

Regulating and Policing the “Grey” Antiquities Market: what works, what doesn’t, and ways forward

Citation for published version (APA):

Yates, D., & Berzina, D. (2021). Regulating and Policing the “Grey” Antiquities Market: what works, what doesn’t, and ways forward. In National Heritage Board of Latvia (Ed.), *Opportunities and Challenges of Art and Antiques Market Management* (pp. 61-72). National Heritage Board of Latvia.

Document status and date:

Published: 01/01/2021

Document Version:

Publisher's PDF, also known as Version of record

Document license:

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Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
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- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

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STARPTAUTISKA KONFERENCE
**MĀKSLAS UN ANTIKVĀRO PRIEKŠMETU TIRGUS
PĀRVALDĪBAS IESPĒJAS UN IZAICINĀJUMI**

INTERNATIONAL CONFERENCE
**OPPORTUNITIES AND CHALLENGES OF THE
ART AND ANTIQUES MARKET MANAGEMENT**

REGULATING AND POLICING THE GREY ANTIQUITIES MARKET: WHAT WORKS, WHAT DOES NOT AND WAYS FORWARD

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ABSTRACT. Market actors refer to a legitimate antiquities market and a separate illegitimate market, however weight of the research indicates that there is a mix of legality and illegality at all points of the supply and demand chain. The antiquities market is a grey market, which makes it difficult to regulate and police. For decades, market actors and antiquities trade have relied on “self” or “auto” regulation of the market claiming that objects with better provenance sell better and buyers avoid dubious sellers, however, these claims are not supported by evidence and the market does not police itself. In this chapter, we will discuss why “self” regulation has not worked and present ideas for Europe to move forward with regulating the market beyond ideas of import and export control. Based on the data gathered during European Commission-funded research, we suggest three pathways as a way forward: creating policies that do not rely on market’s “self” regulation, providing new technology for policing that reflect real operational needs, and reconsidering our own role as experts in the maintenance of markets’ greyness. To regulate and police this grey market we need to change our approaches and to support the kind of research and cooperative infrastructure that will allow for innovative practice and policy development.

1. INTRODUCTION

One of the primary issues with the antiquities market is that it is a grey market. This makes it extremely difficult to control. If we wish to develop effective regulatory responses to the illicit trafficking of antiquities and other crimes within the antiquities market, it is important to understand these points of greyness and to consider the shielding effect they have on criminal actors and practices.

Greyness has been defined in two ways within academic research on crime. In

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the first, greyness is characterised as the difficulty to assess zone between two opposite poles of behaviour. This construction assumes that there is a legal, moral, or appropriate way to act and an illegal, immoral, inappropriate way to act, both of which are defined by laws, cultural norms, or ethical guidelines. In the “grey area”, then, there are actions that, based on the previously mentioned laws and norms, cannot yet be classified as being either legal or illegal, moral or immoral. The second possible conception of grey, particularly in relation to markets, characterises greyness as being a mixing of illegal and legal, of tainted and untainted actions or items, with the resulting situation being neither entirely untainted nor entirely tainted. And just as a black and white paint mix to form a grey paint, the illegal/tainted can no longer be separated from the legal/tainted. To define this more directly with relation to markets, in the first conception greyness occurs when there is a correct way to be, but we do not yet know what it is; in the second conception of greyness, right and wrong have become inseparably mixed.

Both conceptions of greyness can be seen within the antiquities market (see Mackenzie and Yates, 2017 for a more complete discussion of this). Mixed supply streams for all antiquities on the market lead to a situation where legal and licit objects are indistinguishable from illegal and illicit objects. Market traditions of opaque business practices, poor provenance research, and anonymity mask the origins of all antiquities for sale and allow illicit and illegal objects to be laundered (but not fully cleaned). Finally, a high degree of moral ambiguity and shifting ideas of ethical behaviour exist among market actors, creating an atmosphere where engagement with the illicit market is difficult to classify within a simple right/wrong dichotomy.

The weight of academic research indicates that the antiquities market is a mix of legality and illegality at all points along the supply chain (Massy, 2008; Mackenzie and Yates, 2017). Existing policy does not provide enough guidance to classify certain market actions as right or wrong and instead some market actors engage in “creative compliance” by complying with the letter of regulations or norms while violating their spirit (McBarnet, 2003) This evidences a situation where improved regulatory tools are clearly needed. In this chapter we will discuss how we can approach regulating and policing this grey market through three pathways: developing regulatory regimes that are not dependent on the market policing itself, providing support and new technology for policing that reflects real operational needs, and by examining the role experts play in the maintenance of market greyness.

2. DATA COLLECTION

The data used in the present study was collected in 2018 and 2019 as part of a European Commission-Funded study titled “Illicit Trade in Cultural Goods in Europe: Characteristics, criminal justice responses and an analysis of the applicability of technologies in the combat against the trade” (Brodie et al. 2019).

The first goal of this study was to investigate the illicit movement of cultural objects from, to, and through the EU with a specific focus on clarifying basic information about the nature of the trade, such as what types of objects are traded and in what volumes, as well as the operational modes of criminals operating in this field. The second was to consider the role of new technology for identifying illicit cultural objects within Europe and for improving information sharing between various agencies that are charged with preventing trafficking.

To gain this information, a mixed methodology was employed that included a review of relevant literature, interviews with practitioners and experts, an online survey of additional practitioners and experts, snapshot analyses of online markets for cultural goods, and the analysis of case studies. A total of 36 interviews were conducted in 2018, the majority of which were with representatives from European law enforcement and customs who work in this field. The survey, which was open for six and a half weeks in mid-2018, gained 124 responses from 39 countries. We consider this response rate to be relatively low, particularly since we directly or indirectly contacted 770 potential respondents via social media or our professional network. Potential reasons for this low response rate are reflected in both the responses of those who did complete the survey as well as in interviews, including institutional barriers to information sharing and limited time and staffing capacity. In contrast to the interviews, most survey respondents were collectors of cultural objects (33), art dealers (25), university researchers (27), and museum professionals (19). Taken with the more police-focused interviews, experiences from a diverse set of art market actors, researchers, and regulators were obtained. These were contextualised with the results of our desk-based data gathering methods.

3. REGULATING BEYOND SELF-REGULATION

Self-regulation or auto-regulation in a regulatory technique that is perhaps best characterised here with the phrase “the market will police itself”. It is a mix between a government trust in the desire of white-collar actors to “do the right thing” voluntarily out of a sense of civic duty, and a neoliberal idea that an unregulated market will automatically end up “doing the right thing” because market actors’ profit from avoiding actions that harm their business (i.e. businesses won’t poison their customers because then they will not have any more customers). The obvious issue is that it is often profitable to “do the wrong thing” and when nothing compels market actors to have a civic conscious, many do not. An extreme neoliberal view might be to assert that if the market wants “the wrong thing”, in this case they want illicit antiquities, then we should not stand in the market’s way and that right and wrong should be defined by what the market bears. However, the weight of our international and even national understanding of concepts of heritage allow for human culture and the artistic flowering of human capacity to exist as a special case in need of direct protection

and preservation. Even if the market wants to bring the shared cultural heritage of all humankind into a free-market system characterised by private ownership, that simply is not fully possible.

We have a point of tension here, where the market demands antiquities that are potentially illegal or illicit, and we have a broader assertion coming from the outlook of preservation that illegal or illicit antiquities should not be allowed on the market. Despite this conflict of interest on the part of those who market antiquities, the general theme of antiquities market regulation in many jurisdictions has been in support of self-regulation as described above. This choice of regulatory styles has a number of likely origins. First, it is the least expensive for governments in the short term: no government oversight means no government bill to pay. Second, white collar actors are regularly considered as being capable to monitor and police themselves. This public trust is the primary shield for what can be termed white collar crime (Grabosky and Shover, 2010) and, though beyond the scope of this paper, calls in to question the efficacy of many self-regulatory regimes. Finally, market actors themselves are largely in support of autoregulation, claiming that it is effective while enjoying a situation that is less onerous for them than external monitoring and reporting would be.

In promoting self-regulation as appropriate for the antiquities market, market actors put forward several arguments, most of which fit within the same simplified neoliberal idea that a free market eventually automatically rejects negative behaviour. Yet, these arguments are usually presented without significant support from research, and subsequent investigation calls them into question.

Take, for example, the assertion that the antiquities market does and will offer complete and transparent ownership histories for objects on sale because 'objects with better provenance sell better' (e.g., see Melikian, 2013). In other words, that dealers will respond to the demands of consumers and will only sell objects with positive, and not illegal, provenance histories because of a desire for increased profit. However, research shows that aesthetics (Brodie, 2014; Losson, 2017) and authenticity (Fay, 2011; Yates, 2015) are at the heart of antiquities' buyer behaviour. While most antiquities consumers are unlikely to buy an antiquity that they know for a fact is illegal, there are whole categories of antiquities that continue to be sold on the market entirely without provenance. This is supported by market practices where information is selectively disclosed and certain questions about the origins of a piece remain unasked (Mackenzie, 2014). While market actors may have a financial incentive to highlight antiquities with 'clean' provenance in the rare instances that these truly exist, they also have a financial incentive to maintain a culture where aspects of provenance are not key to enticing a buyer. No academic market study to date has clearly connected "good" provenance to increased market value on the antiquities market.

A similar assertion made in favour of self-regulation on the antiquities market is the idea that buyers shun bad actors, that there are only a few "bad apples" in the trade (Mackenzie and Green, 2009), and that antiquities' sellers who sell illicit

objects gain a bad reputation and thus eventually go out of business. However, the ability to determine which sellers of antiquities are "bad" and which are "good" is not immediately evident to most buyers. Some major galleries and some "well-respected" gallerists have been forced to turn over illicit antiquities or even have been convicted of crimes, yet they continue to trade openly and extensively. Significant research time on the part of the buyer is needed to fully assess the history of a seller, and as the majority of antiquities' buyers are likely not crime or market specialists, this is a lot to expect. Even in situations where the acts of a particular market actor might make it so they don't pass a simple "Google search test", market opacity allows even disgraced traders to re-enter the market in other ways. Perhaps the most obvious is the shielding effect of selling via auction houses or, more likely, via the Internet. On the Internet, nobody knows you're a dog...or a dodgy antiquities' dealer.

The idea that the market will police itself, then, is not supported by research. Further, the very fact that this is a topic of discussion at all and that we have a continued issue with antiquities trafficking and illicit sale, shows that self-regulation doesn't work. While we have relied on self-regulation of the market for decades, the market itself has no real incentive to self-regulate. Truly self-regulating would mean more work and less profit. As it stands, there is neither a carrot nor a stick.

A number of interesting possibilities exist for regulating the antiquities' market outside of self-regulation which take into account market greyness. Those presented here are based on a potential European context due to the nature of the data gathering, however they could be adapted beyond Europe. While the exact implementation of these ideas would vary based on jurisdiction, they are presented here as a point of discussion and elaboration.

First, a licensing scheme that applies to all sellers of antiquities would be a potentially effective way to regulate this market. This could be implemented at a European level or done to a set European standard, with all sales of antiquities routed through licensed dealers. The result would be that bad actors get their licence revoked, preventing them from trading. Licensing would also remove the impossible expectation that buyers recognise bad actors on the marketplace and would increase buyer confidence in the market. Further licensing could come along with a minimum standard for training in due diligence, art and heritage law, etc. on the part of sellers, ensuring that those trading in antiquities are informed of their obligations and of the ethical and legal status of various actions and activities. Dealing in antiquities without a license becomes an actionable violation.

Next, mandating the compulsory registration of antiquities stock and transactions in a centralised registry would further reduce greyness within this market. Sellers dealing in cultural objects would be required to provide Object-ID based information for each piece, along with a photograph, provenance, and import/export history, and further report when a transaction concerning the

piece takes place. Registry entries would then be available to buyers and to law enforcement. The result would be a growing provenance record for each antiquity on the market and, yet again, an increase in buyer confidence. Further, compulsory regulation creates a violation for bad acting that is based on clear compliance or non-compliance, and thus is relatively easy to investigate and penalise.

Finally, the promotion of independent provenance research is a way to move away from the greyness of self-regulation in the antiquities market. Provenance research should be out of the hands of people who have a financial stake in the results; it often pays to ignore bad provenance and, depending on the type of the antiquity, for sellers to perform an impartial provenance research is problematic. Fostering the development of independent provenance research as a market sector could be accomplished through support for professional and master's programmes, incentives for provenance researchers to enter the market, and facilitation of access to documents for provenance research. Making thorough and independent provenance research a condition of sale in a way that does not depend on voluntary compliance on the part of market actors would, yet again, have the added benefit of increasing consumer confidence and protections on the market.

Market actors will likely consider any version of the proposed regulatory options as onerous, saying that this will cause a burden that will negatively reduce the whole of the antiquities' trade. However, consumers benefit from a clean market. The reduction will come in the form of excluding grey material from the market which is the goal of the regulation.

4. POLICING BEYOND THE TECHNOLOGY PANACEA

Regulation is only one side of our response toolkit. We must also consider the policing of antiquities-related crimes in light of greyness within this market.

Within EU institutions, the potential application of new technologies to fighting of crime more generally and to antiquities' trafficking specifically has become a priority area. There is a feeling within these institutions and within society that technology should be able to solve our policing problems and that opportunities to apply new technology to crime fighting are passing by us, while at the same time efforts to use new technology are implemented in a disorganised way. Antiquities trafficking prevention, itself, is a graveyard of failed and aborted attempts to apply technology. This topic is littered with databases that are unfunded or abandoned, platforms and applications that no one uses or needs, and press coverage that portrays proposed new tech ideas as solutions to this problem without needed evaluation or critique. A portion of the European Commission-funded study, then, focused on the use of new technologies by law enforcement authorities and other policing agencies in countering antiquities' trafficking to find out what was useful, what was not, and what barriers exist to effectively address this grey market.

While a number of technologies are used by policing agencies in their investigation of trafficking offences, including antiquities' trafficking offences, respondents to our survey and interviewees singled out very few of these technologies as being extremely useful. One useful technology that a number of participants discussed were "web crawlers": programmes that "scrape" the visible or dark web for data, in this case data related to antiquities movement and transactions. The use of crawling and scraping tools within our discussion with participants evidences the important role that the Internet plays in the antiquities market, a fact that has been evidence by numerous studies (e.g., Altaweel 2019; Brodie, 2014b, 2015, 2017; Huffer and Graham, 2017; Sargent et al., 2020). Web crawlers as well as accompanying technologies such as image recognition and related data processing technologies, were considered positive and desirable among participants who saw them as flexible, customisable, and inexpensive. However, this technology is not without its drawbacks. Participants noted that crawlers generate a lot of data, and that the data requires a trained human eye for processing and analysis. Due to staffing and funding issues, there is often more data than trained human eyes. A representative from one European policing agency noted that this was why they did not employ web crawlers in the policing of antiquities-related crime: they had more cases than they were able to deal with from traditional "tips" alone and using crawling technology to find more crime would further exceed their capacity.

Another technology cited as useful by many participants is one that is far from new. Participants noted that databases of stolen or looted objects, and indeed databases of any sort of information relevant to antiquities' trafficking cases, are a key component of antiquities' trafficking investigations. Respondents noted that being able to access actionable and useful information in databases reduced friction in cross-border cases and database consultation is seen as standard practice. However, participants were quick to point out the limitations of databases. First and foremost, databases only contain documentation of antiquities that have been previously registered and then stolen. Several participants were quick to note that this kind of illicit antiquities makes up only a small portion of the greater antiquities market, with most objects for sale being looted from the ground and thus undocumented. A previously unknown antiquity which was removed from the ground by a looter has no records. Further, participants noted that there were often issues with the quality of some database entries and that poor upkeep and infrequent updates reduced the usefulness of many databases. Participants also noted that specialised and trained staff are needed to manually search databases and that, indeed, manual searching is the norm.

Beyond web crawling and related technologies and databases, few informants cited other form of targeted technology as being useful to policing antiquities trafficking. Many noted that they relied on emails, phone calls, and traditional police work, and did not clearly state that they needed any specific technological

tool. Despite the headlines in the media about various technologies that could be used to address antiquities' trafficking, policing agencies are not using them and do not clearly identify a need for them.

In our own analysis of technology options as part of the European Commission-funded study, we have come to the same conclusion as front-line law enforcement agents. Despite conducting a series of evaluations of various proposed technologies to address the illicit trade, none of the additional technologies considered were judged to be particularly useful for combatting the illicit trade or reducing market greyness. Indeed, the technologies considered inevitably fell into one or more of three categories:

- No operational need: police simply do not need the information that this technology generates, and it does not aid investigations.
- No budget to implement: while the technology could potentially have an interesting and useful application, the sheer cost of it compared to realistic policing budgets makes implementation impossible.
- Tech in search of an application: this applies to technology whose creators, often a tech start-up, are looking for a way to apply that technology to generate profit, thus they propose it as a response to antiquities' trafficking (despite 1 and 2 above) even though the technology was not developed for this issue and may be poorly tested.

In the end, we were unable to identify any new technology that would clearly aid the investigation of antiquities' trafficking cases that would not have already been used in Europe.

What, then, acts as a barrier to effective policing of the illicit antiquities trade if there is no "technology gap"? Our participants overwhelmingly cited two related barriers to address this grey market: lack of money and lack of political will. Several participants noted that they wanted to make better use of their technology options (particularly web scraping and related technology), but there was a lack of funding for the staff needed. These technologies were seen as creating the need for more, not less, staff and the staff members using the technology required training which costs either money or time. Related to this lack of funding for staffing was an impression that the illicit trade in antiquities was a low priority for the agencies that participants were part of. Some reported funding increases when certain individuals with an interest in the topic were making resource allocation decisions, but that otherwise other issues take precedence when it comes to staffing assignments and funding allocation.

A clear response to this is to develop earmarked funding pathways for policing units engaged in combatting the illicit trafficking of antiquities which can be applied to locally defined operational needs. If staffing capacity is the barrier to uptake of useful technologies, that capacity must be increased. The development of new technologies in this area is useless if there is not enough policing staff to implement them. Beyond direct funding, several other measures might allow for more effective policing of the illicit trade. First, it would be useful to support

the development of easy-to-implement toolkits of open-source technologies that are already being used by some agencies within Europe. These toolkits would preserve and share best practices, prevent the need for parallel development of the same tech applications, and could include measures focused on streamlining data processing and cost-reduction. Next, funded partnerships between academia and law enforcement could allow the development of technologies that are tailored to operational needs and realities, and such user-led development could also include an element of training and capacity building. Finally, there is a need to improve the technologies that already exist: to provide sustained funding for, for example, the databases that law enforcement officers both regularly use and regularly find incomplete or in need of development.

5. CONSIDERING OUR OWN ROLE AS EXPERTS

Although the role that experts play in facilitating the illicit trade in antiquities was not a focus of the previously discussed European Commission study, it is worth considering how expertise contributes to the maintenance of market greyness. Despite the earlier criticism of self-regulation, we would like to consider here why we, heritage professionals, must police ourselves in a system in which our own participation in the illicit market goes unacknowledged and unpenalized, and may actually be rewarded.

As conservators, authenticators, curators, evaluators, scientists, and researchers, we rarely consider how even the most mundane aspects of our work support the illicit trade in antiquities and the greying of the market. While we do not normally think of our work in this way, we create value on the antiquities' market and our professional actions determine if an antiquity is priceless or worthless. For example, as mentioned previously, authenticity is much more important to dealers and buyers than provenance: an antiquity that is not authentically ancient has little market value. But we, experts, are the gatekeepers of authenticity, determining if something is likely "real" or not via scientific testing and our deep knowledge of the material. Without professional participation in the market, antiquities that lack information about their archaeological location cannot be fully authenticated, which in turn greatly reduces their market value.

Our professional interactions with not only obviously illegal material, but unprovenanced antiquities that have the possibility of being illicit (which, indeed, is all unprovenanced antiquities) occupy an ethically ambiguous grey zone of their own. And though engaging with these antiquities in a professional capacity is conceptually far from the obvious crimes of looting and smuggling, how an expert chooses to navigate this grey zone is not neutral. Somewhere down the line refusing to interact with the objects might disrupt the trade. Somewhere down the line agreeing to interact with the objects can facilitate the destruction of the past.

Some professional codes of ethics within the heritage and preservation sphere restrict engagement with unprovenanced antiquities (e.g. ICOM, 2017; ICON,

2014). Although these codes may seem quite clear on paper, in practice they are applied unevenly, they are subject to free interpretation, and there is negligible punishment for violating them. In other words, these codes of ethics are not as “black and white” as they might appear, placing many actions that experts commonly undertake in the “grey zone” of our first conception of “greyness” outlined above: they are actions that our rules and norms cannot fully classify as right or wrong.

When it comes to interacting with an unprovenanced antiquity or with the market more generally, what one professional might consider to be an allowable level of uncertainty about an object’s origins might be unacceptable to another. Experts may not ask the right questions of market actor. They may trust reputations or existing relationships. They may need the money that giving expertise to the market provides. They may feel pressure from their employers to satisfy market clients or donors. Some may simply not care about this issue. All these issues are known and are the subject of discussion. Yet, the market depends on our expertise and our ability to refuse to provide this expertise in the case of potentially illicit antiquity can destabilise the grey market that depends on it.

Thus, alongside regulatory development and an increase in funding for defined policing needs, we must explore ways in which the greater community of heritage professionals can effectively police themselves (and if we cannot, come up with ways that we can be externally policed) and increase our internal capacity for dealing with thorny ethical issues involved in market engagement. This must include an elaboration of our understanding of professional ethics and the inclusion of real penalties for ethical violations. It must include the ongoing education of students entering the field and, perhaps more importantly, professionals who have developed patterns of engagement with the market that are no longer tenable. Finally, it should include a significant amount of community support for navigating market interactions, ethical issues concerning the illicit trade, and for reducing the culture of silence around discussing specific concerns.

In conclusion, the grey character of the market makes it difficult to regulate and police legality, but it is not impossible. Progress has been made when we move away from 1970s style models for dealing with the illicit trade. There is a wealth of information that could be disclosed through evidence-based research and cooperative infrastructure which could be drawn upon to craft more effective policy. However, the barriers to developing these lines of research are vast. At the moment we are poised to keep repeating past mistakes in policy and technology development Changing that will take work, and we do not currently have the infrastructure in place to support the kind of research needed to do that work.

ACKNOWLEDGEMENTS

The funding for this research was provided by the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation

programme (grant agreement n° 804851) and from European Commission EAC/06/2017 “Improving Knowledge on Illicit Trade in Cultural Goods in the EU”.

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