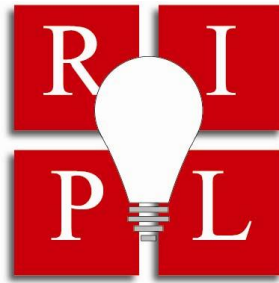


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



WHERE ARE WE AND WHERE ARE WE GOING: LEGAL DEVELOPMENTS IN
CULTURAL PROPERTY AND NAZI ART LOOTING

THOMAS R. KLINE

ABSTRACT

On October, 15, 2015, Thomas R. Kline, Of Counsel at Andrews Kurth LLP and Professorial Lecturer at George Washington University, delivered an introductory presentation entitled “Where Are We and Where Are We Going: Legal Developments in Cultural Property and Nazi Art Looting” at the 22nd Belle R. & Joseph H. Braun Memorial Symposium on Art Restitution, Preservation of Cultural Heritage, and Human Right to Identity. A transcript of that presentation, adapted for print, and the corresponding graphics appear here.

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WHERE ARE WE AND WHERE ARE WE GOING: LEGAL DEVELOPMENTS IN CULTURAL PROPERTY AND NAZI ART LOOTING

THOMAS R. KLINE*

We meet today at the intersection of law and culture. I get to do the law part. People who are better-qualified will talk about the cultural overlay. I, however, am going to try to give a sense of the legal foundation for our approaches and responses to the looting and destruction of cultural property. I say “a sense,” because it is hard to do more in just forty-five minutes; I am not going to be exhaustive.

To start off, we have all seen the pictures. We know cultural destruction abounds, cultural destruction accompanies violence, and there is always a cultural aspect to it because it is tied to wiping out the identity and the memory of people. We have all seen the cultural aspects of it: the presentations in film and in numerous books about the history of the Nazi looting which set a new standard for the destruction of art and cultural property in pursuit of the destruction of various peoples—not just Jews but also eastern Europeans, Polish Catholics, and others. The best part of the story associated with the Monuments Men was not depicted in the movie. After the war, after they recovered the art looted by the Nazis, they attempted to return that art on a country-to-country basis, returning it to the countries from which it had been looted.

WOMAN IN GOLD tells a fantastic story that really personalizes the mission and the fate of the family. Helen Mirren carries the movie on her back and tells us what it was like. She will not speak German anymore. She will not go back—does not

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Mr. Kline serves on the Board of the Lawyers' Committee for Cultural Heritage Preservation, co-teaches a seminar on Cultural Property in the Museum Studies Program at GWU and serves as an Advisory Board Member, Initial Training Network for Digital Cultural Heritage (ITN-DCH). He also writes and speaks on art, museum and cultural property issues and serves on the Advisory Board of the German/English publication *Kunst und Recht*. In 1999, Mr. Kline appeared before the Presidential Advisory Commission on Holocaust Assets in the United States.

Mr. Kline began his restitution work in 1989 representing Autocephalous Greek-Orthodox Church of Cyprus and Republic of Cyprus in litigation against an art dealer in Indianapolis that led to the recovery of Byzantine mosaics that had been stolen from a Church in the Turkish-occupied area of Cyprus. He also represented the Church of St. Servatii, Quedlinburg, Germany, in recovering world-famous medieval religious treasures stolen in Allied-occupied Germany by an American Army officer and mailed home to Texas in the aftermath of World War II. For his work on behalf of the Quedlinburg Church and other German cultural institutions, he was awarded the Officer's Cross of the Order of Merit of the Federal Republic of Germany, and also received the medal of Cyprus Technical University for protecting the cultural heritage of Cyprus.

want to go back—to Austria. She does not even want to get involved in this dispute over her family’s lost art. The movie is a great dramatization of what happened.



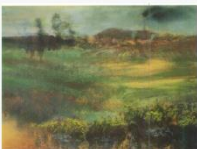
Just so we are all on the same page when we talk about “cultural property,” we are not just talking about art. It might be art, it might not be art, it might be religious, it might be historical; but it is something that is imbued with special meaning that makes it important to some people or groups, or to all people. Of course, that makes it a target for other people to destroy because of that special meaning.

What I am going to talk about today is something I know the most about, which is Cyprus. I will use that as a case study and talk about some other things, just to make sure I offend a wide range of people. Then I will talk about Nazi art looting and how it got to be carried out on such an enormous scale, based on the priority the Nazis put on it, and the scope and purpose of the looting. I will talk about post-War and current restitution, particularly focusing on at least introducing the ideas that our other speakers are going to talk about.

Figure 1

Introduction

- Cultural Property
 - The Case of Cyprus
 - Other issues
- Nazi art looting
 - Priority, scale, scope and purpose
 - Restitution
- Current restitution issues
 - Respect for cultures
 - Respect for internationally accepted principles

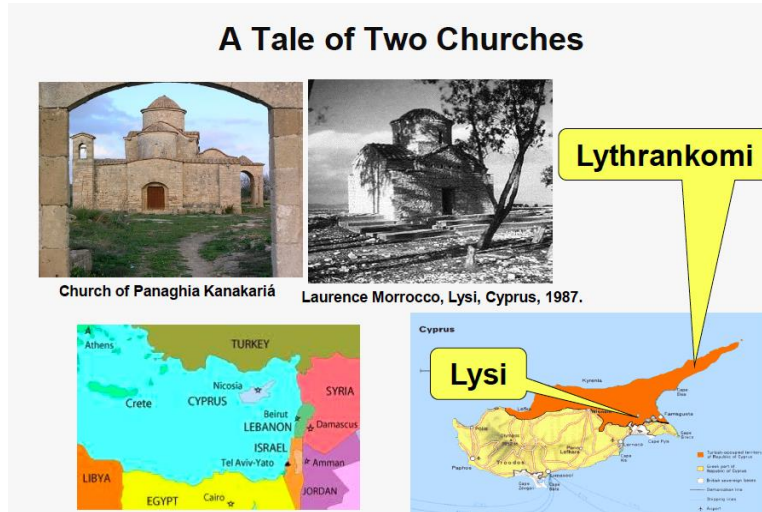
lootingmatters/
blogspot.com

At the top of *Figure 1*, is the “Christ from the Kanakariá” mosaics, which I will talk about first. Below that is “Landscape with Smokestacks,” now found at the Art Institute of Chicago. This piece of art was litigated across the street¹ as the first Nazi art looting claim to go to court in the United States in many decades. Finally is the top and bottom of “The Weary Herakles.” I guess this is my apology to Turkey. The top of that was at the Museum of Fine Arts, Boston (“MFA”) bought jointly by the museum and a collector. It took decades to get it back to Turkey, even though it was well understood that the top and the bottom matched up.

¹ Referring to the U.S. District Court for the Northern District of Illinois at 219 S. Dearborn Street, Chicago, IL 60604, located across the street from The John Marshall Law School.

Let's start with a tale of two churches in Cyprus. Below is a map of Cyprus.

Figure 2



Most Americans think of it as “Crete” over to the west. It’s in a bad neighborhood and has a very painful history as a crossroads of civilization, which means being frequently invaded and taken over. In 1974, Cyprus was invaded from the north by Turkey. The northern third of the country was occupied and a boundary was established. We do not call it a “border,” because it is not legally recognized by anyone except Turkey. Within the occupied area, there was widespread, almost exhaustive, looting of churches, museums, private homes, and eventually archaeological sites as well.

The building in the top right of *Figure 2* is a church in Lysi, close to the border, and the building in the top left of the same image is the church in Lythrankomi, Panaghia Kanakariá, up in the Carpass Peninsula of Cyprus.

Just as long as I have made political remarks, things are easing now after forty years or so, and hopefully there will be some kind of resolution there—a rapprochement between the populations. But in ’74, the Greek Cypriot population was driven out of the North, and the Turkish Cypriot population was attracted up to the North, so a bi-zonal society ethnically—mostly ethnically—divided was created.

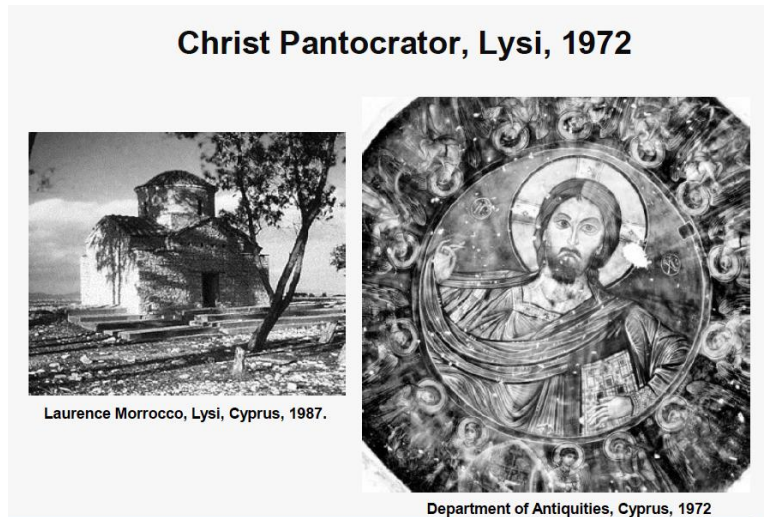
Figure 3

Figure 3 shows the church in Lysi, and “Christ Pantocrator,” a very dramatic fresco that was on the ceiling. The fresco was cut up, which can be seen in *Figure 4*, and taken away—probably to Munich.

Figure 4

The top, left is what it looked like in pieces. So, we are talking not about random looting, but commercial, industrial-sized looting. The Menil Foundation purchased the fresco in the name of the Archbishop of Cyprus—a really revolutionary and unusual approach. The Archbishop agreed, and a long-term loan was given back to Menil. It was later extended so that these frescos could be conserved and displayed in Houston. A consecrated chapel was built for them.

Figure 5 is the church of Panaghia Kanakariá, the one in the Carpass Peninsula. This is the one that we litigated, and the appeal was argued across the street also, in the U.S. Court of Appeals for the Seventh Circuit.

Figure 5

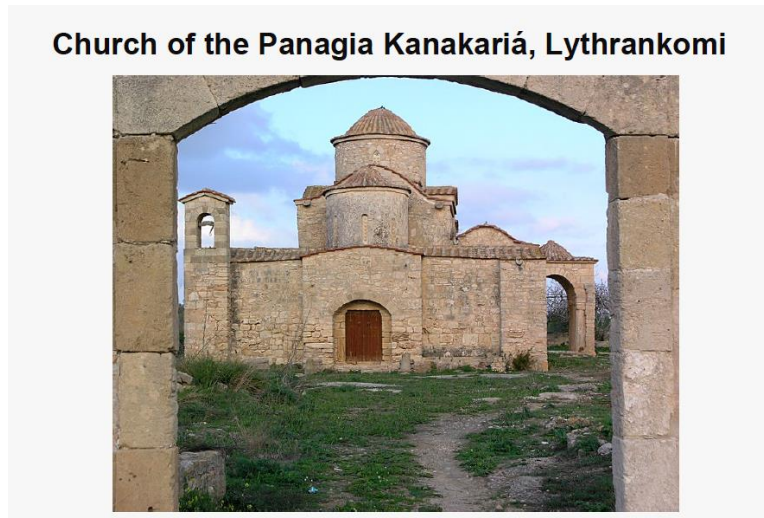
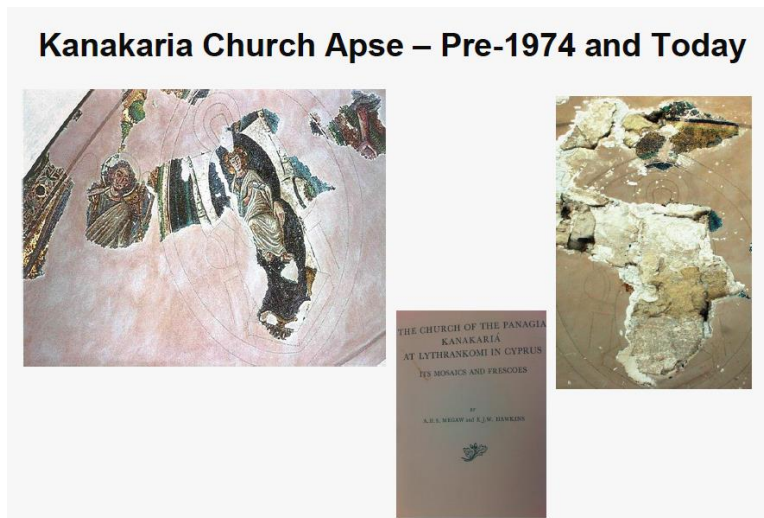


Figure 6 is what the composition looked like on the apse.

Figure 6



There is an adolescent Christ on Mary's robe, and the archangel, Michael, to the north. This was documented very, very thoroughly by the Department of Antiquities of Cyprus and the Byzantine Center at Dumbarton Oaks, one of the leading centers

of the world.² On the right of *Figure 6* is what that same spot looks like now—this kind of huge, Africa-shaped scar where the mosaics were hacked off.

Figure 7



Figure 7 is what it looks like in the church where everything has been taken out. That little piece of wood is the iconostasis where icons would normally be placed. It is hard to learn a lot about the actual looting, because there are not a lot of witnesses. But Michael Jensen has reported it and studied it as well as anybody. She says there was an organized looting campaign underneath the normal kind of looting that accompanies war. At the top right of *Figure 7* is the guy who she understood—and is generally understood—to have been the organizer. Aydin Dikman, based in Munich, with some help from Michel van Rijn—who later wrote a book about it all, called *HOT ART, COLD CASH*—a very cynical fellow holding the feet of Mary from the composition that we looked at a minute ago.

Litigation was necessary in this case because U.S. Customs refused to do anything. Today, that would be absurd; but back twenty-five years ago Customs was not that interested in cultural property, and they declined to do anything about mosaics coming out of a church in an occupied area. Although there had been a transaction in Geneva where the dealer, Peg Goldberg, picked up the mosaics, U.S. law was applied over Swiss law. The court decided the transaction’s connection to Switzerland was transitory, so U.S. law was applied.

Choice of law is one of the more difficult continuing issues in restitution litigation. We have seen it in a number of cases, including a *Cassirer* case just decided in California going up to the Ninth Circuit. The dominant U.S. rule—which controlled in the Kanakariá Mosaics case because of the application of American law instead of Swiss law—is that title does not pass with the theft: if something is stolen, it remains stolen forever. Particularly important for many of these cases, including the Holocaust cases, is the principle that the property was not abandoned. The

² A. H. S. Megaw and E. J. W. Hawkins, *The Church of the Panagia Kanakariá at Lythrankomi in Cyprus, Its Mosaics and Frescoes* (Dumbarton Oaks Studies 1977).

isolated Greek community guarding its church was driven out of the area, so neither the church nor the church community abandoned the mosaics. Cultural significance of the mosaics was noted by the court and was important because we had to establish that this was unique property that we were entitled to get back, as opposed to damages. The mosaics were restituted to Cyprus as a result of the decision in the case.

Particularly important in this case, and in many others, is the passage of time. Because Cyprus was very diligent in looking for its lost property, the statute of limitations did not begin to run. What is called the “discovery rule” was applied. We looked closely at the transaction in which Peg Goldberg purchased these mosaics because she claimed to be a good faith purchaser. We established standards for market transactions, which includes being alert to suspicious circumstances and trying to put doubts to rest. As a result of discovery in the case, we learned about Aydin Dikman.

Cyprus had not previously known about him, so they began working in Germany with German, Dutch, and Cypriot authorities, and they seized more than one thousand objects from this fellow. That is the good news. Unfortunately, the litigation has gone on for more than a decade. Maybe one hundred objects, two hundred objects, have gone back to Cyprus, and many of the others are still subject to dispute or have been returned to the alleged smuggler because the church was not able to prove that the objects were theirs. Most of these are religious objects that were taken from churches in the north of Cyprus. An obvious lesson is about the importance of documenting cultural property, *in situ*, before it disappears.

I want to look at the 1970 United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention (the “UNESCO Convention”). The heart of the UNESCO Convention is Article 9, which allows state parties who are members to ask for international protection for their cultural property that is in jeopardy of pillage, and ask for a concerted effort to help. It took more than ten years, but the United States finally passed implementing legislation that created a standard for how we will agree to cooperate with other countries. They have to ask; they do not get assistance automatically; they have to request protection; and they have to meet these four tests: (1) Cultural patrimony is in jeopardy; (2) State Party has taken measures consistent; (3) our assistance in the form of import controls is going to be taken in concert with others, it would be of substantial benefit, and remedies less-drastic are not available; and (4) the interchange of cultural property among nations will be helped by these restrictions. We start to see that Congress raised the bar beyond Article 9 and made it quite difficult to get agreements under the UNESCO Convention. As a result, fewer than twenty—even now fewer than twenty—countries have either emergency actions or agreements with the United States under the UNESCO Convention.

Most recently, Egypt made an application—maybe more than a year ago—and it’s still pending. Why is it tied up in the state department? Nobody knows, because it is not a transparent process. But you can think of many countries in the world that could use this help, and they have not come forward to ask for help from us. They have the other remedies, like the case of the Kanakariá mosaics. If the objects are stolen, they can always sue. But if they don’t have the resources to make an application, how are they going to have resources to commence major litigation?

Cyprus was one of the first of the giants of the ancient world to request help. Others have followed, like Italy, Greece and most recently, Egypt.

In 1999, Cyprus got an emergency action on ethnological material, because it is the religious material that was in the greatest danger in the occupied area. Cyprus and the U.S. later extended the emergency action to archaeological material which was also at risk. They rolled the two into a single Memorandum of Understanding (“MOU”), and most interestingly, in 2007, they added ancient coins; the first country to do that. So Cyprus has been pushing at the limits of the MOU and the whole MOU process represents a cooperative one between countries.

Figure 8 shows two of six icons that showed up at a major auction house.

Figure 8

**Icons from a Church in Occupied Area Returned
to Cyprus through Pankow Foundation Settlement**



It turned out that the icons in *Figure 8* had left Cyprus before the MOU. This isn't too surprising because MOUs are only prospective, and there was not an MOU until fairly recently. That left us to the traditional remedies. We sat down and talked with the Pankow Foundation. They were very reasonable, but they had their responsibilities to the foundation—a lot like a museum. They had fiduciary duties, so they could not just give them back because we thought they were from Cyprus. Two of the icons were well-documented, one of them historically in a footnote of a book; another two were sort-of well-known; and the final two were not documented at all. It was kind of a “Goldilocks” small, medium, and large problem. We worked out a settlement, where three were given back, and there was a settlement for the other three.

Figure 9, below, is a gospel cover in silver also discovered at a major auction house. It was recognized by the Bishop of Morfou, one of the occupied areas. He said it was from his hometown church in Cyprus.

Figure 9

Silver Engraved Gospel Cover
Church of the Archangel, “Zodias, Greece”



A SILVER-GILT GOSPEL BOOK COVER, GREECE, DATED 1891
the front chased with the Anastasis within scenes from the Passion of Christ, the back with the Crucifixion within the four Evangelists, inscribed in Greek and dated: "Funded by the Church of the Archangel of Zodias town, and the committee, Stilianos Proskinitis, 1891" 37.5 by 29.5 cm, 1 1/2 by 11 5/8 in.

He grew up with this book, and it was being sold as coming from Church of the Archangel in Zodias town in Greece. There is no “Zodias town” in Greece—there is a Zodia in occupied Cyprus. A small lesson here is about the state of due diligence at major auction houses as recently as ten years ago. But the consignor who had the book covers knew Cyprus, was very understanding, and returned it to us. There was a point where they said, “Well, where are your documents?” and I said, “Well, in your auction catalog, those are our documents.” But the Bishop remembered it very vividly. Through a settlement, based on good will, it was returned.

You can see a whole variety of approaches, starting with a loan agreement, unprecedented for people who, in an isolated part of the world, would not necessarily know how to deal with disputed property and who did not have the resources. The frescos came on the market without Cyprus knowing who was selling them. Starting then, they have patched together a very organized, systematic campaign in response to looting there. They have also been very generous in sharing their culture with the United States and others. There is now an exhibition at the Metropolitan.

You may not know the Metropolitan was founded on a collection of 4,000 Cypriot objects. The first director of the Metropolitan was a fellow named di Cesnola, a diplomat who had brought them here. You can see all of that on the Metropolitan’s website;³ it is a colorful story. The Smithsonian hosted a major exhibition of Cypriot objects, 12,000 years of history—which is quite a bit—and a story I am particularly proud of as somebody who works with Cyprus a lot.

³ The Metropolitan Museum of Art Department of Greek and Roman Art, *The Cesnola Collection at The Metropolitan Museum of Art*, HEILBRUNN TIMELINE OF ART HISTORY (2004) available at http://www.metmuseum.org/toah/hd/cesn/hd_cesn.htm.

Figure 10

Review: Cyprus Responds - Comprehensive

- **Response to Looting**
 - Lysi Fresco – Loan Agreement, return later
 - Kanakaria Mosaic – Litigation
 - Germany & Netherlands – Official seizure
 - MOU with US & Switzerland – Prevent Trade
 - Pankow Icons – Settlement
 - Morphou Gospel Cover – Voluntary Return
- **Sharing of Culture**
 - Menil Exhibition
 - Metropolitan
 - Smithsonian
 - MFA, Boston



"Lady of Cyprus," Cesnola Collection, metmuseum.org





Cypriot Votary statue
Sotheby's.com

Provincial Museum
of Limassol



As another example of Cyprus' cooperation, MFA, Boston wanted to buy the votary figure (pictured on the right in *Figure 10*) on the market. They talked to Cyprus, and Cyprus said, "Sure. Buy it. It's been on the market. We don't have to have it back and we'd love to see it at the museum." So we've moved to a very high level of cooperation with Cyprus when people ask and when an object is allowed to come here.

Just to divert from Cyprus for a second, maybe you all remember the story about this group of stolen objects and photographs of looted antiquities that were found in the Freeport section of the airport in Geneva. Even an org chart was found with Robert Hecht at the top showing how the looting and smuggling was carried out. Marion True, who was indicted in Italy, the first time anything like that ever happened, based on the museum's purchasing of allegedly stolen antiquities. Undoubtedly now, it is clear Italy was just trying to make an example of her. It was not ever really a sincere effort to impose guilt on her, but the Getty's buying of undocumented objects led to a whole host of problems for the institution, including the California Attorney General posting somebody on site. And particularly important for us, it triggered many other returns by other American museums. Hundreds of objects went back, representing tens of millions of dollars of wasted investment that should have alerted the museum community to improve their acquisition practices. They had to change the way they did things. With the Getty being held accountable, the Association of Art Museum Directors adopted 1970 as the cut-off date for the purchase of antiquities. That means the date of the UNESCO Convention became the benchmark, and museums are expected to look for documentation back to 1970. Museums had always said, "Well, we can buy undocumented objects. There isn't a real problem." But they did not anticipate that undocumented objects might someday become documented through Polaroids or otherwise.

Cyprus has been systematic. I'll use the old Egypt as a counterpoint—not the current Egypt, but Egypt before the Arab Spring. In *Figure 11* you can see Zahi

Hawass, the former director of antiquities through two periods and a favorite of Hosni Mubarak.

Figure 11

Assessment: Systematic or Episodic

Cyprus

- Menil Loan appreciated in US (“beacon for others”)
- Kanakariá Mosaics – Cyprus “stands apart”
- Cooperation with Dutch & German authorities
- Met opens Cypriot galleries/Smithsonian exhibition
- MOUs with US and Switzerland

Egypt

- No structure in place
- No way to respond to crisis

Turkey



The figure contains three main visual elements: a list of bullet points for Cyprus, a list of bullet points for Egypt, and three images. The Cyprus list includes: 'Menil Loan appreciated in US (“beacon for others”)', 'Kanakariá Mosaics – Cyprus “stands apart”', 'Cooperation with Dutch & German authorities', 'Met opens Cypriot galleries/Smithsonian exhibition', and 'MOUs with US and Switzerland'. The Egypt list includes: 'No structure in place' and 'No way to respond to crisis'. The images are: a man in a light jacket standing in front of the Sphinx in Egypt; a collage of various ancient artifacts; and a collection of golden vessels (a chalice, a bowl, and a vase) from Turkey.

He did not apply for an MOU. He put no structure in place, and that is the important point here for people working with other countries. Whether we, as American representatives are helping other countries directly or indirectly, there needs to be some kind of a structure in place, and that is what the MOU gives. Of course, Egypt has now applied. Turkey, which was quiet for a long time, has now started making claims again, but again in a very aggressive way. There’s no MOU for Turkey. There is no structure in place.

Just in case you think that things cannot get worse, *Figure 12*, below, shows Zahi Hawass making a claim on a statue at the MFA, which is now one of our best institutions in terms of these issues. Later, he had to admit that the object was not stolen.

Figure 12

Bust of Ankhaff, Museum of Fine Arts, Boston

“Egypt will fight to get this stolen statue back.”
 Dr. Zahi Hawass

“When pressed, Hawass acknowledged that the Ankhhaf bust was not stolen.”

Geoff Edgers, “Fragile, don’t touch: Egypt wants a precious ancient bust, but the MFA says no. A delicate matter just got more complicated.”
 Boston Globe, 14 August 2011.




Photo: JCB Walsh

Boy George bought an icon from Cyprus. He did not know anything about occupation and looting, so he returned it when he heard, as seen below in *Figure 13*. Education remains an important point. We want to see more countries get MOUs with the United States.

Figure 13

**Where Are We Going:
 Transition: Confrontation to Collaboration**

- Education and research
- Disseminate information
- Consistent engagement
 - More MOUs
 - Museums – legal peace replaces uncertainty
 - Art market – encourage diligence
- Avoid litigation, if possible
- Seek agreements, loans



Boy George Returns Christ Icon to Cyprus Church, BBC News



Mummy Mask of the Lady Ka-nefer-nefer
www.slam.org/

Zahi Hawass was aggressive, pushed claims that lead to litigation, and lost against U.S. Customs. The museum prevailed. This is not a good example for anything except the importance of trying to avoid litigation and to work things out on a collaborative basis.


Figure 14 shows two statues loaned from Italy fairly recently.

Figure 14


**Cultural Property -
Summary of Current Issues**

- Growing issues of due diligence in art market transactions/museum acquisitions.
- 1970 date for museum acquisitions – oui or non?
- More museum borrowing, less acquiring.
- More attention to conflict zones.
- MOU – Egypt? HR 1493 - Syria? Afghanistan? Yemen?
- Need transparency: markets & museums.
 - HR 1493
 - AAMD Safe Haven proposal

“Statue of Apollo as an Archer” Loaned to Getty by Italy



“Boxer at Rest” loaned to Met Museum by Italy



These statues show the benefits of collaboration, yielding very concrete benefits from the American public to American museums. Ownership is not necessarily the key. In fact, we have been focusing too much on ownership, and not enough on sharing, displaying, and educating.

I wanted to mention H.R. 1493, a statute pending in Congress. It passed the House, and it's sitting in the Senate at the time of this presentation.⁴ It would do two things. First, it would create a Coordinator within the State Department,—a Coordinator of Cultural Property policy for the United States. The United States, unlike European countries, has no Ministry of Culture, so we have no single coordinator. The cultural property policy is found in many places, and a lot of it is with the Defense Department, because they are on the sharp end of the stick. The second thing H.R. 1493 would do is it would put Syria on the chart of countries with protections under the Cultural Property Implementation Act. Obviously Syria is not in a position to make an application now, which always does make me wonder, “what about Afghanistan?” Iraq has been on that chart, starting with executive action and then with legislation. It has never had an agreement with us. But we have not done that for Afghanistan. We have not done it for Yemen. We could all think of lots of countries that probably need protection but are not in a position to make an application covering all those categories.

The Association of Art Museum Directors has passed a “safe haven” proposal to try to allow objects coming out of conflict zones to come to the United States for

⁴ After amendment in the Senate and return to the House of Representatives where it passed again, the legislation was signed by President Obama. Press Release, U.S. House of Representatives Comm. on Foreign Affairs, President Signs Engel Bill to Stop ISIS From Looting Antiquities (May 9, 2016) available at <https://democrats-foreignaffairs.house.gov/news/press-releases/president-signs-engel-bill-stop-isis-looting-antiquities>.

exhibition. Their policy is on the Internet, and they have protocols carrying it out.⁵ The proposal raises a lot of questions, especially when we cycle back to 1970, where museums cannot acquire things that left their countries of origin after that time, only if they left before 1970 and can be documented to be there. Some people are worried whether museums are trying to take too much. I have looked at the safe haven concept and there's a serious problem with bringing looted objects into the United States for safekeeping, because the law is not geared to allow rescue: it forbids movement of looted property. I think we are going to see a lot of analysis and coordination between museums and the government. Obviously it is very hard to get anything out of Congress, so H.R. 1493, which allows U.S. museums to provide a safe haven in limited circumstances, sounds imminently sensible, has been sitting there for a long time, more than a year, because this is its second incarnation.

Let's move to Nazi art looting, which was in many ways a precursor. Although the looting of antiquities and ancient sites has gone on for a long, long time, in terms of our consciousness and attempts to retribute artworks, the Nazi art looting situation took a big leap. And my premise is that Americans are not really able to understand World War II, because we grew up on a diet of Pearl Harbor, D-Day, and the atom bomb being "World War II." And the reality is that, for the Germans, World War II was the Eastern Front. Most of the fighting, most of the dying, took place in Eastern Europe. Twenty to fifty million people died in World War II. When I was growing up, that was a generally accepted figure. Now, it is generally understood to be 50 to 70 million with a reasonable high estimate at 78 million. It tells us a lot that we don't even know within twenty million how many people died in World War II. In genocidal programs, 5.8 to 6.2 million people died. Those are the generally accepted figures for Jews. The total figures are 11 to 14 million, with a reasonable high estimate of 17 million. Most of the rest were Polish Catholics and Soviet prisoners of war: about 5 million killed each. Huge numbers died in organized killing programs. Roma, about half a million. Four hundred thousand Americans died in World War II. I mean they really died, and nobody takes anything away from them. They suffered, their families suffered, plenty were wounded, but not on the order of magnitude of the countries of Europe. That's .32% of the American population. Another way of looking at this is that 7 to 9 out of 10 German army soldiers who died were killed by the Soviets. If you were a prewar resident of Warsaw, you had about a 50/50 chance of surviving World War II. Just for context, we could talk about all of Illinois being wiped out as a frame of reference for the Holocaust.

Michael Bazyler, a professor in California, has patched this together and said it is not only the greatest murder in history, it is the greatest theft. And the point that I think is the most important in the area of culture is the purposefulness. The Nazis called themselves revolutionaries. They were carrying out a revolution, and they said it is important to realize that the revolution is not only political and economic, but cultural—and we need to look at the priority that was attached to looting art and cultural property. All of the organizations of social control were used to help with the looting. In Paris, not just the art looters, the Einsatzstab Reichsleiter Rosenberg, but the chief of the military administration in Paris, the Gestapo, the army, all of these engines were used to assist with the looting. And if you saw *THE MONUMENTS MEN*,

⁵ *Safe Haven Objects*, ASSOCIATION OF ART MUSEUM DIRECTORS, <https://aamd.org/object-registry/safe-haven-objects/more-info>.

you saw them in small groups hitchhiking around Europe. The Nazis put a much higher priority on looting than the Americans put on remedying it.

The process started with what they called “degenerate art” that is “entartete Kunst.” This Munich exhibition was recreated in Los Angeles more recently. Modern art objects with rude things written on the wall. *Figure 15*, below, shows Hitler and Goebbels going to visit the Degenerate Art Show in Munich in 1937.

Figure 15



Of course they were also promoting more traditional art with classic kinds of themes. Hitler had a lot of trouble describing “degenerate art,” but people got the general idea. It meant modern art, Jewish artists and anti-war themes. After the directors of German museums had gotten rid of what they thought was degenerate art, committees went around to determine if they could keep what was left.

The next step was forcing Jews in Germany and annexed Austria to list their property, making it easier to seize. These records, which would have been very useful for restitution, were locked up for many decades, and only released fairly recently. *Figure 16*, below, shows a family’s list of assets and is the kind of record that someone would use if trying to do research to reconstitute property. This one particular document in *Figure 16* does not show the family, so it would have to be put together with other records in order to assist in a real restitution effort.

Figure 18

**Display of Looted Art, Hitler Examining Art,
Goering receiving present; Carinhall.**



The image top left of *Figure 18* was in *THE MONUMENTS MEN* movie. It shows one of the Nazi collecting points, probably Jeu de Paume, where the looted art was collected. The top right is Hitler giving Goering a present. The bottom right is Hitler looking at other looted art. The bottom left is Goering's home, Carinhall, chock-a-block with art, showing that the looting was partly theft for personal purposes to enrich the leaders of the Nazi movement as well as to strip the Jews, and the others, of their culture.

When the looting extended into the occupied area, the Allied forces and governments-in-exile, mostly in London, became aware of it.

Figure 19

Inter-Allied Declaration - 1943

London Declaration of January 5, 1943:

"the Governments making this Declaration and the French National Committee **reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.**"

They issued the London Declaration—seen in *Figure 19*, above—saying, “We know what you’re doing. When we come back—we’re going to come back—we’re going to unscramble your eggs and put it all together.” Worth noting here, January 5, 1943 is about the time of the Battle of Stalingrad, the high-water mark of German military expansion. We can see that the Allies are saying, “We may not have shown you anything on the battlefield yet, but sooner or later we will, and when we come back we’re going to establish order.”

Figure 20

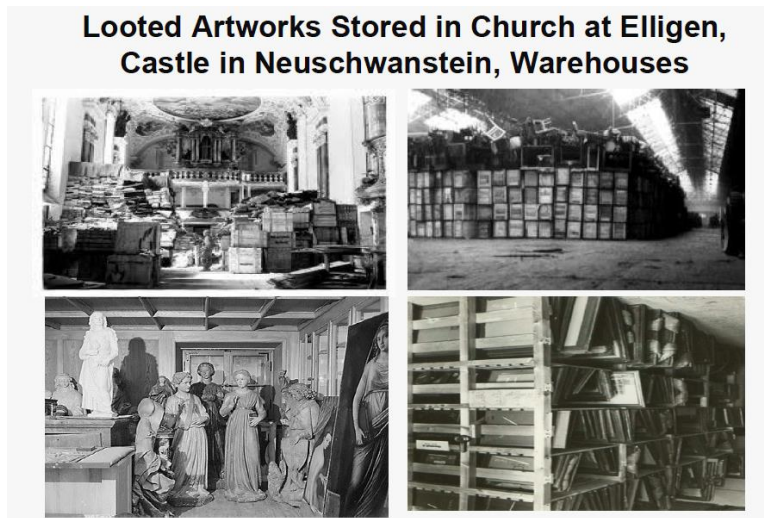


Figure 20 shows what the Allies found. The picture on the top right was also made famous in *THE MONUMENTS MEN* movie. You can see how the Germans aren’t just stealing paintings, but chairs, tables, and household possessions. The situation was so bad when the Allies discovered it that it needed to be brought to Eisenhower’s attention. It became the subject of proceedings at Nuremberg, where theft of art was treated as a war crime. Interestingly, now the international criminal court is going after somebody. They have somebody in custody from Mali, from the destruction there. That would be a huge advance and something of great importance, but it’s too early to analyze it. We do not know what is really happening.

Just a quick summary of what we have seen. There was also Allied looting. We all know about Soviet trophy taking. There was also opportunistic looting on both sides of Germany. The *Monuments Men* were not restituting the art to the families because it was simply too difficult to figure out who the owners were. On occasion they did, but mostly they were doing country-to-country returns. One of the biggest problems we have today is that the countries that received art did not return it to the real owners. Instead, they put it in their national collections and were very happy to hang it in their museums. The process was unfinished.

Figure 21

Gabriel Metsu, *The Washerwoman*

- Documented as stolen by Nazis from Polish National Museum in Warsaw
- Sold at auction in Monaco, 1988
- Offered again at auction in NY in 1993



Figure 21 shows a painting that I was consulted about in 1993. When it came up for auction, the auction house said, “Well, it may have been stolen from the Polish National Museum and is a documented Polish loss. But it was the subject of a good faith purchase.” And here in Figure 22 is the provenance for the good faith purchase. First, Lasienski Palace in Warsaw, which is part of the national gallery of Warsaw, and then a private collection in Germany.” That is what “good faith” meant. I was told this in 1993 about a transaction that had taken place in the 1980s. I was told it was generally accepted that it was not hard to be in good faith, even when you were buying something that was obviously stolen. As a reminder, Figure 22 shows what Warsaw looked like. Something coming out of Warsaw, going to Germany—I would think is suspect.

Figure 22

Gabriel Metsu, 1629-1667

Gabriel Metsu 1629-1667

642 JEUNE FEMME LAVANT DU LINGE À SA FENÊTRE

Signé en haut à droite G. Metsu.
Huile sur panneau.
23,5 × 20,5cm.

F.W. Robinson, dans son ouvrage sur l'artiste, mentionne un autre tableau de

**Palais Lasienski, Varsovie
Collection privéé, Allemagne**

Vente 21 juillet 1749, n° 20 (vendu 45 florins).
Vente J. van der Aar, Amsterdam, 25 août 1773, n° 178 (vendu 520 florins avec le n° 179 de la même vente).

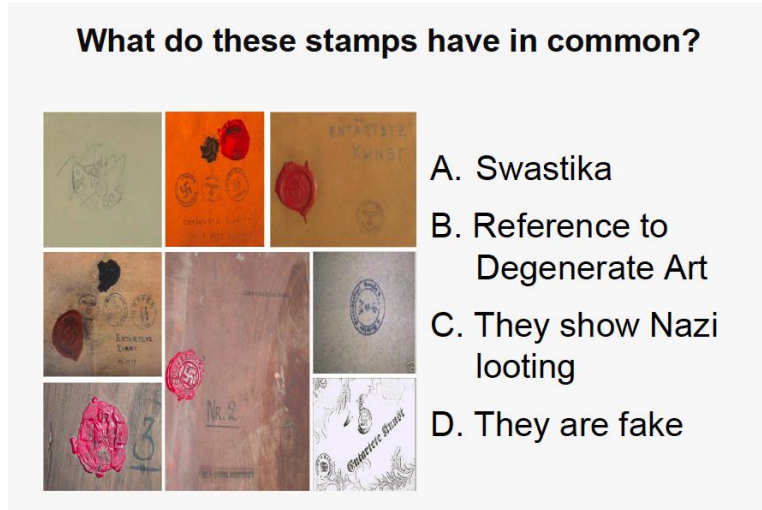
Bibliographie :
Catalogue de la collection du Palais Lasienski, Varsovie, 1895, n° 54.
C. Hofstede de Groot, *Catalogue Raisonné of the Work of the most Eminent Dutch Painters of the XVIIe century*, Londres, 1907, p. 325.
J. Bialostocki et M. Walicki, *Europäische Malerei in Polnischen Sammlungen, 1300-1800*, Varsovie 1936, p. 540.

600.000-800.000 FF



Now we get to the low-water mark of ethics. *Figure 23* depicts fake Nazi wax seals.

Figure 23



They were put on fake art to make it look more real and more valuable. “This painting is so great that the Nazis wanted to steal it. So, you should certainly want to buy it.” In terms of the level of consciousness about what it means to take somebody’s culture, it does not get much lower than that.

The restitution compensation process worked itself out through the 1960s. And then in the ‘70s, ‘80s, and ‘90s this amnesia set in and there were decades of transactions with little or no due diligence. I like to call this the “Valley of Amnesia.” That is probably as big a problem as everything else I’ve talked about until now. Looted art moved freely through the art market and came to rest in our museums and private collections.

There is an interesting paper written by the head of restitution at the MFA, Boston, which asks the question, “If museum people were the Monuments Men, and museums were later buying looted art, how did that happen? Were these the same people?” What she found was that for about 15 years people were careful. After that, they started to trade in looted art.

Then German unification came along. The wall came down. Lynn Nicholas wrote *RAPE OF EUROPA* in the mid-‘90s telling us all about these issues. The idea of Nazi looting became part of the culture, not to the extent of *THE MONUMENTS MEN* and *WOMAN IN GOLD* yet, but in the early to mid-‘90s, we were all starting to become more aware of these issues.

In the mid-‘90s, I represented the Goodman family. We brought a case against the Chicago residents, Daniel Searle and his wife, to get back “Landscape with Smokestacks,” shown below in *Figure 24*.

Figure 24

Landscape with Smokestacks, 1890, mono-type and pastel, 28 x 40. Mr. and Mrs. Daniel Searle.



The painting had been owned by Friedrich “Fritz” Gutmann and Louise Gutmann. Friedrich Gutmann’s father was Eugene Gutmann, who had founded the Dresdner Bank, and moved it to Berlin. These were really very prominent Jewish bankers in Germany. They converted, for whatever reason, to Christianity, but not early enough for the Nazis. The Nazis wanted to see two generations, and here it was just the generation before. The Gutmanns were slow to respond to the Nazi threat. Living in Holland, they thought they were safe. Just at the last minute, they distributed their art. They sent it to friends or people they knew in France who were German-Jewish refugees, and would be at the top of the list of people to be interned, either by the French as enemy aliens or by the Germans as escapees. The painting was monotype—a print with color on it. It was stored in a warehouse and disappeared by the end of the occupation. That was the essence of the litigation. Was it stolen? We drilled down through layers and layers of the onion. Never found out for certain. After the war, the family had made claims on West Germany. Those were honored, so we thought it was pretty likely to be stolen, but it was heavily disputed.

I represented the Goodman heirs, personified by Nick and Simon Goodman who lived here in the United States. Simon just put out a book called *THE ORPHEUS CLOCK*. The book came out in September and received great reviews. I am sure you will find it interesting if you want to hear more about the family-side and the personalization of the family’s side, not just the restitution. It tells the full story, not just of the effort to recover art in twelve different cases, venues, and different means—like Cyprus settlements, claims and litigation—but also reconstructs the history of a not well-known family. This is a very poignant book, written by an American, about his experience and the experience of his family going back three previous generations.

The litigation was particularly significant because Searle moved for summary judgment, and he is reported to have spent a million dollars getting through discovery and making that motion. We defeated that motion. Because United States

statutes of limitations have exceptions like the discovery rule, the judge decided that whether the statute of limitations had run out was a question for the jury. That meant that the case had to go to trial, and Searle had to go in front of a jury. He had to say why he was entitled to keep the painting. It is at that point that he settled.

Around the same time, the State Department called together many of the countries of Europe that had been occupied or had been part of Germany, as well as neutral nations and NGOs (non-governmental organizations), and they put out the “Washington Principles.” The Washington Principles focused on two things: (1) making access to information available, and (2) assisting with claims by trying to treat claims in a reasonable way, and avoiding costs like the million dollars spent in *Goodman v. Searle*. We can think of this as a grand bargain. These European countries had these legacy collections, where the art was returned to them by the Monuments Men or other mechanisms, and they were holding onto it, not trying to reconstitute it. They believed it could not be restituted, but they had not really tried. On this side of the Atlantic, the museum associations were supposed to put out guidelines, encourage their museums to return possibly looted art, and to publicize and treat claims with respect. The same thing was supposed to happen in Europe. What is now the “American Alliance of Museums,” put out a guideline for expanding online access. It created an Internet portal.⁶ But I am sorry to say the Internet portal, having been designed in 1998, was the best technology available in 1998. It is a portal—not digital—and has not been updated. AAM says they are going to update it, but it has become antiquated and basically out of use. It could—and should—be replaced by digital technology.

Figure 25



Figure 25 is one of my favorite slides from Karen Daly at the Virginia Museum of Fine Art. It shows you how difficult provenance research is. They had a claim on a painting called “Portrait of Jean d’Albon,” and they had to research eight paintings to make sure that they had the one that was really being claimed in their collection.

⁶ NAZI-ERA PROVENANCE INTERNET PORTAL, <http://www.nepip.org/> (last visited May 13, 2016).

They also had to make sure there was the right claimant. Often, that is also an issue: the person claims to be the claimant, but is really a second cousin or something. There have been numerous cases where someone else has come along and said, “Well, you returned the painting to A, but I represent B, C, and D, and they’re really the heirs.”


The guidelines also call for aggressive research to try to address claims getting the documentation from claimants. *Figure 26* shows two paintings that have been the subject of litigation. Van Gogh’s “The Diggers,” at the Detroit Museum of Art, was a declaratory judgment action filed by the museum.


Figure 26

AAM Guidelines

- Address claims of ownership asserted in connection with objects in their custody openly, seriously, responsively, and with respect for the dignity of all parties involved. Each claim should be considered on its own merits.
- Review claims promptly;
- Request ownership information from claimant
- Conduct own research
- Attempt to settle
- Waive legal defenses, if appropriate.

Van Gogh's The Diggers
Detroit Museum of Art





Lucas Cranach the Elder's
"Adam" and "Eve."
(Norton Simon Art
Foundation)

I am not crazy about museums being aggressive, but they were. To me—again, my subjective view—they were clearly right that this was not a strong claim. The painting was in Switzerland when it was sold by a German-Jewish refugee while she was in France, before France was invaded. She received the money in her Swiss bank account. To me, it did not look like a strong case. Many people in the claimant community still complain about this case. But I think the museum was right to resist the claim.


On the other side, we have a case that is now going on. It has been appealed twice, twice decided, twice up to the Ninth Circuit, kicked back for trial, and the museum is totally unrepentant. They say they are not a member of the Association of Art Museum Directors (“AAMD”), therefore they are not bound by the guidelines of the AAMD or the American Alliance of Museums. They believe they can do whatever they want. Just as a matter of nonprofit governance and museum practice, the guidelines embody the best practices. If you are not going to follow those, and just make it up yourself, you are in *terra incognita*. You do not get the benefit of the business judgment rule. Museums should be following best practices.

There is the Goudstikker family who had one of the worst fates of any significant dealer or collector. They were gallery owners. Jacques Goudstikker fled on May 10, 1940, the day of the invasion of Holland, and he did not get as far as England when he died on the boat. His mother, left behind, was forced to sign

documents to allow the company to be taken over by a fellow named Alois Miedl who was working for Goering. Eventually, even the Dutch recognized this was a terrible thing and the art had to be returned.

Figure 27

Léone Meyer v. University of Oklahoma



- **1941, Seized by Nazis**
- **1946, Claimed by Meyer**
- **1953, Swiss court refused to return**
- **1956, Purchased in NYC**
- **2000, Donated to OU**
- **2013, Meyer Heir sues**
- **2014, Heir joins AAM & AAMD; case dismissed**
- **2015, Court of Appeals reinstates**

"Shepherdess Bringing In Sheep" 1886 by Camille Pissarro, 1886.

Figure 27 shows the work of art at the center of a difficult case. The artwork is at the University of Oklahoma. There was some kind of litigation in Switzerland, and who knows what is going on with it, but it would be a good case to settle. Again, the museum is digging in its heels—some of that Sooner independence. They do not want to be pushed around. The legislature has asked them to settle. I can see this having a long history yet. Cases that are complicated like this are really good candidates for settlement.⁷

Why do we have so many legacy issues? I think you can tell from the bits and pieces of what I have been able to talk about. Particularly, the Nazis gave looting a high priority. However, post-war restitution—while it did not fail—was not fully successful. Many of the artworks had changed hands during the war and couldn't be found at the end of the war. The country-to-country returns were not restitution, the restitution was often not consummated. Even the war crimes trials ended, as such, it's not too surprising that people lost interest in art theft. Amnesia set in, and the art market undertook very dangerous practices that anyone would understand to be an accident-waiting-to-happen. We are much more attuned to the concept of being diligent, getting a good provenance from the seller now, and knowing what you are getting now. But in the '60s, '70s, '80s, people were just not paying attention.

So what are we thinking about now? What should we be thinking about? In particular, with the Nazi looted art situation, how are we going to try to work it out?

⁷ Since this presentation, the case has settled with the artwork to be shared between the University of Oklahoma museum and the heirs. Graham Bowley, *University of Oklahoma Agrees to Return Pissarro Painting Looted by Nazis*, N.Y. Times, Feb. 23, 2016, available at <http://artsbeat.blogs.nytimes.com/2016/02/23/university-of-oklahoma-agrees-to-return-pissarro-painting-looted-by-nazis/>.

How much effort is enough? Speaking generally, what are the lessons we have learned from all of these experiences—both cultural property and with Nazi looting—about how to address and respond to looting situations? I think the point that has jumped out to me in preparing this talk is: in this society, we deal with this looting and restitution primarily as a legal matter, and so I am laying the legal foundation. But the looting that we see such as site looting, subsistence digging, and so on isn't just financially driven. Much of the looting that we see is culturally driven. There is a cultural component to it. Maybe we need to have more of a cultural component in thinking about restitution, and I think that is what our colleagues are going to tell us.

Thank you for your interest and your attention.