ARTICLE

Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork

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I. INTRODUCTION

Stolen art inundates the legitimate market. Over the years, attorneys, estate executors, trustees, and legal commentators have advised art collectors to conduct due diligence investigations to determine whether valuable art objects have been stolen.[1] As one observer commented, "[t]he lax commercial conventions of the art trade have resulted in most stolen art being eventually owned by innocent good faith collectors."[2] Without a documented record of appropriate inquiries, legal ownership rights in mistakenly-acquired stolen materials cannot be secured.[3] The failure to perform due diligence investigations for valuable artworks can also expose unnecessarily the estates and trusts of collectors to potential liability.[4]

If property, including artwork, is stolen, the law in the United States prevents a purchaser from acquiring good title regardless of the purchaser's good faith and ignorance of the theft.[5] This common law

1. *See* Robert E. Madden, *Steps to Take When Stolen Art Work Is Found in an Estate*, 24 EST. P. 459, 464 (Dec. 1997); Peter Spero, *Asset Protection Aspects of Art*, 3 J. OF ASSET PROTECTION 58, 60 (Jan./Feb. 1998); Leigh-Alexandra Basha, *Stolen Art: What Estate Planners and Trustees Need to Know*, 137 TR. & EST. 60, 60 (Dec. 1998).

2. Spero, *supra* note 1, at 59; *see also* Madden, *supra* note 1, at 461, (asserting that "[s]tolen art saturates the U.S. market"); Spero, *supra* note 1, at 58 (stating that "[l]aw enforcement officials, legal commentators, and journalists consistently report that art objects collectively worth billions of dollars are stolen annually. Most stolen works eventually surface on the legitimate market and are acquired by unsuspecting collectors.").

3. Madden, *supra* note 1, at 464 (instructing that an appropriate due diligence investigation is necessary in order to raise the equitable defense of laches to a potential judicial claim of a former owner seeking to recover a stolen art object); Spero, *supra* note 1, at 61 (advising "'due diligence' to avoid liability.")

4. *See, e.g.*, Basha, *supra* note 1, at 60.

5. In Menzel v. List, 267 N.Y.S.2d 804, 819-20 (N.Y. Sup. Ct. 1966), the court stated that the "principle has been basic in the law that a thief conveys no title as against the true owner." The court commented that the law "stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors." This common law rule is set out in the Uniform Commercial Code at § 2-403, which provides that a mere possessor cannot convey good title.

rule, the English *nemo dat* rule, provides that one who purchases, no matter how innocently, from a thief, or all subsequent purchasers from the thief, acquires no title in the property. Title always remains with the true owner. Thus, in the absence of a limitations bar or a laches defense, a purchaser, whether an individual or an institution, would not acquire good title to valuable artwork if there was a thief anywhere in the chain of title. As a result, even innocent purchasers of stolen artwork are exposed indefinitely to claims of true owners. This potential liability mandates that potential buyers conduct due diligence investigations before acquiring valuable art and collectibles.

Those recommending due diligence investigations for valuable art objects simply are urging collectors and their professional advisors to comply with thirty years of judicial admonitions that persons who buy and sell expensive artworks on the international market take appropriate precautions against trading in stolen property.[6] Courts

6. *See, e.g.*, Menzel v. List, 246 N.E.2d 742, 745 (N.Y. 1969). The *Menzel* court dismissed the argument of an art dealer, in a suit by a former client seeking damages for selling a stolen painting, that recovery in an amount reflecting the current, appreciated value of the work would ruin him economically. The court counseled that "this 'potential ruin' is not beyond the control of the seller since he can take steps to ascertain the status of title so as to satisfy himself that he himself is getting good title." *Id.* In Porter v. Wertz, 416 N.Y.S.2d 254, 259 (N.Y. App. Div. 1979), *aff'd*, 421 N.E.2d 500 (N.Y. 1981), the court condemned the "fantasy land of marketing in the fine arts" and observed that "in an industry whose transactions cry out for verification of . . . title . . . it is deemed poor practice to probe." In addition, the court declared that "commercial indifference to ownership or the right to sell facilitates traffic in stolen art . . . and diminishes the integrity and increases the culpability of the apathetic merchant." In O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980), the court recited that "[t]he limited record before us provides a brief glimpse into the arcane world of sales of art, where paintings worth vast sums of money sometimes are bought without inquiry about their provenance." The court in Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fines Arts, Inc., 917 F.2d 278, 294 (7th Cir. 1990), cautioned that "those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means to protect themselves. Especially when circumstances are suspicious . . . prospective purchasers would do best to do more than make a few last-minute phone calls." In Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 427 (N.Y. 1991), the court commented that in "the New York City art market . . . illicit dealing in stolen merchandise is an industry all its own" and imposed an affirmative duty of investigation upon buyers of art in order to curtail illegal commerce. In Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, *15 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807 (3d Cir. 1996), the court stated that in buying a painting at auction without further investigation, the purchaser "took a gamble" that the work was stolen and "took the risk that an original owner could appear at any time."

Legal commentators have acknowledged the judicial censure of art market conventions. *See, e.g.*, Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective on Stemming the Illicit Trade in Art*, 70 IND. L.J. 985, 1006-7 (1995) (noting that in *Porter*, "[t]he prevailing sentiment of the court was to reprimand the art merchant community for its penchant for secrecy and customary absence of inquiry into the titles of artwork)"; Deborah Hoover, *Museum Collections at Risk: Standards of Diligence in Protecting Your Monet*, 20 J. ARTS MGMT. & L. 37, 40 (1990) (stating that "[t]he *O'Keeffe* court raised serious questions about practices in today's market in which valuable works of art can be bought and sold without even minimal inquiry into title.").

throughout the United States have made it clear that unless collectors can show they took such steps, they may not be positioned to defeat judicial claims brought by former owners seeking to recover stolen materials. Because the innocence or good faith of buyers is irrelevant to the question of title, the question that usually determines the outcome in stolen art cases is whether the claim is precluded by the applicable statute of limitations or the equitable doctrine of laches.[7]

Courts decide this question by "balancing the equities" between the parties.[8] They not only compare the precautions collectors observed against acquiring stolen art with the steps theft victims took to report their losses,[9] but also consider other factors that help determine what is fair and just under the circumstances.[10]

For several reasons, courts view this balance as initially tilted in favor of art theft victims. Courts have recognized that persons who suffer art looting often confront extraordinary obstacles in locating their property through the "labyrinth of the international art market."[11] Many years may elapse before they can identify what has been stolen or even determine that a theft has occurred.[12] Sometimes, as with casualties of the Holocaust, the task of locating looted art falls upon children, grandchildren, or other relatives.[13] Moreover, many

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7. *See, e.g.*, Madden, *supra* note 1, at 460; Basha, *supra* note 1, at 65 (asserting that the decisive question in most cases brought is "whether a claim [to recover a stolen art] object will be regarded as timely for statutes of limitations purposes.").

8. Madden, *supra* note 1, at 462; *see also* Steven Bibas, *The Case Against the Statute of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2448 (1994).

9. Madden, *supra* note 1, at 462.

10. All equitable determinations, of course, balance the interests of the parties and seek to achieve fairness and justice. *See, e.g.*, Estate of Herrera v. Farrel Constr. Co., 12 Cal. Rptr. 2d 751, 756 (Cal. Ct. App. 1992) (stating that "[a] hallmark of equity is comparing the relative merits and faults of parties with respect to the controversy."). In Marker v. Marker, 142 B.R. 734, 742 (Bankr. W.D. Pa. 1992), the court observed that "[e]quity is a flexible concept which involves rejection of rigid rules to accomplish what is fair and just in a particular situation."

11. Madden, *supra* note 1, at 460. *See also* Hoelzer v. City of Stamford, 933 F.2d 1131, 1138 (2d Cir. 1991) (observing that "[b]ecause [stolen] art work can be both extremely valuable and highly marketable to an underground clientele, the difficulties original owners face in recovering missing art abound.").

12. For example, in Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1378-79 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990), a Greek-Orthodox church in Cyprus, in an area under the control of Turkish military forces, did not learn that priceless Byzantine mosaics had been looted from it until perhaps three years after the theft had occurred.

13. For example, Chicago-based pharmaceutical heir Daniel Searle recently was sued by grandchildren of a couple who had perished in the Holocaust, seeking to reclaim a Degas painting that the Nazis had plundered from their grandparents. The case was to be settled with Searle agreeing to donate the painting to the Chicago Art Institute. Terms of the settlement agreement required the Art Institute to have the Degas appraised and to pay the heirs one-half of such appraised value. The Wall Street Journal reported in January 1999 that a settlement of the con-

theft victims lack the resources and art world sophistication to conduct an exhaustive and sustained search. They rarely enjoy the same wealth, access to expertise, and investigative capabilities as art market patrons. Accordingly, courts have placed the initial burden on defendants in possession of stolen artworks. Unless they can show that they diligently searched to determine whether the disputed object may have been stolen, they may not be able to preclude as untimely a judicial action brought to reclaim the object. While ownership of personal property can never be made as secure as title to realty,[14] and no comprehensive registry system for stolen art is available,[15] there are numerous discrete due diligence investigative steps that prospective buyers and current owners of valuable art objects can take to safeguard their legal ownership rights in stolen artworks.

This Article will explore the concept of "due diligence investigation" for valuable art objects and the considerations that properly frame the scope of such an examination. The Article represents that because, as between a dispossessed owner and a good faith purchaser of artworks, equities are balanced in favor of the dispossessed owner, current law has imposed a higher standard of diligence on the purchaser. Thus, the Article will underscore the need for purchasers and collectors to conduct appropriate and comprehensive investigations into title of artworks they acquire or already possess and will demonstrate that a due diligence investigation is the only means by which a potential purchaser can be assured of acquiring good title to valuable artwork. It will demonstrate how existing law entailing an affirmative duty of investigation for buyers and sellers of expensive artworks helps curtail international art theft by encouraging collectors and their agents to use all resources that have proven effective and that are reasonably accessible for identifying stolen art. These resources include

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troversy appeared to be "unraveling." Lee Rosenbaum, *Nazi Loot Claims: Art with a History*, WALL ST. J., January 14, 1999, at A18.

14. As one commentator observed, "[t]itle to personal property can never be as securely documented as title to real estate. Unlike real property, personal property is movable, thereby frustrating private means of tracing title and the origins of such merchandise." Robin M. Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 21 (1993) (citation omitted).

15. As the court in Morgold, Inc. v. Keeler, 891 F. Supp. 1361, 1365 (N.D. Cal. 1995), explained, no registration system exists that allows the transfer of title to artworks to be documented, and valuable art objects occupy the same legal position as other items of tangible personalty:

> There is no statutory system of registration or recordation for documenting and transferring title to works of art. There is nothing comparable to recording statutes for land. Indeed, art is given even less legal dignity than automobiles, for which there are statutory systems for recording ownership and transferring title. Works of art, regardless of their uniqueness and possible value, are relegated to the same legal status as ordinary chattels.

stolen art databases, relevant experts, institutions with prominent collections of a particular artist, and the applicable catalogue raisonne, if available. Finally, this Article will identify the discrete inquiries courts and commentators have prescribed to ensure that art objects have not been reported, nor are reasonably discoverable, as having been stolen, and will discuss the rationale for each.

II. SOURCE OF THE "DUE DILIGENCE" INVESTIGATION

The equitable foundation of the due diligence obligation and its corresponding sensitivity to all surrounding facts and circumstances, as well as to public policy concerns in stolen art cases, invite courts to impose a demanding, yet fair and practical, standard upon the U.S. museums and private collectors that drive the international market. This standard is fair both to theft victims and to good faith purchasers. It rewards comprehensive investigation and promotes commercial certainty. Thus, the due diligence responsibility reconciles, in the most equitable and practical manner, the many hardships confronting victims of international art theft with the need of the U.S. art market for an appropriate title clearing mechanism.

Further, the investigative criterion for expensive artworks coincides with the formal fiduciary responsibilities of both tax-exempt U.S. museums as public trustees and the attorneys and institutional fiduciaries that counsel wealthy collectors in estate, investment, and trust planning. Valuable art objects necessarily play important roles in the estate and investment plans of wealthy collectors.[16] Recent articles in professional journals have identified works of art as appropriate alternatives to stocks and bonds in investment portfolios.[17] Leading estate planning and asset protection attorneys now are stressing the importance of ensuring that clients have secure legal title to artworks in their possession.[18] The professional capabilities of estate planners, executors and institutional trustees, their formal fiduciary responsibilities to safeguard their clients' property, and the precautions commonly employed to protect assets of comparable value provide an

16. For a discussion of the roles valuable art objects can play in estate and investment planning, see, e.g., Anne M. Carley, *Planning When Art and Collectibles Are Assets of an Estate*, 21 EST. P. 219 (1994), and Genevieve L. Fraiman, *The Lifetime Disposition of Fine Art*, 4 PROB. & PROP. 14 (Nov./Dec. 1990).

17. *See* Jane E. Curry, *Art As An Alternative Investment*, 137 TR. & EST. 25 (October 1998); *see also* Warren P. Weitman, Jr., *The Changing Collectibles Market*, 128 TR. & EST. 10, 16 (July 1989); Franklin Feldman, *Commodities and Art: A Delicate Relationship*, 10 COLUM.-VLA J.L. & Arts 197, 202 (1986).

18. *See* Madden, *supra* note 1, at 460; Spero, *supra* note 1, at 61; Basha, *supra* note 1, at 62.

appropriate context for gauging whether an adequate due diligence investigation has been conducted.

Due diligence investigations are imperative under the equitable balancing tests that courts have created for determining whether claims to recover stolen art objects will be entertained for statute of limitations purposes. The two equitable balancing tests are the "demand and refusal/laches" standard applied in New York and the discovery rule that governs actions brought elsewhere.[19]

Courts apply these tests when a statute of limitations defense or the equitable doctrine of laches is asserted in a lawsuit brought to reclaim a stolen item of personal property. Affirmative defenses that will time-bar or otherwise negate such lawsuits are essential in protecting the legal ownership rights and commercial expectations of good faith collectors. As previously noted, under substantive U.S. law, legal title to stolen property never can be obtained, regardless of either how many times a stolen item is bought, sold, or donated, or of the innocence and good faith of those who acquire it.[20] This black letter statement of the law is not entirely accurate, however. When a victim's legal claim to recover stolen property has been vitiated by the statute of limitations or the doctrine of laches, the ownership rights of the current possessor have been made secure. If defendants in mistaken possession of stolen art were unable to thwart judicial challenges to their ownership rights as untimely or otherwise inequitable, they would remain exposed perpetually to possible judicial claims of theft victims. Thus, statutes of limitation are vital defenses employed by purchasers of stolen art.[21]

The question that usually determines whether a court will entertain a claim to recover a stolen item of personal property and, thus, whether the ownership rights of the current possessor will be disturbed, is when the claim arose or "accrued" for statutes of limitations purposes. Courts regard a cause of action as having arisen or "accrued" for statute of limitations purposes when everything necessary to establish the liability of the defendant has taken place.[22]

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19. *See* Bibas, *supra* note 8, at 2446-48; Madden, *supra* note 1, at 462; Spero, *supra* note 1, at 59.

20. *See* Naftzger v. American Numismatic Society, 49 Cal. Rptr. 2d 784, 791 (Cal. Ct. App. 2d 1996); O'Keeffe v. Snyder, 416 A.2d 872 867 (N.J. 1980) (instructing that a thief cannot obtain good title to a stolen art object and cannot "transfer good title to others, regardless of their good faith and ignorance of the theft.").

21. Sydney M. Drum, DeWeerth v. Baldinger: *Making New York a Haven for Stolen Art?* 64 N.Y.U. L. REV. 909, 913 (1989).

22. *See, e.g.*, John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1129 n.29 (1980) (stating that "[a] cause of action comes into existence and thereby accrues when all the elements necessary to

Statutes of limitation generally do not prescribe when this requirement has been satisfied, however, but rather allow courts considerable leeway to make this determination.

Courts in the United States consistently have invoked principles of equity when exercising their discretion to decide whether a claim for the recovery of a stolen work of art has properly accrued. To answer this question, courts consider all the surrounding facts and circumstances of the case and attempt to "balance the equities" between the parties. Through this equitable balance, courts attempt to reconcile the concern that art theft victims receive adequate opportunities to locate and reclaim their stolen property with the goals of repose that statutes of limitation are designed to achieve.[23]

Courts have developed two conceptually distinct, although practically equivalent, approaches to this issue. While these approaches differ in how they assign the initial burden, both are grounded in equity, both consider all the attending facts and circumstances, and both require defendants in mistaken possession of stolen art to show that they investigated the history of the disputed item in a reasonable manner. As one commentator concluded, "Despite the profusion of labels, the laches, due diligence, and discovery rules are similar if not equivalent. These flexible balancing tests weigh the owner's diligence and delay, the buyer's innocence and reliance, the existence of prejudice, and other equitable factors."[24]

A. *Due Diligence Investigation for Purchasers Under New York Law*

Courts in New York, the center of the art market in the United States, have imposed an affirmative obligation upon buyers and collectors of art to investigate the background of potentially stolen materials in their possession.[25] This responsibility assumes special

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establish . . . liability occur" (quoting Comment, *The Evolution of Illinois Tort Statutes of Limitation: Where Are We Going and Why?* 53 CHI.-KENT L. REV. 673, 677 (1977))).

23. Commentators frequently identify the following as the primary goals of statutes of limitations in stolen art cases:

1) encouraging repose;
2) avoiding suits brought after testimony and other evidence necessary to establish a claim or defense is no longer available;
(3) increasing the certainty of ownership;
(4) facilitating commercial transactions by protecting the bona fide purchaser; and
(5) promoting diligence by theft victims in locating and reclaiming their stolen property by punishing unreasonably delay.

See, e.g., Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 131 (1989); Bibas, *supra* note 8, at 2451; Petrovich, *supra* note 22, at 1127.

24. Bibas, *supra* note 8, at 2448.

25. In Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991), New York's highest court rejected the contention of a collector that the judicial claim of a museum to

meaning in the context of the distinctive law of conversion that applies in New York, and perhaps two or three other states.[26]

Conversion is the "intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may be justly required to pay the other the full value of the chattel."[27] In most states, conversion occurs when a good-faith purchaser simply takes possession of stolen property.[28] "The intent required is not necessarily a matter of conscious wrongdoing," explain Professors Prosser and Keeton.[29] Rather, "[i]t is . . . an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights."[30]

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recover a painting stolen some twenty years earlier was barred by New York's three year statute of limitations for conversion and replevin, even though the museum had done nothing in the interim to locate and reclaim the painting other than search its own files. *Id.* at 430. The court repudiated the notion that New York's statute of limitations contained an implicit "discovery rule" that required art theft victims to search diligently for their property "if they wanted to preserve their right to pursue a cause of action in replevin." *Id.* at 431.

The court maintained that although the claim of the museum was not barred by the applicable statute of limitations, it nonetheless could be precluded by the equitable doctrine of laches. This defense, the court instructed, would require the defendant to show that she was prejudiced by the museum's lengthy delay, and placed the responsibility for investigating the background of a work upon the buyer. *Id.* at 431. "[T]he better rule," the court explained, "places the burden of investigating . . . a work of art on the potential purchaser." *Id.*

Finding nothing in the record to demonstrate that either party was entitled to judgment as a matter of law on the defendant's laches defense, the court remanded the proceeding for further fact finding at trial. *Id.*

26. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 15, at 94 n.50 (5th ed. 1984) (observing that "[t]he courts of New York, and those of two or three other states" have held that the mere possession of stolen property "is not in itself a sufficiently serious interference with the owner's rights to amount to conversion, so that the purchaser is liable only when he refuses to return the goods on demand."); RESTATEMENT (SECOND) TORTS § 229, cmt. h (1965) (instructing that "[i]n a small minority of jurisdictions, the bona fide purchaser of stolen goods is held not to be in itself a sufficiently serious interference with the rights of the owner to amount to conversion until he refuses to surrender the goods to the owner on demand.").

27. *See* RESTATEMENT (SECOND) TORTS § 222A (1965). *See also* KEETON ET AL., *supra* note 26, § 15, at 90 (instructing that "the tort of conversion has been confined to those major interferences with the chattel, or with the plaintiff's rights in it, which are so serious, and so important, as to justify the forced judicial sale to the defendant which is the distinguishing feature of the action.").

28. *See, e.g.*, KEETON ET AL., *supra* note 26, § 15, at 94 (stating that "the great weight of authority regards the mere acquisition of the goods under such circumstances as in itself an assertion of an adverse claim, so detrimental to the dominion of the owner that it completes the tort . . . ."); *see also* DeWeerth v. Baldinger, 836 F.2d 103, 109 (2d Cir. 1987); Stephen L. Foutty, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fines Arts, Inc.: *Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 VAND L. REV. 1839, 1843 (1990).

29. KEETON ET AL., *supra* note 26, at 92.

30. *Id.*

Under New York law, however, good faith buyers of stolen property do not become liable for conversion until they refuse the demand of the true owner to return the item. As the Second Circuit Court of Appeals explained in *Kunstsammlungen zu Weimar v. Elicofon*,[31] "[u]nder New York law, an innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner's demand of their return. Until the refusal, the purchaser is considered to be in lawful possession."[32] The refusal of such demand is a substantive element of the tort of conversion under New York law, so that a cause of action for conversion does not accrue, and the statute of limitations does not begin to run, until the requisite demand has been refused.[33] Because the demand is "an essential element of the plaintiff's cause of action . . . without satisfaction of the demand requirement, the plaintiff simply has no right to relief."[34]

The rationale for the New York rule is that "[p]ossession by a bona fide purchaser is not in itself a sufficiently serious interference with the owner's rights to amount to a conversion"[35] and that until the possessor repudiates the owner's demand for the return of the item, no legal wrong has occurred. The rule is intended to give persons in mistaken possession of stolen property an opportunity to rectify their good-faith mistakes before they incur legal liability.[36] "The demand [and refusal] rule protects the innocent purchaser while allowing for eventual recovery for the theft victim: the innocent purchaser is shielded from tortious liability, and the true owner's claim is not extinguished by the passage of time."[37]

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31. 678 F.2d 1150 (2d Cir. 1982).

32. *Id.* at 1161.

33. *Id. See also* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991), in which the court stated that "[t]he rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it. . . ." In Menzel v. List, 267 N.Y.S.2d 804, 809 (N.Y. Sup. Ct. 1966), the court declared 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 upon demand."

34. VINCENT C. ALEXANDER, SUPPLEMENTAL PRACTICE COMMENTARIES TO N.Y. CIV. PROC. § 206, at 96 (1996) (computing periods of limitation in particular actions).

35. Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 848 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

36. As the court explained long ago in Gillet v. Roberts, 57 N.Y. 28, 34 (1874):

> The rule is a reasonable and just one, that an innocent purchaser of stolen property from a wrongdoer shall first be informed of the defect in his title and have an opportunity to deliver the property to the true owner before he shall be made liable as a tortfeasor for wrongful conversion.

37. Elisa B. Pollack, *Toward a New Standard in Art Recovery Cases: New York's* Solomon R. Guggenheim Foundation v. Lubell *and the Rejection of Due Diligence*, 16 COLUM.-VLA J.L. & ARTS 361, 362 (1992).

In *Solomon R. Guggenheim Foundation v. Lubell*,[38] the Court of Appeals of New York reiterated the principle that the mere passage of time does not expunge the ownership rights of a theft victim under New York law. In *Lubell*, the Guggenheim Museum brought a replevin action against a private collector (Mrs. Lubell), seeking to recover a Chagall painting that a museum employee had stolen some twenty years earlier. Mrs. Lubell and her late husband bought the painting in 1967 from the reputable Robert Elkon Gallery in Manhattan for $17,000, and twice had displayed it publicly.[39] The museum had done nothing since the theft to search for the painting or to notify the art world or potentially affected persons. "It is undisputed," the court observed, "that the Guggenheim did not inform other museums, galleries or artistic organizations of the theft, and additionally did not notify the New York City Police, the FBI, Interpol or any other law enforcement authorities."[40] The painting was located when a transparency was taken to Sotheby's for an estimate and identified by an employee who formerly had worked at the museum.[41] Mrs. Lubell argued that the action of the museum was barred by New York's three year statute of limitations for the recovery of chattels.[42] The trial court awarded Mrs. Lubell summary judgment on this defense, reasoning that an implicit discovery rule governs the demand and refusal principle of conversion, so that "a property owner has an obligation to use reasonable efforts to locate its missing property" to ensure that the demand is not unreasonably delayed.[43] The Appellate Division, however, refused to recognize the statute of limitations defense and ruled that the trial court had erred in concluding that "delay alone can make a replevin action untimely."[44]

The Court of Appeals affirmed the decision of the Appellate Division and made it clear that despite the lengthy delay of the museum in prosecuting its claim, Mrs. Lubell's statute of limitations defense failed. The court reaffirmed that under New York law, "a cause of action for replevin against a good faith purchaser of a stolen chattel accrues when the true owner makes demand for the return of the chattel and the person in possession . . . refuses to return it."[45] The court declared that "there is no reason to obscure its straightfor-

38. 569 N.E.2d 426 (N.Y. 1991). For a summary discussion of the *Lubell* decision, see note 25, *supra*.

39. *Lubell*, 569 N.E.2d at 428.

40. *Id.*

41. *Id.*

42. *Id.* at 429 (referring to N.Y. C.P.L.R. § 214(3) (McKinney 1996)).

43. *Id.* at 429.

44. *Id.*

45. *Id.*

ward protection of true owners by creating a duty of reasonable diligence" and concluded that it "would not be prudent to extend the case law and impose the additional duty of diligence before the true owner has reason to know where its missing chattel is to be found."[46]

Most importantly, the court underscored the impossibility of prospectively formulating specific reporting requirements that all art theft victims must follow to preserve their judicial remedies.[47] The court opined that "it would be particularly inappropriate for this Court to spell out arbitrary rules of conduct that all true owners of stolen art work would have to follow to the letter if they wanted to preserve their right to pursue a cause of action in replevin."[48] The value of the object and identity of the theft victims should determine the steps taken to recover stolen art.[49] "[I]t would be difficult, if not impossible to craft a reasonable diligence requirement that could take into account all of these variables and that would not unduly burden the true owner. [Art theft victims] should not be expected to behave in the same way and should not be held to a common standard."[50] The court declared that by encouraging investigation into artworks, the affirmative defense of laches was better calculated than the discovery rule to reform the lax commercial practices of the art market and to prevent New York from becoming a haven for stolen art traffickers.[51] "This shifting of the burden onto the wronged owner is inappropriate," the court stated. "In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating . . . a work of art on the potential purchaser."[52]

The court made it clear that even though Mrs. Lubell's statute of limitations defense was not viable, she still might defeat the museum's claim with her affirmative defense of laches. The court stressed that it was not validating the delay and lack of diligence of the museum in searching for the stolen painting or in prosecuting its claim: "Our holding today should not be seen as either sanctioning the museum's

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 428-29. As the U.S. Court of Appeals for the Second Circuit observed in DeWeerth v. Baldinger, 804 F. Supp. 539, 548 (S.D.N.Y. 1992), *rev'd on other grounds*, 38 F.3d 1266 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 512 (1994), the court in *Lubell* announced its concern with formulating principles in stolen art cases that would help curtail international trafficking in stolen art and protect the commercial integrity of the New York City art market: "[t]he *Guggenheim* court grounded its decision on a range of policy considerations growing out of its concern that any legal rules established by the courts be cognizant of New York's role as a world art center. . . ."
52. *Lubell*, 569 N.E.2d at 431.

conduct or suggesting that the museum's conduct is no longer an issue in this case."[53] However, "it [was] impossible to conclude from the facts of this case that the museum's conduct was unreasonable as a matter of law." The court directed that Mrs. Lubell's "contention that the museum did not exercise reasonable diligence in locating the painting be considered by the trial judge in the context of her laches defense."[54] This defense, the court decided, would make the conduct of both parties relevant and would require Mrs. Lubell to show that she was injured or prejudiced by the museum's delay.[55] The Court of Appeals remanded the case, which settled on the first day of trial. Mrs. Lubell and two third party art dealers agreed to pay the museum $212,000 in damages, an amount reflecting the current, appreciated value of the work, in exchange for title to the painting.[56]

The *Lubell* decision contains several lessons for art buyers and collectors, as well as their legal counsel. First, in New York, regardless of how long theft victims delay their search, they do not forfeit their judicial remedies. As the appellate court in *Lubell* declared, it is "plain that the relative possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long."[57] Accordingly, "[a]ny failure of the owner to exercise due diligence in locating the chattel after discovering its disappearance is not a factor in determining the accrual of the statute of limitations."[58]

Second, *Lubell* makes the conduct of both parties relevant to the final ownership decision and scrutinizes the steps the person in possession of the disputed item took to avoid acquiring stolen property. As the appellate court in *Lubell* instructed, the "defendant's vigilance is as much an issue as plaintiff's diligence."[59] Concurring in an application of the *Lubell* rule, a judge on the U.S. Court of Appeals explained that "[t]he result of this decision is to permit a court . . . to consider and balance all the equities, including the reasonableness of the efforts the theft victim made to locate the property and the reasonableness of the

53. *Id.*

54. *Id.*

55. *Id.*

56. Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 59 n.56 (1995) (citing Andrew Decker, *Guggenheim and Collector Resolve Suit Over Chagall Gouche*, ARTNEWSLETTER, Jan. 25, 1994, at 4-6).

57. Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 622 (N.Y. App. Div. 1990).

58. ALEXANDER, *supra* note 34, at 93.

59. 550 N.Y.S.2d at 623.

possessor's basis for believing that it was entitled to obtain and keep the property."[60]

Third, *Lubell* imposes a burden on persons in mistaken possession of stolen art to show that they took reasonable precautions to avoid acquiring stolen property. This responsibility translates into an affirmative due diligence investigation obligation. As one commentator observed, "[b]y making laches the applicable defense, the court forced the burden of proof onto the . . . purchaser to document that he had made due diligence efforts prior to purchase."[61]

Finally, *Lubell* holds that to benefit from any delay by art theft victims in prosecuting their claims, persons in mistaken possession of stolen art must show that they were injured or prejudiced by such neglect. As the supplemental commentaries to the New York statute of limitations for replevin actions instruct, "[t]o prevail on the laches defense . . . the possessor must be prepared not only to demonstrate a lack of diligence in the owner's efforts to solve the theft but also to show how this lack of diligence prejudiced the possessor."[62]

Many jurists and legal commentators long have favored making the conduct of defendants in stolen art cases relevant by requiring them to investigate materials in their possession. In 1980, eleven years before *Lubell* was decided, Justice Handler, dissenting in the landmark New Jersey case *O'Keeffe v. Snyder*,[63] complained that the majority decision failed to consider the behavior of the defendants. In *O'Keeffe*, the New Jersey Supreme Court held that legal ownership to stolen chattels no longer could be acquired through the doctrine of adverse possession.[64] Rather, the court decreed, the rights of theft victims to reclaim stolen personalty would be governed by a discovery rule.[65] The discovery rule, the court explained, requires theft victims

60. Hoelzer v. City of Stamford, 933 F.2d 1131, 1139 (2d Cir. 1991) (Newman, J., concurring).

61. Hans Kennon, *Take a Picture, It May Last Longer if* Guggenheim *Becomes the Law of the Land: The Repatriation of Fine Art*, 8 ST. THOMAS L. REV. 373, 405-06 (1996). *See also* Pollack, *supra* note 37, at 378, stating that "[u]nder the *Guggenheim* standard, the true owner may have failed to mount what would be termed a diligent search . . . but may nevertheless be able to recover based upon the possessor's negligent behavior in ascertaining title."

62. ALEXANDER, *supra* note 34, at 94. Other commentators have underscored the need for collectors in possession of stolen art to demonstrate that they were injured by the plaintiff's delay. *See, e.g.*, Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art—The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75, 87 (1993-94) (commenting on the *Lubell* decision that "[i]t is clear . . . that delay, even if unreasonably long, will be insufficient by itself to defeat an owner's claim. Purchasers presumably will need to demonstrate detrimental reliance and change of position resulting from the delay in order to establish a successful defense of laches.").

63. 416 A.2d 862 (N.J. 1980).

64. *O'Keeffe*, 416 A.2d at 874.

65. *Id.* at 870.

to show that they took reasonable steps to locate and recover their stolen property in order to suspend the running of the applicable limitation period: "[t]he rule permits [one] who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession."[66] Justice Handler objected that "[n]o similar duty of diligence or vigilance, however, is placed upon the subsequent receiver or possessor, who, innocently or not, has actually trafficked in stolen art."[67] He saw "no justification for removing that burden from the defendant, who may assert equities in his favor to establish his entitlement to the artwork."[68]

Commentators have recognized the salutary policies promoted by a legal rule that requires buyers to take precautions against acquiring stolen property. "[I]t is surely true," one scholar observed, "that a legal rule that threatens the repossession of some stolen property . . . would influence the behavior of some [buyers] and ultimately the profitability of thievery."[69] *Lubell* has been applauded for encouraging wealthy art buyers and collectors to take steps to avoid acquiring stolen art. According to one authority, "the demand rule followed by the New York Court of Appeals in *Guggenheim* is the soundest policy yet applied in stolen art cases. This doctrine best balances the respective rights of the parties and delegates most equitably the obligations of both innocent purchasers and true owners."[70]

While *Lubell* offers many benefits to art theft victims, collectors, dealers, auction houses, and the international art market, it no doubt threatens those who neglect to take appropriate precautions against acquiring or holding stolen art with potentially indefinite liability. Apologists for institutional collectors have protested that "[a]s a result of this decision, New York effectively has no statute of limitations for the recovery of stolen property, and . . . purchasers are perpetually at risk of a claim of theft by a former owner."[71] Others have lamented that *Lubell* "leaves the buyer of stolen art in a position of uncertainty for an indefinite period, until the original owner discovers that the

66. *Id.* at 872.

67. *Id.* at 878 (Handler, J., dissenting).

68. *Id.* at 885.

69. Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEG. STUD. 43, 46 (1987).

70. Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J. 337, 374 (1993). As the former Executive Director of the International Foundation for Art Research, Dr. Constance Lowenthal, stated, the *Lubell* decision "means that people will be less likely to buy stolen art . . . and more likely to ask questions." *Id.* at 281 (quoting Sam Verhovel, *Guggenheim May Sue for Chagall*, N.Y. TIMES, Feb. 14, 1991, at C7).

71. Hawkins et al., *supra* note 56, at 51.

buyer has it,"[72] and that "*Lubell* may have opened the door to suits by foreign owners for the recovery of artworks and antiquities in United States museums, galleries and private collections."[73] Although justified, these concerns will become manifest only if buyers and collectors continue to fail to investigate the background of objects they acquire on the art market. While *Lubell* requires buyers and collectors to take informed precautions against acquiring stolen art, it rewards those who discharge their responsibilities with repose and clear title.[74]

Despite these complaints, the *Lubell* decision is sound for the following reasons: (1) it coheres with the common law principle that ownership rights in stolen property cannot be conveyed; (2) it is consonant with the current political climate recognizing the rights of victims of international art theft to locate and recover their stolen property;[75] (3) it helps inhibit the exploding international commerce in stolen art by encouraging art buyers and collectors to take greater precautions; (4) it fairly allocates duties of inquiry and investigation to both parties in stolen art cases, finally recognizing the capabilities of collectors to take meaningful steps to avoid acquiring stolen art; and, (5) it offers potential for clarity and certainty by inviting courts and legal commentators to identify specific due diligence investigative steps that should enable persons in mistaken possession of stolen art to protect their legal ownership rights.[76] Moreover, as discussed *infra*, the *Lubell* decision protects the commercial expectations of buyers and collectors if they are supported by reasonable "due diligence" investigations, and provides an essential "title clearing" mechanism for the New York City art market.[77]

B. Due Diligence Investigation Under the Discovery Rule

Buyers and collectors of art also must conduct due diligence investigations to protect their legal ownership rights in potentially

72. Constance Lowenthal, *The Role of IFAR and the Art Loss Register in the Repatriation of Cultural Property*, 29 U.B.C. L. REV. 310, 312 (Special Issue 1995).

73. Montagu, *supra* note 62, at 86.

74. Kennon, *supra* note 61, at 406.

75. For example, the U.S. State Department hosted the Washington Conference on Holocaust-Era Assets in December 1998, which was attended by representatives of over forty governments to assist nations in resolving issues related to artworks looted during World War II.

76. Hayworth, *supra* note 70, at 378-79.

77. The goals of fostering commercial certainty and creating an appropriate title clearing vehicle are, of course, paramount for any market. *See, e.g.*, Madden, *supra* note 1, at 459 (stating that "[f]undamental objectives of the Uniform Commercial Code (U.C.C.) are to expunge hidden ownership claims and to promote reasonable commercial expectations so that trade may be encouraged."); Gerstenblith, *supra* note 23, at 154 (proposing that "the purpose of the doctrine of adverse possession of personal property is not only to eliminate stale claims . . . but, perhaps more significantly, to promote certainty and ease of transfer in commercial contexts.").

stolen materials in the majority of states that apply the discovery rule to claims for the recovery of stolen chattels. The need for due diligence investigations under the discovery rule, similarly, is instructed by the substantive law of conversion that applies in these states. In most states an act of conversion is completed when stolen property is merely acquired,[78] so that a buyer of a stolen art object commits conversion immediately upon taking possession of the item.[79] Accordingly, in most states "a sale and delivery of the plaintiff's goods to another . . . will constitute a conversion," and "[i]t is no answer that the defendant acted in good faith, in the honest belief that the delivery was lawful, proper or authorized."[80] "The rule is generally applied where, in addition to the act of purchasing the property, the purchaser takes possession of the goods" and holds them to his or her own use.[81]

Unlike New York, in most states a cause of action for conversion accrues and the applicable statute of limitations begins to run when the good-faith purchaser acquires the stolen property.[82] "To avoid harsh results from [a] mechanical application of the statute, the courts have developed a concept known as the discovery rule."[83] As the New Jersey Supreme Court explained in *O'Keeffe*,[84] "[t]he discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by the exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of the cause of action."[85] Moreover, as the court instructed in *Erisoty v. Rizik*,[86] "[i]n the stolen art context, such facts include the 'identity of the possessor'" of the stolen property.[87]

The discovery rule is "essentially a principle of equity, the purpose of which is to mitigate unjust results that otherwise might flow from a strict adherence to a rule of law."[88] The New Jersey Supreme Court has stated that "[p]roperly interpreted, the discovery rule becomes a vehicle for transporting equitable considerations into the

78. *See supra* page 640 and accompanying notes.

79. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 229 (1965) ("Conversion by Receiving Possession in Consummation of Transaction").

80. KEETON ET AL., *supra* note 26, § 15, at 96-97.

81. 18 AM. JUR. 2D *Conversion* § 34, at 167 (1985).

82. Sarah S. Conley, *International Art Theft*, 13 WIS. INT'L L.J. 493, 504 (1995). *See also* Foutty, *supra* note 28, at 1843 (observing that under the majority rule of conversion, "the limitations period begins to run [upon] wrongful possession.").

83. O'Keeffe v. Snyder, 416 A.2d 862, 869 (N.J. 1980).

84. *Id.*

85. *Id.* at 869.

86. No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807 (3d Cir. 1996).

87. *Id.* at *29.

88. *O'Keeffe*, 416 A.2d at 869.

statute of limitations for replevin."[89] The discovery rule is invoked "'whenever equity and justice have seemed to call for its application.'"[90]

Courts and commentators consistently have recognized that the discovery rule enables courts to consider a broad range of equitable factors, including public policy concerns, in deciding whether to entertain a particular claim. The discovery rule allows the court to consider all aspects of a case relevant to the determination of accrual, and to arrive at a result that is fair and consistent with statute of limitations policy goals.[91] The court in *Erisoty* related that "[t]he discovery rule is 'highly fact sensitive' . . . and flexible; it thus permits the court to consider the relative equities of the rival claimants to the art work."[92] The discovery rule explicitly inquires whether the defendant has been prejudiced by any delay of the plaintiff in prosecuting the claim.[93]

The discovery rule necessarily entails a "balancing of the equities" of the claimants. "[I]n each case the equitable claims of opposing parties must be identified, evaluated, and weighed . . . to ascertain whether the cause of action may be brought."[94] Thus, "[c]ourts have claimed that the discovery rule functions as a balancing test between the defendant's legitimate aims of repose and the hardship to the plaintiff of having a claim barred" before having a reasonable opportunity to learn of the claim.[95]

The equitable foundation of the discovery rule dictates that the investigative responsibilities for art theft victims necessarily will depend upon the particular circumstances of each case. As the *Erisoty* court explained, "'the meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property.'"[96] Another court has suggested that whether a theft victim has complied with the discovery rule in a given instance depends upon "the relevant standard in the particular community affected."[97]

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89. *Id.* at 872.

90. Paula A. Franzese, *Georgia on My Mind—Reflections on* O'Keeffe v. Snyder, 19 SETON HALL L. REV. 1, 8 (1989) (citing Lopez v. Sawyer, 300 A.2d 563, 566 (N.J. 1973)).

91. Petrovich, *supra* note 22, at 1153.

92. *Erisoty*, 1995 U.S. Dist. LEXIS 2096, *34.

93. *See* Lopez v. Sawyer, 300 A.2d 563, 568 (N.J. 1973) (identifying the question "whether the delay may be said to have peculiarly or unusually prejudiced the defendant" as one of several factors appropriately considered in applying the discovery rule).

94. *Id.* at 567.

95. Leah E. Eisen, Commentary, *The Missing Piece: A Discussion of Theft, Statutes or Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIME 1067, 1081 (1991).

96. *Erisoty*, 1995 U.S. Dist. LEXIS 2096, *34.

97. Society of California Pioneers v. Baker, 50 Cal. Rptr. 2d 865, 873 (Cal. Ct. App. 1996).

Many different factors will determine the appropriate scope of investigation for the owner of a stolen art object. However, authorities largely agree that institutional owners, such as museums, should be required to do more than individual theft victims to locate and recover their stolen property.[98] As one commentator stated, "even if an individual plaintiff is wealthy, he or she may not have art-world contacts equal to those of institutional [defendants]."[99] Other considerations that illuminate the meaning of due diligence in a given instance "include the original owner's specialized knowledge, resources, and experience, and the value of the stolen artwork."[100]

Most importantly, the discovery rule considers whether the efforts of theft victims to locate and reclaim their stolen property were reasonable under the circumstances, not whether the stolen item was in fact discoverable, or could have been discovered with greater investigative resources. As the court in *Erisoty* made clear, "the focus must be on the nature of the [plaintiff's] efforts, as measured by the standard of reasonable due diligence, not by a standard of discoverability."[101] Theft victims need not "leave no stone unturned in order to recover their stolen art."[102] "The standard is not whether [theft victims] did everything that might have been done with the benefit of hindsight, but whether their efforts were reasonable given the facts of [the] case."[103] The discovery rule also does not require theft victims to provide constructive notice of their loss to the art world in order to preserve their judicial remedies to reclaim stolen property. The court in *Erisoty* repudiated any notion that "providing notice to the art world" is "fundamental to compliance with the demands of the discovery rule."[104]

The discovery rule creates incentives for buyers and collectors to take precautions against acquiring stolen art even though the rule does not explicitly impose an affirmative burden of investigation upon persons found in mistaken possession of stolen property. The failure of someone in inadvertent possession of a stolen work to investigate whether the item has been reported stolen enables a theft victim,

98. Hoover, *supra* note 6, at 83; Drum, *supra* note 21, at 940-41.

99. Drum, *supra* note 21, at 940.

100. *Id.* at 940-41.

101. *Erisoty*, 1995 Dist. LEXIS 2096, *22-23.

102. *Id.* at *42.

103. *Id.* at *41.

104. *Id.* at *38. In *Erisoty*, the court noted that while the Supreme Court of New Jersey in O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980), included constructive notice as a factor or variable to be considered in applying the discovery rule, neither *O'Keeffe* nor other authorities reviewed "make compliance with such factor a prerequisite to satisfaction of the discovery rule." *Id.* at *38.

under the balance of equities criterion, to preserve perpetually a superior legal ownership interest in the item with only minimal effort. As one commentator observed, "[t]he discovery rule . . . encourages purchasers of art to inquire into . . . artworks. If an owner . . . adequately publicized the theft . . . inquiry by potential purchasers . . . is likely to reveal defects in title."[105] Neglecting to investigate the item, on the other hand, would leave a prospective buyer unaware of the owner's claim and would expose it "to the risk of dispossession."[106]

Courts have recognized that the effect of the discovery rule is to encourage greater precaution by art buyers and collectors. As the Supreme Court of New Jersey opined in *O'Keeffe v. Snyder*, "[i]n practice, our ruling should contribute to more careful practices concerning the purchase of art."[107]

The potential for the discovery rule to foster investigations by art buyers was illustrated in *Erisoty*.[108] There, the court held that a family from whom a Giaqunito painting had been stolen in 1960 was sufficiently diligent, for discovery rule purposes, to preserve their judicial remedy to reclaim the painting even though they had done nothing for thirty years to put the international art market on constructive notice of their loss. The family merely had contacted the Washington, D.C., Metropolitan police and the F.B.I.[109] The court conceded that while the family "could certainly have been more aggressive in their search, for example, making inquiries at galleries and museums,"[110] it concluded, nonetheless, that "the balance of equities weighs in [the family's] favor."[111] The court denounced the failure of the buyer, a professional art restorer, to investigate the painting before acquiring it at auction. The court declared that in neglecting to conduct an investigation, the buyer "took a gamble" and "took the risk that an original owner could appear at any time."[112] The court concluded that "[t]he discovery rule is fact-sensitive so as to adjust the level of scrutiny as is appropriate in light of the identity of the parties," and ruled that under the facts at bar, the scant attempt the family had made to recover the painting constituted a "reasonable search effort under the discovery rule."[113] The court stressed that the standard of inquiry was "not

105. Montagu, *supra* note 62, at 83.

106. *Id.*

107. *O'Keeffe*, 416 A.2d at 873.

108. Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. Lexis 2096 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807 (3d Cir. 1996).

109. *Id.* at *5.

110. *Id.*

111. *Id.* at *38.

112. *Id.* at *39.

113. *Id.* at *40-41.

whether [the family] did everything that might have been done with the benefit of hindsight, but whether their efforts were reasonable given the facts of the case."[114] The court concluded that "[i]n light of all factors considered . . . [the family] exercised due diligence in searching for their painting and as such have satisfied the demands of the discovery rule."[115]

The *Erisoty* decision confirms the earlier observation of a commentator that in stolen art cases, "as between a dispossessed owner and a good faith purchaser for value, a higher standard of diligence will be imposed upon the latter."[116] The decision is instructive because it demonstrates how similar the discovery rule in practice can be to the *Lubell* decision. Both standards "balance the equities" between the parties and both standards favor art theft victims. *Lubell* imposes an affirmative obligation of investigation upon collectors. *Erisoty* shows that the discovery rule can be interpreted to mean that even the most minimal efforts of a theft victim to report a loss, not even efforts reasonably calculated to locate the missing item and falling far short of providing constructive notice of the theft, will suffice when the buyer has taken no precautions against acquiring stolen art.

Both *Lubell* and *Erisoty* make clear that collectors can protect their legal ownership rights in valuable works of art only by conducting appropriate due diligence investigations. Without such investigations, collectors will be subject to potentially indefinite liability to former owners under the equitable balancing principles of either standard. As one commentator has warned, "[t]he time has passed when the transfer of art could be veiled in romantic mystique. Today, accurate information about . . . title must be available if buyers, as well as sellers, are to successfully avoid the replevin suits associated with cultural patrimony."[117]

C. *Due Diligence Investigation as Principle of Fairness and Good Faith*

By encouraging collectors to investigate art objects, courts applying the "balance of equities" judicial criteria of either *Lubell* or the discovery rule are furthering the historical concerns of ensuring that both parties are treated fairly and that buyers have acted in good faith. Several scholars have argued that traditionally, in stolen chattel cases, the mere absence of knowledge on the part of the buyers that the item

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114. *Id.* at *41.

115. *Id.* at *42.

116. Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 VA. J. INT'L. L. 1, 46 (1990).

117. McCord, *supra* note 6, at 1008.

in question had been stolen was deemed sufficient to confirm the buyer's good faith and to provide a rationale for expunging the theft victim's ownership rights if the adverse possession time-period had expired.[118] Courts, however, have recognized that the "no questions asked" nature of the international art market does not assure that a person found in possession of a stolen art object is without fault.[119] After thirty years of admonitions by both courts and scholars to take affirmative precautions, persons who have acquired stolen artworks without first investigating their background are, at a minimum, reckless.[120] Courts have rightly decided that commercial recklessness cannot be the basis for title clearing in the art market. The affirmative duty of due diligence investigation signals this conclusion.

Stolen art cases present, according to one scholar, "what might be called the 'Eternal Triangle of Property Law,'" in which the players are the Owner, the Thief, and the Bona Fide Purchaser (BFP).[121] The Owner's property is stolen and disposed of by the Thief. The BFP acquires the stolen property from the now-missing Thief, and Owner wants to recover it. Authorities have recognized that in such cases courts necessarily must reconcile the rights of the original owner with the reasonable reliance of the buyer and the need for commercial stability in the marketplace:

> The underlying concern in an action for replevin of lost or converted property is that of fairness—fairness to the dispossessed owner who may not have had sufficient opportunity to locate and reclaim the property, and fairness to the innocent purchaser of such property who may be surprised and disadvantaged by the long delayed claim. The law has balanced, on the one hand, its regard for the rights of ownership, as against its concern for quiet in the marketplace and repose in society at large.[122]

Courts traditionally have favored the more innocent party in stolen property disputes, and the equitable basis of replevin actions has encouraged this result because it rewards good faith. "Because equi-

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118. *See generally* Gerstenblith, *supra* note 23; R.H. Helmolz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*," 80 N.W. L. REV. 1221 (1986), discussed *infra*.

119. *See* discussion *infra* pages 655-62 (regarding the peculiar characteristics of the international art market and the culpability that reasonably can be imputed to all who obey its protocol of commercial laxity).

120. *See supra* note 6 (discussing the many judicial warnings to the art industry to take precautions against buying and selling stolen art).

121. John Henry Merryman, *Reversals in Two California Cases Prompt Debate on Time Limits*, 17 IFAR Reports No. 5 (May 1996), at 4.

122. Tobin A. Sparling, *The Resolution of Title to WPA Prints*, 12 COL.-VLA J.L. & ARTS 131, 151-52 (1987).

table principles are applicable in a cause of action for replevin, courts attempt to protect the party who is the most innocent."[123]

Claims for the recovery of stolen chattels traditionally were decided under the doctrine of adverse possession.[124] The doctrine of adverse possession permits a possessor to obtain good title to property even though the possession was wrongful as against the prior owner.[125] Adverse possession requires the possession to be adverse to and hostile against the "rightful owner," open, notorious, visible, exclusive, and continuous. The possession must continue for the prescribed statutory period before the adverse possession will mature into rightful ownership and the statute of limitations will bar the owner's suit to recover the property.[126]

Even though the doctrine of adverse possession does not prescribe explicitly that the competing equities of the parties be weighed and balanced, two scholars who surveyed American jurisprudence in the area have concluded that courts historically have so required.[127] As one explained, "[t]o say that [courts] decide the cases by balancing the equities is no exaggeration. Indeed, in one context [adverse possession] is expressly called the 'superior equities doctrine.'"[128] The other writer asserts that "the [requirement of] good faith and reasonable reliance of the adverse possessor is the most significant extra-statutory element required to establish adverse possession of personal property."[129]

According to both scholars, courts traditionally have considered the equities favoring the position of each party in stolen property cases and especially have sought to preclude those in possession of stolen materials from profiting from their own wrongdoing. As one author summarized:

> Courts regularly have examined the legitimacy of possession of chattels, and have refused to accord possessory rights when they have found . . . misconduct on the part of the possessor. Sometimes this has involved balancing equities between two competing possessors, neither of whom has claim to title. More often,

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123. State Bar Committee on Legal Aspects of the Arts, *Acquiring Title to Stolen Art*, 55 TEX. BAR J., March 1992, 237, 239 [hereinafter *Acquiring Title*].

124. In O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980), the Supreme Court of New Jersey ruled that claims for the recovery of stolen personal property items no longer would be decided under the doctrine of adverse possession.

125. Basha, *supra* note 1, at 67 n.14. *See also* Gerstenblith, *supra* note 23, at 120-21.

126. Gerstenblith, *supra* note 23, at 120.

127. *See* Gerstentblith, *supra* note 23; Helmolz, *supra* note 118.

128. Helmolz, *supra* note 118, at 1236 n.94 (citing Schrier v. Home Indemnity Co., 273 A.2d 248, 251 (D.C. Cir. 1971)).

129. Gerstenblith, *supra* note 23, at 124 (citation omitted).

> however, it simply has involved closing the door on wrongdoers who are seeking to take advantage of their own wrongs.[130]

Before rewarding good title to a possessor of stolen property under the doctrine of adverse possession, one scholar noted that courts generally required three conditions: "(1) honesty on the part of the purchaser; (2) open use by him for the statutory period; and (3) failure on the part of the owner to take reasonable steps to secure his rights."[131] The writer observed that while "[t]he heralded . . . case of *O'Keeffe v. Snyder* expressly laid down this test, . . . the result is less innovative than the New Jersey Supreme Court announced. The test it adopted is very much like what American courts long have done in practice."[132]

Most importantly, courts applying the doctrine of adverse possession have not balked at awarding good title to buyers of stolen property when their honesty and good faith were manifest, even though their possession did not provide the original owner with constructive notice of the competing claim. In posing the question whether adverse possession of personal property would be permitted even when the true owner had neither actual nor constructive notice of the adverse claim, one scholar concluded that "the answer to this question, based on analysis of both case law and statutes, is clearly in the affirmative."[133]

Courts have permitted the ownership rights of theft victims to be expunged, even when they lacked constructive notice of rival claims, in order to protect the reasonable commercial expectations of buyers and to provide a way for title to be made secure in the marketplace. One scholar has voiced his agreement with this result and commented that "clear title must be established at some future point; title eventually must pass out of the original owner. Otherwise, no one could ever gain secure title."[134] According to the commentator, "cases in which courts have allowed possession to ripen into title have involved good faith takers of the property."[135] Thus, "[i]t is not the simple passage of years that cures the 'vice' of wrongful possession. It is honesty."[136] Another commentator stated:

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130. Helmolz, *supra* note 118, at 1223-24.
131. *Id.* at 1236.
132. *Id.*
133. Gerstenblith, *supra* note 23, at 124.
134. Helmolz, *supra* note 118, at 1236.
135. *Id.* at 1237.
136. *Id.*

> The fact that the good faith possessor prevails over the diligent owner demonstrates that when ethical considerations are equivalent, commercial certainty becomes the decisive factor. The good faith possessor who relied on a good title to the property and possessed it for a sufficient period of time prevails so that both commercial activity and ethical conduct may be protected and encouraged.[137]

According to this writer, the goals of rewarding good faith and achieving commercial certainty in stolen property cases are not antagonistic, but rather complementary, for "[t]he requirement of good faith actually advances the goals of commercial certainty and economic efficiency."[138]

The historical propensity of courts in stolen property cases to "balance the equities" between the parties tacitly, and to scrutinize the good faith of those found in possession of stolen materials, suggests several implications for future jurisprudence. First, by supplanting the doctrine of adverse possession with the discovery rule or laches standard, courts can address equitable considerations in stolen art cases more candidly and can achieve results more compatible with declared public policy goals. Both the discovery rule and the laches standard require "a more explicit and responsive balancing of the relevant equities, thereby freeing courts to engage in such inquiry openly (and more accountably), freed from the inhibiting confines of adverse possession doctrine."[139] Second, the traditional judicial focus under the doctrine of adverse possession on the honesty and good faith of the buyer or possessor of stolen property as a benchmark for title clearing decisions recommends that courts maintain a similar perspective when adjudicating cases under the discovery rule or laches standard. As scholars have observed, courts historically have appreciated the importance of a "title clearing mechanism" for personal property and have inquired into the genuine innocence of the buyer or possessor of stolen chattels to decide whether a particular claim for the recovery of such an item should be time-barred.

Courts deciding cases under the discovery rule and laches standard properly should continue to make this consideration pivotal. Because of (1) the myriad impediments art theft victims confront in seeking to locate and recover their stolen property (discussed *infra*), (2) the greater resources and access to information that collectors of valuable art objects typically enjoy, and (3) the repeated efforts of courts

137. Gerstenblith, *supra* note 23, at 125.

138. *Id.* at 163.

139. Franzese, *supra* note 90, at 17.

over the years to encourage art buyers and collectors to investigate art objects, nothing justifies expunging the ownership rights of theft victims unless persons found in mistaken possession of stolen materials can establish they had no reasonable way to learn that the disputed item was stolen. In the context of today's art market, this means showing that they took all demonstrably effective and reasonably available precautions to avoid both acquiring and holding stolen property. Possessors of stolen materials who have not taken adequate precautions and have not conducted appropriate investigations cannot be considered "innocent" or "good-faith" for this purpose, and courts rightfully have concluded that their exposure to former owners should continue indefinitely.

Collectors who decline to investigate materials because they fear the results of such an investigation must be regarded as blameworthy, at least when compared to a theft victim under the balance of equities standard. Collectors who neglect to make inquiries in this context are benefiting from the lackadaisical practices of the international art market and the many difficulties theft victims encounter in locating stolen property. They are "hedging their bets" that if a particular artwork in their possession has been stolen, the former owner will not be able to find it. The problems facing collectors who eschew investigations for works of art that they already have acquired were identified in a recent commentary:

> Where one owns art that may be stolen, a clear dilemma arises. To commence due diligence after one has purchased the item may be throwing good money after bad. If the item turns up stolen, it would appear that it would have to be returned to the rightful owner. To attempt to sell a work of art known to be stolen or continue to hold it may constitute a crime—that is transporting, selling, or holding stolen property.[140]

Such persons are only one degree removed, in a progression of culpability or scienter, from criminal liability under the National Stolen Property Act (NSPA) and analogous state statutes.[141] The NSPA proscribes the "knowing" transportation of stolen property.[142] Collectors who willfully decline to investigate materials in their possession are at a minimum "reckless" in regard to the question whether these

140. Spero, *supra* note 1, at 59-60 (citation omitted).

141. The National Stolen Property Act (NSPA) is codified at 18 U.S.C. §§ 2314-15 (1994).

142. The applicable statute, 18 U.S.C. § 2314 (1994), provides in pertinent part as follows: Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, *knowing* the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both (emphasis added).

items have been stolen. That is, rather than knowing that a particular work has been stolen, collectors have recognized a material risk that the item may be stolen and have decided not to discover the true facts.[143] Courts rightfully have concluded that such persons cannot prevail, in a balance of equitable considerations, against a theft victim.

Finally, persons who acquire materials on the international art market without further investigation should not, and indeed cannot, be considered "innocent" or "good-faith" purchasers for title clearing purposes. As discussed in detail *infra*, the international art market is a sieve through which stolen art objects pass undetected to unwary collectors. For thirty years, both courts and commentators have decried the absence of commercial integrity in the art market and punctuated the importance of independent investigation. Persons who neglect or brush aside these admonitions are necessarily in some degree culpable. At a minimum, they are negligent in failing to take reasonably appropriate precautions to limit the notorious risk of acquiring stolen property. An intention to capitalize upon the systemic corruption of the international market and to exploit the plight of theft victims also reasonably might be imputed to sophisticated participants who are all too familiar with the art world's many machinations.

D. Overall Necessity for Due Diligence Investigation

Stolen art is so pervasive that collectors and their professional advisors need to conduct due diligence investigations regardless of whether suspicious circumstances surround a particular artwork. Without compiling a record of appropriate due diligence precautions, persons found in mistaken possession of stolen art cannot be assured of defeating, under the "balance of equities" judicial criterion, future potential lawsuits that former owners may bring to recover the art.

Some authorities have suggested that a duty of enhanced inquiry arises primarily when doubt exists about the ability of the seller to convey good title.[144] Such a scenario, however, merely implies a con-

143. BLACK'S LAW DICTIONARY 1271 (6th ed. 1990), defines the term "recklessness" to mean, in applicable part, "[t]he state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, through foreseeing such consequences, persists in spite of such knowledge." Collectors who recognize a risk that materials in their possession may have been stolen, but decide not to investigate, clearly foresee possible "injurious consequences" and "persist[] in spite of such knowledge" within the meaning of this definition.

144. *See, e.g.*, Hoover, *supra* note 6, at 52 (advising that "[t]he museum as purchaser must also be alert for suspicious circumstances that would seem to warrant further investigation"); Linda F. Pinkerton, *Word to the Wise: Scrutinize Objects of 'Questionable Origin,'* MUSEUM NEWS 28 (Nov./Dec. 1989) (urging museums to "exercise care when acquiring objects of questionable origin"); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman

spicuously high probability that the item in question has been stolen; material risks that art objects have been stolen can exist even when circumstances are not suspicious. As one authority recently observed, "[i]t is fast becoming conventional wisdom that the art market is rife with stolen goods."[145] Accordingly, "[i]t is likely that clients who own significant art collections hold some stolen items."[146]

The lax commercial conventions of the international art trade, which enable massive quantities of stolen art to seep into the legitimate market, necessarily undercut any reasonable reliance that secure title has attached to an art object. For many artworks, the "presumption of secure ownership is not well placed because the commercial conventions by which these items are traded do not assure that good title has been conveyed."[147] Only by conducting appropriate investigations can collectors prospectively avail themselves of the equitable defense of laches to legal challenges of their ownership rights.

III. EQUITABLE CONSIDERATIONS REQUIRING DUE DILIGENCE INVESTIGATION

A range of equitable concerns favor a broad due diligence investigative obligation for valuable art objects. As legal scholars approvingly note, "our judicial system is finally recognizing that in order to stem the tide of theft and plunder, purchasers . . . must adhere to certain standards of diligence."[148] While "[c]ourts have not enunciated a bright line for either victims or possessors of stolen art," nonetheless, "[t]he purchaser and holder of stolen art clearly [has] a heavy burden to meet in defending an action to recover stolen art."[149]

A. Magnitude and Dynamics of International Stolen Art Trade

Several aspects of the stolen art trade underscore the need for collectors to investigate comprehensively the background of objects they acquire or already possess. First is the sheer volume of the illicit commerce: stolen art is annually a multibillion dollar industry. "The FBI and Lloyds of London estimate that as much as six billion dollars of art has been stolen annually in recent years," a prominent plaintiff's

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Fine Arts, Inc., 917 F.2d 278, 294 (7th Cir. 1990) (counseling that "[e]specially when circumstances are . . . suspicious . . . prospective purchasers would do best to do more than make a few last-minute phone calls.").

145. Letter of attorney Jonathan Ziss to editor of "The Appraiser" (Second Quarter 1998), at 2.

146. Spero, *supra* note 1, at 61.

147. Madden, *supra* note 1, at 459.

148. Hoover, *supra* note 6, at 37.

149. Spero, *supra* note 1, at 61.

attorney in stolen art cases recently noted.[150] There are literally hundreds of thousands of art objects stolen each year.[151] Art theft is raging on every continent, especially in Central and Eastern Europe. International art looting "has been fanned by political upheaval in Eastern Europe, bringing in its wake an epidemic of theft as well as destruction."[152] Plunder from countries that have suffered recent military conflicts, such as Bosnia and Kuwait, add to the illegal commerce, as "virtually all the stolen objects went abroad."[153]

In addition to the current epidemic of looting, art objects pilfered during World War II continue to resurface, often bringing with them title disputes between their pre-war owners and post-war good faith purchasers.[154] According to Ronald Lauder, a former U.S. ambassador to Austria and now chairman of the Museum of Modern Art in New York, "more than 100,000 pieces of art, worth at least $10 billion in total, are still missing from the Nazi era."[155] Mr. Lauder believes that "because of these large numbers, every institution, art museum and private collection has some of these missing works."[156] Materials looted during World War II "increasingly are being found on the market and in the estates of the persons who originally acquired them in the late 1940s and 1950s."[157] Given the dimensions and prevalence of this looting, it is unsurprising that "several of the most prominent judicial decisions concerning claims to recover stolen art have involved items looted during the War."[158]

A second aspect of the stolen art trade favoring the imposition by U.S. courts of a comprehensive investigation duty is that much of the illicit commerce is concentrated in the United States. "Since World War II, the United States has been the biggest market of illegal art."[159] "The U.S. is a consumer country for stolen art," declared an FBI offi-

150. Ziss, *supra* note 145, at 2.

151. Ken Shulman, *FBI Posts Net Gain*, ARTNEWS, December 1998, at 48 (quoting FBI official Lynne Richardson).

152. Norman Palmer, *Recovering Stolen Art*, 47 CUR. LEG. PROB. 215, 218 (1994).

153. *Id.*

154. Hoover, *supra* note 6, at 451. As the court in Morgold v. Keeler, 891 F. Supp. 1361, 1365 (N.D. Cal. 1995), observed, "1995 marks fifty years since the end of World War II, and valuable art works obtained by the force of arms are emerging from hiding in cellars and attics."

155. Ronald Lauder, quoted in Thomas W. Lippman, *44 Nations Pledge to Act on Art Looted by Nazis*, WASH. POST, December 2, 1998 at A-2.

156. *Id.*

157. Ziss, *supra* note 145, at 2.

158. Madden, *supra* note 1, at 461.

159. Alan Riding, *French Museum Chief vs. Art Thieves*, N.Y. TIMES, June 15, 1991, at 13, 15.

cial recently. "Most people don't realize that the majority of stolen art is sold on the open market."[160]

Third, international art thefts greatly exceed the losses reported to stolen art databases,[161] increasing the need for art buyers and collectors to make additional inquiries to determine whether a particular item may have been stolen. Commentators have recognized that art buyers have "strong incentives" to inquire beyond stolen art databases to make sure that what they are acquiring is not looted.[162] The failure of many art theft victims to report their losses to any art world authorities or resources compounds this need.[163] Even though the number of stolen art objects in circulation eclipses reported losses, (perhaps by an order of magnitude or greater), "more than 250,000 works of art and antiquities have been reported stolen to the leading commercially available databases alone."[164]

A fourth factor favoring a broad inquiry is the contiguity of the illicit and legitimate markets. As one commentator observed, "the art world is unique in that it is a recognized legitimate profession as well as a black market."[165] Another writer has lamented that "[i]n the international art world, the distinction between criminal activity and shrewd business dealing [essentially] is a blurry one. There is essentially a sliding scale between smuggler, middleman and dealer."[166] Stolen art is easy to hide, smuggle, and resell.[167] Moreover, the intensive publicity surrounding the art trade, and "the aggressive promotion by auction houses . . . have done much . . . to attract illicitly

160. Shulman, *supra* note 151, at 48 (quoting FBI official Lynne Richardson).

161. 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, 1435-36 (1992) (citing the "discrepancy between the number of reported art thefts and the true number of art thefts.").

162. Hawkins et al., *supra* note 56, at 91.

163. *See, e.g.*, Conley, *supra* note 82, at 498 (asserting that "[a]rt theft affects museums and churches, dealers and private collectors. These targets suffer from costly thefts, yet often do not report their losses.").

The reasons art theft victims often neglect to report their losses include: (1) fear that disclosure of the theft would expose security weaknesses and endanger the remainder of the collection; (2) concern that reporting a loss would drive the stolen work further underground; and (3) a desire to conceal information about expensive art collections from taxing authorities. Grover, *supra* note 161, at 1435-37.

164. Ziss, *supra* note 145, at 2.

165. Meredith Van Pelt, Note, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fines Arts, Inc.: *A Case for the Use of Civil Remedies in Effecting the Return of Stolen Art*, 8 DICK. J. INT'L. L. 441, 458 (1990).

166. Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COL. L.REV. 377, 385 (1995).

167. Drum, *supra* note 21, at 910-11.

acquired goods to the auction and sales rooms of the 'art market' states."[168]

Fifth, the speed with which stolen art can be transported internationally and sold into the legitimate market accentuates the need for comprehensive investigation. Art objects can be stolen, relocated, and resold long before information about the theft has been disseminated to all potential destinations. As noted *infra*, in some instances several years may elapse before the theft of an art object is even realized. As one observer bemoaned, "[s]tolen goods move around the world very quickly. Art information moves slowly."[169]

The pervasive secrecy of the art trade is another reason why buyers and collectors need to take independent and informed precautions. One scholar has related that the most striking thing to a lawyer who comes upon the art world is the assumption that transactions should normally be, and are certainly entitled to be, secret.[170]

Finally, the lackadaisical "ask no questions" commercial conventions of the international art trade make it imperative that buyers and collectors aggressively and competently investigate materials to ensure that they are not acquiring stolen property. Courts and commentators consistently have expressed dismay with the casual practices that govern the art trade.[171] For example, in *Porter v. Wertz*,[172] the American Association of Art Dealers, Inc. filed an amicus brief, conceding, in the court's words, that "the ordinary custom in the art business is not to inquire as to title," and arguing that "a duty of inquiry would cripple the art business which is centered in New York."[173] In *Morgold, Inc. v. Keeler*,[174] the court commented that "it is not the practice in the art industry, in the absence of warnings, for a buyer to require a seller to make disclosures about the chain of title . . . ."[175]

The absence of investigation and inquiry in the commercial art world means that reputable dealers and auction houses often sell stolen

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168. Lyndell V. Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYR. J. INT'L L. & COM. 333, 348 (1983).

169. Edward Lewine, *To Catch a Thief*, 3 MERCEDES "MOMENTUM" 44, 47 (quoting Getty Information Institute consultant Robin Thornes).

170. Conley, *supra* note 82, at 496. Legal commentaries repeatedly have noted the "shroud of secrecy surrounding art transactions." *Id.*

171. *See supra* note 6 (quoting a rash of judicial condemnations of the lax commercial practices of the art industry).

172. 421 N.E.2d 500 (N.Y. 1981).

173. *Id.* at 502.

174. 891 F. Supp. 1361 (N.D. Cal. 1995).

175. *Id.* at 1368. *See also* Collin, *supra* note 14, at 28 (noting the "absence of any custom in the trade of inquiring into an artwork's provenance or the seller's ability to lawfully transfer the work.").

art. As the U.S. Court of Appeals commented in *Holzer v. City of Stamford,*[176] "[i]t is not uncommon . . . for purchasers of fraudulently obtained art work to make their acquisitions from reputable dealers and galleries."[177] A noted scholar has described the ease with which stolen art can be sold at auction: "[t]he use of auction houses by illicit traffickers to dispose of their goods is . . . not difficult . . . Traditionally, they have satisfied themselves that the seller is the *prima facie* owner of the piece, and that is all."[178]

The failure of dealers and auction houses to take appropriate precautions against selling stolen art means that unobservant collectors regularly acquire looted materials. As one authority stated, "[m]ost stolen works eventually surface on the legitimate market and are acquired by unsuspecting collectors."[179] Stolen art "easily evades detection before it is purchased by innocent collectors."[180]

For these reasons, a former Secretary General of the International Council of Museums (ICOM) recently declared that "the art market is the only sector of economic life in which one runs a 90 percent risk of receiving stolen property."[181] Dr. Constance Lowenthal, a former Executive Director of the International Foundation for Art Research has concluded that "85% of all stolen art is hanging on the walls or sitting on the pedestals of unsuspecting collectors."[182] An asset protection specialist and attorney has counseled that "[a]rt theft is so pervasive today that chances are that any client who owns an object of art may be holding stolen property."[183]

The ease with which stolen art can be sold on the legitimate market to unsuspecting collectors amplifies the need for comprehensive and informed investigations.

B. Capability of Common Law and Civil Remedies to Redress Stolen Art Epidemic and Protect Commercial Integrity of U.S. Art Market

The scope of prescribed investigation for wealthy collectors should be determined by how well due diligence inquiry can help deter the stolen art trade and safeguard the commercial probity of the

176. 933 F.2d at 1131 (2d Cir. 1991).

177. *Id.* at 1132.

178. Prott, *supra* note 168, at 348 (emphasis in original).

179. Spero, *supra* note 1, at 58.

180. Ziss, *supra* note 145, at 2.

181. Elizabeth des Portes, *The Fight Against the Illicit Traffic of Cultural Property: The Role of Museum Professionals, in* THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE, ch. 5, at 5-4, (Marilyn Phelan ed. 1998).

182. Dr. Constance Lowenthal, quoted in Lewine, *supra* note 169, at 47.

183. Spero, *supra* note 1, at 58.

art market. Legal scholars and commentators repeatedly have maintained that the common law, through civil remedies to reclaim stolen materials, can curtail illicit commerce in stolen art. "The law offers an opportunity to shape standards of commercial conduct which preserve the stability and integrity of our economy," asserted one scholar.[184] "Common law, by permitting and encouraging victims of theft to sue and recover their property, provides the best opportunity to combat the problems of theft and trafficking in civil litigation."[185] One scholar observed that "the civil remedies available are the most practical, because in addition to having the art returned, the threat of litigation serves as an excellent deterrent to art purchasers. The fear of having art, purchased at considerable cost, returned . . . would certainly make a buyer examine all pertinent [information]."[186]

The many difficulties of applying criminal penalties in the international stolen art trade should also amplify the prescribed degree of due diligence investigation entailed of collectors. As one scholar explained, "[t]he criminal justice system performs its functions quite differently in the international setting than it does in the domestic setting. The difference results in a benefit to both thieves and receivers of stolen goods."[187] Because the problem of art theft cannot be addressed by criminal sanctions alone, dealers and collectors must be encouraged to conduct extensive inquiries into the background of artworks they buy and sell in order to reform the art trade and rid the legitimate marketplace of stolen art.[188]

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184. Collin, *supra* note 14, at 42.

185. *Id.* at 25.

186. Van Pelt, *supra* note 165, at 443. The author maintains that civil remedies in the stolen art context: (1) encourage original owners to sue converters, thus increasing the likelihood that stolen materials will be located and raising costs to the illicit trade; (2) can be more broadly applied than criminal sanctions; and (3) face fewer constitutional obstacles than criminal penalties. *Id.* at 452-53.

187. Collin, *supra* note 14, at 35. The author relates that the difficulties of enforcing criminal sanctions internationally include multiple law enforcement agencies with overlapping functions and jurisdictions. *Id.* at 45. Moreover, "[t]he gathering and delivery of evidence from one jurisdiction to another, including the identification, capture and delivery of a suspect, is complicated by the overarching issue of sovereignty." *Id.* at 36.

Other commentators have acknowledged the inherent limitations of the criminal law to redress the international stolen art trade. *See, e.g.*, Paige L. Margules, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*, 15 SUFFOLK TRANSNAT'L L.J. 609, 645 (1992) (asserting that "[t]he merits of criminal sanctions under the NSPA (National Stolen Property Act) are dubious" and that "[t]he international nature of art theft creates additional problems for criminal sanctions in the United States. There is a lack of international criminal cooperation between the United States and foreign nations.").

188. Collin, *supra* note 14, at 29.

C. Increasing Notoriety of International Art Theft

The public prominence of the stolen art trade should influence the range of due diligence investigation required for valuable art objects. Stolen art has become so pandemic that even the mainstream media now treats it. Works of art looted by the Nazis and found in the possession of U.S. museums and private collectors have received special attention. For example, in 1997, one columnist reported the discovery of "archival records suggesting that many of the unrecovered artworks from Europe moved into the vibrant U.S. market after the war with virtually no U.S. government interest in stopping the flow"[189] and noted that there is "[g]rowing evidence that the . . . U.S. market contains a greater number of plundered artworks from World War II than anyone had expected."[190] *World News Tonight* featured a program in which it reported that the Seattle Art Museum, without any investigation, had acquired a Matisse painting plundered from a family fleeing the Nazis.[191] *Nightline* traced Nazi loot to U.S. museums and reported that art objects plundered by the Nazis "have ended up in private collections and museums all over the world."[192] *U.S. News & World Report* related that stolen art objects from World War II have been located in prominent U.S. museums, and that "[d]isputes over paintings . . . have erupted across the country."[193]

These and other stories have brought the subject of stolen art into public focus and highlight the precautions that collectors reasonably can be expected to take to avoid becoming part of the problem.

D. Significance of State Policy to Protect U.S. Art Market

The importance that courts have assigned to preventing the U.S. art market from becoming a haven for stolen art traffickers also should help define the appropriate scope of due diligence investigation. It is fundamental that equity-based determinations, such as the "balance of equities" judicial criterion, necessarily consider public interest and public policy. As the Supreme Court observed long ago in *United*

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189. Walter V. Robinson, *Stolen Art Claims Shakes N.Y. Museum: Raise Concern U.S. Houses Looted Work*, BOSTON GLOBE, July 24, 1997, at A1.

190. Walter V. Robinson, *An Ignominious Legacy: Evidence Grows of Plundered Art in U.S.*, BOSTON GLOBE, April 25, 1997, at A1.

191. *World News Tonight with Peter Jennings*, (ABC television broadcast, reporter Brian Ross, Oct. 22, 1997) (transcription on file with author).

192. *Nightline: Nazi Loot in America* (ABC television broadcast, Apr. 28, 1998) (transcript on file with author).

193. John Marks, *How Did All That Art End Up in Museums?* U.S. NEWS & WORLD REPORT, June 8, 1998, at 38.

States v. Morgan,[194] "[i]t is a familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of molding its remedies, may be affected by the public interest involved."[195] Indeed, "[c]ourts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved,"[196] and "[i]t cannot be gainsaid that a court asked to dispense equitable remediation should give serious attention to the public interest."[197]

Courts in the United States, and particularly those in New York, repeatedly have underscored the important public policy of protecting the commercial integrity of the art market. The *Solomon R. Guggenheim Foundation v. Lubell* decision,[198] as discussed, was calculated to encourage investigation by collectors in order to curtail the trade in stolen art, and as the court in *Deweerth v. Baldinger* [199] explained, "[t]he *Guggenheim* Court grounded its decision on a range of policy considerations growing out of its concern that any legal rules established by the courts be cognizant of New York's special role as a world art center."[200]

Other New York courts have stressed the need to combat stolen art traffic. For example, the court in *Federal Republic of Germany v. Elicofon*[201] asserted that "New York policy is . . . to protect owners generally as a means to preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods."[202] In *Porter v. Wertz*,[203] the court declared that "commercial indifference to ownership or the right to sell facilitates traffic in stolen works of art."[204]

Accordingly, the importance of declared state policy seeking to constrict illicit commerce in stolen art should influence determinations whether the buyer or possessor of a valuable art object has investigated the item sufficiently.

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194. 307 U.S. 183 (1939).

195. *Id.*

196. Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 552 (1937).

197. Texaco Puerto Rico, Inc. v. Department of Consumer Affairs, 60 F.3d 867, 882 (1st Cir. 1995). *See also, e.g.*, Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 323 (1st Cir. 1989) ("Equity must always be mindful of the public interest.").

198. 569 N.E.2d 426 (N.Y. 1991).

199. 804 F. Supp. 539 (S.D.N.Y. 1992).

200. *Id.* at 548.

201. 536 F. Supp. 813 (E.D.N.Y. 1978).

202. *Id.* at 846.

203. 416 N.Y.S.2d (N.Y. App. Div. 1979).

204. 416 N.Y.S.2d at 259.

E. Value of Art Objects and Expense of Litigation

The economic value of art objects that due diligence investigations are intended to protect, including the scope for potential appreciation of many works, suggests that a broad investigative obligation is appropriate. The potential for many artworks to appreciate exponentially is evident in several of the reported decisions involving the recovery of stolen art. For example, in *Solomon R. Guggenheim Foundation v. Lubell*, a Chagall painting bought in 1967 for $17,000 was valued at approximately $212,000 by 1995.[205] In *Erisoty v. Rizik*, the court found "interesting . . . the appreciation in value of the [disputed] painting over time, estimated to have been worth $9,000 or $10,000 in 1962 and valued at $200,000 in 1993."[206] In *Menzel v. List*,[207] an art dealer protested that an award of damages in the current, appreciated value of a stolen painting that he had sold some fifteen years earlier would subject him "to potentially ruinous liability."[208]

The likely expense of defending a judicial claim for the recovery of a stolen art object also should be considered in defining the scope of an appropriate due diligence investigation. Lawsuits for the recovery of stolen art are notoriously costly and resource-intensive. Complex choice of law questions often are raised,[209] as parties frequently contend that one or more issues are governed by the laws of a foreign country.[210] Testimony from expert witnesses is also usually essential. In 1993, the *New York Times* reported that the standard cost of

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205. *See supra* notes 56 and 57 and accompanying text, discussing the terms of settlement the parties reached in *Lubell*.

206. No. 93-6215, 1995 U.S. Dist. LEXIS 2096, *31 n.6 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807 (3d Cir. 1996).

207. 246 N.E.2d 742 (N.Y. 1969).

208. *Id.* at 745.

209. As the published judicial decisions attest, lawsuits brought to reclaim stolen art objects frequently present choice of law questions involving the laws of foreign countries. *See, e.g., Menzel*, 246 N.E.2d at 812-15 (repudiating, *inter alia*, a contention that the Act of State doctrine validated the seizure in Belgium by the Nazis of a Chagall painting belonging to private citizens); Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1160 (2d Cir. 1982) (rejecting the argument of the defendant, in an action brought to recover looted paintings by Renaissance artist Albecht Durer, that the German doctrine of Ersitzung terminated the title of the former owner); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1400-04 (S.D. Ind. 1989) (ruling that the defendant in an action to reclaim plundered Byzantine mosaics failed to make sufficient inquiry to obtain the status of good faith purchaser under the substantive commercial law of Switzerland).

210. *See, e.g., Elicofon*, 678 F.2d at 1160 (rejecting the contention of the defendant, a New York resident, in a lawsuit brought by a German museum to recover paintings looted during World War II that the German doctrine of Ersitzung had expunged the ownership rights of the museum); *Autocephalous*, 717 F. Supp. at 1400-04 (addressing the contention of the defendant in a suit to reclaim plundered Byzantine mosaics that the ownership rights of the church from which the mosaics had been looted were expunged under the commercial law of Switzerland).

defending a claim for the recovery of an art object was approximately $250,000.[211] That number can only increase with time.

In some instances the parties have paid, or were threatened with, even higher costs. For example, one authority estimated that Chicago-based collector Daniel Searle recently paid $1,000,000 in legal fees defending a lawsuit brought by descendants of Holocaust victims to reclaim a Degas painting looted during World War II.[212] Searle had bought the painting in 1987 for approximately $850,000.[213] The 1998 settlement required him to pay one-half of the current value of the painting to the plaintiffs and then to donate the work to the Chicago Art Institute.[214] Searle's failure to have investigate the painting when he acquired it proved most costly.

F. Potential Damage to Collectors, Estates, and Trusts

The extensive injury that recovery of a stolen art object can cause individual collectors, as well as their estates, trusts, and financial plans, favors a broad investigative responsibility. The presence of a stolen work of art in a private collection can wreak havoc on the most carefully laid plans. First, taking away a specific work can ruin a collection. Expensive art objects are frequently distinctive, if not unique, and thus irreplaceable. Indeed, the singular character of many items contributes importantly both to their artistic significance and financial value. Thus, removing such an item from a collection causes a correspondingly significant injury. In addition, extracting a particular work may destroy the integrity of the collection and negate its theme. Opportunity costs for obtaining other works not subject to conflicting ownership claims also are lost whenever a prized work is confiscated. A threshold consequence is that the chance to invest in another art object, or other asset, that is not impaired with a competing ownership claim is forfeited. The recovery of a valuable art object can destroy the estate, trust, and financial plans of collectors. "First, any investment in a stolen work mistakenly held may represent a lost opportunity cost that can diminish both the financial status of the testator during life as well as the wealth that otherwise would have been available for distribution at death."[215]

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211. William H. Honan, *Lately, More Antiguities Can Go Home Again*, N.Y. TIMES, Jan. 25 1993, at C1.

212. Walter V. Robinson, *Holocaust Victims' Heirs Given Share of a Degas*, BOSTON GLOBE, August 14, 1998, at A1.

213. Lee Rosenbaum, *Nazi Loot Claims: Art with a History*, WALL ST. J., January 14, 1999, at A18.

214. *Id.*

215. Basha, *supra* note 1, at 62.

Second, the unanticipated loss of a valuable work of art necessarily changes the corpus of a collector, and thus affects the financial planning goals of the collector. Because artwork is rarely viewed as a potential source of lifetime liquid assets by collectors, the loss of a work of art often causes the greatest damage in the field of estate planning. Mistakenly held stolen art can undermine estate planning in several ways. First, the unanticipated presence of stolen art in an estate skews initial understanding about the estate's assets and liabilities. Because accurately evaluating the assets and liabilities of an estate is a necessary first step in estate planning, a stolen work mistakenly held results in a material misrepresentation in this phase. A potential liability is treated instead as an asset, and a comprehensive estate plan is constructed based upon this misconception.[216]

Stolen art objects jeopardize planning for estate liquidity and estate tax liabilities. As one authority explained, "collectibles belonging to estates often are sold to provide liquidity for administration expenses and estate tax liabilities."[217] Accordingly, "[i]f a stolen work is designated to be sold to provide estate liquidity, the removal of a work from the estate through a successful judicial challenge means that other assets must be disposed of to supply liquidity. The original estate plan has been disrupted, and a new plan must be devised."[218] The need to ensure that adequate funds are available to pay estate taxes makes it correspondingly important for estate planners to establish that the collector has secure legal title to all assets that have been designated to satisfy this obligation.[219]

The unanticipated presence of stolen art can wreak havoc upon the administration of an estate or trust. As one writer explained, a stolen work may portend costly future litigation to the estate or trust beneficiary who receives it as a distribution. "If the testator intends to distribute a stolen work to a beneficiary, it becomes a potential 'time bomb' that may explode in an expensive lawsuit at some unknown future date. . . . [T]he distribution of a stolen work to a legatee is a doubtful advantage."[220]

Perhaps most significantly, the inadvertent inclusion of a stolen art object in an estate may result in an overpayment of estate taxes,

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216. *Id.*

217. Madden, *supra* note 1, at 460.

218. *Id.* at 463.

219. Commentators repeatedly have discussed the need to ensure that adequate funds are available in the estates of collectors to satisfy estate tax liabilities. *See generally* LEONARD D. DUBOFF & SALLY H. CAPLAN, THE DESKBOOK OF ART LAW, § E (Estate Planning) (1993); Basha, *supra* note 1, at 62-63.

220. Madden, *supra* note 1, at 463.

especially if a tax refund has become time-barred. As one writer cautioned, "[t]he payment of an estate tax liability based upon the mistaken assumption that the decedent owned a valuable art object could impose a substantial hardship upon the estate, especially if the item is recovered by the real owner."[221] The extensive damage that stolen art can cause collectors, individually as well as to their estates, trusts, and financial plans, recommends a thorough investigative responsibility.

G. Identity and Comparative Resources of Parties

As between art theft victims and art buyers, the comparative equities initially weigh heavily in favor of art theft victims for a variety of reasons. First, the status of theft victims is by definition involuntary. In contrast, art buyers obviously choose to assume that status. As one scholar noted, "[t]he position of the original owner is entirely an involuntary one. He has done nothing except be robbed. The good faith purchaser, by contrast, has entered into a transaction known to be problematic."[222] The *Erisoty v. Rizik*[223] court, in balancing the equities between a family from whom a painting had been stolen and a professional art restorer who had bought the work "no questions asked," pointed out that the family "had suffered an intrusive crime."[224] There is little one can do in this context to avoid becoming a victim. Options are clearly limited when the circumstances surrounding the theft involve war, massive political upheaval, or genocide. Art buyers, on the other hand, who are aware that stolen artworks flood the marketplace, can take steps to safeguard against acquiring stolen property. As the United States Court of Appeals for the Seventh Circuit observed in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*,[225] "we should note that those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means to protect themselves."[226] One authority commented that an art buyer "will

221. Basha, *supra* note 1, at 64. Several professional observers have cautioned about this prospect. *See, e.g.*, Madden, *supra* note 1, at 463 (pointing out that "[i]n this scenario, the value of the stolen work would have been wrongfully included in the estate and an estate tax at a marginal rate as high as 55% would have been paid on the value of the work."); Spero, *supra* note 1, at 60 (exclaiming that "[i]n effect, the estate or its successors may be required to return valuable items on which estate taxes were paid, without a corresponding setoff!").

222. Stephen E. Weil, *Repose*, 8 IFAR REP. (Aug./Sept. 1987) at 72.

223. No. 93-6215, 1995 Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807 (3d Cir. 1996).

224. *Id.* at *14.

225. 917 F.2d 278 (7th Cir. 1990).

226. *Id.* at 294.

have had an opportunity to request and receive documentation."[227] Moreover, "[h]e will have had an opportunity to negotiate an arrangement under which he might protect himself against the economic consequences of a subsequent third party claim."[228]

After an artwork is stolen, theft victims frequently encounter severe obstacles in trying to locate and reclaim their property. As the court in *Hoelzer v. City of Stamford*[229] explained, "[b]ecause art work can be both extremely valuable and highly marketable to an underground clientele, the difficulties original owners face in recovering missing art abound."[230] Indeed, "[a] recovery rate of less than ten percent indicates that the odds are strongly against an original owner retrieving stolen work."[231] There are several reasons for these overwhelming odds.

First, many stolen art objects can be easily hidden and transported far from their point of origin. The vast majority of stolen works of art are easy to transport and easy to conceal. It is for this obvious reason that they are targeted by thieves in the first place.[232] In light of this hypermobility, it is unsurprising that theft victims often cannot even imagine where to begin looking for their missing property.

A function of the mobility of art is the international dimension of the stolen art trade. The international nature of the legal and illicit art market intensifies the burden of locating stolen materials. "The . . . scenario of art work stolen in one country and sold to a good-faith purchaser in another is common."[233]

The "ask no questions" commercial conventions of the international art market further complicate efforts to locate stolen art. "Buyers in the high demand market rarely probe the origins of desirable pieces."[234] Moreover, "[t]he original owner is further disadvantaged by the art dealer's usual practice of not examining the sources of the art works in which they trade."[235] Theft owners face the task of searching a global market that trades in commodities with histories about which many of the traders are willfully ignorant.

To compound the difficulty even further, no universally accepted standard resources for searching for stolen art exist. The few

227. Weil, *supra* note 222, at 72.
228. *Id.*
229. 933 F.2d 1131 (2d Cir. 1991).
230. *Id.* at 1138.
231. Drum, *supra* note 21, at 933.
232. Conley, *supra* note 82, at 494.
233. Drum, *supra* note 21, at 933.
234. Foutty, *supra* note 28, at 1840.
235. Drum, *supra* note 21, at 912-13.

resources that are available often remain unknown to theft victims. There is "no clear, regular procedure," one writer lamented, and "[t]he fragmentary and little known mechanisms by which an original owner could report and search for stolen art are inadequate to provide a standard" by which the efforts of theft victims can be judged.[236]

Finally, because artwork often is displayed only privately, stolen materials may never be exposed to public scrutiny. Although both "courts and commentators have noted that the mere residential display of paintings may not constitute the type of open and notorious possession sufficient to afford notice to the true owner,"[237] that is little comfort to the theft victim who may never discover where her art has finally settled. Though it is cold comfort to these victims, when "innocent bona fide purchasers keep their art in the privacy of their own homes for their own pleasure or that of a select few, it is difficult to find any policy reason to favor them over the original owners who will have no, or virtually no, opportunity to recover their art while so held."[238] "Once art objects are stolen," one observer commented, "owners often have no other alternative but to wait for their property to resurface on the art market."[239] Even once the property does resurface, the lack of a widely-regarded mechanism for searching, the "no questions asked" conventions of the art market, and the "private" character of many art collectors often will work to prevent them from ever recovering their stolen art.

Art buyers, on the other hand, who are aware that stolen artworks flood the marketplace, can take steps far more effectively to avoid acquiring stolen property. As the Seventh Circuit Court of Appeals observed in *Autocephalous Greek-Orthodox Church of Cyprus*,[240] "we should note that those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means to protect themselves."[241] Art buyers can demand documentation of an artwork's history. [242] If documentation is

236. *Id.* at 941.

237. Mary K. Devereaux, Note, *Battle Over a Monet: The Requirement of Due Diligence in a Lawsuit by the Owner Against a Good Faith Purchaser and Possessor*, 9 LOY. ENT. L.J. 57, 66 (1989).

238. Earle A. Partington & Yves-Louis Sage, *The American Response to the Recovery of Stolen and Illegally Exported Art: Should the American Courts Look to the Civil Law?* 12 COL.-VLA J.L. & ARTS 395, 417 (1988).

239. Leah E. Eisen, *The Missing Piece: A Discussion of Theft, Statutes of Limitations and Title Disputes in the Art World*, 1 J. CRIM. L. & CRIMINOLOGY 1067, 1069-70 (1991).

240. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fines Arts, Inc., 917 F.2d 278 (7th Cir. 1990).

241. *Id.* at 294.

242. Weil, *supra* note 222, at 72.

unavailable, the buyer can "negotiate an arrangement under which he might protect himself against the economic consequences of a subsequent third party claim."[243] This, at least, would remove the buyer's economic disincentive of returning artwork to rightful owners.

A final factor favoring theft victims in any equitable balance is that buyers of expensive works typically enjoy the resources necessary to investigate materials carefully. Such buyers generally are either auction houses, museums, professional dealers, or wealthy private collectors. "Purchasers of valuable art often are either art dealers or individuals who employ art dealers to carry out their transactions," noted one observer.[244] "Such individuals often are in a better position than original owners to stop the transfer of stolen art objects because they have the opportunity to investigate the validity of the object's title before purchasing it."[245] Accordingly, "[d]ue to their intimate knowledge and extensive resources, entities and individuals in the art industry should be held to a higher standard of good faith in their dealings and investigations of title."[246] Buyers of valuable art works, then, "[are] most able efficiently to bear the cost of inquiry."[247]

These many considerations give the initial position of theft victims far more weight in the "balance of equities" equation with art buyers. "[A] buyer is likely to be several shades more culpable than an owner who has reported the theft."[248]

H. Fiduciary Responsibilities of Attorneys, Trustees, and Executors

The fiduciary obligations of both tax-exempt institutional collectors and the attorneys and trust institutions that counsel many private collectors support a broad investigative standard for valuable art objects. Both tax-exempt organizations and professional fiduciaries have discrete duties to protect the value and title of assets under their control. These responsibilities support the imposition of a broad scope of inquiry and investigation to safeguard against the inadvertent acquisition of stolen artworks.

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243. *Id.*

244. *Id.*

245. *Id.*

246. Maritza F. Bolano, Note, *International Art Theft Disputes: Harmonizing Common Law Principles with Article 7(b) of the UNESCO Convention*, 15 FORDHAM INT'L L.J. 129, 163-64 (1991/1992).

247. Pollack, *supra* note 37, at 377. Commentators regularly have favored amplifying the investigative standard imposed upon professional participants in the art market. *See, e.g.*, McCord, *supra* note 6, at 1003 (arguing that "[b]ecause of (their) preeminent position . . . in the art market, international auction houses should be held to a strict standard of care when buying and selling artwork.").

248. Bibas, *supra* note 8, at 2453-54.

1. Tax-Exempt Institutions/U.S. Museums

Almost every major international museum adheres to the International Code of Professional Ethics of the International Council of Museums, which requires museums to make sure that good legal title attaches to all items in their collections. "Under these ethical standards, . . . museums must satisfy themselves that the evidence of the . . . history of the artwork proves that the vendor has good legal title."[249]

The Code of Ethics for Museums (Code), prepared by the American Association of Museums, declares that U.S. museums owe fiduciary responsibilities to the public and requires that secure legal title attach to all objects in their collections. The Code creates a "public service" mission for museums and lauds their roles as "public trusts."[250] As public trusts, legal obligations form only the starting point of museums' responsibilities; museums must adhere to demanding ethical standards in their acquisition practices:

> The law provides the basic framework for museums operations. As nonprofit institutions, museums comply with applicable local, state, and federal laws and international conventions, as well as with the specific legal standards governing trust responsibilities. This Code of Ethics takes that compliance as given. But legal standards are a minimum. Museums and those responsible for them must do more than avoid legal liability. They must take affirmative steps to maintain their integrity so as to warrant public confidence. They must act not only legally but also ethically.[251]

The Code requires museums to ensure that they have acquired valid legal title to all materials in their collections because the "stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care [and] documentation."[252] Museums are specifically enjoined to make sure certain works in their collections are "protected," "secure," "unencumbered," "accounted for," and "documented."[253] Under the prevailing "balance of equities" judicial criteria, legal title to valuable art objects cannot be "protected" or made "secure" other than through an appropriate due diligence investigation.

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249. McCord, *supra* note 6, at 1000.
250. American Society of Museums, Code of Ethics for Museums (1994), at 4.
251. *Id.* at 4.
252. *Id.* at 8.
253. *Id.*

The Association of Art Museum Directors (AAMD) issued a report entitled "Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-45)" (Report). The Report encourages third parties to create databases of losses of art objects sustained during the war. It also directs its members to conduct due diligence investigations to ensure that materials offered as charitable donations, and those that already are in their collections, were not plundered during World War II. The Report exhorts member museums to

> search their own records thoroughly, and, in addition, . . . take all reasonable steps to contact established archives, databases, art dealers, auction houses, donors, art historians and other scholars and researchers who may be able to provide Nazi/World War II-era . . . information.[254]

As is apparent from these documents, many U.S. museums have imposed on themselves an affirmative duty to investigate the history of both prospective acquisitions and art objects already in their possession. This makes it clear that publicly supported, tax-exempt institutions can and should be expected to perform comprehensive due diligence investigations for art objects in their possession.

2. Attorneys' Legal Liability

The fiduciary responsibilities of estate planning attorneys support a broad investigative standard. Attorneys advising art collectors owe several professional duties to their clients that help define the appropriate scope of investigation necessary in relation to valuable art objects. Authorities have stressed the obligation of estate planning attorneys to understand the wide variety of laws and bodies of knowledge that affect asset protection planning.[255]

If a client owns art, this understanding must necessarily include the laws affecting, and bodies of knowledge relating to, art ownership and possession. Estate planning attorneys should have the ability to inform clients of the potential problems that the presence of stolen art can cause their estates. The unanticipated presence of stolen art in an estate can carry severe consequences for the continued viability of an estate plan. The failure of an estate planning attorney to raise the issue may result in professional liability.[256]

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254. Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933–1945), *posted at* <http://www.aamd.org/guidln.shtml>.

255. Madden, *supra* note 1, at 462-63.

256. Sparo, *supra* note 1, at 58.

At the very least, attorneys should advise their clients about the risk of acquiring stolen art and its many adverse consequences. As a New York court recently counseled, "an attorney is required to advise clients of the legal consequences of their actions."[257] This responsibility is especially important when clients are not otherwise likely to appreciate a particular risk or exposure.[258] Thus, "[w]here the client owns art, the estate planning attorney should outline the potential problems" stolen art may cause the estate, "for example, the possibility of a reduced estate," as well as the possibility that a due diligence investigation "may result in the loss of the item."[259]

Attorneys also have responsibilities to apprise estate administrators and executors about the potential damage that stolen art can cause an estate during administration. One commentator recently recommended that "[t]he issue of stolen art should be raised to clients as well as fiduciaries responsible for administering estates. Failure to do so may distort and thwart estate plans and lead to significant losses to clients and perhaps their advisors."[260]

The potential for overpaying estate taxes highlights an attorney's duty to raise the potential problem of stolen art during estate administration. If estate taxes are paid on art that is later found to be stolen and that art is subsequently returned to the rightful owner, the estate may be time-barred from seeking a tax refund.[261] The overpayment of these death taxes on a stolen art object, the true nature of which could have been discovered by a diligent investigation urged or conducted by the attorney, could subject both the attorney and the executor to professional liability.[262]

3. Trust Institutions and Other Professional Fiduciaries

Trust institutions and other professional fiduciaries that manage the assets of collectors have formal responsibilities to protect and safeguard assets under their care. These obligations should expand the scope of investigation that courts expect for valuable art objects. Initially, trustees and other fiduciaries are required to exercise the degree of skill that they present themselves as having and which they invoke to attract clients:

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257. Madden, *supra* note 1, at 463.

258. *See* Spero, *supra* note 1, at 60; *see also* Charles D. Fox & Rosalie Murphy, *Fiduciaries and Attorneys Must Face Developing Doctrine of Duty*, 136 TR. & EST. 22, 22 (Sept. 1997) (enunciating a "doctrine of attorney duty to estate and trust beneficiaries.").

259. Spero, *supra* note 1, at 60.

260. *Id.* at 62.

261. *Id.* at 61.

262. *Id.* at 60.

> The trustee has a duty to exercise such care and skill as a person of ordinary prudence would exercise in the conduct of his or her own affairs. If the trustee secures its appointment by representing that it possesses a higher level of skill, the trustee must exercise that greater level of skill.[263]

Large institutional trustees and professional fiduciaries almost uniformly represent themselves as possessing extensive capabilities and expertise in asset protection, estate planning, and wealth management.[264] Some claim a special competence in handling expensive artworks.[265] These representations, in conjunction with the staffs of professionals that these institutions assemble (including attorneys, certified public accountants, MBAs, and other professionals), support a due diligence investigative obligation for valuable art objects that is both comprehensive and legally informed.

Fiduciaries have a threshold obligation, under the "prudent person rule" of fiduciary investment, to investigate each asset in an estate or trust in order to identify discrete risks that are specific to that asset. This investigation should include inquiry into attributes of the particular market in which the asset is sold. As a leading authority has instructed, "[u]nder the rule, a prudent fiduciary must make an independent assessment of each asset in an estate or trust with respect to such factors as risk (both in terms of the asset itself and the wider market of which it may be a part), appropriateness to the objectives of the trust or estate, concentration, physical safety, yield and the like."[266]

As previously noted, prevailing conditions in the international art market facilitate the sale of stolen materials.[267] The prudent person rule requires professional fiduciaries to be aware of these conditions and to take appropriate steps to assess and limit risk. Thus, the

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263. ROY ADAMS, FIDUCIARY LAW AND TRUST ACTIVITIES GUIDE 93 (1996).

264. The marketing brochure of the J.P. Morgan Trust Company (Morgan) exemplifies these representations. Morgan touts a "Wealth Advisory" group with distinctive skills in dealing with "unique assets such as real estate, art, and privately held businesses." Morgan Brochure, at 2. Morgan asserts that its "[b]readth of advice is unique," *id.* at 3, and that its "Fiduciary Management group provides an exceptional level of personal attention through its staff of trust officers and administrators, most of whom have law degrees." *Id.* at 4.

Morgan represents that it has the capability to protect the value of all estate assets, including valuable art objects, and of "managing and, where applicable, insuring special assets such as . . . valuable collectibles." *Id.* at 5. In addition, Morgan states that in providing estate administration services, it "[m]oves immediately to protect all property in the estate." *Id.* at 7. The marketing brochures of Banker's Trust, Bessemer Trust, Northern Trust, and Wilmington Trust contain similar representations.

265. *See* discussion *supra* note 264 (regarding representations of marketing brochure of JP Morgan Trust Company. Also note that Citibank offers a special Art Advisory Service.).

266. ADAMS, *supra* note 263, at 49.

267. *See supra* pages 659-63.

threshold fiduciary responsibility of investigation necessarily requires both knowledge and inquiries sufficiently comprehensive and informed to discharge this duty.

A second fiduciary obligation, the duty to identify and inventory the property of an estate or trust, also suggests a broader investigative responsibility standard.[268] A third substantive fiduciary responsibility, the duty to protect the assets of an estate or trust, also suggests a broad investigative obligation for expensive art objects. As a professional commentator recently noted, "the prevalence of stolen art complicates the efforts of personal representatives to ensure that the estate has secure legal ownership rights in art objects in its possession."[269]

It is black letter law that a trustee must preserve the trust property and that the trustee has a duty to enforce trust claims and defend the trust against loss.[270] Because of the unique risks posed by possession of art objects, a special duty may attach to protect collectibles such as art objects. As one authority recently opined:

> [T]he prevalence of stolen art and the possibility that many works may be stolen and subject to conflicting ownership claims also may invoke the fiduciary responsibility of personal representatives and trustees to "use reasonable care and skill to preserve and safeguard estate and trust property." Authorities have counseled that "the personal representative is required to take all reasonable steps to protect the decedent's collectibles from loss or damage," and that "this is particularly important in the case of assets such as art and other collectibles."[271]

The recent "prudent investor rule" of the Third Restatement of the Law of Trusts,[272] and the correspondent Uniform Prudent Investor Act (UPIA), highlight the fiduciary responsibilities of professional

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268. *See* Basha, *supra* note 1 at 64 (stating that "[a] primary responsibility of the personal representative is 'to discover and inventory all of the assets held by the decedent at his death'" (citing *Current Problems in the Administration and Distribution of Tangible Collectible Property in the Estate of a Decedent*, 16 REAL PROP. PROB. & TR. J. 320, 320 (1981))).

269. Basha, *supra* note 1, at 64.

270. ADAMS, *supra* note 263, at 94.

271. Basha, *supra* note 1, at 64 (citations omitted).

272. The "prudent investor rule" is stated in § 227 of the Restatement (Third) of Trusts (1990) in applicable part as follows:

> § 227. General Standard of Prudent Investment
>
> The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.
>
> (a) This standard requires the exercise of reasonable care, skill, and caution, and is to be applied in the context of the trust portfolio and as part of an overall trust investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.

trustees and executors and emphasize the need for appropriate due diligence investigation for valuable art objects included in an estate or trust.[273] As of 1996, "a core number of states, including the most populous [such as New York and California) already enacted the Uniform Act or something like it,"[274] The UPIA is "expected to be widely enacted in years to come."[275] It is likely that the "prudent investor rule" as promulgated by both the Restatement and the UPIA will have a significant effect in fiduciary surcharge suits.[276]

The prudent investor rule and the UPIA heighten the obligations of professional fiduciaries to deal responsibly with valuable art objects. The goal of the prudent investor rule is "to modernize trust investment law" and replace the "prudent man standard" by requiring trustees "to design and actively carry out a reasoned investment policy which fits the trust's unique purposes, circumstances, and beneficiary needs."[277] This new standard requires trustees to identify and deal responsibly with any assets, such as potentially stolen artworks, that may impair the objectives of the trust. Several discrete requirements of the prudent investor rule punctuate the need for professional fiduciaries to take appropriate and informed precautions to ensure that stolen art objects do not defeat trust objectives or a testator's intentions.

First, perhaps, is the premium value that the rule places upon risk management. Comment e to section 227 of the Restatement of Trusts states that because investment risk can never be avoided, but only reasonably limited, fiduciaries must manage risk appropriately by considering all the dangers to which assets under their care may be subject. As instructed in the comment, "[t]he duty of caution does not call for the avoidance of risk by trustees but for their prudent

273. In May 1990 the American Law Institute formally approved the "prudent investor rule," along with "substantial changes in other Restatement sections that affect or are affected by the prudent investor rule." Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151, 1151 (1992).

In 1994, the National Conference of Commissioners on Uniform State Laws (the Uniform Law Commission), after a three year review, promulgated the Uniform Prudent Investor Act (UPIA) in order to codify revised Restatement principles as a uniform law. John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 641 (1996). As previously noted, many states already have adopted some form of the UPIA, and authorities expect that it will significantly impact fiduciary responsibilities.

274. Langbein, *supra* note 273, at 641-42.

275. *Id.*

276. William S. Hershberger, *Fiduciary Investing in the 90's—Restatement Third of Trusts: Panacea or Placebo?* 1993 INST. ON EST. PLAN., ¶ 500, at 5-21 (1993).

277. Lyman W. Welch, *How the Prudent Investor Rule May Affect Trustees*, 131 TR. & EST. 15, 15 (Dec. 1991).

management of risk. For these purposes, risk management . . . takes account of all hazards that may follow. . . ."[278]

Competent risk management for estates and trusts containing valuable art objects requires efforts to ensure that the objectives of the trust or estate are not frustrated by title defects. Because "tolerance of risk varies greatly . . . with the purposes of the trust and the relevant circumstances of the beneficiaries,"[279] the prudent investor rule requires trustees to "act reasonably in an effort to achieve the lowest level of risk for a particular level of expected return . . . ."[280] Section 227 thus properly focuses on whether an incremental increase in risk furthers the goal of attaining the desired return.[281] This marginal risk analysis imposes a special obligation upon fiduciaries to protect against any "unique" or "nonmarket" risks that do not offer a corresponding potential for greater returns.[282] Accordingly, the minimization of "uncompensated risk" becomes a significant goal of prudent investors.[283]

Stolen art objects inadvertently included in an estate or trust appear to present the type of "unique," "non-market," and "uncompensated" risk that the prudent investor rule requires fiduciaries to eliminate whenever possible. By ignoring the possibility that a particular art object may be stolen, a fiduciary does not thereby improve the chances that the item will appreciate or that the total investment "portfolio" will earn a greater return. Rather, the risk is all "one-sided" when stolen art objects are involved. The fiduciary recklessly gambles that the stolen item will not be recovered by a former owner and thus a potentially devastating loss will be avoided. Accordingly, the failure of fiduciaries to recognize and deal responsibly with the potential that artworks belonging to an estate or trust may have been stolen signals a defect in risk management under the prudent investor rule.

Other aspects of the prudent investor rule reinforce the responsibilities of fiduciaries to take informed precautions to avoid the hazards of stolen art. Commentators consistently have stressed that professional fiduciaries, in performing their responsibilities under the prudent investor rule, must consider the objectives of the trust,[284] the

278. RESTATEMENT (THIRD) OF TRUSTS § 227 cmt. e (1990).

279. Langbein, *supra* note 273, at 650.

280. Halbach, *supra* note 273, at 1166.

281. Hershberger, *supra* note 276, at 5-23.

282. RESTATEMENT (THIRD) OF TRUSTS § 227 cmt. e (1990).

283. Halbach, *supra* note 273, at 1160.

284. *See, e.g.*, Welch, *supra* note 277, at 24 (asserting that the prudent investor rule "holds the trustee responsible for fulfilling investment duties in an informed, active manner. The trustee is accountable and can be held to demonstrate that investment judgments were made on a

particular risk characteristics of each asset or investment,[285] and the suitability of the asset or investment for the trust's purposes.[286] Most significantly, "abstractly risky investments . . . should be judged not in isolation but in terms of their role in a particular portfolio or strategy."[287] Accordingly, "the prudent investor rule increases the likelihood that trustees will actively pursue investment policies designed to fit the particular needs of the trust and its beneficiaries . . . ."[288] There can be little doubt, then, that fiduciaries who ignore the discrete risks that expensive artworks pose to a trust or estate breach their responsibilities under the prudent investor rule to ensure that each asset is appropriate for the purposes of the estate or trust.

The specific criteria that the prudent investor rule instructs fiduciaries to consider in making particular investment decisions also underscores the need for informed due diligence investigations for valuable art objects. In comment k to section 227 of the Restatement, fiduciaries are counseled that in reviewing a particular investment a trustee should consider, inter alia, "[e]xpectations concerning the investment's total return," "the degree and nature of risks associated with the investment," and "any special characteristics of the investment that affects its risk-reward tradeoff, and effective return, such as exposure to unlimited tort liability . . . ."[289] The failure of a trustee or executor to consider the possibility that a particular art object belonging to a trust or estate may be stolen and subject to a conversion action by a former owner would ignore these prescriptions.

The substantive responsibilities of fiduciaries both to review and restructure trust investments at inception, as well as to monitor investment performance and suitability thereafter, also support an expanded obligation of due diligence investigation. The prudent investor rule requires trustees, when the trust is created, to ensure that each asset of the trust estate is appropriate for the trust's purposes.[290] Comment a

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reasoned basis and sound economic assumptions appropriate for the unique needs and purposes of the trust."); Halbach, *supra* note 273, at 1167 (instructing that fiduciary duties are to be performed "with due care and skill, and with an eye towards the trust purposes and an overall degree of cautions and conservatism reasonably appropriate to the trust at the time the particular investment decision is made.").

285. *See, e.g.*, Welch, *supra* note 277, at 25 (stating that "the prudent investor rule does not excuse a trustee from acting prudently, intelligently and cautiously regarding each individual investment."); Hershberger, *supra* note 276, at 5-23 (stating that each investment must be considered, in part, "on the basis of its own potential risks and rewards.").

286. *See, e.g.*, Halbach, *supra* note 273, at 1167 (observing that "[e]ach investment . . . should be evaluated in terms of [the] . . . trust purpose it is intended to serve.").

287. Hershberger, *supra* note 276, at 5-26.

288. Welch, *supra* note 277, at 25.

289. RESTATEMENT (THIRD) OF TRUSTS § 227 cmt. k (1990).

290. Section 229 of the Restatement (Third) of Trusts (1990) provides as follows:

to section 229 instructs that "the trustee's decisions about retention and conversion must take account of the suitability of an existing investment to the needs and contemplated strategy . . . of the particular trust."[291]

This threshold investigation of trust assets should include inquiry into attributes of the particular market in which the asset is sold. A leading authority has stated that "[u]nder the rule, a prudent fiduciary must make an independent assessment of each asset in an estate or trust with respect to such factors as risk (both in terms of the asset itself and the wider market for which it may be a part), appropriateness to the objectives of the trust or estate, concentration, physical safety, yield and the like."[292]

The initial obligation to investigate estate and trust assets recommends that special precautions be taken for valuable art objects. As previously discussed, prevailing conditions in the international art market facilitate the sale of stolen materials. The prudent investor rule requires trustees and executors to identify these conditions and to assess and limit risk. For valuable works of art, these responsibilities can only be discharged through an appropriately informed and comprehensive due diligence investigation.

Trustees also have a fiduciary duty to monitor the trust investments to ensure their continued suitability to the trust's objectives and to keep apprised of opportunities and rights pertaining to trust assets and investments. These duties also suggest a broad investigative responsibility for valuable art objects. As prescribed in comment d to section 227, the duty of care under the prudent investor rule "requires the trustee to exercise reasonable effort and diligence in making and monitoring investments for the trust with attention to the trust's objectives. The trustee has a related duty of care in keeping informed of rights and opportunities associated with those investments."[293]

The responsibility to monitor and review trust assets "[o]rdinarily . . . involves obtaining relevant information about such matters as . . . the contents and resources of the trust estate, and the nature and characteristics of available trust investment alternatives."[294] Under this standard, unique assets, such as valuable art objects, need particu-

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§ 229. Duty with Respect to Original Investments

The trustee is under a duty to the beneficiaries, within a reasonable time after the creation of the trust, to review the contents of the trust estate and to make and implement decisions concerning the retention and disposition of original investments in order to conform to the requirements of §§ 227 and 228.

291. RESTATEMENT (THIRD) OF TRUSTS cmt. a (1990).

292. ADAMS, *supra* note 263, at 96.

293. RESTATEMENT (THIRD) OF TRUSTS cmt. d. (1990)

294. *Id.*

lar attention. The duty to monitor and review trust assets requires that trustees seek to identify any hidden ownership limitations or restrictions in trust assets, such as the possibility that valuable art objects may have been stolen, frustrating the objectives of the trust. As one authority has recommended, "to the extent the individual trust assets or portfolios may include special assets, . . . special review and documentation may be advisable."[295]

Requiring a trustee to monitor and review trust assets, even when those assets include unique art objects, does not mean that the trustee must personally become an expert to manage the trust effectively. The prudent investor rule requires trustees to delegate the responsibilities of trusteeship whenever a prudent person might do so.[296] Unlike the "prudent man" standard, which discouraged nonessential delegation,[297] the new standard responds to the reality that "[a]s the [trust] function has grown ever more complex, there is ever less reason to believe that nonspecialists are fit to conduct it."[298]

Generally, delegation is appropriate "whenever the trustee reasonably believes the incremental costs of delegation is warranted and the objectives and circumstances of the trust make delegation advisable."[299] The new rule clearly encourages trustees to "farm out" responsibilities that fall outside the particular area of the trustee's expertise.[300]

The new rule empowers trustees to delegate important trust functions entailing independent professional judgment and discretion. As instructed in comment f to section 171:

> Delegation is not limited to the performance of ministerial acts. In appropriate circumstances delegation may extend . . . to dis-

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295. Welch, *supra* note 277, at 23.

296. Section 171 of the Restatement (Third) of Trusts (1990) prescribes as follows:

> § 171 Duty with Respect to Delegation.
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> A trustee has a duty personally to perform the responsibility of the trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust . . . the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.

(The duty of delegation is also prescribed in § 227(c)(2), requiring trustees to "act with prudence in deciding whether and how to delegate authority and in the selection of agents," and cross references § 171.)

297. *See* Halbach, *supra* note 273, at 1173 (explaining that "the prudent investor rule views delegation in a more positive light than has traditional doctrine accompanying the prudent man standard . . . which . . . has grudgingly accepted delegation only if and to the extent the trustee has no reasonable alternative.").

298. Langbein, *supra* note 273, at 651.

299. Welch, *supra* note 277, at 18.

300. Hershberger, *supra* note 276, at 5-29.

> cretionary acts, to the selection of trust investments or to the management of specialized investment programs, and to other activities of administration involving significant policy judgment.[301]

Given this express authorization and clear break with the limited delegation powers of the past, the refusal of trustees to delegate responsibilities that they are not equipped or qualified to meet may constitute an abuse of fiduciary responsibility[302] and expose the trustee to a suit alleging negligence.[303] The broad authority that trustees enjoy to delegate trust functions entailing independent professional judgment repudiates any notion that professional fiduciaries cannot reasonably be expected to conduct informed and comprehensive investigations to ensure that valuable art objects under their care have not been stolen. The prudent investor rule makes it clear that professional fiduciaries can, and indeed should, delegate such tasks so long as the agents conducting these inquiries are appropriately qualified and the cost of the investigation is reasonable in light of the value of the art object in question and the risk that the investigation is calculated to eliminate.

Finally, two additional attributes of the prudent investor rule support a comprehensive investigative standard for valuable art objects. First, the focus of the prudent investor rule on gauging fiduciary performance by the manner in which investments are made, rather than how they are classified, recommends informed due diligence as a benchmark. The prudent investor rule evaluates the fiduciary performance of trustees based upon the quality of their deliberations rather than their designation of particular investments as either risky or acceptable. In other words, to evaluate the fiduciary performance of trustees, the prudent investor rule looks to the way that investment decisions are made, the process under which a portfolio is constructed, and the manner in which it is managed, rather than looking to whether an investment was "high risk" or "low risk," "imprudent" or "prudent."[304] Rather than presume to use a relative term such as "risky" by which to judge the entire spectrum of potential trust forms, the prudent investor rule "requires the trustee to design and actively carry out a reasoned investment policy which fits

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301. RESTATEMENT (THIRD) OF TRUSTS § 171 cmt. f (1990).

302. Comment a to § 171 counsels that "[a] trustee's discretionary authority in the matter of delegation may be abused by imprudent failure to delegate as well as by making an imprudent decision to delegate."

303. Welch, *supra* note 277, at 22.

304. *Id.* at 15.

the trust's unique purposes, circumstances and beneficiary needs."[305] Accordingly, by encouraging conscientious and informed decision-making, the prudent investor rule champions appropriate due diligence for each asset and investment in an estate or trust, including valuable works of art.[306]

It is worth noting in this context that the importance the prudent investor rule assigns to the deliberative process makes it correspondingly important for fiduciaries to document their decisions. Documentary evidence is clearly the most effective way for a fiduciary to establish that he or she effectively discharged his or her duty of performing a comprehensive and legally informed due diligence investigation.

I. Extent of Potential Risk in Failing to Take Precautions Against Acquiring Stolen Art

The increased likelihood of being sued for the recovery of a stolen art object should amplify the scope of appropriate due diligence investigation. Authorities repeatedly have observed that the increased attention devoted to the recovery of materials looted during World War II has created greater exposure for U.S. collectors. One attorney recently observed, "the current wave of interest in gold, currency, insurance and other assets displaced via the Nazis has surely bolstered the resolve of art theft victims and their heirs, who . . . are becoming increasingly proactive, tracking down and laying claim to works stolen decades ago."[307] The judicial claims for the recovery of stolen art brought so far portend many more to come, and the scope of potential exposure to U.S. museums and private collectors is enormous.[308]

In February 1998 a director of the Art Institute of Chicago informed members of the Banking Committee of the U.S. House of Representatives that the problem of looted art from World War II is "one of the most pressing and difficult questions facing American Art museums today."[309] The *New York Art Journal* identified as a "looming problem for American museums the likely prospect that disputed

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305. *Id.* at 15.

306. *See* Hershberger, *supra* note 276, at 5-39.

307. Ziss, *supra* note 145, at 2.

308. Glen D. Lowry, Director of the Museum of Modern Art in New York, has opined that "[t]his is the tip of the iceberg." Judith Dobrzynski, *How Did You Get That Art in the War, Daddy*, N.Y. TIMES, January 25, 1998, at § 4, p. 4 (quoting Lowry). Lowry commented that "[n]o museum that has acquired works of art in the last 50 years is immune from claims." *Id. See also* Walter V. Robinson, *Plundered Art Prompts Museum Review*, BOSTON GLOBE, June 5, 1998, at A1.

309. Judith Dobryzynski, *Capitol Hill Looks at Issue of Stolen Art in Wartime*, N.Y. TIMES, February 15, 1998, at A17 (quoting James D. Wood, director of the Art Institute of Chicago).

art will continue to resurface not only in loan shows but in their own collections."[310] Art theft victims from World War II have become more organized and intent upon locating and reclaiming materials plundered during the War. The World Jewish Congress has created the Commission on Art Recovery to help original owners locate and recover assets looted during the War.[311] The B'nai B'rith Klutznick National Jewish Museum has sponsored the Holocaust Art Restitution Project.[312] Governor Pataki of New York "has announced that the State Banking Departments Holocaust Claims Processing Office will include in its mission the search for works of art which were displaced during the War."[313] A group of Italian officials is campaigning to reclaim hundreds of art objects looted from Italy during World War II.[314]

J. Repeated Admonitions of Legal and Professional Commentators

The repeated injunctions of legal writers and professional commentators about the extent of stolen art in circulation and the need for collectors to take appropriate precautions should inform investigative responsibilities. For many years, legal commentators have warned how easily collectors can mistakenly acquire stolen art and have punctuated the need for buyers and collectors to exercise caution. These admonitions include the following:

> "Many countries are attempting to repatriate their displaced treasures. The 'rightful owner' of valuable artwork will continually seek its return. This is a problem, of course, for the purchaser of artwork. A buyer cannot be certain whether the seller of a valuable artifact has good title or whether there is a 'rightful owner' who may later appear."[315]

> "[T]he most effective incentive for investigating title before purchasing art . . . is the potential for losing an art work to the

310. Beverly Screiber Jacoby, *The Nazi Legacy in the Art World—Effect on Value is One of Many Issues*, N.Y. L.J., March 30, 1998, at 6 (citing the Summer 1998 issue of Art News). The article made clear that the problem of stolen art is not limited to materials looted during World War II: "[t]he definition of good faith acquisition changes over time. Today it's Nazi loot; tomorrow it could be African sculptures in the Met." *Id.*

311. Ziss, *supra* note 145, at 2.

312. *Id.*

313. *Id.*

314. *See* David D'Arcy, *Italy Goes After Looted Treasures*, ART & AUCTION, May 1997, at 26. The article states "they have fixed their sights on some distinguished works and appear to be prevailing." *Id.*

315. *See Acquiring Title*, *supra* note 123, at 237.

> owner from whom it was stolen and being left with no way to recover the investment."[316]
>
> "Courts have come to demand increasingly thorough investigations into title . . . of artworks and antiquities purchased on the international art market. Purchasers of works of art and antiquities are well advised to undertake particularly thorough investigations . . . ."[317]
>
> "If you are the purchaser of a work of art and you do not want to have an open-ended risk of having the work confiscated without compensation then you must exercise due diligence in checking out its ownership status."[318]
>
> "The steps which (collectors) should take in checking title correspond to those which a rightful owner should take in putting the public on notice that the work is stolen and no title can be conveyed."[319]

This past year, professional commentators in estate planning and asset protection journals have urged attorneys and fiduciaries to deal with valuable art objects responsibly. The exposure of clients with expensive art "can only be eliminated after collectors have taken comprehensive and informed precautions against acquiring stolen art, and have positioned themselves to raise the equitable defense of laches to the potential . . . judicial claim of a former owner."[320] One estate planning attorney has stressed the need for persons in mistaken possession of stolen art to conduct appropriate investigations in order to establish a laches defense to potential future claims.[321] As emphasized in a recent article, "stolen art can wreak havoc upon estate and financial plans, undermine estate administration and compromise fiduciary responsibilities because it can be reclaimed by former owners."[322]

Because numerous professional commentaries in leading estate planning and asset protection publications have counseled due diligence inquiries for expensive artworks, it is all the more reasonable for courts to expect that such investigations will be performed.

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316. Hoover, *supra* note 6, at 50.

317. Montagu, *supra* note 62, at 78.

318. Joshua Kaufman, *In Case of Theft, Consult a Lawyer*, THE ART NEWSPAPER, Nov. 1995, at 6.

319. Laura W. Wertheimer, *The Implications of the O'Keefe Case*, 6 ART & L. 44, 47 (1981).

320. Madden, *supra* note 1, at 464.

321. Spero, *supra* note 1, at 61.

322. Basha, *supra* note 1, at 60 (commenting that a "due diligence investigation can protect estates, trusts and professional fiduciaries").

K. Traditional Deficiencies Inherent in Investigating "Provenance" of a Particular Work

Due diligence investigations are necessary because they are the only effective way collectors and buyers can avoid acquiring stolen artworks. The measures that the art world commonly accepts as adequate to accomplish this objective—investigating the "provenance" of a particular work and relying upon the reputation of individual dealers—are defective.

There are several reasons that the available "provenance" of a work does not diminish the risk the work once may have been stolen. First, authorities have reached no agreement concerning: (1) how the term "provenance" is defined;[323] (2) what materials comprise a provenance; (3) how gaps in available information should be treated; (4) how the material that is selected as "provenance" should be disclosed or presented; or (5) the identity of the person who should make such disclosure.[324]

Second, regardless of how the term is defined, most works lack a complete "provenance."[325] The secrecy of most art transactions assures that accurate information about past ownership often will be unavailable: examining the ownership history of a piece of art can be difficult in a market where anonymity and secrecy are the accepted norms.[326] Gaps in "provenance" often occur in part because many sellers wish to keep their activities hidden. One commentator observed that "art dealers and auction houses often sell art on behalf of well-to-do families who wish to conceal the fact that they are facing financial difficulties."[327] Other collectors "are notoriously tight lipped" and may wish to deflect IRS scrutiny or the attention of potential thieves.[328]

Even when a provenance is available, the materials offered frequently contain errors and mistakes. Art objects of lower value more frequently contain errors in the provenance than more expensive pieces. Adding to the problem is the fact that forged provenances are not difficult to create or purchase.[329]

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323. *See, e.g.*, Kennon, *supra* note 61, at 382 n.45 (discussing varying definitions of the term "provenance" as found in Dictionary of the Arts (M. Wolf. ed. 1951) and Hudson Dictionary of Art Terms (E. Lucie-Smith Thames ed. 1984)).

324. JESSICA L. DARRABY, ART, ARTIFACT & ARCHITECTURE LAW, § 2.11[2], at 2-50 (1995).

325. Newsletter of Gallerie St. Etiene (June 9, 1998-Sept. 11, 1998 edition).

326. Van Pelt, *supra* note 165, at 456.

327. *Id.* at 457.

328. William G. Flannagan, *Phony Provenances Shake the Art World*, FORBES, August 12, 1996, at 170.

329. *Id.*

Finally, few dealers even attempt to verify the information they report as "provenance." Errors are rarely detected, and "the art trade knows that a lot slips through the cracks."[330]

As a result of these many deficiencies of "provenance," few pieces of art come with a perfect and complete pedigree,[331] and "[i]nsiders know there's often no way to track down who has owned a painting."[332] As a matter of diligently researching the history of an art object, the art world's reliance on provenance is misplaced.

The second precaution that the art world has counseled to avoid acquiring stolen art, to buy only from "reputable" dealers, also is flawed. Because dealers frequently do not investigate the background of artworks they sell,[333] they often inadvertently sell stolen materials. Indeed, several defendants in prominent judicial decisions for the recovery of stolen art purchased the disputed items from established and "reputable" dealers.[334] As these anecdotal cases show, an art buyer cannot assume that an art object's history is free from title defects simply because a dealer is "reputable."

L. Art World Resources

The availability of investigative resources that consistently have identified stolen art objects helps define the appropriate scope of inquiry for art buyers and collectors. Legal commentators have maintained that the practical ability of buyers and collectors to investigate the title of art objects should guide determinations about good faith and innocence. In reality, this is little more than a call to assess a buyer's good faith and innocence in light of all the facts and circumstances. Whether a title defect was discoverable at all will not necessarily determine whether the buyer acted in good faith. Rather, the buyer's innocence will hinge on his or her resort to reasonable and effective mechanisms to search for potential title defects.[335]

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330. Flannagan, *supra* note 328, at 297.

331. Van Pelt, *supra* note 165, at 457.

332. Flannagan, *supra* note 328, at 170.

333. *See supra* note 6 (discussing the concession of the American Association of Art Dealers in Porter v. Wertz that "the ordinary custom in the art business is not to inquire as to title.").

334. *See, e.g.*, Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 428 (N.Y. 1991) (observing that the defendant in a lawsuit brought to recover a stolen Chagall painting had purchased the painting from the reputable Robert Elkon Gallery in Manhattan); DeWeerth v. Baldinger, 804 F. Supp. 539 (S.D.N.Y. 1992). In *DeWeerth*, Wildenstein & Co., Inc., (Wildenstein gallery) was joined as a third party defendant in an action brought to reclaim a Monet painting looted at the conclusion of World War II. The Wildenstein gallery had sold the painting to the defendant in 1957. *Id.* at 542.

335. Bibas, *supra* note 8, at 2454.

As discussed *infra*, several information resources and investigative channels in the art world repeatedly have proven effective in identifying and locating stolen art objects.[336] Buyers and trustees have access to these resources, and "[t]here are even organizations that specialize in the title search of fine arts and antiquities."[337]

Accordingly, the capability of buyers and collectors to investigate the background of a work effectively and in a cost-efficient manner (or to hire a professional firm to perform this task) should influence the view of the law as to whether a purchaser took adequate precautions prior to purchasing an artwork.

M. Precautions to Protect Assets of Comparable Value

"Due diligence" has been defined as the measure of prudence and precaution expected of a reasonable person in a given situation. As stated in Black's Law Dictionary, due diligence is:

> [s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.[338]

The purpose of due diligence is to "discover and analyze all the material information" and to "identify and address any material areas of concern" in a transaction.[339] Due diligence investigations enable: (1) relevant information to be fully disclosed; (2) prospective transactions to be evaluated; and (3) potential liability to be limited.[340] Because "[t]he ultimate success" of many transactions "depends directly and exclusively on the quality and detail of the due diligence investigation, the due diligence review is one of the most important and risk-fraught elements of any transaction."[341]

The exhaustive due diligence undertaken to protect assets of similar value and to manage risks of corresponding magnitude can serve as a model for the broad investigative responsibility with regard to expensive art objects. Due diligence investigation has become essential in almost all commercial and real estate transactions. Those who

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336. *See infra* pages 715-27 (discussing the several inquiries that comprise an appropriate due diligence investigation for a valuable art object).

337. Ziss, *supra* note 145, at 10.

338. BLACK'S LAW DICTIONARY 457 (6th ed. 1990).

339. GARY M. LAWRENCE, DUE DILIGENCE IN BUSINESS TRANSACTIONS § 1.01, at 1-5 (1994).

340. LAWRENCE, *supra* note 339, § 1.03, at 1-9.

341. *Id.* § 1.01, at 1-4.

neglect appropriate inquiries in any transaction invite liability. The justifications for due diligence in business and real estate transactions apply with special force when valuable art objects with unknown, and often unknowable, ownership histories are bought and sold in a market saturated with stolen merchandise. As one commentator observed, "[t]he courts are encouraging buyers in the art market to treat purchases more like real estate transactions by allowing time to investigate title."[342]

Due diligence is an ancient practice, and has been conducted in some manner since the dawn of commercial activity:

> The notion and practice of due diligence—that is using reasonable efforts as measured by a prudent person standard to determine the accuracy and completeness of statements or the bona fides [of] . . . [a] transaction—has, at least informally, been in existence since the first unwary customer bought the first misrepresented goods or services from a shrewd merchant.[343]

The complexity and litigiousness of the modern commercial world have made due diligence investigations both essential and ubiquitous. In today's business environment, conscientious attorneys and business persons will perform due diligence in virtually every transaction, regardless of its type or the financial value of what is at stake.[344]

The scope of a diligent investigation required in any situation is informed by the specific facts and circumstances, "as the standard of reasonableness and that of a prudent man are standards that a court will determine in a case by case basis."[345] Moreover, the identity of the person charged with the responsibility of investigation is always an important consideration, and "the courts will measure the adequacy of a defendant's due diligence inspection against what is expected of a person in his particular role."[346] Breaches of due diligence responsibilities are likely to be found when the information needed to make a correct decision could have been readily obtained.[347]

The standard regarding how much investigation is indicated, or "due" in a given situation, is never gauged by the common or histori-

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342. Hoover, *supra* note 6, at 52.

343. LAWRENCE, *supra* note 339, § 2.01, at 2-2.

344. *Id.*

345. 1 WILLIAM M. PRIFITI, SECURITIES: PUBLIC & PRIVATE OFFERINGS § 11.05, at 15 (2d ed. 1995).

346. LAWRENCE, *supra* note 339, § 2.02, at 2-15; *see also* Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 690 (S.D.N.Y. 1968) (observing that in evaluating the due diligence defense of a defendant in an action for the breach of he federal securities laws, "the unique position which he occupied cannot be disregarded.").

347. *BarChris*, 283 F. Supp. at 690; *see also* LAWRENCE, *supra* note 339, § 2.02, at 2-14.

cal practices of the industry in question. Rather, the measure of due diligence is always determined by what a reasonably prudent person would do in like circumstances. Justice Holmes formulated the black letter rule many years ago:

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not.[348]

Given the lax standards of the art world, this formulation of diligence is important in exposing the "status quo" dealers and buyers to liability. Authorities consistently underscore the importance of documenting due diligence investigations to ensure that the parties receive the intended protection. As one commentator observed, "[n]o matter how effective and penetrating the actual due diligence investigation, the level of protection it provides from allegations of inadequacy or malfeasance will be greatly diminished if a clear, concise, and complete record of investigation is not made and retained."[349] Most significantly, "[t]he audience for the due diligence investigation compendium . . . is likely to be a judge or jury who never heard of the underlying transaction until it became the subject of litigation."[350]

Due diligence is required whenever a change in asset ownership is contemplated or when potential liability is threatened. For example, whenever a business is being acquired, prospective buyers and their attorneys are counseled to make inquiries into more than two hundred discrete issues in subject areas including organizational structure, asset ownership, contractual relationships with third parties, insurance, outstanding claims, and current as well as potential litigation.[351] Special investigation is prescribed for international acquisitions.[352]

Due diligence for the purchase of real estate is similarly extensive. One commentator instructed that "[t]he real estate acquisition process is like navigating through uncharted waters" and that "[d]ue diligence procedures can provide the framework for a safe course."[353] The role of the attorney, of course, is especially important in real

348. James D. Schwartz et al., *Due Diligence in Life Insurance Selection*, PROBATE & PROPERTY 39 (March/April 1994) (citing Texas & Pacific Ry. Co. v. Behymer, 189 U.S. 468, 479 (1903)).

349. LAWRENCE, *supra* note 339, § 5.01, at 5-1.

350. *Id.* § 5.01[4], at 5-8.

351. *See, e.g.*, 8 ZOLMAN CAVITCH, BUSINESS ORGANIZATIONS WITH TAX PLANNING (1996) (describing many dozens of distinct inquiries to make when contemplating the purchase of a business).

352. *See, e.g.*, Michael R. Oestreicher, *Legal Due Diligence Checklist - International Acquisitions*, 12 CORPORATE COUNSEL'S QUARTERLY 76 (1995).

353. Harvey S. Gettleson et al., Navigating the Due Diligence Process: A Checklist Approach to Analyzing Real Estate for Your Client, U.S.C. Law Center Tax Institute, ch. 17.

estate transactions. Attorneys must take exceptional precautions to identify any ownership limitations or restrictions in real property that their clients intend to acquire. As one authority instructed,

> [d]eeds, title policies, transfer restrictions, easements, encumbrances, restrictive covenants, zoning, building moratoria, all these and more rest squarely within the attorney's domain, and as such must constitute part of the law firm's principal due diligence efforts for which it will bear primary responsibility. And, as always, . . . the review [must] be conducted in a manner that takes full account of these considerations . . . .[354]

Expansive due diligence investigations have become standard in many other areas as well. For example, underwriters engaged in initial public offerings of securities must perform due diligence in order to escape liability under federal securities laws.[355] Moreover, due diligence has expanded in securities practice to areas where it is not even identified by law as an affirmative defense.[356] In addition, exhaustive due diligence investigation for potential hazardous waste sites on real property is prescribed to mitigate liability under federal environmental laws.[357] Estate planners also have been advised to exercise due diligence in the selection of life insurance.[358] Due diligence informs the responsibilities of trustees in bankruptcy proceedings to inquire concerning the assets of a petitioner under certain circumstances.[359]

Due diligence investigations now are recognized as essential in all business transactions, and for many other activities as well. The institutionalization of due diligence procedures in so many areas makes it all the more reasonable for courts to expect that appropriate precautions of comparable scope also will be observed for valuable art objects.

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354. LAWRENCE, *supra* note 339, § 9.01[2], at 9-6, 9-7.

355. PRIFITI, *supra* note 345, at 57-58 (observing that "without at least a reasonable investigation of the items contained in the disclosure document, defenses in civil suits and administrative proceedings are unavailable").

356. LAWRENCE, *supra* note 339, § 2.02, at 2-29.

357. *See, e.g.*, BA's Envtl. Due Diligence Guide (BNA) (1997) (counseling extensive inquiries for complying with federal legislation imposing personal liability upon designated individuals for hazardous substances liability).

358. *See, e.g.*, Patricia L. Brown, *A Practical Approach to Due Diligence Planning*, THE PRACTICAL TAX LAWYER, Summer 1996, at 7.

359. *See, e.g.*, *In re* Pomaville, 190 B.R. 632, 637 (Bankr. D. Minn. 1995) (stating that "due diligence requires a trustee to conduct searches that are realistic in the ordinary course of the trustee's performance of his duties").

N. Superior Capability of Appropriate Due Diligence Investigation to Protect Legal Ownership Rights

Under the prevailing "balance of equities" judicial criterion, the capacity of appropriate due diligence investigation to protect legal ownership rights in stolen art objects supports a broader standard of inquiry. In most contexts, due diligence investigation is a "virtual 'zero defects' business," because the failure to identify a particular flaw or deficiency (however well-camouflaged or concealed) can result in liability.[360] The adequacy of many due diligence investigations "is most often judged with the benefit of hindsight."[361] On the other hand, due diligence investigations for valuable works of art do not require perfection or that the collector "get it right." Courts applying the "balance of equities" judicial criterion have not imposed a strict liability standard upon buyers and collectors.

The "balance of equities" question is not whether the item in dispute has in fact been stolen, or even whether the collector could have identified the item as stolen through a more comprehensive investigation. Rather, the question is whether the person found in possession of the disputed object took reasonable precautions to avoid acquiring the stolen property as measured by the facts and circumstances of the particular case. Courts applying this standard will weigh and balance the steps the possessor took to avoid acquiring stolen property against the steps the theft victim followed when reporting the loss, and also will consider other equities that favor each party.

Courts will deny the claim of the theft victim if the equitable balance weighs in the defendant's favor even if the defendant might have done more to investigate whether an item was stolen. The capability of an appropriate investigation to protect legal ownership rights under these circumstances favors a more comprehensive standard.

O. Cost-Effective Benefits of Expansive Due Diligence Inquiry

The cost-effective benefits that thorough due diligence investigations achieve for international art theft victims, institutional and private collectors, as well as the U.S. art market, additionally favor more extensive inquiries. As stated in the increasingly familiar economist's terms, "[t]he law's goal should not be to maximize marketability per se, but rather to achieve optimum marketability by inducing buyers to weigh the costs of investigation against its benefits."[362] Equally obvi-

360. LAWRENCE, *supra* note 339, at § 1.01, at 1-3.
361. *Id.*
362. Bibas, *supra* note 8, at 2451.

ous is the fact that the law should assign investigative and reporting duties upon the parties who can discharge them most effectively.[363]

Extensive and informed due diligence investigations offer many advantages. First, such investigations help international art theft victims to locate and reclaim their stolen property. Inquiries to resources to which theft victims are likely to report their losses, or which otherwise may be aware of such losses, by definition assist in locating looted materials. The many difficulties theft victims face in finding stolen art, as previously discussed, amplify the value of this benefit.

In addition, inclusive due diligence investigations enable both institutional and private collectors to secure good legal title to potentially stolen art objects under the "balance of equities" judicial criterion. Legal commentators have recognized that information that assures good title to works of art confers premium value in the marketplace.[364] The cost-effectiveness of aggressive and informed due diligence investigation for art buyers and collectors, then, alone more than justifies it as a prescribed legal standard.

Finally, adequate due diligence investigations provide the U.S. art market with an essential title clearing mechanism that will honor the reasonable commercial expectations of art buyers and collectors.[365] Accordingly, the many benefits of a comprehensive standard of investigation more than recommend it.

P. Refusal of Courts to Prescribe Specific Criteria for Art Theft Victims

The failure of leading U.S. courts to formulate specific investigative or reporting requirements for all art theft victims accentuates the need for collectors to take greater precautions against acquiring stolen materials. As previously discussed, the courts both in *Lubell* (applying the laches standard of New York), as well as *Erisoty* (interpreting the discovery rule), have declined "to spell out arbitrary rules of conduct that all true owners of stolen art would have to follow to the letter if they wanted to preserve their right to pursue a cause of action in replevin."[366] Moreover, as the court in *Erisoty* instructed, the investi-

363. Hawkins et al., *supra* note 56, at 53-54.

364. *See, e.g.*, Borodkin, *supra* note 166, at 412 (asserting that "the economic value of legal . . . legitimacy is crucial to any understanding of the art market, since the market pays a premium value for items with documented provenance").

365. As discussed at pages 659-63, *supra*, the prolific quantities of stolen art in circulation and the lax commercial practices of the international art market mean that buyers and collectors who neglect appropriate precautions cannot be said to entertain "reasonable" ownership expectations.

366. *See* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991); *see also* Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807 (3d Cir. 1996).

gative standard for theft victims is necessarily "fact-sensitive so as to adjust the level of scrutiny as is appropriate in light of the identity of the parties; what efforts are reasonable for an individual who is relatively unfamiliar with the art world may not be reasonable for a savvy collector, a gallery, or a museum."[367]

The intentionally flexible standard that courts have fashioned to gauge the efforts of theft victims under the "balance of equities" judicial criterion intuits that buyers and collectors of valuable art comprise a relatively homogenous group. As previously noted, the identity of art theft victims and the circumstances under which they sustain losses differ substantially. Their wealth, resources, access to information, and art world sophistication similarly vary. For example, impoverished grandchildren of a couple that perished in the Holocaust and that left only scant records of the art objects the Nazis plundered from their grandparents, have little in common with a nationally prominent tax-exempt institutional collector, such as the Metropolitan Museum of Art in New York, or the Chicago Art Institute, from which a particular painting has been stolen. Courts rightly have determined that the efforts of these two diversely situated theft victims to report their losses and pursue their claims should not be governed by the same standard.

Collectors and buyers of expensive art objects, by contrast, have much more in common. They all acquire materials voluntarily. They either are tax-exempt institutions with an abundance of art world expertise and access to information and sophistication or they are private collectors who are sufficiently wealthy to afford these resources. They have time to consider their prospective acquisitions and to conduct investigations before making decisions. The wealth and art world resources that buyers and collectors of expensive works necessarily enjoy, and their similar status concerning many of the considerations that define their equitable position vis-a-vis art theft victims, recommend that courts impose an investigative standard upon buyers and collectors that is both comprehensive and comparatively uniform.

Because buyers and collectors cannot be certain what steps theft victims may have taken to report their losses, or what other equities may weigh in their favor,[368] collectors who want to make certain that their legal ownership rights are protected must investigate valuable materials with special attention. Accordingly, the inherent flexibility

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367. *Erisoty*, 1995 U.S. Dist. LEXIS 2096, *18.

368. As discussed at pages 670-73, *supra*, art theft victims may suffer many impediments and confront numerous obstacles in seeking to locate and recover their stolen property. For these reasons, courts view the equitable balance as weighted heavily in theft victims' favor.

of the equitable balancing standard and the very capability of buyers and collectors to make informed and extensive inquiries, reinforces the need for them to do so.

Q. Flexibility of Laches Doctrine to Protect Buyers and Collectors

The inherent flexibility of the equitable doctrine of laches and the manner in which it protects the typical reliance interests of art buyers and collectors also suggests a comprehensive standard of inquiry. The doctrine of laches safeguards the reliance interests of buyers and collectors who acquire and care for expensive works and who create financial and estate plans with valuable art objects as integrated assets.

Because courts consistently have recognized that laches determinations are appropriate for summary judgment, the laches doctrine offers an efficient way for collectors who appropriately investigate the background of a valuable art object to protect their ownership rights. The responsiveness of the laches doctrine to the needs of buyers and collectors for an effective title clearing mechanism makes it all the more reasonable for courts to expect that inquiries undertaken to identify potential conflicting ownership claims to expensive artworks will be appropriately comprehensive.

IV. LACHES

Laches is the equitable counterpart to the statute of limitations. It is an affirmative defense which, if successful, establishes the facts necessary to prevail on a motion for summary judgment. Unlike the statute of limitations, however, laches does not apply to mere delay alone, but only to delay that causes a defendant harm or prejudice. Laches "permits a court of equity to cut off a right of action when the plaintiff has delayed unreasonably and inexcusably in instituting litigation and thereby has prejudiced the defendant significantly."[369] Accordingly, a successful defense of laches requires not only a showing by the that the plaintiff delayed unreasonably and without excuse under the circumstances in asserting a claim, but also that as a result of the delay, the defendant has suffered prejudice. As the United States Supreme Court has instructed, "[l]aches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."[370] Prejudice and

369. David D. Higgins, *The Application of the Doctrine of Laches in Public Interest Litigation*, 56 B.U. L. REV. 181 (1976).

370. Costello v. United States, 365 U.S. 265, 282 (1961); *see also* 27A AM. JUR. 2D *Equity* § 158, at 635-37 (1996), observing that

delay, however, are integrally inversely related in the laches determination. As one court explained, "the greater the delay the less prejudice required to show laches, and vice versa."[371] Most importantly, a causal relationship must exist between the delay of the plaintiff and the resulting injury or prejudice to the defendant. As the court explained in *Gull Airborne Instruments, Inc. v. Weinberger*,[372] a showing of laches requires not only a "lack of diligence by the plaintiff," but also "injurious reliance thereon by the defendant."[373] The defendant asserting the defense of laches, then, must be able to show

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> As a general rule, two elements are necessary to a finding of laches: (1) Delay by a party in asserting a known right or claim, or, stated otherwise, lack of diligence, lapse of time, or failure timely to assert such right or claim; and (2) prejudice, injury, harm, hardship, damage, disadvantage, unfairness, injustice, inequity, or change of position, circumstances, or condition, that is caused by or results from the delay.

371. White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990); *see also* Stone v. Williams, 873 F.2d 620, 625 (2d Cir.), *vacated*, 891 F.2d 401 (2d Cir. 1989) (instructing that "an evaluation of prejudice . . . is integrally related to the inquiry regarding delay. Where there is no excuse for delay . . . defendants need show little prejudice; a weak excuse for delay may, on the other hand, suffice to defeat a laches defense if no prejudice has been shown."). In Larios v. Victory Carriers, Inc., 316 F.2d 63, 67 (2d Cir. 1963), the court stated that delay and resulting prejudice "are not to be viewed independently. A weak excuse may suffice if there has been no prejudice; an exceedingly good one might still do even when there has been some." *See also* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY, § 28, at 71 (1941) (observing that "[w]here no prejudice has resulted, a long delay has been held not to amount to laches. On the other hand, a very short delay may prevent recovery where it has resulted in serious loss to defendant.").

The U.S. Court of Appeals for the Second Circuit vacated its initial decision in *Stone* based upon new facts that had come to light after it had issued its decision and *not* because of any error of law it had committed in applying the doctrine of laches in that decision. The vacation was based upon a petition for a rehearing of appeal filed under pursuant to Fed. R. App. P. 40 requesting in which the plaintiff requested that the court reconsider its earlier decision. *Stone*, 891 F.2d at 402. That earlier decision had affirmed an award of summary judgment in favor of the defendants on their defense that the doctrine of laches precluded plaintiff's claim seeking her alleged share of copyright renewal rights to songs written by her natural father, Hank Williams. *Id.*

The petition for rehearing was primarily based upon a subsequent decision by the Supreme Court of Alabama that set aside judicial decrees of an Alabama circuit court in 1967 and 1968 that held that the plaintiff was not an heir to William's estate. *Id.* at 403. The Supreme Court of Alabama had found that the defendants had "intentionally, willfully and fraudulently concealed plaintiff's identity, existence, claim and rights as a natural child of Hank Williams, Sr.," and that this fraud, in conjunction with other errors, was sufficient ground to set aside the earlier rulings. *Id.* The Second Circuit declared that the Alabama Supreme Court's "finding of fraud requires a reappraisal of our decision made before the court ruled." 891 F.2d at 404. The court further concluded that "the prejudice to defendants we identified in our prior opinion . . . would not have existed but for the failure of the present defendants to reveal the facts of which they had knowledge," and that the defendants "should not be allowed to claim that they are prejudiced by plaintiff's present assertion of her rights when they were aware of them all along." *Id.* The court accordingly vacated its earlier opinion and remanded plaintiff's claim for a trial upon its merits. *Id.* Most importantly, the court found no error of law in its earlier decision.

372. 694 F.2d 838 (D.C. Cir. 1982).

373. *Id.* at 843.

that the failure of the plaintiff to exercise greater diligence reasonably caused or induced injurious reliance. As another court instructed, "laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered its right."[374]

The discrete elements of laches vary slightly in the several states, although proof of unreasonable delay and resulting prejudice are essential criteria in all formulations of the doctrine.[375] Under the law of New York, where many persons in unknowing possession of stolen art objects may be subject to suit, the laches defense is comprised of four elements:[376]

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374. Provident Life and Accident Ins. Co. v. Driver, 451 S.E.2d 924, 929 (S.C. Ct. App. 1994).

375. Courts throughout the United States have announced tests for establishing the laches defense that differ slightly. However, all consider whether the delay of the plaintiff was reasonable or excusable under the circumstances and whether the defendant sustained injury as a result of the delay. For example, in Province v. Province, 473 S.E.2d 894, 904 (W. Va. 1996), the court instructed that under the law of West Virginia "[t]he elements of laches consist of (1) unreasonable delay and (2) prejudice."

The Court of Appeals of Indiana, however, has declared that "[l]aches is comprised of three elements: (1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party." Shafer v. Lambie, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996).

Other courts have recognized as many as four distinct components to the laches defense that are not always the same. For example, the Appellate Court of Illinois instructed in Evers v. Collinsville Township, 647 N.E.2d 1058, 1061 (Ill. App. Ct. 1995):

> For a court to bar a suit on the grounds of laches, the following facts must be disclosed:
>
> > (1) Conduct on the part of the defendant giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had notice or knowledge of defendant's conduct and the opportunity to institute a suit; (3) lack of knowledge or notice on the part of defendant that the complainant would assert the right on which he bases his suit . . . and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is held not to be barred.

See also Henderson v. Smith, 915 P.2d 6, 11 (Idaho 1996), declaring that "[t]he necessary elements to maintain a defense of laches are:

> (1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

For another formulation of the laches test, which recognizes the absence of excuse of the plaintiff in maintaining a claim as a distinct component, see State ex. rel Polo v. Cuyahoga County Board of Elections, 656 N.E.2d 1277, 1279 (Ohio 1995) (stating that the elements of laches are: "(1) unreasonable delay or lapse of time in asserting a right; (2) absence of excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong, and; (4) prejudice to the other party.").

376. 75 N.Y. JUR. 2D, *Limitations and Laches*, § 333 at 538 (1989). *See also* Rapf v. Suffolk County of New York, 755 F.2d 282, 292 (2d Cir. 1985) (instructing that "[a]n equitable action is barred by laches under New York law where the following exist: (1) proof of delay in asserting a

(1) conduct by an offending party giving rise to the situation complained of;

(2) delay by the complainant asserting his or her claim for relief despite the opportunity to do so;

(3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief,[377] and;

(4) injury or prejudice to the offending party in the event that relief is accorded the complainant.

Courts deciding disputed claims of ownership to stolen art works consistently have applied an equitable "balancing" principle to weigh the factors of delay and resulting prejudice.[378] Authorities have recog-

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claim despite the opportunity to do so; (2) lack of knowledge on the defendant's part that a claim would be asserted; and (3) prejudice to the defendant by the allowance of the claim."); Dwyer v. Mazzola, 567 N.Y.S.2d 281, 282 (N.Y. App. Div. 1991) (prescribing the four distinct elements to the laches defense).

377. Courts in New York and other states have underscored the importance in establishing laches of the reasonable lack of knowledge by the defendant that the plaintiff would bring a claim and have defined the doctrine as essentially protecting the justifiable expectations of the defendant in this regard. For example, in Hoelzer v. City of Stamford, 933 F.2d 1131, 1139 (2d Cir. 1991), the concurring opinion of Judge Jon O. Newman explained the significance of the *Lubell* decision as balancing the reasonableness of the defendant's belief that it owned the controverted painting against the steps the theft victim took to try to find it:

> The result of this decision is to permit a court encountering a dispute between a theft victim and a good-faith possessor to consider and balance all of the equities, including the reasonableness of the efforts the theft victim made to locate the property and the reasonableness of the possessor's basis for believing that it was entitled to keep the property.

Other courts have described the laches defense similarly. *See, e.g.*, Self v. Self, 893 S.W.2d 775, 778 (Ark. 1995), instructing that

> [t]he doctrine of laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance upon the action or inaction of the other party . . . It is based on the assumption that the party to whom laches is imputed has knowledge of his rights and the opportunity to assert them, *that by reason of his delay some adverse party has good reason to believe those rights are worthless or have been abandoned*, and that because of a change of conditions during the delay it would be unjust to the latter to permit him to assert them. (Emphasis added).

See also Provident Life and Accident Ins. Co. v. Driver, 451 S.E.2d 924, 929 (S.C. Ct. App. 1994) (commenting that "as with waiver, laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right"); MCCLINTOCK, *supra* note 371, at 73, (asserting that "defendant's ignorance of notice of plaintiff's claim may have a bearing on the question of what is a reasonable delay").

378. *See, e.g.*, Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 623 (N.Y. App. Div. 1990), reviewing the argument of the plaintiff that the defendants should have taken greater precautions against acquiring a stolen painting and stating that "[w]e comment on this argument only to point out that defendant's vigilance is as much in issue as plaintiff's diligence, which is another reason we characterize the defense urged here as laches. The reasonableness of

nized that under this equitable balance, the failure of theft victims to exercise diligence in seeking to locate their stolen artworks can result in their ownership rights being expunged.[379] As the federal district court observed in *DeWeerth v. Baldinger*[380] (a controversy involving a Monet painting stolen at the end of World War II):

> [i]n reviewing a laches defense, a court must balance the two factors of delay and prejudice, and then apply the balancing test to the facts of the case . . . . Because of the particular fact sensitive nature of the laches inquiry and the lack of any objective standard pursuant to which a laches defense will be held to bar an otherwise valid claim, an assessment of whether a plaintiff is guilty of laches is committed to the sound discretion of the trial court.

A. Equitable Basis of the Laches Doctrine

The equitable foundation of the laches doctrine, and its concern with protecting good faith property possessors from stale claims, rewards buyers and collectors who take appropriate precautions against acquiring stolen art.

First, the adaptability of the doctrine benefits persons who perform adequate due diligence investigations. As a principle of equity, laches invokes the conscience of the court and its ability to consider equitable factors in deciding a controversy.[381] Laches is applied flexibly, not mechanically.[382] As one court noted, "[t]he distinguishing

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both parties must be considered and weighed." In affirming the decision, the New York Court of Appeals declared that defendant's "contention that the [plaintiff] museum did not exercise reasonable diligence in locating the painting will be considered by the Trial Judge in the context of her laches defense. The conduct of both the appellant and the museum will be relevant to any consideration of this defense at the trial level and . . . prejudice will need to be shown." 569 N.E.2d 426, 431 (N.Y. 1991). *See also Hoelzer*, 933 F.2d at 1137-38 (stating that "[t]he doctrine of laches sufficiently safeguards the interests of a good faith purchaser of lost art by weighing in the balance of competing interests the owner's diligence in pursuing her claim.").

379. See Carla J. Shapreau, *California Court of Appeals Adopts Discovery Rule in Cases to Recover Stolen Art*, 17 IFAR REPORTS, No. 5, at 3 (May 1996), asserting that

> [D]iligence is still an important factor in the battle for title to stolen art. A theft victim who fails to act reasonably to locate stolen art and to timely bring a claim to recover it could be vulnerable to a laches defense which could cut off the victim's right to recover stolen art.

See also 1991 Practice Commentary to N.Y.C.P.L.R. 206, at 84 (McKinney 1962) (discussing the *Lubell* decision and instructing that "[t]he lesson for the owner is that the taking of diligent steps to solve the theft may still be relevant in combating a laches defense.").

380. 804 F. Supp. 539 (S.D.N.Y. 1992).

381. *Lubell*, 569 N.E.2d at 431.

382. *See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946), explaining that

> Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that laches is not, like limitation, a mere matter of time; but principally a

feature of equity jurisdiction is that it possesses full power to apply settled rules to unusual conditions and to mold its decree so as to do equity between the parties."[383] Because the court considers all aspects of a case, including the many benefits to international art theft victims and the U.S. art market of appropriate due diligence inquiries, it champions the position of those who conduct such investigations.

Second, the diligence and good faith that an expansive investigation evidences greatly increases a defendant's chances of winning on a defense of laches. This is because laches is premised upon the maxim that "[e]quity aids the vigilant, not those who slumber on their rights,"[384] Equitable relief can be awarded only when the party who petitions for it has demonstrated diligence and good faith: "[a] court of equity . . . has always refused its aid to stale demands, where the party has slept upon its rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence."[385]

Third, laches protects the property rights of those who perform appropriate due diligence investigations. The doctrine of laches is specifically calculated to safeguard property rights and to reward reasonable ownership expectations. Laches seeks to encourage owners to care for their property and to make their ownership claims known. As the court instructed in *Livermore v. Beal*:[386]

> No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable property he holds.[387]

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question of the inequity of permitting the claim to be enforced - an inequity founded upon some change in the condition or relations of the property or the parties.

383. *In re* Marriage of Jones, 921 P.2d 839, 845 (Kan. Ct. App. 1996).

384. *See, e.g.*, Gull Airborne Industries v. Weinberger, 694 F.2d 838, 843 (D.C. Cir. 1982) (asserting that "[t]he laches doctrine . . . reflects the principle that 'equity aids the vigilant, not those who slumber on their rights,' and is designed to promote diligence and prevent enforcement of stale claims"); Comment, *The Doctrine of Laches in Florida: A Statutory Hybrid?* 13 STETSON L. REV. 446, 449 (1984) (observing that "[l]aches, an affirmative defense, is traditionally predicated on the maxim that 'equity aids the vigilant.'").

385. MCCLINTOCK, *supra* note 371, § 419, at 171. See also *Holmberg*, 327 U.S. at 396 (declaring that "to call into action the powers" of a court in equity, "'[t]here must be conscience, good faith, and reasonable diligence'").

386. Livermore v. Beal, 64 P.2d 987 (Cal. Dist. Ct. App. 1937).

387. *Id.* at 995.

Fourth, the doctrine of laches enhances the position of those who perform appropriate due diligence investigations by weighing the benefit to public interest and policy of such inquiries. The Supreme Court has recognized that the welfare of the public in securing good title to property can bear importantly upon the laches determination.[388] Accordingly, the public interest in creating an appropriate "title clearing" mechanism for the U.S. art market, and the imperative of safeguarding the reasonable commercial expectations of buyers and collectors, properly informs laches determinations and thus benefits those who fulfil their investigative responsibilities.

Fifth, the doctrine of laches charges nondiligent theft victims with knowledge of the reasonable efforts of current owners or prospective buyers to discover whether a particular art object has been stolen and to locate the true owner. The laches doctrine imputes constructive notice to plaintiffs of all information that they reasonably should have ascertained.[389] Had theft victims made their losses known

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388. *See, e.g.*, Wetzel v. Minnesota Ry. Transfer Co., 169 U.S. 237 (1898). In *Wetzel*, the Court affirmed a decision precluding, on the ground of laches, a claim brought by the family of a Mexican war veteran to recover a 160 acre tract of land issued to the widow of the veteran under a government land warrant. *Id.* at 239-40. The warrant later was sold but not duly recorded in the orphans' court where the children of the decedent resided. *Id.* at 239. The buyer located the warrant within the corporate limits of the city of St. Paul, Minnesota, and the land appreciated in value over the next thirty years from approximately $1,500 to more than $1,000,000. *Id.* at 240.

Some forty-four years after the warrant was issued, and thirty years after the eldest child of the decedent had reached majority, the family sued to recover the land on grounds that the recording defect voided the transfer. *Id.* at 240-41. The Court held that merely because plaintiffs had been unaware of the defect earlier, and lacked the capability to investigate the matter, did not outweigh the ownership expectations of the public concerning the land which had become settled over the years. The Court declared:

> While the fact that the complainants were ignorant of the defect in the title and were without means to prosecute an investigation into the facts may properly be considered by the court, it does not mitigate the hardship to the defendants of unsettling these titles. If the complainant may put forward these excuses for delay after thirty years, there is no reason why they may not allege the same as an excuse after a lapse of sixty. The truth is, there must be some limit of time within which these excuses shall be available, or *titles might forever be insecure. The interests of public order and tranquility demand that parties shall acquaint themselves with their rights within a reasonable time,* and, although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable.

Id. at 241 (emphasis added).

See also the dissenting opinion of Justice Stevens, joined by the Chief Justice, Justice White, and Justice Rehnquist in County of Oneida, New York v. Oneida Indian Nation of New York State, 470 U.S. 226, 265 (1985) (citing the foregoing passage in *Wetzel* and arguing that laches properly should preclude the claim of a native American tribe seeking to void a conveyance of land that it had made some 175 years earlier).

389. *See* Ebker v. Tan Jay Int'l Ltd., 741 F. Supp. 448, 465 (S.D.N.Y. 1990); *see also* Meyers v. Asics Corp., 974 F.2d 1304, 1307 (Fed. Cir. 1992) (declaring that "[t]o establish the defense of laches, a defendant must prove . . . the plaintiff knew or reasonably should have known of its claim against the defendant. . . ."). In Grant Airmass Corp. v. Gaymar Industries,

to any of the multiple resources that collectors consulted, they would have been able to locate their stolen works. Accordingly, the failure of nondiligent theft victims to have done so properly should preclude their claims.

Finally, laches bars many excuses that nondiligent theft victims might raise in seeking to avoid an equitable bar to their claims. This is because in deciding whether prejudice outweighs delay in a given instance, courts necessarily consider the plaintiff's excuse for the delay.[390] Courts have ruled that poverty,[391] ignorance of legal rights,[392] and the inability to locate an attorney to prosecute an action[393] are inadequate excuses and will not justify a delay in asserting a claim for laches purposes.[394]

B. Appropriate Due Diligence Investigation to Establish Prejudice

Collectors who acquire or maintain expensive works of art after investigating the background of these items frequently are positioned to establish the prejudice necessary to state a defense of laches. Perhaps the most common forms of prejudice to the defendant are loss of evidence necessary to meet the claim of the plaintiff and a change in the situation of the parties or the position of the defendant that has been induced by the delay.

Inc., 645 F. Supp. 1507, 1515 (S.D.N.Y. 1986), the court stated that in deciding the laches question "[t]he court will inquire as to when the plaintiff had actual or constructive knowledge of the facts affecting his rights. . . ."

390. *See, e.g., In re* Brin-mont Chemicals, Inc., 154 B.R. 903, 907 (M.D.N.C. 1993) (explaining that "[t]he role of the court in considering the equitable defense of laches is to balance the plaintiff's delay in bringing his claim and the resulting prejudice to a defendant, against plaintiff's excuse for such delay"); *see also* White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990) (discussing generally the balancing of delay, prejudice, and excuse in deciding the laches question).

391. Hall v. Aqua Queen Mfg., Inc., 93 F.3d 1548, 1554 (Fed. Cir. 1996) (asserting that "[t]he Supreme Court made clear long ago that poverty, by itself, is never an excuse for laches purposes"); *see also* Leggett v. Standard Oil Co., 149 U.S. 287 (1893).

392. *See* Ortega v. Compagnie Generale Transatlantique, 258 F. Supp. 430, 431 (S.D. Cal. 1966) (ruling that the ignorance of a worker injured while unloading cargo from a ship was "not sufficiently exceptional to excuse the delay" in filing suit). The court observed in *In re* Marriage of Flynn, 812 P.2d 1087, 1088 (Ariz. Ct. App. 1991), that "ignorance of the law or legal rights will not excuse a delay in suing."

393. *See* Coleman v. Corning Glass Works, 619 F. Supp 950, 954 (W.D.N.Y. 1985) (repudiating the excuse of a patent holder that he failed to initiate a patent infringement claim earlier because he could not locate or afford appropriate counsel: "[h]e alleges that much of the delay was due to his inability to find an attorney to prosecute the action, or to raise the necessary funds. Those excuses are inadequate as a matter of law.").

394. *But see* 27A AM. JUR. 2D *Equity* § 168, 648-49 (1996) (stating that under certain limited circumstances courts have found these excuses sufficient to preclude a showing of laches).

1. Loss of Evidence

Authorities consistently have recognized that the prejudice necessary for a laches defense can be established by showing that the delay of plaintiff has resulted in the loss of evidence, such as the death of an important witness or the destruction of essential documents.[395]

2. Change in the Situation of the Parties or the Position of the Defendant

Changes in the position or situation of the parties can be brought about by an intervening transfer in title to the property in controversy, expenditures or investments that have been made for maintaining or improving the property, lost opportunity costs and the frustration of preexisting plans, and an increase in the value of the property at issue. For example, a transfer in title that occurs when an innocent party acquires disputed property with no reason to believe that it belongs to another or has been impaired by claims of others may support a laches defense.[396] Courts have acknowledged that defendants can suffer severe prejudice in such instances.[397] Prejudice to the rights of third

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395. *See, e.g.*, Filler v. Richland County, 806 P.2d 537, 540 (Mont. 1991) (declaring that "in determining whether laches shall bar a particular claim it is proper to consider (1) whether a party or an important witness [has] died, and the party against whom the claim is asserted has been deprived thereby of important testimony. . . ."). In Fitzgerald v. O'Connell, 386 A.2d 1384, 1388 (R.I. 1978), the court commented that "[i]n the past typical examples of prejudice that have supported the defense of laches have been the loss of evidence . . . or the death of a key witness."

In Nunley v. Nunley, 925 S.W.2d 538, 542 (Tenn. Ct. App. 1996), the court ruled that laches barred the claim of a former wife against her ex-husband and songwriter for an accounting of her share of royalties earned from the sale of the defendant's song when consequences of her protracted delay included the loss of necessary business records and the deteriorating physical condition of the defendant, "which made it impossible for him to testify in court. . . ." In Illinois v. Heirens, 648 N.E.2d 260, 268 (Ill. App. Ct. 1995), the court ruled that laches precluded the petition of a prisoner for post-conviction relief when petitioner had delayed for some 49 years in asserting his claim and "all of the witnesses and attorneys in the original case appear to be long dead."

396. *See Fitzgerald*, 386 A.2d at 1388 (commenting that "[i]n the past, typical examples of prejudice that have supported the defense of laches have been . . . a change of title. . ."); *see also* 75 N.Y. JUR. 2D *Limitations and Laches* § 337, at 544 (1989) ("[t]he disadvantage may come from . . . change of title").

397. See, e.g., Lake Caryonah Improvement Ass'n v. Pulte Home Corp., 903 F.2d 505 (7th Cir. 1990), where the court affirmed a ruling that the doctrine of laches precluded a claim by a property owners association seeking specific performance of a contract to convey a parcel of land from a home developer (Pulte). The record showed that Pulte had purchased the land "reasonably believing that there were no outstanding claims on the property" and had paid taxes and insurance on it for eleven years. *Id.* at 510. The court declared that "[w]e find it hard to imagine a circumstance in which the application of laches would be more justified." *Id.* at 509.

parties who have modified their position during the period of delay also can be the basis for establishing laches.[398]

Prejudice Resulting from a Change of Position: Prejudice sufficient to raise a laches defense also can be shown "if, during the period of delay, the circumstances or relationships between the parties have changed so that it would be unfair to let the suit go forward."[399] Changes in the relative positions of the parties for laches purposes sometimes are referred to collectively as "economic" or "financial" prejudice and include the following.[400]

Prejudice Resulting from Change of Title: Primary prejudice for laches purposes occurs when an innocent party acquires disputed property with no reason to believe that it belongs to another or has been impaired by claims of others.[401] Courts have acknowledged that defendants can suffer severe prejudice in such instances.[402]

Prejudice Resulting from Incurring Expenses or Making Expenditures for Improvements to Disputed Property: Courts have recognized that if, during the period of delay, an innocent party incurs expenses, enters into obligations, makes improvements to property, or pays taxes, the necessary prejudice for laches purposes may be shown.[403] Prejudice can occur in this context when a party, in reliance upon a certain condition or state of affairs, incurs expenditures that it otherwise would not have made[404] or improves property.[405] The fact that

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398. *Id.*

399. Stone v. Williams, 873 F.2d 620, 625 (2d Cir. 1989); *see also* DRT Mechanical Corp. v. Colin County, 845 F. Supp. 1159, 1162 (E.D. Tex. 1994) (asserting that "[l]aches consists of an unreasonable delay by one having a legal or equitable right in asserting such right and a good faith change of position by another to his detriment because of the delay.").

400. 27A AM. JUR. 2D *Equity*, § 177, 656, § 186, 664 (1996).

401. *See* Fitzgerald v. O'Connell, 386 A.2d 1384, 1388 (R.I. 1978) (commenting that "[i]n the past, typical examples of prejudice that have supported the defense of laches have been . . . a change of title. . . "); *see also* 75 N.Y. JUR. 2D *Limitations and Laches* § 337, at 544 (1989) ("[t]he disadvantage may come from . . . change of title. . . .").

402. See, e.g., *Lake Caryonah Improvement Ass'n*, 903 F.2d 505, where the court affirmed a ruling that the doctrine of laches precluded a claim by a property owners association seeking specific performance of a contract to convey a parcel of land from a home developer (Pulte). The record showed that Pulte had purchased the land "reasonably believing that there were no outstanding claims on the property" and had paid taxes and insurance on it for eleven years. *Id.* at 510. The court declared that "[w]e find it hard to imagine a circumstance in which the application of laches would be more justified." *Id.* at 509.

403. *Id.* at 510, instructing that "[p]rejudice is established when a party 'remains passive while an adverse claimant incurs risk, enters into obligations, or makes expenditures for improvements or taxes.'"

404. *See, e.g.*, Save the Pine Bush, Inc. v. City Engineer, 632 N.Y.S.2d 243, 244 (N.Y. App. Div. 1995) (ruling that organization opposed to development of certain property was laches from challenging site review process because four months elapsed after grading permit had been issued and road construction was under way); Kerrigan v. Kerrigan, 642 A.2d 1324, 1327 (D.C. 1994) (holding that eight year delay by ex-wife in seeking child support arrearages may result in

the defendant expended money or other resources during the period of delay alone does not establish laches; the defendant also must show that an award of the relief plaintiff seeks would work an injustice.[406]

Prejudice Resulting from Disruption or Frustration of Preexisiting Plans and Past Decisions: Prejudice for laches purposes also can be shown when the petitioned relief would frustrate the existing plans or

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laches when former husband, in reliance upon unilateral monthly reduction in amount of child support payments, had "made medical and educational payments on behalf of his daughter and paid approximately $18,000 for her wedding," which he otherwise would not have done); Stanfield v. Osborne Indus., Inc., 839 F. Supp. 1499, 1507 (D. Kan. 1993), *aff'd*, 52 F.3d 867 (10th Cir. 1995) (awarding summary judgment to the defendant in an action by an inventor brought against a manufacturer for fraudulent procurement of trademark when the inventor had delayed for fourteen years in enforcing his rights during which time the manufacturer "ha[d] spent considerable time and expense registering and promoting (the] trademarks").

In Finnie v. Town of Tiburon, 244 Cal. Rptr. 581, 588 (Cal. Ct. App. 1988), the court ruled that opponents of town ballot measure were lached from challenging special election when during period of delay

> the Town had taken all the necessary steps to hold the special election: the notice of election had been published; the sample ballot including the analysis and arguments for and against the measure had been prepared and printed; and the absentee ballots had been mailed and the absentee voting had commenced" and "the Town had incurred expenses of $5,845 in connection with election preparations.

405. See, *e.g.*, County of Du Page v. K-Five Construction Corp., 642 N.E.2d 164, 171 (Ill. App. Ct. 1994), where the court affirmed a ruling that a county was lached from enforcing a zoning ordinance against an asphalt company when "the County had known of the asphalt plant operating on the subject property" for more than five years before taking action, during which time the defendants had "experienced changed circumstances regarding the use of the property in that they decided to spend approximately $600,000 on improvements to the plant."

In Oakes v. Hattabaugh, 631 N.E.2d 949, 953 (Ind. Ct. App. 1994), the court precluded landowners from enforcing a restrictive covenant when adjoining property owners had "bought their property in order to build a new home where they could raise their horses and other animals" and, in apparent violation of the covenant, had erected a barn, boarded their animals, constructed their home and bought an adjacent field "for at least two years without objection" from the plaintiffs. The court found that the "silence" of the plaintiffs constituted an "implied acquiescence in the [defendants'] actions."

In Miller v. Bloomberg, 466 N.E.2d 1342, 1348 (Ill. App. Ct. 1984), the court affirmed a ruling that prospective buyers were lached from reinstating proceedings to obtain specific performance of an agreement to sell real estate pursuant to a lease option clause when, during the more than two and one-half years that had passed since the case had been remanded, the defendants had expended some $6,700 on taxes and $41,900 in improvements.

In Scheer v. City of New York, 284 N.Y.S.2d 775, 777 (N.Y. App. Div. 1967), the court ruled that doctrine of laches barred a taxicab operator from seeking to enjoin a City regulation requiring a partition between front and rear seats of all taxicabs operating during certain hours when during the delay of several months in which the provision had been effective, "many in the industry, it may be assumed, have incurred expenses in reliance upon the regulation."

406. *See* 30 CAL. JUR.3D *Equity* § 45, at 555 (1987), asserting that

> It is clearly the rule that the mere expenditure of either money or effort on the part of a defendant is, in itself, insufficient to show the degree of prejudice necessary to support a plea of laches. A defendant, therefore, in order to invoke the plea successfully, must show in addition to such expenditures that the enforcement of the plaintiff's claim would be inequitable.

past decisions of the defendant. For example, in *Stone v. Williams*,[407] the court affirmed a ruling that the doctrine of laches precluded the natural daughter of the late country music singer Hank Williams from seeking an award of a portion of the profits earned over the years on transactions involving the decedent's songs. The daughter had delayed unreasonably for at least five years after learning of her potential rights before bringing suit to enforce them. The court rejected the plaintiff's contention that the transactions at issue "need not be unraveled" and that she could "simply share in the profits" that defendants already had made.[408] The court explained that the plaintiff misapprehended that defendants' business activities had been based upon a belief that plaintiff had no claim to the song rights. The court repudiated any notion that it could determine what alternative arrangements defendants would have made had they contemplated the reduction in their profits that plaintiff now sought. The court declared,

> But that argument ignores the fact that the transactions were premised upon the apparent certainty of the ownership of the songs' renewal rights—attributable to appellant's delay. This procrastination prejudiced defendants by lulling them into a false sense of security that the renewal rights were as they appeared. . . .
>
> We cannot be sure that defendants would have struck the bargains they did had they anticipated the diminution in their profits that Ms. Stone seeks. This result is logically not altered by whether the defendants made actual expenditures or whether they simply incurred the opportunity costs implicated in foregoing other ventures.[409]

Other courts have not hesitated to preclude claims on the grounds of laches when the petitioned relief would undermine the settled expectations of defendants arising from past decisions or transactions or would wreck havoc upon preexisting plans.[410]

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407. 873 F.2d 620 (2d Cir. 1989).

408. *Id.* at 625.

409. *Id.* at 625-26.

410. See, *e.g.*, Jackson v. Axton, 25 F.3d 884, 889 (9th Cir. 1994), where the Ninth Circuit affirmed a ruling that a musician (Jackson) was lached from seeking to establish that he had co-authored a song with country singer Hoyt Axton after 22 years had passed since the song had been released. The court found that Axton's business activities had been premised upon his assumed exclusive ownership of the song and had been structured in a way that would have been different had Jackson asserted his claim earlier. The court declared

> Here, Appellees have shown that circumstances have changed in a way that would not have occurred had Jackson sued earlier. Axton has arranged his business affairs around the Song, promoted the Song as his own, licensed the Song many times to third parties, and sold the Song. . . .

Prejudice Resulting from Lost Opportunity Costs: Courts have recognized that lost opportunity costs suffered during the period of the delay can result in adequate prejudice to sustain a laches defense. Courts consistently have entertained claims that the delay of a plaintiff in asserting its right caused the defendant to forego opportunities it otherwise would have enjoyed to avoid or mitigate damages or to protect its interests. For example, courts have ruled that the expense of litigating an untimely claim alone can be prejudicial and deprive a defendant of the chances it once may have had to settle the dispute or

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Similarly, in Robins Island Preservation Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 424 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 603 (1992), the court affirmed a ruling that laches barred a nonprofit organization from challenging the ownership rights of a real estate developer (SDC) in a parcel of land (Robin's Island on Long Island) based upon a claim that had arisen nearly two hundred years earlier. The court concluded that the relief requested would undermine SDC's plans for the property:

> It is unlikely that SDC would have purchased the property had it known its title was in dispute. SDC's plans for Robins Island's use, as well as those of SDC's predecessors-in-interest, were premised on the assumption that chain of title was, for almost two hundred years, quiet and complete as recorded. This assumption was not unreasonable. There must arrive a point at which title . . . is settled.

See also *In re* Cutillo, 181 B.R. 13, 15 (Bankr. N.D.N.Y. 1995), where the court ruled that bankruptcy trustee was lached from seeking to dismiss or convert a Chapter 13 bankruptcy proceeding based upon a default by the debtors who reduced their prescribed monthly payments from $600 to $400 under a reorganization plan, yet the trustee had accepted the reduced payments for more than five years. The court ruled that the delay of the trustee denied the debtors the opportunity "to seek modification of their Plan. Instead, they continued to make payments on a regular basis for over six years in reliance on a lack of objection by either the Trustee or any creditors." The court declared that at this late juncture to frustrate debtors' expectations concerning their plan would be "highly prejudicial." *Id.*

In *In re* Drexel Burnham Lambert Group, Inc., 151 B.R. 674, 683-84 (Bankr. S.D.N.Y. 1993), the court disallowed the late claim in a Chapter 11 bankruptcy proceeding of the managing general partner of the debtor because such claim would undermine the debtor's reorganization plan: "[a]llowing Claimant to file a late proof of claim would substantially prejudice Debtor's attempts to pay claims according to the plan of reorganization and would frustrate the administrative goals of the bar date." In Tudor Dev. Group, Inc. v. United States Fidelity and Guaranty Co., 768 F. Supp 493, 497 (M.D. Pa. 1991), the court precluded the late subrogation claim of a subcontractor (York) to an escrow fund when the performance bond surety (USF&G) had already settled other claims based upon the "expectation that the settlement proceeds would be distributed among the three competing claimants who had asserted claims as of the date of the settlement. . . ." The court declared that the other claimants to the fund had been prejudiced by York's untimely claim: "[b]ecause movants changed their position by settling with USF&G and reasonably relied on the assumption that no additional claims would be asserted, they were prejudiced by York's delay in filing its petition to intervene." *Id.*

Also see Burns v. Egan, 501 N.Y.S.2d 742, 745 (N.Y. App. Div. 1986), wherein the court ruled that the doctrine of laches precluded plaintiff taxpayers from challenging the constitutionality of a financing scheme for the construction of a state prison. Plaintiffs had delayed more than two years in filing suit during which time the State had begun construction on the prison "and sold bonds for approximately $294 million." The court declared that "[a]dverse judicial action at this juncture would '"cause unacceptable disorder and confusion"' (citation omitted).

to minimize damages.[411] Courts regularly have acknowledged that prejudice is incurred when a party is deprived of an opportunity it otherwise would have enjoyed to limit its exposure. Such lost opportunity costs can arise in a variety of contexts.[412]

Prejudice Resulting from a Change in the Value of the Disputed Property: A significant increase or decline in the value of the property at issue during the period of delay also may result in prejudice.[413] As one court has explained, "a marked appreciation in the value of the property which is the object of controversy, such that the granting of relief would itself work an inequity, is evidence of injury or prejudice justifying the invocation of laches."[414] Courts have applied the doctrine of laches both to preclude claims to recover property when it has

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411. See, *e.g.*, Wafer Shave, Inc. v. Gillette Co., 857 F. Supp. 112, 129 (D. Mass. 1994), where the court ruled that laches barred plaintiff's (Wafer) action for patent infringement against the Gillette Company (Gillette) when, during the three and one-half year delay of Wafer in bringing suit, Gillette had developed and marketed products that allegedly violated the patent and had foregone opportunities it would have enjoyed to minimize its damages had Wafer brought its claim earlier. The court declared that as a result of Wafer's delay,

> Gillette lost the opportunity to limit its present exposure to substantial litigation costs and damages because it believed there was no longer a threat to litigation concerning the . . . patent. More specifically, the opportunities to reach a settlement, file an early declaratory judgment action, or purchase the . . . patent were no longer available when Wafer Shave filed suit. . . ."

Id. at 125.

412. See, *e.g.*, Kotsias v. Continental Bank, N.A., 601 N.E.2d 1185, 1190 (Ill. App. Ct. 1992), where the court affirmed a ruling that denied, on the grounds of laches, the claim of a beneficiary of a Totten trust against a bank (Continental) for allegedly honoring a forged letter to remove the name of the beneficiary from the trust after the bank already had paid the trust corpus to the estate of the grantor. The court found that the delay of the plaintiff in bringing suit had denied the bank opportunities it otherwise would have had to protect its interests as stakeholder. In Schaller v. Castle Dev. Corp., 698 A.2d 528, 530 (Md. Ct. Spec. App. 1996), the court affirmed a decision that laches precluded a bank from amending an audit of sale of mortgaged property that increased the amount of its petitioned claim. Other creditors had neglected to bid on the property in reliance upon an earlier, much lower bank claim that had induced them reasonably to believe that they would be paid. In Arvizu v. Fernandez, 902 P.2d 830, 834 (Ariz. Ct. App. 1995), the court barred on grounds of laches, in a contempt proceeding for failing to pay child support, the counterclaim of a former husband challenging his paternity of the child. The court ruled that the failure of the defendant to assert his claim earlier deprived the mother of an opportunity to seek support payments from the biological father and because the child has "been emancipated for more than seven years, mother cannot seek support from someone other than [the defendant]."

413. *See, e.g.*, 30 CAL. JUR. 3D *Equity* § 46, at 557 (1987), (stating that "[a] marked increase or decrease in the value of property will ordinarily prove fatal to a plaintiff's cause of action where he could have asserted his full rights prior to the change in value and where, as a result of his failure to do so, the allowance of the relief sought would be inequitable to the defendant.").

414. Schroeder v. Schlueter, 407 N.E.2d 204, 206 (Ill. App. Ct. 1980). *See also, e.g.*, Filler v. Richland County, 806 P.2d 537, 540 (Mont. 1991) (declaring that "[i]n determining whether laches shall bar a particular claim it is proper to consider . . . whether the property involved has increased in value.").

appreciated and to compel specific performance to convey property when its value has declined.[415]

The doctrine of "speculative delay" also may apply when the value of disputed property has materially changed.[416] In *Madrid v. Norton*,[417] the Supreme Court of Wyoming explained that courts are reluctant to allow one party to speculate at the expense of another on the value of property or other rights before making a claim:

> Courts look with disfavor upon the claims of those who lie idle awaiting the results of development. The waiting may be years, months, or days, depending upon the circumstances. There is an inherent injustice in one purportedly holding a right to assert an ownership in property to voluntarily await the propitious event and then decide, when the danger which has been at the risk of another is over, to come in and claim a share of the profits.[418]

Courts have applied this principle when circumstances indicated that one party has attempted to gamble on the potential appreciation of property or business rights to the disadvantage of another.[419] The

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415. *See, e.g.*, Nahn v. Soffer, 824 S.W.2d 442,445 (Mo. Ct. App. 1991) (affirming a ruling that in a quiet title action for the specific performance of a contract to convey a parcel of real property, a counterclaim was barred under the doctrine of laches when the counterclaimant had delayed for more than 21 months following the plaintiff's repudiation of the contract before filing suit, during which time "the property's value increased from $200,000 to between $300,000 and $350,000."); *see also* Renth v. Krausz, 579 N.E.2d 11, 14-16 (Ill. App. Ct. 1991) (barring an action seeking specific performance of a contract to convey real property when during the six year period plaintiffs had delayed in filing suit, the value of the property had declined by 42%).

416. See, e.g., 30 CAL. JUR. 3D *Equity* § 46, at 556 (1987), declaring that

> [a]mong the important changes of condition that require consideration in determining the existence of laches are those that result from a change in the value or character of property. Equity does not favor those who first sleep on their rights and then attempt to assert them after the thrift and enterprises of others have made those rights valuable and desirable.

417. 596 P.2d 1108 (Wyo. 1979).

418. *Id.* at 1120.

419. See, *e.g.*, Tarrin v. Pellonari, 625 N.E.2d 739, 745 (Ill. App. Ct. 1993), where the court upheld a ruling that laches precluded the director and shareholder of a radiator repair chain (Tarin) from challenging the right of several employees to establish a new, potentially competing business (Cool Rite). The circumstances indicated that the plaintiff had delayed in bringing suit while defendants were laboring to set up the new business to see how it would fare before deciding whether to seek to participate. The appellate court observed that "there was a strong inference that Tarin did not intend to file suit immediately because he wanted to see how successful Cool Rite would be before he invested money to hire a lawyer and assert his interest in a business that might not become successful." *Id.* The court observed that "Tarin's conduct was not the type of conduct which justified affirmative relief." *Id.*

Also see Tristram's Group, Inc. v. Morrow, 496 N.E.2d 176, 178 (Mass. App. Ct. 1986), wherein the court affirmed a ruling that laches barred an action by a real estate developer seeking to recover a parcel of real property. Eleven years earlier the developer's assignor had initiated repurchase of the property exercising an option reserved to the grantors. The court found that

fact that the disputed property has appreciated in value, however, does not alone establish that the plaintiff has wrongfully attempted to profit to the detriment of the defendant or otherwise engaged in inequitable conduct that will preclude a claim for recovery.[420]

Prejudice Resulting from the Intervention of Third Party Rights: Authorities have recognized that prejudice for laches purposes may result if the petitioned relief will adversely affect the rights of third parties.[421] Laches can apply "when third parties have contracted with

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the developer had delayed more than eleven years in asserting its claim during which time the value of the property had increased from $6000 (the original contract price) to at least $50,000. The court declared that "[t]he value of the property having risen to not less than $50,000, and all risk for practical purposes having disappeared, the plaintiff now choose to sue. Its position is inequitable." *Id.*

420. *See, e.g.*, Fitzgerald v. O'Connell, 386 A.2d 1384 (R.I. 1978) (reversing a ruling applying the doctrine of laches to preclude a claim seeking specific performance of a contract to convey real estate). In *Fitzgerald*, the plaintiffs (the Fitzgeralds) had entered into a contract in 1963 for the conveyance of a parcel of real estate in Newport, Rhode Island with the owner (O'Connell), who died shortly thereafter. The property then passed to her husband who also soon died. *Id.* at 1385. Although the Fitzgeralds did not commence suit for specific performance until 1973, the court found they had pursued their interest in performing the contract with the representatives of both estates, *id.* at 1385, and under the circumstances had not been guilty of laches. The court declared,

> Nothing in the record suggests that the Fitzgeralds awaited the rise in value of the property before asserting their claim. To the contrary, the Fitzgeralds have, since 1963, stood ready, willing, and able to perform their part of the bargain. . . . In short, *the fact that the value of the property has appreciated does not in and of itself convert delay into laches.*

Id. at 1389 (emphasis added).

421. See, *e.g.*, British Columbia Inv. Co. v. Federal Deposit Ins. Corp., 420 F. Supp. 1217, 1222 (S.D. Cal. 1976), where the court concluded that laches precluded a claim by corporate shareholders of a failed bank seeking declaratory and ancillary relief against the Federal Deposit Insurance Corporation (FDIC) and others, and requesting, *inter alia*, cancellation of certain indebtedness of the bank. Plaintiffs had delayed more than two years in seeking relief while proceedings "involving some of the very debts and assets which plaintiffs seek to place under the jurisdiction of this court" had been ongoing. The court declared that because plaintiffs' claims would impair the rights of other parties, relief must be denied: "[g]iven the scope of the relief for which they pray and the intervening negotiations and settlements involving parties that would be affected by the proposed relief, the court must conclude that plaintiffs did not file this complaint with the diligence required under the circumstances." *Id.*

See also New York Pub. Interest Research Group, Inc. v. Levitt, 395 N.Y.S.2d 608 (N.Y. App. Div. 1977), *aff'd*, 404 N.Y.S.2d 55 (N.Y. 1978), wherein the court ruled that the doctrine of laches precluded a complaint challenging under the New York State Constitution an agreement among New York State, the City of Albany, and Albany County for the acquisition of land for the construction of certain public improvements. The court found that the plaintiffs had delayed twelve years in filing suit, during which time "$925,000,000 in bonds had been issued and sold to investors. $768,000,000 in bonds are still outstanding," and "a huge complex of office buildings, museum and auditorium has been built which would be valueless for the most part to anyone but the State of New York." *Id.* at 610. The court declared that the petitioned relief would impair the rights to too many third parties: "[t]he action has been too long delayed. The rights of too many other parties have been created. This is the classic situation where equity clearly demands that this action be barred by laches." *Id.*

defendant and are harmed by the delay in filing suit" and "particularly is justified where plaintiff's delay in proving a claim would have a catastrophic effect on the rights of many third parties . . . ."[422] Many of these types of prejudice inhere in the ordinary and necessary activities of collectors. For example, significant expenditures are evident in acquiring an expensive work. Still, thereafter, expenditures can be made to appraise, insure, preserve, restore, or improve a valuable art object based upon the assumption that one owns it. Moreover, the decision to purchase one expensive work instead of another may signify that corresponding opportunity costs have been forfeited.

Even when collectors already have acquired valuable works, extensive prejudice may result when they make important estate or financial planning decisions based upon a reasonable and good faith belief that a particular item is not subject to a conflicting ownership claim. For example, the estate plans of many collectors prescribe that works of art be sold to pay estate taxes and to provide estate liquidity.[423] If a work of art assigned this purpose is removed from an estate by a legal claim of a former owner, the estate plan of the collector is prejudiced. As one commentator explained,

> If a stolen work is designated to be sold to provide estate liquidity, the removal of the work from the estate through a successful judicial challenge means that other assets must be disposed of to [provide estate] liquidity. The original estate plan has been disrupted, and a new estate plan must be devised.[424]

Third party rights, including the settled expectations of both individual and charitable beneficiaries, also may be frustrated when expensive works of art are removed from an estate. In summary, the many forms of prejudice that the doctrine of laches recognizes facilitate a showing of laches in almost any context.

C. Summary Judgment on the Laches Defense

The ability of courts to decide the question of laches on summary judgment makes the laches doctrine a very effective title-clearing mechanism for buyers and collectors. Although the decision to apply the doctrine of laches is extremely fact-dependent[425] and such fact-

422. 27A AM. JUR. 2D *Equity* § 176, at 657-58 (1996).

423. *See, e.g.*, Basha, *supra* note 1, at 62 (stating that "works of art often are designated to provide liquidity."); Madden, *supra* note 1, at 463.

424. Madden, *supra* note 1, at 463.

425. *See, e.g.*, Baron Philippe de Rothschild v. Paramount Ditillers, Inc., 923 F. Supp. 433, 438 (S.D.N.Y. 1996) (stating that "[t]he determination whether laches bars an action . . . requires a fact intensive inquiry.").

intensive questions generally are resolved best by the trier of fact, both federal and state courts consistently have granted summary judgment to defendants on the laches question when the circumstances warranted.[426]

Because the decision to preclude a claim on grounds of laches is committed to the broad discretion of the trial court, as long as the trial court does not decide disputed questions of fact on summary judgment, appellate courts review laches determinations under an abuse of discretion standard.[427] Courts have entered summary judgment on the laches question in a variety of cases when the unreasonable delay of the plaintiff in asserting a claim and the resulting prejudice to the defendant were apparent. Appellate courts regularly have affirmed such rulings when no abuse of discretion was indicated.[428]

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426. Summary judgment is a procedure that allows the court to decide a discrete question of law or an entire case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Summary judgment saves the resources of both the court and the parties. *See* 6 JAMES MOORE, MOORE'S FEDERAL PRACTICE ¶ 56.15, at 56-20 (1996).

Summary judgment under the Federal Rules of Civil Procedure is prescribed by Fed. R. Civ. P. 56(c), which provides that summary judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

427. *See* National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, 40 F.3d 698, 707 (5th Cir. 1994).

428. Many federal and state courts have recognized that summary judgment may be awarded on the defense of laches. *See, e.g.*, Ashley v. Boyle's Famous Corned Beef Co., 48 F.3d 1051, 1055 (8th Cir. 1995) (affirming an award of summary judgment in favor or an employer in Title VII action when the employee had delayed six years in bringing suit during which time necessary evidence had become unavailable); Dickey v. Alcoa Steamship Co. 641 F.2d 81, 82 (2d Cir. 1981) (affirming an award of summary judgment in favor of a shipping company on grounds of laches in a product liability claim brought by a seaman for personal injuries); Boone v. Mechanical Specialties Co., 609 F.2d 956, 959 (9th Cir. 1979) (affirming an award of summary judgment in favor or an employer in a Title VII claim when the employee (Boone) had delayed more than seven years in bringing suit and evidence had become unavailable: "Boone offered no evidence from which this court or the court below could even infer an excuse for his seven year delay. In the absence of any factual issues, we conclude that the district court correctly found that Boone's delay in bring suit was unreasonable.").

Federal district courts consistently have granted summary judgment in favor of defendants when the relevant facts were not in dispute. *See, e.g.*, Teamsters, Chauffeurs, Warehousemen and Helpers Local 764 v. Greenawalt, 919 F. Supp. 774, 782 (M.D. Pa. 1996) (ruling that laches barred a claim by a labor union challenging the legality under union bylaws of certain severance payments made to a former union president when the union had delayed some two years and nine months after the transfer before filing suit); ABB Robotics, Inc. v. GMFanuc Robotics Corp., 828 F. Supp. 1386 (E.D. Wis. 1993) (ruling that laches precluded a patent infringement action brought by a patent holder and exclusive licensee against a robotics manufacturer); De Silvo v. Prudential Lines, Inc., 541 F. Supp. 625 (S.D.N.Y. 1982) (awarding a shipowner summary judgment on the question of laches in a personal injury action brought by a longshoreman).

State courts also have confirmed that the laches question properly may be decided on summary judgment. *See, e.g.*, San Bernardino Valley Audubon Soc'y v. City of Moreno Valley, 51

V. SPECIFIC INQUIRIES REQUIRED IN AN APPROPRIATE DUE DILIGENCE INVESTIGATION

The considerations that favor a broad investigative responsibility also help identify the specific inquiries that comprise an appropriate investigation. Both equity and logic require that buyers and collectors contact those discrete art world authorities, resources, and channels of communication that have proven effective in locating stolen art objects and that can be consulted in a reasonable, cost-efficient manner. Moreover, as previously discussed, the Association of Art Museum Directors has counseled its members to investigate the background of any works potentially looted during World War II and has prescribed inquiries to several of the resources identified below. The failure of a buyer or collector of an expensive work to undertake such inquiries should preclude it from defeating the competing ownership claim of an art theft victim under the "balance of equities" judicial criterion.

An adequate due diligence investigation requires art buyers to inquire into several categories or types of art world authorities or resources. The first inquiry is to those institutions, persons, or art world participants to whom theft victims might most likely report their losses. As one commentator suggested many years ago, "[t]he steps which they [private dealers and collectors] should take in checking a title correspond to those which a rightful owner should take in putting the public on notice that the work is stolen and no title can be

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Cal. Rptr. 2d. 897, 906 (Cal. Ct. App. 1996) (affirming an award of summary judgment that laches precluded an environmental group from challenging the validity of an agreement between a state agency and certain counties, municipalities and others and asserting that "[w]hen the facts are undisputed, we are free to determine the [laches] issue as a matter of law"); Cannon v. City of Durham, 463 S.E.2d 272 (N.C. Ct. App. 1995) (affirming a decision granting summary judgment in favor of a city on the question of laches in an action by a citizen challenging its purchase of certain land and the construction of a ballpark); Eastern Shopping Centers, Inc. v. Trenholm Motels, Inc., 306 N.Y.S.2d 354, 358 (N.Y. App. Div. 1970) (affirming an award of summary judgment for the defendant in an action for damages or specific performance of a contract containing an option clause to repurchase certain land and observing that "[w]hile the determination of what is a reasonable time is usually a question of fact, under the circumstances here, where there are no disputed facts, what is reasonable time becomes a question of law and the case is a proper one for summary judgment."); Nilson-Newey & Co. v. Utah Resources Int'l, 905 P.2d 312 (Utah 1995) (affirming the dismissal on the grounds of laches of an action brought by an investor in a syndicate for an accounting and distribution of profits after the investor had delayed 35 years in bringing suit).

See also Troup v. Loden, 469 S.E.2d 664 (Ga. 1996), in which the court affirmed a summary judgment on the laches question entered in favor of defendants in an action seeking division of certain real estate when the plaintiffs had not filed suit until some twenty years after the claim had arisen. The court counseled that, under Georgia civil procedure, "[b]ecause laches is a factual defense, the better practice is for 'the trial judge, sitting as a chancellor in equity, and without the intervention of a jury' to hold an evidentiary hearing and issue findings of fact rather than act on summary judgment as a matter of law." *Id.* at 666.

conveyed."[429] As noted below, these steps include reference to stolen art databases and relevant experts concerning the particular artist or type of art object.

A second category of inquiry is to locations where the type of art object in question, if stolen, reasonably might be expected to be reintroduced into the legitimate market[430] Courts have recognized that theft victims discharge their due diligence responsibilities by alerting "the likely points of sale" of stolen art[431] and by attempting to "stifle the trade at the point of destination."[432] These potential "points of contact" with the international market include noted dealers of the particular artist or type of art object, auction houses, and leading institutions and experts. Such regular art market participants may be positioned to receive reports about stolen art not only from theft victims, but also from the law enforcement authorities of various countries and from governments themselves.

A final category of prescribed inquiry is to those resources that reasonably might assist an informed attempt to determine whether a particular work has been stolen. Examples include the applicable catalogue raisonne of a particular artist (if available), collectors' specialty groups, and journalists who cover the art world.

Each of the following resources has proven effective in identifying and locating stolen art. Collectively, they comprise sources that should be consulted in the course of a conscientious and comprehensive due diligence investigation for a valuable art object. A documented record of investigation to each of these resources should enable a buyer or collector to defeat, under the balance of equities judicial criterion, the claim of a putative theft victim seeking to recover the item. A due diligence investigation into these resources provides an effective title clearing vehicle for valuable art objects, given the irregularities of the international art market and the many factors that favor the position of theft victims in the initial equitable balance with buyers and collectors of expensive works.[433]

The failure of a buyer or collector to undertake each of these prescribed inquiries should not mean that a former owner necessarily should prevail in a judicial contest. Rather, in such instances courts

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429. Wertheimer, *supra* note 319, at 47.

430. Hoover, *supra* note 6, at 55.

431. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fines Arts, Inc., 917 F.2d 278, 290 (7th Cir. 1990).

432. *Autocephalous*, 717 F. Supp. 1374, 1389 (S.D. Ind. 1989).

433. The peculiar attributes of the international art market that enable stolen materials to become widely disseminated are discussed *supra* at pages 659-63.

should still weigh the relevant equities between the parties and judge the efforts of both parties.

A. Commercial Stolen Art Databases

Collectors of valuable art objects must be required to consult any publicly available stolen art databases, archives, or registries. Two databases currently meet this description: The Art Loss Register (ALR) and Thesaurus Group's "TRACER" Database. The ALR has offices in both London and New York. "TRACER" is a computerized "on-line" service operated by Thesaurus Group and located on the Isle of Wight, Great Britain. Each service can be accessed for a reasonable fee. These databases can help collectors determine whether a particular work has been stolen, provided the theft victim has used a principal means for notifying the international art market of the theft.

The ALR was created in 1991 as a joint venture that included as partners the International Foundation for Art Research (IFAR) and several insurance companies and other art world investors in London.[434] ALR maintains a computerized database of reportedly stolen art objects using reports of losses compiled by IFAR since 1977 from a variety of sources, including local and state police agencies, art dealers, homeowners, church committee members, museum registrars, library professionals and periodic reports from the FBI and INTERPOL.[435] ALR also obtains reports of losses from insurance companies, which are increasingly becoming a primary contributor.[436]

Like ALR, TRACER receives reports of stolen and missing art objects from a variety of sources. All reports of stolen materials that Trace Publications, Ltd. (Trace) of Plymouth, England has compiled since its inception in 1988 have been submitted to TRACER, and all such reports that Trace continues to receive as a matter of course also are conveyed to TRACER. In addition, TRACER includes a number of losses promulgated by INTERPOL.

Whether losses have been related to accessible databases and whether collectors have contacted these resources clearly bear upon the "balancing of the equities" determination. Courts consistently have suggested that art theft victims report their losses to such databases and also have urged collectors to contact them.[437] Art theft vic-

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434. Lowenthal, *supra* note 72, at 310.

435. *Id.*

436. *Id.* at 311.

437. For example, in O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980), the Supreme Court of New Jersey suggested that the art world create a registry that collectors and buyers of art objects could consult to determine whether they had acquired good title to art objects: "[i]t may be time for the art world to establish a means by which a good faith purchaser may reasona-

tims in several noteworthy cases did report their losses to the stolen art archives available at the time.[438] Moreover, stolen materials recently discovered on the international market already had been reported both to ALR and TRACER.[439]

Several legal commentators have counseled theft victims to make their losses known to stolen art databases and have recommended that collectors consult these databases to determine whether items of interest have been indicated as stolen.[440] Publicly accessible stolen art archives and databases also play a major role in proposed solutions to the international stolen art epidemic.[441]

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bly obtain the provenance of a painting. An efficient registry of original works of art might . . . serve the interests of artists, owners of art, and bona fide purchasers. . . ."

In Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fines Arts, Inc., 917 F.2d at 294, the court recommended that the stolen art files maintained by the International Foundation for Art Research (on behalf of Art Loss Register) be consulted when an art transaction presents suspicious circumstances.

In Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 428 (N.Y. 1991), the Court of Appeals of New York, in surveying the diligence of each party, noted that the plaintiff museum from whom a Chagall painting had been stolen had failed to report the loss to any available resources: "[i]t is undisputed . . . that the Guggenheim did not inform other museums, galleries or artistic organizations of the theft. . . ."

438. In *O'Keeffe*, 416 A.2d at 866, the artist Georgia O'Keeffe reported, in 1972, to the American Art Dealers Association, Inc. (AADA) stolen art database (which later was merged into the stolen art files maintained by Art Loss Register) the theft of several of her paintings that had occurred more than 25 years earlier.

Similarly, in Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, *15 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807 (3d Cir. 1996), a family from whom a Giaquinto painting had been stolen in 1960 reported the loss in 1992 to the ALR/IFAR stolen art database upon learning of its existence.

439. *See* Walter J. Robinson and Maureen Goggin, *Stolen Art Claims Shake N.Y. Museum*, BOSTON GLOBE, July 24, 1997, at A1 (reporting that a European citizen had made a demand upon New York's Metropolitan Museum of Art for the return of a Monet painting stolen at the end of World War II); Society to Prevent Trade in Stolen Art, press release of June 24, 1997 (reporting that an Irish citizen had recovered a stolen antique gaming table from a U.S. dealer who had offered the table for auction at Christie's in New York). The table had been reported as stolen both to ALR and TRACER.

440. *See, e.g.*, Kaufman, *supra* note 318, at 4 (asserting that an "appropriate attempt at due diligence" entails, *inter alia*, checking with the available commercial data banks of stolen art); *see also* Charles A. Palmer, *Stolen Art and the Struggle for Good Title*, 7 ENT. SPORTS L. 1, 13 (1990) (declaring that "reporting the theft to archives that are set up to locate stolen art is essential. Diligent efforts to locate stolen art after it has been sold deprive innocent purchasers of the necessary means to protect themselves.").

See Hoover, *supra* note 6, at 51, admonishing that "[m]useums must be aware of the resources available for filing notices of stolen art and utilize these services when necessary." *See also* Drum, *supra* note 21, at 943 (proposing that a large institution should be required to report the theft of an art object to the "FBI, INTERPOL or a private registry.").

441. *See, e.g.*, Franklin Feldman & Bonnie Burnham, *An Art Archive: Principles and Realization*, 10 CONN. L.REV. 702, 704 (1978] (observing that "[o]ne generally accepted premise in all of the hypothesized solutions is that an international clearinghouse could materially advance the recovery of stolen objects"); Hoover, *supra* note 6, at 458-59 (declaring that "[t]he establishment of a central registry of art would give art buyers a complete and reliable source of

B. Catalogue Raisonne

A catalogue raisonne is a comprehensive compilation of many of the known works of an individual artist, and often includes information concerning the history of ownership and display of each work presented.[442] When available, the catalogue raisonne becomes the standard reference for that artist.[443]

The catalogue raisonne may reveal that a particular work is owned by a museum or other institution. Museums and institutions are often the only owners listed in a catalogue raisonne that can be identified specifically and contacted, because catalogues rarely disclose the names of private individual owners by name. Museums and institutions listed as owners may be less likely than private collectors to sell or dispose of a particular art object. Accordingly, when an art object is listed in the catalogue raisonne as belonging to a museum or institution or someone other than the listed owner, this strongly suggests a duty of further inquiry. Realistically, collectors should only be expected to contact those museums or institutions that are listed as the current owner of a particular work as of the date the catalogue was published. Consistent with the equitable principles that inform the "balance of the equities" determination, the identification of subsequent owners of a particular work in a catalogue entry places any former owners on constructive notice of an adverse claim of ownership and reasonably occasions a duty of further investigation on their part.

Parties in art ownership disputes have lauded themselves for resorting to the catalogue raisonne and castigated their opponents for

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information . . . . [A] comprehensive registry would cut down on the market for stolen art by making it more difficult for thieves to sell stolen objects to innocent purchasers"); Pecoraro, *supra* note 116, at 41 (proposing a central registry for stolen art that both would measure the obligation of theft victims to pursue losses diligently as well as constitute a benchmark for purchasers to establish the requisite "good faith"); Bibas, *supra* note 8, at 2460-68 (recommending a central art theft database to which art theft victims must report their losses in order to preserve their ownership rights; under this proposal, the failure of art theft victims to report their losses to this database would result in their ownership rights being expunged if good faith purchasers relied upon the absence of such reports in buying the disputed items).

442. As one commentator explained:

> The catalogue raisonne of a given artist's work generally contains information about every known piece by that artist. This information usually includes a physical description (and an illustration) of an object, say, a painting, as well as whatever data the author has gleaned regarding the painting's provenance, exhibition, history, and bibliographic references. In many cases, scholars and art trade professionals universally refer to a celebrated artist's works using the numbers assigned each work in a particular catalogue raisonne. The catalogue becomes the standard reference as to that artist.

Mary McKenna, Problematic Provenance: *Toward a Coherent United States Policy on the International Trade in Cultural Property*, 12 U. PA. J. INT'L BUS. L 83, 104 n. 89 (1991).

443. *Id.*

their failure to employ it. In *Lubell*,[444] a museum from which a Chagall painting had been stolen was listed as the most recent owner of the work in the relevant catalogue raisonne. The museum challenged the failure of a couple who had purchased the painting from a Manhattan gallery to examine the catalogue entry before buying it.[445] The museum argued that had the couple reviewed the catalogue entry they would have realized that the museum was the most recently listed owner.[446] The buyers, on the other hand, championed their own efforts to contact the compiler of the catalogue personally.[447]

C. *International Museums*

Collectors should attempt to contact several major international museums with prominent collections of an individual artist or type of work in question. Museums often have unique resources and expertise concerning the types of art objects they collect. The professional responsibilities of museum curators and directors require them to keep apprised of the latest developments in their areas of specialization. These developments may include whether particular art objects are available for acquisition and, periodically, whether certain works have been reported.

Courts and commentators have encouraged theft victims searching for their stolen art objects to contact museums that specialize in the prescribed area. The distinctive capabilities and resources of museums often enable them to identify particular art objects as having been stolen.[448] In several notable judicial decisions concerning disputed claims of ownership to stolen art objects, theft victims contacted relevant museums in an effort to find their missing works and museums officials were instrumental in helping theft victims to locate their property.[449]

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444. Solomon R. Guggenheim Found. v. Lubell 550 N.Y.S.2d 618 (N.Y. App. Div. 1990).

445. *Id.* at 623.

446. *Id.*

447. *Id.* at 619.

448. Collin, *supra* note 14, at 29-30.

449. For example, in one much acclaimed instance the director of an East German museum from which several Albrecht Durer paintings had been looted during World War II informed, among other persons, appropriate museums both in Europe and the United States in an effort to locate the paintings. See Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 850 (E.D.N.Y. 1981), in which the court observed that the museum director notified, *inter alia*, the Kaiser Frederich Museum in Berlin and the Bavarian National Museum in Munich, as well as the Germanic Museum at Harvard University. The ultimate location of the paintings at the residence of a Brooklyn collector was reported in a front page article of the *New York Times* in May 30, 1966, and, in the words of the court, "was described by one official of the Metropolitan Museum as the 'discovery of the century.'" 678 F.2d at 1156.

D. Authorities in the Art World

Collectors also should attempt to discover whether an art object in question has been reported as stolen to noted art world professionals in the relevant field or subject area. By making inquiries to such experts, collectors avail themselves of another recognized resource for ascertaining whether a particular item has been reported, or is known to be, stolen.

Courts have urged art theft victims to contact recognized professionals in the relevant field to help locate their missing property and also have counseled buyers to do the same when they have been offered suspicious works. Recognized specialists in prescribed areas are often privy to information about stolen art objects that others are unable to attain. For example, in *Autocephalous Greek-Orthodox Church v. Goldberg*, the court rebuked the failure of an art dealer (Goldberg) to contact an independent expert before buying valuable Byzantine mosaics.[450] By making inquiries to such experts, collectors avail themselves of another recognized resource for ascertaining whether a particular item has been reported, or is known to be, stolen.

E. U.S. and International Auction Houses

U.S. and international auction houses are another resource that collectors reasonably might be expected to consult. By contacting auction houses, collectors extend their investigation to significant participants within the commercial art world who are positioned to receive both reports that certain art objects have been stolen, as well as look for stolen materials consigned for sale. In *Autocephalous Greek-Orthodox Church of Cyprus*, the court found that the government of Cyprus (Cyprus) had discharged its obligations to search diligently for stolen Byzantine mosaics by reporting the theft to the "likely points of sale of

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Similarly, the Government of Cyprus, in an attempt to locate priceless Byzantine mosaics that had been looted from a church, reported the theft to the British Museum, the Louvre, and Harvard University's Dumbarton Oaks Institute for Byzantine Studies. *See* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fines Arts, Inc., 717 F. Supp. 1374, 1380 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1996).

In *Autocephalous*, the mosaics were located when an official at the Getty Museum in Los Angeles whom the Government of Cyprus had notified about the theft was able to identify them when they were introduced into the market. *Id.* at 283. Similarly, in Keim v. Louisiana Historical Ass'n Confederate War Museum, 48 F.3d 362 (1995), a curator at the Milwaukee Public Museum apprised the Louisiana Historical Association Confederate War Museum (War Museum) that a Confederate battle flag belonging to the War Museum (and which apparently had been stolen) had been sold to a private collector, but the War Museum neglected to pursue its claim to recover the flag in a timely manner.

450. *Autocephalous*, 717 F. Supp. at 1404.

the mosaics."[451] Cyprus had reported the looting of the works to "individuals from international auction houses, such as Sotheby's and Christie's."[452] The court, quoting Cyprus' expert witness, found Cyprus' strategy in reporting its loss in this manner to be "consistent with what is happening in the art world today, the goal being to stifle the trade at the point of destination."[453] More recently, the Dresden Museum recovered nine drawings missing since the end of World War II after identifying them in a Sotheby's pre-auction catalogue.[454] Auction houses have become increasingly important in the art market and are situated to learn whether particular works have been stolen.[455]

F. Collector Groups and Specialty Publications

Art buyers and collectors also might contact relevant collector groups and specialty publications to determine whether a work in question has been stolen. These organizations are defined by their concentrated interest in, and attention to, the specific category of art object to which the work in question belongs. As such, they may acquire information that particular art objects belonging to this category have been stolen. Because stolen art objects often are offered for sale to individual collectors, organizations of collectors may be channels of information not only about particular art objects that have been stolen, but also about stolen works that have resurfaced in the market.[456] Contacting relevant trade publications that specialize in the

451. *Autocephalous*, 917 F.2d at 290.

452. *Autocephalous*, 717 F. Supp. at 1380.

453. *Id.* at 1389.

454. Press release issued by the German Embassy in Washington, D.C. (Oct. 8, 1998).

455. *See, e.g.*, McCord, *supra* note 6, at 1002-03 (discussing how auction houses have become a "dominant force" in the international market and commenting that "[m]ost suspect art is funneled through auction houses, and it is therefore most strategic to target this narrowest point in the distribution chain.;" *see also* Joette M. Blaustein, *Why Is This Sale Different from All Other Sales?* Abrams v. Sotheby Parke Bernet, Inc., 4 CARDOZO ART & ENT. L.J. 139, 167 (1985) (asserting that "[l]egislation should be enacted to compel auction houses who are 'in a position to dominate the whole art . . . field' to thoroughly investigate title, thus protecting the purchaser.") (citation omitted).

456. For example, in Society of Cal. Pioneers v. Baker, 50 Cal. Rptr. 2d 865 (Cal. Ct. App. 1996), a member of the board of directors of a collector's society from which an antique cane handle had been stolen was able to find it in the possession of a collector. The court commented that the director "apparently worked with others to locate and identify stolen items though collecting activities and had recovered items in the past using these measures." *Baker*, 50 Cal. Rptr. 2d at 873.

In *Autocephalous*, 717 F. Supp. at 1380, the Republic of Cyprus disseminated reports about the looting of certain Byzantine mosaics from a church in Northern Cyprus to many persons in the international art community, including, generally, organizations interested in Greek and Cypriot affairs.

And in Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991), the court observed that a museum from whom a Chagall painting had been stolen failed to notify the art

type of art object that has been stolen also has proven to be an effective way to notify the international art market of the loss.[457]

G. Fine Arts Dealers

Collectors might be expected to contact one or more fine arts dealers who specialize in the particular artist or type of work. Many fine arts dealers, of course, have their fingers on the pulse of the international art trade and often may be the first persons to learn of an attempt to reintroduce a stolen work into the market. Dealers have distinctive expertise in their areas of specialty and have qualified as expert witnesses in high profile cases concerning the recovery of stolen art objects.[458] Directors of prominent museums have recognized the unique role that dealers play in the art market and the opportunities that they often enjoy to acquire information to which others are not privy.[459]

H. Fine Art Restorers and Conservators

Fine art restorers and conservators also may be situated to learn that a particular work may be stolen. Art thieves and illicit traffickers frequently commission art restorers to improve or modify stolen art objects that they wish to resell. Police are sometimes able to trace stolen materials by consulting restorers.[460] Consulting appropriate restorers and conservators expands the contacts of persons who are likely to receive reports of stolen art objects and improves the chances of learning whether any such reports have been made. Recently,

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world about the loss, and neglected to "inform other museums, galleries or artistic organizations of the theft. . . ."

457. *See, e.g.*, Hoover, *supra* note 6, at 51 (declaring that "[s]pecial trade publications should also be considered as resource for spreading the word."). *See also* Pinkerton, *supra* note 144, at 28 (recommending that theft victims notify, *inter alia*, "art and archaeological periodicals in the major capitals of the world, including the major cities of the art market such as New York, London, Basel, Geneva, Paris and Rome.").

458. For example, at the trial stage in *Autocephalous*, 717 F. Supp. at 1404, New York art dealer Andre Emmerich testified as an expert witness on behalf of the defendant.

459. *See* Art Dealers Association of America Directory 1995–1996, "The Role of the Art Dealer," comment by Sherman E. Lee, retired director, Cleveland Art Museum:

> I have always had a great deal of respect for dealers. They're knowledgeable people. They put their money on the line and they also are very keenly interested in what goes on in the art world. They hear and see many things that I certainly never did.

Also see comment by Edmund P. Pillsbury, Director, Kimbell Art Museum:

> The dealers control the market to the extent that even with the enormous increase in the role of the auction houses, still it's the dealers who often locate the material and bring it to the market and decide where it should be offered, how it should be made available.

460. Prott, *supra* note 168, at 347.

appraisers and conservators with special knowledge about distinctive markings on Dutch old master paintings helped the government of Romania recover four paintings stolen some thirty years earlier.[461]

I. Insurance Agents

Insurance agents for fine arts insurers may have information concerning whether a particular art object has been stolen. Collectors whose works are insured against theft often report their losses to their insurance companies to obtain reimbursement. Accordingly, insurance agents who work in the fine arts field may receive reports of art thefts and may learn about thefts that are not insured or that their own companies do not cover. Authorities have acknowledged the role of insurance agents in this context.[462]

J. Journalists

Journalists who report on the fine arts trade may learn that a particular work has been looted or plundered. In *Autocephalous Greek-Orthodox Church of Cyprus*, for example, Cyprus reported the looting of Byzantine mosaics to many persons who might be positioned to help locate them, including international journalists.[463] In another case, a museum established a record of success in recovering stolen art objects by placing classified advertisements.[464] Commentators have recommended that art theft victims contact journalists as part of their "due diligence" efforts to recover their stolen property.[465]

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461. William H. Honan, *Stolen Old Masters Resurface in the U.S.*, N.Y. TIMES, July 9, 1998, at A14.

462. *See, e.g.*, Wertheimer, *supra* note 319, at 46 (recommending that art theft victims report their losses to the police because "[m]any major insurance carriers will not accept loss claims which have not been reported to the police because they seek to prevent fraudulent claims."). *See also* Lowenthal, *supra* note 72, at 311 (observing that "[i]nsurance companies are increasingly sending in loss reports and are becoming a major source of reports" for the Art Loss Register).

463. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fines Arts, Inc., 717 F. Supp. 1374, 1380 (S.D. Ind. 1989).

464. Society of Cal. Pioneers v. Baker, 50 Cal. Rptr. 2d 865, 873 (Cal. Ct. App. 1996).

465. *See, e.g.*, Hoover, *supra* note 6, at 51 (asserting that "[t]he museum victimized by theft should consider issuing a press release on the loss, as media coverage will reach a wide segment of the population"); Pinkerton, *supra* note 144, at 28 (prescribing that art theft victims provide notice of their losses "to the major newspapers and art and archaeological periodicals in the major capitals of the world, including the major cities in the art market such as New York, London, Basel, Geneva, Paris and Rome.").

K. Government of Nation Especially Identified with Particular Work or Artist

Collectors should contact any foreign government that may be closely identified with a particular artist or type of art object. Inquiry to that government may be indicated or suggested in a comprehensive due diligence investigation because the very identity of the work or artist might put a reasonably informed person on constructive notice that a particular country may have a special interest in the work and thus may know whether it has been reported stolen.

Authorities have appreciated that governments of nations closely identified with a specific type of art object may have information concerning whether a particular work of that type has been stolen. Indeed, plaintiff-theft victims in several prominent judicial decisions concerning the recovery of stolen art objects have been governments or government-sponsored institutions.[466] Authorities also have recognized that because individual countries enjoy special contacts, resources, and wealth, they should be held to the highest standards of diligence in pursuing losses of stolen art objects, especially when works of national significance have been lost. As one commentator asked, "[i]f, in examining all the circumstances of the case . . . the court considers the wealth and sophistication of the victim, can any individual be considered more wealthy or sophisticated than an entire nation which claims to be losing its patrimony?"[467] Courts ruling that individual countries suffering stolen art investigated their losses with sufficient diligence under the "balance of the equities" criterion also found that the countries pursued their losses in an informed, methodical, and systematic manner.[468]

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466. *See, e.g.*, Kunstsammulungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982) (affirming a ruling returning stolen paintings by the Renaissance artist Albrecht Durer to a national art museum of the German Democratic Republic from which they had been stolen at the end of World War II); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990) (affirming a ruling returning looted Byzantine mosaics to the Republic of Cyprus and the Church of Cyprus); Republic of Turkey v. OKS Partners, 797 F. Supp. 64 (D. Mass. 1992) (denying a motion to dismiss an action brought by the Republic of Turkey seeking to reclaim an ancient coin collection allegedly smuggled out of Turkey).

467. Pinkerton, *supra* note 144, at 15.

468. The court in *Autocephalous* found that the Republic of Cyprus "took substantial and meaningful steps, from the time it first learned of the disappearance of the mosaics, to locate and recover them. The efforts of the Republic's officials, targeted at the likely points of sale of the mosaics, were sweeping and consistent with trade practices." 917 F.2d at 290. The District court in *Elicofon* concluded that the investigation of the plaintiff museum "followed many channels" and "reflect[ed] a continuous and diligent search." 536 F. Supp. 829, 852 (E.D.N.Y. 1981).

L. Other Possibilities

Several organizations recently have responded to the need of the international market for greater information about stolen art. A reasonable due diligence investigative responsibility necessarily must consider any significant information gathering initiative, provided, of course, that it can be accessed in a cost-effective way. Three such initiatives are the Historic Art Theft Database of the Washington, D.C.-based Trans-Art International, L.C.™, the Commission on Art Recovery (CARR), and the Holocaust Art Recovery Project (HARP).

1. The Historic Art Theft Database

According to a nationally prominent asset protection specialist, the Historic Art Theft Database "comprise[s] the largest and most complete compilation of information available about losses of art objects sustained as a result of World War II."[469] The database contains, among other materials, all items reported in a catalog of German losses from World War II and known as "Verlorene Werk der Malerei." The Verlorene was published in 1945-46, and items reported in it as stolen continue to appear for sale on the market.[470] As of January 1999, the database reported losses of approximately 35,000 art objects from more than one dozen countries, and the database is being updated continually.[471] According to Trans-Art representatives, the database contains reports of stolen materials at issue in at least five recent and well-publicized claims.[472]

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469. Spero, *supra* note 1, at 62.

470. The Verlorene first attracted notoriety in the late 1960s. Two portraits by the Renaissance artist Albrecht Durer that had been looted from an East German museum during World War II and were listed in the Verlorene were discovered in the residence of a private collector in Brooklyn. The museum successfully sued the museum to recover them. *See Elicofon*, 536 F. Supp. at 851.

More recently, a work by the artist Joachim Wtewael, entitled "The Holy Family with Saints John and Elizabeth and Angel" (and valued at more than $1.2 million), listed in the Verlorene as belonging to the Schlossmuseum of the City of Gotha, Germany, was offered for sale at auction by Sotheby's in London. The City of Gotha has sued Sotheby's for the return of the painting. Schlossmuseum of the City of Gotha v. Sotheby's, 1993 C. No. 3428 (Q.B. 1993).

471. Telephone conversation with Lloyd P. Goldenberg, Trans-Art managing member.

472. According to Trans-Art managing member Lloyd P. Goldenberg, the Database identifies as stolen from the War the materials in dispute in the following claims: (1) a 16th century parade shield that an Italian museum recovered from Ronald Lauder, president of the Estée Lauder cosmetics firm and vice chairman of New York's Museum of Modern Art (*see* ART-NEWSPAPER, December 1996, at 35); (2) a Tishbein painting that a German Museum recovered from heirs of an estate offering the work for sale through Sotheby's in New York (*see* Paula Span, "A Bird in the Hand: Stolen German Work Returned After 50 Years," WASH. POST, Feb. 5, 1997, at C1); (3) a Botticelli painting looted during World War II from a Holocaust victim. The heirs obtained from European sellers of the painting a substantial cash payment tied to a January 1997 price offer to buy the work at Sotheby's auction (*see* Walter V. Robinson, *An Ignominious*

2. The Holocaust Claims Processing Office of the New York State Banking Commission

The Holocaust Claims Processing Office was established with the support of New York Governor George Pataki. The Processing Office is designed to serve as a repository of claims for personalty, including artworks, registered by claimants from around the world. The Processing Office works with two other recently established organizations that help Holocaust victims or their descendants: the Commission for Art Recovery of the World Jewish Congress and the Holocaust Art Restitution Project. The Processing Office is seeking new claims made directly by Holocaust victims or their descendants. It has made no attempt, however, to record historically available rec??ords of losses.

VI. NEED FOR DOCUMENTING DUE DILIGENCE INVESTIGATIONS

Authorities have counseled that to be effective, due diligence inquiries must be documented and the record of communications preserved. As one commentary explained, "[a]ll such contacts should be . . . documented and all documents retained. Failure to present sufficient evidence of attempts to substantiate title may a cause a court to decide the buyer was not a good-faith purchaser."[473] Some commentators have recommended that a file be maintained of all contacts made and that records of any telephone inquiries be comprehensively recorded:

> When undertaking an inquiry into title, keep a file on the sources contacted. Records of telephone calls with the dates, the name of the person contacted and the substance of the discussion should be included. Keep copies of any letters written or received. This file should be retained indefinitely in case . . . ownership is ever called into question.[474]

Indeed, the failure to document properly contacts made to identify potential conflicting ownership claims to valuable art objects may cause a court to doubt that such efforts were ever undertaken. In *Autocephalous Greek-Orthodox Church of Cyprus*, for example, the

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Legacy: Evidence Grows of Plundered Art in U.S., BOSTON GLOBE, Apr. 25, 1997 at A1); (4) a 15th century painting upon which the Government of Belgium made a demand from New York's Metropolitan Museum of Art (*see* Walter J. Robinson and Maureen Goggin, *Stolen Art Claims Shake N.Y. Museum*, BOSTON GLOBE, July 24, 1997, at A1); (5) $10 million dollars of looted art that the Bremen museum recovered from a Japanese citizen in New York. Benjamin Weiser, *$10 Million in Looted Art Is Recovered*, N.Y. TIMES, Sept. 10, 1997, at A23.)

473. *Acquiring Title*, *supra* note 123, at 239.

474. Hoover, *supra* note 6, at 52.

court questioned the inability of the defendant, in a lawsuit brought to reclaim looted Byzantine mosaics, to produce documented records of several telephone calls that she testified she had made to determine whether the mosaics had been stolen.[475] The failure of the defendant to produce documented records of these calls helped inform the court's conclusion that she had not investigated the mosaics adequately.[476]

VII. POLICY BENEFITS OF INVESTIGATIONS OF ARTWORKS

The legal rule requiring extensive due diligence investigations for valuable art objects advances many valuable policy goals for the art market. The "due diligence" responsibility reconciles, in the most equitable and practical manner, the many hardships confronting victims of international art theft with the need of the U.S. art market for an appropriate title clearing mechanism. Because the due diligence rule validates only the reasonable commercial expectations of buyers and collectors who demonstrate genuine good faith, it protects the ownership rights of international theft victims and encourages the U.S. art market to reform its lackadaisical practices.

The most significant policy rewards of the "due diligence" rule include the following:

First, comprehensive and informed due diligence investigations are best calculated to determine whether a particular art object has been stolen in fact. The due diligence rule adheres to the bedrock U.S. commercial law principle that a thief can never convey good title to stolen property and that stolen property remains stolen, regardless of how often it is bought and sold. It respects the ownership rights of international art theft victims in their missing property and discourages trafficking in stolen goods.

Second, the due diligence rule deals responsively with a major and potentially troubling category of stolen art objects: items illegally excavated from a particular country in violation of the ownership rights that country has asserted as a sovereign. Inquiries beyond sto-

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475. *Autocephalous*, 717 F. Supp. at 1403. The court observed that the defendant art dealer (Goldberg) lacked documents recording telephone calls that she maintained that she had made to the International Foundation for Art Research (IFAR) and the United Nations UNESCO:

> Goldberg testified that she telephoned authorities at UNESCO's office in Geneva. She cannot recall the name of any individual that she spoke with at UNESCO, Switzerland . . . .
>
> Goldberg also testified that she telephoned the International Foundation for Art Research (IFAR) in New York . . . . No document sent to or received by IFAR confirms Goldberg's telephone call.

717 F. Supp. at 1304.

476. *Id.*

len art databases, and especially to relevant experts in the relevant subject area, are essential to identify stolen and looted materials in this context, because such items necessarily cannot be reported prospectively.

Third, by preserving the focus in stolen art cases upon whether a particular item has actually been stolen, the due diligence rule anticipates, and indeed requires, that buyers and collectors use all reasonably available resources and channels of investigation to make this determination. The flexibility of the due diligence criterion requires buyers and collectors to invoke cost-effective information gathering initiatives such as the Historic Art Theft Database. The due diligence rule thus is calculated to make optimal use of all investigative resources that are available at any given time to determine whether a particular item has in fact been stolen.

Fourth, because the substantive content of the due diligence requirement is necessarily informed by currently available investigative tools, the due diligence rule encourages the development of additional resources for ascertaining whether a particular art object has been stolen. The due diligence rule invites improvement in capabilities for identifying stolen materials.

Fifth, the due diligence investigative responsibility provides an essential backstop to help victims of international art theft to locate and recover their stolen property. As previously noted, international art theft victims encounter many obstacles in attempting to locate missing art objects. They may not even be positioned to know that a particular item has been stolen.[477] By invoking as many resources as reasonably available to determine whether a particular item has been stolen, due diligence investigations can identify stolen materials that theft victims themselves were not able to relate. This capability is especially important for casualties of the Holocaust and other genocides who cannot report and pursue their losses.

Sixth, while safeguarding the rights of theft victims, the due diligence rule at the same time provides an essential title-clearing mechanism for the U.S. art market that validates the reasonable commercial expectations of buyers and collectors. The due diligence rule is the appropriate vehicle for title clearing decisions in the U.S. art market for two reasons. First, by entailing proof of genuine good faith (given the distinctive attributes of the international art market), the due diligence rule decides the question of title in a manner consonant with

477. *See* discussion *supra* pages 670-73.

jurisprudence in stolen chattel cases.[478] Second, the due diligence investigative responsibility for valuable art objects parallels due diligence requirements that have become standard procedure for protecting assets of comparable value and for limiting risks with similar potential exposure.

Seventh, the due diligence rule helps protect the moral and ethical position of U.S. buyers and collectors. It encourages museums in the United States to comply with the formal ethical responsibilities they invoke to justify their tax exempt status and public trust. It also ensures that private collectors have a moral, as well as legal, entitlement to any stolen materials that they mistakenly may have obtained.[479]

Finally, the due diligence rule coheres with a developing international legal consensus favoring comprehensive investigative responsibilities upon art buyers and collectors. This trend is represented by the recently enacted UNIDROIT Convention[480] as well as a 1996 Swiss commercial law decision.[481]

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478. *See supra* pages 652-58 (discussing the historical focus of courts in stolen chattel cases decided under the doctrine of adverse possession upon the good faith of the possessor of stolen goods).

479. In a letter to Honorable Joseph Bruno, Majority Leader, New York State Senate, Sidney Clearfield, Executive Vice President of B'nai B'rith, referred to proposed legislation in New York that would permit purchasers of artwork to consult only one cultural property registry to determine if the artwork was stolen. As Clearfield stated, such legislation would "help legitimize the original theft."

480. "UNIDROIT" is the International Institute for the Unification of Private Law. It was created in 1926 at the instigation of the League of Nations as an independent body to work on the harmonization of the international laws. It deals mostly with commercial law issues. THE ART NEWSPAPER, Vol. 51, Sept. 1995, at 57.

UNIDROIT has been described as "an innovative and workable mechanism for controlling the illicit international trade in art" and approaches the problem of international art theft from the perspective of private international law. *See* Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?* 15 U. PA. J. INT'L L. 469, 491 (1994). UNIDROIT is designed to remedy the "motley assortment of laws currently governing ownership rights in cultural property." *Id.*

UNIDROIT aspires to prevent stolen art traffickers from manipulating choice of law and substantive commercial law differences in various countries in order to launder title to stolen cultural property. *See* A.G. Somers Cocks, *U.S. and U.K. Art Lobbies Muster to Scupper the UNIDROIT Convention*, THE ART NEWSPAPER, Vol. 51, Sept. 1995, at 26.

To accomplish these goals, UNIDROIT requires collectors to return stolen art objects and other collectibles found in their possession, but permits them to be compensated in an amount reflecting the current fair value of the item if they can show that they could not reasonably have known that the object was stolen and they took all reasonably available precautions against acquiring stolen property. UNIDROIT CONVENTION, Chapter II, Article 4(1).

481. A 1996 decision by the highest civil law court in Switzerland, Insurer XV.A.M., 2nd Civil Dept., March 5, 1996, imposes an affirmative due diligence investigative requirement upon merchants in the art trade to determine that the materials that they sell have not been stolen.

VIII. CONCLUSION

Until recently, purchasers of valuable artworks conducted minimal, if any, investigations into title to such works. Now however, the recent and growing number of lawsuits brought by theft victims who are seeking return of their stolen art has demonstrated that massive quantities of stolen materials have filtered unnoticed through the international art market and has accentuated the "time bomb" that is lurking with respect to almost all art collections in the United States.

Because law in the United States prevents a purchaser from acquiring good title to property that once was stolen, regardless of the purchaser's good faith and ignorance of the theft,[482] innocent purchasers of stolen artworks are exposed indefinitely to claims of true owners. Thus, with stolen artwork flooding the U.S. and international art markets, prospective buyers of valuable artworks must conduct due diligence investigations into title in order to limit their investment risk. Not only do such investigations protect the commercial expectations of buyers and collectors, they also can curtail the illicit commerce in stolen art. As the court noted in *Porter v. Wertz*,[483] "commercial indifference to ownership . . . facilitates traffic in stolen works of art."[484]

Several circumstances, as well as developments in the art market, underscore the need for potential purchasers and possessors of artworks to conduct due diligence investigations of title. These can be summarized as follows:

(1) Due diligence investigations are the only effective way collectors and buyers can avoid acquiring stolen artworks.[485]
(2) The increased likelihood of being sued for the recovery of a stolen art object both intensifies the need for, and amplifies the scope of, appropriate due diligence investigation.[486]
(3) The comparative equities in lawsuits brought by art theft victims initially weigh heavily in favor of the theft victims.[487]
(4) The laches doctrine with its equitable foundation protecting good faith possessors from stale claims will reward buyers and collectors who take appropriate precautions against acquiring stolen art.[488]

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482. *See* U.C.C. § 2-403 (1977); *supra* note 6 and accompanying text.
483. 416 N.Y.S.2d 254, 259 (N.Y. App. Div. 1979).
484. *Id.*
485. *See* discussion *supra* page 694.
486. *See* discussion *supra* page 685.
487. *See* discussion *supra* page 670-73.
488. *See* discussion *supra* page 701-05.

(5) To avoid the extensive injury that the recovery of a stolen art object can cause individual collectors, as well as their estates, trusts, and financial plans, collectors have a broad investigative responsibility.[489]

(6) The fiduciary obligations of both tax-exempt institutional collectors and trust institutions mandate discrete duties to protect the value and title of assets under their control.[490] The Code of Ethics for Museums prepared by the American Association of Museums prescribes that U.S. museums owe fiduciary responsibilities to the public and requires that secure legal title attach to all objects in their collections.[491] The fiduciary responsibilities of estate-planning attorneys and trust institutions that manage assets on behalf of wealthy collectors require a broad investigative standard.

As noted in this Article, courts and commentators have articulated discrete due diligence investigative steps that prospective buyers and current owners of valuable art objects can take to safeguard their legal ownership rights in stolen artwork.[492] These steps entail inquiries to institutions, persons, or art world participants to whom theft victims most likely would report their losses. They include inquiries to publicly available stolen art databases, archives or registries, such as the Art Loss Register and Thesaurus Group's "TRACER" Database.[493] Potential purchasers should inquire at locations where the type of art object in question, if stolen, reasonably might be expected to be reintroduced into the legitimate market. Purchasers should inquire of those resources that reasonably might assist them in determining whether a particular work has been stolen, such as the applicable catalogue raissone of a particular artist, collectors' specialty groups, international museums, authorities in the art world, auction houses, and any nation that is especially identified with a particular work or artist.[494] Inquiries to each of these sources consistently has helped to identify stolen art objects. Accordingly, the steps that comprise an appropriate due diligence investigation are essentially self-defining and are prescribed because they are demonstrably effective as well as reasonable. Moreover, an appropriate "due diligence" investigation necessarily will expand from time to time to include any addi-

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489. *See supra* notes 727-28 and accompanying text.
490. *See* discussion *supra* pages 673-85.
491. *See supra* note 266 and accompanying text.
492. *See supra* note 15 and accompanying text.
493. *See* discussion *supra* pages 717-19.
494. *See* discussion *supra* pages 719-26.

tional resources that may become available to help locate and recover stolen art and that can be consulted practically.

Although these wide-ranging inquiries initially may depict a due diligence investigation as unduly broad and cumbersome, investigative resources are available that can narrow the scope of inquiry for art buyers and collectors and facilitate this task.[495] For example, Washington, D.C.-based Trans-Art International, with its Historic Art Theft Database, has the largest and most complete compilation of information about losses of art objects sustained as a result of World War II, and it specializes in title searches of fine arts and antiquities. Enlisting the service of an organization such as Trans-Art International to conduct a comprehensive due diligence investigation on behalf of a potential purchaser or an estate or trust substantially limits the process.

Purchasers of artworks can no longer claim "good faith" status if they have not conducted an investigation of title. On the other hand, an appropriate and adequate due diligence investigation can secure a purchaser's title. To protect the reasonable commercial expectations of buyers and to provide a way for title to be made secure in the marketplace, courts have expunged the ownership rights of theft victims, even when they lacked constructive notice of rival claims.[496] Still, because the theft victim is favored in any balancing of the equities between a theft victim and an innocent purchaser, persons who have acquired stolen artworks without first investigating their background are, at a minimum, reckless.[497] The lax commercial conventions of the international art trade that enable massive quantities of stolen art to seep into the legitimate market necessarily undercut any reasonable reliance that secure title has attached to many objects. On the other hand, with an appropriate due diligence investigation, collectors position themselves prospectively to establish the equitable defense of laches to possible future legal challenges to their ownership rights.[498] Thus, the due diligence responsibility placed upon prospective purchasers reconciles, in the most equitable and practical manner, the many hardships confronting victims of international art theft with the need of the U.S. art market for an appropriate title-clearing mechanism.

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495. *See* discussion *supra* pages 717-27.

496. *See supra* note 150 and accompanying text.

497. *See supra* note 136 and accompanying text.

498. *See supra* note 163 and accompanying text.