



The Hauser Center
for Nonprofit Organizations

**Countering a Legal Threat to
Cultural Exchanges of Works of Art:
The Malewicz Case and Proposed Remedies**

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ABSTRACT

The ability of U.S. museums to borrow for exhibition works of art from museums owned by foreign governments is seriously threatened under a ruling of the Federal District Court for the District of Columbia in the case of *Malewicz v. City of Amsterdam* that is now on appeal. If upheld, future cultural exchanges may be seriously curtailed; in fact, there is evidence that the case has already had a chilling effect on the willingness of foreign lenders to permit their works of art to travel to the United States. The case in question involves works of art lent by the city of Amsterdam to two U.S. museums that, under the terms of the 1965 Immunity from Seizure Act, were protected from seizure while in the United States. At issue in the case is a separate statute, the Foreign Sovereign Immunity Act, under which foreign governmental entities whose property is at any time in the United States are immune from suit here unless the property involves a violation of international law and commercial activity. The District Court held that the Immunity from Seizure Act only protects works of art from seizure; it does not preclude suits for damages against the owners; and that the loan of art works to U.S. museums is “commercial activity” as that term is used in the Foreign Sovereign Immunity Act. In order to assure continued cultural exchanges, legislation is needed that will extend the Immunity from Seizure Act to protect a foreign owner from any suit based on the presence of artwork in the United States that has received protection under the Act.

A. INTRODUCTION

The United States has long recognized the importance of encouraging the cultural exchange of ideas through international loan exhibitions. The decision to send priceless paintings, sculptures or artifacts many thousands of miles from the security of a home museum is an act of trust. If that trust is breached or at all compromised, a foreign lender may simply decide to no longer participate in loan exhibitions. In 1965, in order to protect that trust and ensure the continued ability of American museums to engage in cultural exchanges that benefit the public, Congress enacted the Immunity from Seizure Act, 22 U.S.C. §2459 (“§2459”). For forty years, §2459 has succeeded in encouraging cultural exchange by reassuring foreign lenders that the priceless works lent to U.S. museums would return home. The public benefits emanating from these cultural exchanges have been numerous and valuable.

In March 2005, a federal district court in the District of Columbia called into question the protection available to foreign lenders. The court in Malewicz v. City of Amsterdam² determined that §2459 would not protect a foreign sovereign from litigation in the United States and, in fact, the mere presence of artworks in an international loan exhibition under the §2459 program could expose the lender to litigation. Furthermore, in June 2007, the district court ruled that the City of Amsterdam, through the activities related to its contract with American museums to send artworks to the United States, had sufficient contact with the United States to provide a jurisdictional basis for suit. As a result, foreign lenders have begun to express reluctance to loan works of art for exhibitions in American art museums.

² Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005).

The purpose of this paper is to explore the policy rationale for immunity, the implications of Malewicz, and suggest possible legislative solutions. The paper will first describe the background of the Malewicz opinion and current federal law, and will present a survey of anti-seizure laws in the individual U.S. states and foreign countries. It contains a discussion of the importance of immunity from seizure in the context of cultural exchange, and the detrimental impact that the Malewicz decision will have on cultural exchange. It concludes that a legislative solution is needed and contains legislative language to remedy the harm caused by the Malewicz opinion.

B. BACKGROUND

1. The Malewicz opinion

In 2003, the Stedelijk Museum, which is located in and owned by the City of Amsterdam, exported fourteen works by the Russian artist Kazimir Malewicz to be part of temporary exhibitions at the Solomon R. Guggenheim Museum in New York City and the Menil Collection in Houston. The U.S. State Department granted immunity from seizure to the fourteen Malewicz pieces, pursuant to the Immunity From Seizure Act (§2459), 22 U.S.C. §2459, based on the determination that the objects were of cultural significance, and that their temporary exhibition within the United States was in the national interest. Effectively, the artworks were immune from seizure and other forms of judicial process that would deprive the borrowing museums, or any carrier engaged in transporting the artworks, of custody or control of the artworks while in the United States.

Shortly before the art pieces were sent back to the Stedelijk at the close of the exhibition, thirty-five of the heirs of Malewicz (the “Malewicz Heirs”) filed suit against the City of Amsterdam in the United States District Court for the District of Columbia. Although foreign sovereigns are usually immune from suit in U.S. courts under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1602 et. seq., there is an exception to this immunity when: (1) rights in property taken in violation of international law are at issue; and (2) the property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state.³ The Malewicz Heirs alleged that this exception applied in this case because: (1) the Stedelijk obtained the artworks in violation of international law⁴; and (2) the artworks were present in the United States for a loan exhibition, which they asserted was a commercial activity. The Malewicz Heirs asked for the return of the artworks, or if that was not possible, damages in excess of \$150 million.

After the City of Amsterdam moved to dismiss the case, the U.S. State Department filed a Statement of Interest with the court, arguing that §2459 was intended to preclude lawsuits of this kind, that would have a chilling effect on the willingness of foreign sovereign lenders to lend cultural objects to American museums. The State Department stressed that foreign states would not expect to be exposed to litigation solely because of their loan of U.S. government-immunized artwork to a non-profit exhibition.

³ 28 U.S.C. §1605(a)(3).

⁴ According to the plaintiffs’ brief, the history of the artworks is as follows: In 1927, Kazimir Malewicz, brought over 100 of his works of art to Berlin for an exhibition. When he unexpectedly had to return to Russia, he entrusted his art pieces to four friends in Germany. Most of the artworks ultimately ended up with one of the friends, Mr. Hugo Haring. In the 1950s, the Stedelijk Museum approached Mr. Haring on numerous occasions in an effort to persuade him to sell the Malewicz pieces to the museum. Despite repeated refusals to sell, in which he stated that he was only a custodian of the works and had no right to convey ownership, Mr. Haring finally agreed to sell the works to the Stedelijk in 1956.

Abrogating immunity in such a manner would not only be unfair, but would also threaten the vitality of cultural exchange taking place between the U.S. and other nations.

Nevertheless, the district court's decision held that §2459 only precluded an attempt to seize the artworks from the borrowing institution; it did not preclude the foreign lender from being sued for damages. The court emphasized that a litigant may not *seize* a foreign sovereign's property that is in the U.S. on a cultural exchange and may not *serve* the borrowing institution with judicial process to interfere in any way with the physical custody or control of the artworks, but noted that the Malewicz Heirs had attempted to do neither. Rather, the Malewicz Heirs had sued the City of Amsterdam (as opposed to either of the borrowing museums) for monetary damages (as opposed to an attempted seizure). Such action was permissible because, according to the court, §2459 simply precluded an attempt to keep the works from being seized, but did not prevent the foreign lender from being sued.

The court then determined that the Malewicz Heirs had at least stated, though had yet to prove, a case for an exception to the FSIA in their allegation that the artworks had been taken in violation of international law, were present in the United States, and were in the United States in connection with a commercial activity carried on by the foreign state (i.e., the City of Amsterdam) in the United States. The court emphasized that, under FSIA, "commercial activity" is determined by the nature of the activity, rather than its purpose. In construing the nature of an activity, the court distinguished between activities that could only be performed by a sovereign (which are afforded immunity) and those that private persons can engage in (which are not entitled to immunity). Because commercial activities can be engaged in through private action, they are not immunized.

As such, the district court ruled that the loaning of artworks constituted “commercial activity” because a loan is an activity that a private person or entity can engage in, and therefore is not a sovereign act that warrants immunity. Because the FSIA exception requires “substantial contact with the United States,” the court recognized the merit of the City of Amsterdam’s and the U.S. Government’s argument that the City’s contacts through the loan arrangement were possibly too minimal to expose it to jurisdiction under FSIA. The court indicated that additional discovery was needed in order to determine if the loan activities constituted “substantial contact” with the United States.

The City of Amsterdam appealed the district court’s decision to the United States Court of Appeals for the District of Columbia, but the court decided that it did not yet have appellate jurisdiction to review the lower court’s decision. The City of Amsterdam then renewed its motion to dismiss in district court, submitting documents to show that its contacts with the United States in connection with the loan were insufficient to provide a basis for jurisdiction under the FSIA.⁵ However, the court found that the City of Amsterdam’s contacts were extensive enough to be deemed “substantial.” The court noted that the City of Amsterdam received 25,000 euro as consideration for the loan, contracted with the American museums knowing that the paintings would be displayed in the United States, and sent several Stedelijk employees to the United States for thirty-four days to oversee the safety of the paintings. Although the contract terms did not require that the overseers be Stedelijk employees, the court found it significant that the Stedelijk was the party that insisted on expert couriers accompanying the artworks, and knowingly agreed to send its own employees pursuant to that contract provision. Therefore, the court held that because the City of Amsterdam contracted with the American museums to

⁵ Malewicz v. City of Amsterdam, 2007 U.S. Dist. LEXIS 46312 (D.D.C. June 27, 2007)

send the artworks to the United States, and a major portion of that contract was performed in the United States with the help of Stedelijk employees, the City of Amsterdam's contact with the United States in connection with the loan was substantial. The City of Amsterdam's renewed motion for dismissal was thus denied. The City of Amsterdam is currently appealing the district court's decision to the United States Court of Appeals for the District of Columbia.

2. Current federal law

Immunity From Seizure Act

The Immunity From Seizure Act (§2459), 22 U.S.C. §2459, provides that whenever any work of art or other culturally significant object is imported into the United States from a foreign country in order to be part of a temporary exhibition operated without profit by a U.S. cultural or educational institution, no court in the U.S. may issue or enforce "any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States, of custody or control of such object" if prior to the object's importation, it has been determined that said object is of cultural significance and that the temporary exhibition is in the national interest. A notice to that effect must be published in the Federal Register. As construed by the Malewicz court, §2459 only protects immunized artworks from *seizure*, but does not protect the foreign lender from being sued for damages.

Congress' intent in enacting §2459 was to ensure the continued viability of American art museum exhibitions, which would be severely hindered if foreign lenders were reluctant to entrust their collections to such institutions. The House Judiciary

Committee's Report⁶ acknowledged that the legislation would allow institutions to import loaned artwork from foreign countries "without the risk of the seizure or attachment of the said objects by judicial process," and concluded by noting that the valuable purposes of the bill would "contribute to the educational and cultural development of the people of the United States." The importance of immunity from seizure for cultural exchanges was urged during the House debate on the bill, during which Representative Byron Rogers of Colorado asserted that "if a foreign country or an agency should send exhibits to this country in the exchange and cultural program and someone should decide that it is necessary for them to institute a lawsuit against that particular country or those who may own the cultural objects, the bill would assure the country that if they did send the objects to us, *they would not be subjected to a suit and an attachment in this country.*"⁷

Congress' intent in promoting cultural exchanges was buttressed by support from the Department of State and the Department of Justice. The House report cited correspondence with the Department of State, which declared that "the bill is consistent with the Department's policy to assist and encourage educational and cultural interchange. Its enactment would be a significant step in international cooperation...."⁸ The report also included communication from the Department of Justice, which stated that "the commendable objective of this legislation is to encourage the exhibition in the

⁶ H.R. Rep. 89-1070 (1965), as reprinted in 1965 U.S.C.C.A.N. 3576, 3577-78 [hereinafter IFSA House Report].

⁷ 111 Cong. Rec. 25929 (1965) (statement of Rep. Rogers) (emphasis added).

⁸ IFSA House Report, *supra* at note 6, at 3577.

United States of objects of cultural significance *which, in the absence of assurances such as are contained in the legislation, would not be made available.*”⁹

The very circumstances leading to the enactment of §2459 demonstrate the necessity of having such an immunity law in place. At the time of its enactment, an exchange was pending between a Soviet museum and the University of Richmond that involved several pieces of art that had been appropriated by the Soviet government. The Soviets insisted on a grant of immunity from seizure as a condition to the loan, in order to protect against former Soviet citizens who may have had valid claims to ownership of the artwork. Not only does this incident exemplify the necessity of providing immunity from seizure to artworks on loan for foreign countries, but it also reveals a legislative preference for the benefits of cultural exchange over granting jurisdiction to litigate claims of rightful ownership.¹⁰

The history of the federal legal landscape regarding sovereign immunity prior to the enactment of §2459 also sheds light on the congressional intent behind §2459’s enactment. Historically, the United States had adhered to the “Act of State doctrine,” which generally prevents a U.S. court from adjudicating disputes involving the assessment of the legality of acts, undertaken in its own sovereign territory, of a foreign government recognized by the U.S.¹¹ In 1964, one year prior to the enactment of §2459, Congress enacted the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2)¹², which

⁹ Id. (emphasis added).

¹⁰ Rodney M. Zerbe, *Immunity From Seizure for Artworks on Loan to United States Museums*, 6 NW. J. Int’l L. & Bus. 1121, 1124 n.1 (1984).

¹¹ Id. at 1127-28.

¹² The text of the Second Hickenlooper Amendment states: “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

narrowed the scope of the Act of State doctrine by requiring courts to decide on the merits whether an expropriation by a foreign sovereign violated international law. This congressional action severely restricted the foreign sovereign's immunity against jurisdiction over claims to property allegedly taken in violation of international law, which had the effect of decreasing a foreign lender's confidence that its property would not be seized. As noted in the U.S. Statement of Interest in Malewicz, §2459 was enacted in 1965 to address this "threat to cultural exchange posed by the increased vulnerability to lawsuits of foreign artwork on temporary loan to this country's cultural institutions."¹³ By enacting §2459, which offers more dependable protection than the Act of State doctrine, as a response to the reduction in immunity generated by the Second Hickenlooper Amendment, Congress clearly expressed its commitment to fostering the exchange of art through immunizing foreign-loaned cultural objects from seizure.

Foreign Sovereign Immunities Act

The United States originally adhered to an "absolute" theory of sovereign immunity, under which foreign sovereigns were absolutely immune from suit in U.S. courts. In 1952, the United States officially switched to a "restrictive" theory of sovereign immunity, under which immunity is granted to a foreign state's public acts, but not to its private acts. This change was codified by the passage of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §1602 et seq., which provides foreign states

that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." 22 U.S.C. § 2370(e)(2) (2006).

¹³ Statement of Interest of the United States at 5-6, Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005) (No. 04-0024) [hereinafter U.S. SOI].

with immunity from the jurisdiction of U.S. courts, with certain exceptions. Commercial activity, which is determined by the nature of the activity rather than by its purpose, is one of the exceptions to sovereign immunity. In particular, the Malewicz case involved the exception under §1605(a)(3) of FSIA, which denies sovereign immunity in cases in which rights in property taken in violation of international law are at issue and that property is present in the United States “in connection with a commercial activity carried on in the United States by the foreign state.” The section defines such activity as commercial activity carried on by such state and having *substantial contact* with the United States. The Malewicz court ruled that a loan of artwork constituted commercial activity because, in examining the nature of the activity, a loan was an act in which a private entity could engage in, meaning that such act was not “sovereign.” However, the Malewicz Heirs also needed to meet the second test, proving that the City of Amsterdam had substantial contacts with the United States through the loan of artwork; in considering further evidence proffered by the City of Amsterdam in support of its renewed motion to dismiss, the court ruled that the City’s contacts were sufficient to satisfy this standard.

The House Judiciary Committee’s Report¹⁴ for the FSIA explains that one of the purposes of the FSIA was to provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state, thus rendering unnecessary the seizure and attachment of a foreign state’s property in order to obtain jurisdiction. In effect, the FSIA created a federal long-arm statute for suits against foreign states. Importantly, §1605(a)(3)’s stipulation that the property at issue must be “present in the

¹⁴ H.R. Rep. 94-1487 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606 [hereinafter FSIA House Report].

United States in connection with a commercial activity carried on in the United States by the foreign state” creates a nexus between the two countries that Congress intended would reflect International Shoe v. Washington’s¹⁵ requirements of minimum jurisdictional contacts and adequate notice.¹⁶ As International Shoe stated, the activities at issue must establish “sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice” for a court to assert jurisdiction over a person. Congress itself noted that “incorporating these jurisdictional contacts...satisfies the due process requirement of adequate notice....”¹⁷

C. COMPARATIVE LAW

Although the United States was the first nation to enact an immunity from seizure statute, an increasing number of nations, and subdivisions of nations, have followed suit.

1. Immunity laws in individual U.S. states

As of 2006, only a handful of states have enacted laws protecting loaned artwork from seizure. Of these states, only New York’s statute has been the subject of any litigation.

New York

New York’s Arts and Cultural Affairs Law (ACAL) stipulates that “no process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art” while the work is traveling to or from or while on exhibition, provided that it is on loan from a nonresident and part of a not-for-

¹⁵ 326 U.S. 310 (1945).

¹⁶ FSIA House Report, *supra* note 14, at 6612.

¹⁷ *Id.*

profit exhibition conducted within New York.¹⁸ ACAL differs from §2459 in two main ways: 1) immunity is automatically granted, thus museums are not required to apply for a special grant of immunity; 2) immunity is granted to the *artwork itself*, as opposed to the borrowing institution. ACAL was thrust into the spotlight in the late 1990s, when two paintings loaned to the Museum of Modern Art from Austria were effectively seized due to an ownership dispute. At the core of the controversy was a debate over whether ACAL's protections extended not only to civil seizures, but to criminal seizures as well. The court ultimately held that the statute covered both types of seizures. The litigation surrounding this controversy is discussed more fully below.

Texas¹⁹

Texas' statute provides that a work of fine art may not be seized while it is 1) en route to an exhibition, or 2) in the possession of the exhibitor or on display as part of the exhibition, so long as the exhibition is held under the auspices of an organization exempt from federal income tax or an institution of higher education; is for a cultural, educational, or charitable purpose; and is not for the exhibitor's profit. Like New York's ACAL, the protection offered by the Texas statute is automatic. However, the statute does not apply to artwork where "theft of the work of art from its owner is alleged and found proven by the court."

Rhode Island²⁰

The language of Rhode Island's anti-seizure statute is identical to that of New York's ACAL. Because the statute has not been subject to litigation, it is unclear whether it applies to both civil and criminal seizures.

¹⁸ N.Y. Arts and Cult. Aff. Law §12.03 (Consol. 2006).

¹⁹ Tex. Civ. Prac. & Rem. Code Ann. § 61.081 (2006).

²⁰ R.I. Gen. Laws § 5-62-8 (2006).

Tennessee²¹

Tennessee's statute is similar to that of Rhode Island's and New York's, except in two respects. First, it explicitly notes that works of art are exempt from both civil and criminal seizures, thus shielding the statute from the type of litigation that New York's statute generated. Second, the statute does not prevent a lawsuit against an owner of a work of art in any court that has proper jurisdiction over such owner.

Pennsylvania²²

Pennsylvania does not have a specific anti-seizure law aimed at protecting artwork, but its statute regarding tangible personal property exhibited at international exhibitions could serve the same purpose, albeit in a very limited fashion. The statute provides that tangible personal property on exhibition at any international exhibition held under the auspices of the federal government is exempt from attachment or any other seizure for any cause whatsoever by the authorities of the exhibition or otherwise. Conceivably, this statute could be used to shield artwork displayed at a federal international exhibition from seizure. However, the statute has not been the subject of any litigation, and thus the scope of its protection is unknown.

2. Immunity law in other countries

Canada²³

Five Canadian provinces have enacted anti-seizure laws. British Columbia's statute offers the broadest protection, providing automatic immunity from proceedings

²¹ Tenn. Code Ann. § 28-3-115 (2006).

²² 42 Pa. Cons. Stat. § 8125 (2006).

²³ Law and Equity Act, R.S.B.C. 1996, c. 253, s. 55 (2006) (Can.); The Foreign Cultural Objects Immunity From Seizure Act, R.S.M. 1987, c. F140 (2006) (Can.); Foreign Cultural Objects Immunity From Seizure Act, R.S.O. 1990, c. F.23, s.1 (2006) (Can.); Foreign Cultural Property Immunity Act, R.S.A. 2000, c. F-17, s.2 (2006) (Can.); Code of Civil Procedure art. 553.1 (Can.).

for possession of or a property interest in artworks and cultural objects brought into the province for a temporary public exhibit. In contrast, both Manitoba's and Ontario's statutes protect only against seizures and are limited to artworks or objects on loan from foreign countries for temporary exhibitions that have been determined by the government to be of cultural significance and in the interest of the people of the respective province. Alberta's statute is similar to that of Ontario's and Manitoba's, but expands its scope to cover the temporary use of cultural property for research purposes by the government of Alberta or the borrowing institution. Finally, Quebec's statute exempts from seizure artworks brought into the province to be placed on public exhibit, as long as the government has declared the artworks to be exempt and they were not originally conceived, produced, or created in Quebec.

France²⁴

France has enacted legislation protecting from seizure "all cultural objects lent by a foreign power, local authority or cultural institution to the French State or any other legal person designated by the French State, for public exhibition in France." The French law does not apply automatically to all exhibitions; a government order is necessary in each case. Furthermore, the statute does not provide general protection to all artworks borrowed from foreign lenders. Rather, it is limited to those which are publicly owned and which are loaned to public entities within France. As such, a private foreign lender will not be protected by the French law. The anti-seizure legislation was instituted in response to a 1993 litigation involving a French national's claim to two paintings on loan to a French museum from Russia, discussed more fully below.

²⁴ Information on the French statute and the litigation leading to its enactment is found in Ruth Redmond-Cooper, *Disputed Title to Loaned Works of Art: The Shchukin Litigation*, 1 Art Antiquity and L. 73 (1996).

Germany²⁵

In 1998, Germany enacted an anti-seizure law in support of international cultural exchange. The law provides that for foreign cultural property loaned temporarily to an art exhibit in the Federal Republic of Germany, the “competent highest state authority” may, in consultation with the Federal Central Authority, issue a guarantee of return to the lender. For art exhibits instituted by the German government itself or a federal agency, the competent *federal* authority decides whether to issue the guarantee. Once issued, a guarantee cannot be withdrawn or cancelled. Furthermore, the guarantee’s effect is that third parties cannot raise rights to the cultural property against the lender’s claim for recovery. Finally, until the lender has recovered the cultural property, judicial proceedings on recovery, interim measures, attachments, and seizures are inadmissible.

Switzerland

Under Switzerland’s Federal Act on the International Transfer of Cultural Property, when cultural property is on temporary loan for an exhibition in a Swiss cultural institute, the lending institution may request the issuance of a return guarantee. The request is published in the Federal Bulletin, which contains a detailed description of the cultural property and its origin. Third parties may file a written objection against the issuance of a return guarantee within 30 days of publication. Failure to file an objection precludes the parties from further action, as the effect of the return guarantee is that

²⁵ Information on the German, Australian, Irish, and Swiss statutes is found in Matthias Weller, *Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-seizure Statutes in Light of the Liechtenstein Litigation*, 38 Vand. J. Transnat’l L. 997 (2005). The English version of the Swiss statute can also be found at <http://www.bak.admin.ch/bak/themen/kulturguetertransfer/01104/index.html?lang=en>. The Irish statute is also available online at <http://www.irishstatutebook.ie/ZZA17Y1994S5.html>.

neither private parties nor authorities may make legal claims to the cultural property as long as it is in Switzerland.

Belgium²⁶

Belgium's statute protects cultural objects loaned by a foreign country or foreign public or cultural entity which are exhibited in a Federal Scientific institution. The law does not explicitly protect the objects while they are in transit to or from the borrowing institution, but it is possible that this could be implied.

Austria

Austria's legislation bestows power on the Federal Ministry of Education, Science and Culture to grant immunity from seizure for foreign cultural property that is temporarily borrowed for an exhibit by federal museums (hence, the act does not apply to all Austrian museums). In order to attain such protection, the borrowing federal museum must make an application. If immunity is granted, any court action seeking possession or seizure of the cultural property, or measures of enforcement against it, are inadmissible until the property has been returned to the lender.

Israel²⁷

Recently, Israel passed an anti-seizure law allowing the Minister of Justice to issue an order where, for so long as the cultural property is in Israel by virtue of a loan agreement between the State of Israel or a cultural institution in Israel and a foreign country or cultural institution: 1) an Israeli court shall not have jurisdiction in a claim relating to a right to title or possession of the cultural property, or another right that is

²⁶ Information on the Belgian and Austrian statutes is found in Dept. for Culture, Media and Sport, Consultation Paper on Anti-Seizure Legislation, March 7, 2006 (U.K.). Information on the potential British statute is also found in the Consultation Paper.

²⁷ <http://www.jl-lawfirm.com/files/pdfs/laws/English-Translation-of-the-Anti-Seizure-Law-En.pdf>

contrary to the right of the lender; 2) an Israeli court shall not issue any decision preventing the return of the cultural property to the lender at the end of the loan period. The Minister must give notice of his intention to issue an order by publishing it on the website of the Ministry of Justice and including a photograph of the cultural property, as well as provenance documentation. Within 30 days of the publication of the notice, any person may submit an objection, based on certain grounds, to the issuance of an order within. An order will not be issued until after the end of the 30-day period or, if an objection is submitted, after the objection has been decided on.

Australia²⁸

While Australia does not have specific anti-seizure legislation, the Protection of Movable Cultural Heritage Act exempts from forfeiture protected objects of foreign countries which are imported under an agreement that the object be loaned, for a period not exceeding 2 years, to the Commonwealth, State, Territory, principal collecting institution, or exhibition coordinator for the purpose of the object's public exhibition in Australia.

Ireland

Like Australia, Ireland has not specifically enacted anti-seizure legislation. However, the National Monuments (Amendment) Act, which requires the reporting of possession of archaeological objects, exempts from this duty objects that have been imported into the State for a period of no more than 2 years for exhibition, research, or restoration.

Britain

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[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/4AE22E1FA6EB2EE8CA256FB9002265F2/\\$file/ProtecMovCultHer86WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/4AE22E1FA6EB2EE8CA256FB9002265F2/$file/ProtecMovCultHer86WD02.pdf)

Britain appears to be considering the enactment of anti-seizure legislation. In March 2006, the Department for Culture, Media and Sport issued a Consultation Paper which considered whether the United Kingdom should enact anti-seizure legislation, and if so, what form that legislation should take. The paper recognized that if the United Kingdom refused to enact such measures, its ability to continue to produce prestigious exhibitions would be severely threatened.

D. ISSUES

1. The importance of immunity

International art loans produce significant benefits to individuals and to the nations involved in the exchange. At the individual level, a diversity of artwork can serve to²⁹:

- Reduce parochialism and ignorance by expanding the individual's artistic experience.
- Enrich the individual's life through aesthetic and intellectual stimulation.
- Spur and promote scholarship, as art often plays an important role in historical, psychological, and philosophical studies.
- Inspire more art. Cultural imports from a foreign country can stimulate artistic minds in brand new ways, offering fresh inspiration that otherwise might not occur if artists were always steeped in the artistic tradition of their resident country.

²⁹ Paul M. Bator, *An Essay on the International Trade in Art*, 34 Stan. L. Rev. 275, 305-08 (1982).

At the national level, international loans generate significant benefits for countries on both sides of the exchange:

- For the exporting country, art serves as an “ambassador” which ignites interest in, understanding of, and compassion for that country. As such, international exchange of artworks can foster the breakdown of parochialism and increase international harmony.³⁰
- For the importing country, art serves to widen its citizenry’s cultural horizons and stimulate new art and scholarship. Of particular interest to nations which are home to heterogeneous immigrant populations, such as the United States, is to allow various ethnic groups to maintain contact with the art of their native countries, which helps create a sense of roots and ethnic community.³¹
- The international exchange of artworks symbolizes and fosters diplomatic relations. The United States government itself has recognized that “implementation of §2459 advances important U.S. national interests, including public diplomacy initiatives of the U.S. government, outreach efforts of the American museum community, and avoidance of friction with foreign lenders, including foreign states and their political subdivisions.”³²

In order to fully maximize the benefits of international artistic exchange, the free flow of artwork across national borders must be encouraged. This, in turn, requires the

³⁰ Id. at 306; Zerbe, *supra* note 10, at 1124.

³¹ Bator, *supra* note 29, at 307.

³² Supplemental Statement of Interest of the United States at 2, Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005) (No. 04-0024).

borrowing nation to issue a grant of immunity from seizure, which encourages the exchange of art by assuring protection for owners who are reluctant to lend their pieces due to fear of potential litigation. Immunity from seizure is imperative because:

- If borrowing museums are unable to offer guarantees against seizure of loaned artwork, which is often a crucial factor in the decision to engage in a cultural exchange, lenders are likely to refuse to lend their collections at all.³³ As American museums are increasingly relying on major loan exhibitions from other countries in response to declining museum revenues from more traditional sources of financing,³⁴ such refusals to lend would have a highly negative effect on the American museum community.
- In an era where museums' and private collectors' rightful ownership of artwork is becoming increasingly unstable due to the public exposure of artwork displaced during World War II, the need for statutory protection is more urgent than ever.³⁵
- Both the art exhibits themselves and the publicity surrounding them are fundamental contributors toward the recovery of stolen artwork by increasing the chance that rightful owners will be alerted to the whereabouts of their displaced artwork. Fear of seizure may drive such

³³ According to George Ortiz, a leading private collector and lender, a "firm guarantee against judicial seizure is an 'essential' factor in the decision to lend." Norman Palmer, *Art Loans* 103 (Kluwer Law Int'l 1997). For example, two paintings were absent from a 1994 Monet exhibition at the Musee de Beaux-Arts at Rouen, France due to such considerations. *Id.*

³⁴ Zerbe, *supra* note 10, at 1121 n.1.

³⁵ Alexander Kaplan, *The Need for Statutory Protection From Seizure for Art Exhibitions*, 7 J.L. & Pol'y 691, 701 (1999).

works underground, making the resolution of such ownership claims much more difficult.³⁶

2. Policy impact of Malewicz

As already discussed, §2459 was enacted with the intention of promoting the international exchange of cultural property, and the cultural benefits that accompany such exchanges. The realization of these benefits depends heavily upon providing ample assurance to foreign lenders that participation in an immunized exhibition will not subject them or their artwork to litigation in U.S. courts. However, the result of the Malewicz decision is to weaken the force of §2459's protections: a piece of artwork would be immunized from seizure while it is in the United States, but the foreign sovereign owner could be sued in U.S. courts for a wrongful taking, merely by virtue of having lent the work to an American museum. If the purpose of immunity statutes is to assuage the reluctance of lenders to send their works of art into another country due to fear of seizure, the Malewicz decision actually took a step in the other direction. Just as foreign lenders would be reluctant to send works of art to the United States if the artwork would be subject to seizure, such lenders would also be hesitant to lend artworks if a loan would be deemed sufficient to serve as the sole jurisdictional basis for a lawsuit that otherwise could not have been brought in absence of the loan.³⁷ Moreover, Malewicz threatens to thwart the legislative preference for cultural exchange over the claims of rightful owners that is evident from an examination of §2459's legislative history. By permitting the exercise of jurisdiction under such circumstances, Malewicz threatens to undermine severely the principle objectives of §2459 and to create friction in U.S. foreign relations.

³⁶ Laura Popp, *Arresting Art Loan Seizures*, 24 Colum.-VLA J.L. & Arts 213, 227 (2001).

³⁷ U.S. SOI, *supra* note 13, at 7.

In addition, foreign lenders have come to rely on the protections that §2459 offers. Since its enactment, §2459 protection has been granted with increasing frequency. A search of the Federal Register on Westlaw reveals that over one thousand immunity notices have been published since 1981. From 1981 to 1989, 171 notices were published; 257 were published from 1990-1999; and 447 were published from 2000 through the present. The increase in grants indicates an increase in requests, which are likely the result of foreign lenders' increased reliance on the immunity provided.³⁸ To weaken §2459's protections now would undermine not only Congress' support for cultural exchange, but also the foreign lenders' faith in this immunity protection provided. Effectively, such an action would shake their confidence in loaning artwork to United States museums, thus having a detrimental effect on goals behind §2459's enactment.

Malewicz is likely to result in a chilling effect on the willingness of foreign sovereign lenders to make their art available to U.S. museum exhibitions. When crafting New York's anti-seizure law, New York Attorney General Louis J. Lefkowitz stressed that exemption from seizure should not contain any loopholes because such loopholes would make lenders feel "half-safe," resulting in decisions on the lenders' part to completely eliminate the possibility of trouble by keeping their artworks at home.³⁹ Similarly, puncturing §2459 with any loopholes, such as by allowing jurisdiction based merely on the presence of loaned artworks, would have the same result.

Two cases involving the attempted seizure of loaned artworks exemplify the detrimental impact that inadequate protection can have on cultural exchange. In 1993,

³⁸ Popp, *supra* note 36, at 216-17.

³⁹ Kaplan, *supra* note 35, at 706-07 n.71 (citing Supplemental Memorandum for the Governor, June 14, 1968, Governor's Bill Jacket to 1968 N.Y. Laws 1065).

the Centre National d'Art et de Culture Georges Pompidou in Paris organized a major Matisse exhibition which included works borrowed from two Russian national museums. When the paintings arrived in France, a French national sought the sequestration of certain pieces loaned by the Russian museums in order to determine a claim of ownership. The Paris Tribunal de Grande Instance dismissed the action on the basis of the Russian Federation's sovereign immunity, and the Paris Court of Appeal subsequently ruled that because the disputed paintings had already left France, the application lacked any legal foundation. Neither court reached the policy concerns affecting international cultural exchanges. Concerned about the courts' failure to address the policy implications affecting the security of museum loans, one commentator noted that "if doubt subsists on this issue, major international exhibitions will be impossible, since owners will refrain from lending if they consider that their works may be placed in jeopardy by ownership claims of third parties." The response of the French government was swift, however, and in 1994 it enacted an anti-seizure law, which has subsequently been applied to a number of exhibitions.

Moreover, France's enactment of an anti-seizure statute places it among a growing number of nations that are enacting such laws. This trend toward immunizing artwork and/or culturally significant objects evinces a recognition of the need for such guarantees if cultural exchange is to continue at a satisfactory level. In order to remain competitive in an environment in which more and more nations are enacting immunity from seizure statutes, the United States needs to refrain from diminishing the scope of the protection it offers to foreign lenders.

The second example centers around two paintings by Egon Schiele on loan to New York’s Museum of Modern Art (MoMA) from the Leopold Foundation in Austria, that became the subject of an ownership dispute in the late 1990s⁴⁰ (hereinafter the Schiele Case). In January 1998, the Manhattan District Attorney served a subpoena duces tecum on MoMA, requiring the museum to produce the paintings at a grand jury proceeding, then effectively seizing the paintings because they could not be returned to Austria. In response, MoMA filed a motion to quash based on New York’s Arts and Cultural Affairs Law (ACAL) §12.03. A widely-publicized spectacle ensued in which the District Attorney argued that the statute did not apply to criminal proceedings, while the museum argued that legislative history showed that the law was intended to cover both civil and criminal seizures. Finally, in September 1999, the New York Court of Appeals ruled in favor of MoMA, holding that ACAL §12.03 did indeed apply to both criminal and civil proceedings, as was amply supported by legislative history. The court then went on to rule that the subpoena effectuated a seizure of the paintings, and was thus prohibited by ACAL §12.03.⁴¹ However, within hours of the Court of Appeals’ ruling, the U.S. Attorney’s office obtained a seizure warrant for one of the paintings, “Portrait of Wally,” citing federal laws allowing seizure of stolen property and prohibiting smuggling.⁴² “Portrait of Wally” has remained in the United States ever since, entrenched in legal battles.⁴³

⁴⁰ The respective claimants for each painting are heirs to persons who artwork had been stolen by the Nazis during World War II. Popp, *supra* at note 36, 220 n.42. See also *Museum Wins Dispute Over Art Allegedly Stolen by Nazis*, CNN.com, Sept. 21, 1999, <http://www.cnn.com/US/9909/21/looted.art/>.

⁴¹ *People v. Museum of Modern Art*, 719 N.E.2d 897, 901-02 (N.Y. 1999).

⁴² Popp, *supra* note 36, at 222.

⁴³ There was evidence that the other painting, “Dead City III,” had been restituted to its rightful owner and was therefore not covered by the warrant. “Dead City III” has been returned to Austria. *Id.* at 222 n. 58.

Although the New York Court of Appeals ultimately read ACAL §12.03 to afford broad protection to loaned artwork, the Schiele Case had a significantly adverse impact on the New York museum community while litigation was in progress. Prominent European museums announced that “the actions of the Manhattan District Attorney have shaken our confidence in the worth of the Exemption from Seizure laws both at the state and at the federal level. European museums require reassurance on this point, if they are to lend again to exhibitions in the United States.”⁴⁴ Indeed, MoMA officials reported that a number of European museums and collectors expressed reluctance to lend works of art in the aftermath of the Schiele Case.⁴⁵ For example, soon after the subpoena was issued, two lenders to the Pierre Bonnard exhibition at MoMA rescinded their offers to lend, due to uneasiness over the seizure of the Schiele paintings.⁴⁶ One of the lenders wrote to the curator, saying that “the news of the arrest of the two Schiele paintings in your museum made me very anxious and unsure and you certainly will understand that I’m not in a position to lend you my painting under such circumstances.”⁴⁷ Should the Malewicz decision be allowed to stand, the effects of the Schiele Case would be

⁴⁴ Kaplan, *supra* note 35, at 696 n.14, citing Brief for Respondent at 30 n.24, People v. Museum of Modern Art, 1999 WL 145904, at *1 (N.Y. App. Div. March 16, 1999) (No. 28012-98).

⁴⁵ Lee Rosenbaum, *The Schiele Flap II: U.S. Attorney Leaps Into Fray*, Wall St. J., Nov. 4, 1999, at A28. Indeed, the effects of the Schiele Case extended beyond New York museums. According to Lee Rosenbaum, “what is being held hostage during the protracted legal wrangling is not only Egon Schiele’s affectionate 1912 depiction of his mistress Valerie Neuzil, but also the ability of all American museums to borrow art from foreign lenders for major exhibitions.” *Id.* Arthur O. Sulzberger, chairman of the Metropolitan Museum of Art at the time of the Schiele scandal, wrote a letter to the Manhattan District Attorney in which he declared that museum exhibitions “should not be occasions for potential claimants and/or government agencies to seize the works on loan. The action which your office has initiated has put at risk the ability of the Metropolitan and other New York museums to obtain loans essential to their exhibition programs.” *Id.* See also Judith H. Dobrzynski, *Man in the Middle of the Schiele Case*, N.Y. Times, Jan. 29, 1998, at E1 (quoting Leonard A. Lauder, chairman of the Whitney Museum of American Art, as declaring that “American museums that depend on international loans are not going to be hard pressed to get them.”).

⁴⁶ Kaplan, *supra* note 35, at 729; see also *Judge Says Disputed Paintings Can Return to Austria*, CNN.com, May 13, 1998, <http://www.cnn.com/US/9805/13/schiele.paintings/index.html>.

⁴⁷ Anna O’Connell, *Immunity From Seizure: An Overview*, Art Antiquity and Law.

reproduced on a greater scale, as foreign sovereign lenders would be frightened off from lending not only to New York museums, but to museums all over the nation. The Schiele Case, as well as the French litigation discussed above, perfectly illustrate the significant repercussions that would occur should the protections of §2459 be abrogated by allowing United States courts to exercise jurisdiction over foreign sovereigns merely based on the presence of immunized artwork in the United States.

Furthermore, the Malewicz decision is already beginning to influence whether temporary art loans are considered to be “commercial activity.” For example, Cassirer v. Kingdom of Spain⁴⁸, a recent case also involving an artwork dispute in the context of FSIA §1605(a)(3), relied on Malewicz in holding that a loan of paintings constituted commercial activity. However, as discussed in the preceding section, FSIA’s legislative history indicates that the statute was meant to embody the requirements of minimum jurisdictional contacts and adequate notice of International Shoe. Foreign sovereigns are unlikely to expect that a loan of artwork for a government-immunized exhibit would satisfy the standards of FSIA §1605(a)(3). Such a minimal level of contact does not establish sufficient contacts with the United States to comport with traditional concepts of “fair play and substantial justice,” and would surely not fulfill the “due process requirement of adequate notice.” Furthermore, allowing a mere loan of artwork to satisfy the requirements for jurisdiction has the potential of chilling the willingness of foreign sovereign lenders to engage in cultural exchange with the United States. This, in turn, would run contrary to the purpose behind §2459’s enactment, which was to promote and encourage the international exchange of cultural property. Indeed, the Malewicz court itself recognized the dangers inherent in allowing such minimal contacts to suffice

⁴⁸ 461 F. Supp. 2d 1157 (C.D. Cal. 2006).

for jurisdiction, noting that the concern raised by the United States government “is not an insubstantial point.”⁴⁹ Clearly, subjecting foreign states to U.S. jurisdiction in such a manner would discourage foreign lenders from lending artwork to U.S. institutions, which would completely thwart the original purposes behind §2459. If §2459’s protections are to continue having force, the application of FSIA must take into account §2459’s purpose of promoting cultural exchange. Action must be taken to address the harm that Malewicz has and potentially could cause.

E. RECOMMENDATIONS

In response to the problems engendered by the Malewicz decision, it is imperative that Congress pass legislation to prohibit the filing of lawsuits against lenders of works of art to non-profit exhibitions when the suit is merely based upon the presence of the artworks in the United States. Failure to do so would greatly endanger the ability of the United States to engage in meaningful cultural exchange. This, in turn, would result in the denial of significant benefits to the national populace.

Congress has several possible legislative solutions to choose from. Such remedial legislation could be narrow, applying only to foreign sovereigns by providing an exception to the jurisdictional basis found in the FSIA. For example, Congress could add a new section to FSIA which states: “The exceptions to immunity found in this statute do not apply to lawsuits against foreign sovereign lenders of cultural property to non-profit exhibitions when the sole basis for jurisdiction is the presence of the cultural property in the United States.”

⁴⁹ Malewicz, 362 F. Supp. 2d at 315.

On the other hand, the remedial legislation could employ a broader scope by expanding §2459 to protect *any* lender, whether a foreign sovereign or private owner, from suit simply based upon the presence of artwork in the U.S. in connection with an immunized exhibition. This could be achieved simply by amending the current statutory language of §2459: “...no court of the United States...may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States, of custody or control of such object, *nor shall the foreign owner be subject to suit based only upon the presence of artwork in the United States in connection with the exhibition*, if before the importation of such object the President or his designee has determined that such object is cultural significance....” Such a legislative stance has the added benefit of protecting not only foreign sovereign lenders, but private foreign lenders as well, which would serve to increase the international exchange of cultural property.

Whichever course Congress decides to take, it is clear that some form of congressional action is needed. The Malewicz court’s ruling that immunity from seizure does not necessarily preclude a claimant from filing suit against a foreign sovereign lender jeopardizes the ability of United States institutions to consistently produce first-class exhibitions, which turns in large part on assuring lenders that their works will be safely returned. Congress originally enacted §2459 to promote international cultural exchange and must take action now to ensure that such cultural exchanges continue to be promoted to the fullest extent possible.