

# Nazi-Looted Art: Cranach Paintings to Remain at Norton Simon Museum

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Lucas Cranach the Elder's *Adam*<sup>[1]</sup> and *Eve*<sup>[2]</sup> have hung in the Norton Simon Museum at Pasadena for nearly 50 years. Since 2007, though, they have been the subject of a dispute between the museum and Marei von Saher. Von Saher is the daughter-in-law and surviving heir of Jacques Goudstikker, a Jewish art dealer who fled the Nazi-occupied Netherlands with his family in 1940. Goudstikker's gallery and the family's other assets were then acquired by members of Nazi leadership through a series of forced sales, with the gallery and the family's residence being purchased by Alois Meidl, and more than 800 of the Goudstikker paintings - including *Adam* and *Eve* - being acquired by Hermann Goering.

The story of the Nazi seizure of artworks from public and private art collections in Europe has by now become a commonplace of popular culture.<sup>[3]</sup> Scholars have noted that "as many works of art were displaced, transported, and stolen as during the entire Thirty Years War or all the Napoleonic Wars."<sup>[4]</sup> It has been estimated that "[o]ne-third of all of the art in private hands had been pillaged by the Nazis."<sup>[5]</sup> Nazi looting of art took a number of forms: direct confiscation (seized by government officials and agents); "abandoned" objects (seized after being left behind as their owners fled persecution);<sup>[6]</sup> forced sales;<sup>[7]</sup> and what are sometimes called "fluchtgut" or "fluchtkunst"<sup>[8]</sup> ("flight goods" or "flight art," which are cultural objects sold, generally at a steep discount, by owners desperate to finance their

escape from Nazi-occupied or threatened areas). For background on Nazi-looted art, see my previous discussions [here](#) and [here](#).

That the Cranach panels were looted by the Nazis is not disputed. Rather, the question for the court was whether the post-war restitution processes properly vested ownership of the paintings in the Dutch government such that its 1966 sale of those paintings to George Stroganoff-Sherbatoff (Stroganoff) (from whom the museum purchased them in 1971) was a valid governmental action, and so is not reviewable by U.S. courts. With a decision issued by the Court of Appeals for the 9th Circuit on July 30, the case may have reached its conclusion.<sup>[9]</sup>

In 1931 in Berlin, Goudstikker purchased the panels from the Soviet Union at an auction of objects the Soviets had seized from the Stroganoff family (and others).<sup>[10]</sup> Although the district court, in its 2016 decision,<sup>[11]</sup> had found that the Stroganoff family never owned the panels, Stroganoff ownership of the panels is unclear from the evidence presented. The question of Stroganoff ownership of the panels was ultimately not germane to the 9th Circuit's decision. The panels were recovered by U.S. forces at the end of the war and returned to the Dutch government. Rather, the issue was whether the Dutch government had good title to the panels at the time it sold them to Stroganoff.

When the war was over, and the panels were recovered by U.S. forces., it was U.S. policy to return recovered Nazi-looted objects to the governments of the countries from which they had been taken, for ultimate restitution or other disposition.

The 9th Circuit's analysis focuses on three aspects of Dutch law relating to Nazi agreements and confiscated property: (1) a wartime law nullifying Nazi agreements; (2) the post-war restitution regime; and (3) a post-war law forfeiting to the Dutch government property owned by enemies during the war.

During the war, the Dutch government (then in exile) enacted a law that nullified wartime agreements with the Nazis. After the war, however, that automatic nullification was revoked. The Dutch government instead put in place a formal restitution and restoration of rights process.<sup>[12]</sup> Claimants had until 1951 to file a petition for restoration of rights, after which the presiding council "could still order restoration of rights of its own accord, but claimants were no longer entitled to demand restitution."<sup>[13]</sup> Finally, to compensate the Netherlands for its losses during the war, the government also enacted Royal Decree E133, which forfeited to the Dutch government all property "belonging to an enemy state or to an enemy national."<sup>[14]</sup> Under Royal Decree E133, the paintings owned by Goering were forfeited to the Dutch government.

Goudstikker's widow, Desi, returned to the Netherlands after the war and took on leadership of the firm. She petitioned for restoration of rights for the assets that had been purchased by Meidl, but, on advice, she decided not to petition for return of the paintings purchased by Goering.

In 1961, however, Stroganoff filed a claim for restitution of a number of artworks then owned by the Dutch government, including the Cranach panels, arguing that they had been expropriated from his family by the Soviet Union. The Dutch

government and Stroganoff reached an agreement whereby Stroganoff relinquished his claim to certain of the works, and the government agreed to sell him several pieces, including the Cranach panels.

In the 1990s, von Saher filed a petition with the Dutch government for restitution of those Goudstikker works that had been purchased by Goering, but that petition was denied. However, in 2001, the government reevaluated its prior restitution process and, on the basis of “moral policy” turned over to von Saher those paintings from the Goering collection that were still in the Dutch government’s possession. This did not, of course, include the Cranach panels, which were in the museum’s collection in California. In 2007, von Saher commenced the first of her actions for return of the Cranach panels, arguing that the Dutch government could never have taken ownership of the panels, but merely served as custodian of the paintings until the original owners or their heirs claimed them.

### ***Timeliness: Statute of Limitations***

From 2007 until 2015, the question of the Cranach panels’ ownership played out in the context of motions to dismiss – first with respect to whether the suit was barred by the expiration of the statute of limitations, and then with respect to whether it was barred by the act of state doctrine.

Concerned that California’s three-year statute of limitations was presenting an unfair burden on claimants with respect to Holocaust and in Nazi-era looting cases, the California legislature extended that statute of limitations, but only for such Holocaust and Nazi-era looting claims. The museum filed a motion to dismiss, arguing that the California statute extending the limitations period unconstitutionally intruded upon the federal government’s “exclusive power to make and resolve war, including the procedure for resolving war claims.”<sup>[15]</sup> The district court agreed, and dismissed the case; however, the 9th Circuit reversed, finding the California extension of its statute of limitations unconstitutional. The Circuit Court granted leave for von Saher to amend her complaint.<sup>[16]</sup> The museum amended its motion to dismiss, arguing that the statute of limitations applicable to the Cranach panels had long since expired, since it had begun to run at the time that Goudstikker’s widow, Desi, had discovered the location of the panels after the war. The district court, in a 2015 decision,<sup>[17]</sup> disagreed with the museum’s position, holding that, under California law, the statute of limitations for the return of stolen property begins to run anew against each subsequent owner of the property. To review an extended discussion of statutes of limitations as they relate to Nazi-looted art (and to the *von Saher* case specifically), see my previous discussion [here](#).

### ***Foreign State and Finality: Act of State Doctrine***

With respect to von Saher’s amended complaint, the district court granted the museum’s second motion to dismiss, holding that von Saher’s claims were preempted by the act of state doctrine.<sup>[18]</sup> Quoting the Solicitor General’s brief with approval, the district court found that “[w]hen a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, the United

States has a substantial interest in respecting the outcome of that nation’s proceedings.”<sup>[19]</sup> The 9th Circuit, however, reversed that decision, remanding the case for development of the parties’ factual positions via discovery. The court stated that “[t]he Museum has not yet developed its act of state defense, and von Saher has not had the opportunity to establish the existence of an exception to that doctrine should it apply.”<sup>[20]</sup>

### **Summary Judgment: Act of State**

After the parties had the opportunity to flesh out their factual arguments, the district court once again considered the question of whether the action was barred by the act of state doctrine. On Aug. 9, 2016, the district court issued a decision granting the museum’s motion for summary judgment,<sup>[21]</sup> finding that after the Goudstikker firm decided not to file a claim for return of the paintings, title passed to the Dutch government, and the Dutch government had good title to the paintings at the time it transferred the paintings to Stroganoff. Stroganoff, in turn, passed good title to the paintings to the museum.

In affirming the district court’s decision granting the museum’s motion for summary judgment, the 9th Circuit relied upon the act of state doctrine, which is “a ‘rule of decision’ requiring that ‘acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid’” and are not to be overturned by U.S. courts.<sup>[22]</sup> The court explained that “we apply the doctrine here, because ‘the relief sought’ by von Saher would necessitate our ‘declar[ing] invalid’ at least three ‘official act[s] of’ the Dutch government ‘performed within its own territory.’”<sup>[23]</sup> Von Saher has petitioned the 9th Circuit for a rehearing of the motion for summary judgment. Such rehearing petitions are rarely granted, and von Saher’s previous petitions for rehearing at earlier stages in the case were unsuccessful. Absent a rehearing, von Saher’s likely recourse would be an appeal to the U.S. Supreme Court. Even if the Supreme Court were to grant certiorari, von Saher faces stiff odds against a reversal of the decision on the act of state doctrine.

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[1] Lucas Cranach the Elder, *Adam* (c. 1530), oil on panel, 75 x 27-1/2 in. (190.5 x 69.9 cm), available at <https://www.nortonsimon.org/art/detail/M.1971.1.P>.

[2] Lucas Cranach the Elder, *Eve* (c. 1530), oil on panel, 75 x 27-1/2 in. (190.5 x 69.9 cm), available at <https://www.nortonsimon.org/art/detail/M.1991.1.P>.

[3] See, e.g., “Woman in Gold” (2015), available at <https://www.imdb.com/title/tt2404425/>; “Monuments Men” (2014), available at <https://www.imdb.com/title/tt2177771/>.

[4] Hector Feliciano, “The Lost Museum,” p. 23 (1997).

[5] *Id.* at 4.

[6] See, e.g., *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. 1966) (seeking to recover a painting by Marc Chagall that hung in the Menzel’s Brussels apartment when they fled Belgium before the Nazi occupation).

[7] See, e.g., *Vineberg v. Bissonette*, 529 F.Supp.2d 300, 307 (D.R.I. 2007) (noting that “the Nazi government forced Dr. Stern to liquidate inventory in his art gallery and controlled the manner of the forced sale,” and concluding that “Dr. Stern’s surrender of the painting to [the auction house] for auction was ordered by the Nazi authorities and therefore the equivalent of an official seizure or a theft.”). But see *Orkin v. Swiss Confederation*, 770 F.Supp.2d 612, 616 (S.D.N.Y. 2011) (dismissing the action for lack of jurisdiction, because “[p]laintiff does not allege that Reinhart acted in any capacity other than as a private individual.” The court noted that “[i]n 1933, [Plaintiff’s grandmother] sold the drawing to Swiss art collector Oskar Reinhart for 8,000 Reichsmarks to help fund her family’s escape from the Nazis’ persecution of German Jews.”).

[8] See, e.g., Florian Weiland, “Ist Fluchtkunst dasselbe wie Raubkunst?” (Is flight art the same as looted art?), *Sudkurier*, Sept. 3, 2014, available at <http://www.suedkurier.de/nachrichten/kultur/themensk/Ist-Fluchtkunst-dasselbe-wie-Raubkunst;art410935,7218364>.

[9] *von Saher v. Norton Simon Museum of Art at Pasadena*, 2018 U.S. App. LEXIS 20989, Case No. 16-56308 (9th Cir. July 30, 2018).

[10] Although the district court found that the Stroganoff family never owned the panels, Stroganoff ownership of the panels is unclear from the evidence presented.

[11] *von Saher v. Norton Simon Museum at Pasadena*, 2016 U.S. Dist. LEXIS 187490, Case No. CV 07-2866 (C.D. Cal. Aug. 9, 2016).

[12] The Dutch restitution and restoration of rights regime was re-assessed in the 2000s, and that reassessment resulted in the Dutch government turning over to von Saher those Goudstikker works that were at that time still held by the Dutch government.

[13] *von Saher v. Norton Simon Museum of Art at Pasadena*, 2018 U.S. App. LEXIS 20989 at \*9.

[14] *Id.* at \*10.

[15] *von Saher v. Norton Simon Museum of Art at Pasadena*, Case No. CV-07-2866-JFW, 2007 WL 4302726 (C.D. Cal. Oct. 18, 2007).

[16] *von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9th Cir. 2009), amended by *von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010).

[17] *von Saher v. Norton Simon Museum of Art at Pasadena*, Case No. CV 07-2866-JFW, 2015 U.S. Dist. LEXIS 188627 (C.D. Cal. April 2, 2015).

[18] *von Saher v. Norton Simon Museum at Pasadena*, 862 F.Supp.2d 1044 (2012).

[19] *Id.* at 1051.

[20] *von Saher v. Norton Simon Museum at Pasadena*, 754 F.3d 712, 727 (9<sup>th</sup> Cir. 2014).

[21] *von Saher v. Norton Simon Museum at Pasadena*, 2016 U.S. Dist. LEXIS 187490, Case No. CV 07-2866 (C.D. Cal. Aug. 9, 2016).

[22] *von Saher v. Norton Simon Museum of Art at Pasadena*, 2018 U.S. App. LEXIS 20989, Case No. 16-56308, at \*19 (9<sup>th</sup> Cir. July 30, 2018).

[23] *Id.*

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