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The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art

JULIA A. MCCORD*

If we are to survive as wholesome human beings, if we are to attain the goals that we have set for ourselves as upholders of humanity's values, we need to build upon past strengths and look to the future with optimism. We need to encourage ways and means to raise public awareness and a sense of responsibility for the preservation of the cultural and natural masterpieces that are the very source of our vitality, identity, and survival. We need to ensure that in the future, our children and our children's children will be able to experience the awe, the respect, the satisfaction, the pleasure, and the joy that a painting, a sculpture or a monument has brought to our lives, because without them their lives would be barren, desolate, and lonely.¹

INTRODUCTION

In the past twenty years the art market has experienced a virtual metamorphosis. Traditionally, the art market was the domain of art lovers, collectors, and connoisseurs. The extreme wealth of the 1980's, however, created a new breed of art market participants—nouveau-riche business executives, drug dealers whitewashing drug money, and millionaires disappointed by the stock market.² During this period of reckless abandon, auction houses flourished.³ At the top of the market spiral, speculators relying on good advice from knowledgeable dealers made enormous profits by buying and reselling art. Thus, art became relegated to the status of a commodity—"as bankable as stocks, real estate, gold, or soybeans."⁴

Ultimately, the soaring prices of art in the 1980's could not be maintained. With the onset of a weakened economy and an increasing number of art scandals, the "booming art market of the 1980s went flat in the 1990s."⁵ By 1991, the art market had gone to the "fat farm," and auction buyers worldwide trimmed prices ten to thirty percent from the exorbitant prices of the previous

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1. MATERIALS ISSUES IN ART AND ARCHEOLOGY III 15 (Pamela B. Vandiver et al. eds., 1992).

2. *The Frenzied Art Market*, WORLD PRESS REV., Feb. 1989, at 48.

3. From September, 1987, to September, 1988, for instance, the two main international auction houses of Sotheby's and Christie's sold \$2.4 billion worth of art and antiquities. Of this total, 405 individual pieces sold for prices in excess of \$1 million each. By the first half of the 1988-1989 market year, Christie's had already sold 147 items for more than \$1 million apiece, compared with 95 items during the previous full year. *Top and Bottom of the Art Market*, THE ECONOMIST, Oct. 28, 1989, at 83. From September, 1989, to August, 1990, Sotheby's and Christie's reported combined sales of \$5.6 billion. Heidi Barry, *The Big Uneasy: Auction Houses Brace for a Downturn*, WASH. POST, Sept. 20, 1990, at T14.

4. Larry Van Dyne, *Painted into a Corner*, THE WASHINGTONIAN, June 1993, at 120, 120.

5. Peter Kendall, *Art Dealers Fear They'll All Be Tarred with Same Brush*, CHI. TRIB., Oct. 23, 1993, at 1, 10.

decade.⁶ Once again, the market returned to the serious, long-term collectors and dealers.

Despite this toned-down market, antiquities sales continue to flourish. This booming market for antiquities reinforces an already thriving illicit trade in such works. Indeed, the value of the illicit art and antiquities trade has doubled in the last twenty years, from an estimated \$1 billion in 1972 to \$2 billion by 1990.⁷ Even with the decreased value of art in the 1990's, antiquities are being purchased for excessive sums.⁸ The tremendous value attached to antiquities explains the resilience of the illicit trade in art objects. As one scholar of the art and antiquities market suggests, "More than any other single element, the increase in art prices has been responsible for the wholesale theft, mutilation, and destruction of art everywhere in the world . . ."⁹

The magnitude of the illicit art and antiquities trade has not escaped public attention. In 1970, the international community recognized the illicit trade in cultural patrimony as a top priority. It responded with the United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO Convention").¹⁰ The United States made this a priority, too, by ratifying the Cultural Property Implementation Act ("CPIA") in 1983.¹¹ To supplement this legislation, the United States has also entered into treaties and executive agreements with specific countries to remedy designated problem areas in the art market.¹² In addition, the American

6. Andrew Decker & Bonnie B. Stretch, *A Return to Reason*, ARTNEWS, Jan. 1991, at 39. This represented the sharpest drop in the art and antiquities market at any one time since World War II. James Bartholomew, *State of the Art*, FAR EAST ECON. REV., Aug. 22, 1991, at 37.

7. Judith Church, Note, *Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts*, 30 COLUM. J. TRANSNAT'L L. 179, 180 (1992).

8. For example, the Sevso treasure consisting of Roman-era silver objects was bought by Lord Northampton during the 1980's for about \$14 million. By 1990, the treasure was expected to fetch between \$70 and \$100 million at auction. Jeanne King, *Jury Decides British Lord Deserves the Silver Treasure*, REUTER WORLD SERVICE, Nov. 4, 1993, available in LEXIS, News Library, REUWLD File. The Lydian Hoard, dating from the 6th century B.C., has been valued at in excess of \$20 million. Nadire Mater, *Turkey: New York Museum Returns Smuggled Ancient Treasure*, INTER PRESS SERVICE, Sept. 28, 1993, available in LEXIS, News Library, INPRESS File. Byzantine mosaics from Cyprus dating from the 6th century were bought in July, 1988, for \$1.08 million. Six months later, the buyer offered the artwork for \$20 million. Stanley Meisler, *In the Cutthroat Art Trade, Museums and Collectors Battle Newly Protective Governments over Stolen Treasures*, L.A. TIMES, Nov. 12, 1989 (Magazine), at 8.

9. KARL E. MEYER, *THE PLUNDERED PAST: THE STORY OF THE ILLEGAL INTERNATIONAL TRAFFIC IN WORKS OF ART 5-6* (1973).

10. Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 27 U.S.T. 37, 823 U.N.T.S. 231 [hereinafter UNESCO Convention]. The preamble to the UNESCO Convention identifies its goals to be the exchange of cultural property among nations to enrich the cultural life of all people, as well as cooperation among states to protect the cultural heritage of all states. *Id.*, 27 U.S.T. at 40, 823 U.N.T.S. at 232-34.

11. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (codified at 19 U.S.C. §§ 2601-2613 (1988)).

12. The United States has entered into one treaty and three executive agreements to counteract specific problem areas dealing with cultural patrimony. Thus far, these agreements have been entered into exclusively with Latin American countries, and target the illicit trade in pre-Columbian artifacts. Church, *supra* note 7, at 179.

judiciary has attempted to create a coherent set of laws to settle disputes between original owners and subsequent good faith purchasers of artwork.¹³

Despite these attempts to frustrate the black market for cultural patrimony, the market continues to flourish.¹⁴ In fact, one journalist insists, "Never have there been as many people willing to pay so much for pilfered art as in post-industrial societies where everything is collectible and there is ego and money aplenty to pay for it."¹⁵ Many art-rich nations have taken precautions to stop the flow of antiquities outside their borders, but these efforts have been largely unsuccessful. The art thief and illegal exporter have become too resourceful, and there is simply not enough manpower or funding to fully police the trade in stolen art.¹⁶

This Note proposes a strengthening of the due diligence standard in a limited category of situations to facilitate the goal of extinguishing the illicit trade in art.¹⁷ Museums and auction houses have assumed preeminent roles in today's art market, and for this reason, the strictest standards for evaluating the provenance and title of suspect art should be imposed upon them. With an international illegal art market estimated to encompass \$2 billion worth of art objects, and several hundred thousand thieves, dramatic action must be taken

13. See generally Stephen L. Fouty, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 VAND. L. REV. 1839 (1990) (discussing the duty of due diligence in the Cypriot Mosaic case); Mary McKenna, Comment, *Problematic Provenance: Toward A Coherent United States Policy on the International Trade in Cultural Property*, 12 U. PA. J. INT'L BUS. L. 83 (1991) (discussing the development of due diligence in United States decisional law).

14. In Italy, objects of art have been stolen from churches, museums, and private collections at the rate of 40 per day since 1986. In the 18-month period ending in June of 1988, 23,128 art pieces were stolen in 1466 robberies. This amounted to two and one-half times as many stolen objects during a similar period from 1981 through 1982. The *Carabinieri*, Italy's militarized national police, have calculated that the 1987-1988 thefts included 4400 paintings, 1987 sculptures, 723 archaeological pieces, and 13,938 antiques and ecclesiastical objects. William D. Montalbano, *Art Thieves Find Italy Is a Gold Mine*, L.A. TIMES, Aug. 25, 1988, at 15, 16. While there is no way to measure statistically how much art has been stolen, art historians believe that museum robberies have reached a crisis level. Between 1976 and 1986, the American School of Classical Studies in Athens estimated that registered art thefts averaged 70 per year. Since 1989, this figure has risen dramatically as a result of the sudden surges in the world's black market. In the first half of 1989, the International Federation of Art Research ("IFAR") noted 231 cases of museum theft. Eddie Koch, *Greece: Thefts of Ancient Treasure Reach Crisis Level*, INTER PRESS SERVICE, Sept. 23, 1993, available in LEXIS, News Library, INPRESS File.

15. Montalbano, *supra* note 14, at 15.

16. For example, the chief of the Italian *Carabinieri* art detectives, Major Luigi Bacceli, compares the task of trying to stop stolen art from leaving his country with the United States' attempts to keep drugs from crossing its borders:

Look at the map—thousands of miles of coasts, thousands of vehicles each day across the land frontiers, an hour by plane to Zurich. What should we do, build a fence around the country? Can Florida keep out the drugs? We do the best we can, protecting what there is and recovering what is stolen.

Id. The funds that would be required to police such an area are simply unavailable to most nations.

17. Due diligence has been used in connection with art replevin suits in two ways. The first refers to "investigating provenance [to expose] facts that reveal legal title impairments." Jessica L. Darraby, *Current Developments in International Trade of Cultural Property: Duties of Collectors, Traders and Claimants*, in THE LAW AND BUSINESS OF ART 659, 668 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 297, 1990). The second refers to "limitations of actions" such as statute of limitations and laches. *Id.* In this Note, due diligence is used primarily in the former sense.

immediately. Because the finest works in this illicit trade are sold through a few major auction houses to a few score of museums (and a few thousand collectors), auction houses and museums provide the perfect target for strengthened diligence requirements.¹⁸

I. THE DYNAMICS OF THE ILLICIT TRADE IN ART AND ANTIQUITIES

The pillaging of national patrimony is an ancient and ongoing saga.¹⁹ Historically, it was common for military victors to take with them the spoils of a defeated opponent, including art objects of cultural significance.²⁰ The removal of antiquities from archaeological sites has been another historical source of lost cultural patrimony.²¹

The severity of the problem of lost cultural patrimony has been most effectively brought to public attention through the continuing controversy surrounding the so-called "Elgin Marbles." Lord Elgin acquired these national treasures in 1801 from the government of the Ottoman Empire, which at that time occupied the territory of modern Greece. This infamous purchase took from the ancient city of Athens the most valuable artwork from the Acropolis buildings. What is most noteworthy about this particular sale of cultural

18. MEYER, *supra* note 9, at 124.

19. It was not uncommon for tombs to be robbed even in antiquity. See Dyfri Williams, *The Brygos Tomb Reassembled and 19th-Century Commerce in Capuan Antiquities*, 64 AM. J. OF ARCHAEOLOGY 617, 624 (1992).

20. See generally MEYER, *supra* note 9 (discussing thoroughly the illegal international traffic in works of art). The pillage of past wars is still acutely being felt around the world. The recent return of a 19th-century Korean manuscript seized by French troops in 1866 during a punitive raid following the massacre of nine French missionaries has been a source of much disagreement. Alan Riding, *French Museums Fret over Document's Return; They Fear Other Nations Will Want Icons Back*, DALLAS MORNING NEWS, Oct. 10, 1993, at 34A. More recently, mass confusion during World War II led to the widespread migration of art to foreign nations. This resulted in part from the Nazi campaign to obtain the art treasures of the Western world. See, e.g., *Menzel v. List*, 267 N.Y.S.2d 804 (1966); see also *RECOVERED WORKS OF ART* (Gordon Moran trans., 1984); CRAIG H. SMYTH, *REPATRIATION OF ART FROM THE COLLECTING POINT IN MUNICH AFTER WORLD WAR II* (1988). Other art transfers during the war period relate to transient American soldiers, as well as European citizens escaping to America. See, e.g., *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y.), *rev'd on other grounds*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988); see also Angela J. Davis, *Beyond Repatriation: A Proposal for the Equitable Restitution of Cultural Property*, 33 UCLA L. REV. 642 (1985); Burton W. Kanter & Sheldon I. Banoff, *WWII Art Theft Creates Tax Issues*, 77 J. TAX'N 63 (1992). War and occupation have also continued to be a source of illegal art transactions in recent times. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990).

21. For instance, in 1873, the world-renowned archaeologist Heinrich Schliemann found the site of Troy in Turkish Asia Minor, and was fined 10,000 gold francs by the Ottoman Empire for illegally exporting what he mistakenly called the "Treasure of Priam." Karl E. Meyer, *Who Owns the Gold of Troy?*, N.Y. TIMES, Sept. 26, 1993, at E14. More recently, the objects of archaeological sites throughout the world have been the subject of replevin actions. See, e.g., *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (pre-Columbian artifacts from Mexico); *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990) (artifacts excavated from burial mounds in the Ushak region of Turkey in 1966); *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989) (pre-Columbian artifacts from Peru); *Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566 (N.Y. App. Div. 1990) (Roman silver pieces dating from the fifth century A.D. unearthed in the 1970's).

patrimony is that it continues to be the subject of vigorous controversy in the 1990's. Indeed, Merlina Mercouri, the Cultural Minister of Greece, has designated the return of these treasures as a national priority,²² for "[t]hese sculptures are the symbol of Greek culture and yet they remain in exile."²³

The illicit trade in art and antiquities flourishes, in part, due to the very nature of the art market. International trade in art is the norm, and for this reason, cultural patrimony can easily be taken out of its country of origin and sold to collectors and museums all over the world.²⁴ Because the art trade encompasses legitimate as well as illegitimate international dealings, the problem of deterring the flow of clandestine objects is difficult to solve.

II. CURRENT SOLUTIONS TO THE PROBLEM

Illicit acts in the international art trade encompass a variety of circumstances. They have been categorized as follows:

Illicit acts in the context of international trade in art include plunder of artifacts from archaeological sites, unauthorized excavations generally and especially during war or strife, looting of icons and relics from sanctuaries and shrines, thefts of masterpieces from museums, private collections or exhibitions, and seemingly miraculous, improbable offerings of art heretofore "undiscovered" or "missing" since World War II.²⁵

In controversies surrounding illicit art, three distinct types of situations arise. In some instances, art has simply been stolen from a private owner. In others, art has been illegally exported beyond the borders of a source nation. In a third situation, art has been stolen from a national owner. These distinctions are crucial, for they determine the remedies available to victims of the illicit trade in art.²⁶

A. Simple Theft

Replevin actions involving the simple theft of an art object from a recognized owner are the most straightforward cases to resolve. Under the Uniform Commercial Code ("UCC"), as well as traditional common law, a thief cannot pass good title to a subsequent purchaser.²⁷ Thus, the original

22. Moira Whittle, *UN Move Adds to Clamour over Elgin Marbles*, PRESS ASS'N NEWSFILE, Nov. 2, 1993, available in LEXIS, News Library, PANEWS File.

23. *Id.* (quoting Merlina Mercouri). As legend has it, if you go to the Acropolis at night, you will hear the cries of the Caryatids lamenting the abduction of their sister by Lord Elgin. Koch, *supra* note 14.

24. Koch, *supra* note 14.

25. Darraby, *supra* note 17, at 665-66 (footnotes omitted).

26. See JOHN H. MERRYMAN & ALBERT E. ELSÉN, LAW, ETHICS, AND THE VISUAL ARTS 52 (2d ed. 1987).

27. U.C.C. § 2-403(1) (1994). This section provides that "[a] purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased." *Id.* Because a thief maintains only a void title, he cannot pass any interest to a subsequent purchaser.

owner of personal property will prevail against a thief or subsequent purchaser in a replevin suit.

Notwithstanding this general principle, a subsequent bona fide purchaser of stolen art has several available affirmative defenses to the original owner's suit, the most common being the expiration of the statute of limitations.²⁸ This defense is particularly viable in the context of art transactions because it is not unusual for stolen works to take as long as twenty or thirty years to surface.²⁹ To compensate for this special circumstance in the art context, jurisdictions such as New York have scrutinized the effects of limitation periods in replevin actions and have sought to define special legal principles for art transactions.³⁰

These special legal principles, such as rules governing statutes of limitations for art, have evolved over time. In 1966, *Menzel v. List*³¹ implemented the "demand rule," holding that "[i]n replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel."³² This ruling effectively established a precedent favoring the original owner.

Despite temporary alterations of this rule in *Kunstsammlungen Zu Weimar v. Elicofon*³³ and *DeWeerth v. Baldinger*,³⁴ the 1991 decision in *Solomon R. Guggenheim Foundation v. Lubell*³⁵ reinstated the *Menzel* position in its unadulterated form.³⁶ Rejecting previous attempts to place diligence requirements on the original owner of art, Chief Justice Wachtler wrote, "We see no justification for undermining the clarity and predictability of [the demand] rule by carving out an exception where the chattel to be returned is a valuable piece of art."³⁷ Instead, the court held that the demand rule should

28. For a discussion of statutes of limitations in replevin actions, see Foutty, *supra* note 13, at 1842-45.

29. See, e.g., *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1152 (2d Cir. 1982) (Durer paintings stolen in 1945 resurfaced in 1966); *DeWeerth v. Baldinger*, 658 F. Supp. 688, 692 (S.D.N.Y.) (Monet painting disappearing from the original owner's house between 1943 and 1945 resurfaced in 1982), *rev'd on other grounds*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988); *Menzel v. List*, 267 N.Y.S.2d 804, 807 (N.Y. Sup. Ct. 1966) (Chagall painting illegally plundered by Nazi occupation forces in 1941 resurfaced in 1962).

30. Foutty, *supra* note 13, at 1845-46.

31. 267 N.Y.S.2d 804 (1966).

32. *Id.* at 809.

33. 678 F.2d 1150 (2d Cir. 1982).

34. 658 F. Supp. 688 (S.D.N.Y.), *rev'd on other grounds*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988).

35. 567 N.Y.S.2d 623 (1991).

36. *Elicofon* upheld the use of the demand rule, but also suggested the necessity of reasonable diligence: "Dr. Scheidig's efforts to locate the paintings were reasonably diligent, and . . . any delay in demanding the return of the paintings was reasonable and excusable as a matter of law." *Elicofon*, 678 F.2d at 1165. The decision in *DeWeerth* extended this inclination: "[T]he New York courts would impose a duty of reasonable diligence in attempting to locate stolen property, in addition to the undisputed duty to make a demand for return within a reasonable time after the current possessor is identified." *DeWeerth*, 658 F. Supp. at 688.

37. *Guggenheim*, 567 N.Y.S.2d at 624.

stand alone, independent of any due diligence requirements.³⁸ This position established a broad protection for art theft victims by eliminating the original owner's duty to use due diligence in locating a stolen work.³⁹ The court carefully noted, however, that due diligence is not irrelevant—it still plays an important role in the context of a laches defense.⁴⁰

The *Guggenheim* decision was a conscious effort to deter the trade in stolen art. In fact, the court's opinion acknowledged: "To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art."⁴¹ Experts in the field agreed that the decision would foster a more stable art market. As the executive director of the International Foundation for Art Research ("IFAR") commented, by increasing the risks in buying works that may have been stolen, "people will be less likely to buy stolen art, and more likely to ask questions."⁴²

B. *Illegal Export*

A more difficult problem exists when art theft involves illegal exportation, for this situation implicates the special interests of cultural patrimony and repatriation. In cases involving simple theft, the concerns of original owners are uniform—they wish to regain their property. In cases involving illegal exportation, however, the preeminent concerns of countries are determined by their status as source nation or market nation. In source nations, the country is rich in art, and the supply of desirable cultural property exceeds the internal

38. *Id.* at 627.

39. *Id.* at 623. See generally Sam H. Verhovek, *Guggenheim May Sue for Chagall, Court Says*, N.Y. TIMES, Feb. 15, 1991, at C7.

40. *Guggenheim*, 567 N.Y.S.2d at 628. According to one authority, [t]he "Doctrine of laches[]" is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as [a] bar in [a] court of equity. [Laches is] [t]he neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done.

BLACK'S LAW DICTIONARY 453 (6th ed. 1990) (citation omitted).

The proposition that *DeWeerth's* "unreasonable delay" requirement applies only to the equitable defense of laches was accepted and promoted in the 1990 case of *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990).

In states which do not implement the demand rule, due diligence may play an important function under the "discovery rule." In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, the court noted:

The discovery rule prevents the statute from beginning to run in situations where a plaintiff, using due diligence, cannot bring suit because he is unable to determine a cause of action

In order to maintain a replevin action, the plaintiff must know who is in possession of the property at issue.

717 F. Supp. 1374, 1389 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990). Citing *DeWeerth*, the court emphasized that the "plaintiff who seeks protection under the discovery rule has a duty to use reasonable diligence to locate the stolen items. Determination of due diligence is fact sensitive and must be made on a case-by-case basis." *Id.*

41. *Guggenheim*, 567 N.Y.S.2d at 628.

42. Verhovek, *supra* note 39, at C7 (quoting Constance Lowenthal, executive director of IFAR).

demand. In market nations, the opposite is true—the demand exceeds the supply. Accordingly, in illegal export cases, the legal remedies vary significantly based on the specific regulations enacted by the country where the stolen art originated and any applicable international agreements.

In the war to curtail the illicit trade in objects of cultural importance, both source nations and market nations have taken steps to eliminate the black market. These attempts to control the loss of national treasures range from comprehensive no-export rules to relatively lax standards and cursory review for granting export licenses. Source nations, the entities with the most to lose, have vigorously acted to combat the problem of illegal export and theft. To support the export controls adopted by source nations, some market nations, such as the United States, have implemented complementary programs.⁴³ It must be said, however, that the civil-law market nations have been reticent, even unwilling in some cases, to assist in the quest to extinguish the black market in art and antiquities.⁴⁴

One response by source nations suffering from the plundering of national treasures is to invoke an all-encompassing ban on the exportation of cultural property. This ban includes the total prohibition of any cross-border sale or exchange.⁴⁵ At the extreme, some nations forbid even the loan of important antiquities to foreign museums for any period of time.⁴⁶

In nations which have a significant interest in their own cultural patrimony, but also a thriving market component, a ban may be coupled with more lenient restrictions for works of lesser importance.⁴⁷ In such nations, there may be a total prohibition of works listed as “of national importance” from export, plus a permit requirement for other works. In applying for such a permit, there may be significant delay, confrontation with bureaucracy, paperwork, and extra export taxes.⁴⁸

43. For example, the United States has enacted the Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613.

44. See generally Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431 (1992) (suggesting that civil-law nations perpetuate international art theft by permitting art thieves and dealers who purchase from them to pass good title to their buyers).

45. MERRYMAN & ELSEN, *supra* note 26, at 53. This position has been widely embraced by countries such as Mexico, Guatemala, and Peru, which are rich in pre-Colombian artifacts (as a result of the appeal of this practice among the pre-Colombian source nations, the international market for these objects can only be satisfied illegally), and manifests a hoarding or “retentive” attitude which persists regardless of the presence of huge stocks of duplicate works. *Id.* at 56.

46. MEYER, *supra* note 9, at 185.

47. MERRYMAN & ELSEN, *supra* note 26, at 53. These countries include France, Italy, and Japan. *Id.*; see also Davis, *supra* note 20, at 662.

48. MERRYMAN & ELSEN, *supra* note 26, at 53. One such alternative to a total ban has been the implementation by Canada of the Cultural Property Export and Import Act, R.S.C. ch. 51 (1985) (Can.). This Act was devised to meet Canada’s needs as a source nation, as well as a market nation. One of the primary goals of this legislation is to ensure the preservation in Canada of the best examples of the nation’s cultural, historic, and scientific heritage. For a full discussion, see THE CHALLENGE TO OUR CULTURAL HERITAGE: WHY PRESERVE THE PAST? 213 (Yudhishtir Raj Isar ed., 1986) [hereinafter CHALLENGE].

Canada’s approach to the protection of cultural property is similar to that adopted by Great Britain, which utilizes a system of preemptive sales and export controls. Under this system, the artworks

In reality, bans on exports aggravate the problem. Such regulations restrict the supply of a particular type of art, which leads to an increased demand for these very objects. To satisfy this new demand, alternative means of acquisition emerge, usually in the form of illegal excavations.⁴⁹ The implications of such a system are notable:

If the market cannot be supplied through legal means, it will be supplied illegally. Indeed, the absence of a licit market insures the existence of an illicit one, with the usual consequences: loss of control over a traffic that, if licit, could be regulated; criminalization of the traffic; enrichment of the criminal element who exploit the illicit market; official bribery and other forms of corruption. . . . Clandestine excavation and removal in hasty circumstances by amateurs leads to loss of archeological information, physical damage to the sites, physical damages to the works removed, plus economic and cultural loss to the nation.⁵⁰

Indeed, cynics even assert that such export laws are designed to be violated rather than enforced—creating an enormous incentive for bribes.⁵¹

To complement the export regulations of source nations, the United States adopted the Cultural Property Implementation Act in 1983.⁵² Where statutory prerequisites are met, the CPIA authorizes the United States to participate in bilateral and multilateral agreements with requesting nations.⁵³ In addition, if the President determines that an emergency condition exists and that

scheduled for export may be delayed for a statutory period during which time a governmental agency may purchase it at "market value." If Britain fails to purchase the "treasure" within the statutory period, the export license will be granted. Davis, *supra* note 20, at 662.

49. Lisa Marie Rafanelli, *A Comparative Study of Cultural Property Import Regulation: The United States, the United Kingdom, and Canada*, 15 COLUM.-VLA J.L. & ARTS 543, 545 (1991); see also Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 317-19 (1982) (discussing the inherent side-effects of the total export ban); John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 847-48 (1986) (noting that historically, the tighter the export controls, the greater the need for an illicit market).

50. John H. Merryman & Albert E. Elsen, *The Importance of a Licit Market*, in LAW, ETHICS, AND THE VISUAL ARTS, *supra* note 26, at 63.

51. MEYER, *supra* note 9, at 149. One such collector of smuggled art stated:

"If it did some good, I would return [the art]. If there were reason and plausibility that smuggling could be stopped, I would do it. . . . But often countries encourage smuggling. They make a lot of money out of it. They often scream a lot and yet allow the thievery to go on. They should start enforcing the law."

Id. at 145.

52. 19 U.S.C. §§ 2601-2613.

53. 19 U.S.C. § 2602. To qualify for protection under the CPIA, five preconditions must be met:

- (1) the requesting party's cultural patrimony must be in jeopardy from the pillage of its archaeological or ethnological materials;
- (2) the requesting party must have taken measures consistent with UNESCO to protect its cultural patrimony;
- (3) import restrictions must be in place that would substantially deter serious pillage, and other nations having a significant import trade in the material in danger of pillage have implemented and applied similar restrictions;
- (4) remedies less drastic than the application of import restrictions must not be available; and
- (5) application of import restrictions must be consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural and educational purposes.

Id. § 2602(a)(1)(A)-(D).

As between bilateral and multilateral agreements, the former are preferable because they can be tailored to meet the specific enforcement needs and abilities of the parties. Church, *supra* note 7, at 223.

international cooperation is unnecessary to eliminate the particular problem of pillage, the United States may unilaterally impose import restrictions at a source nation's request.⁵⁴ Where this emergency status is present, import restrictions may be imposed by the United States if their enactment would "in whole or in part" reduce the incentive for such pillage, dismantling, dispersal, or fragmentation.⁵⁵ These emergency actions have been successfully implemented on four occasions.⁵⁶

The CPIA also provides procedures for the seizure and forfeiture of goods which are imported in contravention of the law.⁵⁷ This enforcement mechanism is important because it results in the actual return of cultural patrimony. Objects on public display which are in the United States for only a specified period of time are excluded from such seizures to protect museums, private collections, and temporary exhibits from repatriation actions.⁵⁸

In addition to the CPIA, the United States may enter into treaties or executive agreements with other nations.⁵⁹ This option has been used by the United States to establish agreements with Mexico, Peru, Ecuador, and

54. 19 U.S.C. § 2603(b). Under the CPIA, an emergency situation is defined as involving archaeological or ethnographic material that is:

- (1) a newly discovered type of material which is of importance for the understanding of the history of mankind and is in jeopardy from pillage, dismantling, dispersal, or fragmentation;
- (2) identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions; or
- (3) a part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions.

Id. § 2603 (a)(1)-(3).

55. *Id.* § 2603(a).

56. See Rafanelli, *supra* note 49, at 549-50. Emergency import restrictions were enacted against pre-Colombian artifacts from the Cara Sucia Archaeological Region in southwestern El Salvador from September, 1987, to March, 1992. Restrictions were implemented against the importation of ceremonial textiles of the Aymara culture of Coroma from March, 1989, to May, 1993. In May of 1990, the government of Peru was granted similar relief for gold, silver, and copper ornaments and weapons, as well as ceramics, beads, and textiles from the Sipan II site. Finally, import restrictions were granted to the government of Guatemala for pre-Hispanic ceramic, stone, shell, and bone artifacts from the Peten region in April of 1991. Church, *supra* note 7, at 218-19. The import restrictions on culturally significant archaeological artifacts from the Sipan region of Peru were subsequently extended for an additional three years. Extension of Import Restrictions in Significant Archaeological Artifacts from Peru, 59 Fed. Reg. 32,902-32,903 (1994).

57. 19 U.S.C. § 2609. Under this provision, several requirements must be met. First, a claimant state must compensate a good faith purchaser for any cultural property that is found to have been illicitly imported. Second, if the purchaser does not have good title, but has no knowledge of the conversion, the requesting state may be required to compensate the purchaser. On the other hand, the requesting nation may be absolved from payment if the United States determines that this state would not require a payment by the United States if an article stolen from the United States would be returned by that state free of charge. *Id.* § 2609(c).

58. *Id.* § 2611. Most recently, an exhibit of "cultural significance" entitled "Tomb Treasures from China: The Buried Art of Ancient Xi'an" entered the United States from abroad pursuant to a loan agreement. Culturally Significant Objects Imported for Exhibition; Determination, 59 Fed. Reg. 34,704 (1994).

59. Church, *supra* note 7, at 215.

Guatemala.⁶⁰ The treaty with Mexico, used as a model for the later agreements, commits each party to using the legal means available to recover and return stolen archaeological, historical, or cultural properties which are removed after the date of the treaty.⁶¹ The cultural property protected by treaty includes only those art objects and artifacts of pre-Colombian cultures and of the colonial period that are of "outstanding importance" to the nation.⁶² This limitation is necessary because these agreements are only successful when they are precise enough to be easily implemented by customs officials. This type of agreement is ideal for source nations who are willing to limit protection to their most important items.

Despite the United States' attempts to respect the needs of source nations, existing legislative solutions are inadequate. To begin, the CPIA only provides procedures to respond to severe situations. Thus, the scope and availability of this legislation is extremely limited.⁶³ In addition, the procedural requirements to invoke the statutory aid are numerous and onerous—a formidable burden on petitioning states.⁶⁴ Even then, protection is offered only in situations where it is demonstrable that a significant problem of loss has occurred.⁶⁵ The use of special agreements with specific nations is also unsatisfactory because these treaties typically protect only artifacts which are of greatest cultural significance to a nation.

C. National Theft

When antiquities have been illegally excavated or a source nation has enacted laws which attribute national ownership to all artwork within its borders, another type of action can be brought. In these situations, the nation which has lost a work of art may bring a *replevin* action on the theory that one of its possessions has been stolen. This is similar to the simple theft case, with the original owner being the country of origin.

In national art theft cases, however, the tenet that the owner of personal property will prevail against a thief or subsequent purchaser is not easily implemented. To begin, there may be significant questions as to who the original owner actually is. This is particularly true in the context of antiquities

60. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, July 17, 1970, U.S.-Mex., 22 U.S.T. 494 [hereinafter Treaty for Recovery of Stolen Properties]; Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 15, 1981, U.S.-Peru, 33 U.S.T. 1607; Agreement Between the United States of America and the Republic of Ecuador for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Nov. 17, 1983, U.S.-Ecuador, T.I.A.S. No. 11075; Agreement Between the United States and the Republic of Guatemala for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, May 21, 1984, U.S.-Guat., T.I.A.S. No. 11077.

61. Treaty for Recovery of Stolen Properties, *supra* note 60, art. III, § 1, 22 U.S.T. 494.

62. *Id.* art. I, § 1(c).

63. Rafanelli, *supra* note 49, at 549.

64. See *supra* note 53 and accompanying text.

65. Church, *supra* note 7, at 224.

which have been clandestinely excavated and exported from their country of origin,⁶⁶ or where source nations have decreed blanket ownership laws.⁶⁷

Although the prevailing sentiment from the American courts has been highly protective of original owners,⁶⁸ the cost of repatriation litigation is astronomical. This huge expense may deter many worthy national governments which simply cannot afford to spend scarce resources in this manner.⁶⁹ For example, in the case of the Quedlinburg treasures, Germany paid \$2.75 million for the return of stolen medieval artifacts from the heirs of an American serviceman. Klaus Maurice, the secretary general of the German agency which negotiated the deal, admitted: "If we had pursued the lawsuit in Dallas, the legal fees would have greatly exceeded the amount we agreed to pay."⁷⁰ The cynical characterization of such settlements as the extortion of "money from foreign governments for looted artworks"⁷¹ does not seem far from the mark.

In some instances, litigation has gone forward. In the case of the Lydian Hoard, a collection of 363 precious objects found in tombs from the classical reign of King Croesus,⁷² the Republic of Turkey pursued a replevin action

66. Patrick Boylan, *Treasure Trove with Strings Attached*, THE INDEPENDENT, Nov. 9, 1993, at 18; King, *supra* note 8; *Morning Edition: New York Court To Determine Disposition of Roman Silver*, (NPR Broadcast, Oct. 7, 1993) [hereinafter *Morning Edition*]. The case deciding the fate of the Sevso Treasure held that neither Hungary nor Croatia, both of which claimed to be the country of origin, definitely proved that the silver was illegally excavated and exported from its soil. This inability to determine with absolute certainty the geographical origin of a contested work was also the determining factor in *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd*, 933 F.2d 1013 (9th Cir. 1991). In *Johnson*, Judge Gray wrote:

The plaintiff has no direct evidence that any of the subject items came from Peru Peruvian Pre-Columbian culture spanned not only modern day Peru, but also areas that now are within the borders of Bolivia and Ecuador, and many of the population centers that were part of the Peruvian Pre-Columbian civilization, and from which artifacts have been taken, are within those countries.

Id. at 812.

67. This proved to be the pivotal issue in *United States v. McClain*, and the basis for a reversal of the district court's conviction of the defendants under the National Stolen Property Act. 545 F.2d 988 (5th Cir. 1977), *cert. denied*, 444 U.S. 918 (1979). The court explained:

The district court instructed the jury that "since 1897 Mexican law has declared pre-Columbian artifacts . . . to be the property of the Republic of Mexico, except in instances where the Government" has issued a license or permit to private persons to possess, transfer, or export the artifacts. This instruction casts a cloud on the title of almost every pre-Columbian object in the United States. This Court, of course, recognizes the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures, or of whatever is within its jurisdiction; possession is but a frequent incident, not the sine qua non of ownership, in the common law or the civil law. The district court's instruction was erroneous. Not until 1972 did Mexico enact a law declaring *all* archaeological objects within its jurisdiction, movables and immovables, to be the property of the Nation.

Id. at 992 (emphasis in original) (quoting the trial court).

68. See *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

69. William H. Honan, *Lately More Antiquities Can Go Home Again*, N.Y. TIMES, Jan. 25, 1993, at C11.

70. *The Lydian Hoard: And So to Court*, THE ECONOMIST, Mar. 30, 1991, at 88 (quoting Klaus Maurice).

71. *Id.*

72. *Treasures, Bound for Home*, WASH. POST, Sept. 25, 1993, at A20.

against the Metropolitan Museum of Art despite the cost.⁷³ This legal battle, which lasted nearly a decade, ultimately ended in settlement.⁷⁴ After the United States District Court for the Southern District of New York denied the defendant's motion to dismiss on the basis of statute of limitations and laches defenses, the Museum agreed to send the 2500-year-old cache back to Turkey.⁷⁵

III. FOCUSED SOLUTIONS: INTELLIGENT TARGETING IN THE WAR FOR ART

The staggering statistics reflecting the increasing magnitude of art theft in the world indicate that the present strategies to stem the illicit art trade are less than satisfactory. Accordingly, new solutions must be found. One suggestion is to place stringent standards of care on the institutional bodies involved in the art and antiquities trade—museums and auction houses. These entities possess the experience and ability to recognize suspect works of art and, thus, should have an affirmative duty to prevent their transferral through the legitimate art market.

A. The Preeminent Role of Museums: The Final Resting Place for Art

The reality of the current situation is stark—as long as there is a market for clandestine works, theft from source nations will continue.⁷⁶ At present, museums are the ultimate market for art, and virtually all works eventually end up in public institutions and museums.⁷⁷ Consequently, if museums could be eliminated from the illicit art market, illegal art dealing could be significantly reduced.

With the increase of economic pressure,⁷⁸ as well as the moral pressure and threat of public embarrassment associated with wrongfully possessing

73. Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990); see also *The Lydian Hoard: And So to Court*, *supra* note 70, at 88; Darraby, *supra* note 17, at 699-702.

74. *Treasures, Bound for Home*, *supra* note 72, at A20.

75. *Id.*

76. Stewart L. Peckham, chief archaeologist at the Museum of New Mexico, commented on this phenomenon:

"You can probably detect that I have more than just a mild contempt for the pot hunter. Although he deserves eternal damnation, he isn't the only one to blame. The affluent art collector should also be roasted in Hell. His demand for new conversation pieces to add to his collection, regardless of price, only stimulates the pot hunter to seek out and pillage major archaeological sites."

MEYER, *supra* note 9, at 11 (quoting private letter from Stewart L. Peckham to Karl E. Meyer (June 24, 1972)).

77. See CHALLENGE, *supra* note 48, at 24-25 (discussing the costs of modernization in terms of the violation of archaeological sites and landscapes).

78. See MARTIN FELDSTEIN, *THE ECONOMICS OF ART MUSEUMS* 1 (1991); Honan, *supra* note 69, at C11; Carol Vogel, *Dear Museumgoer: What Do You Think?*, N.Y. TIMES, Dec. 20, 1992, at H1. American art museums have experienced increasing pressure to exhibit new collections and make new purchases with the aim of increasing museum attendance. MEYER, *supra* note 9, at 77.

items of cultural patrimony,⁷⁹ museums have attempted to voluntarily monitor their dealings with tainted art.⁸⁰ The policy adopted by New York's Metropolitan Museum of Art demonstrates a typical response:

Whenever such an object without bibliography or pedigree is proposed for acquisition, a letter is sent to the responsible governmental offices in the countries that might consider the object part of their cultural or artistic patrimony. In this letter the object under consideration is described briefly, the condition and the dimensions are given, and a photograph is enclosed. Only if no claim is made within 45 days after receipt of the letter does the museum feel free to go through with the acquisition.⁸¹

This statement is striking proof that the Museum is aware of its obligation to operate in such a way that foreign governments can reclaim suspect pieces.⁸²

79. Honan, *supra* note 69, at C11. The 1969 Boston Raphael controversy, in which the Boston Museum of Fine Arts illegally bought a portrait of Eleonara Gonzaga and smuggled it past United States Customs in a suitcase, ended with the return of the painting to Italy through smooth negotiations. MEYER, *supra* note 9, at 101-05. The Museum was apparently willing to do anything to make matters right in the wake of this scandal. *Id.* at 105.

80. Honan, *supra* note 69, at C11. Michael Ratner, a lawyer for the New York Center for Constitutional Rights, a nonprofit civil rights organization that represented the Coroma Indians in their suit for the return of sacred textiles, states: "Nobody today wants to be caught with somebody else's sacred objects." Indeed, in many instances, museums will simply return contested objects rather than face the negative publicity of a lawsuit. *Id.* As early as April of 1970, the Pennsylvania University Museum passed the "Pennsylvania Declaration" in which it stated that the Museum would no longer purchase any antiquities unless accompanied by a convincing pedigree. MEYER, *supra* note 9, at 75, app. at 254-55. In 1971, the Harvard Corporation followed suit, adopting a policy barring the acquisition of suspect art. *Id.* at 75, app. at 255-59. In 1972, the Field Museum of Natural History in Chicago adopted a similar policy. *Id.* at 75 app. at 259-61.

81. Dr. Dietrich von Bothmer, Address at Conference on Illicit Trafficking in Florence (Nov. 1971), quoted in MEYER, *supra* note 9, at 96-97.

82. Loopholes remain, however. First, if an object is illegally excavated, the country of origin will have no record of its existence and therefore may not be able to make an effective claim. For any piece of art, there may be several potential countries of origin, and the absence of records may make an ownership claim impossible. For example, Greek art can be found in many Mediterranean countries. MEYER, *supra* note 9, at 97. A second problem is that the museum remains its own judge as to whether a piece is accompanied by an adequate pedigree. This judgment ultimately falls on the willingness of the museum to believe a dealer's story. *Id.* For a discussion of the dangers of believing a dealer's story, see Meisler, *supra* note 8, at 8 (discussing Peg Goldberg's acceptance of false provenance), and Geraldine Norman, *Confessions of a Double Dealer*, THE INDEPENDENT, Oct. 31, 1993, at 94 (describing the involvement of art dealer Michel van Rijn in scams and shady deals involving the art market).

Recently, the museums of Europe have adopted stringent standards for museum acquisition policies. In the 1992 European Convention of the Protection of the Archaeological Heritage, for instance, Article 10 requires each party "to take such steps as are necessary to ensure that museums and similar institutions whose acquisition policy is under State control do not acquire elements of the archaeological heritage suspected of coming from uncontrolled finds or illicit excavations or unlawfully from official excavations." European Convention on the Protection of the Archaeological Heritage, Jan. 16, 1992, art. 10(iii), E.T.S. no. 143, at 10.

In the United Kingdom, the Museum Association Code of Practice similarly mandates:

A museum should not acquire, whether by purchase, gift, bequest or exchange, any work of art or object unless the governing body or responsible officer as appropriate is satisfied that the museum can acquire a valid title to the specimen in question and that in particular it has not been acquired in, or exported from, its country of origin (and/or any intermediate country in which it may have been legally owned) in violation of that country's laws.

B.F. Cook, *The Archaeologist and the Art Market: Policies and Practice*, 65 ANTIQUITY, Sept. 1991, at 533, 534.

Such steps taken by museums of their own accord may help to quash the illicit art and antiquities trade, but the seriousness of the present situation requires more substantial measures. Because museums are the final resting place of most cultural objects, special attention must be directed to them. As an initial matter, museums should be under strict reporting requirements to disclose their knowledge of offered artworks. In addition, particularly stringent duty of care requirements should be imposed on museums. As leaders in the field, museums must be required to act with unquestionable diligence in the area of acquisitions.

1. Mandatory Reporting

As an initial suggestion, museums should be required to report any transactions to a central art registry.⁸³ Because museums are "a significant portal of entry for . . . stolen goods into the visible and legitimated world of art,"⁸⁴ they present a perfect avenue for mandatory reporting. Indeed, museums are viewed as big spenders in the art market, and many initial purchases are made with the specific intent to resell the object to a museum for a huge profit.⁸⁵ In addition, museums are often asked to perform the services of appraisal and authentication, which allows them to evaluate works that are new to the market.⁸⁶ For these reasons, museums frequently become privy to inside information involving illicit art.

Informal reporting to interested parties in cases involving suspect works is already the practice in a number of museums,⁸⁷ but mandatory reporting to a central, comprehensive registry is necessary. Disclosure of museum transactions involving available works will greatly enhance the art community's

83. For a discussion of similar reporting requirements in the auction house context, see *infra* Part III.B.1.

84. Robin M. Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 30 (1993).

85. For example, Lord Northampton purchased the Sevso Treasure in the 1980's as an investment on the advice of Sotheby's former chairman, who told him that the Treasure came from Lebanon. Lord Northampton, an investor, Sotheby's former chairman, and another London dealer attempted to sell the Treasure to the Getty Museum for \$11 million. The Getty refused to buy when it spotted a forged Arabic signature on the Treasure's Lebanese export documents. The investors then paid hundreds of thousands of dollars for new export documents. The Lebanese official who supplied them was subsequently indicted for forgery. Confident in the new papers, the Treasure was re-offered to the Getty for \$24 million, but the offer was rejected. Northampton then took the Treasure to Sotheby's to be auctioned as a "family trust." Lebanon and Yugoslavia each claimed to be the original owner, and the Treasure was impounded. *Morning Edition, supra* note 66. In the case of the Cypriot mosaics, Peg Goldberg bought the pieces for \$1.08 million, only to offer them six months later to the Getty Museum for \$20 million. Meisler, *supra* note 8, at 10.

86. See Collin, *supra* note 84, at 29.

87. See *supra* notes 80-82 and accompanying text. In the case of the Cypriot mosaics, the agents of purchaser Peg Goldberg contacted Dr. True of the Getty Museum in California as a prospective buyer. Dr. True subsequently reported this contact to Dr. Karageorghis, the Director of the Republic of Cyprus's Department of Antiquities, for it was known in the field that Cyprus was actively seeking to recover stolen antiquities. Dr. Karageorghis notified the appropriate Cypriot officials, who then filed an action for replevin in the United States. Pamela Farrell, Case Comment, 15 SUFFOLK TRANSNAT'L L.J. 790, 793 (1992).

knowledge of illicit art. The increase in information regarding objects being offered for sale (or appraised or authenticated) could significantly hamper the black market in art by bringing many stolen objects to the attention of source nations before a sale is made. Furthermore, if museums must disclose all acquisitions, appraisals and authentications, it will be extremely difficult to introduce newly excavated objects into the legitimate market without detection. If reselling in the lucrative museum market is impossible because museums are required to fully disclose all acquisitions in a central registry, the incentive to steal or illegally export objects of cultural patrimony will be significantly decreased.

Another legislative solution has been proposed by Professor Paul Bator. He suggests that the rules of disclosure which apply to the business dealings of Wall Street should apply to museums as well. Under this system, museums must divulge to the public the full provenance of any new work of art, including the dealer and the purchase price.⁸⁸ This, too, suggests a trend toward greater honesty in the art market, and an increased ability to gather information.

2. Enhanced Standard of Care

Progress could also be made in the war to stop the trafficking of illicit art by imposing an additional duty of diligence on any museum acting as buyer. At present, virtually every major museum in the world has voluntarily bound itself to work only within the International Code of Professional Ethics of the International Council of Museums.⁸⁹ Most have adopted their own internal ethical and acquisition codes as well.⁹⁰ Under these ethical standards, museums may not simply satisfy themselves that artwork has not been shown to have been smuggled or stolen. Instead, museums must satisfy themselves that the evidence of the provenance and history of the artwork *proves* that the vendor has a good legal title, that the artwork does not come from an illegal,

88. MEYER, *supra* note 9, at 168.

89. Boylan, *supra* note 66, at 18.

90. *Id.*; see also *supra* notes 80-82 and accompanying text. The American Association of Museums' ethical statement as to acquisition notes:

Illicit trade in objects encourages the destruction of sites, the violation of national exportation laws, and contravention of the spirit of national patrimony. Museums must acknowledge the relationship between the marketplace and the initial and often destructive taking of an object for the commercial market. They must not support that illicit market. Each museum must develop a method for considering objects of this status for acquisition that will allow it to acquire or accept an object only when it can determine with reasonable certainty that it has not been immediately derived from this illicit trade and that its acquisition does not contribute to the continuation of that trade.

AMERICAN ASS'N OF MUSEUMS, MUSEUM ETHICS 12 (1978).

Such statements are more than hollow words, for adherence to them is necessary for the accreditation which is usually a prerequisite for governmental funding. Lawrence J. Persick, Comment, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 DICK. J. INT'L L. 89, 112 (1985). To strengthen the position against illegal trafficking in art, the standard of "reasonable certainty" adopted by the American Association of Museums should also be strengthened to require "documented certainty."

clandestine, or unscientific archaeological excavation, and that it has not been exported, imported, or otherwise transferred from its country of origin or any intermediate state in contravention of any applicable national or international antiquities protection or export control law.⁹¹ A legal imposition of this standard should be adopted. Such a requirement would help eliminate cases involving simple theft, as well as those involving illegal export and national theft.

Museums are in a unique position of power in the art market, and, for this reason, their diligence when researching provenance should be held to the highest standard. Museums often employ experts who can ascertain the illicit nature of an art object,⁹² and are therefore able to prevent the transfer of illicit art. Even when such experts are not employed, museums are in the art business, and common knowledge of the field indicates many suspect situations:

Given the known pillage of archaeological sites and the flood of unprovenanced antiquities on the market, there is clearly reasonable cause to believe that a considerable number, if not the majority, of these unprovenanced objects have been clandestinely excavated and illegally smuggled out of their countries of origin. Under these circumstances all unprovenanced antiquities are tainted with suspicion, and objects considered for acquisition should therefore come with some evidence that they have not recently come into the market through the hands of criminals abroad.⁹³

With this strong suspicion against the legitimacy of any work from antiquity, the enhanced standard of care would require museums to acquire evidence of legitimacy for each work. This would include checking with each potential country of origin for verification of non-ownership.⁹⁴ Thus, this heightened standard of care would lead to increased information regarding art. Such a procedure would undermine the illicit trade at its roots, for if a piece were stolen or illegally exported, an original owner or country of origin could stop the transaction before a sale to a bona fide purchaser. Consequently, the country of origin or original owner could take action against the thief directly.⁹⁵ This would save the innocent purchaser from a lawsuit altogether. In addition, the fact that suspect works would be virtually unsaleable to museums will greatly reduce the market for such objects.⁹⁶

91. Boylan, *supra* note 66, at 18.

92. For an example of the unique position of museum curators, see the discussion of the Getty Museum's response to Peg Goldberg's offer of the Cypriot mosaics, *supra* at note 87 and accompanying text.

93. Cook, *supra* note 82, at 534 (citations omitted).

94. While this appears to be burdensome, the rapidly expanding information highway may relieve some of the potential impact. A clearinghouse, such as an internet bulletin board, through which museums could put all countries on notice of possible acquisitions, could quickly alert source nations of suspect works. For trends in this direction, see Nick Nuttall, *Computer Listing Aims to Tighten Net on Art Thieves*, THE TIMES (London), Jan. 16, 1991, Home News, available in LEXIS, News Library, ARCNWS File.

95. This, of course, assumes that there has yet to be a transfer to a bona fide purchaser.

96. These stringent standards of care would not apply to the individual collector. As the court noted in *DeWeerth v. Baldinger*, "An individual . . . could not be expected to mount the sort of investigation undertaken by the . . . art museum." 836 F.2d 103, 112 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056

Coupled with the mandatory reporting which would facilitate a comprehensive register of stolen works,⁹⁷ this enhanced standard of diligence could significantly frustrate the underground market for art. With the mystery of art dealings eliminated through the greater flow of information, it will become harder and harder for thieves to successfully sell unprovenanced art in the legitimate market.

B. The International Auction House: The Seller's Seat of Power

In today's international art market, auction houses are another dominant force.⁹⁸ Without the cooperation of the collector-dealer fraternity, of which the international auction house is the kingpin, no system of export control can work smoothly, efficiently, or fairly.⁹⁹ The present crisis in the art trade, in spite of international attempts by both source and market nations to stop the pillage, lends credence to this statement.

The composition and dynamics of the art market have drastically changed in recent decades. Increasingly, the auction market has become the largest and most visible component. Today, auction sales data, in terms of consistency, volume, and documentation, are the most reliable index of the art market. In effect, the auction both mirrors and influences the actual market.¹⁰⁰

(1988). Thus, the transfer of illicit art objects could occur, as it now does, within the sector of individual purchasers. Even with this limitation, it is probable that the market would be severely curtailed because individual purchasers, on the whole, simply do not have the purchasing power that larger institutions have.

97. At present, there is an alarming void of information with regard to stolen art. For a more detailed discussion of institutions which aid in the investigation of titles to art works, see Deborah D. Hoover, Note, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443, 458-63 (1983). The International Police Organization ("Interpol") maintains a small office specializing in art thefts. It is, however, more of a service which periodically circulates fliers describing major missing pieces than an agency which returns stolen art. MEYER, *supra* note 9, at 101. Interpol can act only at the express request of a member force, and has a recovery rate of only 8-10%. *Id.* at 150.

IFAR is an organization similar to Interpol, whose major purpose is to gather information on controversial works that are brought to it for examination. *Id.* at 107-08. For example, in August of 1992, the Art Loss Register of IFAR sent fliers to 1100 people on its mailing list and to more than 4000 subscribers to Christie's catalogues regarding stolen paintings by Monet and Picasso. Constance Lowenthal, the executive director of IFAR, stated, "The point of sending the alert was so that anyone in the art business will avoid buying or selling stolen art." Carol Vogel, *The Art Market*, N.Y. TIMES, Aug. 7, 1992, at C23. IFAR now provides computerized access to information as well. Nuttall, *supra* note 94.

Private dealers such as the Wildenstein Gallery also serve as an invaluable source of information because they have cultivated a network of confidential informants for commercial purposes. MEYER, *supra* note 9, at 101-02.

Perhaps the key to this information problem is the disorganized and unsophisticated nature of the current procedures. With the burgeoning information industry, it may be possible to provide a more comprehensive approach to cataloguing stolen art. See *infra* text accompanying note 116. An additional flaw in the current approach is that it attempts to isolate a list of illicit works. A superior strategy may be to assume that all works are tainted until shown to be otherwise.

98. FELDSTEIN, *supra* note 78, at 24; Judith H. Dobrynski, *Agony and Ecstasy in the Art Market*, BUS. WK., Aug. 13, 1990, at 110.

99. MEYER, *supra* note 9, at 213.

100. FELDSTEIN, *supra* note 78, at 17. Indeed, the auction house is especially important because it often plays a creative role in the market—developer of the "hot" new art—simply by drawing attention

With the advent of the international market, art is now accessible to an extended group of purchasers.¹⁰¹ Those of the old school maintain that collecting should not be commodity trading, but today's newer buyers see art as just that—a speculative commodity. Against this modern background, auction houses have gained the confidence of the new, inexperienced collectors who believe that the auction is the best test of a work's fair market value.

Because of this preeminent position among sellers in the art market, international auction houses should be held to a strict standard of care when buying and selling artwork. Most suspect art is funneled through auction houses, and it is therefore most strategic to target this narrowest point in the distribution chain.

Voluntary standards which have already been adopted by some auctioneers and dealers could serve as a model for mandatory legal obligations. For instance, the British auctioneers and dealers have signed a Code of Practice for the Control of International Trading in Works of Art¹⁰² which provides:

Members of the U.K. fine art and antiquities trade undertake, to the best of their ability, not to import, export or transfer the ownership of such objects where they have reasonable cause to believe . . . that an imported object has been acquired in or exported from its country of export in violation of that country's laws.¹⁰³

When asked what this policy means to auction houses, however, a representative of Sotheby's responded, "I don't think one ever knows where antiquities come from We assume that our clients have title to whatever it is they are selling."¹⁰⁴ In reality, the "reasonable cause" in this Code is interpreted by auction houses to mean "positive evidence."¹⁰⁵ Only if furnished with convincing evidence of theft before the sale will the objects be withdrawn.¹⁰⁶ This approach is clearly inadequate.¹⁰⁷

to one particular area of art. Sotheby's, one of the most potent forces in the international art market today, makes it a policy to develop trends rather than to wait for them. MEYER, *supra* note 9, at 8-9.

101. As one commentator explains:

Scarcity and value in the market have combined with mobility in lifestyle to give art a different place in the domestic and emotional landscape of collectors. To put it bluntly, we have probably gone from the era of art collecting to the era of art consuming. In this scenario, art is acquired as an adjunct to other lifestyle decisions and can be changed

FELDSTEIN, *supra* note 78, at 18.

102. Cook, *supra* note 82, at 533.

103. *Id.*

104. *Id.* at 534 (citation omitted).

105. *Id.*

106. For instance, Sotheby's did withdraw from the market a black-figured amphora which had been illustrated in a magazine article on the activities of a *tombarolo*, or graverobber, in Italy. *Id.*

107. There is evidence, however, that auction houses are showing an increased level of concern over stolen artwork. In response to the Sevso Treasure controversy, Sotheby's legal counsel stated that the auction house has decided not to sell the silver, no matter who is recognized as the legal owner. This response is prompted by the fact that the country of origin has not been determined. *Morning Edition*, *supra* note 66. This treasure has been characterized as a "ticking time bomb in the form of unwelcome revelations, such as proof of illicit excavation and smuggled export," and any transfer of such an item would be unwise. Boylan, *supra* note 66, at 18.

New approaches should be implemented to counteract auction houses' indifference to the provenance of the art they offer. As an initial matter, auction houses should be subject to the same reporting requirements as are museums.¹⁰⁸ In addition, the rules of warranty, as they apply to art auctioneers, should be made more stringent. As a result, an auction house likely will refuse to auction any object that it cannot with reasonable certainty¹⁰⁹ verify has not been derived from illicit activities. This will seriously obstruct the illicit art trade, for it will hinder the infiltration of clandestine objects into the legitimate market.

1. Mandatory Disclosure

Reporting requirements are already being imposed to some extent within the auction community. For example, the Consumer Affairs Code of New York City holds art auctioneers to fairly rigid standards of truthfulness in connection with auction reporting and advertising.¹¹⁰ Honest reporting in auction catalogues and other communications with the public is further promoted because such statements often create express warranties.¹¹¹ In fact, the application of express warranties to auction house communications has been mandated in New York and Michigan through legislation.¹¹² These traditional means of reporting should be supplemented. As discussed in connection with museum disclosure,¹¹³ a mandatory reporting requirement for auction houses would add significantly to the body of information concerning illicit art. This would ultimately make the sale of illicit items more difficult.

The maintenance of a comprehensive art register is one goal of this reporting requirement. A registry recording the origin of items of cultural property acquired by an art dealer, the name and address of the supplier, a description of the item, and the price, was first suggested by the UNESCO

108. See *supra* part III.A.1.

109. Again, this standard should be increased to "documented certainty." See *supra* note 90.

110. Jorge Contreras, *The Art Auctioneer: Duties and Assumptions*, 13 HASTINGS COMM. & ENT. L.J. 717, 738 (1991).

111. U.C.C. § 2-313 (1994). This section provides that an express warranty is created by "[a]ny affirmation of fact or promise . . . which relates to the goods and becomes part of the basis of the bargain. *Id.* § 2-313(1)(a).

Auction houses have held themselves out to the public as experts in art and sales, and have invited buyers to rely on their superior knowledge and experience. Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 509 (1988). Accordingly, these institutions should assume liability when they fail to exercise that expertise. Hoover, *supra* note 97, at 449.

At the present time, the express warranties embodied in catalogues and other communications can be disclaimed under U.C.C. § 2-316. However, this practice could be eliminated if the disclaimer of facts quoted in the written communications of an auction house were construed to be per se unreasonable, as this provision states that "negation or limitation is inoperative to the extent that such construction is unreasonable." U.C.C. § 2-316(1) (1994).

112. See N.Y. ARTS & CULT. AFF. LAW §§ 11.01-15.21 (McKinney 1984 & Supp. 1994); MICH. COMP. LAWS ANN. §§ 442.321-325 (West 1989). For a comprehensive discussion of these statutory provisions, see Gerstenblith, *supra* note 111, at 516-23.

113. See *supra* part III.A.1.

Convention itself.¹¹⁴ Since that time, the registry concept has gained support. In 1980, after acknowledging the severity of the current art market problems, one court voiced its support for this type of central registry, asserting: "An efficient registry of original works of art might better serve the interests of . . . owners of art, and bona fide purchasers than the law . . . with all of its uncertainties."¹¹⁵

The rapidly developing communications industry is the key to this comprehensive information source. Recent years have demonstrated that a registry could be maintained through computerized recordkeeping. Indeed, the Lasernet Theft Line, a private service, already allows subscribers to access an electronic art catalogue of works being sold at auctions worldwide.¹¹⁶ The enhanced reporting requirement of disclosure to a central registry would greatly increase the information base relating to illicit art, and thereby decrease the success of tainted transactions.

2. Warranty of Title

Significant headway can also be made by imposing greater liability on auction houses using a warranty rationale. Under the UCC, in a contract for the sale of goods, the seller warrants a good title.¹¹⁷ An auctioneer is only an agent of the seller, however, and therefore is typically not liable under this provision for defects in the title of goods conveyed.¹¹⁸ Even if an auctioneer could be held liable for title defects under the UCC, this liability may be avoided in three ways. First, under section 2-312(2), it may be expressly disclaimed through contract language. Second, under this same provision the warranty may be inapplicable if there are circumstances which give the buyer reason to know that the seller or auctioneer does not claim to pass valid title. Third, an auctioneer may avoid liability by disclosing the name of the actual seller.¹¹⁹

114. See UNESCO Convention, *supra* note 10, art. 11(1), 27 U.S.T. at 43, 832 U.N.T.S. at 242.

115. O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980) (citation omitted).

116. Collin, *supra* note 84, at 28.

117. U.C.C. § 2-312 (1994). The Code provides for warranties of title:

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

Id. § 2-312(1). The UCC also provides for specific instances where this warranty does not apply:

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

Id. § 2-312(2).

118. An exception occurs when the seller's identity is undisclosed. In this situation, the auctioneer is liable to the buyer. See, e.g., Universal C.I.T. Credit Corp. v. State Farm Mut. Auto. Ins. Co., 493 S.W.2d 385, 390 (Mo. Ct. App. 1973); Masoud v. Ban Credit Serv. Agency, 494 N.Y.S.2d 598, 600 (N.Y. App. Term. 1985).

119. U.C.C. § 312(2); see also Contreras, *supra* note 110, at 734.

In the specialized art auction market, it makes sense to alter traditional warranty law.¹²⁰ In many situations it is unwise to leave the warranty with an individual seller because that person may not have the expertise with which to determine the probability of a soiled title. In today's art-commodity market, many sellers have only recently become involved in the market and may not be trained in art. For this reason, they may not be able to easily ascertain whether the provenance of a work is suspect. International auction houses, on the other hand, employ art experts who can be expected to know which types of objects are suspicious. To account for this, auction houses should be held responsible for the warranty of title, despite their technical position as agent for the seller. In addition, liability should attach regardless of any counter-vailing contract language, or disclosures of the seller's identity.

The need to place liability on the auction house reflects the changing status of this entity within the art world. In essence, this change treats auctioneers as traditional dealers, who are UCC "sellers" for the purposes of liability. This is logical in light of the current trend of auction houses to purchase works and resell them on their own behalf,¹²¹ and the dealer's increasing use of traditional auction practices such as sale by consignment.¹²² In effect, there has been a breakdown in the practical distinctions between dealers and auction houses. Thus, the stricter degree of liability which has always burdened dealers should be imposed on auction houses as well.

The shifting of the auction house into a dealer-like entity suggests that precedents such as *Menzel v. List*¹²³ and *Porter v. Wertz*,¹²⁴ which were decided in the context of dealer-buyer relationships, should apply to auction houses as well. In the *Menzel* case, the court placed the full burden of investigation as to the state of the title to a Chagall painting on the dealer, despite the seller's argument that this would expose him to "potentially ruinous liability."¹²⁵ Under this rationale, auction houses should likewise be liable to bona fide purchasers for the value of any works successfully reclaimed by an original owner. Most importantly, the work's value should be defined as the market value at the time of the suit, not the purchase price.¹²⁶

In *Porter*, the court addressed the question of reasonable commercial standards in the context of indifference to provenance. The prevailing sentiment of the court was to reprimand the art merchant community for its

120. The 1987 New York regulations governing auctioneers recognize this by prohibiting an auction house from disclaiming the warranty of title and requiring reimbursement to the purchaser if the title is subsequently proved not to have been transferable. N.Y. CITY ADMIN. CODE § IV (McKinney 1987).

121. In this case the auction house would already be liable for the warranty of title under U.C.C. § 2-312. See *supra* note 117 and accompanying text.

122. Gerstenblith, *supra* note 111, at 556.

123. 298 N.Y.S.2d 979 (N.Y. 1969).

124. 416 N.Y.S.2d 254 (N.Y. App. Div. 1979), *aff'd on other grounds*, 439 N.Y.S.2d 105 (N.Y. 1981).

125. *Menzel*, 298 N.Y.S.2d at 983.

126. According to the president of Christie's, the present custom is to refund the entire purchase price to the buyer when an original owner successfully reclaims the work. Gerstenblith, *supra* note 111, at 528-29. This applies even in the situation where the auction house has relinquished the proceeds to the consignor who is unavailable for suit. *Id.* at 529. This appears to be a generous gesture on the part of the auction houses. In reality, with the constant increase in value of artworks, this settlement is potentially far smaller than the fair market value at the time the item is returned. *Id.* at 529-30.

penchant for secrecy and customary absence of inquiry into the titles of artwork. Indifference to the quality of title, the court maintained, is an unacceptable business practice.¹²⁷

In 1984, an action was brought in New York which could have clarified the required standard of care for an auction house researching a title.¹²⁸ The suit transpired when Sotheby's offered for sale sixty-two Hebrew books and manuscripts which had last been seen publicly in the library of a Jewish school in Nazi Germany.¹²⁹ The plaintiff argued that the consignor could not convey good title, and that Sotheby's had failed to disclose the questionable state of the title to prospective purchasers.¹³⁰ It was expected that this case would establish an auction house's standard of care when researching the quality of title of a prospective consignor, but the case was settled before trial.¹³¹

Despite this settlement, Sotheby's maintained the propriety of the sale. Their routine checking procedures included inquiries with the Federal Bureau of Investigation, a study of the stolen property lists and bills of sale, and general public knowledge about the history of the objects. In this case, Sotheby's also retained a German law firm to investigate German and postwar restitution law.¹³² In spite of these acts, however, the court granted a temporary restraining order after the sale to prevent the distribution of the auctioned items.¹³³ The court's action suggests that Sotheby's procedures may not have been adequate.¹³⁴

Ultimately, the imposition of liability on auction houses for warranties of title will aid in the battle against the illicit art trade. When auction houses bear the significant financial risk of guaranteeing the title to works, they will likely exercise considerable care to auction only legitimate objects. This cuts at the very heart of the illegal art trade. Without the opportunity to transfer art and antiquities through auction houses, the illicit trade will be less profitable for art thieves.

127. *Porter*, 416 N.Y.S.2d at 257; see also Hoover, *supra* note 97, at 445-49.

128. *Abrams v. Sotheby Parke-Bernet, Inc.*, No. 42255-84, slip op. at 1-2 (N.Y. Sup. Ct. Aug. 24, 1984).

129. Joette M. Blaustein, *Why Is This Sale Different from All Other Sales?* *Abrams v. Sotheby Parke-Bernet, Inc.*, 4 CARDOZO ARTS & ENT. L. REV. 139, 139 (1985).

130. Gerstenblith, *supra* note 111, at 526-27.

131. Stipulation and Order of Settlement, *Abrams*, No. 42255-84, slip op. at 1-2 (N.Y. Sup. Ct. July 16, 1985).

132. Gerstenblith, *supra* note 111, at 528.

133. *Id.* at 527 n.124.

134. When determining whether a prospective consignor has the requisite quality of title to works offered for sale, the customary practice of the auction house is to rely primarily on the contract, which is signed by the owner, and states that the owner has the right to consign the property, and that title and right to possession will pass to the purchaser free of all liens. In addition, auction houses rely on the publicity that follows the auctioning of major works of art. Finally, auction houses will research the pedigree of items offered for sale when the circumstances so warrant. *Id.* at 528.

CONCLUSION

The theft and illegal export of artworks and objects of cultural significance has become a problem of epidemic proportions. In the past, it was sufficient for museums and auction houses to adopt ameliorative policies regarding their treatment of items with suspect provenance or title. The time has come, however, for more rigorous measures to be mandated. If the illicit art market is to be successfully conquered, several steps must be taken. The present cooperation between nations has put the international community on the right path, but import and export restrictions alone are not enough. We have reached an era where additional regulations must be imposed and existing policies modified.

The key to a licit trade in art is the exchange of information. Accordingly, the ability to gain information about works of art must be improved. The time has passed when the transfer of art could be veiled in romantic mystique. Today, accurate information about provenance and title must be available if buyers, as well as sellers, are to successfully avoid the replevin suits associated with cultural patrimony.

To realize this goal, stringent regulations and standards should be placed on the pillars of the marketplace—museums and auction houses. To facilitate the gathering of information about stolen art around the world, each museum must report all transactions involving suspect works of art. Auction houses, too, must report such transactions.

To further facilitate the goal of frustrating the illicit art trade, the museum, as buyer, must use the utmost diligence when researching the title to proposed acquisitions. Similarly, auction houses must take responsibility for diligently researching the titles to all auctioned works. To ensure that practices by the auction houses do not become lax, the liability for warranties of title should be irrevocably placed on them. With museums and auction houses acting with an elevated level of truth-seeking and care in all cases, the cornerstones will be removed from the illicit art market. As a result, this market will cease to be profitable. The collapse of the illicit art trade itself will follow.¹³⁵

135. A lingering question remains: How will the increase in diligence requirements affect the domestic contemporary art market? While trends in the art market are difficult to predict accurately, the proposal set forth in this Note should not significantly alter the contemporary market. Contemporary works of art, as opposed to antiquities, are more likely to have a clear pedigree. *But see* O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980) (involving artwork of relatively recent origin).

It is true that the more stringent diligence requirements would apply to all art transactions, but the ready availability of information about recent works would make the additional burden minimal. Indeed, the more rigorous standards of diligence are likely to be a problem only in cases where the title is in dispute, in which case further investigation will help avoid any subsequent litigation. The proposal set forth here will burden the contemporary domestic art market slightly, but this is a reasonable tradeoff for a victory against the illicit trade in art.