Restitution, Repatriation and Return: When Objects Go Back

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Frequently misunderstood development in the law of art and cultural property in recent decades has been the elaboration in national laws, international instruments, and customary international law of the rights of individuals, groups, nations or other entities to obtain the return of cultural objects that were taken from them, their ancestors or predecessor, or their territory at some point in the past. This article is the first in a five-part series discussing restitution, repatriation, and return of cultural objects. Each part addresses a different category of return: (1) restitution of stolen cultural objects, (2) restitution of cultural objects taken during World War II, (3) restitution of illicitly excavated and/or illicitly exported cultural objects, (4) repatriation of tribal and indigenous cultural objects, and (5) the return of cultural objects removed during colonial occupation.

Restitution of Stolen Cultural Objects

Of what I identify as the five categories of claims for the return of cultural objects, the simplest of these, conceptually, is where the object has been stolen. We instinctually understand why the original owner would want the stolen object returned. Popular culture is sometimes ambivalent, though, regarding the theft of art as both glamorous and, to some extent, unserious. Art, in this context, is a luxury good. The art heist is a familiar film trope, generally light-hearted (i.e., Gambit (Michael Caine and Shirley MacLaine, 1966, remade in 2012, with Colin Firth, Cameron Diaz, and Alan Rickman), Topkapi (Maximilian Schell, Melina Mercouri, Peter Ustinov, Robert Morley, and George Segal, 1964), How to Steal a Million (Peter O'Toole and Audrey Hepburn, 1966), or The Thomas Crown Affair (Steve McQueen and Faye Dunaway, 1968, remade in 1999, with Pierce Brosnan and Rene Russo), though sometimes considerably harsher (i.e., Headhunters (Aksel Hennie, Synnove Macody Lund, and Nikolaj Coster-Waldau 2011) and Trance (James McAvoy, Rosario Dawson, and Vincent Cassel, 2013)). In its light-hearted variation, the art heist is perpetrated by a dashing, raffish thief (often a playboy, engaged in a dual life). After plot complications and reversals, the thief, on the verge of his (or her) identity being revealed, outwits the lumbering authorities, and escapes with the artwork, and usually his (or her) romantic interest. The harsher variation, after complications and reversals, typically ends less happily.

Off-screen, art theft is less dashing and less romantic, and it often involves (at some level) criminal networks. Among the highest-profile thefts from museums are: (1) the brief theft of the Mona Lisa from the Louvre in 1911, taken by museum handyman Vincenzo Peruggia, who attempted to return the painting to Italy (the irony being that the painting had never been unlawfully removed from Italy); (2) the 1990 theft of 13 works (including paintings by Rembrandt, Vermeer, Degas and Manet) from Boston's Isabella Stewart Gardner Museum, which remains unsolved and the works unrecovered, although the FBI has identified persons of interest in the case, all of whom have ties to organized crime; (3) the 2002 theft of two paintings from Amsterdam's Van Gogh Museum, in which thieves entered the museum through the roof; the thieves were later arrested and convicted of the theft, but the paintings have not been recovered; and (4) the 2012 theft of seven paintings (including works by Freud, Gauguin, Matisse, Monet and Picasso) from Rotterdam's Kunsthal Museum, taken by a group of Romanian thieves, and allegedly incinerated by the mother of one of the thieves to destroy evidence after the group had been arrested.

Museums are not the only targets of art theft. Cultural objects are perhaps even more frequently taken from private collections and other types of historic and cultural institutions. A few recent examples highlight how most art thefts are not the glamorous, highly-planned affairs of film, but tend to be crimes of opportunity, often by
those who simply happen (for different purposes) to have access to the objects. In 2009, 12 paintings, including works by Marc Chagall, Chaim Soutine, Arshile Gorky, and Diego Rivera, were stolen from a residence in southern California. Nine of the paintings, reportedly valued at $12 million, were later recovered. In 2011, a 12th century illuminated musical manuscript, the Codex Calixtinus, was discovered missing from the Cathedral of Santiago de Compostela. The manuscript had been taken by a former electrician, who had been engaged in an on-going series of thefts from the cathedral, having taken, in addition to the manuscript, more than €2.4 million in cash. The thief was recently convicted and sentenced to a \textit{10-year prison term}. Still another workman (another electrician, even) with opportunistic access to artworks has also made news recently, although the theft occurred decades ago. An electrician who worked for Pablo Picasso at his house in Mougins, France, and the electrician's wife, are currently on trial for stealing 271 artworks from the Picasso house, which the couple then stored in their garage for 37 years. The Picasso works are valued at between €60 and €80 million.

Whether taken from museums or from private collections, when stolen objects are sold, they are moved through progressively higher-level intermediaries, cleansing them of information about the original owner and the circumstances of the theft. \cite{Interpol website, frequently asked questions} With the passage of time, the stolen object is sold (possibly several times), and the current owner may have innocently purchased the object, with no inkling that its history is tainted. This situation is sometimes spoken of as involving “two innocents” – the original owner from whom the object was taken and the good faith purchaser with no knowledge of the theft.\cite{page}

Typical of such cases is \textit{Solomon R. Guggenheim Foundation v. Lubell}, in which the Guggenheim Museum sought return of a 1912 gouache by Marc Chagall that had been taken from the museum's storage area by a mailroom employee in the late 1960s. While the museum had discovered the gouache was missing during a periodic inventory, it did not notify law enforcement of the theft, concerned that publicizing the theft would drive it underground and make its recovery unlikely.

The gouache was purchased by art collectors, the Lubells, from a gallery in 1967, and displayed it in their apartment for many years. The museum discovered that the Lubells owned the gouache in 1985, and wrote to the Lubells, demanding its return. In the litigation that followed, the Lubells argued that the museum had no right to the gouache because New York’s three-year statute of limitations for the return of stolen objects had run. Just as states have different statutes of limitations that cut off a property owner’s right to sue for the return of a stolen object (to discourage stale claims), states also have different rules governing when a cause of action for recovery accrues and the limitations period begins to run. In the U.S., there are three approaches to when a cause of action for replevin accrues, and each approach gives different weight to the rights of the original owner and the rights of the current possessor. In the most favorable to the rights of the current possessor, the statute of limitations begins to run at the time of the theft. Most states, however, apply the “discovery rule,” under which the limitations period begins to run only when the original owner learns the location of the object and the identity of the current possessor.\cite{DeWeerth v. Baldinger} New York, however, is still more protective of the rights of the original owner, and applies the “demand and refusal” rule, so that the limitations period does not begin to run until the original owner makes demand upon the current possessor for the return of the object and the current possessor refuses that demand.

In Lubell, however, the trial court applied a variation on New York’s demand and refusal rule, requiring that the original owner show that it had diligently attempted to locate the object. The trial court granted the Lubells’ motion for summary judgment, holding that “in order to avoid prejudice to a good faith purchaser, demand cannot be unreasonably delayed and that a property owner has an obligation to use reasonable efforts to locate its missing property to ensure that demand is not so delayed.” In so doing, the trial court relied on a prior decision by the United States Court of Appeal for the Second Circuit, \textit{DeWeerth v. Baldinger}, which had required diligence on the part of an original owner. The DeWeerth court had reasoned that:

A rule requiring reasonable diligence in attempting to locate stolen property is especially appropriate with respect to stolen art. Much art is kept in private collections, unadvertised and unavailable to the public. An owner seeking to recover such property will almost never learn of its whereabouts by chance. Yet the location of stolen art may frequently be discovered through investigation.

In Lubell, the New York Court of Appeals ultimately rejected both the trial court’s holding and the Second Circuit’s holding in DeWeerth. The court held that “[o]ur case law already recognizes that the true owner, having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property. Here, however, where the demand and refusal is a substantive and not a procedural element of the cause of action . . . it would not be prudent to extend that case law and impose the additional duty of diligence before the true owner has reason to know where its missing chattel is to be found.”

Statutes of limitations are not the only form of limitation that may apply, since many countries apply prescription periods that operate to vest title in good faith purchasers (even of stolen objects) after a designated period of
time. Since cultural objects frequently cross borders, the mere fact that suit is brought in a jurisdiction (like the
U.S.) that does not have such prescription periods and in which even a good faith purchaser cannot obtain good
title to a stolen object, does not mean that such a period will not apply. In Winkworth v. Christie, Manson &
Woods Ltd, certain artworks were stolen from a collector in England and were taken to Italy, where they were
sold to an apparently innocent purchaser. [See Winkworth v. Christie, Manson & Woods Ltd., [1980] Ch. 496,
[1980] 1 All E.R. 1121]. Later, that purchaser consigned the artworks to an auction house in London for sale. The
collector from whom the objects had been taken brought suit in England for their recovery. Under English law, a
thief cannot transfer good title, and had English law applied to Mr. Winkworth’s case, he would have prevailed and
the objects would have been returned to him. However, the court determined that the question of whether the
seller had obtained good title to the objects when he purchased them in Italy was governed by Italian (not
English) law. Under Italian law, a good faith purchaser can obtain good title even to stolen objects.

A similar case arose in New York, where the Greek Orthodox Patriarchate of Jerusalem sought recovery of the
Archimedes Palimpsest, a 10th century manuscript, which had been taken from Patriarchate at some point in the
past. [See The Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc., No. 98 Civ. 7664(KMW), 1999 WL
673347 (S.D.N.Y. Aug. 30, 1999)]. The manuscript’s current possessor was the heirs of a French civil servant, who
had acquired it in France in the 1920s. Under French law, a good faith purchase obtains good title to a stolen
object after 30 years. The heirs consigned the manuscript to an auction house in New York, and the Patriarchate
brought suit there. As in Winkworth, the Archimedes court found that the question of whether the French civil
servant’s heirs had good title to the manuscript was governed by French law, not U.S. law.

Although courts have tightened the availability of statute of limitations defenses in stolen art cases, current
possessors of stolen (or allegedly stolen) art are increasingly making use of the equitable defense of laches,
which operates very similarly to statutes of limitations in cutting off an original owner’s right to bring suit for the
recovery of an object if (i) the original owner has unreasonably delaying bringing suit, and (ii) that delay has
resulted in prejudice to the current owner (chiefly, resulting in lack of evidence or witnesses). Many of the most
significant developments in the application of laches defenses in recent art cases have been in the area of claims
for the restitution of cultural objects that were taken (by the Nazis or otherwise) during World War II, and so I will
discuss those developments more fully in the next installment of this series.

[1] See Menzel v. List, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966) (“The resolution of these problems is made the more difficult in view
of the fact that one of two innocent parties must bear the loss.”), modified, 279 N.Y.S.2d 608 (App. Div. 1967) (per
curiam), modification rev’d, 246 N.E.2d 742 (N.Y. 1969). See also Ashton Hawkins, Richard A. Rothman, and David B. Goldstein, A
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[2] See, e.g., O’Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980)(applying New Jersey’s version of the discovery rule, which requires the
original owner to diligently pursue the object); Naftzger v. American Numismatic Society, 49 Cal.Rptr.2d 784 (Cal. Ct. App. 1996)
(applying California’s discovery rule, which does not mandate due diligence on the part of the original owner).

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