

Fordham International Law Journal

Volume 17, Issue 4

1993

Article 8

Protecting Cultural Objects in an Internal Border-Free EC: The EC Directive and Regulation for the Protection and Return of Cultural Objects

Victoria J. Viantro*

*

Copyright ©1993 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Protecting Cultural Objects in an Internal Border-Free EC: The EC Directive and Regulation for the Protection and Return of Cultural Objects

Victoria J. Viantro

Abstract

This Comment argues that although the Directive and the Regulation represent a valuable improvement over the present lack of harmony among the civil-law and common-law nations' differing approaches to the conveyance of title to stolen property, these EC measures will by no means sufficiently deter art theft in the EC or diminish the international trade of stolen art because they fail to provide an effective compensation mechanism or to set forth clear requirements for a buyer to qualify as a bona fide purchaser ("BFP"). Part I discusses the various international, national, and private measures that have been taken to protect cultural property. Part II describes how the Directive and the Regulation developed and includes an analysis of both provisions. Part III argues that while the Directive and the Regulation attempt to harmonize the Member States' civil-law and common-law approaches to property rights, ultimately, the Directive and Regulation will not offer a truly adequate form of protection for cultural objects. This Comment concludes that the Directive and the Regulation are commendable for their attempt to address the needs of the common-law and civil-law nations, but that further legislation placing a higher burden on purchasers of art is required to ensure adequate protection of cultural property. Specifically, potential purchasers should be required to research the provenance of an object before purchasing it.

PROTECTING CULTURAL OBJECTS IN AN INTERNAL
BORDER-FREE EC: THE EC DIRECTIVE AND
REGULATION FOR THE PROTECTION
AND RETURN OF CULTURAL
OBJECTS

INTRODUCTION

Only ten percent of all stolen art is ever recovered worldwide.¹ This statistic, coupled with the fact that art theft in Europe is on the rise,² explains why the European Community³ (the "EC") now seeks increased protection of cultural objects⁴ in

1. Andrew Decker, *Met Institutes Screening of Proposed Acquisitions*, ARTNEWSLETTER, Feb. 22, 1994, at 2; Phil Davison, *Monet Sunrise Fails to Dawn*, INDEPENDENT, Sept. 23, 1990, at 4; Constance Lowenthal, *Debunking Dr. No*, WALL ST. J., Mar. 31, 1993, at A12. The recovery rate for major art works is slightly higher. *Id.* See generally, Andrew Decker, *Stolen Art Works: The Ten Most Wanted*, N.Y. MAG., Apr. 4, 1994, at 46 (listing ten stolen works of art that are considered among most important art thefts based on "the importance of the artist and the rarity of the work"). Among the most sought after stolen works of art is Caravaggio's *Adoration of the Shepherds With Saints Lawrence and Francis*, stolen in 1969 from the Oratorio di San Lorenzo, Palermo, Sicily, and valued at more than \$50 million. *Id.* Other works of great importance and significant monetary value are the eleven paintings stolen from Boston's Isabella Stewart Gardner Museum on March 18, 1990. *Id.* Among the paintings stolen from the Gardner Museum are *The Concert* by Jan Vermeer and Rembrandt van Rijn's *The Storm on the Sea of Galilee*, each valued at more than \$50 million. *Id.*

2. LEONARD D. DUBOFF & SALLY HOLT CAPLAN, *THE DESKBOOK OF ART LAW: BOOKLET C* at C-1 (2d ed. 1993).

3. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd.5179-II) 298 U.N.T.S. 3 (1958), as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in *Treaties Establishing the European Communities* (EC Off'l Pub. Office, 1987) [hereinafter EEC Treaty]. On February 7, 1992, the twelve Member States signed the Treaty For European Union in Maastricht, the Netherlands. See Treaty on European Union, Feb. 7, 1992, O.J. C 224/01 (1992), [1992] 1 C.M.L.R. 719, reprinted in 31 I.L.M. 247 (1992) [hereinafter TEU]. The changes to the EEC Treaty, *supra*, made by the TEU, *supra*, were incorporated into the Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty]. The twelve EC Member States are Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom. *Id.*

4. Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, March 15, 1993, O.J. L 74/74 (1993) [hereinafter Directive] (defining "cultural object" as "an object which is classified, before or after its unlawful removal from the territory of a Member State, among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the [EC] Treaty, and belongs to one of the categories listed in the Annex or does not belong to one of these categories but forms an integral part of public collections listed in the inventories of museums,

an internal border-free⁵ EC. Prior to the European union, art thieves not only had to steal a work of art, but also had to elude customs officers when attempting to move the object between European countries.⁶ Today, because customs posts within the European Community have been virtually eliminated,⁷ an object can more easily be removed from a Member State.⁸

Despite the fact that art thieves steal approximately 60,000 works of art in Europe each year,⁹ art theft remains a low priority among law enforcement officials.¹⁰ Generally, stolen objects quickly pass from the hands of savvy art thieves onto the black market. The black market is made up of an international network of art dealers who specialize in the laundering of stolen art and artifacts.¹¹ It is not uncommon for a stolen cultural object

archives or libraries' conservation collection. . . [or] the inventories of ecclesiastical institutions."). *Id.* art. 1(1), O.J. L 74/74, at 75 (1993).

"Cultural objects" are also referred to as "cultural property," "cultural goods," "cultural patrimony," or "national treasures." See generally, Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT'L L.J.* 1033 (1992-93) (defining cultural property). Some definitions of cultural property are extremely broad, including any object that has both property attributes and cultural significance. *Id.* at 1040. Other stricter measures require that an object fall into a specified category. *Id.* See, e.g., United Nations Educational, Scientific and Cultural Organization [hereinafter UNESCO] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 4, 1970, 823 U.N.T.S. at 231 (1972), reprinted in 10 *I.L.M.* 289 (1970) [hereinafter Convention] (defining cultural property as having certain characteristics and falling into one of eleven specified categories).

5. EC Treaty, *supra* note 3, art. 8a. Article 8a of the EC Treaty called for the creation of a common market without internal borders by December 31, 1992. *Id.*

6. Steven F. Grover, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 *TEX. L. REV.* 1431, 1444 (1992); William D. Montalbano, *Art Thieves Find Italy is a Gold Mine*, *LA TIMES*, Aug. 25, 1988, at 1.

7. See TEU, *supra* note 3, art. 7a (requiring the removal of internal borders by December 31, 1992).

8. Alan Riding, *Europe, Unifying, Has Fears for its Art*, *N.Y. TIMES*, Dec. 28, 1992, at C9.

9. Andrzej Koziara, *Art Robbery and Resale: Easy As One, Two, Steal*, *WARSAW VOICE*, Feb. 14, 1993. The International Criminal Police Organization [hereinafter Interpol] confirms this number and estimates that these works have a combined value of six billion dollars. *Id.*; Paul Rambali, *Booming Chronicle of Stolen Art*, *INDEPENDENT*, Sept. 13, 1992, at 14. RALPH E. LERNER & JUDITH BRESLER, *ART LAW* 51 (1989). Interpol is a group of police agencies in 134 countries which is headquartered in France. *Id.* The Art Program of Interpol disseminates information about stolen art. *Id.*

10. Leslie Geddes-Brown, *At Home: Fine Art of Tracking Down the Swag Crime Watch*, *DAILY TELEGRAPH*, Apr. 18, 1992, at 108. Art theft is the second most lucrative international crime after drug smuggling. *Id.*

11. Montalbano, *supra* note 6, at 1. See generally, BONNIE BURNHAM, *THE ART CRISIS* (1975) (explaining stolen art market).

to travel through several European countries before it resurfaces.¹²

Concerned that art would travel freely about the European Community, the Member States became concerned about how they would protect those objects comprising their cultural property.¹³ A nation's cultural property is made up of those objects which have artistic merit and are linked to a culture's identity.¹⁴ Examples of cultural property are Italy's "David" by Michelangelo, Germany's Gutenberg Press, and England's Magna Carta.¹⁵ Because of the unique nature of national treasures, art-rich nations face the challenge of protecting their cultural property from art thieves who know that such objects can be sold illicitly at high prices.¹⁶

Thieves often take stolen cultural property directly from countries with rich cultural heritages to civil-law nations where the purchaser of stolen property can gain good title.¹⁷ In a civil-law nation, a purchaser of stolen art acquires good title provided that she does not know or learn about the object's illicit removal from its rightful owner.¹⁸ In a common-law country, by contrast, a seller cannot transfer better title than she has.¹⁹ A thief in a common-law country thus breaks the chain of good title and any subsequent purchasers can never acquire good title.²⁰ The original owner can therefore reclaim the object regardless of whether the purchaser knew she had bought a stolen object. Because

12. Montalbano, *supra* note 6, at 1. For example, Interpol reported that an illegally exported 5th-Century BC sculpture of Aphrodite traveled from Southern Italy, where it was excavated, to a Sicilian dealer in Switzerland and finally to a dealer in London before it was purchased by the J. Paul Getty Museum in Malibu, California. *Id.*

13. *See supra* note 4 (defining cultural property).

14. *Id.*

15. Interview with Constance Lowenthal, Executive Director of the International Foundation for Art Research (Mar. 23, 1994).

16. Montalbano, *supra* note 6, at 1.

17. Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, How. L.J. 17 (1993). As a general principle of civil law, a bona fide purchaser can obtain good title to a cultural object regardless of the fact that he bought it from a thief. *Id.* Feudal Europe adopted the civil code in an effort to facilitate economic growth. *Id.* at 22, n.30.

18. *Id.* at 21 n.28.

19. *Id.* Common law follows the principle *nemo dat quod non habet*, which means that no one may give better title than he has. *Id.* at 22. Thus, under common law, the thief breaks the chain of good title. *Id.* Examples of common-law nations today are Great Britain, Ireland, the United States, Canada, New Zealand, and Australia. Grover, *supra* note 6, at 1432.

20. Collin, *supra* note 17, at 22.

some EC countries follow the common-law tradition while others have civil-law traditions,²¹ art thieves merely need to take a stolen object out of a common-law country and into a civil-law nation to "launder"²² it.

Protection of cultural property within the EC requires striking a delicate balance between monitoring the return²³ and removal of such objects and the EC's goal of free trade among the Member States.²⁴ Council Directive²⁵ 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (the "Directive"),²⁶ and Council Regulation²⁷ (EEC) 3911/92 on the Export of Cultural Goods (the "Regulation")²⁸ are the products of the Member States' attempt to strike such a balance.²⁹ The Directive and the companion Regulation introduce a system for the protection of the cultural property of the Member States.³⁰ This system in part produces Community-wide rules and in part harmonizes Mem-

21. *Id.* The United Kingdom and Ireland are the two EC countries that follow the common-law tradition. *Id.* All other EC countries are generally representative of the civil-law tradition.

22. Grover, *supra* note 6, at 1441. "Art laundering is the process by which a seller of stolen, or 'dirty,' art makes it 'clean' by selling it in a country that ensures good title for the BFP of stolen art." *Id.*

23. Directive, *supra* note 4, art. 1(5), O.J. L 74/74, at 75 (1993) (defining "return" as "the physical return of the cultural object to the territory of the requesting Member State").

24. Riding, *supra* note 8, at C9 (quoting Robert Key, Britain's Minister for National Heritage, upon adoption of Amended Commission Proposal on November 10, 1992: "We have had to balance the legitimate requirement to protect national treasures with the equally legitimate concern to promote free trade.")

25. See EC Treaty, *supra* note 3, art. 189 (defining Directive). See also JOSEPHINE STEINER, EEC LAW 17 (1988) (explaining that Directive is "a measure intended to be addressed to, and binding on States, either individually or collectively, but apparently requiring implementation by States before it can be fully effective in law.")

26. Directive, *supra* note 4, O.J. L 74/74 (1993).

27. See EC Treaty, *supra* note 3, art. 189 (defining Regulation); see also STEINER, *supra* note 25, at 17 (stating that "the principle feature of a Regulation is its general application. A Regulation is a normative rather than an individual act, designed to apply to situations in the abstract"). *Id.*

28. Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the Export of Cultural Goods, 1992 O.J. L 395/1 (1992) [hereinafter Regulation].

29. See Riding, *supra* note 8, at C9 (explaining how Member States reached compromise). See generally, Kimberly A. Short, *Preventing the Theft and Illegal Export of Art in a Europe Without Borders*, 26 VAND. J. TRANSNAT'L L. 633 (1993) (explaining countervailing interests between free trade and protection of cultural property).

30. Directive, *supra* note 4, O.J. L 74/74 (1993); Regulation, *supra* note 28, O.J. L 395/1 (1992).

ber State rules for such protection.³¹

The Directive establishes the legal procedure for the return of cultural objects that are unlawfully removed from one Member State and resurface in another.³² The Directive also explains how a Member State may initiate restitution measures for the return of its cultural property within the EC.³³ In addition, the Directive contains a statute of limitations provision, after which legal proceedings are barred,³⁴ and a compensation provision for the dispossessed purchaser.³⁵

The Regulation establishes an export certification system under which every cultural object must receive an export certificate before exportation from the EC.³⁶ Accordingly, the Regulation protects cultural property from illegal exportation by requiring that a cultural object not leave the European Community without an export certificate.³⁷ If a prospective purchaser finds a cultural object outside the EC without such a certificate, commonly referred to as a "passport," the potential purchaser should be alerted to the possibility of the object's unlawful removal. However, the potential buyer may assume that the cultural object left its country of origin before the export licensing requirement went into effect on January 1, 1992.

This Comment argues that although the Directive and the Regulation represent a valuable improvement over the present lack of harmony among the civil-law and common-law nations' differing approaches to the conveyance of title to stolen property, these EC measures will by no means sufficiently deter art theft in the EC or diminish the international trade of stolen art because they fail to provide an effective compensation mechanism or to set forth clear requirements for a buyer to qualify as a

31. See *Council Adopts Directive on Return of Cultural Objects Unlawfully Removed from Member States*, *RAPID*, Mar. 17, 1993, No. 93-194. (explaining that Directive and Regulation supplement, rather than replace, Member States' national systems).

32. Directive, *supra* note 4, art. 1(2) defines "unlawfully removed from the territory of a Member State" as "removed from the territory of a Member State in breach of its rules on the protection of the national treasures or in Breach of Regulation (EEC) No. 3911/92, or not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal." *Id.* art. 1(2), O.J. L 74/74, at 75 (1993).

33. *Id.* arts. 2, 4, 5, O.J. L 74/74, at 75-76 (1993).

34. *Id.* arts. 7-8, O.J. L 74/74, at 76 (1993).

35. *Id.* arts. 9-11, O.J. L 74/74, at 76 (1993).

36. Regulation, *supra* note 28, O.J. L 395/1 (1992).

37. *Id.*

bona fide purchaser³⁸ ("BFP"). Part I discusses the various international, national, and private measures that have been taken to protect cultural property. Part II describes how the Directive and the Regulation developed and includes an analysis of both provisions. Part III argues that while the Directive and the Regulation attempt to harmonize the Member States' civil-law and common-law approaches to property rights, ultimately, the Directive and Regulation will not offer a truly adequate form of protection for cultural objects. This Comment concludes that the Directive and the Regulation are commendable for their attempt to address the needs of the common-law and civil-law nations, but that further legislation placing a higher burden on purchasers of art is required to ensure adequate protection of cultural property. Specifically, potential purchasers should be required to research the provenance of an object before purchasing it.

I. THE HISTORY OF THE PROTECTION OF CULTURAL PROPERTY

The difference between civil-law and common-law approaches to settling title to stolen property purchased in good faith, coupled with the lack of agreement among Member States as to whether cultural property should be strictly or liberally protected, facilitates art theft and the illicit trade of stolen art.³⁹ The EC Member States, as well as private and public international organizations, have attempted to protect cultural property from theft and illicit trade.⁴⁰ Member States have adopted various national laws to protect cultural property.⁴¹ The United Nations Educational, Scientific and Cultural Organization ("UNESCO") sought to harmonize various national laws through the 1970 United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting and Prevent-

38. See BLACK'S LAW DICTIONARY 92 (abridged 5th ed. 1983). A "bona fide purchaser" is "one who has purchased property for value without any notice of any defects in the title of the seller." *Id.*

39. Grover, *supra* note 6, at 1445.

40. See e.g., Directive, *supra* note 4, O.J. L 74/74 (1993) (establishing return and restitution system within EC); Regulation, *supra* note 28, O.J. L 395/1 (establishing export certification system for cultural objects leaving EC), Convention, *supra* note 4 (establishing international system for protection of cultural property); see also Lerner and Bresler, *supra* note 9.

41. Grover, *supra* note 6, at 1442.

ing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "Convention").⁴² Private organizations, such as the International Foundation for Art Research, have attempted to combat illicit art trade through the maintenance of databases of lost and stolen art.⁴³

A. *Competing Interests in the Protection of Cultural Objects:
Civil Law v. Common Law*

Whether an illegally removed object remains with the BFP or is returned to the original owner presents a difficult problem of ownership, as both the BFP and the original owner are innocent parties with regard to the theft.⁴⁴ Because it is impossible for both parties to have possession of the object, either the original owner will remain divorced from her property or the BFP will have to return the stolen object, which she believed to have acquired legally.⁴⁵ Settling title to stolen cultural property requires that the burden of the loss fall on either the original owner or the BFP.⁴⁶

Under common law,⁴⁷ a thief breaks the chain of good title when she steals property from its rightful owner.⁴⁸ Thus, according to common law, a thief does not have good title and therefore cannot possibly transfer good title to the purchaser of stolen property.⁴⁹ As a result, the original owner will always be able to

42. Convention, *supra* note 4. The General Conference of UNESCO adopted the UNESCO Convention on November 14, 1970. *Id.*; see Mastalir, *supra* note 4, at 1053 (proclaiming UNESCO Convention as "[t]he primary international instrument regulating trafficking in cultural property").

43. Interview with Anna Kisluk, Director of the Art Loss Register in New York (Mar. 9, 1994) [hereinafter Kisluk Interview].

44. Karen Theresa Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit From Domestic Laws Favoring Bona Fide Purchasers?*, 13 *LOY. L.A. INT'L & COMP. L.J.* 427, 442-43 (1990); Grover, *supra* note 6, at 1431-32.

45. Burke, *supra* note 44, at 442-43. LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* 387 (1st ed. 1977). A purchaser can reduce the risk of buying stolen property. It has been suggested that "[i]n order to avoid being victimized, a purchaser needs to acquire knowledge of the field and to use common sense." *Id.*

46. Burke, *supra* note 44, at 442-43, n.118-21.

47. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 3 (2nd ed. 1985). Common law began in A.D. 1066. *Id.* Great Britain, Ireland, the United States, Australia, and New Zealand have legal systems based on the common-law tradition. *Id.* at 4.

48. Collin, *supra* note 17, at 22 n.28.

49. See, e.g., Sale of Goods Act, 1979, ch. 54, 21 (Eng.) (stating that "where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the

recover his property since the purchaser of stolen property did not receive good title from the thief.⁵⁰ Because common law requires that a purchaser of a stolen object return that object to its rightful owner, purchasers are discouraged from buying stolen property in common-law nations because they do not want to risk having to surrender an object, which they paid for, to the rightful owner.⁵¹

Conversely, in a civil-law nation,⁵² the market in stolen art can flourish because a BFP does not risk that the original owner will be able to recover a stolen object.⁵³ This is because in a civil-law country an individual who buys stolen property can retain that property if approached by the original owner provided that the purchaser was a BFP and the limitations period expired.⁵⁴ This ability to acquire good title to stolen property in a civil-law nation provides an increased economic advantage to art thieves and merchants of stolen art since purchasers do not risk losing their investment to the original owner, provided they purchased

goods than the seller had"); *see also* U.C.C. 2-403(1) (1981) (stating that "[a] purchaser of goods acquires all title which his transferor had or had power to transfer. . ."); Collin, *supra* note 17 at 22 n.28.

50. *See e.g.*, *Menzel v. List*, 267 N.Y.S.2d 804, 808 (N.Y. Sup. Ct. 1966) (holding that where Nazis stole painting by Marc Chagall, third-party defendants, who were bona fide purchasers, must return painting to rightful owners because Nazis, as thieves, could not convey good title as against true owner).

51. Grover, *supra* note 6, at 1432.

52. *See generally* Merryman, *supra* note 47 (explaining historical development of civil law).

53. *See* Grover, *supra* note 6, at 1441 (noting that purchasers will travel to pro-BFP countries (i.e., civil-law countries) where they will be willing to pay higher prices so that they are sure to obtain good title). For example, if an art thief stole a painting by the British artist J.M.W. Turner from the National Gallery, London, it is likely that he would take it to a civil-law nation, such as Switzerland, to sell it rather than attempt to sell it in the United Kingdom, a common-law nation. This is because the thief can find a buyer in a civil-law nation who has specifically travelled to such country to take advantage of the laws under which good title can pass to a good faith purchaser. The purchaser will be willing to pay more money for the Turner if he buys it in a civil-law country because he is assured conveyance of good title. Whereas, if the same buyer purchased the Turner in the United Kingdom, he would risk losing his investment if the original owner ever brought an action for replevin against him, and he therefore would not be willing to pay as much, if anything, for the Turner.

54. *See e.g.*, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp. 1374, 1400 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990) (explaining that under civil law of Switzerland BFP can acquire good title to stolen property); *see also* Grover, *supra* note 6, at 1448-49 (explaining that BFP can acquire good title to stolen property under civil law).

in good faith.⁵⁵ As a result, art thieves often take cultural property from common-law countries to civil-law countries where they can find a system more conducive to trading in stolen objects.⁵⁶

In the United Kingdom, a common-law country, title to a stolen object stays with the original owner even though a BFP may have purchased the object.⁵⁷ One exception to this rule that permits good title to pass to the BFP is known as the theory of *market ouvert*.⁵⁸ According to *market ouvert*, a BFP who purchases property in a public market or in a shop in the City of London during daylight hours acquires good title.⁵⁹ British au-

55. Grover, *supra* note 6, at 1432. Based on the basic laws of supply and demand, as long as people are willing to buy stolen art, art thieves will continue to supply it. Elizabeth Hayt-Atkins, *The Japanese-French Connection*, IFARREPORTS, Dec. 1987, at 4. At the height of the 1980's art market, when Japanese purchasers were causing the price of art to reach record levels, it was noted that art thieves had become equally enamored with art. *Id.*

56. See *Rembrandt Recovery*, IFARREPORTS, Oct. 1986, at 3 (reporting recovery in Germany of Rembrandt's "Portrait of Jacob de Gheyn III," which was stolen from a London gallery).

Art thieves will often "launder" art by taking it into Switzerland where good title can pass with a stolen object if the purchaser is a BFP and five years have passed since the theft. Grover, *supra* note 6, at 1449. Thus, once a stolen object is in Switzerland it is laundered and easily marketable. *Id.* at 1442. See, e.g., Lynn Stowell Pearson, "IFAR Recovery: A Roman Relief," IFARREPORTS, Oct. 1986, at 3 (explaining theft of 2nd-century A.D. marble relief of goddess Roma from Italy and its subsequent sale in Switzerland).

Once an illegally removed object reaches a civil-law country, the transfer of the object through several transactions will produce receipts or bills of sale. Grover, *supra* note 6, at 1449. A potential buyer can ascertain whether the cultural property he would like to buy has ever been stolen by finding bills of sale documenting the transfer of the property from the object's first owner to the successive owners or by looking at a catalogue raisonné of the artist's works. If bills of sale can be found for each transfer of the property, then it is reasonable for the purchaser to assume that the object was sold with each previous owner's consent rather than stolen. Because it is almost impossible to determine the origin of every object, bills of sale produced through several transactions after the cultural object reaches the country with the liberal BFP laws will often satisfy a wary auctioneer that the provenance of the object is not tainted. Alternatively, a potential buyer can trace the provenance of a work of art by looking it up in a catalogue raisonné which purports to be the definitive compilation of an artist's oeuvre, including the history of the works.

57. Sale of Goods Act, 1979, ch. 54, 23 (Eng.); Sarah Jane Checkland, *Fine Art World Combines to Stop Thefts*, THE TIMES (London), Feb. 3, 1992.

58. Larry Tye, *Gardner: Masterwork of Crime; A motive, recovery of art elude the investigators*, BOSTON GLOBE, May 13, 1990, at 1; Grover, *supra* note 6, at 1446.

59. Sale of Goods Act, *supra* note 57; Grover, *supra* note 6, at 1446; Tye, *supra* note 58, at 1. According to the theory of *market ouvert*, good title can pass with cultural objects sold at Bermondsey Market and other bazaars that operate under a 15th-century royal decree and common law. *Id.*

thorities are aware that this exception facilitates trade in stolen art and other property.⁶⁰ However, because most of the objects sold in the markets are not of great monetary or cultural value, British authorities are reluctant to upset tradition and the flow of commerce by changing the exception.⁶¹

The laws of Italy, Germany, and France, on the other hand, enable a BFP to acquire good title to stolen property.⁶² While Italy favors the BFP of stolen goods over the original owner,⁶³ a purchaser cannot acquire good title to an archeological artifact or an object stolen from a public museum.⁶⁴ The German Civil Code allows a BFP to acquire title to a stolen object once the statute of limitations runs out, which statute begins to run at the time of the theft and elapses after ten years.⁶⁵ According to German law, the BFP acquires good title upon expiration of this period provided that the BFP purchased and possessed the work in good faith during the limitations period.⁶⁶

The French Civil Code also allows a BFP to acquire good title to a stolen work of art.⁶⁷ The statute of limitations begins at

60. Tye, *supra* note 58, at 1.

61. *Id.*

62. CODICE CIVILE [C.C.] art. 1153 (It.), translated in THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION (Oceana Publications 1991); BURGERLICHES GESETZBUCH [BGB] art. 937 (Ger.), translated in THE GERMAN CIVIL CODE (Fred B. Rothman 1975); CODE CIVIL [C. CIV.] arts. 2279-80 (Fr.); see *Winkworth v. Christie Mason & Woods Ltd.*, [1980] 1 All E.R. 1121 (explaining that BFP can obtain good title under Italian law); *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1158-60 (2d Cir. 1982) (explaining German law giving good title to BFP).

63. See C.C., *supra* note 62, art. 1153. The relevant statutory language is as follows: "He to whom movable property . . . is conveyed by one who is not the owner acquires ownership of it through possession, provided that he be in good faith at the moment of consignment and there be an instrument or transaction capable of transferring ownership . . ." *Id.* The fact that Italy, a source country, favors the BFP over the original owner is an oddity. Grover, *supra* note 6, at 1452. A possible explanation for the protection of the BFP is the fact that the Italian government enacted the law to ensure commercial certainty in an effort to stimulate the country's economic sector. *Id.*

64. C.C., *supra* note 62; Grover, *supra* note 6, at 1452.

65. BGB, *supra* note 62, art. 937. BGB Article 937 states:

(1) A person, who has a movable thing in his proprietary possession for ten years acquires ownership (usucaption).

(2) Usucaption is excluded, if the acquirer is not in good faith in obtaining possession or if he subsequently learns that he is not entitled to ownership.

Id.; Grover, *supra* note 6, at 1449 n.112.

66. BGB, *supra* note 62, art. 937; Grover, *supra* note 6, at 1450-51.

67. C. Civ., *supra* note 62, arts. 2279-80; Grover, *supra* note 6, at 1449 n.114.

the time of the theft and lasts three years.⁶⁸ Where the BFP bought the goods in a market, at a public auction, or from a dealer who specializes in the particular type of goods at issue, the original owner must reimburse the BFP to regain possession.⁶⁹

B. *The Protection of Cultural Objects Under Member State Laws*

Article 36 of the EC Treaty permits Member States to place limits on the free movement of goods in order to protect their artistic, historical, or archaeological treasures, i.e., essentially all forms of cultural property.⁷⁰ In addition, the TEU has for the first time introduced a provision, Article 128, which expands the EC's scope of action to include cultural measures.⁷¹ According to Article 36 of the EC Treaty, each Member State may protect its cultural property with its own national laws.⁷² In addition, Article 36 allows Member States to protect their cultural property through quantitative restrictions on imports and exports.⁷³ However, a Member State may not use a restrictive measure as a disguised trade restriction.⁷⁴ Because each Member State is allowed to adopt its own laws for the protection of cultural property, harmonization of laws is lacking in this area.⁷⁵ Most EC

68. C. Civ., *supra* note 62, art. 2279; Grover, *supra* note 6, at 1449 n.114.

69. C. Civ., *supra* note 62, art. 2279-80; Grover, *supra* note 6, at 1451-52.

70. EC Treaty, *supra* note 3, art. 36. Article 36 of the EC Treaty states that the EC Treaty's provisions prohibiting quantitative restrictions "shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of . . . the protection of national treasures possessing artistic, historic or archaeological value . . ." *Id.*

71. TEU, *supra* note 3, tit. IX, art. 128(2). The TEU calls for cooperation among the Member States for the protection of cultural property in Article 128(2), which states:

Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples;
- conservation and safeguarding of cultural heritage of European significance; . . .

Id.

72. EC Treaty, *supra* note 3, art. 36; Riding, *supra* note 8, at C9.

73. EC Treaty, *supra* note 3, art. 36.

74. *Id.* Article 36 states: "Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised trade restriction on trade between Member States." *Id.*

75. Riding, *supra* note 8, at C9. One explanation for the strict export regulations

Member States have adopted some export restrictions designed to protect cultural property.⁷⁶ Among the EC Member States there are source countries and acquisition countries.⁷⁷ The source countries, Italy, Greece, France, and Spain, have rich cultural patrimonies⁷⁸ and generally desire strict limitations on the export of cultural goods.⁷⁹ These countries maintain strict control over exports through export licensing systems.⁸⁰ The acquisition countries, namely Germany, Belgium, and the Netherlands, actively participate in the art market and desire a looser system of control.⁸¹

In an effort to curtail rampant art theft in Italy,⁸² Italian law requires that an object having artistic merit cannot be removed from Italy without an export certificate.⁸³ Under Italian law, the Culture Ministry must approve the export of any work of artistic or historical importance that is more than fifty years old before

in the southern European Member States is that traditionally, the Church and governments have been the guardians of cultural property in these countries and they have not encouraged art trade. *Id.*; Montalbano, *supra* note 6, at 1.

76. LEONARD D. DUBOFF, ART LAW 15-18 (1984). The EC Member State Denmark does not have any controls on the export of art. *Id.* at 15.

77. Riding, *supra* note 8, at C9.

78. *Id.*

79. *Id.* While those countries with rich cultural patrimonies generally favor strict control over the export of cultural goods, some art dealers believe that strict controls drive art trade to the black market because it creates a lack of legitimate avenues for the sale of stolen art. *Id.*

80. DUBOFF, *supra* note 76, at 15-18.

81. Riding, *supra* note 8, at C9; Suzanne Perry, *EC Debates the Difference Between Picasos and Paint*, REUTER LIBR. REP., Oct. 17, 1990.

82. Montalbano, *supra* note 6, at 1. Italy lays claim to an unascertainable number of cultural objects. *Id.* According to one Italian police record, thieves stole at least one object of art every hour from an Italian church, museum or private collection in 1988. *Id.* Michael Kimmelman, *Ruined Works Stand as Symbols of Vulnerability*, NY TIMES, May 28, 1993, at A8. The frequency of the occurrences makes the job of protecting and recovering the objects nearly impossible. *Id.* The rampant growth of art theft in Italy has caused the government to remove paintings from churches and store them for security reasons. *Id.* See also BURNHAM, *supra* note 11, at 23 (stating that, faced with an alarming increase in theft of art from churches, in 1971, the city of Venice announced that all paintings in churches would be removed to museums); Lynn Stowell Pearson, *Return of Cultural Property*, IFARREPORTS, Jan.-Mar. 1986, at 2. An example of the treachery of art thieves is the 1983 theft of an 11th-12th century Italian fresco, which was cut out of a wall in the Grotta dei Santi in Calvi near Naples, Italy. *Id.* Because the grotto could only be reached on foot and was a one hour hike from the road it provided an easy target for the thief. *Id.* Fortunately, the fresco was turned over to U.S Customs in 1986. *Id.*

83. Montalbano, *supra* note 6, at 1.

the object can be exported.⁸⁴ According to Spanish law, an antique cultural object cannot be exported without a license.⁸⁵

France completely prohibits the export of certain works of art known as "classified."⁸⁶ Those works that are not "classified" can only be exported after receiving the approval of the Minister of Cultural Affairs.⁸⁷ The owner must apply to the Minister of Education for an export license.⁸⁸ Where a work was created after 1920 and the artist is still alive, the Ministry generally grants an exemption from the permit requirement.⁸⁹ For those objects created before 1920, the Ministry may delay the export of the object for up to six months so that a French museum has an opportunity to purchase the object.⁹⁰

Because fifty to seventy-five percent of the EC's art trade is conducted in the United Kingdom,⁹¹ it qualifies as an acquisition country.⁹² Regardless of this fact, in 1990, the British government restricted the export of its own cultural property through adoption of a law whereby a work of art considered part of the United Kingdom's cultural property could only leave the country if neither a private nor public British buyer wanted to buy the object.⁹³ An export license will only be issued if a domestic buyer cannot be found after a certain amount of time.⁹⁴ The United Kingdom regulates the export of art through its authority over exports and imports rather than through specific legislation controlling the export of art.⁹⁵

84. Short, *supra* note 29, at 653.

85. Perry, *supra* note 81.

86. See Carol L. Morris, *In Search of a Stolen Masterpiece: The Causes and Remedies of International Art Theft*, 15 SYRACUSE J. INT'L L. & COM. 57, 70 (1988) (stating that France prohibits export of "classified" works which are those works having "national historic, artistic, scientific or technical interest").

87. *Id.*

88. *Id.*

89. Short, *supra* note 29, at 653.

90. Morris, *supra* note 86, at 70-71.

91. Short, *supra* 29, at 661. Approximately five billion dollars is traded annually at auction in the United Kingdom. *Id.*

92. *Id.*

93. Carol Vogel, *Inside Art*, N.Y. TIMES, Oct. 1, 1993, at C28. Previously an export license would be granted provided that no public British institution was bidding for the object. *Id.* This stipulation has held up the sale of Antonio Canova's "Three Graces," which the J. Paul Getty Museum in Malibu, California would like to purchase from an unidentified British corporation. *Id.*

94. Short, *supra* note 29, at 652.

95. *Id.* at 651.

C. *Protection of Cultural Objects Under Public International Law:
The 1970 UNESCO Convention*

In 1970, the member countries of UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "Convention") in an attempt to curb the trade of illicitly acquired cultural property.⁹⁶ The Convention attempts to restrict the trade of illicitly removed cultural property through export licenses⁹⁷ and a system of administrative control.⁹⁸ According to Article 6, an export certificate must accompany an exported object of cultural property.⁹⁹ However, the Convention does not oblige signatories to adopt import restrictions.¹⁰⁰

96. Constance Lowenthal, *Unidroit Draft Convention*, IFAR REPORTS, Vol. 12, Aug-Sept. 1991, at 6. Convention, *supra* note 4, art. 10. Article 10 of the Convention states that "the State Parties to this Convention undertake: (a) to restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention" *Id.*

Today, the following EC countries are signatories to the Convention: Spain, Italy, Germany, Greece, Portugal. *Id.*

97. Convention, *supra* note 4, art. 6. Article 6 states:
The States Parties to this Convention undertake:

(a) to introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;

(b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate;

(c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property. *Id.*

98. *Id.* at art. 10(a) states:

The State Parties to the Convention undertake . . . to . . . oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject

Id.

The administrative control system places a particular requirement on antique dealers according to which they must maintain a register of sales. *Id.* The register must recount the origin of the item, the names and addresses of the supplier, and the description and sales price of the object. *Id.* Antique dealers who fail to register the items they sell are subject to penal or administrative sanctions. *Id.* However, the imposition of sanctions is left to the discretion of the parties. *Id.*; see PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART 102* (1981) (referring to this requirement as nuisance provision).

99. Convention, *supra* note 4, art. 6.; see BATOR, *supra* note 98, at 102 (explaining fact that export license requirement places burden on signatory States).

100. BATOR, *supra* note 98, at 103.

Rather, the Convention suggests that the parties enter into an agreement under which they will cooperate to protect each other's cultural property through multilateral cooperation.¹⁰¹

The EC Member States who are signatories to the Convention are Greece, Italy, Germany, Spain, and Portugal.¹⁰² The United Kingdom and France have not signed the Convention.¹⁰³ The United Kingdom did not ratify the UNESCO Convention because it believed that the Conventions's definition of cultural property was too broad¹⁰⁴ and that the requirements on art deal-

101. Convention, *supra* note 4, art. 9. Article 9 provides:

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other State Parties who are affected. The State Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

Id.

102. Convention, *supra* note 4.

103. Lowenthal, *supra* note 96, at 6.

104. Convention, *supra* note 4, art 1. Article 1 of the Convention defines cultural property as follows:

For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

ers would lead to unnecessary bureaucracy.¹⁰⁵ Switzerland, a non-EC country, did not sign the Convention either.¹⁰⁶ This is particularly significant because art thieves often smuggle stolen and unlawfully removed cultural property into Switzerland, where the country's BFP laws facilitate the return of the illicitly removed objects to the art market.¹⁰⁷

D. *Private Organizations' Efforts to Protect Cultural Objects*

Several private international and national organizations have undertaken efforts to create databases and compile books of stolen art.¹⁰⁸ Among these organizations are the International Foundation for Art Research¹⁰⁹ ("IFAR") and the Art Loss Register¹¹⁰ ("ALR"), Trace,¹¹¹ and the International Yearbook of Stolen Art.¹¹² The stolen art databases list works of art that have

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.

Id.

105. John Carvel, *Pillagers With an Eye for Profit Strip the Former Soviet Bloc of its Artistic Heritage as "Cultural Cleansing" to Order Sweeps Over Central and Eastern Europe*, *GUARDIAN*, Nov. 15, 1993, at 22. Today, Britain and other countries are attempting to address the harmonization of national laws regarding the protection of cultural property through the International Institute for the Unification of Private Law ("Unidroit"). *Id.* Unidroit is a Rome based intergovernmental organization which attempts to harmonize the laws of different countries. Lowenthal, *supra* note 96, at 5; Godfrey Barker, *Psst- want to buy a Leonardo?*, *DAILY TELEGRAPH*, Nov. 15, 1993, at 16. There are 56 member nations in Unidroit. *Id.* In 1988, Unidroit began to draft codes for the harmonization of cultural property laws. Lowenthal, *supra* note 96, at 5. UNESCO sees the Unidroit codes as a supplement to the Convention. *Id.* It is hoped that the draft Convention will be ratified by 1995. *Id.* In its present form, the draft requires that a purchaser surrender stolen or illegally exported cultural property to the original owner. *Id.* A BFP will receive compensation which his insurance company will pay for. *Id.*

106. Convention, *supra* note 4.

107. Grover, *supra* note 6, at 1442; *see supra* note 56 (explaining how stolen art is laundered in Switzerland).

108. LERNER & BRESLER, *supra* note 9, at 50-53.

109. *Id.* at 51. A group of lawyers, art historians and scientists created the International Foundation for Art Research ("IFAR") in 1968 for the study and prevention of art theft. *Id.*

110. Kisluk Interview, *supra* note 43. The Art Loss Register ("ALR") is an image database of lost and stolen art. *Id.* The ALR and IFAR share the same office in New York and they work together to report and track down stolen art. *Id.*

111. Checkland, *supra* note 57. Trace is a privately run British publication which is relied upon by both police and insurance agents. *Id.*

112. *Id.* The International Yearbook of Stolen Art is a private French publication

been stolen in an attempt to recover them.¹¹³ Such listings alert the art world, and in particular, a potential buyer, that a particular work has questionable provenance.¹¹⁴

The ALR is the most comprehensive and readily accessible of the available databases.¹¹⁵ The ALR, which is connected to IFAR,¹¹⁶ maintains an image database of approximately 50,000 stolen or lost items.¹¹⁷ The ALR receives information from many sources including private individuals, Sotheby's, Christies Fine Art Auctioneers, and Lloyd's of London.¹¹⁸ In addition, the ALR has several backers including the international auction houses Sotheby's and Christie's Fine Art Auctioneers.¹¹⁹ The objective of the ALR is to identify and recover stolen works of art by publicizing their theft.¹²⁰ Its broader purpose is to deter art theft and to reduce trade in stolen art.¹²¹ Dealers, collectors, museums, auctioneers and the police can easily search the database by contacting the ALR offices in New York or London.¹²² A fee is

initiated by Martin Monestier. *Id.* The book describes and publishes pictures of works of art stolen both in and outside of France. *Id.* The book is distributed internationally. *Id.*

113. Kisluk Interview, *supra* note 43.

114. *Id.*

115. See JOHN E. CONKLIN, *ART CRIME* 262 (1994) (stating that curbing art crime demands complete international stolen art registry system that is easily accessible and that ALR "is the closest there is to such a system").

116. Kisluk Interview, *supra* note 43; Decker, *supra* note 1, at 2.

117. Decker, *supra* note 1, at 2.

118. Kisluk Interview, *supra* note 43; Telephone Interview with Joe Och, General Counsel, Sotheby's, London (Feb. 18, 1994) [hereinafter Och Interview]. Joe Och, General Counsel, Sotheby's (London), noted that a useful data base requires the "marriage" of the insurance companies and those people who deal in fine arts. *Id.* The relationship between the ALR and IFAR effects such a union. Kisluk Interview, *supra* note 43.

119. Kisluk Interview, *supra* note 43.

120. *Id.*; CONKLIN, *supra* note 115, at 262. *Ten Important Recoveries Reported in 1989*, IFARREPORTS, Dec. 1989, at 6. For example, in 1986 IFARREPORTS listed as stolen a circa 470 B.C Attic red-figure kylix. *Id.* In the summer of 1989, someone saw the kylix at a New York auction preview and recognized it as the object that had been listed as stolen in IFARREPORTS. *Id.* IFAR was notified and the kylix was restored to its rightful owner. *Id.*

121. Kisluk Interview, *supra* note 43.

122. *Id.* Decker, *supra* note 1, at 2. The Metropolitan Museum of Art in New York recently adopted the policy that the museum will search the ALR before making any acquisitions that cost \$35,000 or more. *Id.* According to the museum's general counsel, Ashton Hawkins, the institution adopted this policy because an ALR search is considered a reasonable means for ensuring that the museum exercised due diligence before making the acquisition. *Id.* The J. Paul Getty Museum in Malibu, California also searches the ALR regularly before making an acquisition. *Id.*

charged for each search executed for a private client.¹²³ Searches by law enforcement agencies, however, are free.¹²⁴

Anyone can register a work as stolen or missing through either the New York or London ALR offices after submitting an Art Theft Report.¹²⁵ ALR then enters the item into its data base.¹²⁶ In addition, IFAR lists stolen art in the "Stolen Art Alert" which it publishes in its magazine *IFARreports*.¹²⁷ IFAR sends this magazine to art dealers, museums, private collectors, auction houses, and law enforcement agencies.¹²⁸

The entity which reports the theft must furnish the ALR with details of what was stolen, the date and place of theft, information about police involvement, and if possible, a photo.¹²⁹ Only objects reported stolen that possess a certain minimum value will be reported in the ALR.¹³⁰ The ALR charges a fee for registering the object.¹³¹

II. ENACTMENT AND CONTENT OF THE DIRECTIVE AND REGULATION

The Commission of the European Communities, which has the sole power to propose and initially draft legislative texts, issued the draft Directive and Regulation in O.J. C 53/11.¹³² Following the requisite review by the European Parliament and the Economic and Social Committee,¹³³ the Council of Ministers¹³⁴

123. Kisluk Interview, *supra* note 43; Grover, *supra* note 6, at 1440.

124. Kisluk Interview, *supra* note 43; Grover, *supra* note 6, at 1440.

125. Kisluk Interview, *supra* note 43.

126. *Id.*

127. LERNER & BRESLER, *supra* note 9, at 51. IFAR publishes *IFARreports* ten times each year. *Id.*

128. Kisluk Interview, *supra* note 43.

129. *Id.*

130. *Id.*

131. *Id.* This fee may be covered by the owner's insurance. *Id.*

132. Proposal for a Council Regulation (EEC) on the Export of Cultural Goods and Proposal for a Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, COM (91) 447 FINAL—SYN 382, Feb. 10, 1992, O.J. C 53/11 (1992) [hereinafter Draft Regulation and Draft Directive].

See EC Treaty, *supra* note 3, arts. 155-63 (establishing composition and powers of Commission).

133. STEINER, *supra* note 25, at 16. The Economic and Social Committee [hereinafter ESC] has a consultative function in the EC legislative process. *Id.* The Council appoints its members who are meant to represent different sectors of the EC. *Id.*

134. See EC Treaty, *supra* note 3, arts. 145-54 (establishing composition and powers of Council).

enacted the Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State¹³⁵ and the companion Council Regulation (EEC) No. 3911/92 on the Export of Cultural Goods¹³⁶ in accordance with the EC Treaty legislative process.¹³⁷ A significant stage of the legislative process was reached after the Council agreed upon the definition of "public collections"¹³⁸ and the statute of limitations.¹³⁹ The Regulation established an export certification system under which a cultural object cannot leave the EC without a "passport."¹⁴⁰ The Directive established a statute of limitations for the return of unlawfully removed property¹⁴¹ and a provision for the recompensation of the dispossessed owner.¹⁴²

A. Legislative History

Pursuant to Article 100a of the EC Treaty,¹⁴³ the Commission of the European Communities authored the Proposal for a Council Regulation (EEC) on the Export of Cultural Goods and the Proposal for a Council Directive on the Return of Cultural

135. Directive, *supra* note 4, O.J. L 74/74 (1993).

136. Regulation, *supra* note 28, O.J. L 395/1 (1992).

137. EC Treaty, *supra* note 3, art. 100a. The EC Treaty establishes common rules for the harmonization of the Member States' laws. *Id.* pt. 3, title I, ch. 3. In particular, Article 100a(1) of the EC Treaty states:

[T]he following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

Id. art. 100a(1).

The Member States followed the Article 100a procedure in enacting the Directive. Directive, *supra* note 4, O.J. L 74/74 (1993).

138. Directive, *supra* note 4, O.J. L 74/74 (1993).

139. *Id.*

140. Regulation, *supra* note 28, O.J. L 395/1 (1992).

141. Directive, *supra* note 4, art. 7, O.J. L 74/74, at 76 (1993).

142. *Id.* arts. 9-11, O.J. L 74/74, at 76 (1993).

143. EC Treaty, *supra* note 3, art. 100a(1). Article 100a(1) states that "the Council shall, acting by a qualified majority on a proposal from the Commission in cooperation from the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal markets." *Id.*

Objects Unlawfully Removed from the Territory of a Member State (the "Commission Proposal")¹⁴⁴ on February 10, 1992. The Commission Proposal stated that the impending removal of internal borders and customs controls between the Member States' borders created an urgent need for the adoption of measures that ensured protection of national treasures.¹⁴⁵ In accordance with the legislative procedures, the Commission forwarded its Proposal to the Council.¹⁴⁶

Eventually the Council settled on a Regulation to Monitor Exports of Cultural Objects from the EC¹⁴⁷ and a Directive that established a system for the return of cultural objects.¹⁴⁸ The Council confronted several problems in adopting the Directive. Ultimately, in the Directive the Council reached agreements on several of the most debated issues.

First, the Council considered whether the protection of public collections should include protecting ecclesiastical goods.¹⁴⁹ Spain wanted the Directive to include ecclesiastical goods, while other Member States thought that the Directive should not protect such items.¹⁵⁰ Finally, the Council decided that the Directive would protect certain categories of cultural objects listed in the Directive's Annex, as well as those objects which form an integral part of either the public collections listed in the inventories of museums, archives or libraries' conservation collections, or ecclesiastical institutions.¹⁵¹ Thus, the Ministers granted Spain's request that the definition include ecclesiastical goods. Second, Belgium wanted the Directive to protect objects that were provided public funding by public authorities.¹⁵² The Ministers denied the request.¹⁵³

The Council next addressed the statute of limitations issue.

144. Draft Regulation and Draft Directive, *supra* note 132, O.J. C 53/11 (1992); *Culture: Internal Market Council Approves Protection for Cultural Treasures*, EUR. REP., Nov. 14, 1992, § IV. Internal relations; No. 1812 [hereinafter EUR. REP.].

145. Grover, *supra* note 6, at 1444 n.83.

146. EC Treaty, *supra* note 3, art. 100a(1).

147. Regulation, *supra* note 28, O.J. L 395/1 (1992).

148. Directive, *supra* note 4, O.J. L 74/74 (1993).

149. *See Id.*, art. 1(1), O.J. L 74/74, at 75 (1993) (defining ecclesiastical goods as those cultural objects which form "an integral part of . . . the inventories of ecclesiastical institutions." *Id.*

150. EUR. REP., *supra* note 144.

151. Directive, *supra* note 4, O.J. L 74/74 (1993).

152. EUR. REP., *supra* note 144.

153. Directive, *supra* note 4, art. 1, O.J. L 74/74, at 75 (1993).

The Member States encountered difficulty in setting a time limit after which a requesting Member State could no longer initiate legal proceedings against the possessor.¹⁵⁴ Initially, Richard Needham, the UK Trade Minister who chaired the September 22, 1992 Council meeting, proposed a flat 75 year limitations period.¹⁵⁵ Greece and Italy would have preferred an indefinite limitations period; however, they were about to accept the 75 year period as a compromise just before the UK and Belgium decided to oppose the 75 year period as too long.¹⁵⁶ When the Directive was finalized, Greece, a source country,¹⁵⁷ opposed a flat 75-year time limit.¹⁵⁸ Ideally, Greece wanted a rule that would suspend the time limit if a Member State began criminal proceedings, regardless of whether the Member State knew where the item was.¹⁵⁹ Several of the acquisition states, including the United Kingdom, Germany, and the Netherlands, opposed suspension of the time limit.¹⁶⁰

Ultimately, the Directive established that the country where the object is located must return the object unless: (1) one year has passed between the date when the Member State requesting restitution first had knowledge of the object's location and the identity of the person possessing it and the date of the restitution request, or (2) the 30 year statute of limitations, beginning at the time of the object's unlawful removal, has expired.¹⁶¹ Where the object belongs to a public collection or is an ecclesiastical good, the statute of limitations is 75 years from the time of the unlawful removal of the object.¹⁶² An exception exists in Member States where there is no period of limitation, such as Italy, or where bilateral agreements between Member States provide for a period of longer than 75 years.¹⁶³

154. EUR. REP., *supra* note 144.

155. *Culture: UK and Belgium Spoil Hopes of Accord on Cultural Property*, EUR. REP., Sept. 26, 1992 [hereinafter *UK and Belgium*].

156. *Id.*

157. *See supra* note 78 and accompanying text (defining source country).

158. EUR. REP., *supra* note 144.

159. *Id.*

160. *Id.*; *UK and Belgium*, *supra* note 160. The UK, the Netherlands, Germany, and Denmark favored an art market which is "as deregulated and as free of red-tape as possible. Thus, they [gave] their support to the European Commission's proposal of having a 30-year period of limitation." *Id.*

161. Directive, *supra* note 4, O.J. L 74/74 (1993).

162. *Id.*

163. EUR. REP., *supra* note 144.

Fourth, the Council addressed the role of the Member State courts in ordering the return of an illegally removed cultural object. Under the Directive, courts of a Member State where unlawfully removed cultural property surfaces must order the return of the object to the Member State claiming ownership of the object provided that the Member State claiming ownership can prove that the object: (1) belongs to one of the common core categories defined in the Directive or is part of one of the public collections inventories of museums, archives, or conservation libraries or is a religious article and (2) left the national territory illegally after January 1, 1993.¹⁶⁴

Fifth, the Council reached an agreement about restitution. The Directive permits a court to determine equitable compensation for the dispossessed owner if the court finds that the purchaser was a BFP.¹⁶⁵ The Member State receiving the cultural object will pay the compensation.¹⁶⁶ In turn, that Member State can recover the cost of such compensation by suing the parties who were responsible for the illegal export of the object.¹⁶⁷

The Directive was difficult to adopt¹⁶⁸ due to the fact that the source countries, generally the southern Member States, wanted stricter protection of their cultural property, while the acquisition countries of the northern part of the EC took a more liberal view.¹⁶⁹ Ten Member States adopted the Directive by a qualified majority.¹⁷⁰ The Member States which adopted the Directive were Italy, France, Spain, the United Kingdom, Belgium, the Netherlands, Luxembourg, Denmark, Ireland and Portugal.

164. Directive, *supra* note 4, O.J. L 74/74 (1993).

165. *Id.*

166. *Id.*

167. *Id.*

168. EUR. REP., *supra* note 144.

169. *Id.*

170. EC Treaty, *supra* note 3, art. 100a (requiring only a qualified majority for the Directive to pass).

Sheldon Freidman, *The EC vs. NAFTA: Levelling Up vs. Social Dumping*, IIT CHICAGO-KENT L. REV. 1421, 1424 (1993).

When decisions are taken by a qualified majority, France, Germany, Italy and the United Kingdom have ten votes each; Spain has eight votes; Belgium, Greece, the Netherlands and Portugal have five votes each; and Luxembourg has two votes. Out of a total of 76 votes, 54 are needed to approve a Commission proposal and enact it into law.

Id.

Italy and Britain supported the agreement reluctantly. Riding, *supra* note 8, at C9.

Greece, a source country,¹⁷¹ and Germany, an acquisition country,¹⁷² did not vote in favor of the Directive.¹⁷³ On March 15, 1993, the Council formally adopted the Directive.¹⁷⁴

As explained in the Directive, because the Directive and the Regulation combine to introduce the system for the protection of cultural objects in the Member States after the removal of the internal borders, it was necessary that Member States comply with the Directive by the time the Regulation entered into force.¹⁷⁵ The Directive recognized that due to the nature of the legal systems of certain Member States, some Member States need a longer period of time to implement the legislation.¹⁷⁶ Accordingly, the Member States had to implement the laws, regulations and administrative provisions associated with the Directive by December 15, 1993.¹⁷⁷ Belgium, Germany, and the Netherlands were granted until March 15, 1994 to implement the Directive.¹⁷⁸

B. *The Content of the Regulation*

The Council Regulation on the Export of Cultural Goods establishes a procedure for monitoring the export of cultural artifacts from the European Community by an export certification system.¹⁷⁹ According to the Regulation, a cultural object cannot

171. See *supra* note 78 and accompanying text (stating that Greece is source country).

172. See *supra* note 81 and accompanying text (stating that Germany is acquisition country).

173. Riding, *supra* note 8, at C9. EUR. REP., *supra* note 144. Germany abstained to show its opposition to the bureaucracy that it believed the Directive would create. *Id.* Greece voted against the draft Directive because it wanted the 75 year statute of limitations to be suspended between the time when the restitution procedure is initiated and the time the location of the object and the identity of the owner have been established. *Id.*

174. Directive, *supra* note 4, O.J. L 74/74 (1993). The document was addressed to all the Member States and was published in all of the official languages. *Id.* The date of notification and effect were set for March 23, 1993. *Id.* The end of the document's validity is indefinite. *Id.*

175. *Id.* art. 18, O.J. L 74/74, at 77 (1993).

176. *Id.*

177. *Id.*

178. *Id.* Member States must inform the Commission of the implementation of the legislation into their national laws. *Id.* They also must make a reference to the Directive in the adopted measures and in their official publication. *Id.* Each Member State may determine how such reference shall be made. *Id.*

179. Regulation, *supra* note 28, O.J. L 395/1 (1992). The Regulation was adopted on December 9, 1992. *Id.*

travel outside of the EC without an export certificate¹⁸⁰ which is provided by the country of origin.¹⁸¹ The export certificate is valid in each of the Member States.¹⁸² In addition, the Regulation requires that the Member States cooperate to protect each others' interests.¹⁸³ The Regulation became effective on January 1, 1993.¹⁸⁴ Thus, if a potential buyer finds a cultural object outside the EC without an export certificate, a potential buyer should assume that the object has been unlawfully taken from a Member State or that it was exported from its country of origin prior to January 1, 1993.¹⁸⁵

Under the Regulation, Member States cannot require an export license for archeological "junk"¹⁸⁶ provided that the authorities determine that it was not unlawfully removed from the territory of another Member State.¹⁸⁷ Archeological "junk" includes those objects that are at least 100 years old, but do not have any commercial value.¹⁸⁸ This decision resulted from the UK's desire to have archeological finds of little value exempted altogether from the export license system.¹⁸⁹

180. *See id.* art. 2(1), O.J. L 395/1 (1992) ("The export of cultural goods outside the customs territory of the Community shall be subject to the presentation of an export license.").

181. *Id.* art. 2(2), O.J. L 395/1-2 (1992). Article 2(2) states:

The export license shall be issued at the request of the person concerned:

—by a competent authority of the Member State in whose territory the cultural object in question was lawfully and definitively located on 1 January 1993,

—or, thereafter, by a competent authority of the Member State in whose territory it is located following either lawful and definitive dispatch from another Member State, or importation from a third country, or reimportation from a third country after lawful dispatch from a Member State to that country.

Id.

182. *Id.* art. 2(3), O.J. L 395/2 (1992). Article 2(3) states: "The export license shall be valid throughout the Community." *Id.*

183. *Id.* art. 6, O.J. L 395/2 (1992). Article 6 states: "Member States shall take all necessary steps to establish, in the context of their mutual relations, cooperation between the customs authorities and the competent authorities referred in . . . [the] Directive." *Id.*

184. *Id.* O.J. L 395/1 (1992).

185. Grover, *supra* note 6, at 1444 n.84.

186. Regulation, *supra* note 28, Annex, O.J. L 395/4-5 (1992); Riding, *supra* note 8, at C9.

187. Regulation, *supra* note 28, art. 2(2), O.J. L 395/2 (1992).

188. *Id.*

189. EUR. REP., *supra* note 144.

C. *The Content of the Directive*

In the event of the unlawful removal of a cultural object from one Member State into another, the Directive establishes a legal procedure for its return.¹⁹⁰ Article 2 of the Directive states that the Directive's broad purpose is to facilitate the return of unlawfully removed cultural objects.¹⁹¹ The Directive specifically establishes what objects the Directive protects,¹⁹² establishes a procedure for the return of unlawfully removed cultural property,¹⁹³ establishes a statute of limitations,¹⁹⁴ and includes compensation provisions.¹⁹⁵

1. Definition of "Cultural Object" Under the Directive

According to Article 1 of the Directive, an object qualifies as a "cultural object" if it falls into one of the categories listed in the Annex¹⁹⁶ or if it forms an integral part of either the public

190. Directive, *supra* note 4, O.J. L 74/74 (1993).

191. Directive, *supra* note 4, art. 2, O.J. L 74/74, at 75 (1993). Article 2 of the Directive states: "Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive." *Id.*

Article 13 states: "The Directive shall apply only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993." *Id.* art. 13, O.J. L 74/74, at 76 (1993). Article 14(2) states: "Each Member State may apply the arrangements provided for by this Directive to the requests for the return of cultural objects unlawfully removed from the territory of other Member States prior to 1 January 1993." *Id.*, art. 14(2), O.J. L 74/74, at 76 (1993).

192. *Id.* art. 1, O.J. L 74/74, at 75 (1993); *Id.* Annex, O.J. L 74/74, at 78-80 (1993).

193. *Id.* arts. 2, 4-6, O.J. L 74/74, at 75-76 (1993).

194. *Id.* art. 7, O.J. L 74/74, at 76 (1993).

195. *Id.* art. 9, O.J. L 74/74, at 76 (1993).

196. *Id.*, Annex, O.J. L 74/74, at 78-80 (1993). The Annex to the Directive establishes fourteen categories of objects which qualify as national treasures. They are as follows:

- (1) Archeological objects more than 100 years old which are the products of land or underwater excavations and finds, archeological sites or archeological collections;
- (2) Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, more than 100 years old;
- (3) Pictures and paintings executed entirely by hand, on any medium and in any material (which are more than 50 years old and do not belong to their originators);
- (4) Mosaics other than those in category 1 or category 2 and drawings executed entirely by hand, on any medium and in any material (which are more than 50 years old and do not belong to their originators);
- (5) Original engravings, prints, serigraphs and lithographs with their respec-

collections¹⁹⁷ listed in the inventories of museums, archives or

tive plates and original posters (which are more than 50 years old and do not belong to their originators);

(6) Original sculptures or statuary and copies produced by the same process as the original (which are more than 50 years old and do not belong to their originators) other than those in category 1;

(7) Photographs, films and negatives thereof (which are more than 50 years old and do not belong to their originators);

(8) Incunabula and manuscripts, including maps and musical scores, singly or in collections (which are more than 50 years old and do not belong to their originators);

(9) Books more than 100 years old, singly or in collections;

(10) Printed maps more than 200 years old;

(11) Archives and any elements thereof, of any kind, on any medium, comprising elements more than 50 years old;

(12) Collections and specimens from zoological, botanical, mineralogical or anatomical collections and collections of historical, palaeontological, ethnographic or numismatic interest;

(13) Means of transport more than 75 years old;

(14) Any other antique item not already mentioned that is more than 50 years old.

Id.

In addition, a requested Member State may apply the procedure to objects not covered in the categories established by the Annex if it so chooses. Article 14(1) states: "Each Member State may extend its obligation to return cultural objects to cover categories of objects other than those listed in the Annex." *Id.* art. 14(1), O.J. L 74/74, at 76 (1993).

Article 16 states:

1. Member States shall send the Commission every three years, and for the first time in February 1996, a report on the application of this Directive.

2. The Commission shall send the European Parliament, the Council and the Economic and Social Committee, every three years, a report reviewing the application of this Directive.

3. The Council shall review the effectiveness of this Directive after a period of application of three years and, acting on a proposal from the Commission, make any necessary adaptations.

4. In any event, the Council acting on a proposal from the Commission, shall examine every three years and, where appropriate, update the amounts indicated in the Annex, on the basis of economic and monetary indicators in the Community.

Id. art. 16, O.J. L 74/74, at 77 (1993). In addition, according to Article 17 of the Directive, the Commission, assisted by a Committee established under article 8 of the Regulation, will examine questions about the application of the Annex to the Directive. Article 17 states: "The Commission shall be assisted by the Committee set up by Article 8 of regulation No 3911/92." *Id.* art. 17, O.J. L 74/74, at 77 (1993).

197. Directive, *supra* note 4, art. 1, O.J. L 74/74, at 75 (1993). Article 1 of the Directive defines "public collections" as "collections which are the property of a Member State, local or regional authority within a Member States or an institution situated in the territory of a Member State and defined as public in accordance with the legislation of that Member State, such institution being the property of, or significantly financed by, that Member State or a local or regional authority." *Id.*

libraries' conservation collection, or ecclesiastical institutions.¹⁹⁸ In addition to those objects specifically named as cultural goods, Member States retain the right to define cultural goods in accordance with their own local tastes and traditions.¹⁹⁹ Not only must an object qualify as a national treasure to fall under the Directive's provisions, but an object must also meet or exceed certain value requirements set in European Currency Units ("ECUs")²⁰⁰ in the Annex to the Directive.²⁰¹

2. Procedure Under the Directive

Article 4 sets forth the procedure for the return of cultural property within the EC.²⁰² First, upon the request of another Member State, the national authorities of the requested Member

198. *Id.*; Riding, *supra* note 8, at C9. It has been noted that the Directive "covers everything that might possibly appeal to a collector or a museum." *Id.*

199. Directive, *supra* note 4, art. 1(1), O.J. L 74/74, at 75 (1993); Riding, *supra* note 8, at C9.

200. Richard Collins, *The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community*, 11 *CARDOZO ARTS & ENT. L.J.* 361, 382 n.87 (1993). The European Currency Unit [hereinafter ECU] is the proposed single currency of the European Community. The ECU is valued according to a weighted combination of the twelve currencies of the EC Member States. *Id.*

201. Directive, *supra* note 4, Annex, O.J. L 74/74, at 78-80 (1993). Archaeological objects, dismembered monuments, incunabula, manuscripts and archives do not have to have any value to be protected by the Directive. *Id.* Mosaics, drawings, engravings, photographs and printed maps must have a minimum value of 15,000 ecus. *Id.* Statuary, books, collections, means of transport and any antique item that does not fall into any of the designated categories but is over 50 years old must have a value of at least 50,000 ecus. *Id.* Pictures and painting executed entirely by hand must have a minimum value of 150,000 ecus. *Id.* Article 16 of the Directive requires that the Annex be reviewed every three years and that the ECU amounts be updated with regard to the EC's monetary and economic indicators. *Id.* art. 16, O.J. L 74/74, at 77 (1993).

202. *Id.* art. 4, O.J. L 74/74, at 75-76 (1993). Article 4 states:

Member States' central authorities shall cooperate and promote consultation between the Member States' competent national authorities. The latter shall in particular:

1. upon application by the requesting Member State, seek a specified cultural object which has been unlawfully removed from its territory, identifying the possessor and/or holder. The application must include all information needed to facilitate this search, with particular reference to the actual or presumed location of the object;
2. notify the Member States concerned, where a cultural object is found in their own territory and there are reasonable grounds for believing that it has been unlawfully removed from the territory of another Member State;
3. enable the competent authorities of the requesting Member State to check that the object in question is a cultural object, provided that the check is made within 2 months of the notification provided for in paragraph 2. If it is not made within the stipulated period, paragraphs 4 and 5 shall cease to apply;

State shall attempt to locate the stolen object.²⁰³ The Member State forwarding the application must submit all information relevant to the search, including a description of the object and a declaration that the object has been unlawfully removed.²⁰⁴

Second, when the national authorities find a cultural object within their own territory and have reason to believe that it has been unlawfully removed from another Member State's territory, they must notify the Member State concerned.²⁰⁵ Third, provided that the requesting Member State²⁰⁶ attempts to check whether the object in question is a cultural object within two

4. take any necessary measures, in cooperation with the Member States concerned, for the physical preservation of the cultural object;
5. prevent, by the necessary interim measures, any action to evade the return procedure;
6. act as intermediary between the possessor and/or holder and the requesting Member State with regard to the return. To this end, the competent authorities of the requested Member States may, without prejudice to Article 5, first facilitate the implementation of an arbitration procedure, in accordance with the national legislation of the requested State and provided that the requesting State and the possessor or holder give their formal approval.

Id.

Each Member State has the responsibility of appointing central authorities who will be responsible for implementing the Directive's return procedures. Article 3 states: "Each Member State shall appoint one or more central authorities to carry out the tasks provided for in this Directive. Member States shall inform the Commission of all the central authorities they appoint pursuant to this Article. . . ." *Id.* art. 3, O.J. L 74/74, at 75 (1993). The central authorities shall cooperate with the Member States' national authorities and must coordinate measures for the return of unlawfully removed cultural objects. *Id.* art. 4, O.J. L 74/74, at 75-76 (1993). In addition, the central authorities are meant to promote consultation among the Member States' national authorities. *Id.* The Commission must be informed of the Member States' central authority appointments. *Id.* art. 3, O.J. L 74/74, at 75 (1993).

203. *Id.* art. 4(1), O.J. L 74/74, at 75 (1993).

204. *Id.* art. 5, O.J. L 74/74, at 76 (1993). Article 5 states:

The requesting Member State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory. Proceedings may be brought only where the document initiating them is accompanied by:

- a document describing the object covered by the request and stating that it is a cultural object,
- a declaration by the competent authorities of the requesting Member State that the cultural object has been unlawfully removed from its territory.

Id.

205. *Id.* art. 4(2), O.J. L 74/74, at 75 (1993).

206. *Id.* art. 1(3), O.J. L 74/74, at 75 (1993) (defining "requesting Member State" as "the Member State from whose territory the cultural object has been unlawfully removed").

months of the notification to the requested Member State,²⁰⁷ the national authorities in the requested Member State must enable the requesting Member State to execute such a check.²⁰⁸ Provided that the requesting Member State conducts such a check within two months of the notification, the national authorities of the requested Member State must conduct all measures necessary for the physical preservation of the requested object.²⁰⁹ Furthermore, they must prevent the possessor from evading the return proceedings.²¹⁰

Under Article 5 of the Directive, when a cultural object has been unlawfully removed from a requesting Member State's territory, the requesting Member State may initiate court proceedings against the possessor for the return of the object.²¹¹ When the requesting Member State cannot identify the possessor, the requesting Member State may initiate the proceedings against a third party holder.²¹² Such proceedings should be initiated before the competent court of the requested Member State.²¹³ Where the possessor or holder refuses to return the cultural object, only the court in the requested Member State can order the

207. *Id.* art. 1(4), O.J. L 74/74, at 75 (1993). The Directive defines "requested Member State" as "the Member State in whose territory a cultural object unlawfully removed from the territory of another Member State is located." *Id.*

208. *Id.* art. 4(3), O.J. L 74/74, at 75 (1993).

209. *Id.* art. 4(4), O.J. L 74/74, at 75 (1993).

210. *Id.* art. 4(5), O.J. L 74/74, at 75-76 (1993).

211. *Id.* art. 5, O.J. L 74/74, at 76 (1993). Article 5 states in part:

The requesting Member State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory.

Id.

A private owner may not initiate proceedings under the Directive. *See Id.* (stating that requesting Member States initiates legal proceedings).

Article 6 requires that the central authority of the requesting Member State inform the central authority of the requested Member State when the requesting Member State initiates court proceedings. *Id.* art. 6, O.J. L 74/74, at 76 (1993). The central authority of the requested Member State must then inform the central authorities of the other Member States. *Id.*

If the requesting Member State and the holder or possessor approve, the national authorities of the requested Member State may facilitate an arbitration procedure. *Id.* art. 4(6), O.J. L 74/74, at 76 (1993). This arbitration procedure must be conducted in accordance with the requested Member State's national legislation. *Id.* Such arbitration may not prejudice the requesting Member State's right to initiate court proceedings against the possessor or holder. *Id.*

212. *Id.* art. 5, O.J. L 74/74, at 76 (1993).

213. *Id.*

return of the object.²¹⁴

A document describing the object and stating that it is a cultural object must accompany the document initiating the court proceedings.²¹⁵ The requesting Member State must also furnish a declaration from the competent authorities supporting the fact that the cultural object has been unlawfully removed from the territory of the requesting Member State.²¹⁶ Where the requesting Member State proves the unlawful removal of the object in question, the court shall order its return provided that the Article 7 statute of limitations has not run and the object was removed on or after January 1, 1993.²¹⁷

Once a court orders the return of an object, that court shall award the possessor compensation in its discretion provided that the possessor exercised due care and attention.²¹⁸ The legislation of the requested Member State governs the burden of proof regarding the possessor's due care.²¹⁹ The requesting Member State must pay compensation,²²⁰ including the cost incurred in implementing the decision for the return of the object, and any

214. *Id.* art. 8, O.J. L 74/74, at 76 (1993).

215. *Id.* art. 5, O.J. L 74/74, at 76 (1993).

216. *Id.*

217. *Id.* art. 8, O.J. L 74/74, at 76 (1993). Article 8 states: "Save as otherwise provided in Articles 7 and 13, the competent court shall order the return of the cultural object within the meaning of Article 1 (1) and to have been removed unlawfully from national territory." *Id.*

218. *Id.* art. 9, O.J. L 74/74, at 76 (1993). Article 9 states: "Where return of the object is ordered, the competent court in the requested States shall award the possessor such compensation as it deems fair according to the circumstances of the case, provided that it is satisfied that the possessor exercised due care and attention in acquiring the object." *Id.*

Riding, *supra* note 8, at C9. British auction houses dislike the Directive because they believe that art auctions will not be able to operate on account of requesting Member States seeking restitution. *Id.* That is, if it is found that an object has been unlawfully removed from a Member State, the auction would be held up upon the initiation of legal proceedings by the Member State. *Id.* Anthony Brown, a senior director at Christie's in London, noted that an object must be withdrawn from the auction block once a requesting country files a restitution claim, regardless of whether that country continues to pursue the restitution proceedings. *Id.* The concern of the British auction houses over the Directive is understandable given that the art market in London is estimated to be worth U.S.\$5 billion a year. *Id.* It is estimated that between 50% and 75% of the community's art trade and between 85% and 90% of its antiquities business takes place in London. *Id.*

219. Directive, *supra* note 4, art. 1(6), O.J. L 74/74, at 75 (1993). A possessor who acquires the object through donation or succession is in the same position as the person from whom he acquired the object. *Id.*

220. *Id.* art. 9, O.J. L 74/74, at 76 (1993).

costs to cover measures taken by the national authority for the physical preservation of the cultural object.²²¹ The requesting Member State may then recover those amounts from the persons responsible for the unlawful removal of the object.²²²

3. The Statute of Limitations Under the Directive

According to Article 7 of the Directive, a Member State may initiate return proceedings up to one year from the time the requesting Member State knows the location of the cultural object and the identity of the possessor or holder.²²³ Where the location of the object remains unknown, the Member State must bring the proceedings before 30 years elapse from the time of the unlawful removal of the object in question from the territory of the requesting Member State.²²⁴ For objects forming part of public collections and ecclesiastical goods in Member States where such are subject to special protection arrangements under national law, the statute of limitations is seventy-five years.²²⁵ This provision does not apply in Member States where time-limits do not govern the proceedings or where bilateral agreements exist between Member States laying down a period exceeding 75 years.²²⁶ According to Section 2 of Article 7, a change in the law of the requesting Member State which makes the removal of the object no longer unlawful precludes return proceedings.²²⁷

221. *Id.* art. 10, O.J. L 74/74, at 76 (1993).

222. *Id.* art. 11, O.J. L 74/74, at 76 (1993).

223. *Id.*, art. 7(1), O.J. L 74/74, at 76 (1993). Article 7(1) states in part: "Member States shall lay down in their legislation that the return proceedings provided for in this Directive may not be brought more than one year after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder." *Id.*

224. *Id.* Article 7(1) states in part: "[P]roceedings may, at all events, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State." *Id.*

225. Directive, *supra* note 4, art. 7(1), O.J. L 74/74, at 76 (1993). Article 7(1) states in part:

[I]n the case of objects forming part of public collections referred to in Article 1(1), and ecclesiastical goods in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States laying down a period exceeding 75 years.

Id.

226. *Id.*

227. *Id.* art. 7(2), O.J. L 74/74, at 76 (1993).

III. ANALYSIS OF THE DIRECTIVE AND REGULATION AND THEIR EFFECT ON ART THEFT

The combined achievement of the Directive and the Regulation lies in their recognition of the need for Community-wide protection of cultural property.²²⁸ Unfortunately, the Directive, by failing to adopt the common-law approach,²²⁹ or in the alternative, stricter BFP requirements,²³⁰ does not place a significantly high burden on a purchaser, creating the risk that some individuals or institutions will continue to purchase cultural objects with questionable provenance. As a result, the deterrent effect of the Directive on the rampant theft and the illicit trade in cultural property in the EC is compromised.²³¹ In addition, the compensation provision may discourage Member States from commencing restitution proceedings when the Member State cannot afford to pay the compensation.²³²

A. *The Practical Effect of the Export Certification System*

The purpose of the Regulation's export certification system is to put the purchaser on notice about the object's unlawful removal from the EC when an export certificate does not accompany the object.²³³ The effect of the Regulation, then, is to make obsolete the inquiry into whether a purchaser bought in good faith²³⁴ once the object left the EC. In other words, if an object is found without an export certificate outside the EC and it was unlawfully removed from its country of origin after January 1, 1993, a purchaser could never successfully claim that the object was purchased in good faith. On the other hand, if the ob-

228. See *supra* note 145 and accompanying text (noting that measures for protection of cultural property were taken to provide community system for protection of cultural property in internal-border free EC).

229. See *supra* notes 44-51 (discussing that purchaser of stolen property cannot receive good title under common law).

230. See *supra* note 218 and accompanying text (discussing that the court will consider whether a purchaser exercised "due care and attention.")

231. See *supra* note 2 and accompanying text (discussing the increase in art theft in Europe).

232. See *supra* notes 220-22 and accompanying text (explaining Directive's compensation provision.)

233. See *supra* notes 179-89 and accompanying text (discussing Regulation export certification system.)

234. See *supra* note 38 (defining "bona fide purchaser").

ject is accompanied by an export certificate, then the purchaser's good faith cannot be disputed.

However, because only those objects which leave the EC after the date of the Regulation's enactment will have export certificates,²³⁵ the Regulation does not render obsolete the inquiry into whether a purchaser in possession of an object unaccompanied by an export certificate is a BFP.²³⁶ All cultural objects, whether lawfully or unlawfully removed before the enactment of the Regulation, do not have export certificates. Thus, if an object is unaccompanied by an export certificate, a purchaser may not be aware of the object's unlawful removal. Rather, the purchaser may assume that the object left its country of origin before the adoption of the export certification system. Accordingly, a Member State will be unable to prove that the purchaser was *not* a BFP, despite the fact that the object did not have an export certificate.

B. *The Directive's Failure to Adopt the Common Law Approach and Thereby Deter Trade in Stolen Cultural Property*

Recognizing that despite the Regulation's export certification system, a purchaser's good faith would continue to be a factor in the restitution proceedings, the Directive attempted to harmonize the common-law and civil-law approaches to BFP laws.²³⁷ Aware that civil-law nations would be amenable to a discovery rule that prevents the cause of action from accruing until the plaintiff discovers or should have discovered the location of the stolen art, the Directive provides a one year statute of limitations from the time the original owner knew or should have known the location of the stolen object.²³⁸ Once the year has expired, the BFP obtains irrevocable title to the object if court proceedings have not been initiated. Thus, the Directive adopts the common-law approach during the statute of limitations pe-

235. See *supra* note 185 and accompanying text (explaining that effective date of the Regulation is January 1, 1993).

236. See *supra* note 185 and accompanying text (explaining when Regulation takes effect).

237. See *supra* notes 44-69 and accompanying text (discussing common-law and civil-law approaches to statute of limitations periods).

238. Directive, *supra* note 4, art. 7, O.J. L 74/74, at 76 (1993).

riod,²³⁹ but subsequently follows the civil law approach, enabling a BFP to acquire good title to stolen property.²⁴⁰ The adoption of this discovery rule protects the original owner without putting the BFP at a complete disadvantage.²⁴¹

Unfortunately, under the Directive, it is possible that the purchaser of stolen cultural property will be able to retain the property if the Member State from which it was removed cannot ascertain the location of the possessor within thirty years of the unlawful removal.²⁴² Accordingly, an art thief can hide the cultural property for thirty years and legally sell it at a large profit after such time has expired.²⁴³ A patient art thief may steal the cultural property and look at it as a long term investment that will pay handsomely after thirty years. Thus, the fact that a BFP can obtain good title after the statutory period encourages the continued occurrence of art theft.²⁴⁴ Until all of the Member States adopt the common-law approach under which a purchaser can never obtain good title to stolen property, purveyors of stolen art will continue to have a market for their wares. The basic laws of supply and demand will foster the theft and trade of cultural property.²⁴⁵

An effective measure for the protection of cultural property requires adoption of the common-law approach.²⁴⁶ This approach discourages the art thief from unlawfully removing the

239. See *supra* notes 47-51 and accompanying text (explaining common law approach to ownership of stolen property).

240. See *supra* notes 52-56 and accompanying text (explaining civil-law approach to ownership of stolen property).

241. See Grover, *supra* note 6, at 1444. "Legislators and jurists in civil-law countries would be relatively receptive to a discovery rule because it does not require them to abandon their general stance in favor of the BFP or their choice-of-law rules." *Id.*

242. See *supra* note 224 and accompanying text (discussing the thirty year statute of limitations where the possessor or holder cannot be identified).

243. See *supra* note 56 (explaining how art thief can "launder" art).

244. See *supra* notes 52-56 (explaining that under civil law BFP can obtain good title after statute of limitations period expires).

245. See *supra* notes 55-56 and accompanying text (explaining that the systems of civil-law countries are more conducive to trade in stolen art). With respect to the opinion that a common-law approach encourages the sale of stolen art on the black market because it closes all legal outlets, in reality, the black market flourishes where the civil law is used because the civil law system gives thieves a market incentive. That is, thieves know that they can legally sell stolen property and they therefore will steal it. See *supra* notes 55-56 and accompanying text (explaining that the systems of civil-law countries are more conducive to trade in stolen art).

246. See *supra* notes 47-51 and accompanying text (explaining objective of common-law approach).

object in the first place because he will not be able to find a buyer.²⁴⁷ Dealers, collectors, and museums would be unwilling to purchase an unlawfully removed cultural object if they feared the Member State of origin could reclaim the stolen object.²⁴⁸

A statute of limitations approach, on the other hand, in effect encourages art thieves and dealers of unlawfully removed art to play a "waiting game" while the statute of limitations runs.²⁴⁹ Thus, attempted resolution of the conflict between these two legal systems does not provide the best protection for cultural property. Rather, there is a need to harmonize Member States' national laws through EC-wide adoption of the common-law approach regarding the ownership of cultural property.²⁵⁰

C. The Need for Specific Pre-Purchase BFP Requirements

Where civil-law nations refuse to adopt the common-law approach to ownership of stolen property, an alternative solution is to provide purchasers with specific BFP requirements.²⁵¹ An effective measure for the protection of cultural property, in a system where a BFP can acquire good title after the statute of limitations runs, must specifically inform purchasers of certain measures that they must take to ensure that they are not purchasing unlawfully removed cultural property when the object is not accompanied by an export certificate. In this respect, the Directive fails to explain to potential buyers what steps they must take to adequately research the provenance of the object in question.²⁵² Rather, according to the Directive, the court will award compensation to the dispossessed buyer according to its discretion after considering the circumstances of the case and whether the possessor exercised "due care and attention."²⁵³ This vague BFP

247. See *supra* notes 47-51 and accompanying text (explaining objective of common-law approach).

248. See *supra* notes 47-51 and accompanying text (explaining objective of common-law approach).

249. See *e.g. supra* notes 65-66 and accompanying text (discussing German statute of limitations and how BFP can acquire good title).

250. See *supra* notes 44-95 and accompanying text (discussing effects of lack of harmonization of national laws).

251. See *supra* note 218 and accompanying text (discussing Directive's requirement that purchaser exercise "due care and attention").

252. See *supra* note 218 and accompanying text (discussing Directive's requirement that purchaser exercise "due care and attention").

253. See *supra* note 218 and accompanying text (discussing Directive's requirement that purchaser exercise "due care and attention").

standard will not adequately discourage a potential buyer from purchasing an unlawfully removed cultural object.

The requirement of “due care and attention” is extremely ambiguous and depends heavily on the facts of the situation.²⁵⁴ A buyer who can show a minimal amount of due diligence may receive restitution for the object he illegally possessed.²⁵⁵ Accordingly, the purchaser will merely conduct the amount of research that he or she considers reasonable. In effect, the Directive establishes a “reasonableness” test. Such a test completely fails to place an adequate burden on the potential buyer to effectively and completely research the provenance of the object.

An effective measure for the protection of cultural property would require that buyers of cultural art and artifacts search the Art Loss Register before making a purchase.²⁵⁶ This requirement would divide the burden between the original owner and the buyer.²⁵⁷ Thus, the Member State from which the cultural property was unlawfully removed would have the duty to report the fact of the object’s disappearance to the ALR, while the buyer would be required to check the ALR to determine whether the object was legally for sale.²⁵⁸

Because the Art Loss Register is the most comprehensive and accessible of all stolen art databases, it is appropriate that purchasers search the ALR database before buying art.²⁵⁹ A requirement that a buyer conduct a search of the ALR to ascertain whether the object has been reported as lost or stolen would be a less ambiguous way for a purchaser to exercise “due care and

254. See *supra* note 218 and accompanying text (discussing Directive’s requirement that purchaser exercise “due care and attention”).

255. See *supra* note 218 and accompanying text (discussing Directive’s requirement that purchaser exercise “due care and attention”).

256. See *supra* notes 115-31 and accompanying text (explaining that Art Loss Register is most comprehensive and readily accessible stolen art database).

257. See *supra* notes 115-31 and accompanying text (explaining Art Loss Register).

258. Och Interview, *supra* note 118. With regard to private owners, in many cases they are more apt to report their losses to a private organization than a government organization such as Interpol. *Id.* This is because original owners of valuable art often wish to preserve their anonymity. *Id.* For example, a collector of Impressionist art may not want to report the theft of one of his works to a government organization if he had not reported that he invested in the art on his tax return. Owners would often feel more comfortable reporting their losses to a private organization such as IFAR. *Id.* Thus, a private organization is better able to maintain a complete database of all lost and stolen art. *Id.*

259. See *supra* notes 108-31 and accompanying text (describing ALR).

attention." While it is improbable that Member States will be able to report the unlawful removal of every object of cultural property, the requirement that the purchaser's "due care and attention" include a search of the ALR would insure that the purchaser do more than conduct a superficial inquiry into the object's provenance. A purchaser of cultural property cannot merely be held to a vague "reasonableness test."

D. The Preclusive Effect of the Compensation Provision

Lastly, the Directive's compensation provision, which allows the courts to order that the requesting Member State compensate the dispossessed owner, may discourage a Member State from bringing an action.²⁶⁰ According to this provision, the court may require that the requesting Member State pay for the legal proceedings, as well as pay compensation to the requested Member State for the costs it incurred and compensate the BFP for the object.²⁶¹ Member States may choose not to initiate a restitution proceeding if they cannot afford to pay this compensation. In these instances, the Directive's return procedures will never be triggered and the Directive will be useless to those Member States who cannot afford to pay the requisite compensation.

CONCLUSION

The Directive and the Regulation, in their current forms, will have minimal deterrent effect on the illicit removal of cultural property from EC Member States. Thieves continue to have an economic incentive to steal cultural property because under the legislation it is possible for a purchaser to acquire good title to such property. In addition, the legislation fails to place a significant burden on potential buyers to research the provenance of a cultural object by establishing specific BFP requirements. The key to deterring trade in stolen art is to make potential buyers more responsible. Accordingly, because the Art Loss Register is the most comprehensive database of stolen art,

260. See *supra* notes 218-22 and accompanying text (discussing Directive's compensation provision).

261. See *supra* notes 218-22 and accompanying text (discussing Directive's compensation provision).

every buyer should be required to check the Art Loss Register before purchasing a cultural object.

*Victoria J. Vitrano**

* J.D. Candidate, 1995, Fordham University; M.A. Italian, 1991, Middlebury College/University of Florence.