

A Common Standard of Due Diligence in Art Practice: towards a harmonization of restitution claims

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The resolution of one of the most renowned art robberies, leading to the recovery of seven fine art paintings, including Cézanne's still-life painting "*Bouilloire et Fruits*" valued at \$29 million, a Vlaminck and an Utrillo, spanned over three decades and involved four countries. The paintings were stolen in 1978 from the Boston home of an art collector. Twenty years after the theft, the Cézanne was located by an insurance underwriter charged with shipping the painting from Russia to London, who doubted its provenance and ran it through the Art Loss Register database. Meanwhile, the six other paintings were held in a bank vault in Switzerland by the possessor, a retired American criminal lawyer, who remained anonymous for the major part of the proceedings. Upon locating the Cézanne, the original owner, assisted by an Art Loss Register representative, entered in negotiation with the possessor via an intermediary. The negotiation ended in the recovery of the Cézanne in exchange for the concession of title over the six other paintings to the retired lawyer. This agreement was registered in an affidavit held in escrow by a London based attorney. Nevertheless, in 2005, the original owner sued Sotheby's London to enjoin a sale of the six remaining paintings sent from Switzerland. The English courts ordered the restitution of the paintings to the original American owner and directed the parties to open the affidavit, thus identifying the possessor. In 2007, the United States District Court of Massachusetts convicted the possessor of the paintings on one count of dealing with stolen property, a judgment affirmed in appeal in 2010.¹ The complexity of this case is not an exception and the sad events of cultural looting in conflict zones such as Syria reminds us that these issues are still of great importance today.

In most instances of traffic of cultural properties, whether obtained from war-time looting, private robbery or illicit exportation of national patrimony, the litigious artworks will have crossed numerous borders, been owned by several owners of different origins for various lengths of time, and been subject to a variety of jurisdictions. This situation raises complex issues of property rights and of forum for legal settlement. Despite the international scope of both the art market and the fight against illicit traffic of artistic properties, national laws still largely regulate restitution claims. The international community tried to remedy this situation by developing a harmonized international law pertaining to restitution claims, enacted in the UNIDROIT convention of 1995 *on Stolen or Illegally Exported Cultural Objects*. Nevertheless, the effectiveness of this law is limited in practice because the major market countries, including the USA, England, France and Switzerland, have refused to ratify it. The failure of this endeavor is due in large part to the inability of the Convention to overcome the traditional incompatibility between the common law and civil law legal systems in treating property rights, combined with the refusal of these art market countries to change their substantial laws. These two legal systems differ radically in their preferential protection of the original owner (common law) and good

¹ Michael Bakwin vs. Robert M. Mardirosian & others, 467 Mass. 631 (2007) ; *US v. Mardirosian*, No. 09-1144 (1st Cir. 2010).

faith possessor (civil law), thereby creating confrontational philosophical and logical viewpoints in restitution claims. This tension is crucial because important art markets are located in countries subject to the jurisdiction by either common law or civil law. As a consequence, most restitution claims will raise a question of forum between these two systems.

Nevertheless, both systems contain checks and balances to their rules that lessen these differences. New practices of due diligence, notably the use of databases registering art losses, have strengthened these checks and balances through the promotion of a heightened due diligence obligation opposable to both the acquirer and the original owner. National jurisdictions have assimilated this evolution in their legal reasoning, thus enhancing the convergence of both systems' approach to the fight against illicit traffic in favor of the "diligent party," no matter whether he is the original owner or the good faith possessor. A clear illustration of this evolution reconciling common law and civil law can be given through a brief presentation of the law as applied in New York's common law and the French civil law, which are usually presented as two of the most opposed jurisdictions regarding restitution claims. Ultimately, we want to argue that by endorsing a common standard of due diligence applicable to both the original owner and the acquirer, the international community would greatly support and institutionalize this evolution towards a harmonization of cultural properties restitution claims.

According to the NY Court of Appeals, "[T]he better rule [to fight against illicit traffic] gives the [original] owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser."² Common law traditionally applies the *nemo dat quod non habet* rule, which means that no title can be transferred over a stolen property. This rule favors the original owner, even against a good faith possessor, giving him a broad leeway in reclaiming his property. Furthermore, in New York, restitution claims over artistic properties are subject to the "demand and refusal" rule according to which the statute of limitations bearing on the original owner's claim only starts running when the latter has requested his property and the possessor refused it. Thus, the accrual of the right of possession by the original owner is consistently postponed. As a consequence, the burden of due diligence to ensure that an artwork has not been stolen lies on the possessor at the time he acquires the artistic property, and not on the original owner to locate his lost property. The possessor's main defense against the "demand and refusal" rule is to bring the proof of the original owner's laches in claiming his property, an expression derived from an old French term for laxity. According to this defense, the possessor can keep the ownership of a property if he brings the proof that the original owner unreasonably delayed his restitution claim, and that such laches prejudiced the possessor.

The legal solution applied by the French legal system is traditionally reversed and places the burden to locate a lost property on the original owner. Civil law countries tend to favor the good faith possessor by granting him a valid title from the day of the acquisition. Furthermore, the short time frame of the statute of limitations that terminates the original owner's right to file a claim is highly favorable to the good faith possessor by rapidly securing his firm ownership. The original owner's

² *Solomon R. Guggenheim Foundation v. Mrs. Jules Lubell*, 567 N.Y.S.2d 623 (1991).

main defense against this time limitation is to prove the possessor's bad faith, which, if upheld, opposes the latter's acquisition of a valid ownership.

The evolution of art market behavior over the past decades has considerably nuanced this opposition with regard to artistic properties. The standard of due diligence opposable to the acquirer has considerably evolved, imposing an obligation to enquire about the provenance of a dubious artwork. In particular, the consultation of databases registering art losses has become a necessary practice to justify one's due diligence in securing the legality of an artwork's origin (see Table 1). This due diligence requirement has been echoed in many international documents and conventions, helping to strengthen its recognition by national jurisdictions. This evolution has tempered the traditional favoritism of the good faith possessor under civil law, where judges more systematically exclude good faith when the acquirer has failed the due diligence test, notably by not checking available databases. As early as 1998, the High Court of France ruled that a defendant who could have checked specialized registers established by the French government, would have known that the litigious artwork came from the renowned Schloss family collection looted during WWII. Because he failed his due diligence, the possessor could not be considered of good faith when acquiring the artwork, no ownership was established, and the original owner's claim was not subject to the statute of limitations³. The original owner was able to recover his property more than 40 years after the theft.

Conversely, the New York jurisdictions have proven themselves receptive to a duty of due diligence opposable to the original owner on the grounds of the laches defense, thus tempering the traditional favoritism of the original owner. Such duty of due diligence requires the original owner to assume responsibility in actively claiming his lost property, rather than passively waiting for a random occurrence to uncover his artwork prior to filing claim. In 2013, the New York Supreme Court denied a petition for writ of certiorari to the original owners of drawing by Egon Schiele, thereby affirmed a judgment granting legal property over to the good faith possessor⁴. In this case, the Court decided to uphold the laches defense on the grounds that the claimants and their family knew or should have known of their inheritance right to the Schiele drawing, and that this negligence was detrimental to the possessor who was prejudiced, in in this case, by the absence of key witnesses who had died in the interim. Nevertheless, the overall recognition of such duty has been slower to assimilate than that opposable to the acquirer, despite its obvious necessity. For instance, no official documents promulgates any obligation to publicize a claim to artworks in a database registering such losses, even though it seems logical to accompany the obligation to check a database with an obligation to register a loss. This leniency toward the original owner is inappropriate in the light of current practices, which offer owners efficient tools to publicize their claims. This situation has furthered delayed the reconciliation between common law and civil law solutions to restitution claims.

Even if not complete, the evolution of current practices, assimilated both systems' jurisprudence, is beginning to establish a precedent for a common responsibility of due diligence shared by both original owners and acquirers. If both

³ Cass. Crim., 4 juin 1998, n° 96 85871.

⁴ *Bakalar v. Vavra and Fischer*, 569 US (2013), cert. denied ; *Bakalar v. Vavra*, No. 11-4042-ey, 2012 WL 4820801 (2nd Cir. Oct. 11, 2012).

original owners and acquirers are aware of their responsibility, they can contribute to the control of the fight against illicit traffic of artistic properties. Given that the consultation of art loss databases is a well-established and almost systematic practice used to investigate the dubious provenance of artistic properties, it seems appropriate to extend the concept of due diligence to original owners, requiring that registration of a loss to meet this standard. This evolution would mean that under civil law, the acquirer could not be considered of good faith if he did not consult the database, and therefore not be awarded a valid title against the original owner. Under common law, the original owner could be barred from his claim by application of the laches defense if he did not undertake the minimum step of registering his loss. Being aware of the diverse situations of cultural property losses, it would be appropriate to include an exception in cases of emergencies, notably during times of war and crises, upholding the original owner's right in case he was unable to register his loss. It is important to note that such an evolution would constitute a minimum standard of due diligence and not an automatic formula for adjudication. Some cases will present complex issues, obliging the judges to consider other elements in assessing the diligence of each party.

The international community could facilitate this reconciliation by endorsing inter-state agreements, establishing a common due diligence standard with regard to art market practices and the fight against illicit traffic. The persistent lack of an international consensus between common law and civil law systems, despite this evolution in practice and jurisprudence described above, hampers the efficient fight against illicit traffic, because doubt remains regarding the respective responsibilities of the acquirer and the original owner. This issue has become increasingly crucial as the art market has grown into a financial power, reaching in 2015 a yearly worldwide revenue of 55 billion dollars (€51 billion) as shown in the European Fine Art Foundation (TEFAF) report.

Last year, the European Union enacted a directive *on the return of cultural objects* in which it emphasized again on the due diligence principle opposable to the possessor.⁵ Even if this law does not recognize a due diligence opposable to the original owner, it nevertheless further underlines the great necessity to harmonize principles of interpretation between countries to achieve a better coherence on the art market. It would be an even greater step if such an agreement would happen between the European Union and the USA (notably the jurisdiction of NY), homes of the most celebrated art markets subject to differing legal traditions. Progressively, other States could endorse such an agreement. Furthermore, this agreement procedure would facilitate the convergence of solutions to restitution claims already initiated through practice, without requiring a change of substantive law, thus avoiding previous obstacles. The endorsement of a common standard of due diligence for all parties in restitution claims will secure a consistency in the fight against illicit traffic across legal systems that better suits the almost unavoidable international scope of art theft.

⁵ DIRECTIVE 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation, art. 10.

Examples of existing databases registering art losses and compiling documentation on the regulation of traffic of cultural properties*

Name	Type of management	Type of loss	Type of cultural property	Access/URL
AAMDⁱ Object registry database	Private database: AAMD	Any	Archeologic al artifacts and ancient art ⁱⁱ	Public access https://www.aamd.org/object-registry
Arthemis	Private database Art law center university of Geneva General information	Any	Any	Public access https://plone.unige.ch/art-adr
Art Loss Register	Private database: IFAR ⁱⁱⁱ	Any	Any	Access upon request or subscription http://www.artloss.com/about-us/contact-us
Art Theft Register	Private database: South African private corporation "Art Insure"	Any	South African cultural heritage	Public access http://www.artinsure.co.za/art-theft-register

Banca Dati dei beni culturali illecitamente sottratti	National database: Italian police department, (“Carabinieri”)	Criminal theft	Italian cultural properties ^{iv}	Public access http://tpcweb.carabinieri.it/tpc_sito_public/
Central Registry of Information on Looted Cultural Property 1933-1945	International database: CLAE ^v	WWII spoliation	Any ^{vi}	Access upon request http://www.lootedart.com/research-resources
ICOM^{vii} International Observatory on Illicit Traffic in Cultural Goods	International database collaborative platform designed to provide information and resources to all concerned parties on the international regulation of illicit traffic , access to an extensive number of existing tools, practices and resources and detailed information about organisations and institutions concerned by and/or involved in the fight against the traffic.	Any	Any	Public access http://obs-traffic.museum/
International Research Portal for Records Related to Nazi-Era Cultural Property	Private and collaborative portal: Collaboration of national and other archival institutions with records that pertain to Nazi-Era cultural property	WWII spoliation	Any ^{viii}	Public access https://www.archives.gov/research/holocaust/international-resources/
INTERPOL^{ix} Stolen Works of art database	International database: INTERPOL	Criminal theft	Any	Authorized users http://www.interpol.int/Crime-areas/Works-of-art/Works-of-art

Lost Art Internet Database	International database: Germany's central office for the documentation of lost cultural property	WWII spoliation	Any	Public access http://www.lostart.de/Webs/EN/Datenbank/Index.html
Musées Nationaux Récupération database	National database: French government	WWII spoliation	Any ^x	Public access http://www.culture.gouv.fr/public/mistral/mnrbis_fr?ACTION=RETOUR&USRNAME=nobody&USRPWD=4%24%2534P
National Stolen Art File	National database: FBI ^{xi}	Criminal theft	Any	Access upon request http://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/national-stolen-art-file
Origin Unknown database	National database: Dutch Government	WWII related losses	Any ^{xii}	Public access http://www.herkomstgezocht.nl/eng/
Red List database	International database: ICOM ^{xiii}	Any	Endangered Cultural patrimony	Public access http://icom.museum/programmes/fighting-illicit-traffic/red-list/

Stolen Art Listing Belgium	National database: Belgium government	Criminal theft	Any type of antiques	Public access http://www.stolenart.be/
Summary catalogue of cultural values of the Russian Federation stolen and lost in the Second World War	National database: Catalogues published by the Russian government	WWII related losses	Any ^{xiv}	Public access http://www.lostart.ru/en/svodnyj_katalog/search/
TREIMA database	National database: French Bureau on the fight against illicit traffic of cultural property (OCBC)	Criminal theft	Any ^{xv}	Destined to the police http://www.culturecommunication.gouv.fr/Politiques-ministerielles/Circulation-des-biens-culturels/Informations-pratiques/Recherche-dans-les-bases-de-donnees
UNESCO Database of National Cultural Heritage Laws	International database	any	any	Public access http://www.unesco.org/culture/natlaws/index.php?&lng=en

* Shown is a non exhaustive list of databases available to evaluate the provenance of dubious artworks, intended to indicate their variety of scope and access.

ⁱ American Association of Museum Directors.

ⁱⁱ Artifacts held in the collection of AAMD members since June 4, 2008, which lack complete provenance after November 1970.

ⁱⁱⁱ International Foundation for Art Research.

^{iv} Artifacts stolen or illicitly exported outside of the Italian bordure.

^v Commission for Looted art in Europe (an international body of representatives).

^{vi} Artifacts spoliated by the Nazis during WWII.

^{vii} International Council of Museums.

^{viii} *Ibid.*

^{ix} INTERNATIONAL POLice organization.

^x Artifacts spoliated by the Nazis during WWII and still held in the French national artistic collections.

^{xi} Federal Bureau of Invesestigation (US).

^{xii} Artifacts lost during WWII or as a consequence of the war.

^{xiii} International Council Of Museums.

^{xiv} Losses suffered by Russian museums, libraries and archives.

^{xv} Artifacts stolen in France or abroad when listed in the INTERPOL database.