ART & ADVOCACY

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Highlights of Selected Criminal Cases Involving Art & Culture Objects: 2012

By Steven D. Feldman

Introduction

In the United States, the year 2012 was notable for the intersection of criminal cases and the art and cultural property world, rather than the more routine cases of stolen art, fraudulent paintings, or the theft of proceeds from gallery sales. The criminal art and cultural object disputes included a constellation of fascinating cases covering a wide breadth of subjects and issues. The cases were investigated and prosecuted by a number of different agencies, illustrating the variety of law-enforcement entities interested in and committed to protecting art and cultural items and their respective markets.

Stolen Historical Documents

In June 2012, Barry H. Landau, a famous collector of presidential memorabilia, was sentenced to seven years' imprisonment for stealing valuable historical documents from museums and historical societies in Maryland, Pennsylvania, New York, and Connecticut, and then selling selected documents for profit. Mr. Landau and a young colleague, Jason Savedoff, were prosecuted by the U.S. Attorney's Office for the District of Maryland. Both men pleaded guilty. The scheme may have included more than 10,000 stolen items.

Mr. Landau was arrested in July 2011 when an employee at the Maryland Historical Society called the police after observing Mr. Savedoff place a document in a laptop case and then leave the building. When confronted by the police, Mr. Savedoff complained of stomach pains, but law-enforcement officers eventually found keys in his pocket that led to a locker in a nearby building that contained approximately 60 documents. The materials included documents signed by President Abraham Lincoln, numerous inaugural ball invitations and programs worth about $500,000, and signed commemorations of the Statue of Liberty and Washington Monument. Mr. Landau had signed out the documents for viewing in the Maryland Historical Society building.

Mr. Landau and Mr. Savedoff were indicted on charges of conspiracy to steal historical documents, theft of historical documents, and selling selected documents for profit over the period December 2010 through July 2011. According to the indictment, the stolen materials included a letter dated April 1, 1780 from Benjamin Franklin to John Paul Jones stolen from the New York Historical Society; a land grant dated June 1, 1861, signed by President Abraham Lincoln, to a soldier from the Maryland Militia, War of 1812, stolen from the Maryland Historical Society; and seven "reading copies" of speeches given by President Franklin D. Roosevelt, stolen from the Franklin D. Roosevelt Presidential Library, a component of the National Archives. Mr. Landau subsequently sold four of the Roosevelt speeches for $35,000. According to Mr. Landau's plea agreement, Mr. Landau and Mr. Savedoff stole valuable documents and manuscripts from additional museums, including the Historical Society of Pennsylvania, the Connecticut Historical Society, and the University of Vermont.

The scheme was notable for its extensive takings and *modus operandi*. Mr. Landau had deep pockets sewn into the insides of his overcoat and sports jackets so that he could

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hide and remove documents from the museums. He regularly brought baked goods or other treats for the museum staff when he came to conduct his "research," thereby ingratiating himself with the employees. Once a document had been stolen, steps were taken to remove any markings or inventory control notations made on the document. A checklist was prepared for each stolen document that identified the author and date of the document; the collection from which it was stolen; whether the museum card catalogue had been collected; whether there existed any microfilm or other "finding aid" for the document at the museum; the nature of any markings on the document; and whether any museum markings had been removed from the document. As seen in other cultural object theft cases, Mr. Landau and Mr. Savedoff often took the card catalogue entries and other "finding aids," making it difficult for a museum to discover that an item was missing.

Ultimately, when a search warrant was executed at Mr. Landau's residence, law-enforcement agents recovered more than 10,000 historical items. More than 6,000 of those items have been identified as stolen property, including documents signed by President George Washington, President John Adams, President Franklin Roosevelt, Marie Antoinette, Karl Marx, and Sir Isaac Newton. Those 6,000 items were stolen from libraries and repositories throughout the United States. At Mr. Landau's sentencing, prosecutors introduced new evidence that Mr. Landau stole at least one item from the William McKinley Presidential Library and Museum in Ohio in 2005; from 17 to 100 items from the Culinary Arts Museum in Rhode Island in 2008; and more than 250 items from Ms. Betty Currie, former White House Secretary to President Bill Clinton, in 2010.

United States District Judge Catherine C. Blake sentenced Mr. Landau to seven years in prison, followed by three years of supervised release. Judge Blake also ordered Mr. Landau to pay restitution totaling $46,525 to three dealers who unwittingly purchased stolen documents from him, and to forfeit all of the documents recovered during the search of his New York apartment.

Fake Looted Greek Coins

In July 2012, Dr. Arnold-Peter Weiss–a prominent Rhode Island hand surgeon, professor of orthopedics at Brown University School of Medicine, and demaler in ancient coins–pleaded guilty in New York State court to three misdemeanor counts of attempted criminal possession of stolen property, specifically three ancient coins he believed had been recently looted from Italy. Dr. Weiss was prosecuted by the Manhattan District Attorney's Office. Pursuant to a plea agreement, Dr. Weiss was sentenced to 70 hours of community service (providing medical care to disadvantaged patients in Rhode Island), and was ordered to pay a $1,000 fine for each of the three coins in the case and to forfeit an additional 23 ancient coins that were seized from him at the time of his arrest. The court also ordered Dr. Weiss to write an article for publication in a coin collecting magazine or journal warning of the risks of dealing in coins of unknown or looted provenance.

Dr. Weiss was arrested in January 2012 at the Waldorf-Astoria hotel in New York City, and charged with criminal possession of stolen property valued at more than $50,000 for his possession of a purported ancient coin recently looted from Sicily. At the time of his arrest, Dr. Weiss was selling ancient Greek coins at the 40th annual New York International Numismatic Convention. In particular, he possessed a silver coin that purported to be an early 4th century B.C. Greek type known as a Katane Tetradrachm, which he valued at $300,000 - $350,000, and was also trying to sell two other coins, Akragas Dekadrachms, purportedly dating from 409-406 B.C., which Dr. Weiss valued at upward of $2.5 million each. According to the criminal complaint charging Dr. Weiss, he believed at least one of the coins had been recently looted and smuggled out of Italy. The complaint alleged that Dr. Weiss told a confidential informant that "[t]here's no paperwork, I know this is a fresh coin, this was dug up a few years ago." Dr. Weiss also allegedly stated, "This was dug up two years ago. I know where this came from." The complaint further alleged that Dr. Weiss told an undercover investigator that he knew the coins belonged to the government of Italy, which claims state ownership of all antiquities found there since 1909.

Dr. Weiss was saved from a much more onerous outcome in his case by the fact that he was also duped. At Dr. Weiss's court appearance, Assistant District Attorney Matthew Bogdanos, the prosecutor responsible for Dr. Weiss's case, revealed that all three of the seized coins were in fact modern forgeries. Instead of being charged with the felony of possessing stolen property and attempting to sell stolen property, Dr. Weiss pleaded guilty to misdemeanor "attempted" possession because the coins in the case were not ancient and therefore were not actually looted from Italy. According to the prosecutors, the coins were excellent forgeries, and the true nature of the coins was only revealed after experts spent five months studying the coins, comparing them with museum specimens with known provenances, and examining them under a scanning electron microscope.

As part of his sentence, the court required Dr. Weiss, the former treasurer of the American Numismatic Society, to write an article for publication in a coin collecting magazine or journal warning of the risks of dealing in coins of unknown or looted provenance. Dr. Weiss's article entitled "Caveat Emptor: A Guide to Responsible Coin Collecting" was published in the fall of 2012 in the American Numismatic Society's magazine.

Dinosaur Fossils

On December 27, 2012, Eric Prokopi, a self-described "commercial paleontologist," pled guilty to engaging in a scheme to illegally import the fossilized remains of numerous dinosaurs that had been taken out of their native countries illegally and smuggled into the United States. Specifically, Mr. Prokopi pled guilty to a three-count criminal information: Count One charged conspiracy to smuggle illegal goods and make false statements with respect to a Chinese Microraptor flying dinosaur; Count Two charged entry of goods by means of false statements with respect to two Mongolian dinosaur fossils; and Count Three charged interstate and foreign transportation of goods converted and taken by fraud. As part of his plea agreement, Mr. Prokopi agreed to forfeit a nearly complete Tyrannosaurus bataar skeleton, which was taken from Mongolia and sold at auction in Manhattan for more than $1 million. Mr. Prokopi also agreed to forfeit a second nearly complete Tyrannosaurus bataar skeleton, a Saurolophus skeleton, and an Oviraptor skeleton, all of which had been in his possession and were seized by the Government. In addition, Mr. Prokopi agreed to forfeit his interest in a third Tyrannosaurus bataar skeleton believed to be located in Great Britain.

Mr. Prokopi is scheduled to be sentenced in late April 2013, and faces a maximum sentence of 17 years' imprisonment: a maximum of five years in prison on the conspiracy count; a maximum of two years on the entry of goods by means of false statements count; and a maximum of 10 years' imprisonment on the interstate transportation of goods converted and taken by fraud charge. Mr. Prokopi's conduct was investigated and prosecuted by the U.S. Attorney's Office for the Southern District of New York and the U.S. Department of Immigration and Customs Enforcement.

Mr. Prokopi owned and ran a business called "Everything Earth" out of his Florida home and described himself as a "commercial

paleontologist." He bought and sold whole and partial fossilized dinosaur skeletons. Mr. Prokopi's activities first drew the Government's scrutiny in May 2012, when the fossilized skeleton of a Tyrannosaurus bataar, a dinosaur that lived during the late Cretaceous period approximately 70 million years ago, was put up for auction and sold for more than $1 million. The President of Mongolia obtained a court order blocking the transfer of the fossil to the buyer.

Prior to instituting the criminal case against Mr. Prokopi, in June 2012 the U.S. Attorney's Office initiated its efforts by instituting a civil forfeiture action seeking to forfeit the Tyrannosaurus bataar skeleton, i.e., to have it forcibly transferred to the ownership of the U.S. Government (which would in turn transfer it to the government of Mongolia). The forfeiture case relied on allegedly false information provided to U.S. Custom's officials in the customs forms, including the claim that the "country of origin" of the skeleton was Great Britain, rather than Mongolia, and that the value of the fossil was understated on the customs forms as $15,000 instead of the auction catalogue price of $950,000 - $1,500,000. Claims based on misstatements on customs forms are traditional grounds employed by the U.S. Attorney's Office to seek the forfeiture of allegedly stolen artwork. In response to the Government's civil forfeiture action, Mr. Prokopi intervened and filed a motion to dismiss the Government's forfeiture complaint.

In his motion to dismiss the forfeiture action, Mr. Prokopi argued that the skeleton was imported into the U.S. in multiple shipments, and that the value used on the customs form for one particular shipment identified by the Government was the value for the partial single shipment, not the value of the complete dinosaur skeleton. He also claimed that the Government's case was flawed because the Government never published country of origin and valuation rules for fossils. In addition, Mr. Prokopi argued that the Government's claims failed because Mongolian law has not been translated and made available to Americans, and Mongolia does not enforce its own laws within its own country to confirm the claim that the Mongolian Government is the sole owner of all fossils found there. The Government opposed Mr. Prokopi's motion to dismiss, arguing that his motion misstated the facts and the applicable law.

In a decision dated November 14, 2012, Judge P. Kevin Castel rejected all of Mr. Prokopi's arguments and denied the motion to dismiss the amended complaint. The Court ruled that there was no "fair notice" problem because the law simply prohibits importation by way of knowingly false statements, and the law gives fair warning that knowingly false statements are prohibited. The Court explained that if Mr. Prokopi did not know that his statements were false, then he may have a defense to the forfeiture action, but that issue was not before the Court on the motion to dismiss. Regarding issues with Mongolian law identified by Mr. Prokopi, the Court ruled that while he might ultimately prevail by demonstrating that Mongolian law is improperly vague or that Mr. Prokopi lacked the requisite knowledge of illegality, neither defense could be properly considered on a motion to dismiss. Finally, because the amended complaint alleged that Mr. Prokopi was a commercial paleontologist who excavated skeletons in Mongolia in the past, and then allegedly attempted to obscure the dinosaur skeleton's country of origin on importation paperwork, it raised a reasonable inference that Mr. Prokopi knew the Tyrannosaurus bataar skeleton was stolen from the Mongolian state. Accordingly, the Court denied the motion to dismiss the amended complaint.

Meanwhile, in October 2012 the case changed from a civil dispute over a dinosaur skeleton to a criminal case, placing Mr. Prokopi's freedom in jeopardy when Mr. Prokopi was arrested at his home in Gainesville, Florida. In the parallel criminal proceeding, the Government alleged that between 2010 and 2012, Mr. Prokopi acquired several dinosaur fossils from foreign countries and unlawfully transported them to the United States, misrepresenting the contents of the shipments on customs forms. The complaint charged Mr. Prokopi with multiple crimes related to a scheme to illegally import dinosaur fossils into the United States, including the nearly complete Tyrannosaurus bataar skeleton from Mongolia. Criminal charges arising out of allegedly false statements on customs forms is a common method used by the Government to place criminal liability on individuals who bring allegedly stolen artworks or other cultural property into the U.S., and the Government turned to its standard playbook of charges in alleging customs form misrepresentation here.

The Government further alleged that Mr. Prokopi: (a) illegally imported from Mongolia the skeleton of a Saurolophus, another dinosaur from the late Cretaceous period, that he ultimately sold to the I.M. Chait gallery in California; (b) unlawfully sold the fossils of two other dinosaurs native to Mongolia, Gallimimus and Oviraptor mongoliensis; and (c) unlawfully imported the fossilized remains of a Microraptor, a small, flying dinosaur from China. The Government claimed that many of the fossils in Mr. Prokopi's possession were indigenous to Mongolia and could only be found in that country. It asserted that Mongolian officials had uncovered a witness who accompanied Mr. Prokopi to an excavation site in 2009 and observed him physically taking bones out of the ground. Since 1924, Mongolia has enacted laws declaring dinosaur fossils to be the property of the Government of Mongolia and criminalizing their export from the country.

At the December 27, 2012 plea hearing, Mr. Prokopi pled guilty to engaging in a scheme to illegally import the fossilized remains of numerous dinosaurs that had been taken out of their native countries illegally and smuggled into the United States. He also agreed to forfeit the Tyrannosaurus bataar skeleton and other fossils, thereby ending the companion civil forfeiture matter that kicked off this dispute. Mr. Prokopi is scheduled to be sentenced on April 25, 2013.

Mr. Prokopi's case illustrates a conundrum periodically faced by defense attorneys in civil forfeiture cases. Because the U.S. Attorney's Office has the ability to bring a criminal case in appropriate circumstances, it often has far more leverage in a negotiation than does the importer or purported owner of the piece at issue. While the client may wish to contest whether civil forfeiture is appropriate, if it can find a non-frivolous basis, the U.S. Attorney's Office can threaten to bring criminal charges against the client if he or she does not consent to forfeiture. Where a piece is forfeited, the client is only out the value of the object. But if a criminal case is instituted, the client is faced with a felony record and imprisonment. With such great leverage, the U.S. Attorney's Office often obtains the object it seeks to have forfeited and returned.

Conclusion

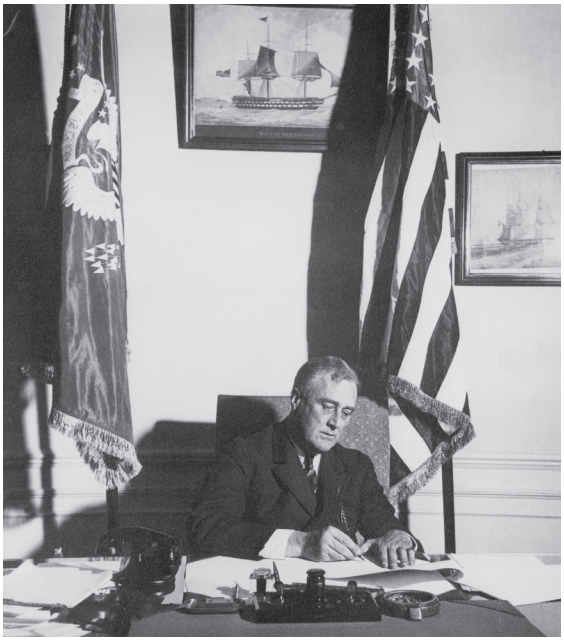
These three cases are just a sample of the intersection of the fields of criminal law and art and cultural property law in the year 2012. The cases demonstrate that in the U.S., both federal and state prosecutors are committing resources to these types of cases. While the U.S. Attorney's Office for the Southern District of New York has historically prosecuted cases in this realm, the 2012 cases show that various other state and federal prosecutors are also investigating and prosecuting these cases. Moreover, while a collector may think that only the ownership of a precious object is at stake when one of these cases commences, the true harm can be much greater, both to the collector's reputation and his or her liberty.

Claim by Museums of Public Trusteeship and Their Response to Restitution Claims

By Charles A. Goldstein and Yael Weitz

A version of this article was previously published by the "Art Antiquity and Law Journal" (October 2011).

When faced with demands for deaccessioning in the context of Holocaust-era art, many museums have made the claim that legal or ethical responsibilities to the public make it difficult to restitute art. Museums base this claim on the premise that the art in their collections is held "in trust" for the public. Against the backdrop of this "public trust," museums often present technical defenses, such as the statute of limitations and laches, as a means of preventing Holocaust looted art cases from ever reaching the merits. Indeed, some museums have gone so far as to explain that, where a museum determines that a claim lacks merit, it is the museum's "fiduciary responsibility" to raise such technical defenses. *see* Graham Beal, Director, President, and CEO of Detroit Institute of Arts, *Four Cases from One Museum, Four Different Results,* Expert Discussion at the Holocaust Era Assets Conference (June 26-30, 2009).



For example, the *Four Cases* discussion refers to a case involving a claim by the heirs of Martha Nathan, a German Jew who had been forced to flee Nazi Germany, in which the Detroit Institute of Arts (DIA) initiated a declaratory judgment to defend its rights to the disputed picture based on statute of limitations grounds. While this, in and of itself, is not notable, the explanation provided by Graham Beal as to why the museum raised this defense is significant. According to Beal, the museum had concluded that the sale of the painting had been legitimate, and not under Nazi duress. Nonetheless, the heirs "declined to withdraw their claims." As a result of "these circumstances," the DIA determined that it had a "fiduciary responsibility to protect the DIA's ownership [of the painting], using all legal means available, including the statute of limitations and laches." As similarly expressed in the DIA's complaint, it was "incumbent upon the DIA to reject [the heirs'] claim and defend the City's rightful ownership of the Painting…." Most notably, the DIA explained that the museum had this obligation because of the museum's responsibility to act for the public, "for whom it holds the Painting in public trust."[1]

Two years after the conclusion of the DIA lawsuit, in which the court dismissed the heirs' claim as barred by the statute of limitations, an identical argument was made by the Museum of Fine Arts, Boston (MFA) in a similar action in its declaratory judgment complaint. The subject of the dispute centered around the ownership rights to an Oskar Kokoschka painting, which was alleged to have been the subject of a forced sale by the Nazis. As with the DIA, the MFA determined that based on the it's understanding of the facts, "the Museum Guidelines [did] not support any cognizable claim of Defendant as a matter of law and public policy." The MFA thereby concluded that it was required to "reject Defendant's claim and defend the Museum's rightful ownership of the Painting in order to uphold the integrity of the Museum Guidelines and to meet its fiduciary and legal obligations to the public for whom it holds the Painting in public trust."[2]

As did the DIA, the MFA appeared to be relying on the premise that a painting could belong to the public trust, even though a court of law had not determined that the museum actually had obtained good title to it. The difficulty that this creates is that museums may end up harboring artworks that have been looted by the Nazis or otherwise stolen. And to display and "profit" from stolen property is to act contrary to the public trust.

But what exactly is the public trust? The regulations of the New York Board of Regents, the authority in charge of supervising New York museums, give the concept a limited definition. The regulations state that the "public trust" refers to the responsibility of museums to "carry out activities and hold their assets in trust for the *public benefit.*" 8 NYCRR § 3.27(a)(18) (2013) (emphasis added). Likewise, the American Alliance of Museums (AAM) has explained that the essence of the public trust is that the museum should act as "a good steward" of the resources it holds "in the public trust." As defined by the AAM's *National Standards & Best Practices for U.S. Museums* 19-20 (2008), a steward is one who "takes care of something *on behalf of someone else,*" and in this case, "that 'someone else' is the public." Even so, the AAM has stated that "it is hard to say exactly what a museum should do" to meet the standards that relate to "public trust and accountability." Glenn D. Lowry, the Director of the Museum of Modern Art in New York, further explains that the "public trust is first and foremost an issue of responsibility," but that there is "very little that defines what constitutes acting within the public trust." Rather, the "public trust for the public benefit" is a nebulous concept, and is not to be confused with the duty of a trustee bound by a trust instrument. As Lowry points out, "[i]n many ways it is up to individual art museums to establish a relationship with the public… and then to act in a way that is consistent with their understanding of the museum. In this sense, the concept of public trust must be seen as negotiable…." Glenn D. Lowry, *A Deontological Approach to Art Museums and the Public Trust, in Whose Muse? Art Museums and the Public Trust* 129, 135 (James Cuno ed., 2004).

While the exact scope and meaning of the "public trust for the public benefit" are hard to pin down, the museums' general obligation to act in the public's interest is not. A museums' responsibility toward the public derives from their status as charitable institutions, which can take the form of either a not-for-profit corporation or a charitable trust. In the United States,

most art museums are not-for-profit corporations, which are governed by a board of directors or trustees. In New York, museums are regulated by New York's Not-for-Profit Corporation Law (N-PCL), a law that applies to every domestic not-for-profit corporation. This law imposes fiduciary obligations on directors that are largely indistinguishable from those imposed on directors of privately owned business corporations. What primarily distinguishes not-for-profit corporations from business corporations, however, is that not-for-profit corporations function to "serve the broad public"; business corporations, in contrast, work to provide a profit to the corporation's shareholders.[3]

Pursuant to N-PCL § 717, directors of not-for-profit entities owe a fiduciary duty of care and loyalty to the public.[4] In the context of museums, this duty mandates that directors carry out the organization's charitable purpose with undivided loyalty. With regard to the duty of care, directors are required to properly manage the museum's art collection with good faith, skill, and diligence. As with business corporations, directors of not-for-profit corporations are subject to the "business-judgment rule," under which directors will only be liable for gross negligence, rather than simple negligence. The reason for this broad standard is to allow directors to take action that they deem to be in the best interests of their institutions without incurring liability.[5]

Directors are also required to ensure that the mission of the organization, which in the case of museums is their *educational purpose*, is properly carried out; indeed, this is one of the directors' most fundamental responsibilities.[6] It should also be noted that this fiduciary duty parallels the federal tax code's requirements for an institution to qualify for tax-exempt status. Where an institution is organized for a charitable purpose, section 501(c)(3) of the Internal Revenue Code, found in Title 26 of the United States Code, affords such organizations a favorable tax status that, among other things, allows them to pay no income tax.

When a museum is organized as a charitable trust, instead of the more common not-for-profit corporation, the trustees also are subject to fiduciary duties of care and loyalty. The duty of care, as it applies to charitable trusts, requires that museum trustees manage the museum's assets with the level of care that an ordinarily prudent person would exercise in dealing with his or her own property. With respect to the fiduciary duty of loyalty, the trustee standard requires that the trustee administer the trust property "solely in the interest of the beneficiaries," which, in the context of charitable trusts, is "the general public." In other words, the trustee must act with complete loyalty and avoid self-dealing in conducting transactions on behalf of the museum. Additionally, as with not-for-profits, charitable trusts also serve the "general purpose of providing a social benefit to the public."[7]

Thus, regardless of whether a museum takes the form of a not-for-profit or a charitable trust, its directors and trustees are obligated to act in the public's best interest. But what does this mean in the context of restitution of Nazi looted art? The answer to this question first requires a discussion of a museum's right to deaccession artworks and the limitations that have been placed on such deaccessioning.

On May 17, 2011, the New York Board of Regents unanimously approved a new set of regulations for deaccessioning artworks, applicable to all not-for-profit museums and historical societies chartered by the Board of Regents. The rules, which went into effect on June 8, 2011, permit museums to deaccession artworks – meaning that they may sell or otherwise remove such objects from their collections – as long as one or more of the following ten criteria are met:

> (i) *the item is inconsistent with the mission of the institution as set forth in its mission statement;* (ii) the item has failed to retain its identity; (iii) the item is redundant; iv) the item's preservation and conservation needs are beyond the capacity of the institution to provide; (v) the item is deaccessioned to accomplish refinement of collections; (vi) it has been established that the item is inauthentic; (vii) *the institution is repatriating the item or returning the item to its rightful owner;* (viii) the institution is returning the item to the donor, or the donor's heirs or assigns, to fulfill donor restrictions relating to the item which the institution is no longer able to meet; (ix) the item presents a hazard to people or other collection items; and/or (x) the item has been lost or stolen and has not been recovered.

8 NYCRR § 3.27(c)(7) (2013) (emphasis added). Note, in particular, that the rules authorize the deaccession of an art object for the purpose of "repatriating… or returning the item to its rightful owner." In the context of Nazi looted art, this means that museums are expressly permitted by the Board of Regents to restitute a work of art to that artwork's rightful owner.

Before the amended Board of Regents rules, a museum in New York also could deaccession any object from its collection as long as the deaccessioning was "consistent with [the museum's] corporate purpose and mission statement." 8 NYCRR § 3.27(6)(ii) (2011) (amended June 8, 2011). Thus, there was never a legal obligation imposed on museums to decline to return stolen works of art in New York. Elsewhere in the United States, with the exception of artworks that were donated to a museum with deaccessioning restrictions attached, most states permit museums to deaccession artworks without legal restrictions.[8]

In New York, a museum's right to deaccession artworks has been the subject of debate since 2008, when Fort Ticonderoga, the historic site/museum in upstate New York, was in financial distress and considered the sale of part of its collection.[9] Although the museum later abandoned the idea after a controversy erupted, the Board of Regents adopted temporary emergency regulations to limit the right of museums in New York to deaccession their artworks. These regulations were similar to, but more restrictive than, the regulations that are currently in effect. Among other restrictions, the emergency regulations allowed for deaccessioning only if one of the following four criteria was met: i) the work was no longer relevant to the mission of the institution; ii) the work failed to retain its identity or was lost or stolen and had not been recovered; iii) the work duplicated other items in the collection and was not otherwise necessary for educational or researching purposes; or iv) the work was too difficult to conserve in a responsible manner. 8 NYCRR § 3.27(7) (expired on Oct. 8, 2010) (emphasis added). The prohibition against deaccessioning to obtain funds for operating expenses, a limitation that existed even before the emergency regulations, was simply maintained. Assemblyman Richard L. Brodsky, with the help of the Board of Regents and the Museum Association of New York, then submitted a bill in the state legislature to limit deaccessioning on a permanent basis. Facing opposition from major art museums, however, the bill was withdrawn. The Metropolitan

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Museum of Art, the Whitney Museum of American Art, and the Solomon R. Guggenheim Museum had asserted a need for flexibility with regard to deaccessioning in order to foster proper management of a museum.[10] The original standard for deaccessioning – which allowed for removal of artworks with virtually no restrictions attached – was thus reinstated.

Even so, after the Brodsky bill was withdrawn, some museum directors found it necessary to continue to explain the advantages of deaccessioning. For example, in response to criticism regarding its own sales, Metropolitan Museum of Art Director Thomas P. Campbell explained that a museum's decision to deaccession should be viewed as being similar to "a gardener pruning a tree over a long period of time." The Museum of Modern Art took this one step further: it stated that deaccessioning was "part of its mandate."[11]

Yet, when faced with claims relating to Nazi looted art, some museums expressed an inconsistent view, arguing that the public trust required museums to maintain artworks in the museums' possession. For example, in March 2009, the President of the American Alliance of Museums, Ford W. Bell, wrote a letter to the editor of *The New York Times*, arguing that "the essential point of museum collections" is that "once an object falls under the aegis of a museum, it is held in the public trust, to be accessible to present and future generations." Letter to the Editor, *Museum Art, Held in Trust, N.Y. Times*, March 30, 2009. Although Bell's statement was made in response to proponents of deaccessioning as a means of paying for a museum's operating expenses, Bell's argument would not necessarily be limited to preventing deaccessioning for this purpose alone. Indeed, museums often raise this argument as a justification for presenting technical defenses in cases involving claims for Nazi looted art. As noted above, in the complaints for declaratory judgment by the DIA and the MFA, the museums relied on this very argument for defending their rights to the disputed paintings, explaining that they had fiduciary obligations to protect their collections because of the public trust.

Others have asserted that deaccessioning for the purposes of restitution would cause a breach of the museum's fiduciary duties to the public because of the financial losses that would be incurred by the museum, occasioned by the loss of a very valuable artwork. But, while museums undoubtedly have an obligation to preserve and maintain their art collections in order to carry out their educational purpose, this protection does not extend to looted or otherwise stolen art. Museums are obligated to exercise diligence and care in both purchasing and accepting donations to ensure that each work of art has a proper provenance. As explained by Michael Conforti, the former president of the Association of Art Museum Directors (AAMD), it is not only important that acquisitions be "responsible and ethical as well as legal," it is also "important to go beyond the letter of the law" to ensure that acquisitions are properly made.[12] Thus, if there was a breach of fiduciary duty, it is likely to have occurred not with the restitution, but with the acquisition or continued custody of the stolen artwork.

This view is also consistent with the missions of associations such as the AAM, the AAMD, and the International Council of Museums (ICOM), presented in their codes of ethics, to ensure that museums do not acquire (or, implicitly, keep) Nazi looted art or objects otherwise stolen. The AAM's "Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era"[13] provides that all three of the organizations are "committed to continually identifying and achieving the highest standard of legal and ethical collections stewardship practices," and that when "faced with the possibility that an object in a museum's custody might have been unlawfully appropriated as part of the abhorrent practices of the Nazi regime, the museum's responsibility to practice ethical stewardship is paramount." The AAMD's code of "Professional Practices in Art Museums"[14] further provides that directors must "ensure that best efforts are made to determine the ownership history of a work of art considered for acquisition" and "must not knowingly allow to be recommended for acquisition – or permit the museum to acquire" any work that has been stolen. Thus, museums have a clear obligation to ensure that their collections are free of stolen and looted art.

In any event, the regulations of the Board of Regents now make clear that returning an artwork to its true owner is a permissible type of deaccessioning. Furthermore, this provision in the Board of Regents regulations is consistent with the Washington Principles on Nazi-Confiscated Art, a policy statement made by 44 nations at a conference convened in Washington, D.C. in 1998, which provides non-binding guidance on the topic of Nazi looted art.[15] The Washington Principles encourage signatory nations – and implicitly the art institutions within them – to facilitate the identification of art that was confiscated by the Nazis and not subsequently restituted. Additionally, where pre-War owners of Nazi looted art can be identified, the Washington Principles state that "steps should be taken expeditiously to achieve a *just and fair solution*" based on the facts and circumstances of the case. In January 2013, before her retirement as Secretary of State, Hillary Clinton issued an official statement re-affirming the United States' commitment to the Washington Principles, noting that "U.S. policy will continue to support the fair and just resolution of claims involving Nazi-confiscated art."[16] In its *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era,* the AAM has acknowledged that, "in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses." Thus, museums are expressly permitted to waive technical defenses in the context of claims to Nazi

looted art — a fact that stands in opposition to the claim that the public trust imposes a "fiduciary obligation" to raise technical defenses where the museum has otherwise determined that the claim lacks merit.

The German Federal Commissioner for Culture, Bernd Neumann, addressed this issue on April 13, 2011 in statements made following the restitution of 13 books from the Berlin Central and State Library to the Berlin Jewish Congregation. He stated that while "some wanted to make us believe" that "the research of history and the search for fair and just solutions" would result in the emptying of museums (and thereby destroy the public trust), in fact, the contrary is true: "museums, archives and libraries gain standing, credibility and competence when they confront the history of their collections."[17] Moreover, in response to a question of whether, in the context of restitution, it should be "understandable" that museum directors are "anxious about valuable pieces in their collections," Bernd Neumann made the following retort:

> It's understandable that they would like to keep their collections as complete as possible. They've restored their pieces and cared for them over the decades. They want to have something to offer the public. But their behavior stands in contradiction to the moral responsibility that we have, which is without doubt more important.[18]

Stated simply, the "search for Nazi looted art and the development of fair and just solutions in restitutions cases is a moral obligation."[19]

The current and former presidents of the world renowned Prussian Cultural Heritage Foundation – Hermann Parzinger and Klaus-Dieter Lehmann, respectively – have expressed similar views regarding museums' moral obligation to restitute looted works. In his Opening Statements at the Symposium, *Paths Towards Taking More Responsibility: Handling Nazi Looted Art 10 Years After Washington*, (Dec. 2008),[20] Parzinger stated that "the Prussian Cultural Heritage Foundation considers itself to be particularly obliged to take expansive decisions in respect of restitution claims…." Likewise, in response to an allegation that the Prussian Cultural Heritage Foundation had "prematurely and frivolously" restituted a van Gogh drawing and a self-portrait by Hans Marées – both of which had been the subject of a forced sale by the Nazis – Lehmann explained: "After all, it is about the ethics of collecting… and about the question that holding onto assets may be unbearable if these assets have been taken away from their former owners in an unbearable manner."[21]

Indeed, museums, as institutions that function in a climate of ethical responsibilities, owe a duty to the public to maintain the integrity of their institutions. That is what their duty to maintain the public trust means. And while museums are obligated to carry out their charitable purposes, this duty does not restrict their right to deaccession their works where it is otherwise permitted by the Board of Regents rules. With the enactment of the amendments on deaccessioning, museums are expressly permitted to deaccession artworks for the purpose of restitution. Moreover, museums are also permitted to deaccession artwork in order "to accomplish refinement of [their] collections." 8 NYCRR § 3.27(c)(7) (2013). If museums have the right to sell their art for refinement purposes, and have further argued that deaccessioning is a "healthy part of the management of any museum collection,"[22] then museums cannot in good faith argue that restitution of Nazi looted art should be precluded on public trust grounds.

Of course, museums would never baldly assert that Nazi looted art should not be returned to its rightful owners, especially as that would directly contradict the codes of conduct they have agreed to follow. But by refusing to permit claimants to have their day in court to prove their cases on the merits, through the mechanism of asserting statutes of limitations and other technical defenses, museums prevent a just and fair resolution of such claims. Moreover, in depending solely on their own determinations of the merits and not permitting the facts to be judged by a court of law – all in the name of their purported need to hold such art "in the public trust" – museums risk being in continued possession of stolen art and thus are subverting that trust.

1 Complaint at 20-21, *Detroit Inst. of Arts v. Ullin*, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007) (No. 06-10333).

2 Complaint at 15, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010) (No. 08-10097), *cert. denied*, 131 S.Ct. 1612 (Mar. 7, 2011).

3 Jennifer L. White, *When It's Ok to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 Mich. L. Rev. 1041, 1050-1051 (1996) [hereinafter "White"].

4 Victoria B. Bjorklund, James J. Fishman, and Daniel L. Kurtz, *New York Nonprofit Law and Practice: With Tax Analysis*, § 11.02[1] (2d ed. 2009) [hereinafter "Bjorklund"]. Although § 717 does not expressly impose a duty of loyalty on directors, various provisions within the code manifest the existence of this duty. Under § 715, for instance, directors are prohibited from engaging in transactions that involve a conflict of interest; typically, these cases arise where corporate property or a corporate opportunity has been used for personal gain, causing the corporation financial loss. *Id.* at § 11.03[1].

5 White at 1053-54.

6 Bjorklund at § 11.04.

7 White at 1049, 1052-53.

8 Patty Gerstenblith, *Museums Face Legal Obstacles to Deaccessioning Works*, Cultural Heritage & Arts Rev. 27 (Fall/Winter 2010); Jennifer Jankauskas, *Deaccessioning and American Art Museums*, 14 Museological Rev. 16, 22 (2010) (stating that in the United States, there is "no federal law in place to regulate deaccessioning" and that "few states have laws governing the process"); *see also* Jorja Ackers Cirigliana, *Let Them Sell Art: Why a Broader Deaccession Policy Today Could Save Museums Tomorrow*, 20 S. Cal. Interdis. L.J. 365, 379 (Winter 2011) (noting that "New York is the only state with a statewide deaccessioning policy") (emphasis added).

9 Robin Pogrebin, *Criticism Flies After State Eases Ban on Art Sales*, *N.Y. Times*, Oct. 4, 2010.

10 *Id.*

11 Robin Pogrebin, *The Permanent Collection May Not be so Permanent*, *N.Y. Times*, Jan. 26, 2011.

12 Association of Art Museum Directors, *New Report on Acquisition of Archaeological Materials and Ancient Art* (June 4, 2008), http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf (quoting Michael Conforti). Conforti's comments were made in the context of acquiring archaeological and ancient art. Nonetheless, his remarks are applicable to the acquisition of all types of art, as museums have an obligation to ensure that stolen property is not included in their collections.

13 Available at http://www.aam-us.org/resources/ethics-standards-and-best-practices/characteristics-of-excellence-for-u-s-museums/collections-stewardship.

14 Available at http://www.aamd.org/about/documents/ProfessionalPracticies2001.pdf.

15 Available at http://www.state.gov/www/regions/eur/981203_heac_art_princ.html.

16 Available at http://www.state.gov/secretary/rm/2013/01/202932.htm.

17 Transcript available in German at http://www.bundesregierung.de/Content/DE/Rede/2011/04/2011-04-13-neumann-provenienz.html).

18 Spiegel Online, *Searching for Nazi-Looted Art, "There's No Point in Trying to Duck,"* Spiegel Online International, Dec. 3, 2008, http://www.spiegel.de/international/germany/0,1518,594232,00.html.

19 Bernd Neumann, Greeting, in Die Verantwortung dauert an. Beiträge deutscher Institutionen zum Umgang mit NS-verfolgungsbedingt entzogenem Kulturgut (Andrea Baresel-Brand ed., Magdeburg 2010).

20 Magdeburg Coordination Agency, *Taking Responsibility – Nazi Looted Art – a Challenge for Museums*, Library and Archives, volume 7 at 49 and 59.

21 Stefan Koldehoff, *Raubkunst Wem gehort Noldes Garten?*, DIE ZEIT, July 10, 2003.

22 Robin Pogrebin, *The Permanent Collection May Not be so Permanent*, *N.Y. Times*, Jan. 26, 2011.

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Art Law Events

Upcoming Events Involving Herrick's Art Law Group

April 10, 2013

Larry Kaye will lead a discussion at a breakfast program hosted by AJC Global Jewish Advocacy, at Pryor Cashman LLP in New York City.

Mari-Claudia Jiménez will speak about looted art and cultural property restitution on a panel entitled "Defining cultural ownership: shifting focus, shifting norms" at Fordham University Law School in New York City.

April 29, 2013

Howard Spiegler will speak about the looting of art by the Nazi regime and its collaborators before and during World War II at the London Jewish Cultural Center in London, England.

May 3, 2013

Howard Spiegler will speak about the recovery of looted art at the New York State Bar Association's Commercial & Federal Litigation Section's Spring Meeting in Saratoga Springs, New York.

Recent Events Involving Herrick's Art Law Group

February 11, 2013

Howard Spiegler gave a lecture about Nazi looted art restitution to Master's Degree students from Sotheby's Institute of Art at Herrick's New York office.

February 22, 2013

Larry Kaye spoke at a symposium entitled "Contemporary Repatriation and Restitution Arguments: The Global Market, the International Legal Community and the Collecting Institution" at Kenyon College in Gambier, Ohio.

March 22, 2013

Larry Kaye and Mari-Claudia Jiménez spoke about the fight against illicit trafficking of cultural property, and good practices in the U.S., as part of a UNESCO seminar entitled "The Globalization of the Protection of Cultural Heritage," held at the Universidad Nacional Autónoma de México (UNAM) in Mexico City, Mexico.

Herrick in the News

February 16, 2013

Stephen Brodie was quoted in the *Wall Street Journal*'s Weekend Investor Column article, "Is it Time to Hock the Art?"

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