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THE SEATTLE ART MUSEUM: A GOOD FAITH DONEE INJURED IN THE RESTORATION OF ART STOLEN DURING WORLD WAR II

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INTRODUCTION

At the end of the First World War, Paris was the hub of the art world, known by many as “the queen of the arts.”¹ At that time, Paul Rosenberg, a Jewish man known to carry himself with an unmatched elegance, emerged as one of the most influential Parisian art dealers of both nineteenth and twentieth-century art.² Continuing a family tradition,³ Rosenberg established a gallery located in Paris’ nerve center of modern French art during the period.⁴ The gallery reflected Rosenberg’s personal elegance and love for his life’s work, with deep, leather sitting chairs and walls covered in red silk adorned with works by Matisse, Van Gogh, Braque, and Picasso.⁵

* J.D. Candidate, June 2001. Thank you to my parents for their support and instilling within me a love for the Arts.

1. HECTOR FELICIANO, *THE LOST MUSEUM* 58 (2d ed. 1997). Paris was the center for the sale of art in all the world, as though both London and New York did not exist in the world art market. *Id.*

2. *Id.* at 53. Rosenberg had enlisted works by such prestigious artists as Gericault, Ingres, Delacroix, Courbet, Cezanne, Manet, Degas, Monet, Renoir, Lautrec, as well as works by up and coming modern artists of the time such as Picasso, Braque, the Douanier Rousseau, Bonnard, Marie Laurencin, Modigliani, and Matisse. *Id.* His client list was just as esteemed and diversified including Viscount Charles de Noailles, Count Etienne de Beaumont, patron of the Ballet Russe, the Swiss collector Oskar Reinhardt, Dr. Albert Barnes from Pennsylvania, Mrs. Arthur Sachs of New York, Mrs. Chester Beatty of London, Gertrude Stein, Dr. G. F. Reber, and various other esteemed patrons. *Id.*

3. *Id.* The family tradition began when Rosenberg’s father emigrated from Slovakia to Paris, France in 1878. *Id.* Upon his arrival, he went into the art and antiques business in Paris. *Id.* Rosenberg, as well as his brother Leonce, followed in their father’s footsteps and established his own gallery. *Id.*

4. *Id.* Various famous French Jewish gallery owners also lived in this small quarter such as Bignou, Hessel, Wildenstein, Guillaume, and Barbazanges. *Id.* It was also the neighborhood of Picasso, giving it the reputation as the center of the art market in Paris. *Id.* at 60-61.

5. *Id.* at 56. To his friends and acquaintances, Rosenberg was a man with

Like Rosenberg's prominence in the Parisian art scene during the early 1930s, Adolf Hitler solidified his prominence in the German political scene, just five weeks after his election as the Chancellor of Germany; his party won its first majority in March of 1933.⁶ From the very beginning, Hitler made it clear that art was very important to the Nazi regime.⁷

As the Wehrmacht swept over Europe, the Nazis looted and confiscated thousands of art collections belonging to museums, galleries, and French Jewish families and art dealers.⁸ In 1938, the Nazis enacted a law allowing the sacking of cultural institutions containing works of art deemed "degenerate" or "too

immense passion for the art in his collection and the artists he had taken under his wing. *Id.* at 57. "With his taste, his first-rate eye, social connections, and commercial acuity, Rosenberg became one of the prime dealers on the Parisian art scene, and his gallery was on the crossroads between the nineteenth-century and avante-garde art in France during the period between the wars." *Id.* at 57.

6. RICHARD BESSEL, *LIFE IN THE THIRD REICH* 44 (3d ed. 1989). After the failure of the Weimar government, the new Nazi majority flooded the disillusioned German people with extremely successful propaganda portraying Hitler not only as the head of the Nazi party, but as the leader of Germany, for whom the nation had been waiting. *Id.* at 46. The German people began to see a crippled post-Weimar Germany return to a state of order through the assumed achievements of Hitler through a rapid reduction in the unemployment rate and a rise in the economy. *Id.* All the while, the Nazi propaganda portrayed Hitler as the embodiment of true Germanic culture and the struggle of the little man. *Id.* at 44. By the end of 1934, Hitler established the Fuhrer cult, with himself as the Fuhrer, as an almost deified, national leader of the new Germany. *Id.* at 46.

7. See JOHN E. CONKLIN, *ART CRIME* 218 (1994) (discussing action taken in the beginning of the Nazi era to ensure the looting of fine art). See also LYNN NICHOLAS, *THE RAPE OF EUROPA* 6 (2d ed. 1995). At a Nazi-affiliated Combat League for German Culture meeting, only nine weeks after Hitler's takeover, the director set forth these ideas:

It is a mistake to think that the national revolution is only political and economic. It is above all cultural. Art is not international If anyone should ask: What is left of freedom? he will be answered: there is no freedom for those who would weaken and destroy German art . . . there must be no remorse and no sentimentality in uprooting and crushing what was destroying our vitals.

Id.

8. FELICIANO, *supra* note 1, at 3. The Nazi conquest of much of the mass collections of art in Europe was driven by Hitler's plan to erect in his boyhood home of Linz, Austria, the greatest art museum in all the world. CONKLIN, *supra* note 7, at 218. Alfred Rosenberg, Dr. Hans Posse, and Herman Goering controlled the drive to amass an extensive collection of confiscated art. *Id.* at 218-19. This group, commissioned to build Hitler's Linz Museum, used the power of the Nazi party and the ferocity of the SS to plunder, in the name of better preservation of the world's cultural treasures and relocation, for appreciation by the masses. *Id.* at 219. The Nazi party justified the plunder of the Jewish community as appropriation of cultural treasures from the "state-designated internal enemy." *Id.*

Jewish.⁹ Hitler knew exactly which works he wanted expunged from Germany, and he made his intentions perfectly clear to his regime.¹⁰

Fearing that Paris would be bombed, Paul Rosenberg relocated his works to his new home in southern France,¹¹ and arranged for his collection to be shown in exhibits in New York and Chicago.¹² He also safeguarded his works by placing them in bank vaults in Libourne, in the south of France far from the Parisian cultural center.¹³

When the Nazis took Paris in June of 1940, Rosenberg decided to relocate his family to the safety offered by New York City.¹⁴ Rosenberg's assistant informed him by letter in March of 1941 that the Nazis had located most of his works in hiding and the remainder left in his home.¹⁵ After the Nazis completed their plundering of the Rosenberg treasures, a member of the Nazi regime sent a message to the Nazi hierarchy, which revealed that

9. CONKLIN, *supra* note 7, at 218. Hitler considered the work of modern and impressionist French artists to be degenerate and directed their works to be kept aside at the Nazi's central collecting point in Paris. *Nightline: Nazi Loot in American Museums: What Should Be Done With Stolen Art?* (ABC News television broadcast, Apr. 28, 1998). The Nazis had a room curtained off that they filled from floor to ceiling with great 20th century works by artists like Picasso, Matisse, Gaguin, Van Gogh, and others. *Id.* Although seemingly unappreciative of their aesthetic value, the shrewd Nazis plundered these paintings as well, aware of their shear value in art markets outside the country. *Id.*

10. ELIZABETH SIMPSON, *THE SPOILS OF WAR* 39 (1995). The displacement of works of art began in Germany itself long before the actual outbreak of war. *Id.* Hitler directed that all cultural objects had to be pure and Germanic, and art would not be exempt. *Id.* He disapproved of anything unfinished or abstract, including the works of German artists, Vassily Kandinsky and Franz Marc. *Id.* However, his criterion was not only stylistic; Pissarro was unacceptable because he was Jewish and Kollwitz and Grosz because they were leftist. *Id.* It took even his closest colleagues to understand his desires. *Id.*

11. FELICIANO, *supra* note 1, at 52-53. By this time, Rosenberg had also relocated his family to the free zone in southern France in an attempt to live as normal a life as possible. *Id.* He took with him to this southern home in Floirac approximately 100 paintings, including those that held sentimental value, like the family portrait completed by good friend, Picasso. *Id.* at 66.

12. *Id.* at 65. Many of Rosenberg's possessions were already housed outside of France; he had also a number of works in his collection at his gallery located in London. *Id.*

13. *Id.* at 65-66. Rosenberg deposited as many as 162 works including a Van Gogh self-portrait, a rare seascape by Seurat, works by Cezanne, Courbet, Ingres and various other artists. *Id.* at 66.

14. *Id.* at 68. Rosenberg left all of his works in vaults and safehouses, arranging with a family friend to have the works sent over to New York by ship. *Id.* at 68-69. The family left through Spain and waited some countless hours outside the border patrolled by the Nazi troops. *Id.*

15. *Id.* at 70-71.

the estimated value of the works was 100 million Reich marks.¹⁶ The finding agent's commission was to be approximately ten million Reich marks, amounting to about eighty million of today's U.S. dollars.¹⁷

From 1940 to 1944, the Nazis amassed approximately 22,000 stolen pieces of art, exclusive of thousands of works that they destroyed¹⁸ or sold to French and Swiss dealers.¹⁹ The Nuremberg records show that 29,984 railroad cars were required to relocate the stolen art to Germany.²⁰ Despite the unmistakable detriment done to the European art collection and community, some have argued that an irony exists in that the same mentality purported by Hitler and his regime to eliminate art, which denied even its own creativity, developed conditions, responsible for its inevitable downfall and self-destruction, "for a society to exist without art is a society without a soul and no amount of plunder of another's soul will restore one's own."²¹

This Comment will examine specifically the Seattle Art Museum's (hereinafter SAM) recent restoration of the Matisse *Odalisque* to the heirs of Paul Rosenberg. Part II of this Comment will analyze the subsequent lawsuit brought by SAM as donee,

16. *Id.* at 71.

17. FELICIANO, *supra* note 1, at 71.

18. CONKLIN, *supra* note 7, at 218. In 1943, the Nazis stockpiled and burned some 500 paintings by Miro, Klee, Ernst, and other artists in a huge bonfire in the interior courtyard of the Jeu de Paume Museum. *Id.* Members of the SS kicked in and slashed out of their frames Jewish family portraits and works by Jewish artists, and then also burned them in the courtyard at Jue de Paume. NICHOLAS, *supra* note 7, at 170.

19. CONKLIN, *supra* note 7, at 218. By this time in 1944, France was the most looted country in Western Europe. FELICIANO, *supra* note 1, at 4. The Nazis pillaged as much as one third of the art in private hands during the war. *Id.* After the war, the Allies were able to recover about eighty percent of the carefully preserved stolen art. *Id.* The plundered pieces were removed from Nazi possession a long time prior to the culmination of the war. An underground association of Swiss and French dealers relocated the pieces out of the country and in turn sold them on the world market. *Nightline*, *supra* note 9. Furthermore, at the end of World War II, the United States government estimated that the Nazis had seized or coerced the sale of more than one fifth of all of the world's western art. *Id.*

20. Eric Gibson, *De Gustibus: The Delicate Art of Deciding Whose Art It Is*, WALL ST. J., July 16, 1999, at W11.

21. LAURIE ADAMS & ROBERT VOLPE, ART COP 2 (1974).

The Nazi's policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religions and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

Elaine L. Johnston, *Cultural Property and World War II: Implications for American Museums, Practical Considerations for the Museum Administrator*, 40 A.L.I.-A.B.A. 29, 43 (Mar. 26, 1998).

against the Knoedler Art Gallery as the original seller of the painting, for breach of warranty of title, fraud and negligent misrepresentation. Part III will further examine the possibilities of recovery for other museums, galleries, and gallery owners as bona fide purchasers for damages incurred by the restoration of stolen cultural property. Part IV will address the obligations of museum, galleries, and purchasers to investigate the provenance of artworks and the consequences for failure to do so. It will further propose a National Registry for all art works. Finally, Part V of this Comment will discuss how the United States legal system should determine appropriate damages for purchasers and third party beneficiaries of stolen Nazi art.

I. THE SORDID HISTORY OF THE ROSENBERG MATISSE

When Paul Rosenberg fled Europe for New York City in 1940, he left behind more than 300 works of art in bank vaults and his gallery.²² In that group was an *Odalisque*, a 1928 work completed by Matisse.²³ After Nazi confiscation and disappearance for decades, the Matisse resurfaced in the Seattle Art Museum. The heirs of the Rosenberg family initiated a claim in federal court in Seattle, Washington for restitution of the piece that rightfully belonged to their grandfather, Paul Rosenberg.²⁴

Seattle art collector Prentice Bloedel bought the painting in 1954 for about \$19,000 from New York's Knoedler Gallery and displayed it in his living room.²⁵ After his death in 1991, he donated it to SAM.²⁶ Although initially reluctant, after months of researching the background or the provenance of the painting aided by the Holocaust Art Restitution Project (HARP), the Seattle Art Museum decided to return the work to the Rosenberg family.²⁷ SAM's research revealed that the serial numbers on the back of the painting did in fact match up with the Nazi's records.²⁸ Like

22. John Marks, *How Did All That Art End Up in Museums? Paintings Stolen by Nazis Turn Up in America*, U.S. NEWS & WORLD REP., June 8, 1998, at 38.

23. *Id.*

24. *Id.* The whereabouts of the painting came to light after it was reproduced as "whereabouts unknown" in Hector Feliciano's 1995 book, *THE LOST MUSEUM*. Regina Hackett, *Seattle's Matisse Will Go Back to Owners: Museum Returning Art Stolen by Nazis*, SEATTLE POST-INTELLIGENCER, June 15, 1999, at A2. Bloedel's grandson, a New York artist, saw the painting and notified the Rosenbergs. *Id.*

25. Hackett, *supra* note 24, at A1.

26. *Id.*

27. *Museum Returns Looted Matisse*, N.Y. TIMES, June 20, 1999, at G3.

28. *Id.* The Nazis, with their intense desire for documentation, carefully inventoried all of the stolen art, writing an inventory number on the back of each painting that matched their records describing circumstances under which they found the art. Robin Updike, "*Odalisque*" Project Was Lengthy, Thorough, THE SEATTLE TIMES, June 16, 1999, at E6. The Nazi records also

the Odalisque, most art plundered during World War II made its way into museums and private collections.²⁹ The works thus remained concealed from their heirs and rightful owners.³⁰

The Seattle Art Museum was the first museum in the United States involved in a suit for the return of art stolen during World War II.³¹ Many other prestigious museums throughout the country such as the Chicago Art Institute,³² New York's Museum of Modern Art,³³ the Minneapolis Institute of Arts,³⁴ and the Cleveland Art Museum³⁵ have had similar subsequent claims made against them.³⁶ The stolen works carry with them a certain significance which sets them apart from other objects lifted during

showed that an art dealer in Germany exchanged some nineteenth-century French pieces, preferred by the Nazis to the degenerate art, as the Nazi's considered the Matisse. *Id.* The German dealer told Allied agents in 1945 that he shipped the painting along with others to his warehouse in Germany, but not surprisingly the shipment did not arrive. *Id.* It is believed that the German dealer actually sold the painting to the Galerie Drouant-David in Paris who then sold the painting to Knoedler in early 1954. *Id.*

29. Gibson, *supra* note 20, at W11. "Most of the paintings now in question are the paintings that Hitler and his generals did not want." See *Nightline*, *supra* note 9 (quoting Brian Ross, reporter). Throughout the plundering across Europe, Hitler, a failed art student, desired only old masters and art by Germans to fill his prospective museum in Linz, Austria. *Id.*

30. *Nightline*, *supra* note 9.

31. Hackett, *supra* note 24, at A1.

32. *Id.* The Chicago Art Institute discovered that it had in its collection a Degas pastel with a cloudy title. *Id.* However, Daniel Searle, drug company heir, had only promised this gift to the Institute. *Id.*

33. Lee Rosenbaum, *Will Museums in U.S. Purge Nazi-tainted Art?*, ART IN AMERICA, Nov. 1, 1998, at 38. The Museum of Modern Art learned in 1997 that a major Matisse it wished to acquire had been confiscated from French collector Alphonse Kann. *Id.* According to the museum's curator, the museum halted any negotiations and alerted the dealer of the problem. *Id.* The Museum was also in a two-year battle with the New York District Attorney, Robert Morgenthau, regarding two Egon Schiele paintings from Austria. Gibson, *supra* note 20, at W11.

34. Gibson, *supra* note 20, at W11. The Minneapolis Institute of Arts discovered, a painting, this time one by Fernand Leger, another plundered from Alphonse Kann. *Id.* Francis Ferar, the nephew of the man who once owned this \$2 million painting wants the painting removed from the museum and restored to its rightful owner. *Id.*

35. *Nightline*, *supra* note 9. The Cleveland Art Museum was accused of having three drawings allegedly taken during World War II. *Id.* Although Allies found them in the salt mines after the war, the drawings were returned to the original family member, who subsequently hired two dealers to sell them for him. *Id.* The Cleveland Museum legally acquired these paintings in the 1950s and 1960s. *Id.*

36. Marks, *supra* note 22, at 38. "More than 50 years after the end of World War II, works of art stolen from galleries and vaults throughout Europe by the Nazis are coming to light in some of the world's greatest collections, both in the United States and in Europe." *Id.* "Museum directors, a small group of professionals normally preoccupied with history's greatest triumphs, are forced to cope with one of its greatest catastrophes." *Id.*

the plunder of war.³⁷ They represent part of the “Final Solution” to extinguish an entire race of people, as well as their culture.³⁸ These pieces symbolize the tragedy of World War II; returning them to the family is the first step towards.³⁹

Central to these controversial matters, the place where all this fear and loss come together, is provenance—which, in the language of the art world, is the history of the ownership of a particular piece of art.⁴⁰ As these stolen cases arise, institutions have begun to set higher standards for documentation of title and provenance.⁴¹ For museums at the end of the twentieth-century, the problem years in terms of provenance are 1930 through 1950, a period which one historian refers to as the “Bermuda Triangle of Art.”⁴²

Consequently, SAM initiated its own suit (originally made as a third party complaint) against the Knoedler Gallery in New York.⁴³ SAM sought damages equal to the current market value of the Matisse *Odalisque*—two million dollars, plus legal fees for a total of 2.5 million.⁴⁴ SAM alleged breach of warranty of title, fraud, and negligent misrepresentation in omitting Rosenberg’s connection to the painting from the provenance and exhibition

37. Gibson, *supra* note 20, at W11.

38. *Id.*

39. *Id.*

40. Marks, *supra* note 22, at 39. In their lifetimes, which can be a few years or many centuries, works of art can pass through hundreds of hands, often, making documentation possible. *Id.* Sometimes, the records have been lost, or wars and other disasters confuse the trail of the work’s life. *Id.* Dealers often prefer to keep the identities of their buyers private and buyers usually prefer their dealings to remain anonymous. *Id.* For example, two affluent avant-garde artists, three dealers, a German collector, a museum director, a member of the Nazi elite, an Amsterdam banker, and a Jewish exile owned Van Gogh’s *Portrait of Dr. Gache*, in a span of only one hundred years. *Id.*

41. MARIE C. MALARO, *THE MUSEUM’S PERSPECTIVE, PRACTICING LAW INSTITUTE: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK 855* (1990). The Code of Professional Ethics for museums states that a museum should not acquire, whether by purchase, gift, bequest or exchange, any object unless the governing agent of the museum is satisfied that they can acquire a valid title to the specimen or object in question. *Id.* at 860. This provision covers works acquired within one’s own country, as well as outside its borders. *Id.* Museums such as the J. Paul Getty, in an attempt to avoid problem situations, have adopted these stricter standards and will require that countries of origin receive certain notifications of proposed sales. *Id.* at 856. The museums will, also, demand warranties from sellers. *Id.*

42. Marks, *supra* note 22, at 39.

43. Regina Hackett, *SAM Sues Gallery in Dispute Over Matisse Work*, SEATTLE POST-INTELLIGENCER, Aug. 26, 1999, at E1 [hereinafter referred to as Hackett, *SAM Sues*]

44. *Id.*

history that the gallery supplied to the Bloedels.⁴⁵ The Knoedler Gallery stated in catalogs for exhibits in both Paris and Pittsburgh between 1937 and 1938, that the Odalisque was then owned or possessed by the Rosenbergs.⁴⁶ The bill of sale sent to the Bloedels by the Knoedler Gallery omitted the fact that both the 1937 and 1938 exhibits stated that Rosenberg loaned the Odalisque for the different exhibitions.⁴⁷

The significance of this suit by the Seattle Art Museum is not the claim for breach of warranty of title against the Knoedler gallery, but rather that SAM is suing as a donee. SAM incurred no expense in acquiring the painting and had no contractual privity with the Knoedler gallery for the initial acquisition of the Odalisque. Virtually no case law exists in which a donee sues for breach of warranty of title. However, courts have considered this issue where the moving party is a good faith purchaser.

The landmark case for breach of warranty of title claims dealing with artwork stolen during World War II is *Menzel v. List*.⁴⁸ In 1932, the Menzels purchased a Chagall painting at an auction in Brussels, Belgium for the then equivalent price of \$150.⁴⁹ The Menzels fled their home prior to the German invasion of Belgium in 1940, leaving all of their possessions including the Chagall painting.⁵⁰ They returned to their home six years later to find most of their possessions, including the Chagall, missing.⁵¹ The Nazis left a receipt for the painting.⁵² In 1955, the Perls purchased the said Chagall in a French gallery for \$2,800, without investigating the provenance of the work.⁵³ The Perls

45. Rosenbaum, *supra* note 33, at 38. Knoedler failed to tell the Bloedels that the painting once belonged to Rosenberg, saying instead that the painting was in Matisse's possession through 1938, when the gallery knew or should have known that this representation was in fact not true. Hackett, *SAM Sues*, *supra* note 43, at E1.

46. Hackett, *SAM Sues*, *supra* note 43, at E1.

47. *Id.* When the gallery sent a bill of sale to the Bloedels, it included a list of where the Matisse had been exhibited and supplied catalog citations for those exhibits. *Id.* The list, however, excluded those exhibits in Paris and Pittsburgh. *Id.* Later, in response to Virginia Bloedel's letter, a Knoedler representative wrote to her that Matisse loaned the painting to both shows. *Id.* The Knoedler representative cited a history of the Odalisque written by Amelie Matisse, the artist's estranged wife. *Id.*

48. 246 N.E.2d 742, 742 (N.Y. 1969).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* Location of the painting between the time of its removal from the Menzel household by the Germans in 1941 and the Perls' purchase in 1955 is unknown. *Id.*

53. *Menzel*, 246 N.E.2d at 742. The Perls relied on the reputability of the Paris gallery as to the authenticity and title and made no independent inquiry into the previous history of the work. *Id.*

subsequently sold the painting to Mr. List for \$4,000.⁵⁴ In 1962, Mrs. Menzel discovered a reproduction of the Chagall in an art book, accompanied by a notice stating that Mr. List owned the painting.⁵⁵

Mrs. Menzel instituted a replevin action against List, and List in turn impleaded the Perls, alleging their liability for breach of warranty of title.⁵⁶ A jury found against List and for Mrs. Menzel awarding her the amount of \$22,500 for the value of the painting.⁵⁷ The jury also awarded Mr. List damages for \$22,500 for the full value of the painting, plus legal fees in his breach of warranty of title action against the Perls.⁵⁸ The Perls appealed to the appellate division, which reduced the amount of the jury award in their favor to \$4,000.⁵⁹ The court held that the applicable measure of damages was the price List had paid for the painting at the time of the purchase, plus interest accrued.⁶⁰ Both parties appealed this verdict to the highest court in New York.⁶¹

The New York Court of Appeals held that at the time List purchased the painting,⁶² an implied warranty existed under the New York Uniform Sales Act.⁶³ List was entitled to enjoy the quiet possession of the goods against any lawful claim at the time of the sale.⁶⁴ The court further awarded List the full present day market value for the painting, reasoning that List must be placed in the position he would be in had the contract with the Perls been upheld.⁶⁵

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 743. List, in fact, returned the painting to Mrs. Menzel, foregoing the payment of monetary damages. *Id.*

58. *Menzel*, 246 N.E.2d at 743. The court awarded legal fees for List's defense of the Menzel suit. *Id.*

59. *Id.*

60. *Id.* It is important to note that the court further held that the statute of limitations had not run on a claim of this sort. *Id.*

61. *Id.* The Perls argued that the appropriate measure for damages was the price List paid at the time of purchase. *Id.* at 744. List, however, argued that the amount of damages must be measured at the value at the date of dispossession. *Id.*

62. *Id.*

63. *Menzel*, 246 N.E.2d at 744.

64. *Id.* Subdivision 6 of the New York Uniform Sales Act provides that the measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events from the breach of warranty. *Id.*

65. *Id.* at 745. If List recovered only the price he had paid upon its purchase from the Perls, the effect would be to put him in the same position he would have occupied if the sale had never been made. *Id.* The court elaborated by holding that an injured buyer is not compensated when he recovers only so much as placed him in "status quo ante" since such a recovery implicitly denies that he suffered any damages. *Id.*

Since *Menzel v. List*,⁶⁶ in the past four decades, litigation surrounding art and its origins has escalated enormously. This rise has placed pressure on museums, galleries, and even the individual art dealer to assure the provenance of the works they sell. Various issues raised by *Menzel*, as well as issues of new impression, cases such as *Kunstsammlungen zu Weimar v. Elicofon*,⁶⁷ *DeWeerth v. Baldinger*,⁶⁸ *Solomon R. Guggenheim Foundation v. Lubell*,⁶⁹ *Autocephalus Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts*,⁷⁰ *Government of Peru v. Johnson*,⁷¹ *United States v. McClain*,⁷² and *Jeanneret v. Vichy*⁷³ have arisen and had a profound impact on the art dealings of today.

66. *Id.* at 742.

67. 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd* 678 F.2d 1150 (2d Cir. 1982). This case involved an action against a private collector for artwork allegedly stolen in 1945 from a German museum. *Id.* at 829.

68. 658 F. Supp. 688 (S.D.N.Y. 1987). A U.S. collector was sued for the return of a Monet which was allegedly stolen from its owner during World War II. *Id.* at 690. In this case, the appellate court required the plaintiff to demonstrate due diligence in its search for the stolen work in order to stop the statute of limitations from running on the action of replevin. *Id.* at 694.

69. 569 N.E.2d 426, 428 (N.Y. 1991). Guggenheim sought the return of a work that had disappeared years earlier from the museum. *Id.* The defendant, bona fide purchaser, sought summary judgment arguing that the museum had taken no significant action to seek the return of the work and hence the statute of limitations had run. *Id.* The trial court granted the motion, and the appellate court reversed. *Id.* at 428-29.

70. 717 F. Supp. 1374, 1374 (S.D. Ind. 1989). Plaintiff sued an American art dealer for the return of four Byzantine mosaics allegedly stolen from Turkish-occupied Cyprus many years earlier. *Id.* at 1375. The court held for the plaintiff, ruling that the statute of limitations did not extinguish the claim because the plaintiffs had exercised due diligence in searching for objects. *Id.* at 1388.

71. 720 F. Supp. 810, 810 (C.D. Cal. 1989). Peru sued a U.S. citizen seeking the return of artifacts it claimed were illegally excavated and removed from Peru. *Id.* at 811. The court held for the defendant on the grounds that Peru could not establish that the artifacts actually came from Peru and could not establish with certainty the status of its domestic law regarding ownership of artifacts. *Id.* at 812.

72. 545 F.2d 988, 988 (5th Cir. 1977). This case involved the importation of moveable pre-Columbian artifacts from Mexico into the United States. *Id.* at 992. The United States Court of Appeals found that as of 1972, Mexican law vested title to all pre-Columbian material in the government. *Id.* at 1000. The court held that the declaration of national ownership is necessary before an item may be considered stolen property. *Id.*

73. 693 F.2d 259, 259 (2d Cir. 1982). This court reversed a lower court's decision which held that illegal export from Italy violated warranty of title under the U.C.C. *Id.* at 269.

II. SAM'S CLAIM AS IT DIFFERS FROM STOLEN ART CASES OF THE PAST

Building on the principles developed in *Menzel v. List*,⁷⁴ cases dealing with stolen art during World War II have arisen more frequently in the past three decades.⁷⁵ This number is sure to rise in the coming years as more and more stolen works resurface.

The premise of the claims alleged by SAM differs from all of the preceding stolen art cases in that it attempts to extend the bridge of privity from the seller to the good faith purchaser to the third party donee. The prior cases deal primarily with the good faith purchaser's return of the stolen artwork to the original owners and their heirs.⁷⁶ Some cases also deal with the statute of limitations issue surrounding a cause of action for replevin by the heirs of the original owners. While SAM's case also involves a good faith purchaser, the case extends itself another level to a subsequent beneficiary.⁷⁷ After the return of the work to the Rosenberg family, SAM, the innocent donee, instituted the suit against the Knoedler Gallery, alleging fraud, negligent misrepresentation, and breach of warranty of title.⁷⁸ SAM attempted to receive the damages allowed to a good faith purchaser, despite the fact that they have no privity with the seller.

In October of 1999, SAM litigated its fraud claim against the

74. 246 N.E.2d 742, 742 (N.Y. 1969).

75. See *Deweerth v. Baldinger*, 836 F.2d 103, 108-09 (2d Cir. 1987), cert. denied, 108 S. Ct. 2823 (1988) (holding that an original owner must make a reasonably diligent attempt to relocate the stolen work). A West German citizen instituted this suit against an American buyer. *Id.* Shortly after the war ended, a painting by Monet was stolen from a castle in Germany where its owner, a relative of Deweerth, hid it safely from the Nazis. *Id.* In 1957, Baldinger, a good faith purchaser, acquired the Monet from a New York Art dealer for \$30,900. *Id.* at 106. In 1982, Deweerth discovered that Baldinger was in fact in possession of the painting and demanded its return. *Id.* at 108-09. The court held that an owner has the responsibility of making a reasonably diligent attempt to locate the stolen property. *Id.* Once the owner locates the stolen painting or property, the owner must demand for its return within a reasonable period. *Id.* See also *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1150 (2d Cir. 1982) (involving a claim by a museum seeking the return from a subsequent good faith purchaser two oil paintings by Albrecht Durer stolen during the Second World War).

76. See *Menzel v. List*, 246 N.E.2d 742, 742 (N.Y. 1969) (holding that a good faith purchaser is entitled to the present day market value on a breach of implied warranty claim). See also *Deweerth v. Baldinger*, 836 F.2d 103, 108-09 (2d Cir. 1987), cert. denied, 108 S. Ct. 2823 (1988) (holding that a good faith purchaser may recover under breach of warranty of title as long as due diligence is shown upon the discovery of the stolen piece).

77. *Rosenberg v. Seattle Art Museum v. Knoedler-Modarco, Inc.*, 42 F. Supp. 2d 1029, 1032 (W.D. Wash. 1999).

78. *Rosenberg v. Seattle Art Museum v. Knoedler-Modarco, Inc.*, No. C98-1073L, 1999 WL 824639, at *1 (W.D. Wash. Oct. 7, 1999).

Knoedler Gallery in Washington State Federal Court.⁷⁹ SAM alleged that in 1954 the Knoedler Gallery fraudulently represented the provenance of Matisse's "L'Odalisque" to the Bloedel family.⁸⁰ SAM presented evidence that the Knoedler Gallery knew the painting belonged to Paul Rosenberg, but assured the Bloedels that Knoedler had good title to the painting.⁸¹ However, Knoedler argued that it made no fraudulent representation of the painting's provenance or title, that neither the Bloedels nor SAM relied on this alleged representation, and that Knoedler did not intend for a reliance on said representation of title.⁸²

The court found a genuine dispute to exist between the two parties because of the evidence proffered by SAM.⁸³ SAM presented one key piece of evidence which was a letter from the Knoedler Gallery to the Bloedels.⁸⁴ SAM also presented evidence that the Nazis looted much of Paul Rosenberg's art possessions during World War II and the Nazi occupation of Paris.⁸⁵ The court, however, held that SAM presented no evidence that Knoedler

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at *2. In order to establish a claim for fraud, the moving party must present by clear and convincing evidence the following nine elements:

(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of the falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.

Rosenberg, 1999 WL 824639 at *1.

83. *Rosenberg*, 1999 WL 824639 at *2.

84. *Id.* The letter from Knoedler's Leila Wittler to Virginia Bloedel's inquiry as to the provenance of the painting is as follows:

I am sorry there was any question left unanswered in your mind, but the thing was so clear to us although we do not know the name of the former owner. The Paris dealer from whom we bought the Matisse would not give out the name of the former owner, as they always hoped to get more pictures from the same source.

This picture as you know, was painted in 1928 and was exhibited at the Salon des Tuileries that same year; and in 1937 it was exhibited in the independent show when it was loaned by the artist. In 1938 he again exhibited it in the International Exhibition at Carnegie Institute in Pittsburgh. It was without doubt in his possession through 1938. As it was published in a Swedish publication in 1938, it may have gone to Sweden and was in some Swedish collection. However, from then on it was owned privately by this collection, from which it now comes, and whose identity we are unable to get from the Paris dealer. The document, of which you have a Photostat, comes directly from Madame Matisse, which leaves, of course, no doubt as to the authenticity of the picture. I think possibly Dr. Fuller would be interested to see the pedigree of the picture, and also the document.

Id. at n1.

85. *Id.* at *2.

attempted to defraud the museum or that SAM in fact relied on the statements made by the Knoedler gallery regarding the provenance of the Matisse.⁸⁶ The court was therefore left to decide whether SAM had a right to recover for the alleged fraud by the Knoedler Gallery.⁸⁷ SAM argued that the Bloedels' assigned their right to recover for fraud against Knoedler to the museum when they bequeathed the painting.⁸⁸

The court found SAM's arguments insufficient and declared that without any other grounds on which SAM may be entitled to sue for fraud, a summary judgment must be granted in favor of the Knoedler Gallery.⁸⁹ The decision by the court to dismiss SAM's claim for fraud, an intentional tort, has profound jurisdictional effects on SAM's other claims of negligent misrepresentation and breach of warranty of title.⁹⁰ According to Stuart Dunwoody, the museum's attorney, SAM is currently appealing this decision.⁹¹

The two parties settled out of court in December of 2000.⁹² The settlement involved a reimbursement by Knoedler Gallery to SAM for all legal fees and costs, including research and travel fees, and the gallery is to give SAM one or more of its works in exchange for the loss of the Matisse or, if the museum was not satisfied with the stock of painting, a cash payment.⁹³ In return, SAM agreed to withdraw all further allegations against the

86. *Id.*

87. *Id.*

88. *Rosenberg*, 1999 WL 824639 at *2. SAM contends that this intent is further solidified by the agreement entered into by the Bloedels' heirs giving SAM the right to bring all claims in their stead. *Id.*

89. *Id.*

90. *Id.* at *3. The court held that without the tortious claim of fraud, SAM has no standing to advance the claims of both negligent misrepresentation and fraud. *Id.* The Ninth Circuit uses a three-part jurisdictional test in determining whether the court has jurisdiction. *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029, 1037 (W. D. Wash. 1999). Once purposeful availment and but for causation is shown by the offering party, jurisdiction will lie unless fairness factors outweigh the prior considerations. *Id.* Furthermore, in the Ninth Circuit, only an intentional tort may satisfy the burdens of this test. *Id.* Therefore, the court held that should it eventually be found that the fraud claim fails on its merits, no independent jurisdiction would lie for the other two claims asserted by SAM. *Id.*

91. Interview with Stuart R. Dunwoody of Davis Wright Tremaine LLP, Attorney, in Seattle, Wash. (Nov. 8, 1999).

92. Raphael Rubenstein, *Seattle Lawsuit Resolved; Seattle Art Museum and M. Knoedler and Company Inc. Settle Case over Matisse Painting*, ART IN AMERICA, Dec. 1, 2000, at 31. See also Regina Hackett, *Art Museum Settles Suit over a Stolen Matisse; N.Y. Gallery Offering a Replacement for \$2 Million Work Seized by Nazis*, SEATTLE POST-INTELLIGENCER, Oct. 13, 2000, at B1 [hereinafter referred to as Hackett, *Art Museum Settles*]

93. *Id.*

gallery.⁹⁴

Despite the out of court settlement,⁹⁵ SAM's claim for breach of warranty of title raised the question as to who will bear the loss that arose upon the return of "L'Odalisque" to the Rosenberg family. Virtually no case law exists regarding whether an innocent donee may recover from the initial seller on a breach of warranty of title claim where no privity exists between the two. However, a substantial amount of case law exists that deals with stolen items with apparent cloudy titles.⁹⁶ In those cases, good faith purchasers returned the stolen items to the original owners and courts allowed good faith purchasers to recover damages from sellers.⁹⁷

The Uniform Commercial Code (U.C.C.) Section 2-312 governs cases involving breach of warranty of title issues.⁹⁸ This section states that a seller gives an implied warranty of clear and good title in every contract involving the sale of goods.⁹⁹ Section 1-201 of the U.C.C. defines a purchaser as a person who takes by purchase.¹⁰⁰ A purchase includes "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property."¹⁰¹

The Bloedels purchased the Matisse from the Knoedler Gallery under the assumption that the gallery had good title to

94 *Id.* Knoedler forgave a \$143,000 fine that U.S. District Judge Robert Lasnik for failing to show proof of legal ownership in a timely way. Hackett, *Art Museum Settles*, *supra* note 92, at B1. The museum and Knoedler Gallery stated that they were satisfied with the settlement. *Id.* In March of 2000, SAM used some of the money from the settlement to purchase two new John Singer Sargent portraits, as a tribute to their outgoing curator. Sheila Farr, *SAM Acquires Major Warhol, Sargent Works*, SEATTLE TIMES, Mar. 15, 2001, at E1.

95. A strong possibility exists that in order to have jurisdiction over the Knoedler Gallery, SAM may have to pursue this litigation in the Federal Courts in the state of New York. *Rosenberg*, 1999 WL 824639 at *1. Success or failure in an art replevin case may be dictated more by the choice of forum and whether the court has jurisdiction than whether the case is successful on its merits. Tarquin Preziosi, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225, 225-26 (1997). Art theft has given rise to the dilemma of how to decide ownership between two innocent parties: the owner, as victim of the theft, and the innocent purchaser of the stolen artwork. *Id.* at 251-52.

96. See *supra* notes 67-73 and accompanying text discussing existent case law dealing with stolen art during World War II.

97. See *supra* notes 67-73 and accompanying text regarding the return of the works to the original owners.

98. U.C.C. § 2-312 (1977).

99. *Id.* No requirement exists for fault on the part of the seller. LEONARD DUBOFF, ART LAW 82 (1984). The plaintiff must only show that a warranty existed on the goods, the goods failed to conform to that warranty, and consequently the plaintiff suffered an injury. *Id.* at 82.

100. U.C.C. § 1-201 (1977).

101. *Id.*

pass.¹⁰² Galleries or art dealers¹⁰³ generally purchase the art from the original owner or artist, and it is common practice that in such situations the warranty of good title is assumed to apply.¹⁰⁴ The Bloedels were good faith purchasers from the Knoedler Gallery.¹⁰⁵ In fact, following the purchase of the Matisse, Virginia Bloedel sent a letter to the Knoedler Gallery for the purpose of re-verifying its title.¹⁰⁶ In response to that letter, Lelia Wittler, as representative of the gallery, further warranted the painting's title in her reply.¹⁰⁷ Ms. Wittler stated that the museum contained further proof of clear title from Matisse's wife.¹⁰⁸

Under the doctrine laid out in *Menzel*,¹⁰⁹ the Bloedels would have an action against the Knoedler Gallery for breach of warranty of title, assuming they made the claim within the statute of limitations. A court would likely hold in favor of the Bloedels because Knoedler Gallery represented that they were passing good title to the Bloedels. The implied warranty failed because the gallery sold the Matisse with a cloudy title stemming from the years of World War II. This claim would be almost identical to that brought by List in the *Menzel* case.¹¹⁰

The ownership of the Matisse, however, does not stop with the Bloedel family. In 1991, SAM took possession of "L'Odalisque" through a bequest in the will of Mrs. Virginia Bloedel and a trust established by her husband, Mr. Prentice Bloedel.¹¹¹ The Bloedels bequeathed full ownership of the painting upon Mr. Bloedel's death in 1996.¹¹² Under Section 1-201 of the U.C.C.,¹¹³ SAM is a

102. *Rosenberg v. Seattle Art Museum v. Knoedler-Modarco, Inc.*, No. C98-1073L, 1999 WL 824639, at *1 (W.D. Wash. Oct. 7, 1999).

103. A dealer is defined as one who buys to sell; not one who buys to keep, or makes to sell. BLACK'S LAW DICTIONARY 277 (6th ed. 1991).

104. Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 524 (1988).

105. *Rosenberg*, 1999 WL 824639 at *1.

106. *Id.* at *2.

107. *Id.* Wittler assured Ms. Bloedel of its exhibition in 1938 and then its sale to an undisclosed private owner. *Id.* at n1. She proceeded to further inform Ms. Bloedel that additional documentation of the painting's authenticity and title came from Madame Matisse herself. *Id.*

108. *Id.*

109. *Menzel*, 246 N.E.2d 742, 744-45. The court held that in the purchase of art an implied warranty existed which entitled List, the good faith purchaser, to enjoy the quiet possession of the goods against any other lawful claim. *Id.* at 745. When a claim arose by the original owner that resulted in the return of the painting, the court allowed the good faith purchaser to recover under breach of warranty of title against the seller. *Id.* The court awarded List the full present-day market value for the painting. *Id.*

110. *Id.* at 743.

111. *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 1029, 1032 (W. D. Wash. 1999).

112. *Id.*

113. U.C.C. § 1-201 (1977).

purchaser because it received an interest in property by way of gift. The Bloedels transferred all of their rights under the painting to SAM.¹¹⁴ Therefore, it logically follows that the Bloedels' right to sue the Knoedler Gallery for breach of warranty of title under U.C.C. 2-312 also transferred to SAM. Furthermore, SAM and the Bloedels signed an agreement which assigned any residual claims to SAM.¹¹⁵

The U.C.C. has no express provision within its text that addresses privity of contract in situations dealing with the breach of warranty of title. The requirement of privity between the aggrieved party and the breaching party may be lessened in jurisdictions that have adopted the broadest third party beneficiary provision of Section 2-318 of the U.C.C.¹¹⁶ In at least one state, privity of warranty of title runs to a remote purchaser.¹¹⁷ In *Bordwell v. Collie*,¹¹⁸ New York's highest court held that a third party beneficiary may maintain an action against the original sellers, so long as the beneficiary proceeds as an assignee of the good faith purchaser.¹¹⁹ The court held that the original purchaser had a claim against the seller.¹²⁰ The original purchaser subsequently assigned that claim to the plaintiff, thus giving the plaintiff standing through assignment to make a claim of breach of warranty.¹²¹ Under this reasoning, SAM should be able to proceed against Knoedler because the Bloedels assigned all the claims

114. Interview with Stuart R. Dunwoody of Davis Wright Tremaine LLP, Attorney, in Seattle, Wash. (Nov. 8, 1999).

115. *Id.*

116. U.C.C. § 2-318 (1977). See 67 AM. JUR. 2D *Sales* § 717 (1985) (stating that these broad sections of the U.C.C. extend warranties to any person who may be reasonably expected to use, consume or be affected by the good and a requisite injury to that party has occurred). See also *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409 (1972) (stating that some states have interpreted warranties to extend to any person who might reasonably use the good).

117. *Id.* See also *Nobility Homes of Texas, Inc. v. Shivers*, 539 S.W.2d 190 (Tex. Ct. App. 1976) (holding that in furtherance of judicial economy and the modern trend to refrain from strict rules of privity, a contractual relationship was not required to recover for the breach of an implied or express warranty of habitability). See generally *Mitchell v. Webb*, 591 S.W.2d 547 (Tex. Ct. App. 1979) (holding that where the seller sold to the purchaser, who subsequently sold the good to the aggrieved party, that party could recover from the seller regardless of privity).

118. 45 N.Y. 494 (1871).

119. *Id.* This case involved a situation in which the owner sold a horse with a mortgage attached to it. *Id.* That seller subsequently sold the horse to another, unaware of the mortgage that clouded the title of that chattel. *Id.*

120. *Id.*

121. *Id.* at 494. The court went to great lengths to differentiate a breach of warranty of title issue from that of a suit on breach of quiet enjoyment of land. *Id.* In that instance, the lessee/vendee may sue a remote vendor. *Id.*

under the painting to SAM.¹²² The remaining heirs also consented to the assignment of their rights to SAM by written agreement.¹²³ The assignment extinguished the Bloedels' claim under breach of warranty of title and transferred it to SAM.¹²⁴

In *Menzel*,¹²⁵ the court dealt with two innocent parties—List, the good faith purchaser and Perls, a New York art dealer, neither of whom knew anything about the painting's provenance.¹²⁶ The SAM case, however, deals with two innocent parties on the same side—a good faith purchaser and an innocent donee.¹²⁷ The third party, Knoedler, is a reputable gallery that knowingly sold a painting with questionable title.¹²⁸ It would be unjust to allow the Knoedler Gallery to escape liability under its breach of warranty of title simply because the Bloedels donated the painting to SAM. To hold against SAM, would leave an innocent party to bear the loss resulting from Knoedler's conduct, who is still available for remedies.

An art dealer or gallery owner is held to a higher standard of care to purchasers in establishing the title and authenticity of artwork.¹²⁹ When works of art are wrongfully transferred due to theft, breach of fiduciary duty, or fraudulent misrepresentation, an aggrieved party is entitled to be made whole.¹³⁰ Based upon special training and skills, combined with an escalated purchase price for

122. *Rosenberg*, 1999 WL 824639 at *2.

123. Interview with Stuart R. Dunwoody of Davis Wright Tremaine LLP, Attorney, in Seattle, Wash. (Nov. 8, 1999).

124. *Id.*

125. *Menzel*, 246 N.E.2d 742, 742 (N.Y. 1969).

126. *Id.* at 743. The Perls purchased the Chagall from a Parisian art gallery for \$2,800. *Id.* The gallery mistakenly made no investigation into the background of the painting and relied merely on the reputation of the Parisian art gallery as to the painting's provenance. *Id.*

127. Interview with Stuart R. Dunwoody of Davis Wright Tremaine LLP, Attorney, in Seattle, Wash. (Nov. 8, 1999).

128. A case of striking similarity to the one at hand arose in August of 1999 in Jerusalem. *Israel Museum Drags its Feet Over its Looted Pissarro*, THE JERUSALEM REP., Aug. 2, 1999, at 4. The heir of a German Jewish art collector instituted a claim against the Israel Museum for a looted Pissarro in its collection. *Id.* The painting was sold off during a "Jew Sale" in Berlin in 1935. *Id.* The eventual purchasers, the Loebes, a prominent New York banking family, promised the Pissarro to the Israel Museum in honor of its twentieth anniversary. *Id.* The Loebes also purchased the Pissarro from the Knoedler Gallery in New York. *Id.* The museum is currently investigating the provenance of the painting along with the European Commission on Looted Art. *Id.*

129. Gerstenblith, *supra* note 104, at 555. One may see a counterbalance to the elevated pricing at a gallery to be the greater protection the purchaser can reasonably rely on from an experienced and learned gallery owner or art dealer. *Id.* The buyer could very well be a first time purchaser that is unaware of such things as warranty of title and the provenance of a work. *Id.* at 559.

130. *Id.* at 537.

the art, the gallery owner is in a better position to bear the risks of cloudy title and spread those costs among their buyers.¹³¹

As a matter of public policy, both the original owner and the good faith purchaser have remedies upon the discovery of stolen art.¹³² No reason exists why the court should deny SAM, standing in the place of the good faith purchasers after the donation of the Matisse, recovery for the loss that it sustained.

Although stolen art cases present difficult decisions for the courts, remedies must be available to the aggrieved parties, whether the parties are good faith purchasers or third party beneficiaries. A remedy under Contract law is based on making the injured party whole. Solidifying an exception to that rule as applied to third party beneficiaries would be unjust. By holding that a good faith donee has no standing to sue, courts will effectively deny any property rights that a good faith donee may seek to hold in the case of a donation. This type of decision will adversely affect the non-profit organizations and galleries that make donations a chief part of their collection.

An art thief will rarely keep a stolen work in his possession for a long period of time.¹³³ The theft is only the first link in a chain that may eventually land the painting in the hands of an innocent purchaser or donee.¹³⁴ One can see the chain of these events unfold with works stolen by the Nazis that end up in both American and foreign museums.

With increasing discoveries, courts are faced with more and more civil cases for the recovery of stolen art and must attempt to resolve competing claims with alternate approaches that take into consideration the conduct of both sellers and purchasers.¹³⁵ The

131. *Id.* at 554, 562. Courts must place art traders on notice that if they deviate from a thorough investigation of the provenance of the works they sell, consequences shall be suffered. Barbara Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 RUTGERS L.J. 441, 471 (1999). "No longer should eyes be shut under the guise of enhancing a collection whether in a museum or private home." *Id.* Now, the absence of an unbroken provenance chain, as well as gaps in the provenance spanning the years of World War II, must be interpreted and investigated with greater regard. Beverly Jacoby, *The Nazi Legacy in the Art World: Effect on Value is One of Many Issues*, 59 N.Y.L.J. 219, 219 (1998). This situation may present difficulties for dealers bargaining under the old rules, when dealings were more casual and provenance was primarily understood to be a support for authenticity and the portrait's significance in the international art world. *Id.*

132. Preziosi, *supra* note 95, at 248.

133. Ildiko DeAngelis, *Civil Claims for Recovery of Stolen Property: Developments in the Law and Lessons for Museums*, C723 A.L.I. 5, at 7 (Mar. 25, 1992).

134. *Id.*

135. *Id.* at 16. Some have classified the legal responses to stolen art as being mired in horse and buggy law and therefore incapable of serving the increasing problems of stolen art cases. Preziosi, *supra* note 95, at 232.

art community has established a standard for dealing with stolen property and now must continue to refine the legal standards by which its members may be judged in courts of law.¹³⁶

Although a solution as to what occurs upon the discovery of stolen art in a museum or an art gallery remains unclear, auction houses, especially in New York, devised their own methods of returning stolen works and paying damages.¹³⁷ In *Abrams v. Sotheby*,¹³⁸ Sotheby's auction house sold a collection of fifty-nine Hebrew books and manuscripts dating from the fifteenth and the sixteenth centuries.¹³⁹ Sotheby's presented this collection for auction in 1984 on consignment from a private individual after what they claimed to be an extensive investigation into the provenance of the collection.¹⁴⁰ The primary contention of the suit, however, was that the private individual could not convey clear title to the collection and that Sotheby's failed to adequately disclose the questionable title to prospective purchasers.¹⁴¹ A year later the parties settled this suit by returning the auctioned items without any finding of liability.¹⁴² Customary practice according to the president of Christie's, another New York Auction house, is to refund the entire purchase price to the buyer and return the object to the rightful owner.¹⁴³

"Judicial responses to the problems of stolen art have been more of a Band-Aid than a cure: since courts have applied varying standards and rules, no clear-cut guidelines have emerged." *Id.*

136. DeAngelis, *supra* note 133, at 16. Museum practices do not exist in a vacuum. *Id.* Courts must take notice of the prevailing standards at the time the actions were taken by museums and judge the reasonableness of those actions along with the nature and size of that particular museum. *Id.* Museum collection management procedures have become more established and standardized over the last twenty years, up to the point where all museums should be up to a unified practice. *Id.*

137. Gerstenblith, *supra* note 104, at 528.

138. See No. 42255-84, slip op. at 1-2 (N.Y. Sup. Ct. Aug. 24, 1924) (granting motion for preliminary injunction). See generally Gerstenblith, *supra* note 104, at 526-32.

139. *Id.* These items originally belonged to the library of Hochschule für die Wissenschaft des Judentums, an institution of Jewish learning located in Berlin which the Nazi government closed in 1942. *Id.*

140. *Id.* Sotheby's routine procedure involved title checks with the FBI, study of various stolen property lists and bills of sale, as well as public knowledge of the history of the collection or work of art. Stipulation and Order of Settlement, *Abrams v. Sotheby Parke-Bernet, Inc.*, No. 42255-84 (N.Y. Sup. Ct. July 16, 1985), slip op. at 1-2.

141. *Id.* The customary practice of auction houses is to procure a contract from the assignor or seller stating that they have a right to consign that property and that the title will pass to the purchaser free of all liens. Rita Reif, *Auctions – The Silent Role of Consignors*, N.Y. TIMES, Aug. 2, 1985, at C23.

142. Gerstenblith, *supra* note 104, at 501.

143. Reif, *supra* note 141, at C23. The auction house makes the refund to the buyer even if the auction house has turned over the proceeds to the consignor

On this premise, each person is restored to the position they were in at the time of contracting. This solution differs from that found by the Court in *Menzel v. List* in which the court allowed the good faith purchaser to recover the loss of present day market value.¹⁴⁴ These amounts may differ greatly. One can see a rather large difference in the original value as compared to the present day value in the SAM case because the Bloedels purchased the painting at \$19,000 and the current market value of the painting is two million dollars.¹⁴⁵

III. A UNITED FRONT

Although the U.C.C. entitles a good faith purchaser to damages for breach of warranty of title in the amount of the present day value of the goods sold,¹⁴⁶ two million dollars seems a steep price to pay for the Knoedler Gallery, especially to a party in which it had no contractual dealings. However, by denying a third party beneficiary, such as SAM, any claim to recovery, the courts would effectually eliminate any property rights a third party beneficiary or donee may acquire upon bequest or donation.

This Comment proposes the institution of a special federal arbitration committee specifically organized by Congress to deal with cases that arise over stolen cultural objects during World War II. This arbitration committee will work together with the parties for a just resolution and restoration of the stolen objects to the rightful owner. Congress must entitle this committee to award partial damages to an injured party paid by the party that breached the warranty of good title. A centralized arbitration committee will relieve the burden on the courts and provide for a more unified set of decisions.

This Comment further proposes legislation by Congress which would require any purchase, loan, donation, gift, or bequest of a painting or cultural object with cloudy or questionable title during the years prior to and just following World War II to be registered with a central registry including a photograph and alleged provenance of the work.¹⁴⁷ For example, the Art Loss Register

and the consignor is unavailable for suit. *Id.*

144. *Menzel*, 246 N.E.2d 742, 745 (N.Y. 1969).

145. Hackett, *SAM Sues*, *supra* note 43, at E1.

146. U.C.C. § 2-714 (1977).

147. A central database and registry is essential in allowing the victims to register their claims and in aiding potential buyers to determine the provenance of the prospective work. Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 25 (1998). As more and more groups establish themselves in the fight to restore stolen works to their original owner, it is imperative that these groups focus their efforts on a united front. *Id.* See Willard L. Boyd, *Museums as Centers of Controversy*, in 128 DAEDALUS 185 (American Academy of Arts and Sciences, 1999) (proposing that a museum

(hereinafter ALR) established a computerized system that catalogs all lost art with an international database.¹⁴⁸ The ALR is underwritten by a number of auction houses and insurance companies.¹⁴⁹ In a period of over seven years, the ALR assisted in the recovery of over 100,000 pieces of art and antiques worth over \$75 million.¹⁵⁰

Eventually, this type of registration system may easily be extended to all sales of art.¹⁵¹ This registry may be funded by charging a fee for each painting or cultural object that is registered, along with possible funding from the government, as well underwriting from insurance companies. This type of registration on a widespread scale will help to answer the questions involving indeterminate title and eliminate the possible expense and time of lengthy legal proceedings that follow the accusation of a looted object.¹⁵² A registration of this kind may be analogized to the of registration required from a car buyer or homebuyer.

Should this legislative requirement be ignored and a case arise questioning the provenance of a particular work, the arbitration committee would be entitled to impose penalties upon all members of the original sale, deal, loan, or bequest including the museum, gallery, or art dealer for ignoring their duty.¹⁵³ This

should not acquire by purchase, gift, bequest or exchange, any cultural object unless the governing body and chief representative officer are satisfied as to the valid title of the object in question).

148. See generally Jacoby, *supra* note 131, at S2. Owners, insurance corporations, and any law enforcement agency may register a stolen piece of art with the registry in New York, London, Dusseldorf, Perth, Dublin and Stockholm. *Id.* The Registry charges a fee on a scale proportional to the piece's worth and the Registry waives the fee for victims of the Holocaust. *Id.*

149. Preziosi, *supra* note 95, at 242. The Art Loss Register stores descriptions and photographs of stolen artworks worldwide. *Id.* Prospective buyers may use the register for a small fee and museums, galleries, and auction houses use the register on a regular basis to check the title of works of art. *Id.* at 243. In order for an item to be registered, the item must be uniquely describable either by description or photograph. *Id.* at n.185. Some items must have a descriptive or identifying mark, and some require photographs. *Id.*

150. *Id.*

151. See Johnston, *supra* note 21, at 33 (stating that at least three organizations have been created since the fall of 1997 that are dedicated to assisting Holocaust victims to locate and recover art and other property that was unlawfully taken from them during the Nazi era).

152. See Ori Z. Soltes, Holocaust Victims' Claims, Address Before the Congressional Committee (Feb. 12, 1998), in 1998 WL 8992010 (discussing how the types of research and documentation of stolen art by HARP, like the ALR, help to eliminate questions and expensive legal battles).

153. "The art trade should be on notice of the risks to them for failure to investigate the provenances of the works it sells. No longer should eyes be shut under the guise of enhancing a collection whether in a museum or in a private home." Tyler, *supra* note 131, at 471. The fallout from the ravaging of

penalty could be allocated to further the funding of a centralized registry.

Many museums, galleries, auction houses, dealers, and collectors may assert that this type of mandatory legislation, along with sanctions would be an invasion of the art world by non-experts and impose an expensive burden.¹⁵⁴ However, it is crucial that the rules as applied to society as a whole, like homebuyers and car-purchasers, are not suspended for those that deal with fine art.¹⁵⁵ As responsible parties of collections of cultural property and holders of the public trust, the government must establish a means to redress the unresolved and emerging issues relating to stolen cultural property.¹⁵⁶

Finally, the public must be kept informed because awareness has already aided many individual claims and influenced countries and museums to change their policies.¹⁵⁷ As noted above in the case of the Rosenberg Matisse, Bloedel's grandson, a New York artist, saw the painting in Hector Feliciano's book *The Lost Museum* and notified the Rosenbergs.¹⁵⁸ This public awareness "is an invaluable part of the solution, and must continue to help Holocaust victims recover stolen art."¹⁵⁹

art by Hitler's troops has emerged in America's cultural institutions, wreaking havoc in the art world among museum curators as well as art dealers and galleries, and placing the provenance and fate of countless collections of cultural property under the microscope. *Id.* at 441-42. Current owners should be advised to do their utmost to satisfy themselves that the chain of ownership is not blighted and title is not clouded by a wrongful taking, such as forced sales or confiscation. Jacoby, *supra* note 131, at S2.

154. *Id.*

155. *Id.*

156. DeAngelis, *supra* note 133, at 33. Any such claim against a museum will likely result in substantial risks and costs to the institution, legal expenses, the loss of valuable resources, and the effects of negative public perception. *Id.* Experts say that claimants must be prepared to spend at least \$100,000 in costs simply to begin litigation. Tyler, *supra* note 131, at 444-45. Some attorneys suggest that if the artwork is worth less than three million dollars, the heirs should forego pursuing the work rather than expending extensive funds on retrieval efforts. *Id.*

157. Schwartz, *supra* note 147, at 25.

158. Hackett, *supra* note 24, at A2.

159. Schwartz, *supra* note 147, at 25. For example, public awareness influenced Austria to improve its policies towards victims of looted art during World War II. *Id.* In the past, Austria has refused to respond to inquiries about missing art for years after the war. *Id.* Furthermore, France, in response to Feliciano's book, displayed approximately 2000 pieces of art that had been integrated into museums post-World War II. *Id.* at 26. This display reunited many Holocaust victims and their heirs with works. *Id.* Additionally, the Dutch government began investigating the ownership and provenance of over 4,000 works recovered from the Nazis and never claimed. *Id.* Museums and the United States government are slowly beginning to follow suit in the quest to restore victims of the Holocaust with their lost cultural objects. *Id.* at 26-27. The House of Representatives held a meeting to

CONCLUSION

Although a mandatory arbitration committee and legislation restrictions on the requirements of art dealings may not solve all of the problems dealing with stolen cultural objects, it is a first step, and although a reluctant one, it is one that will eventually eliminate the mysteries surrounding works in cultural institutions. Eventually, an international registry can be implemented, but the effort must first begin here. Had these steps been in place three years ago, both SAM and the Knoedler Gallery could have avoided needless legal fees and exhaustive time in bringing a case in federal court.

discuss the restitution efforts with art dealers, art museums and other repatriation organizations regarding stolen art. Jacoby, *supra* note 131, at S2. Several members of Congress stated an intention to introduce bills that will specifically address the obligations of museums to avoid acquiring or exhibiting Nazi-plundered art and to return such objects to their owners. *Id.* Bill Clinton has set up a team to investigate Holocaust-era assets which are housed in American by different cultural institutions and galleries. *Putting a Price on the Holocaust*, THE ECONOMIST, Nov. 27, 1999, at 10.

