

Art Restitution of Nazi-era Looted Art: A Growing Force in Art and Law

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Abstract

Art restitution is one of the few ways to make reparations to the many victims of the treacheries of World War II. Victims of Nazi-era art theft and their heirs should be able to successfully bring actions in the United States to recover their possessions as this is usually one of the last options available for recovery. Claims concerning art restitution should be heard in U.S. courts and the statute of limitations and the U.S. Department of State's Statement of Interest should not be used to preclude adjudication on the merits of these cases. The Court should assert their independence and refuse to dismiss these cases. Recent art restitution settlements and the U.S. Supreme Court's current involvement shed light onto this topic and help the victims of art theft reclaim what rightfully belongs to them.

Keywords: art, restitution, crime, Nazi-era looted art, World War II, U.S. State Department, Malevich, Altmann.

Introduction

It is believed that Nazi Germany and the Soviet Union plundered an estimated 650,000 pieces of art during World War II.¹ In the dying days of World War II, the Soviet Union raided Germany and other enemy territories for art troves and thus indirectly looted tremendous amounts of art confiscated by the Nazis from the Jews. How can a victim of an art crime find restitution in a postwar landscape? The war mentality of “to the victor go the spoils” ran rampant, causing artwork to move underground and to switch hands often. An entire barter commerce system developed as a result of the cultural raids and much of the looted art was intended to become part of Hitler’s Fuhrer art museum in Linz, Austria. Once a piece resurfaces, what happens when the rightful owners step forward and makes a demand for their property? Recent art restitution cases have been transforming the way courts view legal disputes over stolen artwork. Survivors of the Holocaust and heirs to these looted works are seeking art restitution services and bringing action in the United States Federal Courts.

Art restitution is one of the few ways to make reparations to the many victims of the treacheries of World War II. After the War, art began reappearing in the United States in droves. Cultural hotspots such as New York and California have seen the most art traffic, which explains why these states have the most progressive case law concerning art crimes and restitution. With the fall of the Berlin Wall, the opening of Eastern Europe, and access to Internet databases, cases have literally been coming out of the woodwork as masterpieces are being tracked down. Many works have been returned to the rightful owners or their heirs but the legal path has proved arduous. In an area of law that is gaining momentum and press coverage, victims and their heirs now bring actions to recover their possessions into the U.S. judicial arena.

Crimes committed during World War II occurred more than half a century ago; therefore bringing suit is often the only option. The passage of time has become the most difficult issue, the statute of limitations clock often running out on the claimant. In the art restitution cases discussed, the property in question is the artwork of Kazimir Malevich, the father of Suprematism, Gustav Klimt, and Lucas Cranach the Elder. When the request for the work is made and that request is refused, the court system is the only option left to a victim or heir of looted art. This analysis examines how the cases are adjudicated, what this means for the future of art crimes, and what transpires after the artwork is discovered.

Who rightfully has ownership of the artwork is often dependent upon whose law applies. An heir may be successful

recovering the pilfered art but if a U.S. court dismisses the case, a successful claim will be even less likely in a European court. This is an important factor in art crime investigations involving works that were stolen from European Jews during World War II. Once the artwork is discovered, the challenge then becomes finding the proper channels for restitution. Usually the only evidence plaintiffs have is poor documentation so they must rely on the courts to determine the rightful owner. If the parties cannot settle a claim for the return of the art, only a court has the power to decide between the two claims. This piece will examine the judicial system’s treatment of looted art and the journey the rightful owner must take to have their work repatriated to them. There are moral and philosophical considerations in determining the legal owners of Nazi-era looted art, and keeping that in mind, this piece examines current court cases and what that means for the future of art restitution. The *Altmann*, *Malevich*, and *von Saher v. Norton Simon Museum of Art* cases shed light on the future treatment of art restitution claims in the United States. The U.S. Supreme Court’s request for a briefing on the *Norton Simon Museum* case has the potential to push art restitution cases further into the spotlight. The following pages discuss the rise of Nazi-era art restitution claims, judicial hurdles, U.S. State Department’s involvement, relevant casework that has made art restitution a stronger area of litigation, and new developments, which could aide the heirs of looted artwork.

Art Restitution: An Attempt to Rectify Victims of Art Looting

Efforts by the United States and Germany to complete restitution claims were stymied by the Cold War. Stuart Eizenstat, a former Deputy Secretary of Treasury, helped to introduce efforts to resolving issues of reparation. In a 2001 keynote address to Fordham University School of Law, Eizenstat described the reparation efforts best when he said, “The end of the Cold War freed up energies, opened up archives in the former Iron Curtain countries, permitted people behind the Iron Curtain, which was then lifted, to travel to the West, to look for bank accounts; new democracies were brought into power interested in helping what I call the ‘double victims of World War II,’ those who were victims of both Nazism and Communism, and who were largely uncompensated by German payments in the past.”² Whether the pieces were taken by the Nazis or sold to finance their escape, the survivors and heirs are stepping forward to reclaim them.

Once investigations began, one discovery led to many more complex issues. Eizenstat describes how the silence was broken. “Swiss banks led to German cases, to Swiss cases, to French cases, to art, to insurance, and one issue after another

1 Kelly Crow, *The Bounty Hunters*, WALL ST. J., Mar. 23, 2007, at W1.

2 Stuart Eizenstat, Esq. Fordham International Law Journal, 25 Fordham Int’l L.J. 205, 2001.

began to emerge.³ Works that were looted from the Jews by the Germans were then again stolen by the Soviet Red Army or even Allied Forces and put into treasure troves. If one studied the provenance of a piece originally looted during WWII it would become a connect-the-dot game involving captors and the trophies they claimed.

In 1998, the Washington Principles, an agreement signed by 44 countries, including the United States, was until recently the most extensive effort to restore looted art to the rightful owner.⁴ In December 2002, in response to the Washington Principles, the Commission for Looted Art in Europe, based in the United Kingdom, created a central registry to facilitate restitution of Nazi loot. The Central Registry holds information on more than 20,000 objects from more than 12 countries, as well as historical and current documentation from more than 40 countries.⁵ There are now over a dozen Internet databases that list stolen or missing works, many of which changed hands during the World War II years.⁶ Some countries, Poland for example, had already begun to form catalogs of stolen cultural items before World War II ended. Unfortunately because of the suppression of Eastern Europe, these claims were put on the back burner for nearly five decades.

Art restitution cases directly affect the museum industry when a work's provenance comes into question. Opponents to these lawsuits argue that they are having negative impacts on the museum industry, removing masterpieces from the public eye, leaving gaping holes in collections worldwide. For example, the Detroit Institute of Arts and the Toledo Museum of Art have had their van Gogh and Gauguin challenged respectively.⁷ Even the Museum of Modern Art in New York, and the National Gallery of Art in Washington, D.C., got into a tangle of legal discussions with Polish and Ukrainian institutions over Albrecht Durer drawings. Museums are being more cautious in accepting works for exhibits if there may be reason to believe that the provenance is in question and will lead to a lawsuit. Some high-end auction houses and museums have formed departments specifically to curtail selling potentially looted works. Provenance or ownership researchers have been hired to track the history of suspect pieces. In the latest move by the Getty Museum, the Getty Research Institute (GRI) does just this, provenance research, searching for evidence to establish ownership history.

The Race against the Clock and the Good Faith Purchaser

In addition to the time commitment and exorbitant costs of pursuing a claim, the legal standards across the international spectrum are in no way uniform. The timeliness of when an action is made has often become the outcome determinate of art restitution cases. Some circuits of the U. S. court system are more flexible on the statute of limitations for a crime that occurred more than 50 years ago while foreign courts usually bar these claims. For this reason, the statute of limitations makes the U.S. court system a more attractive forum than the European courts. Other forums will also dismiss claims based on the statute of limitations having run out. Some U.S. courts, like New York and California, hold that the clock only starts running once the artwork is discovered and the original owner makes a demand upon the purchaser, whether they purchased the artwork in good faith or not. The Second Circuit (NY) is one of the frontrunners for art restitution cases. New York is a hotbed for the art world and hosts hundreds of collections each year although the Ninth Circuit (CA) has proven to be a more successful forum for issues involving art restitution.

Once a reasonably prudent claimant discovers the artwork the clock will run for 3 years. If a claimant is lucky, the particular piece of art surfacing will be newsworthy enough to be written up thereby alerting the rightful owner or heir of its existence. A legal action must be brought within that timeframe. If the demand on the artwork is refused, the clock begins to run for 3 years. As recent as this past September, California Governor Schwarzenegger signed into law a new art-theft bill that gives claimants seeking the return of stolen art another arrow in their quiver. The new law allows for the statute of limitations to run for 6 years instead of just 3. This bill was intentionally written so as not to infringe upon foreign policy issues that are governed by Federal law and not state law.

Basic property law also makes the United States a more attractive forum. European courts usually favor good faith purchasers, or a present day possessor who didn't know the work was looted, over victims of art theft. In the United States, you cannot pass on property with bad title and you cannot keep property even if you bought it in good faith. Progressive decisions by California and New York courts have declared that "accrual" begins when the owner proceeds against one who innocently purchased the property in good faith. A painting that disappeared during World War II easily could have passed from one person to another and finally ended up on an auction room floor or have become part of a collection in a museum. A good faith purchaser could then be subject to litigation by the alleged rightful owner. This clearly causes commercial and legal problems when the rightful owner bringing claims of replevin (an action for the recovery of property taken) or seeks damages in conversion against a

3 Eizenstat, 25 Fordham Int'l L.J. 205 at 208.

4 The Washington Principles was a product of the Conference on Holocaust-Era Assets held in Washington, D.C. in 1998. The purpose was to resolve issues relating to Nazi-confiscated art, recognizing that among participating nations there are differing legal systems and that countries would act within the context of their own laws.

5 Julia Parker, *World War II and Heirless Art: Unleashing the Final Prisoners of War*, 13 Cardozo J. Int'l & Comp. L. 661 (2005).

6 Kelly Crow, *The Bounty Hunters*, WALL ST. J., Mar. 23, 2007, at W1.

7 *DeWeerth v. Baldinger*, 836 F.2d 103 (3rd Cir. 1987) and *Guggenheim v. Lubell*, 569 N.E. 2d 426 (N.Y. 1991).

good faith purchaser. Once a demand is made on the property the statute of limitations clock could begin to run.⁸ Foreign courts, for example, in Switzerland, sit on the opposite end of this spectrum viewing that all purchasers of property, stolen or not, acted in good faith, making a New York court far more attractive from the claimant's perspective. Once they have filed suit, claimants must turn their attention to the U.S. State Department and diplomacy issues.

The U.S. State Department: A Hindrance to Claimants

In the past, the U.S. courts have been reluctant to adjudicate issues that involve foreign relations. It is necessary to understand the State Department's role in art crimes in order to know what tools the defendant may use. Many times, the looted art in question is loaned to the United States by foreign countries. The State Department is often more helpful to the defendant in order to preserve diplomatic relations with foreign countries. The State Department is able to grant the defendant immunity. In layman terms, the artwork they are loaning to the United States cannot be taken into custody while it is on U.S. soil. The State Department plays the role of protector of diplomatic relations by playing down the victim's ownership rights and granting immunity to the artwork.

For instance, if the Executive Branch has entered into a treaty or even an Executive Agreement (when Senate confirmation is not needed), the Courts will most likely follow the State Department's advice, which comes in the form of a written "Statement of Interest." It is a standard policy for the State Department to submit the Statement, as the U.S. government's diplomatic arm. The Statement is submitted to the court, advising the role the court should take if the action involves foreign policy. Because usually the artwork in question is on loan from a foreign country, it almost always involves foreign policy. Most often the State Department encourages the court to dismiss the case on non-justiciability grounds because in not doing so, the court could very well be encroaching upon foreign policy such as agreements the United States has made with other countries. Usually the Statement recommends that the action be dismissed so as to avoid diplomatic embarrassment, which could harm international relationships.

In the past, the actions for art restitution have fallen victim to the Statement of Interest. In deciding whether to review the merits of a case, the U.S. judicial system will defer to the U.S. government. The U.S. Federal Courts may think an art restitution case could hurt foreign relations and decide to dismiss it. The Court essentially says if it did not dismiss such a claim, it would not be able to avoid embarrassing the U. S. government. It could not undertake this claim "...

without expressing lack of respect due coordinate branches of government...or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."⁹ The State Department has continued to argue for "dismissal on any valid legal ground" if there would be foreign relation implications.¹⁰ If the court reviews the merits of a case involving looted artwork, this hardly seems to be an issue that would cause embarrassment to a branch of the United States government or harm diplomatic relations.

The U.S. government entered into an agreement aimed at achieving "legal peace" with post-WWII Germany.¹¹ The "Remembrance, Responsibility, and the Future" Foundation was formed, which began to define the State Department's influence on whether the judicial branch should review the merits of a reparation claim.¹² Defendants may request that the State Department submit a Statement to the court in hopes of obtaining immunity from seizure of the artwork and having the lawsuit dismissed. The State Department depends on the defendant to do his/her own provenance research and does not fact check on their own. If the provenance of the artwork is not proven or even convincing (claims of competing ownership must be noted), this will not bar them from protection by the Statement. It is important to be aware of the past treatment of the State Department's submitted Statement in order to understand the current treatment in art restitution cases. The following cases are examples of the court leaning on the Statement of Interest in reparation issues, though not involving looted artwork; they shed some light on how a court would rule when faced with art restitution claims.

In a case arising out of New Jersey in 2006, the Third Circuit affirmed the dismissal of a survivor's claims against German corporations for compensation for Nazi-era war crimes.¹³ *In re: Nazi Era Cases Against German Defendants Litigation v. Schering*, the reparation issue involved Holocaust-era insurance claims. The Department of State had issued a Statement of Interest that said it would be in the court's best interest to dismiss the case because of a previous Executive Agreement between the United States and Germany appointing any reparations to be handled by the German Foundation.¹⁴ The court found a constitutional commitment to the executive branch in the issue of war reparations.

9 Baker v. Carr, 369 U.S. 186 at 217 (1962).

10 *Nazi Era* at 380.

11 Ungaro-Benages v. Dresdner Bank, 379 F.3d 1227, 1231 (11th Cir. 2004).

12 The German Foundation ("Foundation") was the product of an executive agreement, the result of a cooperative effort between the U.S. and Germany. The German government asked Deputy Secretary of the Treasury Stuart E. Eizenstat to help resolve the numerous class action lawsuits pending in U.S. courts. *In re Nazie Era Cases*, 129 F. Supp. 2d at 378.

13 *In re: Nazi Era Cases Against German Defendants Litigation*, *Simon Rozenkier v. AG Shering*, 196 Fed. Appx 93 (3rd Cir. 2006).

14 *In re: Nazi Era Cases*, 196 Fed. Appx. at 95 (2006).

8 DeWeerth v. Baldinger, 836 F.2d 103, 106 (3rd Cir. 1987).

The court found that the government's State of Interest was persuasive because of possible retribution in foreign policy for judicial determinations. Circuit Judge Alan Louire authored the opinion noting:

...the United States government's long-standing foreign policy commitment to resolving reparations claims arising out of World War II and the Holocaust at the governmental level, coupled with the more recent creation of the Foundation, the signing of the Agreement, and the filing of the Statement of Interest in this case, together provide such a basis.¹⁵

They concluded that the Executive Agreement, the Statement of Interest, the long standing foreign policy commitment between the United States and Germany, and the creation of the Foundation were basis enough to dismiss the claims under a non-justiciable political question.¹⁶ This court agrees with the Ninth Circuit's decision in *Alperin v. Vatican Bank*, in which the court held that slave labor claims would raise a political question and should be deferred to the "Foundation" but that property claims against the Vatican Bank should not. The Ninth Circuit allowed the property claim to proceed, good news for art restitution plaintiffs.¹⁷

Claims concerning art restitution should be heard in U.S. courts and the Statement of Interest should not be used to preclude adjudication on the merits of these cases, especially when violations of international law in stolen property are alleged. While the Department of State's role is to aid the Executive Branch in foreign relations, courts should not so easily discard cases because a Statement of Interest is submitted suggesting a dismissal. The State Department is no doubt worried about political repercussions if a foreign museum sends its collection to the United States only to be met by a restitution lawsuit.

Private Lawsuits as an Alternative for Victims Pursuing Claims

As survivors of World War II become fewer, their heirs are bringing action in court to reclaim what belonged to the family. Just to bring a timely claim and beat the Statute of Limitations clock is obstacle ridden. In *Republic of Austria v. Altmann*, plaintiff Altmann was ultimately successful in recovering six Gustav Klimt paintings.¹⁸ Maria Altman fought for 7 years to

recover the Klimt paintings. Her aunt had been a subject of Klimt's portraiture work. In 2004, the Supreme Court upheld the Ninth Circuit denying the Republic of Austria's motion to dismiss based on sovereign immunity. However, the holding was narrow and case specific. It focused on the Foreign Sovereign Immunity Act (FSIA) and whether Austria had immunity because the claim was based on conduct that happened before the Act's enactment.

Foreign states, including the Republic of Austria, had used the FSIA as a defense because of the immunity it granted them. *Altmann* argued that publications and advertising by the Austrian Gallery fell under "Commercial Activity" of the FSIA, removing immunity granted to them under the Act. The defendants then argued that the activity pre-dated the FSIA so it was not applicable. The Court said that the FSIA did apply to pre-1952 conduct, therefore stripping the defendant of its immunity. Austria could not be immune as it was complicit in the expropriation of the Klimt paintings.¹⁹

Though the holding was narrow, this is a positive development for those looking to the U.S. courts to handle their claims for looted artwork. However further progress for restitution in the court stopped at the Court's decision to remand to a California District Court as the parties agreed to arbitration in Austria.²⁰ Ending in a settlement, *Altmann* advances the reparation of Nazi-looted art claims.

Malevich v. City of Amsterdam begins over 80 years ago with the story of Russian avant-garde artist Kazimir Malevich and spans from Germany to the Soviet Union to the United States where action was finally brought. This art restitution case has recently become more important in the future of restitution cases not because of the outcome, but because it acted as a trailblazer for future cases involving Nazi-looted artwork. Now deceased, Malevich's works were on loan to the United States as part of a collection owned by the Stedelijk Museum in Amsterdam. The founder of Suprematism (modernism's first completely abstract painting style), Malevich's work often had underlying political messages. In the 1920s he was invited to exhibit his work at the Great Berlin Art Exhibition. During the exhibition he was forced to return to St. Petersburg and his work was left with friends in Germany. War separated the two countries and Malevich died in 1935, his pieces scattering across Europe. Some of his works were kept in safe keeping in Amsterdam, since the Nazis had banned such art as "degenerate."²¹ The heirs of the artist seek the return of the artwork.

15 *Id.* at 102.

16 Justice Alito heard oral argument in this case but was elevated to the United States Supreme Court on January 31, 2006. The opinion was filed by a quorum of the panel and Honorable Lourie was sitting by designation.

17 *Id.* at 100.

18 Maria Altmann, a Viennese Jew and sole surviving heir of her family, brought suit to recover against an Austrian Gallery to recover the paintings stolen by the Nazis.

19 *Republic of Austria v. Altmann*, 541 U.S. 677, 677 (2004).

20 Sue Choi, Comment, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 167, 174 (2006).

21 Carol Vogel, *The Modern Gets to Keep Malevich Work*, N.Y. TIMES, June 19, 1999, at B7.

Only after the fall of the Soviet Union did Malevich's family bring suit to reclaim the works. In an earlier case, in 1999, the Museum of Modern Art in New York reached a settlement with Malevich's heirs in regards to pieces they have held since 1935.²² The most recent lawsuit by Malevich's heirs centers around 14 pieces on loan to New York's Solomon R. Guggenheim Museum. This case involves paintings that had been lent by the City of Amsterdam ("the City") to museums in the United States. The paintings have continued to switch hands until just recently, stemming from World War II. In 2003, the artwork in question was exported to the United States to be part of a temporary exhibition in New York City and Houston. Because of diplomatic protocol, the paintings were immune to seizure, therefore the Malevich heirs sued the City of Amsterdam for the return of these pieces.

The U.S. District Court for the District of Columbia ("the Court") denied the City of Amsterdam's motion to dismiss the case on jurisdictional grounds. The court ruled this was a commercial activity, which removes the issue from an exception to the Foreign Sovereign Immunity Act (FSIA).²³ Foreign states are not immune when rights in property have been taken in violation of international law and the property is present in the United States (the situs requirement) in connection with a commercial activity carried on in the United States by the foreign state.²⁴ The activity of loaning the paintings was a "commercial activity", removing immunity from the City of Amsterdam.²⁵

Though the case did not revolve around a treaty or executive agreement, the court could have very well sunk this case, ruling the claim unjusticiable because it involved a World War II claim. The State Department's filed Statement of Interest favored the City of Amsterdam, voicing concern that the works were protected by the immunity clause of the FSIA. The Court says the Statement of Interest "presented the Court with something of a dilemma..." because the U.S. Government's opinion is "entitled to great weight."²⁶ Yet, it also notes that "establishing jurisdiction for certain

claims against a foreign sovereign are both clear and not inconsistent," and that the focus should be on the cultural exchange, not foreign policy.²⁷

The court elaborates on the cultural exchange by discussing the meaning of the immunity and jurisdictional statutes of the Mutual Educational and Cultural Exchange Program. The court says the meanings of these statutes are "more clearly perceived" by the Plaintiffs.²⁸ What the statutes do provide is if the pieces are brought into the United States then, they are subject to litigation. The statutes say a litigant cannot seize the property while on U.S. soil or serve judicial process on the receiving museum (in this case the Guggenheim and the Menil Collection). The plaintiffs did neither, which was key in moving the case past these technical defenses. These factors made the City's reliance on the Statement of Interest misplaced. The works in question only needed to be "present" in the United States when the suit was filed. The Malevich heirs filed suit at the appropriate time. The Court continued to say that just because the works are immune from seizure they are not immune from a suit for alleged conversion.²⁹ Essentially the Malevich heirs had to wait until the proper moment to file suit.

In 2007, the D.C. Circuit court decided the "commercial activity factor."³⁰ The bottom line was whether the contract made by the City of Amsterdam could be made by a private person therefore removing its immunity (quoting *Texas Trading*, 647 F.2d at 309). The court found that the contacts were enough to establish the City as a private person conducting commercial activity. It is the nature of the activity, contracting for the pieces and shipping them to the United States, not the purpose, which in this sense would be cultural and educational. Any private person may submit a painting and contract with a museum. The MoMA is full of pieces on loan including the Malevich pieces that were on display. This essentially would fall under "trade and traffic in commerce".³¹ The court found it was a "commercial activity" in both the public and private arena because the parties contemplated a potential sale of the works.

The facts show that in the past the collection was in the midst of a sale agreement, resulting in a loan contract between Mr. Sandberg, the previous Director of the Stedekijk Museum in Amsterdam and Mr. Haring, a longtime friend of Malevich. The City had received consideration for the contract in the form of an agreed monetary amount and had scheduled its own employees to transport the paintings to the United States

22 Alexander Dörner, director of the Provinzial museum (which was later renamed the Landesmuseum) in Hannover kept works by Malevich hidden until they were smuggled into the U.S. via the Netherlands. (Vogel, N.Y.Times, June 19, 1999, at B7).

23 Foreign Sovereign Immunity Act, 28 U.S.C. 1602 (2005). The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

24 Under 28 U.S.C.S § 1605, (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state.

25 The court relied on *Republic of Argentina v. Weltover, Inc.* in determining the commercial character of the loan.

26 Malewicz at 311.

27 *Id.* at 311.

28 *Id.* at 311.

29 Malewicz at 312.

30 Malewicz v City of Amsterdam, 517 F. Supp. 2d 32 (2007).

31 Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 42 (2005) citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 119 (1992).

The City's Motion to Dismiss was denied and the parties would go to trial. Their patience seemed to have paid off, but a settlement was reached before going to trial. Again, no cut and dry decision came from the courts but the parties decided to settle and walk away. The Malevich heirs received five paintings while the city kept the remaining pieces along with the titles. One could argue that the heirs preserved the Malevich legacy and came out on top, but this case didn't provide the legal waves in art restitution it could have. A more useful lesson learned was how the Malevich party navigated the U.S. judicial system, playing a figurative cat and mouse game with the paintings. Again, the costs and stresses of litigation over looted art ended in a settlement.

The most recent development in the American courts has put art restitution cases in the direct purview of the U.S. Supreme Court, promising that in the future more attention will be given to the subject in general. In October of 2007, the Los Angeles U.S. District Court dismissed a case, *von Saher v. Norton Simon Museum of Art*, involving a 480 year old diptych "Adam and Eve" by Lucas Cranach the Elder. The claimant, Marei Von Saher of Connecticut, heir of a Jewish art dealer who lost the artwork to the Nazis in World War II, had sued California's Norton Simon Museum for the diptych. The dismissal was based upon the reasoning that the California law extending the statute of limitations intruded on the federal government's powers to resolve war claims. The Ninth Circuit also sided with the Norton Simon Museum, saying that the law was an attempt for California to establish a Holocaust restitution forum, which is not a state responsibility. Upon the claimant's appeal to the highest court, the Supreme Court neither accepted nor declined to hear the case, but instead asked the Solicitor General to submit a brief on the government's view of the issue. The issue is whether future suits are decided on the merits of the case (who the rightful owner is) or the timeliness in which the action was brought. This could change the way future art restitution cases are decided, potentially setting aside the statute of limitations.

Conclusion

The struggles an art restitution plaintiff must overcome in order to bring a successful claim are difficult enough without their case being dismissed because of procedural pitfalls, namely the statute of limitations or a Statement of Interest. Reclaiming one's property should not be lumped into the foreign policy arena in which the State Department could encourage the argument that the Courts should dismiss it because of diplomatic sensitivity. Art restitution cases should be litigated and a plaintiff's efforts should not be frustrated by the Executive Branch's powers of conducting foreign relations. If the plaintiffs have proven that the artwork is in fact rightfully theirs, treaties and executive agreements should not affect an individual's claim. A defendant's request for a

State Department opinion, to be used as possible grounds for dismissal, should not be granted if the only justification for it is because the claim involves an action arising from a war time era. The U.S. courts should adjudicate these cases.

Though there have been such successes as *Altmann* and *Malevich*, future cases will continue to be discarded or shelved unless the U.S. judicial system moves in an independent direction. The Solicitor General's briefing on the *von Saher* appeal is due in the next few months and how the Supreme Court Justices read the government's view of the matter will be instrumental to the future treatment of art restitution cases. Their guidance on such matters as the statute of limitations could remove some of the roadblocks claimants currently face. Those who were victims of the Holocaust or Stalinist repression should be able to have their day in court to reclaim what rightfully belongs to their family.

Response to David Grann's "The Mark of a Masterpiece," published in *The New Yorker*: From a Legal Perspective

In July, David Grann reported on a Hungarian-born restorer of art who has earned a great deal of notoriety as an authenticator of works of art by examining orphaned works and searching for fingerprints that can then be compared with fingerprints on other authenticated works of art. In so doing, Grann offers insight into the two schools of art authentication: connoisseurship and forensics.

Traditionally, art has been authenticated by examining the work itself. Looking in a detailed way at brushstrokes, composition, iconography, and pigments can all help a skilled authenticator determine whether a work of art is genuine. Yet this method of authentication has fallen out of favor. The art world has increasingly begun to favor science. As Grann writes, this shift may "reflect the contemporary faith in science to conquer every realm". The piece offers some pointed criticism of this new reliance on forensic science.

The primary focus—Peter Paul Biró—first emerges as a skilled scientist who can remove the human fallacies that call into question the assertions of connoisseurs. Yet Grann digs deeper and discovers some troubling details. Biró shifts and the reader suspects he is a skilled con man, who may even fabricate his results. His primary method relies on proprietary technology, and pulling fingerprints from works of art requires decisions that look less and less like science and more and more like connoisseurship.

I will leave it to the other editorials to weigh the strengths and weaknesses of science or connoisseurs. Rather I want to focus particularly on the troubling aspects of the art trade that Grann's article reveals. A flawed trade artificially elevates the importance of forensic authenticators like Peter Paul Biro. There are good reasons why works are lost to history and rediscovered. Yet unscrupulous dealers and sellers rely on the shroud of secrecy that envelops the art trade. Art sellers do a spectacularly poor job of determining and guaranteeing the history of an object.

This can be seen acutely in the history of the "Bella Principessa," which has recently surfaced and been attributed to Leonardo da Vinci. The work was bought for around

\$22,000 in 1998 by Kate Ganz. At the time Ganz knew only that the work was the "property of a lady"; no real history of the work was given. It was later sold to an unknown buyer in 2007 for the same price. This is how works of art often surface and retreat into private collections. Private ownership of art carries many advantages, yet this anonymous market damages our understanding of artists, movements, and periods of history.

One would be hard-pressed to come up with an industry that enjoys so little meaningful regulation. We are routinely given receipts and a paper trail for mundane purchases. There would be much more information offered for a printed reproduction of any work of art than if we were to buy the actual work itself. One of the biggest contributors to art fraud—and art theft—is the ease with which criminals can exploit the art market. Art transactions do not involve an exchange of information on title history, or what is called provenance. Very little information regarding the authenticity of title are given, nor are there firm guarantees that any of the provenance information that is given is actually accurate. Not only does an accurate provenance provide a buyer with evidence that the seller actually has the right to sell the object, but it also ensures that works of art are authentic. We need a shift in the way the art market guarantees authenticity and title. One of the best ways to accomplish this will be for buyers, sellers, and observers to pay more attention to the idea of good faith. Good or bad faith plays a prominent role in the resolution of disputes involving stolen object, but may also play a role in the sale or even authentication of orphaned works.

Good faith first emerged in Roman law, which established that something as simple as a promise can create an obligation that could be enforced by a judge. In the middle ages buyers and sellers would offer up their faith to the Church, and if they lied they would be forfeiting their eternal salvation. Today the law defines good faith as "a state of mind consisting in honesty in belief or purpose, faithfulness to one's duty or obligation, observance of reasonable commercial standards of fair dealing in a given trade or business, or absence of intent to defraud or to seek unconscionable advantage."¹ Buyers, sellers and authenticators of art would be well-served to

take up this definition anew. As Grann’s terrific discussion of connoisseurship and science reveals, much about the authentication process relies on the scruples and moral character of the individual—whether they rely on the tools of a connoisseur or a forensic scientist. Though these opinions and transactions carry the weight of millions of dollars in many cases, their subject is a work of art—a work that will likely be enjoyed and cherished for generations if a work is determined to be genuine. With this knowledge comes a great deal of pressure to make the right decision about a work of art. Yet individuals who mislead will not only harm the proximate parties but also damage the understanding of our collective cultural heritage.

1 Black’s Law Dictionary (7th Ed., 1999).

A Real Van Gogh: How the Art World Struggles with Truth
(Amsterdam University Press 2010)

Henk Tromp

The art world wants to be tricked.

That is certainly the conclusion one comes away with after reading *A Real Van Gogh*, Henk Tromp's thoroughly researched, highly readable, fascinating new book, which uses the history of van Gogh authenticity and forgery debates to discuss what happens in the art world when someone cries wolf. It's not a pretty picture for the expert who deigns to proclaim a work inauthentic.

Tromp's book does an admirable job of balancing a text that is rigorous in its academic research (use of primary source documents, copious citations, application of methodologies), with a narrative that is gripping enough to keep you reading. The core of the book involves a series of lawsuits, some of which turned into real courtroom dramas, surrounding the authenticity of works by van Gogh. We're used to hearing about contemporary cases in which the authenticity of ancient or Old Master works are in question. But it's an interesting setting to find the debate about van Gogh raging a mere three decades after his death, in 1890. The central figures in this story are a series of experts, connoisseurs--which is now a dated term (please see my "Lessons from the History of Art Crime" article in this issue for more on connoisseurship and methods of authentication). Scientific analysis and provenance research are now the preferred means of authenticating; however, personal expertise maintains a strong, pseudo-mystical foothold in the art world, even today.

The issue of the refusal of the art world to accept bad news from experts, and the rivalry among experts within the battles to authenticate the work of van Gogh, forms the core of Tromp's excellent book. The most famous case involves the trial of Otto Wacker, who claimed to be the dealer for a Russian who escaped the Communists and needed to sell his collection of thirty-plus van Goghs to save his family. Wacker refused to reveal the name of this Russian, who quite obviously did not exist. He was brought to trial for fraud, falsification of documents, and breach of contract when a number of the buyers of his "van Goghs" learned from experts that they were fake. The resulting trial was a showcase of expert versus expert. Tromp's protagonist is Jacob Baart de la Faille, author of the first major catalogue raisonné of van Gogh's work (in which every extant work by the artist is listed and described, along with its location). But de la Faille wound

up vacillating, changing his mind about the authenticity of the Wacker van Goghs a whopping five different times. His rival was H. P. Bremmer, a pompous, condescending, and self-important art expert who once said of an Odilon Redon drawing, that even if Redon himself declared the drawing one of his best, Bremmer would still know that it was a fake, because declaring authenticity was Bremmer's job, not the artist's.

The 1932 Wacker trial may be the result of the first police investigation of a suspected forger in the modern era. The police discovered that Otto Wacker's brother, Leonhard, was the forger--unfinished "van Goghs" were found in his studio, and it was later learnt that Otto and Leonhard's father, Hans Wacker, had been an Old Master forger. Otto was sentenced to a year in prison, appealed, and to his dismay found his sentence raised after the appeal to a year and seven months.

Tromp emphasizes the damage that can come from even the suspicion of inauthenticity in personal, financial, and even collective, national cultural spheres. On the one hand we have Chester Dale stubbornly insisting, in spite of all the contrary evidence, that a painting he had purchased is a van Gogh, saying: "I know of course that this is a controversial painting, but as long as I am alive, it will be genuine." But nations grapple with the subject, as well. William Goetz, the American head of Universal Studios, bought *Study with Candlelight*, a newly-discovered work that De La Faille championed as a van Gogh masterpiece, but which was considered a fake by Willem Sandberg, director of Amsterdam's Stedelijk Museum. Goetz was enraged and immediately sent his lawyer to Amsterdam, demanding expert examination of the painting and a symbolic payment of 10 cents for libel damages. The city of Amsterdam, which runs the Stedelijk, steadfastly refused to participate in the discussion, stating that this was a matter of personal opinion between Sandberg and Goetz. The city feared a souring of Dutch/American relations, which threatened to scupper a proposed blockbuster van Gogh monograph exhibition that was planned to tour the United States. In the process of this debate, the press declared Sandberg a Communist, for deigning to denounce a work in an American collection. The Dutch government asked Sandberg to keep his opinions to himself for the sake of international relations. From a personal to a national level, the unspoken rule of the art trade is the same: in questions of authenticity,

one should remain noncommittal.

In the end, Chester Dale chose to believe that his van Gogh was authentic. He also hid scientific evidence and falsified provenance in order to trick the National Gallery in Washington, D.C., into accepting and displaying his fake. William Goetz bullied with threatened lawsuits and political power plays until the nay-sayers felt compelled to hush up. Bremmer was so confident in his own abilities, that he would overturn the pronouncement of an artist about the artist's own work. And Otto Wacker so fervently argued his innocence in the blatant forgery sales for which he was tried that he seemed to have convince himself that he was guiltless.

The moral: keep your mouth shut and *will* every questionable artwork to be legitimate. If everyone believes it's legitimate, whether it is or not, it is.