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International Art and Cultural Heritage Law

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This article surveys significant legal developments in international art and cultural heritage law during the calendar year 2018.

I. Nazi-Looted Art: *von Saher v. Norton Simon Museum of Art*

This past year the Ninth Circuit may have brought to conclusion the long-running dispute concerning ownership of a diptych, *Adam and Eve*, painted by Lucas Cranach the Elder. The Dutch collector, Jacques Goudstikker, purchased the diptych in 1931 from the Soviet government.¹ In May 1940, Goudstikker was forced to relinquish all his assets, including the paintings, to the Nazis in two forced sales.² He then died while fleeing the Netherlands. At the end of the Second World War, the Allied Forces returned the paintings to the Dutch government for restitution. In 1966, the Dutch government sold the paintings to the Russian collector George Stroganoff-Sherbatoff in settlement of his claim of ownership of the paintings before the Russian Revolution and their expropriation by the Soviet government.³ Stroganoff subsequently sold the diptych to the Norton Simon Museum in 1971.⁴ Goudstikker's daughter-in-law and successor in interest, Marei von Saher, sued the Norton Simon Museum in 2007, claiming ownership of the diptych.⁵

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1. *Von Saher v. Norton Simon Museum of Art*, 897 F.3d 1141, 1143 (9th Cir. 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 1146. The claim was originally filed in 2007. The Ninth Circuit Court of Appeals has twice previously heard this dispute. *Von Saher v. Norton Simon Museum of Art (von Saher II)*, 754 F.3d 712, 714 (9th Cir. 2014); *von Saher v. Norton Simon Museum of Art (von Saher I)*, 592 F.3d 954, 956 (9th Cir. 2010). The earlier Ninth Circuit decisions addressed the validity of two different "special" California statutes of limitation extending the time period for recovery of stolen artworks. In the first decision, the Ninth Circuit held that the statute, which applied only to artworks stolen during the Holocaust, was unconstitutional under the federal foreign affairs preemption doctrine; in the second decision, the Ninth Circuit upheld a broader version

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Following the Second World War, the Dutch government established a procedure for seizing enemy property, which included the Goudstikker assets that had been acquired by Alois Miedl and Hermann Göring. Ownership of seized enemy property was then vested in the Dutch government. The Dutch government also established a process for restitution to victims who filed claims by a certain deadline. The Goudstikker heirs, however, chose not to file claims for the assets taken by Göring, which included the Cranach paintings. In 1999, the Dutch government refused to restore von Saher's right to the Cranachs, finding that the Goudstikker heirs had made a conscious, and well-considered, decision to waive rights to the artworks taken by Göring.⁶

In 2001, influenced by the 1998 Washington Conference Principles, the Dutch government established a new policy of restitution that would be less legalistic and "more moral."⁷ But the new policy explicitly did not apply to settled cases, including those in which a claim for restitution had been settled in a conscious and deliberate manner and those in which the claimant had expressly renounced a claim for restitution.⁸ A restitution committee was then established to administer the new policy; von Saher brought a claim to recover 267 works of art but did not include the Cranach paintings, which were no longer in the possession of the Dutch government.⁹ In 2006, approximately two hundred of these claimed works were returned, although the Dutch State Secretary for Education, Culture and Science ("The Secretary") determined that the claim had been waived.¹⁰ The Secretary regarded the claim to the Cranachs as fully settled and referenced the earlier acts to this effect.

Following the Ninth Circuit's 2014 decision upholding the revised California statute of limitations, which extended the time period in which suits for recovery of stolen art works could be brought, in 2015 the district court held that von Saher's claim was not barred by the statute of limitations.¹¹ However, the district court subsequently granted summary judgment to the Museum on the grounds that the Dutch government had good title to the paintings under its post-war decree when it sold them to the Museum.¹² Upon reaching the Ninth Circuit for the third time, the case was resolved on the basis of the act of state doctrine. At the outset, the Ninth Circuit noted that adjudication of von Saher's claim to the Cranachs would necessitate evaluating numerous actions of the Dutch government: the first

of the statute of limitations. See CAL. CIV. PROC. CODE § 338 (Deering, LEXIS through 2018 Sess.) (amended 2010).

6. *Von Saher*, 897 F.3d at 1153.

7. *Id.* at 1152.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Von Saher v. Norton Simon Museum of Art*, No. CV 07-2866-JFW (JTLx), 2015 U.S. Dist. LEXIS 188627, at *24 (C.D. Cal. Apr. 2, 2015).

12. *Von Saher v. Norton Simon Museum of Art*, No. CV 07-2866-JFW (SSx), 2016 U.S. Dist. LEXIS 187490, at *42-43 (C.D. Cal. Aug. 9, 2016).

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act, viewed holistically, involved the Dutch post-war decree nationalizing enemy property, the post-war decree vesting ownership of such assets in the Dutch government, the process for restitution of assets to victims of the Nazis, and the decision to return the Cranachs to Stroganoff in settlement of his restitution claim;¹³ the second act was the 1999 Dutch court decision denying von Saher's rights to the Cranachs; and the third act occurred in 2006, reiterating the 1999 decision and concluding that any claim to the Cranachs was settled.¹⁴

The act of state doctrine is based on the premise that:

[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.¹⁵

The justification for the doctrine has evolved over the years. In the past, it was considered to be an expression of international law, based on principles of international comity, but subsequently it has been described as “reflecting ‘the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder’ the conduct of foreign affairs.”¹⁶ The doctrine arises frequently in the context of expropriation of property by foreign governments.¹⁷

While the Dutch government's decisions not to return the Cranachs satisfied all the doctrinal elements, the Ninth Circuit considered two exceptions. The Ninth Circuit acknowledged the possibility of an exception for commercial acts—that is, acts in which a private citizen could engage. On the other hand, regardless of whether such an exception exists, the Ninth Circuit held that “[e]xpropriation, claims processing and government restitution schemes are not the province of private citizens. Those are ‘sovereign policy decision[s]’ befitting sovereign acts.”¹⁸ These acts would therefore not qualify as purely commercial acts, which might be exempted from the act of state doctrine.

The second exception is contained in the Second Hickenlooper Amendment, which states in part:

13. *Von Saher*, 897 F.3d at 1145–46, 1149–50. The District Court found that the diptych was never owned by the Stroganoff family. *Von Saher*, 2016 U.S. Dist. LEXIS 187490, at *3.

14. *Von Saher*, 897 F.3d at 1151–52.

15. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

16. *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990) (quoting *Banco Nacional de Cuba*, 376 U.S. at 423). [This is later cited as *Sabbatino*, which is the more common way it is cited]

17. *See, e.g., Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 145 (2d Cir. 2012) (refusing to examine the validity of the expropriation of a work of art by the Soviet Government in 1918).

18. *Von Saher*, 897 F.3d at 1154.

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Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation . . .¹⁹

The initial expropriation of the Goudstikker assets occurred long before 1959. The Ninth Circuit declined to characterize the 1966 sale to Stroganoff as a second expropriation because the Goudstikker heirs had already waived their rights to the diptych and the Dutch government was therefore the owner. Further, the Hickenlooper Amendment applies only when the taking is in violation of principles of international law, judged by the law as it existed at the time of the taking. In this case, at the time of the post-war decrees concerning restitution, the Allies had imposed deadlines for the filing of restitution claims after which claims would be forever barred. Thus, the Dutch government's post-war decrees, and the deadlines they established, were not in violation of international law at the time.²⁰

The Ninth Circuit also referenced three circumstances in which the policies underlying the act of state doctrine might weigh against its application. These three policies involve the degree to which a consensus exists concerning an international law principle, the extent of implications of the issue involved for foreign relations, and whether the government that perpetrated the challenged act is still in existence.²¹ According to the Ninth Circuit, all three of these policy considerations indicate that the act of state doctrine should apply. First, there is no consensus of international law that the Dutch post-war restitution process was flawed; second, delving into the decision-making processes of the Dutch government would be potentially detrimental to U.S. foreign relations with the Netherlands; and third, the same Dutch government has been continuously in existence from the post-war period until today and is the government that engaged in these acts of state. In conclusion, the Ninth Circuit stated that this was an appropriate case for application of the doctrine and that it would “presume the validity of the Dutch government's sensitive policy judgments and avoid embroiling our domestic courts in re-litigating long-resolved matters entangled with foreign affairs.”²²

This long-running litigation has entailed consideration of statutes of limitation on claims for recovery of stolen art works, the foreign affairs preemption doctrine, and now the act of state doctrine, all against the

19. 22 U.S.C. § 2370(e)(2) (2012).

20. *Von Saber*, 897 F.3d at 1155.

21. *Id.* (citing *Sabbatino*, 376 U.S. at 428).

22. *Id.* at 1156.

backdrop of the expropriation of art works during the Holocaust. The circumstances in which the act of state doctrine may apply to the expropriation of art works have become limited. The *von Saber* litigation has given us new insight into the application of the doctrine in the context of post-Second World War restitutions.

II. Nazi-Looted Art: *Bauer v. Toll*

In 2017, the heirs of Simon Bauer sued American defendants Bruce and Robbi Toll before the Paris High Court to obtain the restitution of a painting by Camille Pissarro, entitled *La Cueillette*,²³ that had been fortuitously on loan at the Marmottan Museum in Paris. Ruling on various issues, including transfer of title and statute of limitation, the court ordered the restitution of the painting to the Bauer heirs.²⁴

A. BACKGROUND

On October 1, 1943, French businessman Simon Bauer's art collection, including *La Cueillette*, was confiscated by Jean-François Lefranc, an art dealer appointed administrator and receiver by the General Commissariat for Jewish Questions in charge of economic aryanization under anti-Jewish legislation.²⁵ A few months later, in April 1944, Lefranc fraudulently diverted part of the collection and sold the painting to Jane Eudeline for the price of 250,000 francs.²⁶

When Simon Bauer returned from captivity, he immediately tried to recover his collection. As republican legality was restored,²⁷ he brought criminal charges against Lefranc and filed a restitution claim in accordance with the special summary procedure for victims of spoliation set up by the Ordinance of April 21, 1945.²⁸ The two lawsuits proved successful. As early

23. Also known as *La Cueillette des Pois*, or *Harvesting the Peas*.

24. Samuel Petrequin, *French court rules Pissarro painting belongs to Jewish heirs*, AP NEWS (Oct. 2, 2018), <https://www.apnews.com/a4319145addd4c78a678c7d2c9c2fda6> (discussing Cour d'appel Paris [CA] [regional court of appeal] Paris, 1e ch., Oct. 2, 2018, 17/20580 (Fr.)).

25. See generally JEAN MATTÉOLI, RAPPORT GÉNÉRAL: MISSION D'ÉTUDE SUR LA SPOLIATION DES JUIFS DE FRANCE [GENERAL REPORT: THE STUDY MISSION ON THE SPOILIATION OF THE JEWS OF FRANCE] (2000), available at <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/004000897.pdf>.

26. Roos Hoek, *French court orders restitution of looted Pissarro — does this set a precedent?*, GMW ADVOCATEN (Nov. 12, 2018), <https://www.gmw.nl/en/topics/art-culture-law/articles/french-court-orders-restitution-of-looted-pissarro-does-this-set-a-precedent/>.

27. Ordonnance du 9 août 1944 relative au rétablissement de la légalité républicaine sur le territoire continental [Ordinance of August 9, 1944, Concerning the Restoration of Republican Legality Within the Continental Territory], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 9, 1944, pp. 688–94.

28. Ordonnance 45-770 du 21 avril 1945 portant deuxième application de l'ordonnance du 12-11-1943 sur la nullité des actes de spoliation accomplis par l'ennemi [Ordinance 45-770 of April 21, 1945 Implementing for the Second Time the Ordinance of November 12, 1943, on the Nullity of Acts of Spoliation Committed by the Enemy], J.O., Apr. 22, 1945, pp. 2283–85.

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as November 8, 1945, all of Lefranc's art sales, including the sale of the painting, were pronounced null and the artworks were ordered to be immediately returned to Simon Bauer.²⁹ Two years later, Lefranc was found guilty and sentenced to five years imprisonment.³⁰ Simon Bauer died on January 1, 1947, having recovered some pieces of his collection, but not the missing painting.³¹

In 1965, Bauer's heirs learned that *La Cueillette* had been sold by Eudeline to an American gallery owner named Peter Findlay.³² A criminal claim was filed, and the painting seized. The investigating magistrate eventually released it, having determined no grounds for a criminal procedure against Findlay. The painting left France in 1966, with a valid export notice, and sold at auction in London the same year.³³

In May 1995, the defendants purchased the painting at auction in New York and, in 2017, loaned it to the Marmottan Museum.³⁴ When the Bauer heirs learned about its whereabouts, they filed a request before the Paris High Court to obtain the sequestration of the painting and the communication of all documentary evidence. The request being a non-contradictory procedure, the President granted the order to communicate all documents but refused the sequestration plea. The Bauer heirs then cited the Tolls before the motion section of the Paris High Court which, in a summary judgment dated May 30, 2017, granted the sequestration order providing a referral to the Court before July 14, 2017.³⁵ On July 13, 2017, the defendants were served a summons to appear before the court in a restitution claim based on the former judgment of November 8, 1945.³⁶ The court held in favor of the Bauer heirs.

The case raised two core questions: (1) whether the 1945 Ordinance could apply to a 1995 purchase that took place in the United States, and (2) whether the replevin claim was time-barred on the basis of either acquisitive or extinctive prescription.

29. The decision of the Seine High Court of November 8, 1945 was confirmed by CA Paris May 4, 1951. Laetitia Nicolazzi, et al., *Affaire La cueillette de Pissarro – Héritiers Simon Bauer c. Bruce et Robbi Toll* [*The Case of Pissarro's La Cueillette—Heirs Simon Bauer v. Bruce and Robbi Toll*], ARTHEMIS 1, 2 (July 2018), <https://plone.unige.ch/art-adr/cases-affaires/la-cueillette-de-pissarro-2013-heritiers-simon-bauer-c-bruce-et-robbi-toll/fiche-2013-la-cueillette-de-pissarro>.

30. ELIZABETH CAMPBELL KARLSGODT, DEFENDING NATIONAL TREASURES: FRENCH ART AND HERITAGE UNDER VICHY intro. (2011) (noting LeFranc's imprisonment for five years, a result of a decision from the Tribunal correctionnel de la Seine, Apr. 26, 1947).

31. Hoek, *supra* note 26.

32. *Id.*

33. *Id.*

34. *Id.*

35. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 7, 2017, 17/58735 p. 4 (Fr.); *see also* Hoek, *supra* note 26.

36. TGI Paris, Nov. 7, 2017, 17/58735 p. 4 (Fr.).

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B. THE APPLICABILITY OF THE ORDINANCE OF APRIL 21, 1945

The 1945 Ordinance implementing the London Declaration of 1943³⁷ (the “1945 Ordinance”) had two main purposes: (1) to declare null all transfers or transactions that took the form of admitted plunder or sacking, or which were ostensibly illegal, even when they appeared to have been undertaken with the consent of the victims; and (2) to provide victims of spoliation with a speedy and effective procedure for the recovery of their goods or assets, free of all charges and mortgages, before the President of the civil or commercial court. To avoid any contest, Article 4 states that the successive purchasers of spoliated works are deemed to be bad faith possessors as it relates to the dispossessed owner.³⁸ Subsequent case law held that the 1945 Ordinance superseded any other laws,³⁹ and was outside the scope of common law. It is on the basis of the 1945 Ordinance that Simon Bauer had obtained the final and enforceable decision,⁴⁰ which was applied with respect to the defendants. The defendants challenged both the applicability of the 1945 Ordinance to their case, and the enforceability of the November 1945 restitution decision.

The court dismissed the argument by first citing the London Declaration of January 5, 1943, stressing that eighteen countries, including France, Great Britain, and the United States had signed it, and that the French National Liberation Committee representing France had accepted full execution of this declaration by ordinance dated November 12, 1943.⁴¹ Regarding the applicability of the 1945 Ordinance, the Court noted that (i) the text provided no time limit to the presumption of bad faith of the subsequent purchasers with regard to the dispossessed person, adding that “the effectiveness intended by the authors of the order for re-establishment to their rights of the dispossessed persons requires this solution,”⁴² (ii) the 1945 Ordinance is still enforceable, and (iii) the Paris court had jurisdiction because the Bauer heirs are of French nationality and are partly domiciled in Paris, and the painting was located in Paris at the time of the sequestration.

37. *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control; Establishment of Inter-Allied Sub-Committee on Acts of Dispossession*, I FOREIGN REL. U.S.: DIPLOMATIC PAPERS 438 (Jan. 5, 1943) [hereinafter *London Declaration*].

38. Ordonnance 45-770 du 21 avril 1945 portant deuxième application de l'ordonnance du 12-11-1943 sur la nullité des actes de spoliation accomplis par l'ennemi [Ordinance 45-770 of April 21, 1945 Implementing for the Second Time the Ordinance of November 12, 1943, on the Nullity of Acts of Spoliation Committed by the Enemy], J.O., Apr. 22, 1945, art. 4 (Fr.).

39. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 15, 1955, Bull. civ. I, No. 251 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., June 9, 1952, Bull. civ. II, No. 194 (Fr.); Conseil d'état [CE] [highest administrative court] Sect., July 30, 2014, Rec. Lebon 349789 (Fr.).

40. Cour d'appel Paris [CA] [regional court of appeal] Paris, 1e ch., Oct. 2, 2018, 17/20580 (Fr.).

41. Ordonnance du 12 novembre 1943 sur la nullité des actes de spoliation accomplis par l'ennemi ou sous son contrôle [Ordinance of November 12, 1943 on the Annulment of Acts of Spoliation Committed by the Enemy or Under its Control], J.O., Nov. 18, 1943, p. 277.

42. CA Paris, 1e ch., Oct. 2, 2018, 17/20580 (Fr.).

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On the subject of the nullity of the sale, the Court noted that it is a “legal fact,” enforceable against third parties to the transaction, in particular the successive sub-purchasers, and lastly the defendants, even though thirty years have elapsed since the appellate court decision of 1951.⁴³ In addition, with the obvious desire to leave no loose ends, the court noted that Simon Bauer had indeed been the victim, in 1943, of a measure of spoliation, and that he had lost no time in pursuing his claim upon his return from the Drancy internment camp in 1944.⁴⁴ The Court acknowledged that Bauer had complied with the six-month delay awarded to the victims by the 1945 Ordinance to file a claim.

C. PRESCRIPTION AND STATUTES OF LIMITATION

Under French law, a property claim concerning a lost or stolen movable may be dismissed by either of two legal means: (i) acquisitive prescription, or (ii) extinctive prescription. A prescription is deemed acquisitive when a person of good faith is in possession of a lost or stolen movable and no adverse claim has been filed within three years of the theft or loss.⁴⁵ Providing the possession is public, peaceful, continuous, and unequivocal, the title of property is granted to the good faith possessor. A prescription is extinctive when the statute of limitations has run. At the time of the purchase, in 1995, the general statute of limitations was thirty years, but could be suspended if the person was unable to act.⁴⁶

The defendants opposed the two prescriptions, claiming (i) that their unchallenged good faith possession since 1995 met the criteria required by the law, so that they had acquired good title, and (ii) that the Bauer heirs were time-barred under various statutes of limitations, including not only the prescription extinctive, but also the U.K. Limitation Act of 1980⁴⁷ and the U.S. Holocaust Expropriated Art Recovery Act of 2016.⁴⁸

The court disagreed with this line of defense, holding that the possession of the painting by the defendants was not subject to the rules as set forth in the Civil Code, nor to any statute of limitations from any foreign law. The court found that the exceptional provisions of the 1945 Ordinance were to

43. *Id.*

44. Naomi Rea, *After a Long Legal Battle, French Court Orders American Couple to Return Nazi-Looted Picasso*, ARTNET NEWS (Nov. 8, 2017), <https://news.artnet.com/art-world/french-court-orders-restitution-of-nazi-looted-but-now-american-owned-pissarro-1142555>.

45. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2276 (Fr.).

46. C. CIV. arts. 2262, 2235 (Fr.) (before their modification by Loi 2008-561 of June 17, 2008, which changed the statute of limitation from a thirty-year period to a five-year period). See Loi 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile [Law 2008-561 of June 17, 2008, Reforming Limitation Periods in Civil Matters], J.O., June 17, 2008, p. 9856, art. 1.

47. Limitation Act 1980, c. 58, § 5 (Eng. & Wales), available at <https://www.legislation.gov.uk/ukpga/1980/58>.

48. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, §§ 4–5, 130 Stat. 1524, 1525–28.

be applied, and that it fulfilled the purpose that the Allies had set in 1945, with the court adding firstly the United States of America.⁴⁹ The court noted that Simon Bauer had acted well within the allotted timeframe and that according to the 1945 Ordinance the successive purchasers were deemed to be bad faith possessors in relation to the dispossessed owner. The court thus determined that the defendants could not invoke an acquisitive prescription defense.

The court also noted that the action of the Bauer heirs was not time-barred on the grounds of the thirty-year prescription. The court granted the defendants their right to invoke a public possession since their purchase in 1995 but observed that the defendants cannot add to it the period of possession of unknown previous owners, whose possession cannot, therefore, be considered public. The court also stated that a victim of spoliation cannot be required to be constantly on the lookout for his or her looted possession. Furthermore, because the painting had been in unknown hands from 1966 until 1995, the thirty-year prescription had not run.⁵⁰

III. The Visual Artists Rights Act and Street Art: 5Pointz

2018 marked a milestone in the ongoing saga of what has commonly become known as the 5Pointz litigation. At one time, what came to be known as 5Pointz has been variously described as the “United Nations,”⁵¹ “the Sistine Chapel of graffiti,”⁵² “a world-class museum on Jackson Avenue in Long Island City . . . free . . . open 24/7,” showing “the top artists in their field . . . hundreds of artworks,” or “New York’s hub for the high aerosol – or spray-can – art.”⁵³ 5Pointz had “the blessing of the building’s landlord, the developer Jerry Wolkoff, who has owned it since 1971.”⁵⁴

In 2013, Wolkoff announced that he would demolish 5Pointz and replace it with a condominium complex.⁵⁵ The 5Pointz litigation was initiated by twenty-one aerosol artists, each of whom had contributed artworks to

49. Cour d’appel Paris [CA] [regional court of appeal] Paris, 1e ch., Oct. 2, 2018, 17/20580 (Fr.).

50. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 7, 2017, 17/58735 pp. 9?10 (Fr.).

51. Scott Manson, *New York’s ‘United Nations of graffiti,’* THE GUARDIAN (Sept. 20, 2011, 4:37 AM), <https://www.theguardian.com/travel/2011/sep/20/new-york-graffiti-street-art-5pointz>.

52. *5Pointz, la “capilla sxtina” del grafiti en Nueva York que fue demolida y por la que un grupo de artistas recibirá US\$6,7 millones de indemnización* [5Pointz, *The “Sistine Chapel” of graffiti in New York that was demolished and for which a group of artists will receive US \$ 6.7 million in compensation*], BBC MUNDO (Feb. 15, 2018), <https://www.bbc.com/mundo/noticias-43070893>.

53. Sarah Bayliss, *ART/ARCHITECTURE; Museum With (Only) Walls*, N.Y. TIMES, Aug. 8, 2004, at 2002026, available at <https://www.nytimes.com/2004/08/08/arts/art-architecture-museum-with-only-walls.html>.

54. *Id.*

55. Ann-Derrick Gaillot, *Fight for your right to spray paint: A conversation with graffiti artist Lady Pink about the demolition of legendary graffiti spot 5Pointz—and the lawsuit that may prevent a similar tragedy from ever happening again*, THE OUTLINE (Feb. 20, 2018, 3:30 PM), <https://theoutline.com/post/3464/5pointz-lawsuit-lady-pink-interview?zd=1&zi=qlhkhdoh>.

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5Pointz.⁵⁶ The artists sought a preliminary injunction, under the Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A,⁵⁷ against Gerald Wolkoff and four of his real estate entities to prevent the demolition of 5Pointz and the consequent destruction of their paintings.⁵⁸ On November 12, 2013, Judge Frederic Block denied preliminary injunctive relief,⁵⁹ but stated that a written opinion would soon follow.⁶⁰ But on November 19, 2013, before the judge's written opinion could be issued, Wolkoff ordered the whitewashing of 5Pointz "in the middle of the night."⁶¹

Despite unsuccessful attempts to save the 5Pointz murals, "the artists continued to pursue their claims."⁶² On February 12, 2018, in *Cohen v. G&M Realty L.P.*, Judge Block handed down his final verdict on the 5Pointz case, holding that Wolkoff had violated the artists' "moral rights," and awarded the plaintiffs the maximum allowable statutory damages, in the amount of \$ 6.7 million.⁶³ The case "marks the first time that a court has had to determine whether the work of an exterior aerosol artist – given its general ephemeral nature – is worthy of any protection under the law."⁶⁴ The case also marks the first time that graffiti artists have won a lawsuit based on VARA.⁶⁵

The court has applied the holding of *Carter v. Helmsley-Spear, Inc.*,⁶⁶ determining that forty-five of the forty-nine paintings that were at issue in the case were works of visual art "of recognized stature," considering the artistic recognition outside of 5Pointz achieved by the plaintiffs and detailed findings as to the skill and craftsmanship of the works provided by a highly qualified expert.⁶⁷

56. Aislinn O'Connell, *The 5Pointz Case: Damages awarded against property owner for whitewashing street art*, 13 J. INTELL. PROP. L. & PRAC. 529, 530 (2018).

57. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a)(3) (2012).

58. See *Cohen v. G&M Realty L.P.*, No. 13-CV-05612 (FB) (RLM), 2018 U.S. Dist. LEXIS 99250, at *1 (E.D.N.Y. June 13, 2018).

59. See *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

60. See *Id.*

61. Gaillot, *supra* note 55.

62. See *Cohen*, 2018 U.S. Dist. LEXIS 99250; see also Megan E. Noh & Christopher J. Robinson, *5Pointz Opinion: Maximum Statutory Damages Awarded to Aerosol Artists; Additional Clarity on "Recognized Stature" Standard*, N.Y. CNTY. LAW. ASS'N L. BLOG (Feb. 23, 2018), <https://nyclalaw.wordpress.com/tag/cohen-et-al-v-g-m-realty-l-p-et-al/>.

63. *Cohen v. G&M Realty L.P.*, 320 F. Supp. 3d 421, 428, 447 (E.D.N.Y. 2018).

64. *Id.* at 427 (quoting *Cohen*, 988 F. Supp. 2d at 214).

65. See O'Connell, *supra* note 56 at 530.

66. See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994).

67. Judge Block observed that "expert testimony is not the *sine qua non* for establishing that a work of visual art is of recognized stature," recognizing the need for courts to utilize common sense in assessing whether a visual work is of recognized stature. *Cohen*, 320 F. Supp. 3d at 438; see also Uché Ewelukwa Ofodile, *Do Intellectual Property Rights Extend to Graffiti Art?: The 5Pointz Case*, JURIST (Mar. 30, 2018, 5:13 PM), <http://jurist.org/forum/2018/03/Ofodile-Graffiti-Art.php>.

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The 5Pointz decision continues to reverberate,⁶⁸ not only in the U.S., but worldwide,⁶⁹ suggesting that under the right circumstances graffiti art can be protected by existing copyright law.⁷⁰ This reverses both the perception of graffiti art as fringe (or, worse, illegal) art and the notion that graffiti artists must stand by helplessly as their works are destroyed or appropriated by more powerful players.⁷¹

Even after the damages award decision, the 5Pointz litigation continues. On September 21, 2018, Wolkoff filed an appeal of the decision, claiming that graffiti works are “ephemeral” and painting over them is “part of the culture.”⁷² More specifically, Wolkoff claimed that these pieces are not

68. For comments on the verdict, see Lise Berichel, *Around the Block Ruling in 5Pointz*, CTR. ART LAW (Apr. 10, 2018), <https://itsartlaw.com/2018/04/10/around-the-block-ruling-in-5pointz/>; see also Steve Schindler & Katie Wilson-Milne, *Moral Rights in Street Art: The 5Pointz Story*, ART LAW PODCAST (Apr. 9, 2018), <http://artlawpodcast.com/2018/04/09/5pointz-and-the-moral-rights-of-artists/>; Eileen Kinsella, *After 5Pointz, Can Artists and Developers Ever Work Together Again? Experts Lay Out the Way Forward*, ARTNET NEWS (Mar. 7, 2018), <https://news.artnet.com/art-world/5pointz-graffiti-art-vara-lawsuit-1234652>.

69. See 5Pointz, *la “capilla sixtina” del graffiti en Nueva York que fue demolida y por la que un grupo de artistas recibirá US\$6,7 millones de indemnización*, supra note 52; Ephrat Livni, *A landmark court case affirms that street art is high art*, QUARTZ (Feb. 15, 2018), <https://qz.com/1206623/a-landmark-5pointz-case-shows-the-legal-reasons-why-graffiti-is-art/>; Helga Marsala, *La battaglia di 5Pointz a Nyc. Vincono gli artisti: mega risarcimento per i graffiti cancellati* [The Battle of 5Pointz in N.Y.C. The Artists Win: Huge Damages for Erased Graffiti], ARTRIBUNE (Feb. 17, 2018), <https://www.artribune.com/arti-visive/street-urban-art/2018/02/la-battaglia-di-5pointz-a-nyc-vincono-gli-artisti-mega-risarcimento-per-i-graffiti-cancellati/> (It.); *New York: un juge donne gain de cause aux graffeurs du “5 Pointz,”* [New York: a judge wins the case for the graffiti artists of the “5Pointz”], FR. INFO (Feb. 21, 2018, 4:48 PM), https://www.francetvinfo.fr/economie/emplem/metiers/art-culture-edition/new-york-un-juge-donne-gain-de-cause-aux-graffeurs-du-5-pointz_2621932.html.

70. The number of cases involving street art are increasing, see, e.g., the Swedish fashion company H&M’s complaint filed on March 9, 2018, and voluntarily dismissed on March 16, 2018, against the graffiti artist Jason Williams, whose mural the fast-fashion brand used in an advertising campaign, and over which they claimed that the artist did not own any copyright. See Henri Neuendorf, *Street Artist Revok and H&M Settle Dispute Over an Ad That Featured His Work Without Permission*, ARTNET NEWS (Sept. 7, 2018), <https://news.artnet.com/art-world/revok-hm-ad-campaign-1345127>; H&M (@hm), TWITTER (Mar. 15, 2018, 1:37 PM), <https://twitter.com/hm/status/974384097319743840>; *UPDATED: H&M Calls Foul on “Vandal” Graffiti Artist’s Threat of Lawsuit*, THE FASHION LAW (Mar. 15, 2018), <http://www.thefashionlaw.com/home/hm-calls-foul-on-vandal-graffiti-artists-threat-of-lawsuit>.

71. See Francesco Mazzucchelli, *Street(icono)clashes: Blu vs Genus Bononiae: un caso di iconoclastia urbana* [Street(icono)clashes: Blu vs Genus Bononiae: A Case of Urban Iconoclasm], 18 OCULA 22 (2017) (exploring the events that accompanied *Banksy and Co: Art in the Urban Form*, an exhibition held in the City Museum of Bologna in May 2016, with a special focus on the reaction of the street artist Blu, who decided to erase all his street artworks in the city of Bologna) (It.).

72. Nicholas Rizzi, *5Pointz Developers File Appeal Over \$6.8M Judgement for Whitewashing Graffiti*, COMM. OBSERVER (Sept. 25, 2018, 12:13 PM), <https://commercialobserver.com/2018/09/5pointz-developers-file-appeal-over-6-75m-judgement-for-whitewashing-graffiti/>; see Eileen Kinsella, *The 5Pointz Developer Ordered to Pay Street Artists \$6.8 Million for Whitewashing Their Work Is Now Pushing Back*, ARTNET NEWS (Sept. 27, 2018), <https://news.artnet.com/art-world/5pointz-real-estate-developer-appeals-order-to-pay-street-artists-1358323>.

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protected under VARA, because VARA requires formal recognition of an artwork, not “subjective assessments of the works’ quality.”⁷³ In an interview with the *Commercial Observer*, Wolkoff argued that “[t]he nature of graffiti in itself is to paint over itself constantly, and [the artists] made reference to that and it’s what happened over the [twenty-seven] odd years.”⁷⁴ Meanwhile, a museum for 5Pointz has been established—the Museum of Street Art, or MOSA.⁷⁵

**IV. Convention on Cultural Property Implementation Act:
*United States v. Ancient Coin Collectors Guild***

After almost ten years, the U.S. Court of Appeals for the Fourth Circuit has resolved the litigation surrounding the import of ancient Cypriot and Chinese coins. In early 2009, in response to the U.S. Department of State entering into memoranda of understanding with Cyprus and China imposing import restrictions on certain categories of cultural objects (including ancient coins), the Ancient Coin Collectors Guild (an organization formed to lobby and litigate against restrictions on the ancient coin trade) (the “Guild”) shipped, through a London-based coin dealer, twenty-three ancient Cypriot and Chinese coins to Baltimore.⁷⁶ The invoice for the coins stated that the coins lacked any recorded provenance and that their respective find spots were unknown. Upon arrival in the United States, the coins were detained by Customs, which sent a Notice of Detention to the Guild, requiring that it provide Customs with documentation showing that the coins were being imported in compliance with the Convention on Cultural Property Implementation Act (CPIA).⁷⁷

Before the U.S. government filed a forfeiture action, the Guild brought suit against the State Department, Customs and Border Protection, and certain officials, alleging, among other things, that the seizure of the coins violated the Administrative Procedures Act and the Guild’s First and Fifth Amendment rights, and that in imposing import restrictions on ancient Cypriot and Chinese coins, the State Department had exceeded its authority. In August 2011, the U.S. District Court for the District of Maryland rejected the Guild’s claims,⁷⁸ specifically holding that, under the CPIA, Customs may seize items that are listed by category pursuant to a memorandum of understanding, and the burden then shifts to the importer

73. See Keith Estiler, *5Pointz Developers File Appeal Over \$6.8 Million USD Payment For Whitewashed Works*, HYPEBEAST (Sept. 28, 2018), <https://hypebeast.com/2018/9/5pointz-developers-file-appeal> (internal quotation marks omitted).

74. *Id.*; see Rizzi, *supra* note 72.

75. Lauren Hard, *5 Years Ago, Their 5Pointz Art Was Erased. Now There’s a Museum for It*, N.Y. TIMES, Sept. 16, 2018, at A22, available at <https://www.nytimes.com/2018/09/16/nyregion/5pointz-street-art-graffiti-museum-nyc.html>.

76. *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep’t of Homeland Sec.*, 801 F. Supp. 2d 383, 418 (D. Md. 2011), *aff’d*, 698 F.3d 171 (4th Cir. 2012).

77. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-13 (2012).

78. *Ancient Coin Collectors Guild*, 801 F. Supp. 2d at 418.

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to establish that the items at issue were properly exported from their country of origin. In October 2012, a unanimous panel of the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision.⁷⁹ But the Fourth Circuit did note, in a forfeiture action, that the Guild would be entitled to "press a particularized challenge to the government's assertion that the twenty-three coins are covered by import restrictions."⁸⁰

Following the Fourth Circuit's 2012 decision, the U.S. government filed a forfeiture action. In its amended answer, the Guild asserted multiple affirmative defenses in the nature of re-arguing and re-litigating the issues the district court and the Fourth Circuit had already decided in their earlier decisions, and the district court struck those affirmative defenses. In March 2017, the district court ruled on the parties' cross motions for summary judgment,⁸¹ granting the Guild summary judgment with respect to seven of the Chinese coins that did not match the categories of coins on the Chinese designated list and granting the U.S. government summary judgment with respect to the seven Cypriot coins and eight of the Chinese coins.⁸²

The Guild appealed the district court's decision, arguing that: (1) in a forfeiture action under the CPIA, the government bears the burden of showing that the coins were (a) first discovered in the State Party that requested the memorandum of understanding and subject to that country's export control, and (b) illegally removed after the date the import restrictions went into effect; (2) the district court improperly excluded the Guild's expert witness testimony as to the circulation of ancient coins; (3) the Customs regulation codified at 19 C.F.R. § 12.104 improperly deviated from the CPIA's definition of "archaeological or ethnological material of the State Party" by failing to require that such objects were "first discovered within, and [are] subject to export control by, the State Party";⁸³ (4) the district court improperly refused to approve the Guild's efforts at relevant discovery; and (5) the district court improperly struck the Guild's amended answer. In its March 22, 2018 decision, the Fourth Circuit affirmed the district court's decision in toto.⁸⁴

In its decision, the Fourth Circuit rejected the Guild's assertion that the government bears the burden of establishing the provenance and find spot of the specific coins at issue. The court noted that "Congress drafted the CPIA in an effort to balance procedural efficiency with procedural recourse."⁸⁵ The court held that the government met its burden when it showed that the

79. *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep't of Homeland Sec.*, 698 F.3d 171, 175 (4th Cir. 2012).

80. *Id.* at 185.

81. *United States v. 3 Knife-shaped Coins*, 246 F. Supp. 3d 1102 (D. Md. 2017), *aff'd sub nom. United States v. Ancient Coin Collectors Guild*, 899 F.3d 295 (4th Cir. 2018), *cert. denied*, No. 18-767, 2019 WL 659850 (U.S. Feb. 19, 2019).

82. *Id.* at 1123-24.

83. *United States v. Ancient Coin Collectors Guild*, 899 F.3d 295, 320 (4th Cir. 2018), *cert. denied*, No. 18-767, 2019 WL 659850 (U.S. Feb. 19, 2019) (internal quotation marks omitted).

84. *See id.* at 301.

85. *Id.* at 315.

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items at issue are listed pursuant to an MOU, and the burden then shifted to the importer to show that the items are properly imported. The court reasoned:

The second sentence of [CPIA] § 2604 requires the government in a forfeiture action to demonstrate that the listed, restricted material is “covered by” the relevant MOU. The first requirement of that sentence does not oblige the government to establish that the material at issue was “first discovered” within the relevant State Party.⁸⁶

The court also rejected the Guild’s claim that the language of the Customs regulation conflicts with the language of Section 2601(2) of the CPIA, and that this conflict resulted in a lack of fair notice to the Guild that the coins were subject to import restrictions. The court noted:

The Guild concedes that it used the Cypriot and Chinese Designated Lists as guideposts in deciding which ancient coins were likely to be seized by Customs. The fact that the Guild . . . correctly identified the coins subject to the import restrictions, shows beyond peradventure that importers of ordinary intelligence are able to ascertain the conduct that contravenes federal law. In these circumstances, the Guild’s due process rights were not violated . . .⁸⁷

This latest decision from the Fourth Circuit concludes this litigation challenging the applicability of memoranda of understanding under the CPIA to ancient coins. In both this and its earlier decision, the Fourth Circuit has analyzed and laid out the elements that each party in a civil forfeiture under the CPIA must establish and the placement of the burden of proof at different stages of the proceedings. Perhaps most significantly, however, these decisions indicate that no category of ancient artifact is, purely by its nature, exempt from import restrictions imposed by the CPIA.

⁸⁶. *Id.*

⁸⁷. *Id.* at 322–23.