor habitually resides or in State where object is located at time of claim).

* J.D. Candidate, 1992, Fordham University