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Ronan Saref

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THE VALUE OF BORROWED ART

I. INTRODUCTION

"Few are the museums of such vast scope and depth that their permanent collections can, in themselves, offer special exhibitions substantial enough to rival any display of loaned works."¹ While museums like the Metropolitan Museum of Art (Met) can claim inclusion of such a distinguished minority, most cannot. Indeed, for many museums exhibitions of high-quality artwork are an integral part of their mission and the need for outside sources vital for that continuance.² The question faced by museum-goers and lawmakers is how much borrowed art is valued and to what extent it should be protected.

Those museums fortunate enough to be in New York, like the Met, have had the benefit of section 12.03 of New York's Arts and Cultural Affairs Law³ (ACAL) which provides automatic immunity from seizure for artworks brought into New York for nonprofit exhibition.⁴ The statute serves to promote the free exchange of artworks by assuring lenders of their safe return.⁵ The ACAL expresses the unique interest of New York as an international art center to advance and protect the welfare of the art world and its preeminent role in it.⁶ In addition to the ACAL, there exists a federal statute, entitled the Immunity From Seizure Act⁷ (IFSA). Enacted three years prior to the ACAL, IFSA offers similar protection from seizure for any foreign artwork loaned to an American nonprofit exhibitor upon an approved application.⁸ For thirty years both the ACAL and IFSA have received little attention from judicial

1. Philippe de Montebello, *Familiar Works in Fresh Contexts: The Museum's Collection as Special Exhibition*, CALENDAR (Metropolitan Museum of Art, New York), Sept.-Oct. 1998, at 2.

2. See Rita Poley, *Tainted Treasures: Philadelphian Named to Task Force on Provenance of Artworks*, JEWISH EXPONENT, Mar. 19, 1998.

3. N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1984 & Supp. 1999).

4. See *id.*

5. See Memorandum from Governor Rockefeller in support of the ACAL (June 22, 1968) (contained in the ACAL bill jacket) [hereinafter Memorandum from Governor].

6. See *id.*

7. 22 U.S.C. § 2459 (1994).

8. *Id.*

opinions and legal scholarship.⁹

In January 1998, the ACAL, for the first time in its history, became the subject of judicial inquiry.¹⁰ The case involved two paintings that were exhibited at the Museum of Modern Art (MoMA) in New York City.¹¹ The exhibition, entitled "Egon Schiele: The Leopold Collection, Vienna," was of 150 paintings, owned by the Leopold Foundation in Austria on a three year world-wide tour.¹² After allegations that two of the exhibit's paintings were stolen, a criminal investigation was launched and the Manhattan District Attorney subpoenaed the two paintings.¹³ MoMA challenged the subpoena by raising the ACAL, thus requiring the court to decide whether the ACAL protects against subpoenas of a criminal investigation.¹⁴ In September 1999, after the trial court and the appellate division reached different conclusions,¹⁵ New York's highest court ruled that the ACAL protects items from both civil and criminal seizures.¹⁶

The merit in protecting borrowed works of art for nonprofit exhibition rests in assuring foreign lenders that their artwork will be protected against any kind of seizure while it is on loan either to New York institutions,¹⁷ other American institu-

9. See, e.g., 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 (1998); Alexander Kaplan, Notes and Comment, *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 691 (1999). Unlike prior scholarship in this area, this Note will focus exclusively on the merits and effects of protecting foreign loaned artwork for nonprofit display.

10. See *Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872 (1998).

11. See *id.* at 872.

12. *Id.*

13. See *id.*

14. See *id.* at 876.

15. The New York Supreme Court, Appellate Division, reversed the lower court's interpretation of the ACAL, finding that the ACAL did not extend protection to criminal subpoenas. *People v. Museum of Modern Art*, 688 N.Y.S.2d 3 (1st Dep't. 1999).

16. *People v. Museum of Modern Art*, 93 N.Y.2d 729 (1999). See Judith H. Dobrzynski, *Modern Wins Ruling on Art Seizure*, N.Y. TIMES, Sept. 22, 1999, at E1. One of the two paintings, *Portrait of Wally*, remained at MoMA pending a federal investigation by the United States Customs Service into the potential smuggling of stolen property. See Judith H. Dobrzynski, *U.S. Warrant Halts the Return of a Schiele to Austria*, N.Y. TIMES, Sept. 23, 1999, at E2.

17. See Memorandum from Governor, *supra* note 5.

tions,¹⁸ or to the entire spectrum of foreign art exhibitors. Such assurances would maintain the high level of art shows for which New York and other cities are renowned.¹⁹ It would also release museums from having to investigate the provenance²⁰ of artworks that will be in the exhibitor's custody for only a short period of time.²¹ Furthermore, promoting exhibitions at prestigious museums can potentially increase the value of these works of art,²² enhance the museum's own reputation, and immeasurably benefit the viewing public.²³

Alternatively, as museums represent the very best of human creativity²⁴ and are sources of civilized values, preservers of human culture and educators of the public, they should be required to insure the moral and legal legitimacy of the works they borrow and exhibit.²⁵ Thus, although checking an artwork's provenance can be a costly and time consuming expenditure, it may be necessary to insure the legitimate ownership of the artworks even if they are in the museum's custody temporarily. In addition, it is plausible that only lenders who have substantial fears about the legitimate ownership of their artwork would be discouraged from exhibiting their works. Finally, the economic incentive attached to exhibiting works at prestigious museums, like MoMA, may be too great to dissuade foreign lenders from lending their artworks even if no immuni-

18. See S. REP. NO. 747, at 2 (1965).

19. See Memorandum from Governor, *supra* note 5.

20. Researching an artwork's provenance requires a complete, and thus time consuming survey of the artwork's prior ownership, often for the purposes of determining the legitimacy of the artwork's title. See Interview with Lauren Meyers, Director of Fraunces Tavern Museum (Oct. 16, 1998).

21. See Elaine L. Johnston, *Cultural Property and World War II: Implications for American Museums Practical Considerations for the Museum Administrator*, AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COURSE OF STUDY, Mar. 26-28, 1998, at 29, 57 (citing testimony of Glenn D. Lowry, Director of MoMA, before the House Banking & Financial Services Committee on February 12, 1998).

22. See Evelyn Brody, et al., *Selected Materials on Trustee Code of Ethics*, AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COURSE OF STUDY, Mar. 26-28, 1998, at 183, 185.

23. See Johnston, *supra* note 21, at 95, 96 (citing testimony of Stephen E. Weil, before the House Banking & Financial Services Committee on February 12, 1998).

24. See *id.* at 51 (citing testimony of Philippe De Montebello, Director of the Met, before the House Banking & Financial Services Committee on February 12, 1998).

25. See *id.* at 89 (citing testimony of Stephen E. Weil, before the House Banking & Financial Services Committee on February 12, 1998).

ty is offered.²⁶ Thus, the need for such immunity to ensure the welfare of the free exchange of art may be suspect.

Because of the interest surrounding the Schiele case and the effects it has had, and may continue to have, on the lending of foreign artworks,²⁷ this Note will offer an analysis of the values underlying the protection of borrowed art for non-profit display. Part II of this Note will examine the history and policies underlying the protection of foreign loaned artwork from seizure when on nonprofit display. Both domestic and foreign statutes, in addition to non-legislative methods of temporary protection, will be discussed. Part III will analyze the various values and ramifications behind such protective measures and the competing interests involved in immunizing works temporarily. And finally, Part IV will offer suggestions for providing similar protection from seizure in the future.

While questions concerning the allegations of stolen art and their rightful return involve important and complex issues, they are beyond the scope of this study. This Note is concerned with the international exchange of art for nonprofit exhibition and the values involved in preserving and promoting it through temporary protection. Such an objective rests in large part on the example set by New York as the world's premier art center, both in the exhibition and in the protection of artwork. Yet, with two similar functioning statutes in operation in New York for over thirty years, and a substantial increase in the exchange and theft of art world-wide,²⁸ little substantive scholarly literature analyzing this area has been offered. It is the contention of this Note that the values underlying such protection are good ones in that the benefits conferred to the art community from the free exchange of artworks are so numerous that its promotion and protection deserve the temporary immunization of those artworks.

26. See *id.*

27. See *Freezing the Schiele Painting*, N.Y. TIMES, Jan. 9, 1998, at A18; Judith H. Dobrzynski, *Already, Schiele Case Is Reining In Art World*, N.Y. TIMES, Jan. 10, 1998, at B1.

28. See Beverly M. Wolff, *Theft in the Museum: What Duty to Pursue? What Duty to Prosecute?*, AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COURSE OF STUDY, Mar. 24-26, 1993, at 345, 347.

II. THE HISTORY AND PURPOSE OF PROTECTING BORROWED ART

President Johnson proclaimed 1965 International Cooperation Year.²⁹ Congress in that year, without any substantial debate, introduced and passed IFSA.³⁰ The statute reads:

Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country . . . providing for the temporary exhibition or display . . . without profit . . . no court of the United States, any State, the District of Columbia, or any territory or possession 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 such object is of cultural significance and that the temporary exhibition or display . . . is in the national interest, and a notice to that effect has been published in the Federal Register.³¹

As the senators who introduced the legislation explained, IFSA was designed to "permit organizations and institutions engaged in nonprofit activities to import, on a temporary basis, works of art and objects of cultural significance from foreign countries for exhibit and display, without the risk of the seizure or attachment of the said objects by judicial process."³² The Department of Justice, in assessing IFSA, explained that its purpose was "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."³³ The legislation was endorsed by the Department of State, Department of Justice, the Smithsonian Institution and the American Association of Museums.³⁴

IFSA grants the power of immunizing foreign loaned

29. See S. REP. NO. 747, *supra* note 18, at 2.

30. See 111 CONG. REC. 25,928 (1965). There was no debate held in the Senate with only a minor oral exchange in the House of Representatives on October 5, 1965. *Id.*

31. 22 U.S.C. § 2459 (1994).

32. S. REP. NO. 747, *supra* note 18, at 2.

33. *Id.*

34. See H.R. REP. NO. 89-1070, at 3576, 3577 (1965).

works of art to the President or his designee.³⁵ Upon an application to the President for federal protection, and provided that the President finds the works of art borrowed to be of such cultural significance as to be in the national interest of the United States, a note would be published to this effect in the Federal Register and the works of art would be immune from any judicial proceedings in the United States or its territories.³⁶ If the artwork qualifies for protection the scope of the protection is broad, protecting against both civil and criminal seizures.³⁷ Despite the fact that there had been no actions filed against artworks brought into the United States prior to 1965,³⁸ the statute was nevertheless passed simply to assure lenders that the works they loan for temporary nonprofit display would not be subject to attachment or seizure while on display.³⁹ IFSA thus sought to protect an industry that had never been threatened.

In 1978, President Carter designated the duty of granting immunity from judicial seizure to the director of the United States Information Agency (USIA).⁴⁰ The director of the USIA delegated the job to the agency's office of general counsel.⁴¹ The application for IFSA protection requests information regarding any possible reasons why the artwork might be attached when in the United States.⁴² Unless there is reason to believe that there is a problem with the artwork, beyond the information offered by the protection-seeking institution, the USIA will often take the word of the institution and grant immunity.⁴³ As one person at the USIA in charge of reviewing applications explained, the USIA does not independently investigate the provenance of specific artworks.⁴⁴

Annually, the USIA receives between 20 to 30 applications

35. 22 U.S.C. § 2459.

36. *See id.*

37. *See id.*

38. *See* 111 CONG. REC. 25,928 (1965) (statement of Rep. Rogers).

39. *See id.* at 25,929.

40. *See* Exec. Order No. 12,047, 43 Fed. Reg. 13,359 (1978), *amended by* Exec. Order No. 12,388, 47 Fed. Reg. 46,245 (1982); Elissa Gootman, *Morgenthau's Loop-hole*, FORWARD, Mar. 13, 1998, at 7.

41. *See* Gootman, *supra* note 40, at 7.

42. *See id.*

43. *See id.*

44. *See id.*

and in the past 20 years, has denied only one.⁴⁵ That sole rejection came in 1980 when a collection from the Hermitage Museum in the former Soviet Union was being displayed in the United States.⁴⁶ Commentators at the time described the denial of protection as a sign of American disapproval of the Soviet invasion of Afghanistan.⁴⁷ It became one in a series of actions indicating American refusal to engage in normal diplomatic relations with the Soviet government.⁴⁸ The denial of protection for the Hermitage exhibit did not mean that the federal government would prohibit the collection's importation or threaten to seize it once imported, but rather that the federal government did not consider it to be of cultural significance to receive protection.

Three years after the federal government passed IFSA, the New York legislature, in response to the civil seizure of artwork at an exhibition within New York by an out of state artist, passed the ACAL.⁴⁹ Its purpose was nearly identical to that of IFSA: to prevent the seizure of a foreign artwork on loan at a New York institution for nonprofit display.⁵⁰ It was titled the Exemption from Seizure statute, borrowing language from a similar 1880 law which immunized exhibits of any kind at international exhibitions held under the auspices of the United States.⁵¹ Although amended in 1984, it has remained substantially the same.⁵² The ACAL reads as follows:

45. *See id.*

46. *See* Paul Richard, *U.S. Will Not Allow Hermitage Art Tour*, WASHINGTON POST, Jan. 17, 1980, at B1, B4; Gootman, *supra* note 40, at 7.

47. *See* Gootman, *supra* note 40, at 7.

48. *See id.*

49. The incident involved a retrospective of artist Naum Gabo's work at the Albright-Knox Museum in the Second Buffalo Festival. *See* Letter from Lee V. Eastman to Governor Rockefeller (May 15, 1968) (contained in the ACAL bill jacket). Mr. Gabo, a resident of Connecticut, loaned his work to the Museum, at which time the Marlborough-Gerson Gallery attached Mr. Gabo's loaned artwork using a procedural law which permitted attachment of the property of non-residents in anticipation of judgments against them. *See id.* The Gallery attached all of Mr. Gabo's artwork effectively precluding him from exhibiting his artwork at New York museums, including an upcoming show at The Metropolitan Museum of Art. *See id.*

50. *See* Memorandum from Attorney General Lefkowitz to Governor Rockefeller in support of the ACAL (June 14, 1968) (contained in the ACAL bill jacket) [hereinafter Memorandum from Attorney General].

51. *See id.*

52. N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1984 & Supp. 1999).

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.⁵³

Proponents of the ACAL, like Governor Nelson A. Rockefeller and Attorney General Louis J. Lefkowitz, explained that the statute was to "allay the fears of potential exhibitors and enable the State of New York to maintain its pre-eminent position in the arts."⁵⁴ To do so, the ACAL would have to be all inclusive, which meant including in the statute's protection immunity from creditors.⁵⁵ As Lefkowitz explained:

If this bill is to serve the psychological, but nevertheless *real*, need to allay any fear of harassment on the part of non-resident potential lenders of works of art to the museums of this State, the exemption from legal seizures by local creditors must be full and unequivocal.⁵⁶

Thus, the protection of the ACAL was drafted in broad language, spoke of no exemptions and was automatic.⁵⁷

Creating such expansive immunity, however, fostered problems, as the Association of the Bar of the City of New York explained when the statute was proposed.⁵⁸ The rights of creditors would be negated, the Association complained, as would the rights of the work's true owner if the work on exhib-

53. *Id.*

54. Memorandum from Governor, *supra* note 5.

55. *See* Memorandum from Attorney General, *supra* note 50.

56. *Id.*

57. N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1984 & Supp. 1999).

58. Association of the Bar of the City of New York Committee on State Legislation, Statement of Disapproval for the ACAL (June 18, 1968) (contained in the ACAL bill jacket).

it was stolen or unlawfully retained.⁵⁹ But the ACAL was not intended for lenders or for those whose legal rights might be abridged; rather, the ACAL was intended for the museums and other cultural institutions that depend upon the free flow of art to offer exhibitions.⁶⁰ The adoption of the ACAL thus suggested that the added benefit it conferred to the culture of New York outweighed the potential postponement of otherwise legal claims.

Although IFSA and the ACAL are similar in many respects, there are fundamental differences between the two. Whereas IFSA requires an application process, the ACAL is automatic.⁶¹ Furthermore, the ACAL does not require that the artwork be culturally important or in the national interest. Protection by the ACAL merely requires that the artwork be borrowed from an out of state source and temporarily exhibited in New York for nonprofit purposes.⁶² If the goal is to allay the fears of potential lenders, nothing is as reassuring as automatic immunity.

In addition to the United States and New York, a number of Canadian provinces and France have similar protective statutes.⁶³ Canadian anti-seizure statutes vary according to the province.⁶⁴ In British Columbia, the anti-seizure provision protects temporarily displayed artwork from any proceeding,⁶⁵ far broader than that extended by the application process of IFSA or the nonprofit requirement of the ACAL. Manitoba grants protection if the artwork is from a foreign country and is lent to a governmental, cultural or educational institution.⁶⁶ However, like IFSA, the Manitoba law requires government approval that artwork is culturally significant, that the display of the works be in the interest of the people, and that the order of the government be issued in the Manitoba Gazette.⁶⁷ Que-

59. *See id.*

60. *See* Memorandum from Attorney General, *supra* note 50.

61. 22 U.S.C. § 2459; N.Y. ARTS & CULT. AFF. LAW § 12.03.

62. N.Y. ARTS AND CULT. AFF. LAW § 12.03 (McKinney 1984 & Supp. 1999).

63. *See* NORMAN PALMER, ART LOANS 111-12 (1997).

64. *See id.* at 111.

65. The British Columbia Law and Equity Act, R.S.B.C., ch. 224, § 50(1) (1980) (Can.).

66. The Foreign Cultural Objects Immunity From Seizure Act, R.S.M., ch. F170 (1976) (Can.).

67. *See id.*

bec⁶⁸ and Ontario⁶⁹ offer similar protection, but Ontario is the only one limited to artworks displayed at nonprofit exhibitions.⁷⁰

France passed similar legislation in 1994, responding in large part to an unsuccessful court action taken against a painting on loan from Russia.⁷¹ In that case, paintings from several Russian museums, which were confiscated during the 1917 Revolution when the collections from which the paintings came were nationalized, were being exhibited at a major exhibition at the Centre National d'Art et de Culture Georges Pompidou in Paris.⁷² Heirs of the paintings original owners sought to sequester the works and have them remain in France until an investigation could resolve the question of ownership.⁷³ The action was dismissed by the lower court on the grounds that the 1917 confiscation could not be declared illegal as a matter of French public policy because of Russia's sovereign immunity.⁷⁴ The appellate court then dismissed the case when the paintings were subsequently returned to Russia.⁷⁵

France, like the United States⁷⁶ and England,⁷⁷ recognizes sovereign immunity in a restrictive, rather than absolute manner.⁷⁸ In that sense, immunity would not attach where the State acts in a commercial capacity.⁷⁹ Nationalization, however, is considered to be an act of State rather than a private commercial action.⁸⁰ Thus, Russia's confiscation of the

68. See Code of Civil Procedure, S.Q., ch. 48, art. 553.1 (1976) (Can.).

69. See The Foreign Cultural Objects Immunity From Seizure Act, R.S.O., ch. F.23, § 1 (1990) (Can.).

70. See *id.*

71. See PALMER, *supra* note 63, at 112; Ruth Redmond-Cooper, *Disputed Title to Loaned Works of Art: The Shchukin Litigation*, 1 ART ANTIQUITY & L. 73, 73-76 (1996) (providing a good analysis of the case, its underlying facts, and the subsequent French anti-seizure statute).

72. See Redmond-Cooper, *supra* note 71, at 73.

73. See *id.* at 74.

74. See *id.*

75. See *id.*

76. See Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (1994).

77. See State Immunity Act (1978) (G.B.) (implementing the 1972 European Convention on State Immunity which came into force in 1976).

78. See Reg. 19 Feb. 1929, D.P.29.I.172; Redmond-Cooper, *supra* note 71, at 75.

79. See Redmond-Cooper, *supra* note 71, at 74.

80. See *id.*

paintings could not be questioned. It is curious, however, whether the entrance fees and catalogue sales could lift such immunity by making the exhibit a commercial act and the State a commercial actor.⁸¹

As a consequence of the potential seizure of the paintings, France enacted broad legislation protecting loaned artwork.⁸² The statute protects from seizure "all cultural items lent by a foreign power, local authority or cultural institution to the French State or any other legal person designated by the French State, for public exhibition in France."⁸³ Like IFSA, and certain Canadian statutes, protection attaches upon some type of government approval.⁸⁴ Here, a joint order from the Minister of Culture and the Minister of Foreign Affairs must be made which would provide for a list of protected works, determine the duration of the exhibit and identify the exhibit's organizers.⁸⁵ Unlike American and Canadian statutes, however, the French law does not provide protection to individuals, but rather to publicly owned institutions which lend artworks to public organs within France.⁸⁶

Despite the ease with which the French statute was passed, its validity is unclear. It may, for example, potentially violate both the 1993 Council Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State⁸⁷ and the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict,⁸⁸ since both require signatory states to aid in the return of unlawfully removed cultural property.⁸⁹ No challenge has been made against the statute's validity on this or any other ground and so, like the North American statutes, it is still valid law.

81. See *id.* at 75-76. The French court did not resolve this problem. See *id.* at 74-76.

82. See *id.* at 76.

83. Law No. 94-679 of Aug. 8, 1994, J.O., Aug. 10, 1994, p. 11,668 (translated in Redmond-Cooper, *supra* note 71, at 76).

84. See Law No. 94-679 of Aug. 8, 1994, J.O., Aug. 10, 1994, p. 11,668.

85. See *id.*

86. See *id.*

87. Council Directive 93/7, 1993 O.J. (L 74).

88. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, Protocol, 249 U.N.T.S. 240, 358.

89. See PALMER, *supra* note 63, at 112. For a discussion of the effect of internationally recognized anti-seizure statutes, see *infra* Part IV.

Other possible protections which may exist for lenders and borrowers, but which are not rooted in legislation aimed at the free-flow of art, are sovereign immunity and assurances by the exhibitor's country that no attachment of the artwork will be allowed while the artwork is on temporary display. Sovereign immunity, as its title suggests, would only extend to government institutions.⁹⁰ Thus, the vast number of art institutions, private holders and individuals, who lend works of art for nonprofit display, would be without protection. Furthermore, direct government assurances that no attachment would be successful may not always be attainable, and based on the authority which grants the protection, highly suspect.

In light of the legacy of Nazi art looting, the increased occurrence of illegal art trafficking in recent decades,⁹¹ and a substantial increase in museum attendance,⁹² lenders and borrowers of art are limited to these few jurisdictions and avenues of temporary protection. Yet all of these types of protections have problems. In the case of the ACAL, these problems are evidenced best by the Schiele exhibit. But to determine whether such protection has any merit at all, the values we place on the free flow of art deserve some attention.

III. THE VALUE OF PROTECTING BORROWED ART

The majority of artworks exhibited in American museums are borrowed from American exhibitors.⁹³ As of yet, only two claims have been made against artwork loaned to a nonprofit American exhibitor.⁹⁴ Furthermore, the MoMA case is the first seizure of a foreign artwork on loan to an American museum.⁹⁵ The reality suggests, therefore, that statutes intended

90. See Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (1994).

91. See Wolff, *supra* note 28, at 347.

92. In New York, for example, more people visit museums than any other art or sport venue. See Norman MacAfee, *The Scent of Art*, PA. GAZETTE, Sept.-Oct. 1998, at 42.

93. See Appendix for Appellant at A29, *The People of the State of New York v. The Museum of Modern Art*, 688 N.Y.S.2d 3 (1st Dep't. 1999) (supporting Affidavit of Glenn D. Lowry, Director of MoMA) [hereinafter Lowry Affidavit].

94. These are the two examples previously mentioned: the Gabo exhibition in Buffalo, New York, see discussion, *supra* note 49, and the Schiele exhibit at MoMA, see Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872 (1998).

95. See Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872 (1998).

to protect loaned artwork on temporary exhibition at American museums are not needed, as the occurrence for the seizure of such borrowed artwork has been so rare. However, as artwork becomes an ever more attractive international currency,⁹⁶ concern over the future protection of artwork loaned abroad, both to American museums and elsewhere, indicates that the subject of such protection is indeed worthy of legislation. The coming to light of art plundered during the second world war, in addition to the enormous increase in art theft and stolen art trafficking,⁹⁷ further supports the claim that the movement of artwork for either legal or illegal purposes is a reality with which legislatures, courts, museums, private lenders and the public must deal.

The values in borrowing and displaying works of art are numerous, derived chiefly from the invaluable attributes of the artworks themselves. Art enhances the human experience by providing examples of humanity's greatest achievements; it offers testimony, by its infinite shapes and forms, to the diversity and scope of our species; and, it provides a tangible means of identifying with one's past. Art is a rich source of scholarly information and benefits the viewing public in countless pedagogical and psychological ways. Thus, the exchange of artworks increases the visibility of these sources of knowledge and benefits the public greatly. Taken to its intellectual extreme, the exhibition of even stolen art may be justified.

Providing protection to loaned works serves to accomplish several goals. As the legislative design and history of IFSA and the ACAL suggests, such protection intends to promote the exchange of art by removing the lenders' fears that their artwork will be seized when on loan.⁹⁸ Such fears need not emanate from illicit motives, for the lender may simply feel that the work, over which he has good title, might nevertheless be the subject of a seizure. Such added assurance, even when dealing with unfounded fear, might help in securing that the

96. See Monique Olivier, *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 *GOLDEN GATE U. L. REV.* 627 (1996); Robin Morris Collins, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 *HOW. L.J.* 17 (1993).

97. See Wolff, *supra* note 28, at 347. Presently, the international exchange in stolen artwork is considered to be second only to narcotics and estimated to be worth approximately \$2 billion a year. See *id.*

98. See Memorandum from Governor, *supra* note 5.

artwork loaned to New York, for example, both in its quality and quantity, remains high. This consistency, afforded in part by IFSA and the ACAL, has enriched the virtues of culture and art worldwide and has helped make New York the premier international center for both. Indeed, many collections survive by lending to the United States,⁹⁹ and the incentive to maintain that exchange is understandably high.

Another goal that the protection of loaned artwork serves to promote is the conservation of a nonprofit exhibitor's own financial resources. Museums, though they may showcase priceless objects, are under heavy financial constraints.¹⁰⁰ In addition to their daily operating costs, the expenses incurred in hosting an exhibition include installation costs, carrying fees and insurance costs.¹⁰¹ If museums were forced to add to their tasks the requirement of examining the provenance of every piece of artwork they borrow for temporary exhibition, it would severely handicap their ability to host exhibits.¹⁰² Provenance investigations have the potential of occupying the time of museum employees and delaying and increasing the costs of exhibits.¹⁰³ Thus, offering immunity against seizure can greatly minimize the financial and potential legal complexities incumbent when borrowing art. Conducting provenance checks for the purchase of art, however, is a wholly different matter. The difference between the two is best expressed by the difference between the actual ownership of the artwork and the mere privilege to temporarily display it. Thus, the nature of the proprietary interest in either circumstance justifies the exclusion of provenance investigations for mere loans.

In addition to the responsibilities incumbent on museums, lenders also risk the welfare of the often very fragile objects they lend.¹⁰⁴ Further, some owners often lend their artworks with the request of anonymity, preferring the public not know

99. See Gaby Wood, *Arts: Profits and Loss*, GUARDIAN, Feb. 14, 1998, at 6.

100. See Interview with Lauren Meyers, Director of Fraunces Tavern Museum (Oct. 16, 1998).

101. See *id.*

102. See Johnston, *supra* note 21, at 60-62 (citing testimony of Glenn D. Lowry, Director of MoMA, before the House Banking & Financial Services Committee on February 12, 1998).

103. See Interview with Lauren Meyers, Director of Fraunces Tavern Museum (Oct. 16, 1998).

104. See *id.*

the ownership of the artwork and frustrating its possible theft.¹⁰⁵ Add the threat of seizure to the list of concerns and it is questionable indeed whether a lender would lend artwork at all without some assurance of its return, beyond the mere monetary guarantees afforded by insurance. The value of the artwork is clearly what is at stake and not the character of the artwork's lender. Thus, who the lender of the artwork is ought not be a concern. Legislators rightly understand that art is not exhibited because of its owner, but rather because of its own self-worth.¹⁰⁶ What the lender offers the public, and by extension the international art community, is what this type of legislation should protect and encourage.

If the protection of borrowed artwork is to be extended without regard to ownership, stolen artwork loaned for the purposes of display by nonprofit organizations would also be protected. However, such protection might only be improper if either the lender or the borrower knew or could have known of the artwork's history. Considering the high ethical standards to which museums must hold themselves, a standard that goes beyond the mere avoidance of illegality but rather to the maintenance of their integrity and the furtherance of the public's trust,¹⁰⁷ no museum would knowingly display stolen artwork. Indeed, no museum would be willing to entertain the embarrassment and stigma of knowingly borrowing, owning or displaying stolen art.¹⁰⁸ Furthermore, a willingness not to investigate the questionable provenance of artwork that is the subject of temporary display, in light of the fact that the artwork is not intended for the museum's permanent collection, should not deter protection of that artwork because museums should not be placed in a position to conduct lengthy and costly inquiries into the legitimacy of the pieces meant only for temporary display. Inquiries for objects intended for a museum's permanent collection, on the other hand, deserve far greater scrutiny.¹⁰⁹

105. *See id.*

106. *See supra* Part II.

107. *See* Ellsworth H. Brown, *Code of Ethics for Museums*, AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COURSE OF STUDY, Mar. 25-27, 1992, at 145, 152.

108. *See* Judith Dobrzynski, *Museums Call for System to Address Nazi Booty*, N.Y. TIMES, Feb. 5, 1998, at E1.

109. For a good discussion of what museums might do to check a work's prove-

If law makers are to protect loaned artwork from legal seizure, such protection should take into consideration its effect on the public and the art world. Critics of such protection argue that the nature of the international art market is such that assurances of this kind have no practical effect on the loaning of artwork and, indeed, the threat of seizure may not be enough to discourage lenders from lending their works to, for example, New York.¹¹⁰ The advantages in lending artwork to prestigious institutions like large New York museums are numerous.¹¹¹ An exhibition adds to the prestige and value of the work exhibited, the collection to which it belongs and to the prestige and value of the exhibitor's own collection.¹¹² Thus, in certain cases it is in the best interest of the lender and borrower to host such exhibitions. It is this financial, and prestige-enhancing inducement, critics may suggest, that a protection against seizure would most likely facilitate. But do the social and economic benefits that come with lending artworks outweigh the threat of seizure?

The Schiele exhibit at MoMA offers a good illustration of the issues and complexities that can arise from an artwork's past when the work is temporarily displayed. The exhibit entitled, "Egon Schiele: The Leopold Collection, Vienna," ran from October 12, 1997 to January 4, 1998.¹¹³ It was composed of 150 Schiele paintings and had been exhibited in London prior to coming to MoMA.¹¹⁴ Included in the exhibit were two paintings that attracted a great deal of attention. The first was a 1912 painting entitled, *Portrait of Wally*, and the second was a 1911 painting entitled, *Dead City III*.¹¹⁵ Both of the paintings were well known to the art world for several years having been acquired by Dr. Rudolf Leopold, an ophthalmologist, avid art collector and self-made Schiele expert, over the

nance when intended for their permanent collection, see Linda F. Pinkerton, *Museums Can Do Better: Acquisitions Policies Concerning Stolen and Illegally Exported Art*, 5 VILL. SPORTS & ENT. L.J. 59 (1998).

110. See Johnston, *supra* note 21, at 89 (citing testimony of Stephen E. Weil, before the House Banking & Financial Services Committee on February 12, 1998).

111. See *id.*

112. See *id.*

113. See Raphael Rubinstein, *Schieles Seized at MoMA*, ART IN AMERICA, Feb. 1, 1998, at 27.

114. See Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872 (1998).

115. See *id.*

course of several decades.¹¹⁶ The entire collection was purchased by the Austrian government, to which Dr. Leopold owed many years' worth of unpaid wealth tax, in 1994 for \$175 million.¹¹⁷ The paintings, now held by the government-financed Leopold Foundation, will be housed in a new museum in Vienna designed specifically for the collection.¹¹⁸

Dr. Leopold's eccentric and highly aggressive tactics in amassing his collection were well known to the art world, tactics which included late night calls, warring down buyers by waiting outside their homes at night, and answering the phone of one owner in order to prevent other buyers from speaking with her.¹¹⁹ But despite the infamous tales of this uniquely driven eye doctor, the unparalleled Schiele collection had been exhibited at many institutions world wide and was spoken of, and written about, on a serious basis.¹²⁰ In fact, the Solomon R. Guggenheim Museum in New York had exhibited *Dead City III* in 1965.¹²¹

During December 1997, while the paintings were on display, MoMA received letters from people who claimed to have true legal ownership of the two paintings.¹²² *Dead City III* was claimed by the heirs of Fritz Grunbaum, a Viennese entertainer who died in the Dachau concentration camp in 1941, and whose wife died in 1942.¹²³ Rita Reif and Kathleen Reif, the widows of Grunbaum's two nephews, who had sought the heirship of the painting, made the claims on their husbands' behalf to MoMA.¹²⁴ In April 1998, although a German court revoked the 1963 declaration of heirship that provided the basis for their claim, the family members said that they had no knowledge of the ruling and that they would continue to re-

116. See Judith H. Dobrzynski, *A Singular Passion For Amassing Art, One Way or Another*, N.Y. TIMES, Dec. 24, 1997, at E1.

117. See Wood, *supra* note 99, at 6.

118. See Dobrzynski, *supra* note 116, at E1.

119. See *id.*

120. See *id.*

121. See Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872, 877 (1998); Dobrzynski, *supra* note 116, at E1.

122. See *Museum of Modern Art*, 677 N.Y.S.2d 872, 876 (1998).

123. See Judith H. Dobrzynski, *German Court Rules on Schiele Painting*, N.Y. TIMES, Apr. 19, 1998, at E1.

124. See *id.*

claim the painting despite the decision.¹²⁵

The second Schiele painting in dispute, Portrait of Wally, depicting Schiele's model and mistress Wally Neuzil, was claimed by Lea Bondi, a Viennese art-gallery owner.¹²⁶ Bondi, prior to fleeing to London in 1937, claims she was intimidated into giving her gallery and the Schiele painting, which hung in her house, to a Nazi art dealer named Friedrich Welz.¹²⁷ Bondi briefly returned to Vienna in 1946 to reclaim her gallery and the Schiele painting, and successfully sued for some.¹²⁸ Portrait of Wally, however, turned out to have been confiscated from Welz by American officials who had detained Welz as a suspected war criminal.¹²⁹ The painting was placed in the collection of the Belvedere, the Austrian National Gallery.¹³⁰ According to Bondi, she returned to London, and after meeting Leopold, asked him to retrieve the painting for her.¹³¹ In 1954, Leopold went to the Austrian National Gallery and acquired Portrait of Wally for himself.¹³²

The provenance Leopold offered for Wally in the catalogue for the MoMA exhibit had the painting pass from Bondi to Viennese collector Heinrich Rieger, then to his son Heinrich Rieger Jr., who sold it to the Austrian National Gallery from where Leopold acquired it.¹³³ However, this contradicts a 1966 Schiele catalogue which has no mention of Rieger. Although Rieger owned two other Schiele paintings, the 1966 catalogue never included Wally among them.¹³⁴ Because of financial difficulties, Bondi never sued for the return of her painting, but continued to press for its return.¹³⁵ She died in 1969 and her 76-year-old nephew Henry S. Bondi made the request to MoMA on her behalf.¹³⁶

The day the Schiele exhibit was scheduled to be shipped to Barcelona, the District Attorney of Manhattan, Robert M.

125. *See id.*

126. *See* Rubinstein, *supra* note 113, at 27.

127. *See id.* *See also* Wood, *supra* note 99, at 6.

128. *See* Wood, *supra* note 99, at 6.

129. *See* Rubinstein, *supra* note 113, at 27.

130. *See id.*

131. *See id.*

132. *See* Wood, *supra* note 99, at 6.

133. *See* Rubinstein, *supra* note 113, at 27.

134. *See* Wood, *supra* note 99, at 6.

135. *See* Rubinstein, *supra* note 113, at 27.

136. *See id.*

Morgenthau, who is also chairman of the Museum of Jewish Heritage, a Living Memorial to the Holocaust,¹³⁷ turned a private legal battle over an artwork's title into a criminal issue.¹³⁸ Although no claims were filed by either heir against the Leopold Museum of Austria or against MoMA, Mr. Morgenthau, without any demonstration of proof, did in private what would have normally been an adjudication of claims between the parties, in this case, the alleged heirs of the painting's original owners and the Leopold Foundation.¹³⁹ It is, furthermore, very ambiguous what Mr. Morgenthau's intentions were regarding the criminal prosecution he launched. After all, who was the target of his investigation?¹⁴⁰ Was it MoMA for harboring stolen merchandise or the Leopold Foundation, over which New York courts could not assert jurisdiction, for owning and lending stolen merchandise?¹⁴¹

Since the works belonged to a government-financed foundation, an official protest was registered by the Austrian government with the U.S. Department of State.¹⁴² Austria appealed to the State Department to act rapidly in securing what Foreign Minister Wolfgang Schuessel called, part of Austria's "precious national cultural heritage."¹⁴³ Leopold himself considered the seizure to have serious consequences for other foreign collectors considering loaning their artworks to American exhibitions.¹⁴⁴ Leopold personally proclaimed that as a result of this case, "[p]aintings from the Leopold Foundation will certainly not be shown in the United States in the near future."¹⁴⁵

International experts involved in searching for stolen art of the second world war hailed the seizure as a move toward the return of stolen Nazi work to their rightful owners.¹⁴⁶ If

137. See Raymond Sokolov, *Whose Culture is it Anyway?*, WALL ST. J., July 9, 1998, at A16.

138. See Wood, *supra* note 99, at 6.

139. See Jeremy G. Epstein, *U.S. Help to Art Claimants Sets a Poor Legal Precedent*, NAT'L L. REV., May 18, 1998, at A21.

140. See Martha B.G. Lufkin, *Art World Watches Two Key Cases in New York*, NAT'L L.J., Nov. 2, 1998, at A8.

141. See *id.*

142. See Laura Sudell, *All Things Considered*, WNPR report, Jan. 8, 1998.

143. *Austria Presses U.S. Over Seized Paintings*, AGENCE FRANCE-PRESSE, Jan. 9, 1998, available in 1998 WL 2197031.

144. See *id.*

145. *Id.*

146. See Ian Traynor, *Seizure of Paintings Sparks Fear Over Loans: Art Dispute*

the seizure served any purpose for exhibitors, galleries and museums were put on immediate warning that they had better check the provenance of everything they owned.¹⁴⁷ The Schiele case became one in a lengthening series of claims of disputed Nazi art looting that, although centered in Europe for decades, now came to the United States.¹⁴⁸ Indeed, looted works have been found in major as well as mid-sized U.S. museums, art galleries and private collections,¹⁴⁹ triggering national and international claims.¹⁵⁰

The Schiele exhibit, absent its now two infamous paintings, moved on to Barcelona's Picasso Museum after assurances from Spanish authorities that the artworks would not be seized.¹⁵¹ Although the heirs of Lea Bondi and Fritz Grunbaum knew of the painting's whereabouts, the paintings' questionable acquisition by Dr. Leopold and the allegations that they were taken from their relatives by the Nazis during the occupation of Austria,¹⁵² it was the collection's world tour and the painting's exposure to a New York audience that brought the two paintings' past to the public's attention and, ultimately, to the scrutiny of the Manhattan District Attorney.

The announcement of the service of the subpoena sent shock waves throughout the art world and had museum directors calling their attorneys asking if what they were reading was true.¹⁵³ What Attorney General Lefkowitz called an "omnibus exemption"¹⁵⁴ seemed to have had a major unrecognized loophole, and the idea that artwork loaned to the capital of the art world could be seized under the theory of criminal wrongdoing horrified museum directors and owners of private

Widens, GUARDIAN, Jan. 10, 1998, at 17.

147. See *id.*

148. See Hector Feleciano, *Nazi Plunder Seeking Moral Justice By The Return of Looted Art*, LOS ANGELES TIMES, Jan. 11, 1998, at M1.

149. See *id.*

150. See *id.* Claims against artwork looted by Nazis have most recently been made at the Seattle Art Museum, the Wildenstein & Co. gallery in New York, and the Art Institute of Chicago. See *id.*

151. See *Barcelona's Schiele Show to go Ahead Despite New York Seizures*, AGENCE FRANCE-PRESSE, Jan. 28, 1998, available in, 1998 WL 2210156.

152. See *People of the State of New York v. Museum of Modern Art*, 677 N.Y.S.2d 872, 877 (1998).

153. See *Freezing the Schiele Painting*, *supra* note 27, at A18; Dobrzynski, *supra* note 27, at B1.

154. Memorandum from Attorney General, *supra* note 50.

collections around the world.¹⁵⁵

MoMA experienced firsthand the anxiety that collectors felt about lending their works for exhibition when collectors withdrew paintings from MoMA's Pierre Bonnard retrospective, scheduled to be held at MoMA on June 17, 1998, six months after the Schiele exhibit.¹⁵⁶ Two paintings by Bonnard, which were seen at the Tate Gallery in London, were withdrawn from the show before the retrospective exhibition moved on to New York.¹⁵⁷ In a letter to MoMA, the owner of one of the two paintings, identified only as a private collector from Liechtenstein, explicitly cited the seizure of the two Schiele paintings as the reason for not wanting to lend his painting to the museum.¹⁵⁸ Also, the Met, prior to the shipping of three dozen works by Paul Klee to an exhibition in Berlin, wrote to the German museum asking if they had any claims on the works.¹⁵⁹ And in Washington, the Department of State began assessing the need for new regulations to protect international cultural loans from seizure.¹⁶⁰

In New York, institutions such as the Met, the Pierpont Morgan Library, the Solomon R. Guggenheim Museum and the New York Public Library all expressed their serious concern over the District Attorney's actions.¹⁶¹ They denounced the subpoena as not only a violation of the ACAL, but more importantly, as a substantial threat to New York's cultural status as an exhibitor of world class art and the welfare of the international art community.¹⁶² As the director of the Pierpont Morgan Library wrote: "If cultural institutions in this country cannot guarantee the return of works of art, what foreign institution or individuals will risk lending them in the future?"¹⁶³

155. See *Freezing the Schiele Painting*, *supra* note 27; Dobrzynski, *supra* note 27, at B1.

156. See Raphael Rubinstein, *MoMA's Bonnard Show Hit by Schiele Fallout*, *ART IN AMERICA*, June 1, 1998, at 27.

157. See *id.*

158. See *id.*

159. See Francine Cunningham, *Art With a Dubious Past*, *IRISH TIMES*, Aug. 12, 1998, at 11.

160. See *id.*

161. See Appendix for Appellant at A16, A19, A20, A22, A150. *The People of the State of New York v. The Museum of Modern Art*, 688 N.Y.S.2d 3 (1st Dep't. 1999).

162. See *id.*

163. Letter from Charles E. Pierce, Jr., Director of The Pierpont Morgan Li-

Moreover, the President of the New York Public Library argued that, "[w]hile there may be legitimate legal issues as to ownership . . . the vitality and benefits of balanced, thorough scholarly and educational exhibitions should not be compromised by making such exhibitions the nexus for adjudicating such claims."¹⁶⁴

New York institutions, however, were not alone in expressing concern over this new development. European museum directors like Nicholas Serota of the Tate Gallery predicted that the New York seizure would deter art collectors from lending artworks to international exhibitions.¹⁶⁵ Mikhail Piotrovsky, the director of the Hermitage Museum; at St. Petersburg, Russia, announced that works by Schiele and his student Gustav Klimt, scheduled to be exhibited at the Hermitage, were canceled days after the Schiele seizure in New York.¹⁶⁶ The Russian Parliament, shortly after the Schiele incident occurred, began calling for legislation prohibiting the removal of "World War II Trophy Art," some of which is displayed at the Hermitage, from leaving the country.¹⁶⁷ In addition, a meeting of the International Meeting of Exhibition Organisers held at the National Gallery in Prague a few weeks after the subpoenas were issued, expressed grave concern over the future of lending European artworks to American museums: "European museums urgently require re-assurance . . . if they are to lend again to exhibitions in the United States."¹⁶⁸ The fate of international loans of artwork was in serious jeopardy. But were such concerns warranted?

brary to the Manhattan District Attorney's Office (Jan. 21, 1998) (contained in Appendix for Appellant at A19, *The People of the State of New York v. The Museum of Modern Art*, 688 N.Y.S.2d 3 (1st Dep't. 1999)).

164. Letter from Paul LeClerc, President of the New York Public Library to the Manhattan District Attorney's Office (Jan. 28, 1998) (contained in Appendix for Appellant at A150, *The People of the State of New York v. The Museum of Modern Art*, 688 N.Y.S.2d 3 (1st Dep't. 1999)).

165. See Philip Sherwell & Catherine Milner, *Art World Faces Chaos After U.S. Seizure of Nazi Loot*, SUNDAY TELEGRAPH, Jan. 11, 1998, at 11.

166. See *D.A. Puts Damper on Museum World*, *MoMA Moans*, FORWARD, Apr. 10, 1998, at 1.

167. See *id.*

168. International Meeting of Exhibition Organisers—Prague February 1998, *The Sub-poena of Schiele and Loans from Europe* (contained in Appendix for Appellant at A155, *The People of the State of New York v. The Museum of Modern Art*, 688 N.Y.S.2d 3 (1st Dep't. 1999)); *D.A. Puts Damper on Museum World*, *MoMA Moans*, *supra* note 166, at 1.

The President of the New York Public Library explained in his letter to the District Attorney that the effect of his actions would "potentially threaten reciprocal immunity offered by other jurisdictions to New York owners of materials they lend outside New York State."¹⁶⁹ The fact is, however, that no jurisdiction offers anything remotely similar to the blanket immunity offered by New York. Private lenders to institutions outside of the United States, and other jurisdictions that have protective statutes, are presented with the single option of requesting statements from a government official in the foreign country to which they are sending their artwork securing it against any kind of seizure while on loan.¹⁷⁰ The only similar type of reciprocity of which the New York Public Library may be speaking is a foreign country advancing such an assurance. In addition to government assurances, sovereign immunity may also be implicated in this particular case since the party that lent the paintings to MoMA is an Austrian Stiftung, which may under the meaning of the Foreign Sovereign Immunities Act be considered a government institution.¹⁷¹

Phillip de Montebello, Director of the Met, stated that he believed that New York institutions in particular would suffer as a result of this: "Any number of institutions and individuals will not lend to institutions in New York, and all the good shows will go to Washington, Boston and Philadelphia."¹⁷² This statement, however, must be looked at in light of the fact that neither one of the cities mentioned, with the exception of New York, offers immunity. And if an exhibition secures IFSA protection, such protection would extend to New York exhibitions just as they would extend to exhibitions in Washington, Boston or Philadelphia.

The MoMA case is also a good example of the differences between American and European laws concerning jurisdiction. American courts take cases where the only basis for doing so is

169. Letter from Paul LeClerc, *supra* note 164, at A151.

170. See Elizabeth A. Croog, *Immunity from Judicial Seizure for Cultural Objects Imported from Abroad for Temporary Exhibition—The Museum's Perspective*, AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION COURSE OF STUDY, Mar. 20-22, 1989, at 329, 334.

171. 28 U.S.C. § 1605(a)(3)(1994) (West 1981). See Detlev F. Vagts, *Restitution for Historic Wrongs, The American Courts and International Law*, 92 AM. J. INT'L L. 232, 233 (1998).

172. Dobrzynski, *supra* note 27, at B1.

the defendant's transitory presence in the jurisdiction at the time of service of process.¹⁷³ The U.S. Supreme Court has affirmed such jurisdiction as constitutional in light of its long tradition.¹⁷⁴ European nations, however, such as Great Britain, Germany and France, have given up transitory jurisdiction.¹⁷⁵ But Europeans would consider it appropriate to take in rem jurisdiction in cases where the property itself is transported to the United States.¹⁷⁶ Such was the scenario with the paintings in the MoMA case.

A number of American museums have sought IFSA protection and those outside of New York, like the Art Institute of Chicago, the High Museum of Art in Atlanta and the San Francisco Fine Arts Museum, have done so without any state immunity.¹⁷⁷ IFSA has been operating since 1965 and although American museums have sought its protection in the past, it is a time consuming process and in light of the ACAL's automatic immunity, New York museums have relied instead on the ACAL.¹⁷⁸

In light of IFSA, the ACAL, foreign statutes and the explosion of illicit art trafficking worldwide, the pertinent question is how the international art community might deal with the protection of borrowed art.

IV. THE EFFECT OF PROTECTING BORROWED ART

Confronting the illicit trafficking of cultural art has occupied the international community for decades, and treaties like the UNESCO¹⁷⁹ and UNIDROIT¹⁸⁰ have tried to control the booming market in stolen artworks.¹⁸¹ But in the realm of

173. See Vagts, *supra* note 171, at 233.

174. See *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

175. See Vagts, *supra* note 171, at 233.

176. See *id.*

177. See Elissa Gootman, *States Do Just Fine Absent Shield Law*, FORWARD, May 22, 1998, at 15.

178. MoMA has sought IFSA protection for only four of 89 exhibitions held over a three year period. See Lowry Affidavit, *supra* note 93, at A30.

179. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 10 I.L.M. 289 (1971).

180. International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, 34 I.L.M. 1322 (1995).

181. See Paige L. Margules, Note, *International Art Theft and the Illegal Im-*

protecting borrowed art from legal seizure, there are only few protections, and in select jurisdictions. If lenders are to be encouraged to lend and display artwork under the increasingly litigious atmosphere created by the growing awareness of art looting and illegal trafficking, lenders must be given the assurance that while the artwork is on display, no legal seizure of the artwork will be successful. To advance this, ACAL-type legislation needs to be passed on a global scale to offer complete immunity for such free flow of artwork. Only the kind of automatic blanket immunity offered by an ACAL-type statute would best promote and ensure the free exchange of artwork.

An ACAL-type statute would be more effective than other similarly aimed statutes for several reasons. First, an IFSA or similarly typed statute which requires approval, for example, fails in its most basic premise because, as seen by the Hermitage example, it has the potential of placing more emphasis on the lender of the artwork than on the artwork itself.¹⁸² Furthermore, a French-type statute, for example, is limited to only governmental lenders and borrowers, severely limiting the scope of protection to the vast number of private lenders.¹⁸³ An ACAL-type statute, however, pays no regard to the lender's character and instead focuses attention only on the fact that an artwork is being exhibited for nonprofit purposes.¹⁸⁴ Whereas IFSA and others offer the potential for politicization and bias, an ACAL-type statute offers no such possibility.

Second, a French or IFSA-type statute would make the process of acquiring immunity a cumbersome one without any added benefits. IFSA and the French statute require government approval which can be both time consuming and biased.¹⁸⁵ Before immunity is granted by IFSA, for example, the USIA must find the works to be culturally important, in the national interest and a determination to that effect be

port and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions, 15 SUFFOLK TRANSNAT'L L. REV. 609 (1992).

182. See WASHINGTON POST, *supra* note 46, at B1; Gootman, *supra* note 40, at 7.

183. See Law No. 94-679 of Aug. 8, 1994, J.O., Aug. 10, 1994, p. 11,668; Redmond-Cooper, *supra* note 71, at 76.

184. See N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinneys 1984 & Supp. 1999).

185. 22 U.S.C. § 2459 (West 1981); Law No. 94-679 of Aug. 8, 1994, J.O., Aug. 10, 1994, p. 11,668.

published in the Federal Register.¹⁸⁶ Such protection would, therefore, not include last minute additions to an exhibition. Furthermore, the policy of the USIA in reviewing applications for IFSA protection does not include an investigation of the artwork's provenance.¹⁸⁷ In that sense alone, there is no benefit in having such an application process if no light is shed on the artwork's past. In the case of the Schiele exhibit, although information about the artwork's questionable acquisition was known, information about the two painting's vague provenance was not known by the larger public until the exhibit was open and the claims publicized.¹⁸⁸ Furthermore, considering that a Schiele exhibit toured the United States in 1995 and received IFSA protection then,¹⁸⁹ it would seem very likely that MoMA could have secured IFSA protection for the Schiele exhibit had it applied. Thus, requiring an application process that does little more than process pre-approved immunity is hardly an alternative to automatic ACAL-type protection.

Disputes over the exhibition of questionably acquired artwork, as was the case with the Schiele exhibit, or disputes involving the attachment of artwork by creditors, will never cease, and museums will undoubtedly find themselves caught in the middle of many such instances. When a museum is not a true party to the dispute, however, as was the situation with MoMA, but merely a temporary exhibitor of the borrowed artwork, a museum's position in the dispute ought to mimic the tangential relationship it has with the artwork's ownership. Accordingly, an ACAL-type protection should be encouraged in all jurisdictions simply because it offers complete and automatic protection not only to the artwork but also to the exhibitor. Furthermore, if the protection of borrowed art is to have any meaningful impact it must extend to all types of legal proceedings.

Although such broad protection would impede the immediate litigation of a claim involving borrowed work, it would not prevent the ultimate exercise of justice. Beyond the monetary value associated with the artwork, there exists a human element involved in reclaiming a part of one's past that reigns

186. See 22 U.S.C. § 2459.

187. See Gootman, *supra* note 40, at 7.

188. See *supra* notes 116-20, 131-32 and accompanying text.

189. See Gootman, *supra* note 40, at 7.

paramount.¹⁹⁰ In the case of art stolen during the second world war, it may be a surviving victim's attempt to recapture an object from her childhood. Yet, despite the obvious injustice that must be remedied, all that this ACAL-type protection would do is compel the parties to pursue their claim elsewhere, specifically, in the artwork's home jurisdiction. In fact, justice need not even be delayed. As with the case of the Schiele exhibit, the parties could have accepted an offer made by the Leopold Foundation to submit the claim to an international tribunal and honor any decision reached by that tribunal.¹⁹¹ Taking advantage of the paintings' transient presence, in this case in New York, forces the exhibitor to not only have to defend an action brought against it, but also breach its contractual duty with the lender. Where other avenues of potential restitution are open, MoMA, or any other nonprofit temporary exhibitor, should not be compelled to defend its obligation to return the borrowed work.

Because art is a commodity, its theft is inevitable. As a result, the potential for displaying stolen art naturally rises. Attempts to curb the absolute immunity of an ACAL-type statute because of this inevitability might include either an obligation for museums to act in good faith when making loan agreements or a requirement to conduct a minimal investigation of the artwork beginning with a registry of lost art before accepting the loan.¹⁹² However, such limitations on protection should be resisted. To maintain a free flowing exchange of art, unhampered by fear that is either well-founded or not, requires total immunity. Take the Schiele paintings for example. Dead

190. See Poley, *supra* note 2.

191. See *Austria Presses U.S. Over Seized Paintings*, *supra* note 143. Such an offer, both for the resolution of claims against loaned work as well as for claims against artworks owned by private or public institutions, is the most effective solution to this increasing problem. Indeed, an official with the World Jewish Congress investigating stolen art said that the proposal to submit the claim of ownership to an international tribunal was unprecedented. See *id.* For a good brief analysis of the benefits of creating a permanent independent arbitration commission, see Feleciano, *supra* note 148, at M1.

192. See Pinkerton, *supra* note 109, at 59. The Art Loss Register, an international database of stolen artworks based in London, is expanding its services to develop a list of artworks taken by the Nazis during the second world war which will undoubtedly aid in checking the provenance of artworks for loans and purchases. See Matthew MacDermott, *Art Register Limits Liability*, BUS. INS., June 22, 1998, at 27.

City III and Portrait of Wally would certainly not have appeared on any registry of lost art. Their whereabouts were well known to the world and their provenance, albeit inconsistent, was published.¹⁹³ These two paintings, indicative of most paintings which have had colorful histories of ownership, would confuse and confound exhibitors when trying to comply with such statutes. In addition, registries of stolen artworks would be limited by their own nature, the most obvious factor being the desire to keep an artwork's theft silent, either because knowledge of its disappearance would drive the artwork further underground or because of the humiliation and stigmatization a museum or collector might feel if the public knew it was robbed.¹⁹⁴

Requiring only the display of artworks which are absolutely free from any kind of questionable past history would not only be an impossibility, but would also be a great disservice to lenders, borrowers and audiences. Take for example any of the artworks owned at some point by Parisian collector Alphonse Kann.¹⁹⁵ Determining if a particular artwork owned by Kann was either stolen, its sale coerced, sold or traded in Kann's ever churning collection, is a problem for anyone who now owns a work that has passed through Kann's hands.¹⁹⁶ Indeed, such complexities presented themselves to MoMA in 1997 when it wanted to purchase a painting once owned by Kann, and also to the Minneapolis Institute of Arts which is presently investigating the provenance of a painting once owned by Kann.¹⁹⁷ Include other situations such as wartime looting by countries, the theft of archeological sites and the frequent anonymous buyer and donor of art, and it becomes very difficult indeed to determine the provenance of a work of art with any certainty.

Abolition of the temporary exchange and display of stolen artwork by museums rests ultimately not in rules and legislation, but in the museum's moral authority to act in accordance

193. See *supra* notes 116-36 and accompanying text.

194. Such was the probable motivation in *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y. 1991), where the museum was the victim of a theft.

195. See Sokolov, *supra* note 137, at A16.

196. See *id.*

197. See Lee Rosenbaum, *Will Museums in U.S. Purge Nazi-Tainted Art?*, *ART IN AMERICA*, Nov. 1, 1998, at 39.

with the wisdom and virtue that its stewardship function entails. Museums like MoMA, whose chairman Ronald Lauder also heads the World Jewish Congress's new Commission for Art Recovery, are unlikely to be in the habit of or willing to participate in the display of stolen artworks. At present, museums are hastily investigating and cataloguing the provenance of their holdings to better satisfy the public pressures that have risen since greater knowledge of Nazi looting has come to light.¹⁹⁸ Museums have, furthermore, returned artwork which they bought in good faith upon the discovery of evidence that the artwork had been stolen.¹⁹⁹

In the end, even if artwork of dubious provenance is displayed, the exhibition itself could aid to remedy that. Depending on the host, size and subject of the exhibition, enough people might be attracted to focus new attention on the missing years left by shady dealings and war-time looting. The Schiele exhibit at MoMA was seen by an estimated quarter of a million people,²⁰⁰ several of whom did precisely that.

V. CONCLUSION

Art is of sufficient value to society that legislation must in some way affect it. The authors of IFSA, the ACAL and other foreign statutes, have deemed art important enough to prevent its seizure when on loaned display. This Note has maintained that such protection is sound, even in light of questionably owned art, because the benefits that come with the free exchange of art outweigh the potential for illicit activity and the convenience of claimants and investigators to detain the work. Nonprofit exhibitors, especially those in cities like New York that advance the virtues of art, should be centers of culture and not litigation.

The ultimate problem is not in protecting stolen art but

198. Museum directors who testified before Congress on February 12, 1998, pledged to combat the increasing number of stolen artworks. See Johnston, *supra* note 21, at 51 (citing Testimony by Phillippe De Montebello, Director of the Metropolitan Museum of Art, before the House Banking & Financial Services Committee on February 12, 1998). Lead by Phillippe De Montebello, a new international task force is being developed to catalogue and curb the increasing problem in illicit art dealing. See *id.*

199. See *id.* at 57.

200. See Lowry Affidavit, *supra* note 93, at A25.

rather in the methods we choose to remedy the acts for which we find such protection at first so unconscionable. We are not so much offended by the fact that stolen artwork is being temporarily protected as by the fact that we stood in line to see stolen art, and that its rightful owner had to stand in the same line to see it. Thus, the international art community should continue to address their attention not at the protection of stolen art, but rather at its restitution. Protecting borrowed art for the purpose of nonprofit exhibition is well intentioned, justifiable and should be promoted.

Ronen Sarraf