

1999

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Recommended Citation

Alexander Kaplan, *The Need for Statutory Protection From Seizure for Art Exhibitions: The Egon Schiele Seizures and the Implications for Major Museum Exhibitions*, 7 J. L. & Pol'y (1999).

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THE NEED FOR STATUTORY PROTECTION FROM SEIZURE FOR ART EXHIBITIONS: THE EGON SCHIELE SEIZURES AND THE IMPLICATIONS FOR MAJOR MUSEUM EXHIBITIONS

*Alexander Kaplan**

INTRODUCTION

Art theft has been a perpetual plague on the art market and increasingly has become one of the most profitable forms of illegal trade.¹ In recent decades the art world has witnessed an increase in claims for repatriation of stolen antiquities² and lawsuits for the

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¹ "Art theft has probably been with us for almost as long as there has been art." See Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 49 (1995). Art theft is the third most profitable form of illegal trade, following drug smuggling and arms trading, with estimated profits of \$2 billion a year. *Id.* at 49 & n.2.

² See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 293-94 (7th Cir. 1990) (finding that the Republic of Cyprus could recover four sixth-century mosaics that had been stolen from a Cypriote Church and bought by an American collector); *Republic of Turk. v. Metropolitan Museum of Art*, 762 F. Supp. 44, 45 (S.D.N.Y. 1990) (following settlement, the Republic of Turkey recovered from the collection of the Metropolitan Museum of Art in New York a cache of more than 300 ancient artifacts called the Lydian Hoard, which had been excavated from burial grounds in Turkey and exported to the United States in contravention of Turkish law). See also Lawrence M. Kaye, *The Future of the Past: Recovering Cultural Property*, 4 *CARDOZO J. INT'L & COMP. L.* 23 (1996) (discussing efforts and recent cases involving the recovery of antiquities).

return of stolen artwork in the hands of good faith purchasers.³ Currently, an intense interest has developed in the return of artwork to families of European Jews whose cultural possessions were looted by the Nazis during World War II.⁴ These acts of plunder,

³ A good faith purchaser is one “who buys without notice of circumstance which would put a person of ordinary prudence on inquiry as to the title, or as to an impediment on the title, of a seller.” BLACK’S LAW DICTIONARY 693 (6th ed. 1990). To determine whether a buyer is a good faith purchaser, courts examine several factors “to determine whether the purchaser knew that the seller lacked title, or whether an honest and careful purchaser would have had doubts with respect to the seller’s capacity to transfer property rights, and if so, then whether the purchaser reasonably inquired about the seller’s ability to pass good title.” *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1376 (S.D. Ind. 1989), *aff’d*, 917 F.2d 278, 279 (7th Cir. 1990). See *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1152-53 (2d Cir. 1982) (finding that the Federal Republic of Germany could recover two Albrecht Dürer portraits from a New York collector who had bought the works in good faith from an American soldier who had stolen them from a German castle during World War II); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 427 (N.Y. 1991) (finding that the Solomon R. Guggenheim Museum in New York could recover a Marc Chagall gouache that had been stolen from the museum by a mailroom employee, sold to a gallery, and subsequently bought by an unsuspecting couple).

⁴ Elaine L. Johnston, *Cultural Property and World War II: Implications for American Museums—Practical Considerations for the Museum Administrator*, SC40 ALI-ABA 29, 32 (1998). Looting and coercive transfers of art during the period of the Nazi party’s rise to power in 1933 to the conclusion of World War II in 1945 occurred at unprecedented levels. *Id.* at 31. The Nazis unlawfully seized millions of objects from Jewish individuals and other Holocaust victims, public and private museums and galleries, and religious and educational institutions throughout Europe. *Id.* In France, for example, with the cooperation of the occupied Vichy government, Adolph Hitler and Herman Goering personally selected art objects for themselves. *The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Banking and Fin. Servs.*, 105th Cong. 2 (1998) [hereinafter *House Holocaust Hearings*] (opening statement of James A. Leach, Chairman, House Banking and Financial Services Committee). Entire inventories of museums were removed and some of the greatest private collections of such collectors as the Rothschilds were expropriated and sold off. *Id.*

Art had never assumed such a principal role in the ideology of war in Western history. See Stephen K. Urice, *World War II and the Movement of Cultural Property: An Introduction and Brief Bibliography for the Museum*

generally viewed as theft under principles of American and international law, give rise to claims by the families of the dispossessed for restitution of their stolen property.⁵

Restitution cases involve returning possession and good title to works of art to the original, dispossessed owners.⁶ A stolen work

Administrator, SC40 ALI-ABA 1, 4 (1998) (citing generally JONATHAN GEORGE PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* (1996)). Also unprecedented was the Nazi army's inclusion of well-trained specialists whose missions were to obtain and safeguard transportable works of art. See Urice, *supra*, at 4. Luckily, although for a despicable objective, the professionalism of the Nazi pillagers saved most of the treasures of Europe for today. See Urice, *supra*, at 4. Following the surrender of Germany, Allied forces, through extraordinary efforts recovered most of the objects from Germany and the occupied territories. See Johnston, *supra*, at 32. Art experts were assigned to each of the Allied occupation units at special collection points to sort out the uncovered paintings, sculptures and other works hidden by the Nazis in castles, bunkers and churches. See *House Holocaust Hearings*, *supra*, at 2 (opening statement of James A. Leach, Chairman, House Banking and Financial Services Committee). Vast numbers of works were returned to their owners, or the heirs of those who had not survived the Holocaust, or repatriated to the countries they were removed from. See Johnston, *supra*, at 32. However, by the mid-1950s, the formal recovery and return effort ceased and many thousands of objects remain missing today. See Johnston, *supra*, at 32. See also generally LYNN H. NICHOLS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND SECOND WORLD WAR* (1994) (providing an in-depth study of the Nazi pillage of European art).

⁵ See Johnston, *supra* note 4, at 31. The Hague Convention of 1907, to which Germany, the United States and most other Allied nations were parties, prohibited, *inter alia*, pillage, confiscation and seizure of works of art. See Johnston, *supra* note 4, at 31 n.2 (citing the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; 1 Bevans 631). The Allies also issued a declaration reserving the right to invalidate any transfer of art in the territories occupied by the Axis powers. See Johnston, *supra* note 4, at 31 n.2.

⁶ Good title refers to "[t]itle which is free of defects and litigation and hence may be transferred to another." BLACK'S LAW DICTIONARY, *supra* note 3, at 1486. Possession means "having control over a thing with the intent to have and to exercise such control." BLACK'S LAW DICTIONARY, *supra* note 3, at 897. Thus, a good faith purchaser or a possessor may have physical control over an object of art but may not hold good title to the object if it is stolen property. *Guggenheim Found.*, 569 N.E.2d at 429. Upon demand, the original owner may have the right to recover the work from the good faith purchaser in a court

of art generally rejoins the art market, where a good faith purchaser, unaware of the work's history of theft, buys the tainted work.⁷ Frequently, a stolen work embarks on a chain of ownership transfers from the thief to the current possessor. With each transfer, evidence of the initial theft becomes more obscure.⁸ Although a museum has been the good faith purchaser in some restitution disputes, the disputed work in such a case has been part of the museum's permanent collection, rather than on loan for a temporary exhibition.⁹

Recently, the museum community was shaken when the New York County District Attorney ("District Attorney") issued a subpoena duces tecum¹⁰ to the Museum of Modern Art in New York ("MOMA")¹¹ to seize two paintings exhibited in the fall of 1997, which were part of a three-year worldwide tour of the

proceeding. *Id.*

⁷ See Hawkins, *supra* note 1, at 49 (describing the typical path of a stolen work of art).

⁸ "Stolen works are generally 'laundered' through a series of sales to buyers with progressively less knowledge of the object's taint." Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 VA. J. INT'L L. 1, 1 (1990).

⁹ See *Guggenheim Found.*, 569 N.E.2d at 428 (noting that a stolen Chagall gouache had been part of the Guggenheim Museum's collection since it was donated in 1937). In *Republic of Turkey v. Metropolitan Museum of Art*, the Metropolitan Museum of Art purchased the Lydian Hoard for its permanent collection, although the Museum kept most of the 300 artifacts in storage rather than on display. See Kaye, *supra* note 2, at 28 (citing *Republic of Turk. v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990), describing further the Museum's possession of the artifacts).

¹⁰ "A 'subpoena' is a process of a court directing the person to whom it is addressed to attend and appear as a witness in a designated action or proceeding in such court A subpoena duces tecum is a subpoena requiring the witness to bring with him and produce specified physical evidence." N.Y. CRIM. PROC. LAW § 610.10 (McKinney 1995).

¹¹ The Museum of Modern Art was founded in 1929 and holds over 100,000 works dating from the 1880s to the present. See *House Holocaust Hearings*, *supra* note 4, at 174 (statement of Glenn D. Lowry, Director, Museum of Modern Art, New York). Over 1.5 million people visit MOMA each year, many to see special exhibitions. See *House Holocaust Hearings*, *supra* note 4, at 174 (statement of Glenn D. Lowry).

Austrian expressionist Egon Schiele.¹² The heirs of two European Jews claimed ownership to the paintings, which they alleged the Nazis had looted from their ancestors during the annexation of Austria in World War II.¹³ Reverberations of the subpoena and ensuing litigation spread throughout the art world. The news jolted New York museums and lenders around the globe, with the former fearing their ability threatened to continue first-class exhibitions, and the latter concerned about the extent to which their artwork

¹² Egon Schiele was an Austrian Expressionist who lived from 1890–1918. See MAGDALENA DABROWSKI, *EGON SCHIELE: THE LEOPOLD COLLECTION, VIENNA 6* (1997). During his brief career, the artist was prolific, producing more than 3,000 works on paper and executing approximately 300 paintings. *Id.* Though he lived only 28 years, and his artistic career spanned merely 10, Schiele is one of the most important Austrian artists of the early twentieth century. *Id.* Schiele was a founder of Austrian Expressionism, an artistic movement that “rejected the conventional concept of beauty and introduced the element of ugliness and exaggerated emotion as the fundamental traits of its pictorial language.” *Id.* The difficult subject matter, often sexually explicit and highlighting the tragic, made the artist’s work “underappreciated outside his home country.” *Id.* As a result, his principal patrons were Austrian collectors. *Id.* Today, most of Schiele’s work remains in Viennese public and private collections. *Id.*

¹³ The claimants are relatives of Lea Bondi and Fritz Grunbaum, both Austrian Jews who lost their works during the Nazi occupation of Austria during World War II, and are seeking the return of “Portrait of Wally” and “Dead City III,” respectively. See *infra* note 111 (describing the claimants’ communication with MOMA seeking help in the return of the Schiele paintings). This Note does not consider the veracity of the claimants’ allegations of their right to title of the disputed works, although the trial court’s opinion raises some doubts as to the merits of the claimants’ positions. See *In re* Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872, 881 n.12 (Sup. Ct. 1998), *rev’d, mot. denied sub nom.* People v. Museum of Modern Art, No. 28012-98, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999). See also Judith H. Dobrzynski, *Ownership Conflict Tests Art Seizure Law*, ORANGE COUNTY REGISTER (Cal.), Jan. 25, 1998, at F32 [hereinafter Dobrzynski, *Ownership Conflict*] (reporting that a relative of one of the claimants may have sold the painting to a Swiss gallery, thus making the lender’s purchase of the work lawful). *But see* Judith H. Dobrzynski, *A Singular Passion for Amassing Art, One Way or Another*, N.Y. TIMES, Dec. 24, 1997, at E1 [hereinafter Dobrzynski, *A Singular Passion*] (stating that the exhibitor may have bought the other disputed work knowing, yet ignoring that it was the property of one of the claimants).

would be protected while on exhibit in New York.¹⁴ The subpoena unsettled the extent of protection for exhibits because it appeared to override a section of the New York Arts and Cultural Affairs Law¹⁵ that had safeguarded loans like the Schiele exhibition for the past thirty years.

Section 12.03 of the New York Arts and Cultural Affairs Law (“ACAL”) contains an Exemption From Seizure provision, which protects works of art loaned to non-profit exhibitions from “any kind of seizure . . . for any cause whatever.”¹⁶ This provision had never been challenged in court.¹⁷ Based upon the statute’s surrounding language and legislative history,¹⁸ the District Attorney interpreted the statute not to include seizures for criminal investigations and therefore subpoenaed MOMA to produce the paintings.¹⁹ MOMA successfully moved to quash the subpoena,²⁰ decided by the New York Supreme Court in *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*²¹ (“Schiele Case”). In the *Schiele Case*, the court disagreed with the District Attorney’s interpretation of the law and granted the motion.²² However, this success was short lived. While

¹⁴ For instance, leading European museums declared that “[t]he 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.” Brief for Respondent at 30 n.24, *People v. Museum of Modern Art*, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999) (No. 28012-98).

¹⁵ N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999). See *infra* Part I.B for text of statute.

¹⁶ *Id.*

¹⁷ See *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 872 (noting that the statute “has never been the subject of court scrutiny”).

¹⁸ See *infra* notes 120-123 (discussing the District Attorney’s arguments).

¹⁹ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 872, 875.

²⁰ See *infra* notes 117-119 (discussing MOMA’s arguments in support of its motion to quash).

²¹ 677 N.Y.S.2d 872, 874 (Sup. Ct. 1998), *rev’d, mot. denied sub nom.* *People v. Museum of Modern Art*, No. 28012-98, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999).

²² *Id.* at 881. See *infra* Part II, discussing the trial court’s decision.

MOMA remained in possession of the paintings,²³ the District Attorney appealed the ruling.²⁴ In *New York v. Museum of Modern Art*,²⁵ the Appellate Division of the State of New York for the First Department reversed the trial court, finding the statute not to immunize loans seized pursuant to criminal investigations. MOMA intends to appeal the ruling.²⁶

The controversy over the extent of protection provided by the ACAL arises in the broader context of the legal system's approach to whether the good faith purchaser of stolen artwork or the original owner should have the legal right to ownership. Common law and civil law nations take opposite approaches to this dilemma. Civil law nations generally favor the good faith purchaser under a policy fostering commercial certainty, whereas the United States and other common law nations generally award the artwork to the victim of the theft.²⁷ New York law is particularly sympathetic to the original owner, in an effort to thwart the stolen art market.²⁸

Although the ACAL does not award possession of a disputed work of art to either the possessor or the claimant, nor does it prevent a claimant from bringing a suit for replevin,²⁹ the law

²³ Upon issuance of the subpoena, the District Attorney and MOMA reached an agreement "which culminated in an understanding that the museum will maintain custody of the paintings until the conclusion of litigation over the subpoena." Brief for Appellant at 5, *People v. Museum of Modern Art*, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999) (No. 28012-98).

²⁴ See Brief for Appellant, *Museum of Modern Art* (No. 28012-98).

²⁵ No. 28012-98, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999), *rev'g In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872, 874 (Sup. Ct. 1998).

²⁶ See Bill Alden, *Panel Orders Museum to Give Up Paintings*, N.Y.L.J., Mar. 17, 1999, at 1 (reporting that a MOMA spokeswoman stated that "the museum intended to appeal the panel's ruling").

²⁷ See *infra* notes 163-164 (describing the differences between the common law and civil law approaches to the transfer of stolen chattels).

²⁸ See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991) (holding that New York law should not "encourage illicit trafficking in stolen art"). See also *infra* note 166 (describing further New York law).

²⁹ See N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999). Replevin is "an action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels." BLACK'S

may make a claimant's recovery efforts more difficult by preventing a claimant from seizing a work temporarily loaned to a New York museum.³⁰ Thus, by interpreting the ACAL to prohibit seizures pursuant to criminal investigations, the statute appears to run against the grain of New York law by not favoring victims of art theft. However, this Note argues that the statute reflects a legislative policy choice that, in the words of the trial court, it is "in the state's best interest to protect cultural institutions and their ability to encourage the exchange of art for the benefit of the entire populace over the needs of a few individuals to recover their art, even if the art was stolen."³¹ While this stance seems harsh to victims of art theft, and particularly to those of the Holocaust, this Note contends that unequivocal exemption from seizure under the ACAL will not prove detrimental to a claimant's recovery efforts.

The ACAL can prohibit seizures pursuant to criminal investigations without jeopardizing a claimant's recovery efforts because the potential pernicious effects of the statute on victims of art theft should be mitigated by the recent rise in interest and efforts in returning stolen artwork to its rightful owners. Museums and the art community currently are increasing their awareness of, and improving policies concerning, the acquisition and display of stolen artwork.³² Concurrently, various organizations have developed,

LAW DICTIONARY, *supra* note 3, at 1299.

³⁰ As one critic of the *Schiele Case* has argued, foreclosing seizure under the premise that a claimant may seek remedy abroad is a "flawed idea [because] [t]he foreign state to which an artwork in controversy is allowed to return may permanently foreclose recapture, leaving a claimant no mechanism to assert ownership." Daniel J. Bender, Case Commentary, *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 31 N.Y.U. J. INT'L L. & POL. 109, 119 (1998).

³¹ *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872, 879 (Sup. Ct. 1998), *rev'd, mot. denied sub nom.* *People v. Museum of Modern Art*, No. 28012-98, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999).

³² Several directors of America's most prominent museums recently testified before Congress as to their commitment to measures to investigate the provenance of every work in their collections. See *House Holocaust Hearings*, *supra* note 4, at 8, 10. Philippe de Montebello, Director, Metropolitan Museum of Art, New York, speaking for the Association of Art Museum directors, stated that museums are "committed to a process of more directed research, continued

and are improving, computer databases that museums can consult when considering works for exhibition.³³ Additionally, in the wake of recent ownership disputes between a good faith purchaser and a victim of art theft, several alternative dispute resolution proposals have surfaced to resolve claims for stolen art work.³⁴ Finally, increasing pressure resulting from congressional and international action to right the wrongs of the Holocaust should assist a claimant in recovering stolen artwork displayed at a museum exhibition without resort to seizure.³⁵

This Note analyzes the New York and federal statutes³⁶

vigilance, and to the enhanced use of new technologies in order to access records as they become available." See *House Holocaust Hearings*, *supra* note 4, at 10. Even Sotheby's, the inveterate auctioneer, now attends conferences on Holocaust-era art and scrutinizes its auction catalogue for objects that may have been looted by the Nazis. See David D'Arcy, *Sotheby's Takes Lead on War Loot Issue*, ART & AUCTION, Feb. 15, 1999, at 28. This is a significant sign indeed of increased diligence in avoiding trade in Holocaust-tainted art, as Sotheby's traditionally had been slow to "acknowledge the legitimacy of claims concerning property slated for sale." *Id.*

³³ See *infra* Part III.A, discussing the recent progress in developing computer databases to track and record stolen art.

³⁴ See *infra* Part III.B, discussing various alternative dispute resolution proposals suggested in response to recent ownership disputes over stolen artwork.

³⁵ In the United States, Congress recently enacted the Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998) which, *inter alia*, encourages all governments to help to return property stolen by the Nazis to victims of the Holocaust. See *infra* notes 201-204 and accompanying text (discussing the Act). Other nations are seeking to make reparations to Holocaust victims as well. The Austrian government currently is undertaking efforts to return cultural property in possession of national museums to Holocaust victims. See *infra* note 227 (describing Austria's actions). In 1998, Swiss banks agreed to pay \$1.25 billion to Jewish groups to settle Holocaust-related lawsuits. See Barry Meier, *Jewish Groups Fight for Spoils of Swiss Case*, N.Y. TIMES, Nov. 29, 1998, at A1. In December 1998, representatives of 44 countries met in Washington and agreed to produce a master list of artwork stolen by the Nazis "as part of an international effort to attain justice for the victims of financial war crimes." Brigid O'Hara Forster, *What Has Been Looted? The West's Art Museums Face a Daunting Task as They Search for the Remnants of Nazi Pillaging*, TIME, Mar. 15, 1999, at 58.

³⁶ See Immunity From Seizure Act, 22 U.S.C. § 2459 (1994), discussed *infra* Part I.A. MOMA chose not to apply for federal protection, believing it to be a time-consuming process, and presumed that the New York statute would afford

protecting works of art on loan to exhibits from seizure, and discusses the importance of these laws in providing art loans with full exemption from seizure to ensure the stability and success of major museum exhibitions in New York.³⁷ While arguing for the need for comprehensive statutory protection from seizure, this Note recognizes and addresses the rights of victims of art theft to concrete means of recovery and compensation. Part I of this Note introduces the federal and New York statutes and analyzes the legislative history and underlying policy concerns of the laws. Part I advances several arguments maintaining that the purpose of the New York statute is to insure complete statutory protection for lenders to museum exhibitions in order to foster premier exhibitions. Part II discusses the background of the *Schiele Case* and the trial court and appellate division decisions. This Part criticizes the appellate decision, and argues that the trial court correctly found that the New York statute protects against seizures for grand jury subpoenas pursuant to criminal investigations, by considering the harmful effects seizures may have on the ability of museums to host major international exhibitions. Part II also considers the chilling effect that may occur when collectors abstain from lending in fear of possible seizure, and the potential impact on victims of art theft who benefit from unimpeded exhibitions in locating their stolen works. Part III sets forth current efforts and proposals that the art and museum communities are developing to insure that museum collections and exhibitions contain only those works whose rightful ownership is certain. Part III also explores recently improved means available to claimants to identify and recover stolen art, and evolving remedies to resolve disputed claims of ownership that avoid litigation.

all the protection necessary against any seizure. See *infra* text accompanying notes 90-95 (discussing further MOMA's practice of seeking statutory protection from seizure for exhibits).

³⁷ In New York City, more people visit museums than all other art venues—opera, concerts, ballet, theater—combined. See Norman MacAfee, *The Scent of Art*, PA. GAZETTE, Sep./Oct. 1998, at 42. Museum attendance even exceeds that for the entire city's professional sporting events. *Id.*

I. THE STATUTES

In order to secure major international museum exhibitions, statutory protection from seizure of art loans by third-party claimants is essential.³⁸ Aside from theft or damage to an artwork on loan, “the emergence of an unsuspected ulterior owner during the loan period is probably the situation most feared by borrowers.”³⁹ A borrowing museum’s inability to extend to lenders firm guarantees against judicial seizure of artwork while on exhibition will likely deter future loans.⁴⁰ In an era of international instability over museums’ and private collectors’ rightful ownership of artwork stemming from the exposure of displaced artwork as a result of World War II,⁴¹ the need for statutory protection is particularly urgent.⁴²

Federal⁴³ and New York statutes⁴⁴ provide protection for lenders from seizure of artwork loaned to non-profit museum exhibitions, as well as to borrowers of such works by ensuring their

³⁸ For example, George Ortiz, a leading private collector and frequent lender of antiquities, believes that some “firm guarantee against judicial seizure is an ‘essential’ factor” in a collector’s decision to lend. See NORMAN PALMER, ART LOANS 103 (1997).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *infra* note 178 (discussing that in the past year, claims to artwork looted by the Nazis, and now in the possession of museums and collectors, have emerged in Chicago and Seattle). See also Jonathan Mandell, *Art, Artists and the Nazis: The Modern Fallout*, NEWSDAY (N.Y.), May 3, 1998, at D16 (discussing how the problem is more widespread in Europe where, for example, the French, Dutch and Austrian government-run museums have admitted to holding many “unclaimed” works of art stemming from Nazi thefts that could not be returned to the proper owners following the end of World War II).

⁴² See *infra* Part III, discussing the equally important need for international awareness and informational systems to identify art objects looted by the Nazis, and the ability of these systems to enable the victims of theft to recover their works.

⁴³ Immunity From Seizure Act, 22 U.S.C. § 2459 (1994).

⁴⁴ N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999).

ability to receive loans. Both the New York State Legislature⁴⁵ (“Legislature”) and Congress⁴⁶ enacted the laws with the intention of ensuring the protection of exhibited artwork, which lenders otherwise would not entrust to museum exhibitions. This Part analyzes and contrasts the two statutes, finding the New York law to provide fuller and more efficient protection to New York museums, and concludes by exploring efforts outside of the United States to statutorily prohibit the seizure of art loans.

A. *The Immunity From Seizure Act*

The Immunity from Seizure Act⁴⁷ (“Federal Act”), enacted in 1965, grants protection from seizure to works from any foreign country on loan to a not-for-profit cultural institution in the United States for temporary exhibition. The statute provides in relevant part:

Whenever any work of art . . . is imported into the United States from any foreign country, . . . 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 . . . of custody or control of such object if before the importation of such object the President or his designee has determined that the object is of cultural significance and that the temporary exhibition . . . is in the national interest, and a notice to that effect has been published in the Federal Register.⁴⁸

⁴⁵ See *infra* notes 75-76 and accompanying text (discussing the legislative intent of the New York anti-seizure statute).

⁴⁶ See *infra* notes 53-56 and accompanying text (discussing the Congressional intent of the Immunity from Seizure Act).

⁴⁷ 22 U.S.C. § 2459.

⁴⁸ *Id.*

In 1978, President Jimmy Carter issued an executive order⁴⁹ appointing the Director of the United States Information Agency (“USIA”) to assume the responsibilities designated to the President under the Federal Act.⁵⁰ The Presidential directive also compelled the Director of the USIA to consult the Secretary of State with respect to the determination of “national interest.”⁵¹ The directive further suggested that the USIA director consult with the Secretary of the Smithsonian Institution and the Director of the National Gallery as to the determination of the cultural significance of the objects to be loaned.⁵²

Congress enacted the Immunity from Seizure Act with the intent of insuring the successful exhibition of art.⁵³ The House Judiciary Committee’s Report⁵⁴ recognized that the Federal Act would allow institutions to import for display works of art from foreign countries “without the risk of the seizure or attachment of the said objects by judicial process.”⁵⁵ The report went on to cite the opinion of the Department of Justice that “[t]he commendable objective of this legislation is to encourage the exhibition in the 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.”⁵⁶ Thus, under the Federal Act, museums could provide protection from seizure to their lenders to secure successful exhibits, but only if they received government approval, and only for works loaned from outside the United States.

⁴⁹ Exec. Order No. 12,047, 43 Fed. Reg. 13,359 (1978), *amended by* Exec. Order No. 12,388, 47 Fed. Reg. 46,245 (1982). The 1978 Order replaced an initial order of 1966, Exec. Order No. 11,312, 31 Fed. Reg. 13,415 (1966), which originally delegated the functions to the Secretary of State. *Id.*

⁵⁰ Exec. Order No. 12,047, 43 Fed. Reg. at 13,359.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See H.R. REP. NO. 89-1070 (1965).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

B. The New York Arts and Cultural Affairs Law

In 1968, three years following the implementation of the Federal Act, New York State enacted its own anti-seizure statute. Section 12.03 of the New York ACAL reads:

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 same is enroute to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.⁵⁷

Although the catalyst of the law was a civil action in which the works of a non-resident exhibitor were seized during an exhibition in New York,⁵⁸ an analysis of the bill's legislative history indicates that the Legislature and the author of the bill, New York Attorney General Louis J. Lefkowitz,⁵⁹ intended that it provide the

⁵⁷ N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999).

⁵⁸ In 1968, Governor Nelson Rockefeller signed the ACAL into law in response to the seizure of a non-resident artist's work loaned to an exhibition hosted by a Buffalo, New York museum. See Governor Nelson Rockefeller, MEMORANDUM OF APPROVAL, Assembly Bill No. 6906, June 22, 1968, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 29. In March, 1968, under an order of attachment in a law suit, a New York gallery seized the works of the internationally famous artist Naum Gabo which were part of a retrospective at the Albright-Knox Museum in Buffalo. See Louis J. Lefkowitz, MEMORANDUM FOR THE GOVERNOR, May 20, 1968, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 2.

⁵⁹ See Governor Nelson Rockefeller, MEMORANDUM OF APPROVAL, Assembly Bill No. 6906, June 22, 1968, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 29 (stating that the bill was prepared by and was part of the Attorney General's 1968 legislative program).

broadest possible protection to artwork covered by the ACAL.⁶⁰ The appellate division rejected the trial court's analysis of the legislative history of the ACAL in the *Schiele Case*, which presented several strong arguments indicating that the Legislature intended to cover any and all seizures.⁶¹ However, the legislative policy at the root of the ACAL confirms that the statute was designed to insure that New York museums have the capacity to conduct the finest possible exhibits without concern over seizures. Therefore, the spirit of the ACAL is served best by interpreting the statute to apply to all seizures, both in the context of civil claims and criminal investigations.

Although the statute does not expressly immunize loaned works from seizures pursuant to criminal investigations, the Legislature apparently was aware of the statute's potential effect on stolen artwork before the bill was passed.⁶² Moreover, the Legislature did not alter the bill's language to address this concern.⁶³ A memorandum from the Committee on State Legislation of the Association of the Bar of the City of New York ("Bar Committee") expressed skepticism that the bill would prevent a rightful owner from reclaiming stolen art.⁶⁴ The memorandum stated that, "[i]f [a] plaintiff, including a resident of this State, alleges that a work on exhibit has been stolen from him or unlawfully retained by a

⁶⁰ See Louis J. Lefkowitz, MEMORANDUM FOR THE GOVERNOR, May 20, 1968, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 2; Louis J. Lefkowitz, SUPPLEMENTAL MEMORANDUM FOR THE GOVERNOR, June 14, 1968, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 8.

⁶¹ *People v. Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, No. 28012-98, 1999 WL 145904, at *4 (N.Y. App. Div. Mar. 16, 1999).

⁶² See *infra* notes 64-66 and accompanying text (discussing that the Association of the Bar of the City of New York informed the Legislature of the statute's effect on stolen art work).

⁶³ The language of the bill, quoted in a memorandum of opposition to the bill, is identical to the language as it exists in the enacted statute. Compare Memorandum No. 122, Association of the Bar of the City of New York, Committee on State Legislation, June 18, 1968, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 18, with N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999).

⁶⁴ Memorandum No. 122, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 18.

bailee, he may nonetheless not replevy the property if the criteria of the bill are met.”⁶⁵ Attorney General Lefkowitz acknowledged the Bar Committee’s criticism of the bill and responded, refusing to alter the bill’s language.⁶⁶ The trial court interpreted this response as a clear indication that the statute was to “provide coverage for all seizures, whether in the context of a civil action or a criminal investigation.”⁶⁷ The appellate division, in reversing the trial court, held that the Bar Committee’s memorandum, although discussing stolen property, only referenced the civil remedy of replevin.⁶⁸ The appellate court also noted that all agencies and legal groups whom the drafters of the bill heard from had civil interests and that no law enforcement or criminal defense groups objected to the bill.⁶⁹

While the trial and appellate courts differ over whether the Bar Committee’s memorandum evidences a cognizance on the part of the Legislature and the Attorney General that the statute was to cover seizures pursuant to criminal investigations, what appears obvious is that the Attorney General intended the bill to afford complete protection from seizure with no exceptions. In his response to the Bar Committee, Attorney General Lefkowitz initially noted the Bar Committee’s failure to grasp the “importance of this bill to museums and other cultural institutions in enabling them to borrow works of art for temporary exhibitions held within the State.”⁷⁰ The Attorney General stressed the importance that the exemption from seizure should not contain any exceptions or loopholes because lenders might keep their artwork in the safety of

⁶⁵ *Id.*

⁶⁶ Louis J. Lefkowitz, SUPPLEMENTAL MEMORANDUM FOR THE GOVERNOR, June 14, 1968, *Governor’s Bill Jacket* to 1968 N.Y. Laws 1065 at 8.

⁶⁷ *In re* Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872, 878 (Sup. Ct. 1998), *rev’d, mot. denied sub nom.* People v. Museum of Modern Art, No. 28012-98, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999).

⁶⁸ People v. Museum of Modern Art, 28012-98, 1999 WL 145904, at *4 (N.Y. App. Div. Mar. 16, 1999).

⁶⁹ *Id.*

⁷⁰ Louis J. Lefkowitz, SUPPLEMENTAL MEMORANDUM FOR THE GOVERNOR, June 14, 1968, *Governor’s Bill Jacket* to 1968 N.Y. Laws 1065 at 8.

their homes if the bill made lenders feel only “half-safe.”⁷¹ The Attorney General then concluded his memorandum by reiterating the need for an “omnibus” exemption from seizures in order not to “frighten[]-off” the potentially large number of non-resident lenders to New York museum exhibitions.⁷² As the trial court observed, “[t]he Attorney General, the highest law enforcement officer of the state, is presumed to have recognized the potential consequences of the statute in criminal investigations.”⁷³ Yet instead of expressing his concern that the statute could inhibit criminal investigations into allegedly stolen works, he advocated an omnibus exemption. Thus, although the trial court’s belief may be overstated in finding that “the direct references by the Bar Association and the Attorney General to the effect of the statute on stolen art . . . removes any doubt that the enactment was intended to provide coverage for all seizures, whether in the context of a civil action or a criminal investigation,”⁷⁴ the memoranda appear at least to demonstrate a legislative intent to provide the broadest protection from seizure for loans to New York museum exhibitions.

The conclusion that the Legislature intended the ACAL to apply to any and all seizures is further, and most clearly, evidenced by a review of the Attorney General’s and the Governor’s memoranda in support of the law, which suggest that the statute’s *raison d’être* is to ensure that New York museums continue to lead the art world in the presentation of major exhibitions. Thus, even if the Legislature did not enact the ACAL with the specific *purpose* of

⁷¹ *Id.* at 9. The Attorney General added:

To puncture the exemption sought by this bill with a single major loophole . . . thus forcing ‘potential-lenders-in-good-faith’ to seek legal advice before lending their works to museums of this State would be self-defeating, since non-resident artists and patrons of the arts can exercise their free alternative to stay out of trouble by keeping their possessions safely at home.

Id.

⁷² *Id.* at 10.

⁷³ *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872, 878 (Sup. Ct. 1998), *rev’d, mot. denied sub nom. People v. Museum of Modern Art*, No. 28012-98, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999).

⁷⁴ *Id.* (emphasis added).

prohibiting seizures pursuant to criminal investigations, the desired immunizing effect was to apply to all seizures, as the Legislature would have seen any seizure as equally detrimental to the health of New York museum exhibitions.

An analysis of Governor's Bill Jacket elucidates that the ACAL emanates from a legislative policy that attempts to ensure museums the opportunity to display the finest possible exhibits. In his Memorandum of Approval, the Governor stated that the disruption of the exhibit inspiring the ACAL "has deeply concerned the artistic world, which feels that the repercussions could result in the reluctance of out-of-state exhibitors to show their work in New York The bill . . . will go far to allay the fears of potential exhibitors and enable the State of New York to maintain its pre-eminent position in the arts."⁷⁵ As the Attorney General explained, the "primary policy concern of this bill is not with the lenders, but with the museums and other cultural institutions of this state which are completely and thoroughly dependent upon the free flow of works of art into the State for the purpose of conducting exhibitions of major public interest."⁷⁶ It is unlikely that the Legislature, when enacting the statute in 1968, foresaw the rise of recent claims challenging the provenance of art looted by the Nazis over fifty years ago and now in the hands of good faith purchasers.⁷⁷ Although it may appear unsympathetic to claimants in this context,⁷⁸ the text of the statute combined with the legislative policy of the ACAL to provide complete protection to exhibitions,

⁷⁵ Governor Nelson Rockefeller, MEMORANDUM OF APPROVAL, Assembly Bill No. 6906, June 22, 1968, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 29.

⁷⁶ Louis J. Lefkowitz, SUPPLEMENTAL MEMORANDUM FOR THE GOVERNOR, June 14, 1968, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 10.

⁷⁷ Claims for restitution of artwork stolen by the Nazis has reached great proportions only relatively recently. See Detlev F. Vagts, *Restitution for Historical Wrongs, The American Courts and International Law*, 92 AM. J. INT'L. L. 232, 232 (1998).

⁷⁸ The trial court, while finding that the ACAL covered any seizure, emphasized that the horror of the Holocaust was beyond words, but that the tragedy of the Holocaust, "although casting a pall over this matter," must be separated when interpreting the statute. *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 881.

indicates that the Legislature intended the statute to prevent *any* kind of interference with the museum community's ability to provide world-class exhibitions.

C. *The Two Statutes Contrasted*

There are several significant differences between the ACAL and the Federal Act, which suggest that obtaining protection under the ACAL is simpler and more expedient for New York museums. For example, the ACAL does not require a designation of "cultural significance" or "national interest."⁷⁹ In fact, the ACAL does not require any filing or application with the State to obtain exemption from seizure. Protection under the ACAL is automatic.⁸⁰ By contrast, the Federal Act demands publication of notice in the Federal Register, which requires a minimum of three days after submission by the USIA.⁸¹ Consultation with the State Department averages ten days.⁸² These time periods do not seem terribly lengthy but the submissions a museum must make to the USIA could be quite time-consuming.

Pursuant to the Federal Act, the USIA requires a museum seeking immunity from seizure to provide a substantial amount of information on all aspects of the proposed exhibition.⁸³ A museum is required to disclose a description of each work to be covered, a copy of the agreement with each lender and participating museums, and a statement as to the non-profit nature of the exhibition.⁸⁴ Most notably, a museum must supply a statement as to why anyone might want to attach an exhibited work in the United States and an

⁷⁹ N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999).

⁸⁰ *Id.*

⁸¹ See R. Wallace Stuart, *Legal Problems of Museum Administration*, SB53 ALI-ABA 323, 327 (1997) (providing a breakdown of the components of the Federal Act and a checklist outlining the requirements that museums must meet in order to obtain protection under the Federal Act).

⁸² *Id.*

⁸³ *Id.* at 328-29.

⁸⁴ The USIA requires museums to submit other information such as the dates the works will arrive in the United States, a statement demonstrating the cultural significance of the works to be exhibited, and information proving the exhibitor's status as an educational or cultural institution. *Id.*

evaluation of the threat.⁸⁵ Furthermore, the USIA may require time to consult other authorities to determine the issue of the exhibit's cultural significance.⁸⁶

The most significant difference between the statutes is that the Federal Act only applies to works loaned from abroad, whereas the ACAL also protects works loaned from within the United States.⁸⁷ This is a critical distinction in the extent of protection because lenders within the United States loan the vast majority of artwork to American museums for exhibitions.⁸⁸

Considering the steps the Federal Act requires museums to undertake to obtain immunity from seizure and the narrower scope of protection it offers, New York museums understandably find the automatic protection of the ACAL more attractive.⁸⁹ According to the Director of MOMA, "New York cultural institutions often eliminate th[e] time-consuming process" required in seeking

⁸⁵ See *id.* MOMA could not have successfully undertaken this requirement and anticipated the claims of the Schiele claimants if the museum had applied for federal protection for the Schiele exhibition since, according to MOMA's director, MOMA "had no reason to believe that there was any cloud on the paintings' past. Both of the pictures had been exhibited around the world for decades and both had been reproduced frequently in books." See *House Holocaust Hearings*, *supra* note 4, at 178 (statement of Glenn D. Lowry, Director, Museum of Modern Art, New York). "Whatever logistical and financial difficulties exist for examining one's own collection are multiplied for loans. There is no effective way to determine the provenance of, in this case, 152 works of art arriving for a three month loan." See *House Holocaust Hearings*, *supra* note 4, at 179 (statement of Glenn D. Lowry).

⁸⁶ If the USIA determines that outside advice is required, it may consult the Smithsonian Institute, the National Gallery or any other government agency. See Stuart, *supra* note 81, at 327. The USIA has also consulted experts from the private sector. See Stuart, *supra* note 81, at 327.

⁸⁷ The Federal Act protects works "imported into the United States from any foreign country," 22 U.S.C. § 2459 (1994), whereas the ACAL immunizes from seizure works loaned by any "nonresident exhibitor," N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999).

⁸⁸ *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872, 875 (Sup. Ct. 1998), *rev'd, mot. denied sub nom.* *People v. Museum of Modern Art*, No. 28012-98, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999).

⁸⁹ *Id.* at 876.

protection under the Federal Act.⁹⁰ The museums prefer instead to rely on the apparent automatic protection from any seizure granted by the ACAL.⁹¹ In fact, MOMA has sought federal protection for only four of eighty-nine exhibitions it has hosted over the last three years,⁹² each at the request of its lenders.⁹³ MOMA received federal protection on all four occasions.⁹⁴ For the Schiele exhibition, however, MOMA did not seek federal protection, choosing instead to rely on the New York statute.⁹⁵

D. Statutory Protection in Foreign Jurisdictions

New York is not the only forum to legislate in an effort to secure major international exhibitions. In 1994, France enacted legislation protecting from seizure all cultural objects loaned by a “foreign power, local authority or cultural institution to the French State, for public exhibition in France.”⁹⁶ France instituted the law in response to a French national who attempted to sequester paintings loaned by Russian national museums to an Henri Matisse exhibition at the Centre Georges Pompidou (“Pompidou Center”) in Paris, in order to determine a claim of ownership.⁹⁷ The

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Ruth Redmond-Cooper, *Disputed Title to Loaned Works of Art: The Shchukin Litigation*, 1 ART ANTIQUITY & L. 73, 76 (1996) (citing Article 61, Law No. 94-679 of Aug. 8, 1994). The French law does not grant blanket protection, but limits coverage through governmental order to works that are publicly owned and loaned to French public entities. *Id.*

⁹⁷ *Id.* at 73-74. The exhibition borrowed 21 works from the Pushkin and Hermitage museums. *Id.* at 73. Many of these works had been confiscated during the Russian revolution of 1917 from huge private collections of 20th century French art. *Id.* The claimant of the Matisses, a French citizen, was the daughter of Sergei Ivanovich Shchukin, a Matisse patron and one of the collectors. *Id.* at 73-74. The law also may have been the result of non-French lenders withholding two works from the Claude Monet “Cathedrals” show at the Musée des Beaux-Arts, in Rouen, France in 1994 in the wake of the claim on the Matisses. See PALMER, *supra* note 38, at 103.

Pompidou Center challenged the action as a matter of “grave concern,” claiming that successful prosecution would “severely disrupt inter-state cultural exchanges.”⁹⁸ The French court ruled against the claimant on the basis of the sovereign immunity⁹⁹ of the Russian Federation and never reached the policy concerns affecting loans to museums.¹⁰⁰

However, the policy concerns did not go unnoticed. The French government enacted the anti-seizure law soon after the court’s decision.¹⁰¹ Dissatisfied that the French court never reached the policy concerns affecting museum loans, one commentator suggested that these concerns must be considered because “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

⁹⁸ See Redmond-Cooper, *supra* note 96, at 74.

⁹⁹ See Redmond-Cooper, *supra* note 96, at 74. The United States also applies the doctrine of sovereign immunity. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1994 & Supp. 1996). Under the doctrine of sovereign immunity, “a foreign sovereign is immune from the jurisdiction of ‘the courts of the United States and of the States.’” *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.C. Cir. 1994). The doctrine is subject to certain statutory exceptions, such as circumstances in which the foreign sovereign has explicitly or implicitly waived its immunity, or in which the claim arises from a foreign state’s commercial activity. See 28 U.S.C. § 1605(a) (noting general exceptions to the jurisdictional immunity of a foreign state). “A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act.” 28 U.S.C. § 1603(d). “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.” *Id.* Like the American law, French and English courts limit their doctrines of sovereign immunity so as not to include commercial activity. See Redmond-Cooper, *supra* note 96, at 75. See also Redmond-Cooper, *supra* note 96, at 75-78 (analyzing whether loaning of art constitutes commercial activity for purposes of sovereign immunity in the French or English courts).

¹⁰⁰ See Redmond-Cooper, *supra* note 96, at 74 (discussing *Stchoukine v. Le Centre National d’Art et de Culture Georges Pompidou*, T.G.I. Paris, 1e ch., 1re section, June 16, 1993). The *Stchoukine* court ruled that the title of the claimant’s deceased father had been revoked by a Russian “Act of nationalisation” in 1918 under which property of Russian citizens was taken by the Russian government in accordance with Russian law. See PALMER, *supra* note 38, at 102.

¹⁰¹ Redmond-Cooper, *supra* note 96, at 76.

third parties.”¹⁰² Several recent exhibitions in France have employed the law for protection against seizure.¹⁰³

Four Canadian provinces also have enacted anti-seizure statutes.¹⁰⁴ British Columbia’s statute appears to provide broad protection to exhibitors. The law states that “[n]o proceeding for possession or for a property interest shall be brought in respect of works of art or objects of cultural or historical significance brought into the Province for temporary public exhibit.”¹⁰⁵ The British Columbian law seems to exceed the scope of the ACAL and the Federal Act since it protects not only seizure, but *any proceeding* for restitution of artwork temporarily exhibited. Manitoba protects artwork or other cultural objects from seizure loaned for temporary display from foreign countries to governmental, cultural or educational institutions, if the Manitoban government determines the work to be of “cultural significance,” and the exhibition to be “in the interest of the people of Manitoba.”¹⁰⁶ Ontario provides the same protection from seizure as Manitoba, but limited to non-profit exhibitions.¹⁰⁷ The province of Quebec provides exhibitors with statutory protection from seizure as well.¹⁰⁸

II. THE EGON SCHIELE CASE

From October 8, 1997 to January 4, 1998, MOMA held an exhibition entitled “Egon Schiele: The Leopold Collection,

¹⁰² Redmond-Cooper, *supra* note 96, at 74.

¹⁰³ These shows include Maurice Denis, Lyon, September, 1994; Andre Derain, Paris, September, 1994; and Paul Cézanne, Paris, July, 1995. See Redmond-Cooper, *supra* note 96, at 76. See also PALMER, *supra* note 38, at 112.

¹⁰⁴ See PALMER, *supra* note 38, at 111.

¹⁰⁵ The British Columbia Law and Equity Act, R.S.B.C., § 50(1) (1980) (Can.).

¹⁰⁶ The Foreign Cultural Objects Immunity From Seizure Act, R.S.M., ch. F.140 (1976) (Can.).

¹⁰⁷ Foreign Cultural Objects Immunity from Seizure Act, R.S.O., ch. 172 (1980) (Can.).

¹⁰⁸ See PALMER, *supra* note 38, at 111 (citing Art 553.1, Code of Civil Procedure, S.Q., ch. 48 (1976) (Can.)).

Vienna.”¹⁰⁹ The exhibition was on loan from the Leopold Museum of Austria and had been exhibited in several cities around the world before arriving in New York.¹¹⁰ Five days before the exhibit was to close and return to Europe, MOMA received letters from two separate claimants asserting that an exhibited painting was taken from the possession of their respective ancestors during the Nazi annexation of Austria during World War II.¹¹¹ The letters requested that MOMA not move the paintings out of its jurisdiction until the matter of true ownership could be determined.¹¹² On January 3, 1998, MOMA notified the claimants that

¹⁰⁹ *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872, 874 (Sup. Ct. 1998), *rev'd, mot. denied sub nom. People v. Museum of Modern Art*, No. 28012-98, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999). The exhibit contained over 150 works and was loaned by the Leopold Museum in Vienna, Austria. *Id.* The Museum takes its name from Dr. Rudolph Leopold, an Austrian ophthalmologist and passionate collector of Egon Schiele, who recently sold his collection of more than 250 Schieles to Austria for construction of a new state museum. See Dobrzynski, *A Singular Passion*, *supra* note 13, at E1. Doctor Leopold has been fascinated by Schiele his entire life and has collected Schieles since he was in medical school. However, newspaper reports which appeared at the close of the Schiele exhibit in New York, just before MOMA received notice of the claims, raised questions about Dr. Leopold's knowledge that Ms. Bondi was the rightful owner of "Portrait of Wally" before Leopold himself purchased the painting. The reports also discussed other shady practices Dr. Leopold has been accused of employing to acquire his Schiele collection. According to the reports, Dr. Leopold denies using any illegitimate methods of acquisition. See Dobrzynski, *A Singular Passion*, *supra* note 13, at E1.

¹¹⁰ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 874. The exhibit visited England, Germany, Switzerland and Japan before reaching New York. *Id.*

¹¹¹ *Id.* at 874-75. In late December, 1997, Henry Bondi, the nephew of Lea Bondi, the original owner of "Portrait of Wally," one of the challenged paintings, sent a letter to Glenn D. Lowry, the Director of MOMA, on behalf of Ms. Bondi's other heirs who reside in New York City, the State of Washington and Great Britain. See Judith H. Dobrzynski, *Modern is Urged to Play Solomon in Paintings Dispute*, N.Y. TIMES, Jan. 1, 1998, at E1. Rita and Kathleen Reif, the heirs of Fritz Grunbaum, the original owner of the other painting, "Dead City III," also sent MOMA a letter claiming rightful ownership. See *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 875.

¹¹² Mr. Bondi wrote, "[w]e earnestly request that you do not return the painting to the jurisdiction of the 'lenders' until the matter of true ownership has

it was in no position to pass judgment on the foundation of their claims.¹¹³ MOMA averred that it had “no knowledge of the existence of any claims with respect to the Paintings.”¹¹⁴ Furthermore, the paintings previously had been exhibited and published around the world.¹¹⁵ On January 7, 1998, pursuant to a criminal investigation into the allegedly stolen property, the District Attorney served MOMA with a grand jury subpoena duces tecum, ordering MOMA to hold the paintings pending an investigation into rightful ownership.¹¹⁶

On January 22, 1998, MOMA filed a motion to quash the subpoena.¹¹⁷ MOMA argued that the District Attorney’s actions violated the law because the “statute is unambiguous, and provides no exceptions.”¹¹⁸ MOMA further argued that the subpoena was contrary to the underlying public policy safeguarding loaned works and ensuring that New York “maintain its pre-eminent position in the arts.”¹¹⁹ The District Attorney responded that despite the phrase “any seizure,” the specific actions the statute referred to were all civil remedies.¹²⁰ The District Attorney asserted that the rules of statutory construction therefore limited “any” to mean any

been clarified.” See Dobrzynski, *supra* note 111, at E1. The Reifs declared that the heirs of Mr. Grunbaum never consented to any sale or transfer of the painting. *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 875. The heirs of Mr. Grunbaum further stated that they are the lawful owners of the painting and “requested that the Museum not return the Painting[] to the lender until the matter of true ownership was resolved.” *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* In fact, the painting claimed by the Reif’s, “Dead City III,” at one time had been exhibited at the Guggenheim Museum in New York. *Id.*

¹¹⁶ *Id.* See *supra* note 23 and accompanying text (discussing that the District Attorney actually subpoenaed MOMA to turn over the works but later reached a deal with MOMA that it hold the paintings and not return them to Europe with the remainder of the exhibit until the court decided the issue).

¹¹⁷ Brief for Petitioner at 1, *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872 (Sup. Ct. 1998) (No. 28012-98).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 14.

¹²⁰ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 876. See also *supra* note 57 and accompanying text (providing text of the ACAL).

other civil remedies.¹²¹ Furthermore, nothing within the text of the statute, argued the District Attorney, indicated that the Legislature intended to restrict the Grand Jury's power to subpoena art work,¹²² and that the legislative history revealed that the statute was only to apply to civil remedies.¹²³ The trial court, in an opinion authored by Justice Laura Drager, agreed with MOMA and quashed the subpoena, holding that "[t]he clear import of the term 'any kind of seizure' leaves no doubt that the Legislature intended to prohibit any court process that would interfere with art work on loan from out of state."¹²⁴ Justice Drager then held that a grand jury subpoena was a clear example of such a court process.¹²⁵ As a result, Justice Drager ruled that the statute prohibited seizures in criminal as well as civil actions.¹²⁶ The trial court opinion further rejected the argument that the federal statute, which only prohibits seizures of works loaned to exhibitions from abroad, preempted the New York statute.¹²⁷ However, at the heart of the trial court's opinion was the recognition of the need for statutory protection

¹²¹ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 877.

¹²² *Id.* at 876. See also Brief for Appellant at 12, *People v. Museum of Modern Art*, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999) (No. 28012-98) (supporting the District Attorney's argument).

¹²³ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 876. See also Brief for Appellant at 13, *Museum of Modern Art* (No. 28012-98) (supporting the District Attorney's argument).

¹²⁴ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 876.

¹²⁵ *Id.* at 877.

¹²⁶ *Id.* at 881. The court also discussed the limits that a grand jury subpoena faces in other areas of the law and that "[o]n occasion, the Legislature has determined that in balancing competing interests, the need for unfettered Grand Jury investigations must yield to other policy considerations. Where the Legislature limits those powers 'it may do so explicitly or by implication.'" *Id.* at 880 (citation omitted).

¹²⁷ *Id.* at 884. The second half of the opinion is devoted to the District Attorney's argument that the New York statute is preempted by the Federal Act. *Id.* at 881. Federal law preempts state law under the Supremacy Clause of the Constitution in three circumstances. *Id.* at 882. The trial court found that none of the three circumstances were satisfied. *Id.* First, the language of the IFSA does not expressly prohibit the ACAL; second, Congress did not intend to occupy exclusively the field of regulated conduct; and finally, the ACAL does not conflict with the goals of the Federal Act. *Id.*

under the ACAL to insure that New York continue its preeminence as a cultural center.¹²⁸

The appellate division's decision, in reversing the trial court, was devoid of any such policy considerations.¹²⁹ In a narrow statutory analysis, the appellate panel held that a subpoena does not constitute a seizure¹³⁰ and that the Legislature simply intended to "protect non-resident exhibitors from 'legal seizures by local creditors.'"¹³¹ In finding that the ACAL does not immunize loans from seizure in the context of a criminal investigation, the appellate division found it "unnecessary to reach the issue of whether such statute is preempted by Federal law."¹³²

The appellate division also based its ruling on the civil law-related location within New York statutory law of the statute from which the text of the ACAL was drawn.¹³³ The appellate division noted that the ACAL emanates from a statute enacted in 1880, which prevents seizure of articles displayed at international exhibitions held in New York State.¹³⁴ This statute originated in the Code of Civil Procedure before being moved to the Personal Property Law in 1920, where it presently stands.¹³⁵ The appellate division then noted that the Penal Law and the Criminal Procedure Law ("CPL") "are in *pari materia* in that they both relate to the

¹²⁸ "With its vast array of cultural institutions, New York has a unique interest in maximizing the possibility of exhibiting art on loan from other states and around the world." *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 884. See also *id.* at 881 ("The statute has served the state well in enhancing its position as a cultural center.").

¹²⁹ The closest the appellate panel came to considering the broad policy intent of the ACAL was a dismissive statement that "no one disputes" the Legislature's intention "to promote the arts in New York and to maintain a 'free flow' of art by ensuring that New York museums and other cultural institutions could conduct exhibitions of major public interest without concern about legal processes and challenges." *People v. Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, No. 28012-98, 1999 WL 145904, at *3 (N.Y. App. Div. Mar. 16, 1999).

¹³⁰ *Id.* at *2.

¹³¹ *Id.* at *3.

¹³² *Id.* at *5.

¹³³ *Id.* at *3.

¹³⁴ *Id.* (citing L. 1880, ch. 393, § 1).

¹³⁵ *Id.* (citing N.Y. PERS. PROP. LAW § 250 (McKinney 1992)).

criminal branch of the law, but the [Civil Practice Law and Rules] and its predecessors are not generally so related to either the Penal Law or the CPL."¹³⁶ Thus, the court concluded that the ACAL, being almost identical to a statute located in the Code of Civil Procedure and the Personal Property Law, "with no reference whatsoever to the criminal statutes, cannot, without more, be considered to have been intended to effect the provisions of the Criminal Procedure Law, which applies exclusively to all criminal actions and proceedings, including criminal investigations."¹³⁷

The appellate division, however, avoided several points raised by the trial court demonstrating that the location of the ACAL indicates that immunity from seizure may not have been intended to pertain only to civil remedies. First, a recommendation in the Bar Committee's memorandum opposing the bill¹³⁸ suggested that the Legislature should incorporate the statute within the Civil Practice Law and Rules ("CPLR") where civil remedies, such as attachment, are generally located, rather than incorporate it in the General Business Law ("GBL").¹³⁹ The Legislature specifically rejected this proposal.¹⁴⁰ Second, the statute has resided since its inception in sets of laws that contain criminal penalties. The trial court described the GBL as "a substantive series of enactments replete with criminal penalties often prosecuted by the Attorney General's office."¹⁴¹ In 1983, the statute was transferred to the

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Memorandum No. 122, Association of the Bar of the City of New York, Committee on State Legislation, June 18, 1968, *Governor's Bill Jacket* to 1968 N.Y. Laws 1065 at 18.

¹³⁹ "It would be desirable to cover this subject not, as does the bill, in the General Business Law, but rather in the CPLR . . ." *Id.*

¹⁴⁰ *In re* Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872, 878 (Sup. Ct. 1998), *rev'd, mot. denied sub nom.* People v. Museum of Modern Art, No. 28012-98, 1999 WL 145904, at *3 (N.Y. App. Div. Mar. 16, 1999).

¹⁴¹ *Id.* The District Attorney conceded that "many business-related offenses" are contained in the GBL, such as illegal auctioneering practices (section 27), illegal peddling (section 34), and illegal junk dealing (section 64) although "the provisions of the chapter are in the main unrelated to criminal law, and certainly the contents of this chapter are unrelated to criminal practice." Brief for

New York Arts and Cultural Affairs Law, where it currently exists.¹⁴² This body of law also contains criminal penalties.¹⁴³ Thus, since its inception, the ACAL has been located among statutes containing both civil and criminal provisions. Finally, as the appellate division noted, the CPLR “does apply to motions to quash subpoenas issued in furtherance of a criminal investigation.”¹⁴⁴ It seems sensible, therefore, to construe the ACAL in both a civil and criminal context.

The trial court also recognized that the District Attorney’s grand jury investigation would not be defeated by an inability to subpoena the paintings.¹⁴⁵ The trial court endorsed MOMA’s offer to have the paintings photographed to preserve the evidence for the grand jury, thus enabling the District Attorney to proceed with the investigation.¹⁴⁶ Furthermore, the trial court stated that the claimants in the *Schiele Case* are not precluded from pursuing their claims against the lender if the District Attorney is barred from issuing a subpoena to MOMA to seize the works in question.¹⁴⁷ As the trial court noted, a claimant will always know the

Appellant at 22, *People v. Museum of Modern Art*, 1999 WL 145904, at *3 (N.Y. App. Div. Mar. 16, 1999) (No. 28012-98). .

¹⁴² See N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1999).

¹⁴³ See, e.g., *id.* §§ 13.03, 19.15, 23.05, 23.19.

¹⁴⁴ *People v. Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, No. 28012-98, 1999 WL 145904, at *3 (N.Y. App. Div. Mar. 16, 1999) (citing *In re Cunningham v. Nadjari*, 347 N.E.2d 915 (N.Y. 1976)).

¹⁴⁵ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 880.

¹⁴⁶ The court stated that photographs could be taken immediately and would not interfere meaningfully with the possession of the works, and thus would not constitute a seizure. *Id.* The District Attorney insisted that photographs would not be a reasonable alternative to seizure because they are not appropriate evidentiary substitutes and they would fail to provide proof of value, necessary to comply with the stolen property statutes. Brief for Appellant at 39, *People v. Museum of Modern Art*, 1999 WL 145904, at *3 (N.Y. App. Div. Mar. 16, 1999) (No. 28012-98). More importantly, the District Attorney argued, the paintings must remain in New York during the investigation because “[i]t would be absurd for anyone to be permitted to ship possibly stolen property outside New York State.” *Id.*

¹⁴⁷ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 880.

location of artwork covered by the statute, even if privately held, since it will be displayed to the public in a museum.¹⁴⁸

The trial court raised an additional point that even if the claimants were the rightful owners of the paintings, it is questionable whether a criminal investigation could lead to a return of the works without a civil suit to determine ownership.¹⁴⁹ A grand jury subpoena is a temporary seizure for a reasonable period of time.¹⁵⁰ It is not intended to secure property permanently. Thus, the trial court stated, the intent of the statute governing grand jury subpoenas is to return the subpoenaed property to the entity that was served with the subpoena.¹⁵¹ The District Attorney argued that under New York Penal Law section 450.10, if the paintings were stolen, it would be inappropriate to return the paintings to MOMA until the issue of rightful ownership is determined.¹⁵² Penal Law section 450.10 provides for property to be returned to the rightful owner during the pendency of a criminal proceeding "after satisfactory proof of such person's entitlement to the possession thereof."¹⁵³ However, this section does not specify a procedure to determine title.¹⁵⁴ Accordingly, even if the ACAL permits seizure by the District Attorney, an additional proceeding would have to examine a claimant's assertion of entitlement to

¹⁴⁸ In the *Schiele Case*, the claimants knew the identity of the current owner, provenance, value, and location of the paintings. *Id.* Additionally, the current owner had openly acknowledged that the claimants' ancestors at one time owned the works. *Id.* The trial court failed to note, however, that this may not always be the case. In a situation where a work is loaned by a private lender who does not want an exhibitor to release his or her identity, a claimant will not know the lender's name or location based on a visit to the exhibition.

¹⁴⁹ *Id.* at 880 n.11.

¹⁵⁰ *Id.* "The possession shall be for a period of time, and on terms and conditions, as may reasonably be required for the action or proceeding." N.Y. CRIM. PROC. LAW § 610.25(2) (McKinney 1995).

¹⁵¹ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 880 n.11.

¹⁵² *Id.* See also Brief for Appellant at 39-40, *Museum of Modern Art*, (No. 28012-98).

¹⁵³ N.Y. PENAL LAW § 450.10(2) (McKinney 1989 & Supp. 1999).

¹⁵⁴ See *id.*

ownership of the disputed work, and to investigate the ownership history of the work.¹⁵⁵

The appellate division held that it found no evidence in the District Attorney's subpoena of notice to retain the paintings in custody.¹⁵⁶ However, the court then stated that the District Attorney could retain subpoenaed property under a subpoena that noticed an intent to retain.¹⁵⁷ The court held that such a retention of property would not "run afoul" of the ACAL as a prohibited seizure.¹⁵⁸ Thus, with the District Attorney now armed with the ability to retain subpoenaed artwork in a future case, the trial court's finding of the necessity of a civil proceeding to determine ownership of the retained paintings remains.

A civil proceeding to determine competing claims to artwork raises a host of complex legal issues that typically requires an extensive period of time to resolve.¹⁵⁹ To adjudicate ownership of an artwork where transfers of ownership occurred overseas, a court confronts choice of law issues as to which country's law governs the ownership proceeding.¹⁶⁰ In a case determining the

¹⁵⁵ *In re Grand Jury Subpoena Duces Tecum*, 677 N.Y.S.2d at 880 n.11.

¹⁵⁶ *People v. Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, No. 28012-98, 1999 WL 145904, at *2 (N.Y. App. Div. Mar. 16, 1999).

¹⁵⁷ *Id.* (citing N.Y. CRIM. PROC. LAW § 610.25(2) (McKinney 1995) ("Where physical evidence specified to be produced will be sought to be retained in custody, notice of such fact shall be given the subpoenaed party.")).

¹⁵⁸ *Museum of Modern Art*, 1999 WL 145904, at *2.

¹⁵⁹ See Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes Over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 36 (1988) (stating that a claim involving artwork stolen during World War II will take between seven and twelve years to resolve).

¹⁶⁰ See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 286 (7th Cir. 1990) (determining that Indiana law rather than Swiss law governed a suit for replevin of mosaics stolen from a Cypriot Church). The United States, England and European civil law nations, apply the *lex situs* rule to the transfer of chattels. See Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1457-58 (1992). Under the *lex situs* rule, "for an international sale involving a work of art, the transfer of ownership is governed by the law of the state where the object is situated at the time of the alleged transfer." See Quentin Byrne-Sutton, *Who is the Rightful Owner of a Stolen Work of Art? A Source of Conflict in International Trade*, in

INTERNATIONAL SALES OF WORKS OF ART 500, 500 (Pierre Lalive ed., 1985). The *lex situs* rule focuses the property dispute on the conduct or transaction that led to the defendant's possession, usually a sale from an art dealer or other intermediary to the good faith purchaser. See Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 22-23 (1993). There are several factors favoring the *lex situs* rule, including a respect among sovereigns for the right of each to determine the rules under which property within one's state can be held, transferred or bequeathed. See Pecoraro, *supra* note 8, at 9-10. The rule also avoids commercial uncertainty by preventing the forum state in which the dispute was filed from undoing transactions valid under the laws of the country in which the transfer occurred. See Pecoraro, *supra* note 8, at 9-10. The *lex situs* rule is subject to several exceptions including where the law of the situs would be contrary to legal principles or policies of the forum state. See Pecoraro, *supra* note 8, at 11.

Although the United States generally maintains "flexible choice-of-law rules capable of responding to policy considerations [which] better [enable a court] to render a just result, the *lex situs* rule has survived." Pecoraro, *supra* note 8, at 10. An example of the application in New York of the *lex situs* rule, applied in combination with the principles of the *Restatement (Second) of Conflict of Laws* ("*Restatement*") is demonstrated in *Kunstsammlungen Zu Weimar v. Elicofon*. 536 F. Supp. 829, 845-46 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150, 1153 (2d Cir. 1982). The Second Circuit affirmed the ruling, "substantially for the reasons stated in the district court's opinion." *Elicofon*, 678 F.2d at 1160. The *Elicofon* court determined a choice of law question as to whether New York or German law should determine the interest of title between an original owner and a good faith purchaser. *Elicofon*, 536 F. Supp. at 845-46. An American citizen bought two Albrecht Dürer portraits in New York in good faith from an American soldier who had stolen the paintings from Germany during World War II. *Id.* at 830. The purchaser contended that since the theft of the works occurred in Germany, German law granted him good title. *Id.* at 845. See also *infra* note 163 (describing German law and the rights of the good faith purchaser). The court rejected this argument, instead applying the law of *lex situs*, holding that "New York's choice of law dictates that questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer." *Elicofon*, 536 F. Supp. at 845-46. However, the court then supplemented its acceptance of the *lex situs* rule under the *Restatement's* "significant relationship" analysis, stating that the case's contacts with New York, because the defendant purchased and held the paintings in New York, are "relevant to effecting its interest in regulating the transfer of title in personal property in a matter which best promotes its policy." *Id.* at 846 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 242, 246 (1971)). See also Alejandro M. Garro, *The Recovery of Stolen Art Objects from Bona Fide Purchasers*, in INTERNATIONAL SALES OF WORKS OF ART 503, 505 (Pierre

right to title of a good faith purchaser of stolen artwork, the choice of law is particularly important because it may determine the outcome of the dispute.¹⁶¹ European civil law differs from United States common law on several substantive legal principles affecting

Lalive ed., 1985). Thus, while *Elicofon* adopted the *lex situs* rule, “the court’s rationale suggests that the overriding policy concern should be the long-term health of the legitimate marketplace for art as well as a state’s interest in controlling the commercial norms and standards by which business is done in its jurisdiction.” See Collin, *supra*, at 24-25.

In light of *Elicofon*, it is unclear which nation’s law a court would apply to determine a claim of ownership of an artwork stolen by the Nazis, bought by a good faith purchaser in Europe, and later loaned to a New York museum. This is precisely the situation in the *Schiele Case*, and under *Elicofon*’s *lex situs* analysis, if the “alleged transfer” occurred in Europe, the law of the country where transfer occurred (Austria, in the *Schiele Case*) would govern the validity of the transfer. See *Elicofon*, 536 F. Supp. at 845-46. On the other hand, as *Elicofon* also stated, a court may additionally apply the *Restatement*’s significant relationship analysis. *Id.* at 846. Since *Elicofon* held that New York law and policy reflect a strong concern for favoring an original owner’s right to title and deterring development of a legal code that will facilitate art theft, a court could override the *lex situs* rule using the *Restatement*’s significant relationship analysis. However, this tendency toward favoring the interests of an original owner and regulating the New York art market may not lead a court to apply New York law to cases concerning works, whose transfer of ownership occurred outside of New York, which are temporarily loaned to museum exhibitions. This is because the lender is not transferring an ownership interest in New York, but merely temporarily lending the work. Thus, *Elicofon*’s concern for New York “becoming a marketplace for stolen goods” is similarly not at issue. *Id.* See also Garro, *supra*, at 512-14 (further discussing the “unsettled state of New York conflicts theory”).

¹⁶¹ In bringing suit to recover a stolen work of art,

the plaintiff must typically establish its possession of good title to the [artwork], either through ownership or by demonstrating some other right to [it]. The outcome of such suits, however, more often than not turns on whether the courts of the forum state agree to recognize and enforce that title (which is difficult to predict, given states’ conflicting definitions of what constitutes good title). Much, therefore, depends on how jurisdiction over the civil action for recovery is determined and eventual conflicts of jurisdiction are resolved.

restitution cases.¹⁶² European civil law generally favors the good faith purchaser over the original owner.¹⁶³ In the United States,

¹⁶² See Vagts, *supra* note 77, at 234. The right to title of the good faith purchaser is "one if the few examples of precisely contrary rules in Common Law and Civil Law systems." John Henry Merryman, *American Law and the International Trade in Art*, in *INTERNATIONAL SALES OF WORKS OF ART* 425, 428 (Pierre Lalive ed., 1985). Ownership disputes over artwork looted by the Nazis from Jewish families during World War II generally will involve subsequent transfers of ownership that occurred in Europe. Patty Gerstenblith, *Cultural Property and World War II: Some Implications for American Museums: A Legal Background*, SC40 ALI-ABA 17, 26 (1998).

¹⁶³ Civil law nations, to varying degrees, favor the good faith purchaser of stolen property over the original owner. See Grover, *supra* note 160, at 1448. Such civil law nations include Germany, France, Italy, Switzerland, Mexico and many other Central and South American nations. See Grover, *supra* note 160, at 1442. The degree to which each nation favors the good faith purchaser is based upon the extent that the law of each nation reflects Roman or Germanic legal principles as to the rights of an original owner. See RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* 283-86 (5th ed. 1988). Roman law clearly gave the original owner a right to recover stolen chattels. *Id.* Germanic customary laws, on the other hand, were more favorable to the good faith purchaser. *Id.* From the 15th to the 19th century, the Roman and Germanic viewpoints vied for predominance. *Id.* Eventually, the drafters of modern commercial codes in Western European nations combined the best features of both rules, thus winding up with different results. *Id.* Historically, European codes favored the good faith purchaser in the interest of protecting the integrity of transactions in personal property and to promote commercial security in post-plague Europe. See Collin, *supra* note 160, at 22. At that point in European history, the rise of a merchant class was transforming feudal Europe to a continent of urban centers of trade. See Collin, *supra* note 160, at 22. Commercial codes were designed to favor the good faith purchaser to encourage the rapid pace of economic development. See Collin, *supra* note 160, at 22.

European civil law nations differ in the time the good faith purchaser is required to possess a chattel before he acquires title. For example, in Switzerland, the good faith purchaser of stolen property obtains title, even from a thief, if five years pass from the time of the theft. See *Schweizerisches Zivilgesetzbuch* [ZGB] art. 932-934 (Switz.). The original owner must reimburse the good faith purchaser for the purchase price if he reclaims possession. ZGB art. 939. By contrast, German commercial law favors the original owner more strongly. A good faith purchaser will acquire title to a stolen chattel if he purchases and holds the chattel for a period of ten uninterrupted years following the original owner's loss of possession without knowledge of any defect in title. See *Bürgerliches Gesetzbuch* [BGB] § 937 (Ger.). In France, a good faith

on the other hand, the good faith purchaser generally cannot obtain good title to stolen property.¹⁶⁴ Additionally, the rules governing

purchaser assumes title to stolen goods three years following the loss of the original owner. *See* Code civil [C. CIV.] art. 2279 (Fr.). In Italy, a nation prone to art theft, the law affords unqualified protection to the good faith purchaser who acquires title immediately upon purchase. *See* Codice Civile [C.C.] art. 1153 (Italy). *See also* Grover, *supra* note 160, at 1452 (describing further Italy's pro-good faith purchaser law).

¹⁶⁴ Common law principles followed by the United States and England are in conflict with European civil law regarding the transfer of stolen chattels. *See* Gerstenblith, *supra* note 162, at 19. English and American law generally will not grant title to a good faith purchaser for value of a painting previously stolen, whereas the good faith purchaser often gets good title in Europe. *See* Grover, *supra*, note 160, at 1448-49. The common law principle is based on the centuries-old principle *nemo dat quod non habet* ("a seller of goods cannot transfer a better title than he himself has"). *See* Grover, *supra*, note 160, at 1445. Under English law, the good faith purchaser of a stolen chattel receives void title and is not entitled to reimbursement from the seller if the original owner replevies the property. *See* Richard Crewdson, *Some Aspects of the Law as it Affects Dealers in England*, in *INTERNATIONAL SALES OF WORKS OF ART* 47, 50 (Pierre Lalive ed., 1985). Until 1994 a limited exception existed to the rule. The antiquated law of "market overt" held that a good faith purchaser who bought stolen goods in a public market or shop during daylight hours in the City of London obtained good title. *Id.* at 50 (citing Sale of Goods Act, 1979, ch. 54 § 22 (Eng.)). The market overt exception was abolished by amendment to the Sale of Goods Act, effective January 3, 1995. *See* PALMER, *supra* note 38, at 359-60.

In the United States, both the common law and the Uniform Commercial Code ("U.C.C.") hold that a thief cannot pass good title to a good faith purchaser. *See* Grover, *supra* note 160, at 1447. The Supreme Court of the State of New York has held that "the principle has been basic in the law that a thief conveys no title as against the true owner." *Menzel v. List*, 267 N.Y.S.2d 804, 819 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd*, 246 N.E.2d 742 (N.Y. 1969). The U.C.C. states that, "[a] purchaser of goods acquires all title which his transferor had or had power to transfer." U.C.C. § 2-403 (1995). Under the U.C.C., however, the good faith purchaser will be reimbursed by the seller for purchasing a defective title if the seller is a merchant regularly dealing in goods of such kind. *See* U.C.C. § 2-312 (1995). The U.C.C. states, "[u]nless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that goods shall be delivered free of the rightful claim of a third person." *Id.* As this provision relates to dealing in art, "'merchant' includes a commercial art gallery, an art auctioneer, and a private art dealer and excludes a collector whose occupation is not related to art." *See* RALPH E. LERNER &

statutes of limitation differ between nations regarding the time within which one may bring a claim to recover stolen art and the time at which the limitation period begins to run against the owner.¹⁶⁵ New York's statute of limitations period is particularly

JUDITH BRESSLER, *ART LAW* 77 (2d. ed. 1997). This provision seemingly encourages a buyer to purchase goods from a reputable dealer where title may be dubious, and provides dealers with economic incentive to make the greatest efforts to ensure proper title.

¹⁶⁵ There are significant differences in the substantive law between European nations and the United States regarding the statute of limitations period within which a claimant may sue to recover stolen artwork. The length of time the dispossessed has to bring a claim for repossession is critical to the successful retrieval of stolen property because statutes of limitation bar a plaintiff from suing at the expiration of a set time period after a cause of action accrues. *See Gerstenblith, supra* note 162, at 20. Because of the amount of time and difficulty involved in locating a stolen work of art, the point at which the statutory recovery period accrues is more critical than its length. *See Gerstenblith, supra* note 162, at 20. It is on this point that the significance of the differences between American and European law as to statutes of limitation affect the rights of the good faith purchaser versus the rightful owner.

In many European nations, a cause of action accrues the moment the theft occurs. For example, the statute of limitations period in France, is three years and runs from the date of the loss or theft (though claims to stolen art objects from public museums are not subject to the three-year limitations period). *See PALMER, supra* note 38, at 360-62. French law effectively terminates the right to bring a claim because if the defendant does not raise the expiration of the statute of limitations as a defense, the court will do so on its own initiative. *See PALMER, supra* note 38, at 360-62. Of course, the statute of limitations applies only to the possessor who has acquired the artwork in good faith. *See PALMER, supra* note 38, at 360-62. French policy reflects the common European approach in choosing to promote commercial certainty. *See PALMER, supra* note 38, at 360-62. The law in Italy is even harsher with respect to the original owner's right to recovery because it grants title to the good faith purchaser of stolen property immediately upon purchase. *See C.C. art. 1153 (Italy)* (Italian law affording unqualified protection to the good faith purchaser). Germany and Switzerland allow the rightful owner a longer time to bring a claim for recovery, but a cause of action still accrues upon the theft. *See BGB § 937 (Ger.); ZBB art. 932-34 (Switz.)* (the length of the statute of limitations period in Germany and Switzerland is ten and five years, respectively). Even the English legal system has chosen to promote commercial certainty at the expense of the original owner. The English statute of limitations of six years runs from the date of the first good faith conversion and the period does not run anew with subsequent good faith transfers. *See PALMER, supra* note 38, at 356-58.

generous to the original owner.¹⁶⁶ Whatever the resolution of the

By contrast, in the United States, the laws of many states delay the accrual of a cause of action out of recognition that it usually takes an owner many years to locate and make a claim for the stolen work. See Gerstenblith, *supra* note 162, at 20. In general, American courts prefer a more flexible approach to the restrictions of statutes of limitation, allowing for investigation of the merits of the claims of the original owner and the good faith purchaser of the stolen chattel, since both are often innocent parties and the thief has long since disappeared. See PALMER, *supra* note 38, at 363. In most states, the length of statutes of limitation are between two and six years from the time the cause of action accrues. Gerstenblith, *supra* note 162, at 20. "However, no uniform rule has been adopted and different jurisdictions use different tests to determine whether, in a particular set of circumstances, time should be considered to have run against the particular plaintiff-owner." PALMER, *supra* note 38, at 363. Some states have embraced the "discovery rule," under which the limitations period accrues when the dispossessed knew or reasonably should have known the whereabouts of the artwork. See, e.g., *O'Keeffe v. Snyder*, 416 A.2d 862, 870 (N.J. 1980). Entitlement to the benefit of the discovery rule is dependent upon, *inter alia*, whether a claimant "used due diligence to recover the paintings at the time of the alleged theft and thereafter." *Id.* See also *Hawkins*, *supra* note 1, at 80. (the dispossessed is required to undertake a certain level of due diligence to discover the location and identity of the possessor). California has codified the discovery rule. CAL. CIV. PROC. CODE § 338(c) (West 1981 & Supp. 1998) (stating that an owner has three years to file suit to recover an article of "artistic significance [upon the] discovery of the whereabouts of the article by the aggrieved, his or her agent, or the law enforcement agency which originally investigated the theft").

¹⁶⁶ See N.Y. C.P.L.R. 214(3) (McKinney 1996). New York State has rejected the discovery rule, instead applying the "demand rule" to govern the recovery of stolen art. See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991) (holding that "New York has already considered—and rejected—adoption of a discovery rule"). See also *Menzel*, 267 N.Y.S.2d at 809. Under the demand rule, the three-year statute of limitations accrues upon demand and refusal to return a stolen work. *Guggenheim*, 569 N.E.2d at 429 (citing N.Y. C.P.L.R. 214(3)). The significance of the *Guggenheim* decision is that New York law does not require the owner to undertake a high level of diligence in investigating the theft and making a timely demand. See Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art – The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75, 88 (1993). Under the equitable principle of laches, however, New York law allows a court to find for the good faith purchaser if a lack of reasonable diligence on behalf of the dispossessed in delaying a replevin claim unfairly prejudiced the former when he purchased of the work. *Guggenheim*, 569 N.E.2d at 431. By

choice of law issue, the consequent litigation would certainly delay the resolution of the controversy and cost the parties significant sums of money.¹⁶⁷

Ironically, by allowing seizure of a temporarily exhibited work of art in order to provide a means of return of possession to an alleged rightful owner, such a policy actually could prevent a potential claimant's opportunity for recovery. The likely result of the Appellate Division's ruling will be that legitimate owners of potential loans, not wanting to chance a rival claim of ownership and a resulting seizure by New York authorities, will refrain from loaning works whose ownership history cannot be determined.¹⁶⁸ The consequences of such an occurrence are three-fold. First, museums may be unable to attract works essential to the integrity of a particular exhibit, thus reducing the exhibit's strength.¹⁶⁹ Second, a collector who refrains from loaning such a work denies the rightful owner the chance to discover the existence of the work or the identity of its owner.¹⁷⁰ Finally, the publicity generated by

considering a defense of laches, the demand rule, like the discovery rule, "allows a court to examine the reasonableness of the actions of both parties and to bar the claim when the possessor's purchase of the stolen art work would have been avoided if the original owner had taken steps to provide reasonable notice of the theft to potential purchasers." See Gerstenblith, *supra* note 162, at 23. *But see* Hawkins, *supra* note 1, at 66-69 (noting that laches is inadequate to protect the good faith purchaser).

¹⁶⁷ For example, issues relating to the statute of limitations "almost always inject an enormous amount of time and expense" into cases determining the disposition of stolen art. See Kaye, *supra* note 2, at 32. In *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 833 (E.D.N.Y. 1981), resolution of the statute of limitation issues spanned eight years. See Kaye, *supra* note 2, at 32. In *Republic of Turk. v. Metropolitan Museum of Art*, 762 F. Supp. 44, 46-47 (S.D.N.Y. 1990), three years passed before the statute of limitation issues were resolved. See Kaye, *supra* note 2, at 35.

¹⁶⁸ Since the ownership history of many works of art is incomplete, particularly those looted by the Nazis whose ownership records were never recovered, lenders may legitimately fear potential claims. See *supra* note 4 and accompanying text (describing the difficulties encountered in determining the rightful owners of art looted by the Nazis following the end of World War II).

¹⁶⁹ This is precisely the consequence that the N.Y. Legislature intended the ACAL to avoid. See *supra* Part I.B, discussing the issue further.

¹⁷⁰ Claimants of the Schiele paintings discovered the whereabouts of the

a major exhibition has the greatest likelihood of notifying a previously unaware rightful owner of the whereabouts of his stolen artwork.¹⁷¹ A loan to an exhibit that might reveal to a previous owner the location of his property is prevented if collectors are hesitant to exhibit their works in major New York exhibitions because of the potential for seizure.¹⁷² Ultimately, the ability of a District Attorney to seize a loaned work could drive a stolen work further underground.

Already, the concerns of Attorney General Lefkowitz have materialized.¹⁷³ Soon after the District Attorney issued the subpoena, two lenders to the Pierre Bonnard exhibition at MOMA¹⁷⁴ rescinded their offers to lend their works, citing uneasiness over the Schiele seizures.¹⁷⁵ The subpoena has impaired the statute's effectiveness by frightening off lenders. This recent episode demonstrates that the ACAL is necessary to ensure continued major

works as a result of the Leopold exhibit. See Lee Rosenbaum, *Will Museums in U.S. Purge Nazi-tainted Art?*, ART IN AMERICA, Nov. 1998, at 37.

¹⁷¹ "Public exhibition and widely dispersed publication is a major source of knowledge about the whereabouts of art. This constant addition of work to the public and international marketplace of ideas and images is a fundamental contribution toward the recovery of stolen artworks . . ." See *House Holocaust Hearings*, *supra* note 4, at 17 (statement of James N. Wood, Director and President, Art Institute of Chicago).

¹⁷² See Rosenbaum, *supra* note 170, at 37 (by preventing the display of art due to the threat of seizure, a "well-meaning policy may end up shortchanging not only the public but also the families seeking to recover lost works").

¹⁷³ See *supra* notes 71-72 and accompanying text (discussing Attorney General Lefkowitz's fear that an anti-seizure statute providing less than complete protection will frighten-off lenders).

¹⁷⁴ The Bonnard exhibition ran at MOMA from June 21 through October 13, 1998, after the Tate Gallery in London showed the exhibit from February 19 to May 17, 1998. Raphael Rubinstein, *MOMA's Bonnard Show Hit by Schiele Fallout*, ART IN AMERICA, June 1998, at 27.

¹⁷⁵ The two paintings, both part of the exhibit while at the Tate Gallery, were "Standing Nude" (1928) and "Gray Nude in Profile" (1936). *Id.* The owner of the latter, a private collector, wrote a letter to MOMA citing the Schiele seizures as his reason for withdrawing his painting from the exhibition. *Id.* This is not the first time an international art exhibition was handicapped by an attempted judicial seizure. Refusal to loan works to an exhibition following an attempted seizure in the courts also occurred in France in 1994, prompting the French anti-seizure statute. See *supra* Part I.D, discussing the French statute.

public exhibitions in New York. As a matter of policy, the ACAL should therefore be interpreted not to permit seizure of artwork loaned to New York museums. As MOMA argued, "[t]he success of New York's museums in presenting first class exhibitions on a consistent basis is dependent, in part, on their ability to provide assurances to art lenders that their works will be safely returned."¹⁷⁶

III. EFFORTS AND PROPOSALS ENABLING MUSEUMS TO IDENTIFY AND CLAIMANTS TO RECOVER STOLEN ART

As a result of rapidly improving means for museums to identify and claimants to recover stolen art, a party seeking return of an art object loaned to a New York museum for temporary exhibition does not require seizure to bring a claim for repossession. Ownership disputes over artwork temporarily loaned to New York museums rarely arise,¹⁷⁷ although claims to artwork looted by the Nazis, and now in the possession of museums and other collectors around the world, have increased.¹⁷⁸ Fortunately, a great interest

¹⁷⁶ *In re* Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872, 875 (Sup. Ct. 1998), *rev'd, mot. denied sub nom.* People v. Museum of Modern Art, No. 28012-98, 1999 WL 145904, at *1 (N.Y. App. Div. Mar. 16, 1999).

¹⁷⁷ However, just under a year following the Schiele exhibit in which the ownership of two paintings were challenged, a painting at a Claude Monet exhibit at the Museum of Fine Arts ("MFA") in Boston was also claimed to have been the property of a prominent French Jewish collector during the time of the Holocaust. See Brian Macquarrie & Walter V. Robinson, *MFA Moves to Verify That Monet Was Looted*, BOSTON GLOBE, Dec. 1, 1998, at A1. The French national museum system has held the painting since 1950 when it was retrieved from the possession of Adolph Hitler's foreign minister. *Id.* The MFA received immunity from seizure from the federal government under the IFSA, and the family of the original owner will likely make a claim for return of possession from the French government when the exhibit returns to France. *Id.*

¹⁷⁸ See John Strand, *Art and Restitution: An Interview with Constance Lowenthal*, MUSEUM NEWS, May/June, 1998, at 58. For example, the Egon Schiele seizures at MOMA, a Matisse at the Seattle Art Museum, a Degas in the private collection of a trustee of the Art Institute of Chicago, a Braque in Paris, and two paintings by Frans Hals in Vienna have all been the subject of ownership disputes. *Id.*

in uncovering the provenance of works with histories connected to World War II has accompanied the rise in claims to Nazi-tainted art.¹⁷⁹ With this heightened concern, the art community is improving information systems to assist museums and collectors in their efforts to avoid borrowing and purchasing stolen objects.¹⁸⁰ More importantly for the victims of art theft, these systems will enable them to establish the validity of their claims.¹⁸¹ Various art-concerned organizations have proposed several forms of alternative dispute resolution to resolve such disputed claims of ownership.¹⁸² Thus, the art and museum communities' sincere interest, and developing ability, to return cultural property to its rightful owners, combined with the budding alternative dispute resolution methods, should enable claimants to recover works of art loaned to New York museums for temporary exhibitions without resort to seizure.

A. Current Efforts and Proposals to Enable Museums to Avoid Borrowing Tainted Art

The recent discoveries of Nazi-looted artwork in the hands of museums and other good faith purchasers suggest that museums have a responsibility to undertake investigation of the provenance of exhibited works.¹⁸³ Several members of the art community are

¹⁷⁹ An intense interest has developed recently in "the fate of the art and cultural property displaced as a result of [World War II] and other actions of the Third Reich from the time the Nazi Party came into power in 1933." Johnston, *supra* note 4, at 32. See also Vagts, *supra* note 77, at 232 ("In recent years there has been an upsurge of interest in doing what can be done to right wrongs done by governments in Europe in the 1930's."). Due to the Schiele Case and other events, "public awareness has risen dramatically, . . . both in the art profession and in the general public." See Strand, *supra* note 178, at 59-60.

¹⁸⁰ See Part III.A, describing the creation of databases to record reports of stolen art.

¹⁸¹ See Johnston, *supra* note 4, at 34.

¹⁸² See *supra* Part III.B, discussing some recent alternative dispute resolution efforts to settle restitution cases.

¹⁸³ Several museum directors and officials recently testified before the House Banking and Financial Services Committee as to the importance of and measures museums are taking to establish that art objects in their collections are not the

creating and upgrading computer databases and registries for victims of art theft to locate or issue notice of their losses, and for buyers to consult when purchasing artwork of unknown history.¹⁸⁴ This rise in increasingly accessible information can overcome the obstacles that often inhibit investigation of the ownership history of works of art and should enable museums to avoid the exhibition of artwork of questionable ownership.¹⁸⁵ If museums do display borrowed artwork with a tainted ownership history, access to this information will assist claimants in attempting to recover such works.

The Holocaust Art Restitution Project ("HARP"), established in September 1997 by the B'nai B'rith Klutznick National Jewish Museum, is an example of a computer registry currently being developed to help locate the lost art possessions of European Jews during the Holocaust.¹⁸⁶ HARP will continually gather and

property of victims of art theft, particularly Holocaust victims. *See House Holocaust Hearings, supra* note 4.

¹⁸⁴ The Art Loss Register is the largest computerized database of stolen or missing art. *See infra* text accompanying notes 192-196 (describing the Art Loss Register). Other organizations include the Holocaust Art Restitution Project, International Research Center for the Documentation of Wartime Losses, the Society to Prevent Trade in Stolen Art (STOP), and Trans-art International. *See House Holocaust Hearings, supra* note 4, at 205 (statement of Ori Z. Soltis, Director and Curator of the B'Nai B'rith Klutznick National Jewish Museum and Chairman of the Museum's Holocaust Art Restitution Project).

¹⁸⁵ Museums and art collectors in general have been hindered in their ability to insure that acquired artwork was not stolen from Jewish collectors by the Nazis. Johnston, *supra* note 4, at 33. Reliable information regarding ownership history has sometimes not been available:

Although there are voluminous records of objects that were acquired by the Nazis or otherwise lost during the war, as well as records relating to the recovery and return of objects after the war, some losses were never documented. Moreover, many records have been lost over time and existing documents have been dispersed in public archives and private files in numerous countries and in many languages.

Johnston, *supra* note 4, at 33-34. Now, with renewed attention to identifying looted artwork still unaccounted for, more information is becoming available for museums to consult. Johnston, *supra* note 4, at 34.

¹⁸⁶ *See House Holocaust Hearings, supra* note 4, at 205 (statement of Ori Z. Soltis, Director and Curator of the B'Nai B'rith Klutznick National Jewish

provide information to reconstruct Jewish cultural losses at the hands of the Nazis.¹⁸⁷ These efforts will result in a worldwide computerized database that the art world can consult on-line to trace the ownership history of artwork.¹⁸⁸ The database will include not only information pertaining to stolen collections, but also general information on the Nazi assault on Jewish artistic and cultural life during the Holocaust.¹⁸⁹

The Commission for Art Recovery of the World Jewish Congress, another recently formed restitution organization, is also attempting to return lost art to Jewish families and to “recover heirless Jewish property for the benefit of Jewish communities.”¹⁹⁰ The Commission intends to work in conjunction with other organizations, such as HARP, to develop computer databases to aid recovery efforts.¹⁹¹

Museum and Chairman of the Museum’s Holocaust Art Restitution Project).

¹⁸⁷ See *House Holocaust Hearings*, *supra* note 4, at 205 (statement of Ori Z. Soltis).

¹⁸⁸ See *House Holocaust Hearings*, *supra* note 4, at 205 (statement of Ori Z. Soltis).

¹⁸⁹ See *House Holocaust Hearings*, *supra* note 4, at 205 (statement of Ori Z. Soltis).

¹⁹⁰ Johnston, *supra* note 4, at 49 (Commission for Art Recovery World Jewish Congress Mission Statement, Mar. 6, 1998).

¹⁹¹ See Johnston, *supra* note 3, at 49 (Commission for Art Recovery World Jewish Congress Mission Statement, Mar. 6, 1998). Constance Lowenthal, Director of the Commission for Art Recovery of the World Jewish Congress, has described how databases will enable Holocaust victims to recover artwork lost to the Nazis:

Our database is going to help them in the following manner: We will accept their recollections. As claims, they need to be validated. We hope to be able to validate some of their recollections by putting in [the database] Nazi lists of what was looted and by going through old insurance policies that might have scheduled art items. Then—when those things have all been compared—we may find that the victims’ recollections can be proven, by means that they did not have. Perhaps they did not have the wherewithal to do international research, or a grandchild never knew that his grandparents had an insurance policy. But with databases these days, you can make so many cross-references and you can search on so many different fields that we believe we’ll be able, if we know the grandparent’s name, to find an insurance policy with an art schedule that would confirm ownership. Then we

The Art Loss Register ("ALR"), though not specifically linked to remedying the wrongs of the Holocaust, provides a broad-based computerized art registry of stolen art objects. The ALR is a British, for-profit organization that manages a computerized database listing stolen and missing works of art and antiquities.¹⁹² The ALR is the largest computerized registry of stolen or missing art, consisting of 100,000 items, with approximately 10,000 objects added each year.¹⁹³ Members of the commercial art community, including auction houses, art dealers, and appraisers consult the ALR.¹⁹⁴ According to its chairman, the activities of the ALR are responsible for the recovery of nearly 300 art objects each year.¹⁹⁵ Art theft victims can register their stolen objects with the ALR, and buyers can consult the registry to investigate whether a work has been reported as stolen.¹⁹⁶ In February 1998, the ALR

will see if we can find the art in published records. It's easier with prominent artists' work. Some art is completely private, but lots of it is not. And then, if we can, we will help with private research that will need to be completed before we can be sure that we are dealing with a solid claim, in case something's been recovered in the interim and then sold legitimately.

Strand, *supra* note 178, at 59 (interview with Constance Lowenthal).

¹⁹² *House Holocaust Hearings*, *supra* note 4, at 362 (statement of Ronald S. Tauber, Chairman, The Art Loss Register, Inc.).

¹⁹³ *House Holocaust Hearings*, *supra* note 4, at 362 (statement of Ronald S. Tauber).

¹⁹⁴ *House Holocaust Hearings*, *supra* note 4, at 362 (statement of Ronald S. Tauber). In February 1994, The Metropolitan Museum of Art announced that it would consult the registry for all acquisitions over \$35,000 in value. See Hawkins, *supra* note 1, at 87-88. The J. Paul Getty Museum in Los Angeles, California regularly employs the ALR. See Hawkins, *supra* note 1, at 87-88.

¹⁹⁵ See *House Holocaust Hearings*, *supra* note 4, at 362 (statement of Ronald S. Tauber, Chairman, The Art Loss Register, Inc.).

¹⁹⁶ See Hawkins, *supra* note 1, at 87-88. In 1994, ALR charged \$65 to register an item. Hawkins, *supra* note 1, at 87-88. The theft must have been reported to a law enforcement agency and the value of the stolen work must exceed \$2,000. Hawkins, *supra* note 1, at 87-88. Potential buyers must pay \$50 to search the registry, although law enforcement officials are not charged the fee. Hawkins, *supra* note 1, at 88.

offered to assist with the development of a specialized new Holocaust database.¹⁹⁷

An example of the success that databases such as the ALR can achieve in aiding the return of stolen artwork to its original owners was demonstrated just recently by the discovery of a painting that was part of a loan to a Claude Monet exhibition at Boston's Museum of Fine Arts.¹⁹⁸ The ALR research director used the claimants' photograph of the Monet painting they were seeking and matched it against the work on display in Boston.¹⁹⁹ The claimants, descendants of a Jewish art collector living in France during the Nazi occupation, are expected to make a claim for the Monet when the exhibition returns to France.²⁰⁰

The federal government has also addressed the importance of returning cultural possessions to victims of Nazi looting during World War II. In February 1998, Congress enacted the Holocaust Victim's Redress Act.²⁰¹ The law primarily applies to restitution of gold and other monetary assets to Holocaust survivors and their families.²⁰² However, one title deals with art and cultural property. Title II of the Act states:

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the

¹⁹⁷ See *House Holocaust Hearings*, *supra* note 4, at 362 (statement of Ronald S. Tauber, Chairman, The Art Loss Register, Inc.).

¹⁹⁸ See Macquarrie & Robinson, *supra* note 177, at A1 (describing the incident).

¹⁹⁹ See Walter V. Robinson, *Monet in MFA Show Believed to Be Nazi Plunder*, BOSTON GLOBE, Nov. 30, 1998, at A1. It must be noted that, although a victory for the effectiveness of computer databases in recovering stolen art, the ease of the ALR discovery also evidences the ease with which the MFA could have discovered the provenance of the painting when considering whether to borrow it. *See id.*

²⁰⁰ See Macquarrie & Robinson, *supra* note 177, at A1 (noting the claimant's plans for recovery).

²⁰¹ Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998).

²⁰² See Johnston, *supra* note 4, at 32.

claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.²⁰³

The Act also authorizes the allocation of five million dollars "for archival research and translation services to assist in the restitution of assets looted or extorted from victims of the Holocaust."²⁰⁴

In addition to the Holocaust Victims Redress Act, some members of Congress have introduced legislation that specifically addresses "the obligations of museums to avoid acquiring or exhibiting Holocaust-tainted objects and to return such objects to their rightful owners."²⁰⁵ Representatives Charles Schumer and Nita Lowey introduced the Stolen Artwork Restitution Act of 1998, designed to assist families in locating their lost and stolen art.²⁰⁶ The bill seeks to codify a requirement that art purchasers perform reasonable investigations into the history of title transfers for objects they seek to acquire.²⁰⁷ The bill allows an individual who produces sufficient evidence that an artwork offered for sale was stolen from the individual or his family, to request the seller or purchaser to inquire into the ownership history of the work using a computer registry.²⁰⁸ Congress will appropriate up to \$5 million to fund research organizations that help families find lost art.²⁰⁹ A further section of the bill includes a provision requiring the attorney general to review the art collections of the federal government to determine if any of its holdings have been stolen.²¹⁰ The bill also encourages all museums, auction houses and

²⁰³ Holocaust Victims Redress Act § 202, entitled "Sense of the Congress Regarding Restitution of Private Property, Such As Works of Art."

²⁰⁴ Holocaust Victims Redress Act § 103(b), entitled "Fulfillment of Obligation of the United States."

²⁰⁵ See Johnston, *supra* note 4, at 33.

²⁰⁶ H.R. 4138, 105th Cong. (1998). See also *House Holocaust Hearings*, *supra* note 4, at 5 (statement of Rep. Charles Schumer).

²⁰⁷ See *House Holocaust Hearings*, *supra* note 4, at 5 (statement of Rep. Charles Schumer).

²⁰⁸ H.R. 4138, 105th Cong. § 3 (1998). This section of the bill only applies to artwork with a sales price over \$5,000. *Id.* The Attorney General will establish the standards that constitute "sufficient evidence." *Id.*

²⁰⁹ *Id.* § 8.

²¹⁰ *Id.* § 4.

foreign governments to investigate artwork in their possession to determine whether they unknowingly possess stolen works.²¹¹

B. Remedies Available to Victims of Stolen Art Beyond Litigation

The art and museum communities are currently developing alternative dispute resolution proposals²¹² intended to enable claimants to recover artwork loaned to New York museums without having to resort to seizure and subsequent litigation. When a disputed claim of ownership for a work of art arises between a good faith purchaser and the original owner, an alternative form of dispute resolution such as arbitration or mediation is often a better method of resolution than litigation.²¹³ Alternative dispute resolution methods may avoid the all-or-nothing result to which litigation subjects the good faith purchaser or the original owner, both generally innocent of any wrongdoing.²¹⁴ Avoiding litigation can

²¹¹ *Id.* § 5.

²¹² The term alternative dispute resolution “refers to procedures for settling disputes by means other than litigation; e.g., by arbitration, mediation, mini-trials. Such procedures [] are usually less costly and more expeditious” BLACK’S LAW DICTIONARY, *supra* note 3, at 78.

²¹³ Decisions rendered by a mediator and an arbitrator differ in their authority to bind the parties to the decision. In an arbitration proceeding, “a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision.” BLACK’S LAW DICTIONARY, *supra* note 3, at 105. Mediation is a “[p]rivate, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.” BLACK’S LAW DICTIONARY, *supra* note 3, at 981. See Evangelos I. Gegas, Note, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13 OHIO ST. J. ON DISP. RESOL. 129, 151-54 (1997) (describing the advantages of alternative dispute resolution methods for resolving cultural property disputes).

²¹⁴ “The resolution of these problems is made the more difficult in view of the fact that one of two innocent parties must bear the loss.” *Menzel v. List*, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev’d*, 246 N.E.2d 742 (N.Y. 1969). As one commentator has noted:

also avert the attorneys' fees that can easily exceed the pecuniary value of the disputed work.²¹⁵ Furthermore, avoiding litigation can reduce the amount of time required to resolve restitution cases.²¹⁶ In disputes over an alleged original owner's claim for artwork in the possession of a good faith purchaser, those in the art community prefer mediation because mediators are more familiar than judges with the complex and emotionally sensitive nature of restitution cases.²¹⁷

Both museum directors and restitution organizations support the development of mediation procedures specifically designed to resolve restitution claims. For instance, the Association of Art Museum Directors ("AAMD"), representing directors of 170 of the largest art museums in North America, has established a special task force to establish forms of alternative dispute resolution to assist museums in resolving ownership disputes.²¹⁸ On behalf of

When the former owner finally locates the art in the possession of [the] good faith purchaser and commences an action against this innocent purchaser for conversion or replevin, the courts are faced with the unpleasant dilemma of allocating rights and burdens between these two innocent victims of the thief, who is typically either unknown or judgement proof.

See Hawkins, *supra* note 1, at 49-50. See also *infra* note 232 and accompanying text (describing a recent settlement of an ownership dispute over an artwork where the parties shared the loss that could double as a mediation proposal).

²¹⁵ See Rosenbaum, *supra* note 170, at 37 (quoting a lawyer involved in several restitution cases, "I am almost at the point of saying that if the art isn't worth \$3 million, don't go after it.").

²¹⁶ See *supra* note 167 (describing the length of time courts require to decide restitution issues).

²¹⁷ One of the reasons the World Jewish Congress' Commission for Art Recovery prefers mediation is that "the people who are guiding the negotiations are really familiar with the constraints, the requirements, the needs, the ethics, and the ways of the art world—which most judges are not While many judges would love to have such a case, it's almost always their first." Strand, *supra* note 178, at 60.

²¹⁸ The Association has stated:

In order to achieve timely resolution of ownership claims relating to art alleged to have been stolen immediately before, during, and immediately after World War II, the Association strongly recommends the creation of a mechanism for the fair resolution of these claims,

victims of art theft, the Commission for Art Recovery of the World Jewish Congress has stated that it recognizes that looted art will be found in the possession of innocent purchasers, unaware of the art's tainted history, and accordingly will offer mediation services in ownership disputes involving art wrongfully taken by the Nazis.²¹⁹ The Commission has offered to assist in the mediation efforts proposed by the Leopold Museum,²²⁰ one of the few specific manifestations of a mediation proposal regarding the disposition of Nazi-tainted art.

In the *Schiele Case*, the lender initially suggested a mediation proposal to resolve the ownership conflict upon the return of the paintings to Austria. The Leopold Museum proposed the formation of a fact finding tribunal to examine the claims of the two families

such as mediation, arbitration, or other forms of alternate dispute resolution . . . reconciling the interests of individuals or their heirs who were dispossessed of works of art with the complex legal obligations and responsibilities of art museums to the public for whom they hold works of art in trust.

Johnston, *supra* note 4, at 48 (Association of Art Museum Directors press release, Feb. 3, 1998). It must be noted that the AAMD, which meets twice a year, has been slow in developing specific mediation procedures. See Rosenbaum, *supra* note 170, at 37.

²¹⁹ Ronald Lauder, Chairman of the Commission for Art Recovery for the World Jewish Congress, testified before Congress, suggesting that Congress support a mediation mechanism for resolving disputes over looted art. See *House Holocaust Hearings*, *supra* note 4, at 193 (statement of Ronald Lauder). Lauder offered the Commission's assistance to provide a panel of knowledgeable mediators guided by principles that balance the needs of interested parties. See *House Holocaust Hearings*, *supra* note 4, at 193 (statement of Ronald Lauder). The panel would "develop solutions acceptable to good faith purchasers while seeking the restitution of looted art for the families that have been deprived of so much." See *House Holocaust Hearings*, *supra* note 4, at 193 (statement of Ronald Lauder). Soon after the *House Holocaust Hearings*, a bill was introduced in the House stating that Congress believes that "parties disputing the ownership of stolen artwork should attempt to resolve their disputes by alternative means, such as by arbitration, before seeking judicial remedies." Stolen Artwork Restitution Act of 1998, H.R. 4138, 105th Cong. § 5 (1998).

²²⁰ See Walter V. Robinson, *New York DA Bars Return of Austrian Art: Two Paintings Are Allegedly Nazi Loot*, BOSTON GLOBE, Jan. 9, 1998, at A1.

who alleged to be the rightful owners.²²¹ The Museum promised to adhere to the tribunal's findings.²²² The families were dissatisfied by this proposition, insisting the paintings be kept in New York as insurance that the tribunal's process would be fair.²²³ The Leopold Museum withdrew the offer upon the District Attorney's subpoena.²²⁴ The Leopold Museum has said that it would reinstate its fact-finding tribunal offer if the paintings are returned to Austria.²²⁵ The Austrian Government, in consultation with the World Jewish Congress, would choose the members of the reinstated tribunal.²²⁶ However, the Museum and the Austrian Government, not the tribunal, would decide the disposition of the paintings.²²⁷

²²¹ See Judith H. Dobrzynski, *District Attorney Enters Dispute Over Artworks*, N.Y. TIMES, Jan. 8, 1998, at B2.

²²² *Id.*

²²³ *Id.*

²²⁴ See Dobrzynski, *Ownership Conflict*, *supra* note 13, at F32.

²²⁵ See Dobrzynski, *Ownership Conflict*, *supra* note 13, at F32.

²²⁶ See Dobrzynski, *supra* note 221, at B2.

²²⁷ See Dobrzynski, *supra* note 221, at B2. Since the Museum, not the panel, has the final say in this proposal, it is understandable that the claimants would reject the offer. However, it should be noted that political pressure on the Leopold Museum from within Austria may affect the Museum's decision. In the wake of the Schiele seizures, the Austrian government is currently undertaking efforts to return art and cultural property stolen from Jewish families during World War II. See Judith H. Dobrzynski, *Austria to Return Some Nazi-Seized Art, But Disputes Remain*, N.Y. TIMES, Nov. 23, 1998, at A6. The Austrian Parliament approved a law enabling the return of hundreds of artworks seized by the Nazis, which also covers furniture and other artifacts held by the Austrian government. *Id.* A seven person advisory panel, including the Austrian "finance and justice ministers, will review claims and offer advice on specific restitutions" under the law. *Id.* Elisabeth Gehrler, the Austrian Culture Minister, has stated that the panel will not consider the value of the works when making restitution determinations. *Id.* Austria's ten state-owned museums have a number of works stolen from Jews by the Nazis because of an art export ban preventing those who fled Austria from retrieving all of their property. *Id.* Those works were generally given or dedicated to state museums and galleries. See Jane Perlez, *Austrian Leaders Expect to Return Art From Nazis; Proposal Would Force Museums to Give Up Items*, DALLAS MORNING NEWS, Sept. 13, 1998, at A23. Some art objects could not be returned to their rightful owners despite restitution efforts following the War, and those works also reverted to state collections as

In a second example of a dispute resolution proposal to avoid judgment by trial, an ownership dispute over a painting looted by the Nazis during the Holocaust was recently settled after protracted and costly litigation, providing a potential remedy to parties engaged in similar disagreements.²²⁸ Family members of the Gutmanns,²²⁹ major European Jewish art collectors, claimed ownership of a Degas pastel that their ancestors sent to a Paris warehouse for safekeeping during World War II.²³⁰ The possessor, a trustee of the Chicago Art Institute, bought the work from a New York gallery which had acquired the work from Europe and displayed it several times.²³¹ Pursuant to a pre-trial settlement, the possessor donated his share of the work to the Chicago Art Institute, receiving a substantial tax write-off. The Institute purchased the claimants' share, giving them a cash equivalent of half of the Degas' value, as determined by a third-party appraiser.²³² The Institute also benefited by adding a coveted artwork to its collection.²³³ Whether this settlement will establish precedent

"ownerless." *Id.* Half a century following World War II, the Austrian government is finally making concerted efforts to return Nazi-stolen works to their rightful owners. In January 1998, the Austrian government ordered the national museums to review the provenance of works in their collections. *See* Dobrzynski, *supra*, at A6. The government hoped to return 400–500 items whose provenance had been fully investigated by the end of 1998 to some 20 families. *See* Dobrzynski, *supra*, at A6. However, some of the more valuable works whose ownership histories are not yet clear, such as the Schieles seized by the District Attorney, will not be automatically returned under the new law. *See* Dobrzynski, *supra*, at A6. Restitution of these works will require legal resolution. *See* Dobrzynski, *supra*, at A6.

²²⁸ Kevin M. Williams, *Degas Settlement Lands In Uncharted Territory*, CHICAGO SUN-TIMES, Aug. 16, 1998, at 43.

²²⁹ Friedrich and Louise Gutmann were the only major Jewish art collectors in Western Europe whose collections were confiscated by the Nazis who also were murdered in the concentration camps. *See* Walter V. Robinson, *Holocaust Victims' Heirs Given Share of a Degas*, BOSTON GLOBE, Aug. 14, 1998, at A1.

²³⁰ Williams, *supra* note 228, at A1.

²³¹ Constance Lowenthal, *An Annotated Checklist of Cases and Disputes Involving Art Wrongfully Taken During the Nazi Era and Its Aftermath*, SC40 ALI-ABA 11, 14 (1998).

²³² Williams, *supra* note 228, at A1.

²³³ Williams, *supra* note 228, at A1.

is unknown, but it is a convincing example of an alternative to trial.

In a specifically World War II-related alternative dispute resolution proposal, Ralph Lerner, an attorney for the good faith purchaser of the Gutmann's Degas, and chairman of the Art Law Committee of the New York State Bar Association, has proposed the formation of a restitution commission to compensate victims of art theft at the hands of the Nazis.²³⁴ The commission, which would be a distinct governmental entity, would consist of art historians and art experts and could be administered in part by the Commission for Art Recovery.²³⁵ Under Lerner's proposal, individuals with claims that works of art owned by their family were stolen by the Nazis would present their case to the commission.²³⁶ If the commission finds sufficient evidence that the Nazis stole the work and that the claimant is an heir, the commission would award compensation to the claimant.²³⁷ The plan would compensate claimants through federal funds under the Holocaust Victim's Redress Act.²³⁸ Lerner optimistically suggests that additional funds could be acquired from commercial art galleries and auction houses which would benefit from increased stability in the art market.²³⁹

²³⁴ See Rosenbaum, *supra* note 170, at 37. Lerner believes the case law demonstrates the need for a special commission to resolve ownership disputes over art stolen during World War II:

One thing is clear from a review of the cases: a matter involving a claim for an artwork stolen during World War II will take between seven and twelve years to resolve. The legal cost will most likely exceed the value of the art, and the nondiligent claimant has little chance of victory resulting in the return of the artwork, since most claims will be barred by a statute of limitations or laches defense.

Lerner, *infra* note 159, at 36.

²³⁵ *Id.* See *supra* notes 190-191 (discussing the Commission for Art Recovery).

²³⁶ See Lerner, *supra* note 159, at 36.

²³⁷ See Lerner, *supra* note 159, at 36.

²³⁸ See Lerner, *supra* note 159, at 37 & n.73. See *supra* notes 201-204 and accompanying text (discussing the Holocaust Victim's Redress Act).

²³⁹ See Lerner, *supra* note 159, at 38.

The benefit of the proposal to claimants would be the elimination of the need to surmount the burdens of proof a court would require to prove the object stolen.²⁴⁰ Claimants would also avoid the troublesome defenses of a statute of limitations and laches.²⁴¹ However, to the likely dissatisfaction of claimants, the disputed work would always remain with the museum under Lerner's proposal, and the commission would only award "reasonable compensation, not the current fair market value of the stolen artwork."²⁴² However, considering the costs and delay of litigating art disputes, claimants may be inclined to trade a rapid and easier means of compensation for a lesser value.

It is too soon to tell whether the various alternative dispute resolution procedures will succeed in providing dispossessed owners of artworks with adequate means to bring their claims for repossession without resorting to the courts. The *Schiele Case* has not yet been resolved by the mediation proposal offered by the Leopold Museum. However, the proposed involvement of the Commission of Art Recovery of the World Jewish Congress,²⁴³ and the mediation offer by the Museum itself, are encouraging signs of a commitment to alternative dispute resolution procedures to resolve art restitution disputes.

CONCLUSION

The New York Legislature enacted the Exemption from Seizure provision of the Arts and Cultural Affairs Law to insure that the State would continue to lead the art world in the presentation of major art exhibitions. The success of this objective is dependant on the ability of museums to provide lenders statutory assurances of complete protection for their loans from seizure. Prohibiting seizure of artwork loaned to New York museum exhibitions through comprehensive statutory protection will not block the ability of

²⁴⁰ See Lerner, *supra* note 159, at 37.

²⁴¹ See Lerner, *supra* note 159, at 37.

²⁴² See Lerner, *supra* note 159, at 36.

²⁴³ See *supra* note 220 (describing the offer of the Commission of Art Recovery of the World Jewish Congress' to provide a panel of mediators to resolve the Schiele dispute).

victims of art theft to bring claims against lenders for the return of their stolen property. In fact, if collectors are not discouraged from loaning their works to major exhibitions, the publicity these shows generate could notify a rightful owner of the location of his stolen artwork.

The worldwide interest in righting the wrongs of the Holocaust, coupled with the availability of information systems to track stolen art, is enabling unprecedented claims for restitution of Nazi-tainted art. Therefore, New York can provide lenders with the insurance necessary to carry on premier exhibitions under the ACAL, while victims of art theft at the hands of the Nazis remain protected. The appellate division's decision to limit the protection under the ACAL to solely civil seizures will not provide lenders with the confidence that their loans will be returned. In order to provide that confidence, the courts must interpret the ACAL to immunize loans from seizure in both a criminal and civil context.