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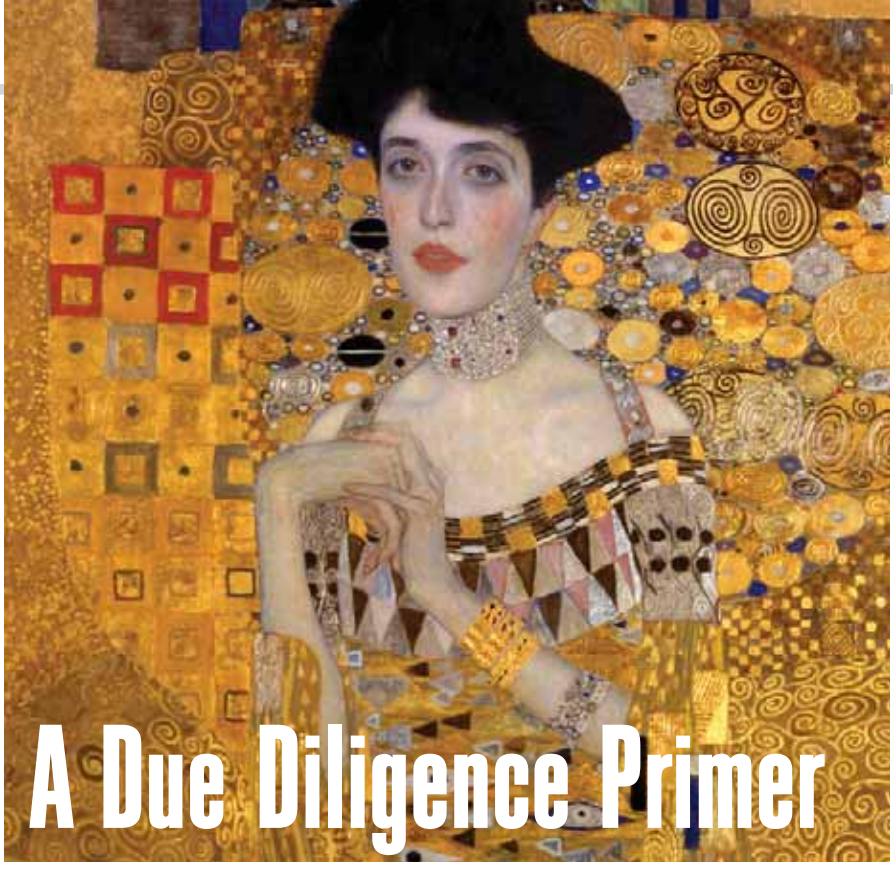

Stolen Cultural Property: A Due Diligence Primer

Completing detailed homework before purchasing artwork or cultural artifacts is essential to protect would-be buyers from loss and liability.

The art dealer has a special deal for you. One that he's not offering just anybody. Just you. It's a Cezanne. And the price is $750,000. Cash on delivery. But, you ask, "Why is the price so low? Cezannes have sold for hundreds of millions of dollars." The reply: "I'm going through a divorce and I need cash. For my kids."

Is this deal too good to be true? Short answer: yes. For a longer answer, read on.

In all likelihood, the Cezanne is either stolen or a forgery. If it is stolen, the seller does not have the right to convey title, so if you buy it, your title is void.[1] More than that, law enforcement authorities might be suspicious of your role, wondering if you are knowingly involved in trafficking stolen property. And what will the neighbors think? The longer you look at it, the less appealing this deal seems to be.

Lawyers get involved in transactions like this in many different ways: sometimes before the fact and sometimes after. Preventing a problematic transaction in the first place is optimal, and the best means to that end is effective and rigorous due diligence prior to acquisition.

Provenance and Due Diligence

Not all stolen property scenarios are as obvious as the Cezanne example above. Lesser-known works and lesser-known artists pose significant hazards, which are compounded by the passage of time. And there are significant incentives to trafficking in stolen art. Failures of due diligence can be costly. Stolen cultural property might be subject to return (without refund) or even seizure by law enforcement.

In the worst-case scenario, the failure to verify the suspicious provenance could result in criminal charges. Prosecution for possession or transportation of stolen property can be based on a theory of "willful blindness," under which knowledge that an object is stolen is imputed to a defendant who consciously closes his or her eyes to facts that would lead a reasonable person to realize the object was stolen.[2]

Compounding the due diligence challenge is the fact that, as a practical matter, the provenance of cultural property offered for legitimate sale is frequently imperfect. This is especially true when the object is old and has passed through many hands over the years. Records are lost, witnesses die, art dealers and galleries go out of business. The due diligence challenge is significant.

Fine Art

Let's start with fine art. Here are some basic questions a buyer should ask before buying.

What is the seller's basis for ownership? The prospective buyer should ask the seller for complete documentation (such as contracts, invoices, receipts, import and export records, bills of lading, etc.). These documents should then be verified.

If a seller will not comply with this request, or provide a reasonable explanation, walk away. If the seller provides a letter documenting provenance, contact the author of the letter. Then go beyond the face of the letter and follow any clues that are revealed. If the letter refers to previous transactions, obtain records of those transactions. If the parties are still living, speak to them directly. Leave no stone unturned.

Is the ownership of the work disputed? Determine whether there are any ongoing disputes over ownership by examining relevant probate and other court records. Obtain records relating to loans or sales of the object and interview the parties involved. Identifying issues prior to acquisition — even if their merit is unclear — will save anguish and expense in the long run.

Has the work been reported stolen? Query stolen art databases, including the FBI's National Stolen Art File, INTERPOL's stolen-works-of-art database and the Art Loss Register. Survey dealers and others who participate actively in the market for that type of work. Check public resources available through the Internet and news services. These resources are not comprehensive, as they are based on thefts that are reported to authorities, but they are worth checking.

Here is an example from my experience as a federal prosecutor. In 1978, seven Norman Rockwell paintings were stolen from a gallery in Minneapolis. The police and FBI were called but the thieves were never arrested. Years later, in 1999, FBI Special Agent Bob Wittman received a call from a Philadelphia art dealer who was suspicious about two Rockwells he had for sale on consignment.

FBI records showed that the two paintings were among the seven stolen in 1978, but they had not been identified as such in any public database. Bob and I investigated the consigner, a Brazilian art dealer. In the end, we recovered three stolen Rockwell paintings from a farmhouse in the mountains behind Rio de Janeiro: "The Spirit of '76,'" "So Much Concern" and "A Hasty Retreat," worth about a million dollars.

Looting of archaeological sites is an international scourge that results in significant challenges for buyers and acquiring museums.

Is there any reason to believe the object might have been looted by Nazis? During World War II, the Nazi regime systematically plundered art from European museums, churches and private collections, particularly those of Jewish families. As a result of the enormous scope of this effort, a significant number of stolen works in the market today are among those looted by the Nazis.[3] In addition, many questionable works of fine art, while not plundered by the Nazi regime directly, were acquired from Jewish owners under duress for a fraction of their value. Acquiring such works is obviously to be avoided.

One prominent example of this particular peril is *Republic of Austria v. Altmann*,[4] the basis for the movie *Woman in Gold*. In that case, the ownership of several paintings by Gustav Klimt (1862-1918) was at issue. The plaintiff claimed the paintings had been owned by her uncle, who fled Austria prior to the Nazi invasion of 1938, leaving the paintings behind. She alleged the paintings were seized by the Nazis prior to being acquired by the Austrian Gallery. The Austrian Gallery contended that the paintings had been bequeathed to it by the plaintiff's aunt.

The plaintiff filed suit, first in Austria, and then in the United States. The case made its way to the U.S. Supreme Court, which ruled that the plaintiff could sue the Austrian government in U.S. court. Ultimately, the case went to arbitration and the paintings were returned to the plaintiff.[5]

A thorough review of ownership and transaction records should be conducted of any piece of artwork that could have been plundered by the Nazi regime.

Archaeological Works

While archeological objects pose many of the same challenges as fine art, there are some additional concerns that must be addressed.

Is the object a protected Native American artifact? U.S. law protects certain Native American artifacts. The Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa *et seq.*, prohibits removing or damaging "any archaeological resource" (as defined) located on federal and Native American lands without a permit, unless a specific exemption applies. ARPA also prohibits trafficking in such artifacts.[6]

The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 *et seq.*, also protects Native American artifacts, particularly human remains and burial objects. Among other provisions, NAGPRA requires the return, under defined circumstances, of Native American human remains and artifacts.[7]

Violating NAGPRA is a federal criminal offense under 18 U.S.C. § 1170, and may trigger a variety of other federal criminal liability including under 18 U.S.C. § 641 (theft of government property), 18 U.S.C. § 1361 (damaging government property), 16 U.S.C.A. § 710 (Migratory Bird Treaty Act), 18 U.S.C. § 1163 (theft from a tribal organization), and 18 U.S.C. § 2314 (interstate transportation of stolen property).[8]

Does the object originate from a foreign nation? Looting of archaeological sites is an international scourge[9] that results in significant challenges for buyers and acquiring museums.[10] This problem is truly global in scope.[11] Some recently looted sites, notably in Peru and Iraq, are so extensive they can be seen from space.[12]

Proving that an object of cultural property has been looted can be factually challenging because no inventory of underground archaeological objects exists. Likewise, because looting has been so widespread and ongoing over the years, there is no comprehensive inventory of

looted cultural property.

Nevertheless, in evaluating whether an object might be stolen or looted, buyers acquiring archaeological objects should consult resources such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Council of Museum's (ICOM) Red List and the U.S. State Department Cultural Heritage Center.

Determining whether an object is looted can also be legally complex because it involves the analysis of international treaties and the laws of the object's country of origin. Many nations, unlike the United States, have laws (sometimes called "patrimony laws") asserting national ownership of all cultural property that originated within the nation's borders.[13] These nations classify cultural objects removed without permission as stolen property.[14]

In addition to cultural property ownership laws, many countries also have strict export laws for cultural artifacts; in fact, some countries prophylactically ban exports of certain kinds of cultural property.[15] An object brought to the United States in violation of these laws will be considered (by the country of origin) to be an illegal export and might be considered an illegal import as well.

Was the object stolen from a foreign museum? One particularly egregious example of museum theft is the pillaging of the Iraqi National Museum of Antiquities immediately after the fall of Saddam Hussein — estimated by author Roger Atwood to involve the theft of 13,000 objects.[16] Of course, not every museum theft is so well publicized and cultural property removed from museums sometimes enters the market long after it was stolen. Cultural property stolen from museums is generally more easily identified than looted artifacts, but the ease of identification depends on the quality of the museum's record keeping, which is highly variable.

Is the object subject to seizure by the U.S. government? A number of import restrictions can result in stolen cultural property being seized by the. U.S. government for return to the country of origin.[17] One of these is the Convention on Cultural Property Implementation Act (CPIA),[18] which implements the 1970 UNESCO Convention and allows the U.S. government to restrict imports of certain cultural property,[19] including objects stolen from museums.[20] Under the CPIA, the U.S. government can enter into bilateral agreements and memoranda of understanding with foreign nations to restrict the importation of identified antiquities.[21]

The CPIA was the basis for the U.S. government's claim in *United States v. Eighteenth Century Peruvian Oil on Canvas Painting*,[22] which involved two paintings imported into the United States from South America in 2005. Both paintings, which appeared to be cut from their original frames, were provided to a gallery in Washington, DC, to sell on consignment. The gallery was suspicious of their provenance and they were seized by the FBI. The U.S. government filed a complaint under CPIA, obtained an order of forfeiture and returned the paintings to Peru.[23]

Another basis for a U.S. government claim against an object is the National Stolen Property Act (NSPA),[24] which makes it a crime to knowingly transport a stolen object worth more than $5,000 across state or international boundaries. The leading example is *United States v. Schultz*,[25] a federal criminal prosecution against Frederick Schultz, a prominent antiquities dealer in New York. Schultz and a British confederate, Jonathan Tokeley-Parry, conspired to smuggle artifacts from Egypt to the United States through Britain, where they were altered to appear to be part of a fictional early 20th-century collection called the Thomas Alcock Collection. Egypt has a patrimony law under which artifacts like those trafficked by Tokeley-Parry and Schultz are considered the property of the Egyptian government.[26] Tokeley-Parry was successfully prosecuted by British authorities and Schultz by U.S. authorities.

There are other statutes under which the U.S. government has sought forfeiture in addition to, or in combination with, the NSPA and the CPIA. These include 19 U.S.C. § 1595a and 18 U.S.C. § 545, which authorize seizure and forfeiture of merchandise imported into the United States "contrary to law." In these actions, the artifact at issue is usually first seized by the U.S. government, which then files a lawsuit against the object itself (as opposed to the object's purported owner). If the government prevails, the object is forfeited, meaning that the government takes exclusive title, usually with the goal of returning it to the country of origin.[27]

Can the country of origin make a claim? Even without the aid of the U.S. government, foreign countries can seek the return of stolen objects through the U.S. legal system. For example, in 2008, the government of Peru sued Yale University, seeking the return of many artifacts from Machu Picchu.[28] The artifacts had been at Yale for approximately 100 years — with the permission of the government of Peru, according to Yale. Peru contended they had been loaned to Yale in the early 20th century and never returned. The case was eventually resolved by a settlement involving the return of some objects and the development of a program of academic cultural exchange.[29]

As a federal prosecutor, I was involved in a similarly complex case involving Peruvian antiquities. A U.S.museum acquired a gold Moche monkey head (circa 300 A.D.) from a benefactor. The provenance of the monkey head was weak and contradictory. Our investigation showed that the monkey head had been looted from the royal tombs of Sipan and Peru asserted ownership as part of its cultural heritage.

Due to the passage of time from the acquisition of the monkey head, I was faced with significant statute of limitations and laches issues. The museum was faced with the fact that it owned looted property, which was inconsistent with its values. In the end, a settlement was reached under which the museum voluntarily surrendered the monkey head, which was returned by the U.S. government to the government of Peru.

Conclusion

The presence of stolen cultural property is the marketplace is sufficiently commonplace to justify rigorous due diligence prior to acquisition. The practical issues associated with identifying satisfactory provenance are significant. But the cost of due diligence is more than justified by the avoidance of a negative outcome in the market — or worse, at the hands of law enforcement. ◆

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to charge and does not purport to be a complete statement of all relevant issues

NOTES

1. "Void" title can be contrasted with "voidable" title. Under this doctrine, a party who acquires flawed — and therefore voidable — title to property does not automatically lose title when the flaw is discovered. The acquiring party might defend title on the ground, for example, that he or she is a "good-faith purchaser." Generally speaking, this defense does not apply in the case of stolen property. *See* Patty Gerstenblith, *Art, Cultural Heritage and the Law* (Durham, NC: Carolina Academic Press, 2004), 423-24.

2. "A defendant may not purposefully remain ignorant of either the facts or the law in order to escape the consequences of the law." *United States v. Schultz*, 333 F.3d 393, 413 (2d Cir. 2003).

3. Michael Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (New York: NYU Press, 2003); Robert M. Edsel, *Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History* (New York: Center Street Books, 2010).

4. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

5. William Grimes, "Maria Altmann, Pursuer of Family's Stolen Paintings, Dies at 94," *New York Times*, February 9, 2011, www.nytimes.com/2011/02/09/arts/design/09altmann.html.

6. *See* 16 U.S.C. § 470ee.

7. *See* 25 U.S.C. § 3005.

8. *See generally* Judith Benderson, Executive Office for U.S. Attorneys, *Native American Artifacts: The Archaeological Resource Protection Act and the Native American Graves Protection Act*, https://www.justice.gov/sites/default/files/usao/legacy/2010/07/26/usab5804.pdf.

9. Matthew Bogdanos and William Patrick, *Thieves of Baghdad* (New York: Bloomsbury, 2005), 249; Peter Brems and Wilm Van den Eynde, *Blood Antiquities*, 2009, film. www.fandor.com/films/blood_antiquities.

10. Robert K. Wittman, *Priceless: How I Went Undercover to Rescue the World's Stolen Treasures* (New York: Crown Publishers, 2010), 82-86.

11. Roger Atwood, *Stealing History: Tomb Raiders, Smugglers, and the Looting of the Ancient World* (New York: St. Martin's Griffin, 2006).

12. Dan Contreras, "Using Google Earth to Identify Site Looting in Peru: Images," Trafficking Culture, accessed May 5, 2014, www.traffickingculture.org/data/using-google-earth-to-identify-site-looting-in-peru-images-dan-contreras/; Margarete Van Ess *et al.*, "Detection of Looting Activities at Archaeological Sites in Iraq Using Ikonos Imagery," AGIT Symposium 18 (2006): 669.

13. U.S. Department of State, Bureau of Educational and Cultural Affairs, "Guide to Cultural Property Import Restrictions Currently Imposed by the United States of America," February 2013, eca.state.gov/files/bureau/chart-of-import-restrictions.pdf.

14. Leah Weiss, "The Role of Museums in Sustaining the Illicit Trade in Cultural Property," *25 Cardozo Arts & Ent. LJ* 837, 843 (2007).

15. Robert K. Paterson, "Moving Culture: The Future of National Cultural Property Export Controls," 18:1 *Sw. J. Int'l L.* 287, 287 (2012).

16. Atwood, *supra note* 17, at 1. *See also* Bogdanos and Patrick, *Thieves of Baghdad*.

17. Export restrictions might also be relevant. Under regulations by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC), it would be difficult to return stolen cultural property to Iran, for example. 31 C.F.R. 560.204 (2014) (Prohibited exportation, re-exportation, sale or supply of goods, technology, or services to Iran).

18. 19 U.S.C. § 2601 *et seq.* (2013).

19. 19 U.S.C. §§ 2602-2606 (2013).

20. 19 U.S.C. § 2607 (2013) (Stolen cultural property).

21. Applicable import restrictions can be found at the State Department website: eca.state.gov/files/bureau/chart-of-import-restrictions.pdf.

22. 597 F. *Supp.* 2d 618 (E.D. Va. 2009).

See **Stolen Cultural Property** *continued on page 24*